ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 55 and 71

[FRL–5526–7]

RIN 2060–AD68

Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates regulations setting forth the procedures and terms under which the Administrator will administer programs for issuing operating permits to covered stationary sources, pursuant to title V of the Clean Air Act as amended in 1990 (Act). Although the primary responsibility for issuing operating permits to such sources rests with State, local, and Tribal air agencies, EPA will remedy gaps in air quality protection by administering a Federal operating permits program in areas lacking an EPA-approved or adequately administered operating permits program. Federally issued permits will clarify which requirements apply to sources and will enhance understanding of and compliance with air quality regulations.

EFFECTIVE DATE: July 31, 1996.

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SUPPLEMENTARY INFORMATION:

Docket

Supporting information used in developing the promulgated rules is contained in Docket No. A–93–51. Supporting information used in developing 40 CFR part 70 is contained in Dockets No. A–90–33 and No. A–93–50. These dockets are available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday at EPA's Air Docket, Room M–1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

Background Information Document

A background information document (BID) for the promulgated rule may be obtained from the docket. Please refer to ''Federal Operating Permits Program - Response to Comments.'' The BID contains a summary of the public comments made on the proposed Federal Operating Permits Program rule and EPA responses to the comments.

Regulated Entities

Entities potentially regulated by this action are major sources, affected sources under title IV of the Act (acid rain sources), solid waste incineration units required to obtain a permit under section 129 of the Act, and those areas sources subject to a standard under section 111 or 112 of the Act which have not been exempted or deferred from title V permitting requirements. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Major sources under title I or section 112 of the Act; affected sources under title IV of the Act (acid rain sources); solid waste incineration units required to obtain a permit under section 129 of the Act; area sources subject to new source performance standards or national emission standards for hazardous air pollutants that are not exempted or deferred from permitting requirements under title V.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in section 71.3(a) of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section or the EPA Regional Office that is administering the part 71 permit program for the State or area in which the relevant source or facility is located.

Outline. The information presented in this preamble is organized as follows:

I. Background

A. Background of EPA's Development of the Proposed Part 71 Rule

Title V of the Act requires that if a permits program meeting the requirements of title V has not been approved for any State by November 15, 1995, EPA must promulgate, administer, and enforce a Federal title V program for that State (42 U.S.C. section 7661a(d)(3)). Thus, from the date of enactment of the 1990 Amendments to the Act, EPA was subject to a 5-year deadline to establish a Federal program for States that do not obtain EPA approval of their State programs within that time. The Act had also placed EPA under a 1-year deadline to promulgate regulations establishing the minimum elements of approvable State permit programs (42 U.S.C. section 7661a(b)). The EPA promulgated its regulations establishing these criteria, codified at 40 CFR part 70 (the part 70 rule), on July 21, 1992 (57 FR 32250). States were then to submit their title V programs for EPA review by November 15, 1993, and EPA was to approve or disapprove those submitted programs within 1 year of receiving them (42 U.S.C. section 7661a(d)(1)). Thus, under the temporal scheme of title V, EPA was to approve or disapprove timely submitted State title V programs by November 15, 1994, exactly 1 year before EPA's duty to establish a Federal program for unapproved States would ripen.

Almost immediately upon promulgation of part 70, numerous industry, State and local government, and environmentalist petitioners challenged EPA's final rule in litigation in the Court of Appeals. See *Clean Air Implementation Project v. EPA*, No. 92–1303 (D.C. Cir.). Petitioners identified dozens of issues to which they objected in the part 70 rule, and EPA decided to conduct broad-based settlement discussions with all petitioners concerning these issues. These discussions occurred for over a year following the commencement of the litigation, and resulted in EPA, with the consultation of all of the litigants, developing proposed revisions to many provisions in the part 70 rule. These provisions mainly concerned the flexibility provisions of part 70, which governed when permits would need to be revised to reflect changes in operation at sources, and the procedures by which permits would be revised. On August 29, 1994, EPA published proposed substantial revisions to part 70 reflecting the outcome of these discussions (59 FR 44460) (hereafter ''August 1994 proposed revisions to part 70''). That proposal reflected EPA's

most current thinking at the time concerning the proper implementation of title V, and departed in numerous respects from positions taken in the existing promulgated part 70 rule.

When EPA began developing part 71 in the fall of 1993, settlement discussions concerning part 70 were still ongoing and were yielding what appeared to be fruitful results. The Agency believed at the time that any needed revisions to part 70 would be finalized well in advance of the deadline for establishing any necessary Federal programs, and so decided to develop part 71 based on contemplated proposed revisions to part 70, as EPA wished to model part 71 on its long-term implementation goals for title V, rather than on provisions of a part 70 rule that EPA did not believe would remain as promulgated in the current rule.

When EPA published its proposed revisions to part 70 in August 1994, the Agency still believed that the revisions would be finalized in time for EPA to base its part 71 Federal program rule on the revised part 70. Consequently, when EPA published its proposed part 71 regulations on April 27, 1995, the proposal was based on the August 1994 proposed revisions to part 70 (60 FR 20804; hereafter, ''part 71 proposal''). The part 71 proposal thus contained provisions concerning critical definitions under title V, the scope of applicability of the program to sources, requirements governing applications and permit content, and, most significantly, operational flexibility and permit revisions that departed from the current part 70 rule's corresponding provisions. In the proposal notice, the Agency specifically solicited comment on whether the Agency had appropriately based part 71 upon the relevant provision of the existing part 70 rule and the recently proposed revision to part 70. See 60 FR at 20805.

At the time of proposal of part 71, the Agency was aware of many adverse comments on the August 1994 proposed revisions to part 70, and EPA had engaged in discussions with stakeholders to obtain recommendations for publishing a supplemental proposal to revise the flexibility provisions of part 70. See 60 FR at 20805, 20817. The part 71 proposal notice indicated that the Agency believed it might not be possible to promulgate final permit revision procedures for part 71, in light of the ongoing discussions to develop part 70 permit revision procedures in time to meet the statutory deadline for establishing Federal programs in States lacking approved part 70 programs. As a result, the notice suggested that EPA may have to finalize the part 71 rule in two phases, the first without any provisions for revising permits, which would be addressed in a later supplemental proposal. Id. Indeed, EPA's supplemental proposal for both parts 70 and 71, published on August 31, 1995, described how part 71's future permit revision procedures would be modelled upon the part 70 procedures for permit revisions proposed in that notice (60 FR 45530; hereafter, ''August 1995 supplemental proposal'').

B. The Need for Part 71 To Facilitate Transition

In the part 71 proposal notice, EPA stressed the need for implementation of part 71 to facilitate a smooth transition to State implementation of title V through approved part 70 programs. See 60 FR at 20805, 20816. The EPA continues to believe that Congress envisioned that States would have primary responsibility for implementing title V, just as they do for implementing much of the rest of the Act. See, for example, section 101(a)(3) of the Act, in which Congress found that air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments (42 U.S.C. section 7401(a)(3)). Note also that under title V of the Act, Congress gave States the initial opportunity to develop and administer title V programs, while directing EPA to function as a backstop if States are unable to adopt provisions under State law to take on title V responsibilities, rather than directing EPA to establish the Federal program first and then allowing States to apply to take over title V administration, as under prior permitting programs such as the prevention of significant deterioration (PSD) and the national pollutant discharge elimination system (NPDES) under the Clean Water Act.

The EPA believes that granting States primary responsibility to implement title V makes good policy sense. States are far better positioned than EPA to administer permitting programs covering their resident sources for several reasons. First, States are more familiar with the operational characteristics of resident sources, and with the applicable requirements to which they are subject. In having had the lead on developing State implementation plans (SIP's) and implementing other provisions of the Act that apply to these sources, States have developed substantial expertise in, among other things, running air permit programs that govern new construction and changes in emissions of air pollutants such as the new source review (NSR) and PSD programs. States have developed enforcement programs based on this structure, and are able to coordinate their permitting programs with the goals and needs of their overall air pollution control programs. Finally, compared to EPA Regional offices, States are simply closer to their sources, have greater resources, and are better able to respond to the regulated community and its needs for expeditious permit processing.

In light of this, EPA has repeatedly stated its belief that federally-implemented part 71 programs would be of short duration, lasting only until the few remaining States that have not developed approvable part 70 programs are able to submit title V programs that meet the requirements of the Act. Rather than viewing part 71 only as a means of exerting leverage in States that have not yet adopted adequate part 70 programs, EPA has also viewed part 71 as an opportunity to aid States in taking up responsibility to implement title V. To this end, EPA has attempted to structure the rule so that States in which part 71 programs are established will be able to use the program as an aid to adopting and implementing their own part 70 programs. For example, today's rule provides that States can take delegation of administration of the Federal program in their States. If a State that for whatever reason has not been successful in developing its own statutes and regulations to implement title V is nevertheless capable of running a Federal program, EPA sees no reason not to offer the State the opportunity to more efficiently run the permit program than EPA believes the Agency could. The EPA also believes that the experience of running the Federal program may assist States in overcoming any remaining hurdles that have so far prevented them from adopting adequate title V programs under State law.

C. Basing Part 71 on the Part 70 Program

In the part 71 proposal notice, EPA stated its view that it is appropriate to model part 71 procedures on those required by part 70, in order to promote national consistency between title V programs that are administered throughout the country. See 60 FR at 20816. Such national consistency would ensure that sources are not faced with substantially different programs simply because EPA, as opposed to State agencies, is the relevant title V permitting authority, would promote uniformity in affected State and public participation, and would provide a level playing field for sources. Basing part 71 on part 70 would also encourage States

that are still developing their title V programs to take delegation of the part 71 program, as it would be more consistent with the programs they are preparing to implement under State law. States taking delegation would in turn ensure smoother transition to State administration of part 70 programs, as sources would have already become familiar with the State as the title V permitting authority and would not need to restart their permit application process anew when the State program receives EPA approval.

Since at the time the part 71 proposal was being developed it appeared to EPA that part 70 would soon be revised in many significant respects, EPA chose to base the proposal upon the recent proposed revisions to part 70, rather than on the existing promulgated rule. This was due in part to the fact that the August 1994 proposed revisions to part 70 addressed a number of basic issues under title V that necessarily would govern how those issues are addressed in part 71 (such as the definition of major source and the necessary provisions to implement section 502(b)(10) of the Act), and in part to the Agency's wish to provide in the Federal rule many of the benefits of the August 1994 proposed revisions to part 70. As noted above, however, EPA specifically asked commenters to address whether EPA had inappropriately either followed or departed from the approaches taken in both the current part 70 rule and its proposed revisions.

Echoing their comments on the August 1994 proposed revisions to part 70, industry commenters unanimously argued that the permit revisions procedures contained in the part 71 proposal were too complex and confusing and would hinder sources' abilities to make rapid changes in response to market needs. In addition, most industry commenters presented three general arguments in response to EPA's proposal to establish a uniform national part 71 rule based on the August 1994 proposed revisions to part 70. The first type of argument was that EPA should not promulgate a uniform national part 71 rule at all, but rather should develop part 71 programs case-by-case, taking into account the specific characteristics of the State's existing air program, and basing the State's part 71 program as much as possible on the State's part 70 program that it has developed to date and that EPA had not found to be inadequate. According to this argument, the best way to facilitate transition from Federal to State implementation of title V is to make sure the Federal and State programs are virtually identical in each relevant State, even if that means the Federal programs would differ from State to State. It would follow that EPA should approve whatever adequate elements a State had adopted for its title V program, and then only fill the remaining gaps with Federal provisions as necessary. This argument also held that section 502 of the Act actually requires a case-by-case approach to developing part 71 programs for States, and that the Act does not authorize EPA to promulgate a nationally uniform rule.

While EPA agrees that in theory the smoothest transition from Federal to State implementation might occur where the Federal program is identical to the State's, the Agency does not agree that it is inappropriate to promulgate a nationally uniform rule for part 71. At the outset, EPA disagrees with the assertion that the Agency lacks legal authority to establish a nationally uniform rule for part 71. While section 502(d)(3) of the Act does require EPA to promulgate, administer and enforce a title V program ''for'' any State that does not obtain part 70 approval, 42 U.S.C. section 7661a(d)(3), that language does not compel a separate State-by-State approach to establishing a Federal title V program; nor does it compel a Federal program that is based on the State's existing but as yet unapproved State program. Indeed, EPA would be hard-pressed to base a Federal program on a State program where no State program has ever been adopted or submitted for EPA evaluation. Even if a State had adopted and submitted a program, EPA stresses that the Agency can only evaluate the adequacy of State programs through notice and comment rulemaking, which might not occur before a Federal program is due. The EPA believes Congress must have recognized the possibility that EPA would be called upon to establish a Federal program even where a State has never adopted any State program of its own or where a program had not been submitted in time for EPA to find it adequate; in such situations, it would be impossible for EPA to base the Federal program on the State's. The EPA also believes that the resource burden of establishing and implementing different case-by-case programs for States would overwhelm EPA Regional offices and establishing a generic template for part 71 is a far more efficient use of Agency resources to get the Federal program up and running. The EPA has consequently concluded that a nationally uniform regulation is necessary for purposes of carrying out the Agency's functions under title V. Section 301(a)(1) of the Act authorizes EPA to prescribe such regulations as are necessary to carry out the Administrator's functions under the Act (42 U.S.C. section 7601(a)(1)). Thus, EPA believes it has ample statutory authority to establish the most efficient and nationally consistent part 71 regulation possible. Finally, EPA notes that EPA's other permitting programs under its environmental statutes, such as the NPDES program and the PSD program, are governed by nationally uniform regulations, implementation of which have been very successful. The EPA sees no reason to depart from this established approach for purposes of running Federal title V programs, especially since Congress clearly did anticipate that EPA would first address title V through establishing regulations that would govern the minimum elements of title V programs to be administered by any air pollution control agency. See section 502(b) of the Act, 42 U.S.C. section 7661a(b).

The second type of industry argument in response to basing the part 71 proposal on the proposed revisions to part 70 stressed that EPA should delay promulgation of any part 71 rule until the revisions to part 70 are finalized. This argument pointed out that promulgating part 71 based on the August 1994 proposed revisions to part 70 would result in the part 71 rule being based on an approach that the Agency itself had begun to revise in developing the supplemental proposed revisions to part 70 (which were eventually published just 4 months after the date of the part 71 proposal). The argument noted that since EPA is envisioning substantial changes to the part 70 rule, the part 71 rule should not finalize title V issues that will remain in transition until the part 70 rule is finally revised. This argument also specifically responded adversely to EPA's statement in the proposal that it may be necessary to split finalization of part 71 into two phases in which the operational flexibility and permit revision procedures would remain reserved until a second phase. In the view of these commenters, such provisions are critical components of any part 71 rule that is adopted, and it would not be appropriate to leave them out of part 71 for any unspecified time. This argument also stated that finalizing part 71 now based upon the proposed revisions to part 70 would actually impede transition to approved State part 70 programs, since the Federal program, and the approved State program based on the current part 70 that replaces it, would take very different approaches to such fundamental issues as applicability of the program, operational flexibility

and permit revision procedures. Finally, this argument offered a theory that title V actually does not require EPA to adopt part 71 programs for States until May 15, 1997; under this theory, a commenter argued that the Act actually gives States until May 15, 1995, rather than November 15, 1993, to submit initial title V programs, since States have 18 months following the first ''due date'' to submit any remedies to deficient programs and avoid sanctions that would fall after that 18-month period. The commenter would interpret the date on which the 18-month period expires as the date referred to in section 502(d)(3) and argues that EPA is not required to promulgate a Federal program until 2 years after the expiration of the 18-month period.

First, EPA is not persuaded by the commenter's argument that part 71 programs are not due until May 15, 1997. Section 502(d)(1) of the Act clearly provides that States are to submit their title V programs ''[n]ot later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990,'' 42 U.S.C. section 7661a(d)(1), which occurred on November 15, 1990. Moreover, section 502(d)(3) clearly refers to ''the date required for submission of such a program under paragraph (1) (of section 502),'' 42 U.S.C. section 7661a(d)(3), as the trigger for the 2-year period after which EPA must establish Federal programs. There is no reference to any 18-month grace-period in section 502(d)(3), and EPA disputes the assertion that the date on which a sanctions clock expires under section 502(d)(2) can be viewed as the ''real'' deadline for submission of State programs in the face of the plain language of section 502(d)(1) and section 502(d)(3)'s reference to the deadline in section 502(d)(1). Thus, while EPA is sympathetic to concerns that finalizing part 71 in advance of the Agency finally revising part 70 could result in the Agency promulgating provisions that are essentially moving targets in the Federal rule, EPA does not believe it has the authority to delay issuance of part 71 beyond the deadline prescribed by Congress. Moreover, as a policy matter, EPA believes it is necessary to put part 71 in place to aid States that to date have unsuccessfully struggled to develop approvable title V programs, as it is a potential vehicle for State administration of title V (through delegation of part 71) even where obstacles remain that block certain States from obtaining part 70 approval. The EPA does not believe that the environmental benefits of title V should be delayed simply due to the fact that some States have not been successful at developing title V programs. Moreover, EPA does not feel it would be appropriate to attempt to justify delaying promulgation and implementation of the Federal program because of the continuing difficulties in revising the part 70 rule. However, EPA is persuaded by commenters that the part 71 rule should not contain gaps to be filled in at a second stage for provisions for operational flexibility and permit revisions, and is sympathetic to concerns that basing these provisions on the August 1994 proposed revisions to part 70 might even interfere with transition to State programs approved under the current part 70 rule. These latter points are discussed in more detail below.

The third general type of industry argument in response to basing part 71 on the August 1994 proposal was that if EPA must establish a Federal program now, it should do so based on the existing part 70 rule, and revise the program later when part 70 is revised. This argument recognized that EPA may simply be unable in certain cases to base a State-specific part 71 program on an existing State program, but stressed the fact that any program that the State is still struggling to adopt would be based on the existing part 70 rule, rather than on the proposed revisions thereto. The argument pointed out the fact that under the August 1994 proposed revisions to part 70, EPA planned to allow States several years following final promulgation before States would be expected to implement new part 70 programs based on the revised rule. Thus, commenters observed, States would likely be developing and implementing part 70 programs based on the July 1992 rule for considerable time. In light of this, it would actually interfere with smooth transition from Federal to State implementation to base part 71 on the future part 70 rule, especially in light of the fact that at this point how part 70 will be ultimately revised is only speculative; rather, transition could be facilitated only where the Federal rule resembles the model that the State rule is expected to follow. States might be less inclined to take delegation of a Federal rule that does not resemble existing part 70 and the State analogues that are being developed, and thus sources would be more likely to be faced with different permitting authorities under part 71 and part 70 programs. Moreover, the relevant guidance that EPA had issued to date to aid implementation of the current rule, such as the Agency's ''White Paper for Streamlined Development of Part 70 Permit Applications'' (herein referred to as the ''first white paper'') and the March 5, 1996 guidance document entitled ''White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, could be less valuable as an aid in implementing a Federal rule that is not based on the current part 70, and both sources and part 71 permitting authorities could be forced to start somewhat from scratch in implementing the program.

The EPA agrees that the most appropriate course of action is to promulgate, on an interim basis, part 71 based on the current part 70 rule. In reaching this conclusion, EPA was persuaded by concerns about impeding transition to part 70 approval under the current rule and by industry concerns about issuing a rule containing gaps regarding operational flexibility and permit revisions. Moreover, as many issues in part 70 are still outstanding following the August 1994 and August 1995 proposals, and as many of those issues concern key definitions and procedures under title V, it would be premature for EPA to finalize part 71 based upon the proposed revisions to part 70 until it makes final decisions on these issues in part 70. Thus, the only way EPA can fulfill its mandate to step in as the title V permitting authority for States that have not obtained part 70 approval at this time, and to do so by establishing a complete part 71 program that provides the flexibility needed by industry and mandated by title V, is to promulgate the rule based upon the current part 70 regulation. The EPA stresses, however, that by finalizing this interim approach in part 71, the Agency does not preclude itself from revising part 71 in the future as based on appropriate aspects of either the August 1994, April 1995, or August 1995 proposals for parts 70 and 71. In fact, EPA intends to issue a second round of final rulemaking for part 71 (hereafter ''phase II rulemaking) in the future once the Agency has resolved with relevant stakeholders the outstanding issues and is prepared to promulgate final revisions to part 70. As a general matter, EPA stresses that the most current reflection of the Agency's intended policy regarding many of these provisions is the August 31, 1995 supplemental proposal. Consequently, while the provisions adopted today in part 71 that relate to outstanding issues under the definitions, applicability, permit application, permit content, permit revisions and reopenings, and affected State and EPA review sections are consistent with the corresponding

provisions in the existing part 70 rule, rather than with provisions in the proposals mentioned above, it should be expected that EPA will issue a second final rulemaking, without a second round of proposal, to conform part 71 to the revised part 70 rule when the Agency is prepared to issue it.

The EPA believes that this approach is a logical outgrowth of the part 71 proposal issued in April 1995. While that proposal only contained regulatory provisions based on the August 1994 proposed revisions to part 70, EPA explicitly solicited comment on whether the proposal was in any way inappropriately inconsistent with the current part 70 rule. Clearly, the commenters noted such inconsistencies, and the proposal facilitated meaningful comment on what approach the Agency should take in promulgating part 71 vis-a-vis the outstanding issues in the part 70 revision process. As discussed above, the proposal enabled industry commenters to fall into three basic categories in response to the proposal—in fact, many commenters advanced more than one of the basic types of arguments in their comments, realizing that the different arguments might have different force depending upon the extent to which States had actually developed and submitted their own programs. The approach adopted today was urged by numerous industry commenters as the most reasonable in light of the need to issue a part 71 program now, as opposed to leaving gaps to be filled in later at a second stage of final rulemaking. In addition, today's rule is consistent with the existing part 70 rule under which States continue to submit programs, and under which EPA continues to approve those programs. Thus, EPA does not believe that a second round of proposed rulemaking is necessary before finalizing part 71 to conform to the Agency's currently effective regulation implementing title V, part 70.

In the following sections of this notice, the specific provisions that are being finalized based upon current part 70 rather than upon the provisions of the part 71 proposal are identified and further discussed. For each of them, the general governing principle is that while the Agency has proposed to revise part 70 to modify many of the provisions corresponding to the part 71 provisions adopted today, EPA is not yet prepared to adopt final positions on those issues and so, in the interests of promoting smooth transition from Federal to State implementation of title V, is choosing to issue, on an interim basis, a part 71 rule that matches as closely as possible the existing part 70 rule. The EPA's finalization of those provisions today in no way reflects the Agency's ultimate decision to renounce any of the positions articulated in the proposed revisions to part 70 or the corresponding proposals for part 71.

II. Summary of Promulgated Rule

A. Applicability

The Federal operating permits program requires all part 71 sources to submit permit applications to the permitting authority no later than within 1 year of the effective date of the program. The operating permit program applies to the following sources:

1. Major sources, defined as follows:

a. Air toxics sources, as defined in section 112 of the Act, with the potential to emit 10 tons per year (tpy), or more, of any hazardous air pollutant (HAP) listed pursuant to 112(b); 25 tpy, or more, of any combination of HAP listed pursuant to 112(b); or a lesser quantity of a given pollutant, if the Administrator so specifies (501(2)(A)).

b. Sources of air pollutants, as defined in section 302, with the potential to emit 100 tpy, or more, of any pollutant (501(2)(B)).

c. Sources subject to the nonattainment area provisions of title I, part D, with the potential to emit, depending on the nonattainment area designation 10 or more tpy of volatile organic compound (VOC) or oxides of nitrogen, 50 or more tpy of carbon monoxide, and seventy or more tpy of particulate matter (501(2)(B)).

2. Any other sources subject to a standard under section 111 or 112.

3. Sources subject to the acid rain program (501(1)).

4. Any source subject to the PSD program or the NSR program under title I, part C or D.

5. Any other stationary source in a category EPA designates, in whole or in part, by regulation, after notice and comment.

For purposes of determining applicability, a source's total emissions of a pollutant are found by summing the potential emissions of that pollutant from all emissions units under common control at the same plant site. If a source is a major source, even if only due to the total emissions from one pollutant, then a source must submit (with few exceptions) a permit application that includes all emissions of all regulated air pollutants from all emissions units located at the plant.

Part 71 follows the approach of part 70 in deferring nonmajor sources from permitting requirements. The permitting requirements for nonmajor sources subject to a standard under section 111 or 112 of the Act prior to July 21, 1992 are deferred for 5 years from the effective date of the first approved part 70 program that deferred nonmajor sources. The EPA may determine on a case-by-case basis permitting requirements for nonmajor sources when they become subject to new section 111 or 112 standards. Sources subject to the new source performance standard for new residential wood heaters or the national emission standards for hazardous air pollutants for asbestos as it applies to demolition and renovation activities are permanently exempt from permitting requirements.

B. Program Implementation

The EPA will administer a part 71 program for those portions of a State that lack EPA approval for its operating permits program or for a State that fails to adequately administer and enforce an approved program. However, the requirement that EPA establish a Federal program for States lacking a fully approved program is suspended if a State program is granted interim approval. The EPA will also administer part 71 programs in Tribal areas. Should a part 71 program become effective prior to the issuance of part 70 permits to all sources (under an approved part 70 program), EPA will require part 71 permit applications from sources that have not received part 70 permits. Applications shall be due within a year of the effective date of the part 71 program. The EPA will take final action on at least one-third of the applications annually.

Section 71.4 also establishes procedures that would be used for issuing permits to certain sources located on the Outer Continental Shelf (OCS) and after EPA objects to a proposed or issued State permit.

The EPA may also delegate the responsibility for administering the part 71 program to the State or eligible Tribe if the requirements of section 71.10 have been met. However, delegation will not constitute approval of a State or Tribal operating permits program under part 70.

The EPA will suspend the issuance of part 71 permits upon publication of notice of approval of a State or Tribal operating permits program under part 70. The EPA or the delegate agency will continue to administer and enforce part 71 permits until they are replaced by permits issued under the approved part 70 program.

The EPA will publish a notice in the Federal Register informing the public of the effective dates or delegation of any part 71 programs for States, Tribal areas,

and OCS sources. Where practicable, EPA will also publish notice in a newspaper of general circulation within the area subject to the part 71 program and will notify the affected government.

C. Permit Applications

Each source meeting the applicability criteria of this part is required to submit timely and complete information on standard application forms provided by the permitting authority. Streamlined forms for electronic formats may be provided.

An initial part 71 permit application is required within 12 months of the later of:

1. The effective date of this part in a State, Tribal area, or OCS area where a source is located, unless the source has an existing part 70 permit;
2. The expiration of any deferral for a nonmajor source;
3. The date a source commences operation; or
4. The date a source meets any of the applicability criteria of section 71.3.

Sources with part 70 permits in force at the time part 71 becomes effective in the area where they are located would not have to apply for a part 71 permit until their part 70 permit expires. Prior to its expiration, the part 70 permit may be modified by EPA.

Sources would be notified of the requirement to submit an application at least 180 days prior to when the application is due.

The permitting authority will perform a completeness determination within 60 days of receipt of an application, or the application will be deemed complete by default. A complete application would contain all the information needed to begin processing the permit application, including, at a minimum, a completed standard application form (or forms) and a compliance plan.

The compliance plan describes how the source plans to maintain or to achieve compliance with all applicable air quality requirements under the Act. This plan must include a schedule of compliance and a schedule for the source to submit progress reports to the permitting authority. Each source must submit a compliance certification report in which it certifies its status with respect to each requirement, and the method used to determine the status.

Each operating permit application, report, or compliance certification submitted pursuant to part 71 must include a certification signed by a responsible official attesting to the truth, accuracy, and completeness of the information submitted.

Applicants may be required to update information in the application after the filing date and prior to the release of the draft permit.

D. Permit Content

Part 71 permits must meet all applicable requirements of the Act and, among other things, must contain:

1. A 5-year term for acid rain sources, up to a 12-year term for certain municipal waste combustors, and up to a 5-year term for all other sources.
2. Limits and conditions to assure compliance with all applicable requirements under the Act.
3. A schedule of compliance, where applicable.
4. Inspection, entry, monitoring, compliance certification, recordkeeping, and reporting requirements to assure compliance with the permit terms and conditions.
5. A provision describing permit reopening conditions.
6. Provisions under which the permit can be revised, terminated, modified, or reissued for cause.
7. Provisions ensuring operational flexibility so that certain changes can be made within a permitted facility without a permit revision.
8. A provision that nothing in the permit or compliance plan affects allowances under the acid rain program.

All terms and conditions in a part 71 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

Like part 70, part 71 would allow sources to apply for a permit shield, i.e., a provision in the permit that states that if the source complies with terms and conditions of the permit, the source shall be deemed in compliance with any applicable requirements reflected in the permit as of the date of permit issuance.

E. Permit Issuance and Review

Regulations concerning the processes for permit issuance, review, renewal, revision, and reopening are found in sections 71.7 and 71.11. Briefly, these include:

1. Action on Applications for Permit Issuance and Permit Renewal

Section 71.7(a) describes the conditions that must be satisfied before EPA or a delegate agency may issue a permit. These include receipt of a complete application, compliance with public participation requirements, and notification of affected States, Indian Tribes, and EPA (if the program has been delegated). Except during the initial phase-in of the program, the permitting authority is required to act on permit applications within 18 months after receiving a complete application.

The timely submittal of a complete application and any additional required information creates a ''shield'' against enforcement for failure to have a part 70 or part 71 permit. Permits being renewed are subject to the same procedural requirements that apply to initial permit issuance, as provided in section 71.7(c). The administrative procedures for permit issuance are contained in section 71.11 and are generally based on analogous provisions governing other EPA permitting programs at 40 CFR part 124.

2. Permit Revisions

Sections 71.7 (d) and (e) outline the mechanisms for permit modification and administrative amendments that are needed to revise part 71 permits to accommodate changes that would otherwise violate terms and conditions of the permit.

Administrative amendments can be accomplished by the permitting authority without public or EPA review. These permit revisions include correction of typographical errors, changes in address or source ownership, as well as incorporation of requirements established under State preconstruction review that meet certain procedural and compliance requirements.

If a change is not prohibited or addressed by the permit, the permittee may make the change after submitting a notice, and the permit is revised at renewal.

The regulations establish minor and significant permit modification procedures for changes that go beyond the activities allowed in the original permit or that increase the total emissions allowed under the permit.

Minor permit modifications reflect increases in permitted emissions that do not amount to modifications under any requirement of title I and that do not meet certain other requirements. Minor permit modification procedures require a source to provide advance notice of the proposed change, but allow a change to take effect prior to the conclusion of the revision procedures.

A source that makes a change before the minor permit modification has been issued does so at its own risk. It is not protected from underlying applicable requirements by any shield. It is only afforded a temporary exemption from the formal requirement that it operate in accordance with the permit terms that it seeks to change in its modification application. Should the proposed permit modification be rejected, the source would be subject to enforcement

proceedings for any violation of these requirements.

Significant permit modifications are inherently more complex, and will require additional time to accomplish. Permitting authorities will initiate their review of the proposed changes after receipt of an application.

Sources subject to requirements of the acid rain program must hold allowances to cover their emissions of sulfur dioxide (SO_2). Allowance transactions registered by the Administrator will be incorporated into the source's permit as a matter of law, without following either the permit modification or amendment procedures described above.

3. Reopening for Cause

The permitting authority may terminate, modify, or revoke and reissue a permit for cause. Reopening and reissuing procedures follow the same procedures as apply to initial issuance. Advance notice is required before permit reopenings may be initiated.

Section 71.7(f) requires that permits issued to major sources with 3 or more years remaining in the permit's term be reopened to incorporate applicable requirements which are promulgated after the issuance of the permit. Revisions must be made as expeditiously as practicable, but no later than 18 months after the promulgation of such additional requirements.

4. Permit Notification to EPA and Affected States

Consistent with 40 CFR section 70.8(b), EPA or the delegate agency would be required to provide notice of draft permits to all affected States and to certain Indian Tribes.

Affected States are those whose air quality may be affected and that are contiguous to the State in which the source is located, or that are within 50 miles of the source. The permitting authority must give affected States an opportunity to submit written recommendations for the permit and notify any affected State in writing of any refusal to accept all of its recommendations.

Although Indian Tribes are not considered affected States unless they establish their compliance with criteria for being treated in the same manner as States pursuant to section 301(d) of the Act, the Agency believes federally recognized Tribes should be given notice of draft permits that may be issued to sources that could affect Tribal air quality. The regulation requires that the permitting authority send such notices.

The Act authorizes EPA to object to any permit that would not be in compliance with the applicable requirements of the Act. In the case of a delegated program, the permitting authority may not issue a part 71 permit if the Administrator has objected to its issuance in writing within 45 days of receipt of the proposed permit.

5. Administrative and Judicial Review

After the close of the public comment period on a draft permit, the permitting authority will issue a final permit decision. Within 30 days of the final permit decision, anyone who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board (EAB) to review any condition of the permit. In general, the objections in the petition must have been raised during the public participation period on the permit. The petition will stay the effectiveness of the specific terms of the permit which are the subject of the request for review, pending conclusion of the appeal proceedings.

The EAB will issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action and are subject to judicial review in the United States Court of Appeals under section 307(b) of the Act. The decision of the EAB to issue or deny the permit is also subject to judicial review.

Interested persons (including permitees) are authorized to petition the Administrator to reopen an already issued permit for cause. Petitions would be required to be in writing and to contain facts or reasons supporting the request.

F. Permit Fees

Section 71.9 establishes the Federal operating permits program fee requirements for owners or operators of part 71 sources. The fees must be sufficient to cover the permits program costs, including the following:

1. Reviewing and acting on any permit, permit revision, or permit renewal, and processing permit reopenings.
2. Administering the permit program.
3. Implementing and enforcing the terms of any part 71 permit.
4. Monitoring, modeling, manipulating, and tracking emissions.
5. Providing support to small business stationary sources.

Consistent with the two-phased approach to part 71 promulgation described in this notice, EPA is today implementing a two-phased approach to part 71 fee requirements. Phase I fee collection will be sufficient to cover Phase I costs. Since Phase II fee collection is associated with permit revision procedures, a fee amount for Phase II cannot be finalized in today's rule. The Phase II fee will add the costs for the permit revision procedures that are finalized in that rulemaking.

The dollar per ton fee will vary depending on the implementation mechanism EPA uses to administer a part 71 program. A program that is administered completely by EPA would charge $32 per ton per year (ton/yr). Permit fees for a program for which EPA relies on contractor assistance to the greatest extent possible would be approximately $57 per ton/yr. Program costs (and fees) would vary among part 71 programs depending on the hourly rate paid to the contractor for its work on the particular State's part 71 program. The costs of a program that is staffed in part by EPA employees and in part by contractors or by the delegate agency would vary in accordance with the percentage of personnel time allocated to non-EPA staff and the hourly rate paid to the contractor for its work on the State's part 71 program.

The EPA may suspend collection of part 71 fees for part 71 programs which are fully delegated to States and for which EPA incurs no administrative costs.

The EPA may promulgate a separate fee schedule for a particular part 71 program if the Administrator determines that the fee schedule in the rule does not adequately reflect the cost of administering the program.

Sources are required to submit fee calculation worksheets and fees at the same time as their initial permit applications are due and thereafter on an annual basis.

Part 71 program costs and permit fees will be reviewed by the Administrator at least every 2 years, and changes will be made to the fee schedule as necessary to reflect permit program costs.

G. Federal Oversight of Delegated Programs

Section 71.10 establishes the procedures EPA would follow when delegating the authority to administer a part 71 program to a State, eligible Indian Tribe, or other air pollution control agency. The EPA will delegate authority to run the program where possible in order to take advantage of existing expertise of the delegate agency or where it seems probable that the delegate agency's submitted part 70 program will be approved within a short time by EPA, provided in both cases that the delegate agency has the authority to administer the program that would be delegated.

A delegate agency must submit a formal request for delegation and other documentation that shows the agency or eligible Tribe has adequate legal authority and capacity to administer and enforce the part 71 program. If the request for delegation is accepted, EPA and the delegate agency will enter into an agreement that sets forth the terms and conditions of the delegation.

As part of its oversight of delegated programs, EPA would review copies of applications, compliance plans, proposed permits and final permits that the delegate agency would be required to send to EPA. The EPA would have 45 days in which to review proposed permits. If EPA objects to the issuance of a permit within that time, the delegate agency would be required to revise and resubmit the proposed permit to EPA.

Delegation of a part 71 program would not relieve a State of its obligation to submit an approvable part 70 program, nor from any sanctions that the Administrator may apply for the State's failure to have an approved part 70 program.

H. Enforcement

The Federal enforcement authority available under section 113 of the Act for violations of title V and the regulations thereunder provides broader enforcement authority than States are required to have under the part 70 regulations. Examples of the Federal enforcement authorities available under the Act include, but are not limited to, the authority to: (1) restrain or enjoin immediately any person by order or by suit in court from engaging in any activity in violation of the Act that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment; (2) seek injunctive relief in court to enjoin any violation of the Act; (3) issue administrative orders that assess civil administrative penalties; (4) assess and recover civil penalties; and (5) assess criminal fines.

III. Significant Changes to the Proposed Regulations

A. Section 71.2—Definitions

The Agency has adopted definitions in today's rulemaking that are consistent with and are mainly modelled on corresponding definitions in the current part 70 rule, rather than on the part 71 proposal. Consequently, many of the definitions adopted today differ from those contained in the part 71 proposal which were largely based upon the August 1994 proposed revisions to corresponding definitions in part 70 which the Agency is not yet prepared to finalize.

Several definitions found in the proposed section 71.2 have been revised to conform more closely to the definitions used in the current part 70 rule. These include ''affected State,'' ''applicable requirements,'' ''final permit,'' ''major source,'' ''permit revision,'' ''permitting authority,'' and ''responsible official,'' each of which is discussed briefly below. Similarly, EPA adopted definitions for ''permit modification'' and ''section 502(b)(10) change'' from the current part 70 rule, because these terms are integral parts of today's rulemaking, which is based on the existing part 70 regulations. Also, several definitions in the part 71 proposal describe terms and concepts that the Agency has concluded are either not necessary or are not ready to be finalized in today's rulemaking. The terms for which EPA has not adopted a definition include ''insignificant activity or emissions,'' ''major new source review,'' ''minor new source review,'' ''potential to emit,'' ''title I modification,'' and ''Tribal area.'' To the extent these proposed terms were based on the August 1994 proposed revisions to part 70, EPA will finally address them in the Phase II rulemaking.

In addition, the Agency has retained several definitions found in the part 71 proposal that are not found in the current part 70 rule, but are needed for part 71. These include definitions for ''delegate agency,'' ''part 71 permit,'' ''part 71 program,'' and ''part 71 source.'' The Agency has also adopted definitions for ''eligible Indian Tribe,'' ''Federal Indian reservation,'' and ''Indian Tribe,'' which were added to clarify which Tribes would be eligible to receive delegation of the part 71 program and to be considered ''affected States.''

The part 71 proposal and the August 1995 supplemental proposal reflect the Agency's position on what definitions would be appropriate in conjunction with the permit revision procedures, operational flexibility provisions, and other provisions that have been proposed for finalization in the Phase II rulemaking. Subsequent to reviewing all of the comments on both of these proposals, EPA may finalize definitions that differ from those adopted today.

1. Affected States

a. *Indian Tribes.* The EPA received numerous comments from Indian Tribes suggesting that federally recognized Indian Tribes should be considered to be ''affected States'' if their air quality may be affected or the Tribal area is contiguous to the State in which the permittee is located or is within 50 miles of the permittee. They contended that Tribes should not have to meet any type of eligibility criteria in order to be considered an ''affected State.'' Contrary to the view of these commenters, the EPA interprets section 301(d)(2) of the Act as authorizing the Agency to treat Indian Tribes in the same manner as a State for purposes of being an ''affected State'' only when EPA has determined that the Indian Tribe has demonstrated that it has met the eligibility criteria of section 301(d)(2) of the Act. The second paragraph of the proposed definition of ''affected State'' was inconsistent with this interpretation in that it would have treated Tribes in the same manner as States if the permitting action concerned a source located in a Tribal area, regardless of the Tribe's eligibility status. Therefore, EPA has amended this paragraph to include the same eligibility requirement as the first paragraph. That is, that the Indian Tribe must have demonstrated that it has met the eligibility criteria of section 301(d)(2). However, in the interest of furthering government-to-government relationships with Tribes, EPA has adopted a provision in section 71.8 that requires the part 71 permitting authority to provide notice of draft permits to any federally recognized Indian Tribe whose air quality may be affected by the permitting actions and whose reservation or Tribal area is contiguous to the jurisdiction in which the part 71 permit is proposed or is within 50 miles of the permitted source. (See discussion at section III.G. of this notice.)

b. *Local agencies.* The proposed definition of ''affected State'' in the part 71 proposal added language not found in the current part 70 definition of ''affected State'' to the effect that, when a part 71 permit, permit modification, or permit renewal is proposed for a source located within the jurisdiction of a local agency, that agency would be considered an affected State. Today's rulemaking retains this approach because it pertains to a situation which is unique to part 71, i.e., when EPA administers a part 71 program in an area where the local agency would normally be the permitting authority of record under an approved part 70 program. The proposal also differed from today's rulemaking in that under the proposal, local agencies would not otherwise be considered affected States. Since the approach taken to such jurisdictions is an issue for both parts 70 and 71, it will be addressed in the Phase II rulemaking. In the interim, the proposed language has been deleted to comport with the current part 70 definition.

2. Applicable Requirements

The part 71 proposal expanded the part 70 definition of ''applicable requirement'' to include the provision that any requirement enforceable by the Administrator and by citizens under the Act which limits emissions for the purpose of creating offset credits or avoiding any applicability requirement is itself an applicable requirement. This addition, while helpful for understanding what constitutes an applicable requirement, was based on the August 1994 proposed revisions to part 70, which EPA is not yet prepared to finally promulgate. As such, EPA believes it is not appropriate to finalize this change for purposes of part 71 at this time, but intends to address this issue in the Phase II rulemaking. It was therefore deleted to comport with the current part 70 definition.

The definition of ''applicable requirement'' in the part 71 proposal also differed from the definition in the current part 70 rule in that it limited the title VI requirements that would have to be included in a title V permit. This proposed language, while consistent with the August 1994 proposed revisions to part 70, which, again, EPA is not yet prepared to finalize, was removed so that the definition would conform to the definition in the current part 70 regulation.

3. Final Permit

The proposal contained a proposed definition of ''final action or final permit action.'' The final rule changes this term to ''final permit'' in order to better harmonize the definition with the term ''final permit'' in the current part 70 regulation promulgated at section 70.2.

4. Major Source

The proposed part 71 rule contained a definition of ''major source'' that was based on the proposed change to the term contained in the August 1994 proposed revisions to part 70. Since publication of the part 71 proposal, EPA has also proposed additional changes to the term in the August 1995 supplemental proposal for parts 70 and 71. The EPA is currently in the process of reviewing, evaluating and developing positions in response to comments on this very important term and other issues raised in the August 1995 proposal. Consequently, EPA is not yet prepared to promulgate part 71 in general, or the major source definition in particular, as based on the August 1994, April 1995 or August 1995 proposals. The only exception to this approach is in regard to source categories for which fugitive emissions are to be counted in determining whether a source is a major source under section 302 of the Act.

Consistent with PSD and nonattainment NSR, current part 70 requires the counting of fugitive emissions from source categories which have been listed pursuant to section 302(j) in major source applicability determinations. See the definition of ''major source'' at 40 CFR section 70.2. The one difference, however, between the list of source categories under PSD and nonattainment NSR and current part 70 is in regard to the 27th category of sources that are required to count fugitive emissions. In parts 51 and 52, the 27th category is stated as follows:

> Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

In current part 70, the 27th category reads as follows:

> All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category;

As can be seen from the above, one of the principal differences between these two paragraphs is the date of August 7, 1980, which is specified in the PSD and nonattainment NSR regulations, but is absent from the current part 70 regulation. The result of this difference is that part 70 literally requires sources to count fugitives even where those sources are not required to do so in determining whether they are major for purposes of PSD or nonattainment NSR. As stated in the preamble to the August 1994 part 70 proposal, EPA acknowledges that it did not follow the procedural steps necessary under section 302(j) to expand the scope of sources in this category for which fugitives must be counted in part 70 major source determinations. See memorandum of June 2, 1995, entitled ''EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting,'' from Lydia Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Regional Air Directors. Instead of perpetuating this problem by following this aspect of current part 70, and even though the Agency is not yet ready to finalize the approach taken in the August 1995 supplemental proposal for parts 70 and 71, EPA believes that an appropriate interim solution is to finalize this category similar to how it was proposed in the April 1995 part 71 proposal and consistent with the provisions in the PSD and nonattainment NSR regulations. As a result, the 27th category will read as follows:

> Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

Use of the above language best ensures that, until EPA is prepared to finalize part 70's proposed revisions, there will be no discrepancy between the treatment of fugitive emissions under PSD and nonattainment NSR and the corresponding provision in this phase I part 71 rule. This language further ensures that sources which are considered major sources under PSD and nonattainment NSR are also major sources under part 71. This consistency is compelled by section 501(2) which requires any stationary source to be considered major under title V if it is a major source under section 112 or a major stationary source under section 302 or part D of title I.

It is important to remember that EPA has proposed additional modifications to the list of source categories, including this 27th category, in the August 1995 proposal for parts 70 and 71. However, as EPA is currently in the process of reviewing and evaluating comments regarding these revisions, EPA cannot at this time finalize any of these proposed modifications.

The EPA stresses that the definition of major source in today's rulemaking does not constitute a decision to reject other proposed changes to the term contained in the recent proposals. Rather, EPA expects the Phase II part 71 rulemaking to make whatever changes to the term are necessary in order to maintain harmonization with part 70, if the part 70 definition of major source is ultimately revised as the Agency intends. In the meantime, however, in order to avoid delay in fulfilling the Agency's responsibilities under title V, and in order to avoid repeating a procedural mistake that occurred in the development of the first part 70 rule, EPA has concluded, in response to the commenters, that at this point it is most reasonable to promulgate a definition that is consistent with the major source definition contained in the current part 70 rule, except for the 27th category of sources listed pursuant to section 302(j). As EPA has already told States that they may receive interim approval of their State programs even if they do not literally match with current part 70's 27th category, due to EPA's concession that the Agency did not take the procedural steps necessary in part 70 to constitute a section 302(j) rulemaking, EPA believes it is reasonable to take this limited departure from part 70. The EPA will respond to specific comments on

the major source definition as proposed in April 1995 and August 1995 in the context of finalizing the Phase II part 71 rule.

5. Permit Modification and Permit Revision

For the purposes of this rulemaking, EPA adopted the definition of permit modification in the current part 70 regulation and revised the definition of ''permit revision'' to be consistent with the current part 70 definition.

6. Permitting Authority

The final rule changes the proposed definition of ''permitting authority'' to more closely match the definition of the term currently promulgated at section 70.2.

7. Potential to Emit

Today's rule does not include a final regulatory definition of the term ''potential to emit.'' The part 71 proposal contained a proposed definition of potential to emit that was based on the August 1994 proposed revisions to part 70. The current part 70 definition of the term provides that physical or operational limits on a source's capacity to emit an air pollutant shall be considered part of the source's design if the limitation is enforceable by the Administrator. Under the proposed definition, the phrase ''and by citizens under the Act'' would have been added. The EPA is still in the process of evaluating comments on the proposed revisions to part 70 with respect to this issue, and is not yet prepared to adopt the revision to the definition into a final rule. Consequently, it is premature to adopt this change into the final part 71 rule at this time.

In addition, EPA also received substantial adverse comment on the proposed requirement that limitations on potential to emit be enforceable by the Administrator (i.e., ''federally enforceable''). Industry commenters noted that EPA's policy on Federal enforceability was the subject of several pending lawsuits against the Agency in the Court of Appeals. These commenters have long held that emissions limitations enforceable under State law should not have to be federally enforceable in order to be considered part of a source's physical or operational design and a valid limit on potential to emit. These commenters also urged EPA to codify the Agency's January 25, 1995, memorandum in which EPA stated it would not require certain sources that otherwise have the potential to emit an air pollutant in major amounts to obtain permits under state part 70 programs. See, memorandum of January 25, 1995, 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),'' from John Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors (hereafter ''January 25, 1995 memorandum from John Seitz'').

Since the close of the comment period, the U.S. Court of Appeals for the District of Columbia Circuit has ruled on two occasions that EPA in two separate regulations had failed to explain why the Agency had adopted a restrictive interpretation of ''potential to emit.'' See *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. July 21, 1995), and *Chemical Manufacturers Association v. EPA*, No. 89–1514 (D.C. Cir. Sept. 15, 1995). In response to these rulings, EPA has begun a rulemaking effort that would consistently apply to all of its regulations and programs that base applicability on sources' potential to emit. This rulemaking will address potential to emit not only in the regulations that were the subject of the two court rulings (EPA's ''General Provisions'' regulations under section 112 of the Act promulgated at 40 CFR part 63, and the NSR and PSD regulations at parts 51 and 52), but also to parts 70 and 71.

In the meantime, however, the Agency believes it would not be appropriate to delay issuance of the part 71 regulation (and implementation of the Federal operating permit program in States that have not yet obtained part 70 approval) due to the pendency of the Agency's general potential to emit rulemaking. At the same time, EPA does not believe it would be appropriate to merely recodify the part 70 definition of potential to emit in this Phase I part 71 rule, in light of the recent court decisions concerning the section 112 and NSR and PSD regulations. Consequently, for this interim part 71 rule, EPA is not adopting a regulatory definition of potential to emit for purposes of part 71. This definition will be added to part 71 at a later time, when the Agency completes its general rulemaking to define potential to emit for its various stationary source programs under the Act.

Nevertheless, the absence of a regulatory definition of potential to emit in today's rule should not prevent sources from being able to determine whether they are subject to the part 71 program because they are major sources. The EPA stresses that the term ''major source'' is already defined as a statutory matter in title V at section 501(2) of the Act to mean a major source as defined in section 112 and a major stationary source as defined in section 302 or part D of title I of the Act. Moreover, the definition of major source adopted today also tracks these statutory provisions, and, as discussed in the recent memorandum entitled ''Interim Policy on Federal Enforceability Requirement for Limitations on Potential to Emit,'' from John Seitz, Director, Office of Air Quality Planning and Standards (hereafter January 22, 1996 memorandum from John Seitz), most current regulatory requirements and policies regarding potential to emit, including the interim policy discussed in the January 25, 1995 Seitz memorandum, remain in effect while EPA conducts expedited rulemaking to address these issues in detail. Consequently, in determining whether a source is major, the part 71 permitting authority and source operator should look to the regulatory definition of major source adopted in today's rule and the statutory definitions in section 112, section 302, and part D of title I (as those provisions are implemented by applicable regulations thereunder) as controlling for purposes of this Phase I part 71 rule.

In *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. July 21, 1995), the Court dealt with the potential to emit definition under the hazardous air pollutant programs promulgated pursuant to section 112. In this decision, the Court agreed with EPA that only ''effective'' State-issued controls should be cognizable in limiting potential to emit. In addition, the Court did not question the validity of current federally enforceable mechanisms in limiting potential to emit. However, the Court found that EPA had not adequately explained why only federally enforceable measures should be considered in assessing the effectiveness of State-issued controls. Accordingly, the Court remanded the section 112 General Provisions regulation to EPA for further proceedings. Thus, EPA must either provide a better explanation as to why Federal enforceability promotes the effectiveness of State controls, or remove the exclusive Federal enforceability requirement. The Court did not vacate the section 112 regulations, and they remain in effect pending completion of EPA rulemaking proceedings in response to the Court's remand.

The EPA reiterates that independent from the decision in *National Mining,* current EPA policy already recognizes State-enforceable potential to emit limits under section 112 and title V in many circumstances under the

transition policy discussed in the January 25, 1995 John Seitz memorandum, as recently revised by the January 22, 1996 John Seitz memorandum. In recognition of the absence in some States of suitable federally enforceable mechanisms to limit potential to emit applicable to sources that might otherwise be subject to section 112 major source requirements or to title V, EPA's policy provides for the consideration of State-enforceable limits as a gap-filling measure during a transition period that extends until January 1997. Under this policy, restrictions contained in State permits issued to sources that actually emit more than 50 percent, but less than 100 percent, of a relevant major source threshold are treated by EPA as acceptable limits on potential to emit, provided that the permit and the restriction in particular are enforceable as a practical matter. In addition, sources with consistently low levels of actual emissions relative to major source thresholds can avoid section 112 major source requirements even absent any permit or other enforceable limit on potential to emit. Specifically, the policy provides that sources which maintain their emissions at levels that do not exceed 50 percent of any applicable major source threshold are not treated as major sources and do not need a permit to limit potential to emit, so long as they maintain adequate records to demonstrate that the 50 percent level is not exceeded.

Under today's Phase I part 71 rule, sources that are not treated as major under this policy would also not be treated as major for purposes of part 71. However, if a source would be treated as major under the applicable regulations implementing section 112 and this policy, the source would be required to obtain a part 71 permit. The EPA notes that this policy is to end in January 1997. In conjunction with the general rulemaking on potential to emit, EPA will consider whether it is appropriate to extend the transition period beyond January 1997.

In *Chemical Manufacturers Association* v. *EPA*, No. 89–1514 (D.C. Cir. Sept. 15, 1995), the Court addressed the potential to emit definition in the PSD and NSR programs. Specifically, this case challenged the June 1989 rulemaking in which EPA reaffirmed the requirement for Federal enforceability of potential to emit limits taken to avoid major source permitting requirements in these programs. In a briefly worded judgment, the Court, in light of *National Mining*, remanded the PSD and NSR regulations to EPA. In addition, in contrast to its disposition of the section 112 regulations in *National Mining*, the Court in *Chemical Manufacturers* vacated the federal enforceability requirement of the potential to emit definitions in the PSD and NSR regulations.

The EPA interprets the Court's decision to vacate the PSD/NSR Federal enforceability requirement as causing an immediate change in how EPA regulations should be read, although EPA expects that the effect of this change will be limited. Specifically, regarding provisions of the definitions of potential to emit and related definitions requiring that physical or operational changes or limitations be ''federally enforceable'' to be taken into account in determining PSD/NSR applicability, the term ''federally enforceable'' should now be read to mean ''federally enforceable or legally and practically enforceable by a State or local air pollution control agency.''

However, the effects of the vacatur will be limited during the period prior to completion of new EPA rulemaking on this issue. Thus, during this interim period, Federal enforceability is still required to create ''synthetic minor'' new and modified sources in most circumstances pending completion of EPA rulemaking. This is because EPA interprets the order vacating certain provisions of the PSD/NSR regulations as not affecting the provisions of any current State or Federal implementation plan (SIP or FIP), or of any permit issued under any current SIP or FIP. Thus, previously issued federally enforceable permits issued under such programs remain in effect.

Moreover, new or modified sources that seek to lawfully avoid compliance with the major source requirements of PSD or nonattainment NSR by limiting potential to emit to achieve synthetic minor status must still obtain a general or ''minor'' NSR preconstruction permit under section 110(a)(2)(C) of the Act and 40 CFR section 52.23. (This requirement was not at issue in the *Chemical Manufacturers* case, and is unaffected by the Court's ruling.) Every SIP contains a minor NSR program that applies generally to new or modified sources of air pollutants, and permits issued under such programs are, like all other SIP measures, federally enforceable. In sum, the precise impact of the vacatur on PSD/NSR applicability in any State, and hence the applicability of part 71 under the section 302 and part D of title I prongs of the definition of major source adopted in part 71, can be definitively established only by reviewing the provisions of the particular SIP or FIP to which the source is subject.

8. Regulated Air Pollutant

In the August 1995 supplemental proposal, EPA proposed a less inclusive definition than is currently promulgated in part 70 or was proposed for part 71 in the April 1995 notice. However, for purposes of today's rulemaking, EPA is retaining the definition in the part 71 proposal, which is consistent with the current part 70 definition. The EPA intends to take final action on the term as proposed in the supplemental proposal in the Phase II rulemaking.

9. Responsible Official

Although EPA has proposed, in the August 1994 proposed revisions to part 70, to clarify that the criteria for selecting the designated representative is the same at an affected source as at other sources, the Agency has adopted a definition of this term for purposes of today's rulemaking that is consistent with the definition in current part 70. The EPA will take final action in Phase II consistent with the Agency's final resolution of this issue in response to comments on the August 1994 notice.

10. Section 502(b)(10) Changes

The part 71 proposal, in omitting the definition of ''section 502(b)(10) changes'' from section 71.2, followed the approach used in the August 1994 proposed revisions to part 70. The Agency's reasons for the omission are articulated in that proposal at 59 FR 44467–8. As indicated in the August 1995 supplemental proposal, this is still the Agency position. However, EPA will not adopt a final position on proposed revisions regarding operational flexibility for part 70 or 71 until the Phase II rulemaking. For purposes of today's rulemaking, EPA has adopted a definition of the section 502(b)(10) changes that comports with the current part 70 regulation, in order to better harmonize the Phase I part 71 rule and the current part 70 regulation.

11. Title I Modification

The part 71 proposal, based on the August 1994 proposed revision to part 70, contained a proposed definition of the phrase ''Title I modification or modification under any provision of title I of the Act.'' Subsequently, EPA issued a revised proposed definition in the August 1995 supplemental proposal for parts 70 and 71. The EPA is in the process of reviewing and developing a position in response to the comments on the several proposals with respect to this issue, and is not yet prepared to define the term in a final rule. The EPA will add a definition in the Phase II rulemaking that is consistent with how

EPA ultimately defines the term under part 70.

A detailed discussion of the history of this definition is contained in the preamble to the August 1995 part 70 proposal (60 FR 45545). At issue is whether the phrase ''modifications under any provision of title I'' as used in section 502(b)(10) of the Act includes not only modifications subject to major NSR requirements of parts C and D of title I but also modifications subject to minor NSR programs established by the States pursuant to section 110(a)(2)(C).

In August 1994, EPA proposed to interpret the title I modification language of part 70 to include minor as well as major NSR modifications (55 FR 44527). The EPA received many comments from industry and States contesting this interpretation. The commenters argued that EPA had defined title I modification in the preamble to the May 1991 proposed part 70 rule to exclude minor NSR (56 FR 21746–47 and footnote 6) and did not redefine it in the final July 1992 rule. As a result, they argued that they were relying on the current rule to be interpreted consistent with the proposed rule preamble and that EPA could not change its interpretation without undertaking further rulemaking.

Based in part on the arguments raised by commenters, EPA revised its proposed interpretation of the definition of title I modification in the August 1995 supplemental notice to exclude modifications subject to minor NSR. In addition, EPA proposed regulatory language defining title I modification which excluded the reference to section 110(a)(2) of the Act.

While EPA is not yet prepared to adopt a final definition for the term, in implementing the Phase I part 71 program EPA will treat the issue consistently with the approach the Agency has advised States to take under the current part 70 regulation. Consequently, it will not consider title I modifications to include changes subject to State minor NSR programs.

B. Section 71.3—Sources Subject to Permitting Requirements

The final rule promulgates provisions regarding applicability of the program at section 71.3. These provisions are based on their counterparts in the currently promulgated part 70 rule at section 70.3. Consequently, in several aspects, they differ from section 71.3 as proposed, which was based on the August 1994 proposed revisions to section 70.3 which the Agency is not yet prepared to finalize.

Paragraph (a)(1) of the part 71 proposal contained an exemption from title V for major sources that would be subject to title V only if they have the potential to accidentally release pollutants listed pursuant to section 112(r)(3) in major amounts. This exemption has been deleted, even though it garnered reviewer support, consistent with the decision to match the part 70 requirements except where unique circumstances make a change necessary. If EPA ultimately revises part 70 to add the deleted language, the Agency would intend to revise part 71 consistently.

Proposed section 71.3(a)(4) which was modelled upon the August 1994 proposed revisions to part 70 and would have stated that any source subject to title I parts C or D would be required to obtain a permit was also deleted from the final regulation to comport with the part 70 regulation. The purpose of this provision was to ensure that all sources subject to preconstruction permitting as major sources under parts C or D of the Act are also subject to title V permitting. Again, if part 70 is ultimately revised to add this provision, EPA would intend to revise part 71 to add it as well.

Similarly, paragraph (b)(2) has been changed to conform with section 70.3(b)(2), which addresses applicability for sources subject to section 111 or 112 standards promulgated after July 21, 1992. Proposed section 71.3(b)(2) differed from both existing section 70.3(b)(2) and the August 1994 proposed revisions thereto. If section 70.3(b)(2) is ultimately revised, EPA would expect to revise section 71.3(b)(2) to harmonize it with part 70.

Paragraphs (c) and (d) of this section, found in the proposal at sections 71.6(a)(1)(iv) and 71.5(f)(3)(i), respectively, were moved to this section for compatibility with the current part 70 provisions at sections 70.3 (c) and (d).

C. Section 71.4—Program Implementation

The major issues raised by commenters on proposed section 71.4 related to the need to base part 71 on finalized (as opposed to proposed) provisions of part 70, how the part 71 program should be customized to fit the unique needs of the State or area for which the program is administered, and jurisdictional issues with respect to programs on Tribal lands. The Agency's approach to the first issue is discussed at length in section II of this document. This section addresses the second and third issues in addition to several minor changes to the proposed rule that were adopted today.

1. National Template Approach

With respect to the second issue, EPA received divergent comments. For example, commenters suggested that a national template should be flexible, that a national template should be used only to fill in the gaps of deficient State programs, and that there should be no national template because title V does not authorize EPA to develop such a rule.

The Agency carefully considered the statutory framework for the program and interprets title V as authorizing a national template approach. For a further discussion of this issue, see section II of this document. The EPA chose a national template approach because EPA believes the national template is flexible enough to be an effective program in nearly all areas, and individual rulemakings for each area that has a part 71 program would be needlessly burdensome on the Agency. Since the national template will serve the needs of most areas, it is more efficient to promulgate the program once while allowing for separate rulemakings, as needed, in some areas. The EPA recognizes the desirability of providing a flexible approach to administering the program, as the commenters have suggested, when the national template does not adequately fit the unique State or Tribal situation. Such flexibility is already contained in section 71.4. When EPA determines that the national template rule is not appropriate for a State, EPA may adopt, through a separate rulemaking, appropriate portions of a State or Tribal program in combination with provisions of part 71 in order to craft a suitable part 71 program, as provided in section 71.4(f). Furthermore, section 71.9(c)(7) provides that when the national fee structure would not reflect the cost of administering a part 71 program, the Administrator shall through a separate rulemaking set an appropriate fee. Finally, as provided in section 71.5 and as discussed in section III.D of this document, EPA has designed part 71 to provide significant flexibility to accommodate the localized air quality issues. For example, EPA will use State application forms whenever possible and will try to match the list of trivial activities which may be left off application forms to the lists established in the State operating permit program.

2. Part 71 Programs in Tribal Areas

The EPA is deferring promulgation of regulations that would describe how the Agency would determine the boundaries of a part 71 program for a

Tribal area. The EPA has published a proposed rule, pursuant to section 301(d)(2) of the Act, specifying the provisions of the Act for which EPA believes it is appropriate to treat Indian Tribes in the same manner as States and outlining the Agency's position on the authority of Indian Tribes to administer air programs under the Act. See 59 FR 43956 (Aug. 25, 1994)(''Indian Tribes: Air Quality Planning and Management,'' hereafter ''proposed Tribal rule''). As indicated in the part 71 proposal, EPA intends to follow the approach of the Tribal rule with respect to issues of jurisdiction and resolution of jurisdictional disputes. The EPA agrees that it would be more practical to defer addressing jurisdictional issues until the promulgation of the Tribal rule. The Agency will finalize an approach to jurisdiction as well as a definition of Tribal area in the Phase II rulemaking or in conjunction with finalizing the Tribal rule. In the interim, the Agency will not be able to implement part 71 programs in Tribal areas unless it completes a rulemaking that establishes the boundaries of the part 71 program in the Tribal area. Rulemakings for the Tribal rule and Phase II will be completed well in advance of the November 1997 deadline for EPA to implement part 71 programs on Tribal lands. Therefore, EPA does not expect that the deferral of jurisdictional issues will delay implementation of the part 71 program. Although part 71 contains no definition of ''Tribal area,'' EPA will provide (and will require delegate agencies to provide) notice of proposed permitting actions pursuant to section 71.8(d) even prior to the Phase II rulemaking. In the interim, federally recognized Indian Tribes will receive notice with respect to permitting actions related to sources whose emissions may affect Tribal air quality and that are located in contiguous jurisdictions or are within 50 miles of the exterior boundaries of the reservation.

3. Expiration of Part 71 Permits

The Agency received comments suggesting that part 71 permits should be rescinded automatically, without the Agency taking any action, when they are replaced by a part 70 permit. The EPA agrees that no separate agency action should be required when a part 71 permit is replaced by a part 70 permit issued under the approved part 70 program because unless the rescission happens simultaneously with the issuance of the part 70 permit, a source could be subject to a part 70 and a part 71 permit which may contain different requirements. Accordingly, EPA has deleted proposed section 71.4(l)(3) which provided that the Administrator would rescind part 71 permits when they were replaced with part 70 permits. Further, the EPA has adopted section 71.6(a)(11) which provides that part 71 permits shall contain a provision to ensure that a part 71 permit will expire when the source is issued a part 70 permit.

4. Suspension of Issuance of Part 71 Permits

The EPA revised the first paragraph of proposed section 71.4(l) to clarify, consistent with EPA's original intent, that EPA may suspend issuance of part 71 permits whenever the Agency has granted full or interim approval to a State part 70 program. Section 502(e), which addresses suspension of the issuance of part 71 permits, provides that the triggering event for suspension is publication of notice of approval. Thus, there is no statutory requirement that a State program must ''fully'' meet the requirements of part 70 or be fully approvable in order for EPA to suspend permit issuance. The Agency believes it is appropriate to suspend issuance of part 71 permits when a State program substantially meets the requirements of part 70 and has received interim approval because it would be confusing and burdensome to have two title V permit programs operating simultaneously in the same jurisdiction. Therefore, EPA has deleted the word ''fully'' from the first paragraph of proposed section 71.4(l).

5. Delegation Agreements

The final rule makes a minor change to proposed section 71.4(j) in parallel with a change to proposed section 71.10(b) to reflect the fact that under the final rule, EPA will not publish its delegation agreement with a delegate agency. Therefore, section 71.4(j) provides that the roles of the delegate agency and EPA in administering the part 71 program will be defined in a delegation agreement, not in a Federal Register notice. The EPA will follow the procedures for delegation agreements established for the PSD program under which EPA does not publish its delegation agreements. Delegation agreements reflect the understanding of EPA and the delegate agency as to their respective responsibilities and are not subject to any notice requirement. This approach allows EPA and the delegate agency to modify their agreement as circumstances change, without the burden of publishing a Federal Register notice.

6. Early Reductions Permits

The Agency retained in section 71.4(i)(3) the requirement that the permitting authority take action on complete permit applications containing an early reduction demonstration within 12 months of receipt of the complete application. Although the current part 70 regulation sets a 9 month deadline for State action, EPA Regional offices are allowed 12 months to take action on the permit applications submitted under the interim permitting rule for early reduction sources that EPA adopted prior to the approval of any State part 70 programs. See 40 CFR section 71.26(a)(2). The Agency believes that this time frame is reasonable given the effort required to process the permits and the need for sources qualifying for a compliance extension under the Early Reductions Rule to obtain a permit prior to certain deadlines set by the rule.

D. Section 71.5—Permit Applications

The part 71 proposal addressed permit applications at proposed section 71.5 (a) through (i). This proposed section was based upon a combination of corresponding provisions in the existing part 70 rule and in the August 1994 proposed revisions to part 70, and was presented in a slightly different structure from the part 70 rule. In light of EPA's decision to promulgate part 71 on an interim basis, more consistently with the existing part 70 rule, the provisions based upon the August 1994 proposal are not being adopted today. Moreover, in order to facilitate transition from implementing part 71 to part 70 programs, the final rule is being adopted in a structure that is more consistent with that of the current part 70 rule.

1. Timely Application

Under section 71.5(b)(1) of the proposal all initial permit applications would have to be submitted within 12 months or an earlier date after the source becomes subject to part 71. The proposal would have required that the permitting authority provide notice of the earlier date to the source and that this notice would be given at least 120 days in advance of the application submittal date.

Several commenters argued that the 120 days (4 months) minimum notice would not give sources sufficient time to prepare an application. They also argued that 4 months was insufficient time for sources to submit their applications early for purposes of addressing deficiencies and ensuring they receive the application shield.

In response to these comments, EPA has lengthened the notice period from 4

months to 6 months. Section 503(c) of the Act requires the submittal of all applications within 12 months of the effective date of a permit program or such earlier date as the permitting authority may establish and that one-third of these applicants be issued permits in this first year. In order to issue one-third of the permits in the first year, EPA must receive at least one-third of the applications prior to 12 months after the effective date of the program.

The EPA considered and rejected commenters' suggestions for 8 to 12 months' advance notice because they would interfere with EPA's requirement to issue one-third of the permits in the first year. The EPA believes that the 6 month alternative will allow EPA enough time to process and issue permits. The EPA believes that 6 months is sufficient time for sources to prepare applications for several reasons that had not been announced at time of proposal. First, on July 10, 1995, EPA issued the first white paper that examines options for simplifying part 70 permit applications and sets minimum expectations concerning how much information must be included in order for the application to be found complete. In today's notice EPA announces its intention to implement both of the white papers for part 71 program purposes. Second, EPA has revised the rule to clarify that part 71 permit application forms may be developed by the delegate agency or the EPA allowing a part 71 application form to be based on a State form developed for part 70 purposes, as long as the form meets the minimum requirements of part 71 (discussed in more detail below). Third, because the final rule more closely follows the part 70 program upon which most State operating programs are based, sources will be familiar with most part 71 permit application requirements.

In addition, proposed sections 71.5(b)(2) and (3) have been deleted because they referred to off-permit changes and a four-track permit revision system which the Agency is not finalizing today.

2. Complete Applications

The final rule adopts the language from the current part 70 rule concerning complete applications. However, EPA believes that several clarifications will help applicants understand the flexibility available for submitting simplified permit applications that can be found complete. The terms ''simplified permit application'' or ''streamlined permit application'' refer to applications that require less information.

In the part 71 proposal, EPA proposed to adopt language from the August 29, 1994 part 70 revision notice (59 FR 44518) that would have clarified that an application would be found complete if it contained information ''sufficient to begin processing the application.'' As stated previously, today's rulemaking is based on provisions of current part 70; therefore, this language does not appear in today's rulemaking. However, EPA believes, as stated more fully in the first white paper, that considerable flexibility already exists in the part 70 rule to find simplified permit applications complete. Since the white papers will be implemented for part 71 purposes, this flexibility also exists in the part 71 permit program.

Furthermore, the proposed revisions to part 70 (August 29, 1994) and the part 71 proposal discussed several additional options currently available to States for developing simplified permit applications and finding them complete, and did not propose any rule changes necessary to implement these options. These options were: (1) a two-step application completeness determination process for simplified applications and (2) simplified application content requirements for applicable requirements with future compliance dates. After the publication of these proposal notices, the first white paper included these two flexibility options, as well as many additional options, and reaffirmed EPA's interpretation that implementation of these options does not depend on making changes to the part 70 rule or State part 70 programs.

The EPA believes this approach will provide flexibility for sources to prepare simplified permit applications and for permitting authorities to find them complete. This approach will also promote consistency between the part 71 and part 70 programs, which in turn, will provide for a smoother transition between the programs. Guidance on the implementation of the white papers and other flexibility options for completeness determinations for a part 71 program implemented in a particular State may be provided by the EPA or delegate agency soon after the program takes effect.

Additionally, proposed section 71.5(d), concerning the treatment of business confidential information, has been revised in the final rule. The language of the proposal discussed the responsibilities of permitting authorities to process requests for confidential treatment and included a general reference to 40 CFR part 2. Considering the structure of these regulations and this section's position in these regulations, the Agency believes that the promulgated language clarifies the procedures that applicants must follow to request confidential treatment for business information in applications, provides a more precise cross-reference to those procedures, and does not add any new requirements regarding the treatment of confidential information not intended by the proposal.

Note also that certain technical changes are being made to part 71's completeness provisions as a result of the final rule's greater harmonization with the existing part 70 rule. First, the completeness criteria are being promulgated at section 71.5(a)(2) while the proposal addressed completeness at section 71.5(c). In addition, the final rule references section 71.5(c) as the provision setting out required information in permit applications, while the proposal referenced proposed section 71.5(f). Moreover, the final rule cites section 71.5(d) as the provision concerning certification by a responsible official, while the proposal cited proposed section 71.5(i). Finally, the citation in the proposal to section 71.7(a)(3) has been changed in the final rule to section 71.7(c)(4) as a result of the changes to section 71.7.

3. Standard Application Form and Required Application

Proposed section 71.5(f) would have required part 71 sources to submit ''applications provided by the permitting authority, or if provided by the permitting authority, an electronic reporting method'' and did not include any preamble discussion of the interpretation of this phase. One commenter on the proposal encouraged EPA to use existing State forms in States where EPA assumes part 71 authority. Final section 71.5(c) has been revised to more closely follow the corresponding language of section 70.5(c). The EPA agrees with the commenter and will provide forms developed by delegate agencies (States), or the EPA, including electronic application methods, for purposes of applying for part 71 permits. This approach to application development is possible because ''permitting authority'' is defined in section 71.2 as including the EPA or the delegate agency. This approach to providing part 71 forms will lead to less disruption and a smoother transition for sources preparing initial part 71 applications because, in many cases, sources will be familiar with the State form on which the part 71 form is based. For example, sources may already be collecting information and drafting an operating permit using the State form in expectation of part 70 program approval by EPA. In addition, commenters asked

that EPA clarify and simplify the requirements for emissions-related information in part 71 applications consistent with EPA's guidance in the first white paper. In response to these comments, EPA intends to implement the white paper guidance with respect to the collection and reporting of emission-related information and EPA believes that no changes to part 71 are necessary to do so.

Numerous technical changes have been made to the final rule regarding information to be required in permit applications to better match the current part 70 rule. In the proposal, information requirements were addressed at proposed sections 71.5(f) through (i), while the final rule follows part 70 by covering these requirements in sections 71.5(c) and (d). New citations to other provisions of part 71 are also due to the final rule's harmonization with part 70.

4. Insignificant Activities and Emission Levels

Extensive comments were received on the proposed insignificant activity and emission levels provisions of proposed section 71.5(g). Commenters argued, in part, that activities subject to applicable requirements should be eligible for the exemption for insignificant activities and emission levels, that the requirement that applications not exclude information needed to determine whether a source is subject to the requirement to obtain a part 71 permit would be too restrictive, that the list of insignificant activities in the final rule should be expanded, that the list of trivial activities in the first white paper should be codified in part 71, that the exemption for mobile sources as insignificant activities should be removed, that the single emissions unit emissions thresholds for insignificant emissions should be raised, and that the aggregate source-wide emission thresholds for insignificant emissions should be deleted.

a. *Eligibility for Insignificant Treatment and Information Required in Applications.* Section 71.5(c) of the final rule addresses, in part, information that must not be omitted from permit applications. These requirements have special relevance for applicants when determining what information must be included in applications for emission units that are eligible for insignificant treatment. To be consistent with current part 70, final section 71.5(c) deletes certain proposed provisions that do not follow the corresponding language of section 70.5(c) and that were based upon the proposed revisions to part 70 published in August 1994. Accordingly, deleted from final section 71.5(c) is the proposed language that would have not allowed the application to omit information needed to: (1) Determine whether a source is major, and (2) determine whether a source is subject to the requirement to obtain a part 71 permit. Notwithstanding these deletions, EPA continues to believe that the definition of major source at section 71.2 controls the determination of which units are counted for major source applicability purposes and that emissions of units that qualify for insignificant treatment in the application are not exempt from these determinations. Consistent with the Agency's approach in implementing the current part 70 rule, the EPA is reversing its interpretation, first expressed in the proposed preamble, that would have excluded the eligibility of activities for treatment as insignificant when such activities are subject to applicable requirements. The EPA believes that no change to the final rule is necessary to implement this new interpretation.

Industry commenters were particularly concerned that EPA's interpretation that proposed section 71.5(g) would not allow activities with applicable requirements to be eligible for insignificant treatment would render the insignificant activity and emissions level provisions meaningless because few sources would be eligible for streamlined treatment in the application.

The EPA now believes that it was overly broad in stating that emission units were precluded from eligibility as ''insignificant'' if such units would be subject to applicable requirements. As discussed below, EPA believes there are circumstances in which an emission unit or activity can be treated as ''insignificant'' under a Federal operating permits program, even if it is subject to an applicable requirement. However, a title V application must still contain information needed to determine the applicability of or to impose any applicable requirement or any required fee and a permit must still meet the requirements of section 71.6 for all emission units subject to applicable requirements, including those eligible for insignificant treatment.

Both sections 71.5(c) and 71.5(c)(3)(i) require sufficient information to verify the requirements applicable to the source and to collect appropriate permit fees.

This means that some of the information required by sections 71.5(c)(3) through (9) may be needed in the permit application for insignificant activities in order for the permitting authority to draft an adequate operating permit. As an example, where an insignificant activity is not in compliance with an applicable requirement at the time of permit issuance, the permit application would need to contain a compliance plan, including a compliance schedule, for achieving compliance with the applicable requirement. As another example, if a source has some insignificant activities within a category that are subject to an applicable requirement and some within that same category that are not subject to that applicable requirement because the applicability criteria for the applicable requirement are different from the applicability criteria for insignificant activities, the permit application would generally be required to include sufficient information on the insignificant activity for the permitting authority to determine which units are subject to the applicable requirement and to include that applicable requirement in the permit for the subject insignificant activity. The EPA believes that a part 71 permit application may simply list the applicable requirements that apply to insignificant activities generally, rather than requiring the permit application to explicitly identify which insignificant activities are subject to which applicable requirements. The permitting authority would then issue a permit imposing the applicable requirements in the permit, but not specifically identifying which insignificant activities are subject to those applicable requirements. (For a more detailed discussion, see the first white paper and the proposed interim approval and proposed notice of correction for the State of Washington's part 70 program, 60 FR 50166 (September 28, 1995).)

b. *Insignificant Activity Lists.* Section 70.5(c), in part, allows States to develop lists of insignificant activities and emission levels that need not be included in applications and requires activities (or equipment) exempted due to size or production rate to be listed in the application. State part 70 program submittals were approved by EPA that implement this provision in a variety of ways. The structure of the proposed regulations was based on the structure of these State implementing regulations, and included a short list of insignificant activities and provisions setting insignificant emissions levels. The proposed list of insignificant activities, section 71.5(g)(1), included a list of specific source categories, activities, or equipment that could be left off the application. The proposed insignificant

emissions provisions, section 71.5(g)(ii), allowed sources the flexibility to treat additional source categories, equipment, or activities as insignificant, provided certain eligibility criteria were met, including not exceeding certain emissions levels, and provided that the activities were listed in the application. The EPA believed that the proposed insignificant emissions approach was flexible enough that extensive lists of insignificant activities would not be needed in the final rule. The EPA reasoned that no list of insignificant activities would ever be so inclusive as to list every type of activity potentially eligible for insignificant treatment at industrial sources, and therefore, additions to the list would require resource-intensive notice and comment rulemaking on an ongoing basis. The proposal asked for comment on its approach and asked whether the proposed approach would be compatible with approaches developed by States.

Numerous industry commenters argued, in general, that the proposed part 71 list was not extensive enough to provide meaningful relief for industry from the administrative burdens associated with submitting detailed information for emission units or activities that pose little or no environmental risk and that the part 71 list was not as extensive as lists developed by States for their part 70 programs.

The EPA is finalizing the proposed list of insignificant activities with one revision. The EPA believes that the commenters' concerns that there be more opportunities for streamlining the information required by part 71 permit applications is best addressed by implementing the white papers for part 71 purposes, and that no changes to the final rule are necessary to implement this approach. The EPA believes that the white papers provide for application streamlining that is comparable and, in many ways, superior to approaches based on omitting certain emission unit or activities from the application only when eligibility for insignificant treatment is established in a rule. In general, the white papers allow sources to provide little or no detailed source-specific information for emissions units or activities where the information is not reasonably available and to the extent the information is not needed to resolve disputed questions of major source status, applicability of requirements, compliance with applicable requirements, or needed to calculate fees.

For example, section B.3. *Insignificant Activities* of the first white paper allows trivial activities to be completely omitted from applications. The white paper defines trivial activities as activities without specific applicable requirements (although they may have ''generic'' applicable requirements, explained below) and with extremely small emissions and included a list of trivial activities in Appendix A. Many of the trivial activities identified in the first white paper are common to State lists of insignificant activities. Under part 71, sources may rely on this list, and EPA or the delegate agency may add to it without the need for Federal rulemaking. This allows EPA to expand the list of trivial activities for a part 71 program in a specific location, consistent with trivial activity lists established in the State operating permit program, thus tailoring the program for a specific program implemented in a State.

Also providing considerable streamlining is section B.4 *Generic Grouping of Emission Units and Activities* of the first white paper which allows emissions units or activities with ''generic'' applicable requirements to be omitted from the application, independent of eligibility for insignificant treatment. Under this section, sources may provide little or no detailed source-specific information, even for units with ''generic'' requirements, provided that the ''generic'' requirements are described in the application such that their scope and manner of enforcement are clear. ''Generic'' requirements are certain broadly applicable requirements that apply and are enforced in the same manner for all subject units or activities and that are often found in the SIP. Examples of such requirements include requirements that apply identically to all emissions units at a facility (e.g., source-wide opacity limits), general housekeeping requirements, and requirements that apply identical emissions limits to small units (e.g., certain process weight requirements). Where the applicable requirement is amenable to this approach, part 71 permitting authorities may follow this approach regardless of whether subject activities have been listed as trivial or insignificant. A lengthy list of the types of requirements suitable for this treatment is not possible here because, among other reasons, the examples of which EPA is aware are SIP requirements, and so vary from State to State. The EPA or delegate agency will decide which SIP requirements can be treated in this generic fashion for specific locations where part 71 programs are implemented.

The EPA has determined that the insignificant activity exemption for air-conditioning units used for human comfort at final section 71.5(c)(11)(i)(B) should be changed to clarify that substances other than class I or II substances may be regulated under title VI of the Act. This change is necessary because effective November 15, 1995, title VI requires recycling or recovery of substitute refrigerants regardless of whether or not they are ozone depleting substances (Class I and Class II substances) unless EPA makes a refrigerant-specific decision that the substitute will not harm human health or the environment and can, therefore, be vented.

c. *Insignificant Emissions Levels.* In response to comments, EPA has revised proposed section 71.5(g)(2)(i), which is section 71.5(c)(11)(ii)(A) of the final rule, to increase the insignificant emissions threshold for regulated air pollutants other than (HAP) from a single emissions unit from 1 tpy to 2 tpy and to delete the 1,000 pounds (lb) per year threshold in extreme ozone nonattainment areas. The EPA believes this decision is appropriate since, as commenters pointed out, EPA has previously stated in part 70 approval notices that insignificant emissions thresholds set at 2 tpy would be approvable in most locations. The EPA believes that due to the similarity between part 70 and part 71 programs it can logically conclude that this level is also appropriate for a part 71 program, regardless of where it is located. This level will provide a measure of additional flexibility for sources to exempt insignificant activities, thus simplifying the application, with little additional risk that significant emission units will be excluded from the application. As further discussed below, there are several safeguards available in the final rule that should ensure that significant units are not excluded from applications due to their eligibility for insignificant treatment. In addition, EPA is deleting the proposed 1,000 lb per year threshold for extreme ozone nonattainment areas. This will simplify the rule by setting the same tpy emission thresholds for attainment and nonattainment pollutants, while requiring the thresholds in relative terms to be no more than 20 percent of the major source threshold for nitrogen oxides and VOC and 2 percent of the major source threshold for the remaining criteria pollutants. Two tpy is considered trivial by EPA for all pollutants other than HAP in relation to major source thresholds in all attainment or

nonattainment areas and will not prevent the EPA from collecting information of a consequential or significant nature. In addition, these levels are more commonly found in State part 70 programs and therefore should help to ease the transition from part 71 to part 70 operating permit programs.

In response to comments, EPA has decided to delete the aggregate source-wide emissions criteria for insignificant emissions of regulated air pollutants (sections 71.5(c)(11)(ii) (A) and (B) of the final rule). The EPA proposed these aggregate source-wide emissions criteria as an additional means to ensure that emissions that might otherwise trigger the applicability of applicable requirements or major source status would not be excluded from applications. However, EPA now believes that the proposed aggregate emissions thresholds would have significantly limited the value of the insignificant emissions provisions for most medium to large sources. This deletion should not impede the permitting authority's ability to write permits which assure compliance with applicable requirements and the requirements of part 71. The EPA also believes that the utility of aggregate plant-wide thresholds is negligible because of various other safeguards already provided in the rule; in particular, section 71.5(c)(11) requires applications to not exclude information needed to determine the applicability of, or to impose, any applicable requirement. In addition, the requirement of section 71.5(c)(11)(ii) that units or activities with insignificant emissions be listed in the application provides an opportunity for the permitting authority to review the source's decision to treat emissions as insignificant, while the single-unit emissions thresholds of sections 71.5(c)(11)(ii) (A) and (B) limit the size of emissions to levels that would normally ensure that the units are not covered by extensive control requirements.

5. Compliance Certification

The part 71 proposal would have required sources to submit certifications that they were in compliance with all applicable requirements. Commenters requested further clarification of the certification requirements and argued that it was not clear exactly what efforts a source was required to make to determine its compliance status prior to certifying that it was in compliance with all applicable requirements, and that it was unclear whether or not a source was obliged to reconsider past applicability determinations prior to making such a certification. The EPA does not believe that any revisions to the rule are necessary to address the commenters' points. This is true because the white papers for part 70 address these issues and sources may follow that guidance for purposes of completing part 71 permit applications.

E. Section 71.6—Permit Content

Today's permit content provisions more closely track the provisions contained in current 70.4 and 70.6 than did those in the proposal. Thus, the order of the paragraphs in section 71.6 is more similar to the permit content section of current part 70 than to the part 71 proposal. For example, the provisions dealing with the permitting authority's duty to address emissions units in the permit has been moved from section 71.6(a)(iv) to section 71.3(c), consistent with current part 70. In addition, using current part 70 as the template for permit content means that the provisions for ''off-permit'' contained in today's rulemaking mirror those found at section 70.4(b), while the off-permit provisions of the proposed rule tracked those contained in the August 1994 proposed revisions to part 70. Similarly, today's rulemaking adopts the requirements for emissions trading and operational flexibility that are found in current part 70.

In addition, EPA retains a provision related to the prompt reporting of deviations from permit conditions from the part 71 proposal. Current part 70 requires States to define ''prompt'' in their own programs, and today's rulemaking defines the term for the part 71 program and closes this gap in the proposed rule. Today's rulemaking also establishes a part 71 permit expiration date.

The EPA reiterates that today's rulemaking finalizes provisions for permit content on an interim basis in order to better facilitate smooth transition from implementation of part 71 to approved State programs established pursuant to the current part 70 rule. With respect to permit content provisions, the April 1995 and August 1995 proposals contain provisions which reflect the Agency's current best thinking, and subsequent to reviewing all of the comments on both proposals, EPA may finalize provisions for permit content that differ from those adopted today consistent with the approaches EPA eventually takes in promulgating final revisions to part 70.

1. Off-permit Operations

Under today's rulemaking, sources are allowed to make changes at a facility that are not addressed or prohibited by the permit terms, provided they meet the requirements of section 71.6(a)(12). The provision adopted today is patterned on 70.4(b) (14) and (15), the analogous provisions in current part 70. Like part 70, part 71 requires that the source provide the permitting authority with contemporaneous written notification for these types of changes, that these changes be incorporated into the permit at renewal, and that the source keep certain records of these changes. Consistent with current part 70, section 71.6(a)(12) limits off-permit changes to those that do not constitute title I modifications, are not subject to any requirements under title IV of the Act, and meet all applicable requirements of the Act. In applying this provision, the Agency will use the interpretation of the term ''title I modification'' that States are allowed to use under the current part 70 rule. EPA expects that allows a significant number of minor NSR changes, to the extent that they are not prohibited by the title V permit, to qualify for off-permit treatment.

Like part 70, part 71 does not allow off-permit changes to alter the permitted facility's obligation to comply with the compliance provisions of its title V permit and does not grant the permit shield to off-permit changes. For a more thorough discussion of the concept of off-permit changes, see the rationale for part 70's off-permit provision found at 57 FR 32269.

The part 71 proposal contained a modified off-permit provision at proposed section 71.6(q) that was designed in light of the four-track permit revision procedures contained in the proposal and modeled on the off-permit provision contained in the August 1994 proposed revisions to part 70. Proposed section 71.6(q) would have allowed certain changes to remain off-permit but would have required the source to submit an application to revise its permit to reflect that change within 6 months of commencing operation of that change. In the August 1995 supplemental proposal to parts 70 and 71, the Agency indicated that off-permit provisions may be unnecessary if the streamlined permit revisions procedures for parts 70 and 71 are adopted as proposed therein. After reviewing comments on both proposals, EPA will decide whether to retain an off-permit provision in the Phase II rulemaking, consistent with the approach EPA takes in finalizing permit revisions procedures. Off-permit treatment is available in the interim, consistent with that provided by current part 70, but EPA does not believe that many permits

will be issued prior to the Phase II rulemaking and that the off-permit provision therefore will not be greatly utilized.

2. Operational Flexibility

Under the rule adopted today, sources will enjoy the same operational flexibility as is provided to part 70 sources under current part 70. Section 502(b)(10) of the Act requires that the minimum elements of an approvable permit program include provisions to allow changes within a permitted facility without requiring a permit revision. In the current part 70 rule at section 70.4(b)(12) (i)–(iii), and the rule adopted today, there are three different methods for implementing this mandate. Accordingly, section 71.6(a)(13)(i) provides for sources to make certain changes within a permitted facility that contravene specific permit terms without requiring a permit revision, as long as the source does not exceed the emissions allowable under the permit and the change is not a title I modification. Under the interpretation of the term ''title I modification'' that EPA is allowing States to take under the current part 70 rule, section 502(b)(10) changes may include changes subject to minor NSR, provided the change does not exceed the emissions allowable under the permit. Section 71.6(a)(13)(ii) also allows emissions trading at the facility to meet limits in the applicable implementation plan when the plan provides for such trading on 7-days notice in cases where trading is not already provided for in the permit. Additionally, section 71.6(a)(13)(iii) allows emissions trading for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. For a thorough discussion of the flexibility allowed under the analogous part 70 provisions, see 57 FR 32266.

The part 71 proposal contained an approach to operational flexibility that was modeled on the August 1994 proposed revisions to part 70, not current part 70. The August 1995 supplemental proposal suggested further refinements to the concept. After reviewing comments on both proposals, EPA may adopt an approach to operational flexibility that is different from the one found in today's rulemaking, consistent with the approach EPA takes in finally revising part 70. While the approach adopted today differs significantly from that of the proposal, the Agency is adopting it on an interim basis in order to better facilitate transition to the State part 70 programs that are similarly based on the provisions governing operational flexibility under the current part 70 rule.

3. Affirmative Defense

In order to remain consistent with current part 70, EPA is adopting a provision from the part 71 proposal that would allow sources to assert an affirmative defense to an enforcement action based on noncompliance with certain requirements due to an emergency. Such a defense would be independent of any emergency or upset provision contained in an applicable requirement. See section 71.6(g). This provision is consistent with that found in the current part 70 rule at section 70.6(g).

As a result of concerns identified in legal challenges to part 70, the Agency, in the August 1995 supplemental proposal, solicited comment on the need for, scope and terms of an emergency affirmative defense provision. The Agency is reviewing those comments, but has not yet made a decision on whether or not to modify or remove this additional affirmative defense provision from part 70. The Agency will make part 71 consistent with the decision reached for part 70 in the part 71 Phase II promulgation. In the interim, sources may rely on the affirmative defense offered by section 71.6(g).

4. Definition of Prompt Reporting

The proposal contained provisions concerning prompt reporting of deviations from permitting requirements at proposed sections 71.6(f) (3) and (4). The final rule at section 71.6(a)(3)(iii) requires that each permit contain provisions for prompt notification of deviations.

Two commenters requested that the prompt reporting deadlines in part 71 be adjusted to reflect other environmental regulation timelines or to reflect State program guidelines that have been approved by the Agency for part 70 programs. The Agency disagrees with the request. Section 503(b)(2) of the Act requires permittees to promptly report any deviations from permit requirements to the permitting authority. Since individual permitting authorities are responsible for having programs to attain and/or maintain air quality within their geographical boundaries, they are obligated under the operating permits program to determine, among other things, what constitutes a prompt notification. Included as factors in determining prompt notification would be elements such as pollutant concentration, deviation duration, and authority response time. Because sources and pollutants of concern vary among permitting authorities, States have adopted differing prompt reporting schedules. The Agency has reviewed its obligation to protect air quality on a national level, and has determined that its prompt reporting deadline is appropriate for this obligation. Therefore the deadlines contained in part 71 remain unchanged from the proposal.

Two commenters requested that part 71 clarify prompt reporting requirements for deviations other than those associated with hazardous, toxic, or regulated air pollutants, as described in sections 71.6(a)(3)(iii)(B)(1) and (2). The Agency believes that the requirement contained in section 71.6(a)(3)(iii)(A), in which sources are to report all instances of deviations from permit requirements at least every 6 months, provides the basis for prompt reporting of all other deviations. However, the Agency is willing to clarify this reporting requirement and has modified section 71.6(a)(3)(iii)(B) by adding a statement that directs sources to submit all other deviation reports in accordance with the timeframe given in section 71.6(a)(3)(iii)(A).

5. Inclusion of Federally Enforceable Applicable Requirements in Permits

Two commenters requested that EPA include in part 71 the analogue to section 70.6(b)(2), a provision that requires the permitting authority to identify in the permit any applicable requirements that are not federally enforceable. The EPA disagrees with this request because part 71 permits will not include any non-federally enforceable applicable requirements; therefore, a requirement for the Agency to identify such terms as non-federally enforceable would be moot, and a part 71 analogue to section 70.6(b)(2) is not needed. Part 71 differs from part 70 in this respect. However, section 71.6(b) is consistent with the first paragraph of section 70.6(b), which provides that part 70 permit terms and conditions are to otherwise be federally enforceable.

6. General Permits

The proposal contained provisions at proposed section 71.6(l) addressing general permits, which were based on the proposed revisions to the general permits provisions in the August 1994 notice. Under part 70, the EPA afforded other permitting authorities the choice of utilizing general permits, and the Agency intended to provide this flexibility to itself. The Agency believes that general permits offer cost-effective means of issuing permits for certain

source categories. The Agency has not yet decided on the proper approach concerning opportunities for public review and judicial review associated with general permits, and in the interim, has decided to remain consistent with the current part 70 rule. Therefore, under today's notice, EPA's authorization to allow a source to operate pursuant to a general permit may proceed without public notice and does not constitute final permit action for judicial review purposes. Today's part 71 general permit provisions are found at section 71.6(d) and are patterned after the analogous provisions at current section 70.6(d). In the Phase II rulemaking, EPA intends to revise the part 71 general permit provisions if necessary to remain consistent with the approach the Agency ultimately takes in the final revisions to part 70.

7. Permit Expiration

The proposed rule contained a provision for rescinding part 71 permits at proposed section 71.4(l)(3). Under today's rulemaking at section 71.6(a)(11), part 71 permits would contain a provision that automatically cancels the part 71 permit upon expiration of the initial permit term or upon issuance of a part 70 permit, without the need for separate action to rescind the permit. The Agency believes that a clear expiration date is necessary in order to avoid potential confusion over which title V permit terms and conditions are valid. The majority of permitting authorities are moving towards final approval of part 70 programs. In those few instances where a particular permitting authority may not have final part 70 program acceptance by the deadline for implementation of part 71, the Agency expects that final program approval will occur well before the 5-year part 71 permit term (12 years for certain municipal waste combustors) has expired. Once the part 70 program is approved, sources and permitting authorities may desire to begin implementation as soon as possible. The Agency has no desire to be a stumbling block in those efforts, nor does the Agency wish to promote confusion over which permit (part 71 or 70) would be in effect at a particular time.

One of the purposes of title V was to provide sources with certainty as to their applicable requirements. Part 71 and part 70 permits will be similar, but not necessarily congruent, e.g., part 71 permits would contain only federally-enforceable requirements, insignificant activities could differ, and reporting provisions would differ. In order to prevent the potential confusion stemming from an unexpired part 71 permit remaining in effect concurrent with a part 70 permit, the Agency has decided to preclude the event from occurring. No such comparable provisions are needed in part 70 because that program provides just one title V permit per source. Consequently, section 71.6(a)(11) provides that a part 71 permit automatically expires upon the earlier of the expiration of its term or the issuance of a part 70 permit to the source.

F. Section 71.7—Permit Review, Issuance, Renewal, Reopenings, and Revisions

As discussed above, EPA is, on an interim basis, promulgating final regulations regarding permit issuance, renewal, reopenings, and revisions for part 71 that are based upon the existing provisions governing State title V programs at 40 CFR, section 70.7. Consequently, the provisions adopted today differ from those contained in the part 71 proposal, which were based upon the August 1994 proposed revisions to part 70. The EPA is still in the process of adopting revisions to part 70, and thus is not able at this time to base part 71's provisions on the expected future changes to part 70. As a result, EPA has concluded, in response to comments, that the most reasonable approach is to model part 71's permit issuance, renewal, reopenings, and revisions procedures on the corresponding provisions in the existing part 70 rule. These changes from the proposal, in addition to other changes in response to comments, are identified below.

1. Permitting Authority's Action on Permit Application

First, the organization of the paragraphs has been changed from the proposal to be consistent with 40 CFR section 70.7(a). In addition, in section 71.7(a)(1), the word ''modification'' is now used in place of the word ''revisions,'' which was used in the proposal. This is a technical change to the rule to make it conform with the language used in corresponding provisions in the current part 70 rule. Also, section 71.7(a)(1)(ii) has been changed to track section 70.7(a)(1)(ii) by explicitly providing that changes subject to minor permit modification procedures need not comply with the public participation requirements of sections 71.7 and 71.11. This change from the proposal is a result of the Agency's adoption in today's rule of permit revision procedures modelled on those contained in the existing part 70 rule. Moreover, section 71.7(a)(1)(iv) has been adopted without the language providing that, in some cases, the terms of the permit need not provide for compliance with all applicable requirements that are in force as of the date of permit issuance. Again, this change is necessary to make section 71.7(a)(1)(iv) consistent with the corresponding provision at section 70.7(a)(1)(iv), which does not contain the proposal's language. That language was first proposed in the August 1994 proposed revisions to part 70, and the Agency is not yet prepared to adopt it into a final title V rule. Likewise, section 71.7(a)(1)(v) is being promulgated without references to the administrative amendment and *de minimis permit* revision procedures contained in the proposal in order to better match the current part 70 provisions at section 70.7(a)(1)(v).

Section 71.7(a)(2) is being adopted without the language in the proposal which would have required permitting authorities to take final action within 12 months after receipt of a complete application for early reductions permits under section 112(i)(5) of the Act because regulatory language addressing this requirement was moved to section 71.4(i)(3). Furthermore, this provision is being adopted without the language in the proposal that would have allowed permitting authorities to delay final action where an applicant fails to provide additional information in a timely manner as requested by the permitting authority, as section 70.7(a)(2) currently does not provide such authority.

A new section 71.7(a)(3) is being promulgated to require the permitting authority to ensure that priority is given to taking action on applications for construction or modification under title I of the Act. This change is made to make part 71 consistent with the corresponding provision in current part 70 at section 70.7(a)(3).

Section 71.7(a)(4) (section 71.7(a)(3) in the proposal) deletes the references in the proposal to the proposed regulatory provisions addressing administrative amendments, *de minimis* permit revisions, and minor permit revisions, and tracks current section 70.7(a)(4) by providing that permitting authorities need not make completeness determinations for applications for minor permit modifications. This change is a result of EPA's basing section 71.7 on the current section 70.7. In addition, sections 71.7(a) (5) and (6) (sections 71.7(a) (4) and (5) in the proposal) are renumbered in order to track existing sections 70.7(a) (5) and (6).

The proposal contained a provision at proposed section 71.7(a)(6) addressing how draft and final permits may be issued with respect to applicable requirements that are approved or promulgated by EPA during the permit process. This provision was proposed in the August 1994 proposed revisions to part 70 and is not contained in the current part 70 rule. For the reasons stated above, EPA is not yet prepared to adopt it into part 71, and so is deleting the proposed provision from today's final rule.

2. Requirement To Apply for a Permit

One commenter suggested revising 71.7(b) regarding the application shield to say that the permitting authority must set a reasonable deadline for the submission of additional information, and commented that EPA should not be able to request information that is ''needed to process the application'' but only that which is ''reasonable and necessary to issue the permit''. The Agency disagrees that the regulation should set a specific deadline for the submission of additional information because the determination of what is a reasonable time will vary depending on the information requested. Also, EPA disagrees that there is a distinction between information needed to process the application and information that is reasonable and necessary to issue the permit.

One commenter suggested revising section 71.7(b) to allow sources to operate subsequent to submission of a complete, but late, application or application for renewal. The Agency believes that extending an application shield to sources that fail to submit timely applications is inconsistent with the Act. The proposal for part 70 contained a provision that would have provided a grace period of up to three months to submit applications after the required submittal date. The EPA deleted this provision from the final part 70 rule because extending the application shield to sources that did not submit a timely application would have been inconsistent with section 503(c) of the Act. The Agency is promulgating section 71.7(b) to closely track the corresponding provision at current section 70.7(b). Consequently, the references in proposed section 71.7(b) to the proposed provisions addressing administrative amendments, de minimis permit revisions, and minor permit revisions have been deleted and replaced by references to provisions addressing section 502(b)(10) changes and minor permit modifications. In addition, the proposal's reference to section 71.7(a)(3) has been replaced with a reference to section 71.7(a)(4), due to the restructuring of section 71.7(a).

3. Permit Renewal and Expiration

Section 71.7(c) is being promulgated to more closely match the corresponding provision under current section 70.7(c) than did the proposal. The references in proposed section 71.7(c)(2) to proposed sections 71.5(b) and 71.5(c) have been replaced by a reference to section 71.5(a)(1)(iii), due to the restructuring of section 71.5. Moreover, section 71.7(c)(2) (section 71.7(c)(3) in the proposal) is being promulgated without the language that would have provided that, where the permitting authority fails to act on a timely renewal application before the end of the term of title V permit, the permit shall remain in effect until the permitting authority does take final action. Instead that language (which is based upon the existing section 70.4(b)(10) of the current part 70 rule) is being promulgated at section 71.7(c)(3).

4. Permit Revisions

Commenters remarked that the Federal title V permit program as proposed in April 1995 would establish a new, added layer of permitting which would add unacceptably to the amount of time needed before a source could implement process changes. They suggested that even though the April 1995 permit revision tracks attempt to build on existing preconstruction programs, they still pose substantial new requirements (e.g., new criteria for adequate prior review in NSR). These commenters opined that if EPA believes that insufficient public review is afforded by existing programs, the Agency should address those shortcomings, not start a new process. Another commenter suggested that clerical changes should be handled through notification of the change by an amendment letter to the permitting authority that would then be attached to the permit without any EPA review until permit renewal. The commenter further suggested that all minor source changes which do not violate any permit term and do not render the source newly subject to an applicable requirement should be allowed to follow this amendment procedure. Other commenters opined that the April 1995 proposed four track permit revision procedures were fundamentally flawed and must be replaced with simpler procedures. One commenter suggested that EPA Regions, not just delegated States, should be authorized to conduct ''merged processing'' to add NSR or section 112(g) terms to title V permits, if such processing is retained in the final rule. Some suggested that EPA promote consistency between part 70 and part 71 permit programs to reduce confusion for sources that have to make a transition between different regulatory programs.

In light of these and other comments, EPA proposed in August 1995 a revised permit revision process, developed with extensive stakeholder input, which proposes several ways of streamlining permit revisions, particularly for those changes subject to prior State review (e.g., NSR changes). In the interim, as discussed earlier in this preamble, rather than adopting the four-track permit revision system that the Agency proposed for part 71 on April 25, 1995, the EPA has decided to adopt, for the first phase of part 71, the permit revision system in the current (July 1992) part 70 rule. Current part 70 provides three ways to revise a permit: the administrative amendment process, the minor permit modification process and the significant permit modification process. The specific regulatory changes to proposed part 71 taken to adopt these procedures are described below.

One commenter requested that EPA not follow the approach to ''title I Modification'' in the August 1994 proposed revisions to part 70 in defining the term for part 71. In implementing the current part 70 permit revision procedures during the interim period, EPA would apply the interpretation of ''title I modifications'' that States are allowed to apply under the current part 70 rule. Under this interpretation, minor NSR actions may be incorporated into the title V permit using the minor permit modification procedures of current part 70, or alternatively, may be made as off-permit changes if they are eligible.

a. *Rationale for Providing Interim Permit Revision Procedures.* The proposal indicated that due to the ongoing discussions with stakeholders regarding permit revision procedures under title V, EPA was considering finalizing part 71 in the interim without provisions for permit revision procedures. Several commenters suggested that EPA not finalize any portion of part 71 until permit revision procedures are finalized because they will influence how sources design their initial permit applications. The commenters argued that sources will need the ability to obtain expeditious revisions to permits, and that there is thus a need for provisions governing modifications. As discussed previously, EPA has decided to include the permit revision procedures of current part 70 in

this interim part 71 rule, while reserving the right to adopt procedures based upon future changes to part 70, when part 70 revisions are promulgated and Phase II of this rule is completed.

The EPA agrees with commenters that including current part 70 revision procedures is most appropriate for several reasons. First, EPA believes that it is premature to adopt the procedures proposed in April 1995 for part 71, or in August 1995 for part 70, because both of these proposals involve outstanding issues. Although the August 1995 proposal contains the latest thinking on streamlined permit revision procedures, it would be inappropriate to rush to promulgate a proposed system before the Agency has taken time to consider comments on the August 1995 proposal and arrive at a final position. In the meantime, the Agency has at its disposal the permit procedures of the current part 70 rule under which the Agency continues to approve State programs.

Second, industry commenters note that a clear understanding of permit revision procedures is important as sources prepare their part 71 permit applications. The revision procedures of part 70 are more clearly understood than any proposed procedures, having been promulgated by EPA and adopted by many State programs. Third, adopting the existing part 70 permit revision procedures insures a smooth transition from a Federal operating permits program to a State program due to the similarity between the two programs.

Finally, the Agency does not believe that many permit revisions will occur during Phase I of this program. The timing of permit issuance under part 71 is such that the Agency believes that few part 71 permits will be issued and fewer will need to be revised before States receive part 70 approval or before Phase II of part 71 is promulgated. Permit revision procedures in Phase I of the part 71 rule become more essential the longer part 71 programs are in place without a Phase II rule, which is possible if the Phase II rulemaking is delayed.

b. *Description of Permit Revision Procedures.* The part 71 proposal addressed permit revisions at proposed sections 71.7(d)–(h) using proposed provisions from the August 1994 part 70 notice. Proposed section 71.7(d) would have defined when a permit revision is necessary; proposed section 71.7(e) would have addressed administrative amendments; proposed sections 71.7 (f) and (g) would have addressed de minimis permit revisions and minor permit revisions, respectively; and proposed section 71.7(h) would have covered significant permit revisions. All of these provisions have been deleted in today's rule, and replaced with new provisions at sections 71.7 (d) and (e) that track the corresponding provisions in the current part 70 rule governing administrative amendments, minor permit modifications, and significant permit modifications. The EPA directs interested persons to the preamble to the final part 70 rule, 57 FR 32250 (July 21, 1992) for a detailed description of these permit revision procedures.

Under section 71.7(d), changes eligible to be processed as administrative amendments include administrative changes such as correction of typographical errors, changes in mailing address, ownership of the source (or part of the source) unless restricted by title IV, contact persons, and changes in individuals who have assigned responsibilities, (including the responsibility to sign permit applications). Administrative permit amendments can be handled by direct correspondence from the permitting authority to the facility after the appropriate information related to the changes has been supplied by the facility. As under current part 70, administrative amendments could also be used to address ''enhanced NSR'' changes, to which the permitting authority could also extend the permit shield. Sections 71.7(e) (1) and (2), which address minor permit modification procedures, are designed for small changes at a facility which will not involve complicated regulatory determinations. A source may make a change immediately upon filing an application for a minor permit modification, prior to the time the permitting authority, affected States, and EPA (in the case of a program delegated pursuant to section 71.10) review the application. Eligible changes could be processed individually or in groups, but the permit shield may not extend to these changes. Section 71.7(e)(3) covers significant modifications. In this track, the public, the permitting authority, affected States, and EPA (in the case of a program delegated pursuant to section 71.10) will review the modification in the same manner as review during permit issuance. The permit shield may extend to changes processed under this track.

5. Permit Reopenings

The proposal addressed permit reopenings at proposed 71.7 (i) and (j). These provisions were modeled on the existing provisions at section 70.7 (f) and (g), as proposed to be revised in the August 1994 notice. One of the features of that approach was a specific provision for reopening permits to incorporate new maximum achievable control technology (MACT) standards promulgated under section 112 of the Act. As part 70 has not yet been finally revised to adopt this approach, it is premature at this time to adopt it for part 71. Consequently, in order to more closely track the current part 70 rule and promote consistency with State programs developed and approved under the current rule, the part 71 provisions for permit reopenings adopted today at sections 71.7 (f) and (g) are modeled on the existing provisions at sections 70.7 (f) and (g), and do not include the proposed provisions concerning reopening permits to incorporate new MACT standards.

G. Section 71.8—Affected State Review

The provisions of section 71.8 differ from provisions proposed in the part 71 proposal in several respects. First, because today's rulemaking adopts permit revision procedures based on the current part 70 rule, rather than those that were proposed in April, the cross references to section 71.7 were changed and the reference to de minimis permit revisions has been deleted. In addition, the final rule specifically provides, consistent with part 70, that timing of notice to affected States of major permit modifications is not tied to the timing of notice to the public.

Second, section 71.8(b) is being adopted to more consistently follow section 70.8(b)(2) in providing that where EPA delegates administration of a part 71 program, the permitting authority shall transmit notice of refusal to accept recommendations of an affected State as part of the permitting authority's submittal of the proposed permit to EPA.

Third, as discussed in section III.B of this document, a new paragraph (d) has been added to section 71.8 that requires that part 71 permitting authorities provide notice of certain permitting actions to federally recognized Indian Tribes. While this is a departure from what part 70 currently requires of State permitting authorities, EPA agrees with commenters who suggested that federally recognized Indian Tribes should not be required to establish compliance with any eligibility criteria in order to be entitled to notice of Federal permitting decisions that may affect Tribal air quality. One commenter suggested that applying for treatment in the same manner as a State was a time consuming and burdensome process for Indian Tribes and urged the elimination of that requirement for Tribes to receive notice of permitting actions. Consistent

with the Agency's policy of maintaining government-to-government relationships with Indian Tribes, EPA (and delegate agencies) will notify federally recognized Indian Tribes of draft permits that may be issued to sources that could affect Tribal air quality, including all draft permits issued by EPA for the Tribal area and all draft permits for sources that are within 50 miles of the reservation boundary or the Tribal area. Accordingly, the Agency has added a new paragraph that provides that the part 71 permitting authority shall send notices of draft permits to federally recognized Indian Tribes whose air quality may be affected by the permitting action. The EPA is imposing upon itself this responsibility in order to further its government-to-government relationship with Tribes.

H. Section 71.9—Permit Fees

1. Two-Phase Promulgation of Fee Requirements

Consistent with the two-phased approach to part 71 promulgation described in this notice, EPA is today adopting a two-phased approach to part 71 fee requirements. Upon Phase I promulgation, collection of fees should be sufficient to cover the anticipated program costs of Phase I. On the other hand, because the cost of Phase II is tied to procedures which will not be finalized until the Phase II rulemaking (i.e., revised and streamlined permit revision procedures), a fee amount for Phase II cannot be finalized in today's rule. Thus, the Phase I fee covers all program costs except those associated with permit revisions which are excluded because the Phase II rulemaking will finalize streamlined permit revision procedures that will ultimately differ substantially from those contained in today's rule. Instead, the Phase II rulemaking will add to the fee the costs for the new permit revision procedures when they are finalized. More information on the determination of specific activities and costs associated with each phase is contained in the document entitled ''Federal Operating Permits Program Costs and Fee Analysis (Revised),'' which is contained in the docket for this rulemaking.

The two-phased approach to fee requirements will not impact the ultimate fee amount owed by a source. For the majority of sources, EPA expects that the part 71 application and associated fee submittal will occur after the Phase II rulemaking. For these sources, the fee will be paid all at once. Sources that submit their applications prior to the Phase II rulemaking will pay a Phase I fee in full at the time of application. The balance of the fee necessary to cover the costs of the Phase II provisions will be collected once the Phase II rule is promulgated. The specific timing and amount of the Phase II fee collection will be discussed in the Phase II rulemaking.

The EPA fully expects that the Phase II rulemaking finalizing permit revision procedures will be completed before any part 71 permits are issued and that no program costs will be incurred in the interim period as a result of permit revisions. However, EPA recognizes that in the unlikely event that a part 71 permit is both issued and revised (under the interim revision procedures in today's rule) fees will not have yet been collected to cover the cost of the revision and that if the Phase II fee is finalized based on a streamlined permit revision process, there may be a shortfall in revenue. However, the alternative would be to finalize today a Phase I fee based on the interim revision procedures that potentially overcharges sources and would necessitate, if and when the permit revision procedures are streamlined as expected, a refund. The EPA wishes to avoid this unnecessary and burdensome process.

2. Fee Amount

The part 71 proposal proposed a base fee amount of $45 per ton/year which was based on a fee analysis which projected EPA's direct and indirect costs for implementing the part 71 program nationwide and dividing that by the total emissions subject to the fee. A detailed discussion of this methodology is found in ''Federal Operating Permits Program Costs and Fee Analysis,'' which is contained in the docket for this rulemaking. Using the same basic methodology as the original fee analysis, EPA has calculated the costs of Phase I and has set the base Phase I fee amount at $32 per ton/year to cover these costs. The determination of this amount is contained in the report entitled, ''Federal Operating Permits Program Costs and Fee Analysis (Revised)'' (hereafter ''Revised Fee Analysis''), which is contained in the docket for this rulemaking. As proposed, the fee will be adjusted based on the level of contractor support needed for those programs where it is necessary for EPA to use contractors.

One commenter suggested that the $3 per ton surcharge to cover EPA oversight of contractor and delegated programs should be eliminated, noting that EPA does not charge oversight fees for State part 70 programs. The EPA agrees and believes that such a surcharge would be inconsistent with the approach taken in part 70. A full evaluation of the April 1995 comments was made after the development of the August 1995 proposal, in which EPA proposed to eliminate the surcharge. This evaluation of comments confirmed the direction EPA took in the August 1995 proposal. Therefore, today's action both responds to the April comments and is consistent with the August 1995 proposal. Accordingly, EPA is today deleting the surcharge provisions from sections 71.9(c)(2) and (3). The EPA will continue to consider any comments received on the supplemental proposal, and, if necessary, will take any additional action on the surcharge in the Phase II rulemaking.

For reasons similar to those described in the preceding paragraphs on the surcharge, the EPA is deleting ''preparing generally applicable guidance regarding the permit program or its implementation or enforcement'' from the list of activities in section 71.9(b) whose costs are subject to fees. The EPA believes that this category partially duplicates the fourth category under section 71.9(b), general administrative costs. To the extent that it is not duplicative, it refers to guidance that is issued before an individual part 71 program is in place. The EPA does not require that States charge fees for these activities for part 70 programs, and the Agency does not believe that such costs should be included in part 71 fees. This change does not result in a change in the fee structure because costs of activities which occur before the effective date of the part 71 program were not included in the original fee analysis. This change simply adjusts the list of activities in section 71.9(b) to more accurately reflect the activities whose costs were included in the fee analysis. Consistent with the deletion of the surcharge, the EPA is taking this action based on comments received on the part 71 proposal. If adverse public comment is received regarding this change as proposed in the August 1995 supplemental proposal, the EPA will take additional action as necessary in the Phase II rulemaking.

3. Fees for Delegated Programs

As discussed in the part 71 proposal, EPA intends to allow delegation of part 71 programs to States in many cases. Originally, EPA envisioned funding these delegated part 71 programs with revenue generated from part 71 fees. However, EPA is aware that many delegate agencies have the authority under State or local law to collect fees adequate to fund delegated part 71 programs. In some cases, these agencies could continue to collect fees even

though EPA would be collecting part 71 fees. Several commenters pointed out that this would result in the undesirable situation of paying fees to two permitting authorities. On the other hand, one commenter noted that if a delegate agency, in deference to part 71, rescinds its authority to collect fees, funding for the Small Business Assistance Program (SBAP) in that State could be adversely affected.

The EPA believes that the best way to address both of these situations is to suspend collection of part 71 fees for part 71 programs which are fully delegated to States and for which the State has adequate authority under State law to fund fully-delegated part 71 activities with fees collected from part 71 sources. This ensures that State revenue is available to administer the program, including the SBAP, while addressing the commenters' concerns about double fees. However, EPA cannot suspend fee collection for partially delegated part 71 programs, since in those situations EPA will still incur substantial administrative costs. Suspension of EPA fee collection does not constitute approval of the State's fee structure for part 70 purposes. Rule language codifying this approach has been added to section 71.9(c)(2).

The suspension of part 71 fees for delegated programs was proposed in the August 1995 supplemental proposal. While the timing of today's promulgation has not allowed thorough evaluation of comments on that proposal, the EPA agrees with the concerns about duplicate fees and the SBAP which were raised in reference to the part 71 proposal. A full evaluation of these comments was made after the development of the August 1995 proposal on this issue. This evaluation confirmed the direction EPA had taken in the August 1995 proposal. Therefore, today's action both responds to the April comments and is consistent with the August proposal. Furthermore, today's action is consistent with EPA's position that its fees be based on program costs, because EPA will not incur any program costs after it fully delegates a part 71 program. The EPA will still evaluate all comments received on the August 1995 proposal and will take any necessary additional regulatory action on the suspension of part 71 fees for delegated programs in the Phase II rulemaking.

For part 71 programs that are delegated but for which EPA does not waive fee collection, EPA's policy will be to continue to collect part 71 fees itself. The proposed fee amount for part 71 programs was based on the assumption that certain activities would be more costly for EPA to implement than for States due to increased travel, unfamiliarity with individual sources, etc. However, commenters pointed out that when a program is delegated, this assumption is not applicable. The EPA agrees with this comment, and is today promulgating language establishing a lower part 71 fee for delegated programs which omits the increased cost assumption made for EPA-administered part 71 programs. Where EPA continues to collect part 71 fees for a fully-delegated program, the Phase I part 71 fee amount will be $24 per ton/year. The determination of this amount is contained in the Revised Fee Analysis. Furthermore, for partially delegated programs, the part 71 fee that EPA collects will be lower than the fee for an EPA-administered program because the fee will be adjusted to account for the proportion of effort performed by the delegate agency at a lower cost. For these programs, the Administrator will determine the fee according to the formula in section 71.9(c)(4).

4. Timing of Fee Payment

The part 71 proposal provided that sources submitting their initial fee calculation worksheets must pay one-third of the initial fee upon submittal, and must pay the balance of the fee within 4 months. However, EPA believes that two changes discussed in today's preamble make this installment approach to fee payment infeasible. First, EPA is promulgating a later due date for permit applications, which would mean that under the proposed installment approach, receipt of two-thirds of the fee revenues would be delayed until the end of the first year of the program, which would not provide adequate funding for initial program activities. Second, EPA is promulgating a two-phased approach to fee collection. The EPA believes that it would be unnecessarily complicated and potentially confusing to provide for installment payment of the fee for one or both phases. For these reasons, EPA is promulgating language at section 71.9(e)(1) which clarifies that payment of the full fee amount for the first year is due upon submittal of the initial fee calculation worksheet.

In addition, because today's rule changes the due date for permit applications, a change must also be made to the deadlines for the initial part 71 fee calculation worksheets in the event that EPA withdraws approval of a part 70 program. The proposal contained a schedule for submission of the fee calculation worksheet based on SIC code. The due dates ranged from 4 to 7 months after the effective date of the part 71 program. Changes to section 71.9(f)(1) adjust the fee calculation worksheet due dates to range from 6 to 9 months after the part 71 effective date, depending on SIC code.

5. Computation of Emissions Subject to Fees

A commenter pointed out that the rule language in proposed section 71.9(c)(5)(ii) inadvertently limits the 4000 ton cap on emissions subject to fees solely to programs administered by EPA, not delegated or contractor-administered programs. Accordingly, the EPA has amended this paragraph to clarify that the 4000 ton cap applies to all types of part 71 programs.

6. Penalties

The part 71 proposal contained a penalty charge of 50 percent of the fee amount if the fee is not paid within 30 days of the due date. In addition, the proposal assessed a penalty of 50 percent on underpayments with the 50 percent penalty assessed on the amount by which the source underpaid the fee owed. The proposal also provided relief from the penalty for certain underpayments where the source is making an initial fee calculation based on estimated rather than actual emissions. The proposal provided that where the underpayment results from an underestimate of future emissions and where the underpayment does not exceed 20 percent of the fee amount (i.e., where the source pays more than 80 percent of the fee owed), no penalty would be assessed.

Some industry commenters were concerned that establishing a penalty for underpayment for a source that underpays by as little as 20 percent would be too harsh in light of the uncertainty in making emissions estimates. Although title V requires a penalty to be assessed for failure to pay any fee lawfully imposed by the Administrator, the EPA agrees that there is a degree of uncertainty in estimating emissions, particularly for HAP sources, which are often smaller, and for which emission factors are not well-defined.

Upon consideration of comments and evaluation of the relative uncertainty of emission estimates for HAP listed pursuant to section 112(b) of the Act, the EPA is today promulgating in section 71.9(l)(4) an underpayment penalty which differs slightly from the proposal. For sources who base their initial fee calculation worksheet on estimated rather than actual emissions, the EPA will, for HAP emissions, apply the penalty to an underpayment of 50 percent or more. The penalty will still apply to an underpayment of 20 percent

or more for non-HAP emissions. If a source is subject to fees for both HAP and non-HAP emissions, the underpayment which would trigger a penalty will be prorated based on what portion of the source's emissions are HAP versus non-HAP. Thus, to determine whether an underpayment would incur a penalty, such a source's HAP emissions would be multiplied by the 50 percent rate, and its non-HAP emissions would be multiplied by the 20 percent rate. The sum of these emissions rates determines the level of underpayment which, if exceeded, would incur the underpayment penalty. The EPA believes that this approach offers significant relief to sources faced with difficulty in accurately estimating their emissions, while still ensuring that adequate fee revenues can be collected in a fair and timely manner.

7. Certification Requirement

The EPA believes that the correct interpretation of the part 71 certification requirement at section 71.5(d) is that it applies to all fee calculation documents. However, for clarity, EPA is today adding a requirement to sections 71.9(e) and (h) which requires certification of the fee calculation worksheets by a responsible official. The added language in section 71.9 is simply a cross reference to the language in section 71.5(d).

I. Section 71.10—Delegation of Part 71 Program

1. Delegation of Authority Agreement

With respect to the content of Delegation of Authority Agreements, EPA wishes to clarify that the adequacy of State permit fees must be addressed when EPA waives collection of part 71 permit fees. As described in section III.F.3 of this preamble, when EPA has determined that a delegate agency has raised adequate fee revenue from sources subject to title V to administer a fully-delegated part 71 program absent any financial assistance from EPA, then EPA will waive collection of part 71 fees. In such a case, the Delegation of Authority Agreement would specify that the delegate agency has sufficient revenue and will collect sufficient revenue from sources subject to title V to administer all of its duties as outlined in the Agreement. The EPA will not waive fees when the part 71 program is partially delegated or when the delegate agency lacks sufficient revenue to fund the delegated part 71 program.

2. Appeal of Permits

The Agency has revised proposed section 71.10(i), which addresses the petition process for permits issued by delegate agencies. In lieu of restating which persons and parties may submit petitions to the Environmental Appeal Board pursuant to section 71.11(l)(1), section 71.10(i) provides that the appeals of permits under delegated program shall follow the procedures of section 71.11(l)(1).

3. Transmission of Information to EPA, Prohibition of Default Issuance, and EPA Objections

The final rule also makes certain changes to the proposed provisions addressing transmission of information to the Administrator, the prohibition of default issuance of permits, and EPA objections to proposed permits at sections 71.10(d), (f) and (g). Essentially, these changes are being made today in order to better harmonize the final rule with corresponding provisions in the currently promulgated part 70 rule at 70.8(a), (c) and (e). Regarding transmission of information to EPA, the reference in proposed section 71.10(d)(1) to proposed section 71.7(a)(1)(v) has been rewritten, and proposed paragraphs (2) and (3) have been merged into it in order to more closely track part 70. New paragraph (2) has been adopted in order to achieve consistency with section 70.8(a)(2).

The provision on prohibition of default issuance has been changed to follow the existing provision at section 70.8(e). In proposed section 71.10(f)(2), EPA had provided that the prohibition would not apply to permit revisions processed through the proposed de minimis permit revision track, following the August 1994 proposed revisions to part 70. As that track is not being adopted in this Phase I rule, the exception has been deleted.

Finally, section 71.10(g) on EPA objections has been changed from the proposal in order to follow the test established under the current part 70 rule for when EPA would object to proposed permits, and to follow the promulgated part 70 language providing for what shall happen when a permitting authority refuses to respond adequately to an EPA objection. This change includes deletion of the proposed reference to proposed section 71.7(a)(6), which is not being adopted as proposed in this final rule.

J. Section 71.11—Administrative Record, Public Participation, and Administrative Review

The Agency has chosen to establish part 71-specific rules in today's promulgated section 71.11 for administrative procedures in order to clarify for the public and the regulated community those requirements associated specifically with Federal operating permits under title V of the Act. Today's promulgated section 71.11 is based closely on the provisions of 40 CFR part 124. Part 124 covers a number of EPA permitting programs, and the process of identifying the separate and distinct requirements associated with those individual programs can be complex. The Agency feels that it is advantageous in this case to describe the administrative procedures for today's promulgated part 71 within the rule itself, since that will avoid potential confusion as to which provisions of part 124 apply to the part 71 program, and since interested parties will not be required to refer to separate regulations in discerning applicable administrative procedures.

Certain aspects of section 71.11 that would correspond to proposed streamlined part 71 permit revision processes discussed in the preamble to the supplemental part 70 and 71 proposed rules published on August 31, 1995 (60 FR 45529), are not addressed in today's notice because the Agency is not yet prepared to conduct final rulemaking for those processes. In the meantime, EPA is promulgating permit revision processes based on the current part 70 rule in response to numerous comments on the proposed part 71.

To accommodate basing part 71's permit revision procedures on the existing part 70 rule, today's notice makes certain changes to the regulatory language of section 71.11 as proposed on April 27, 1995 (60 FR 20804) in order to apply administrative procedures to the permit revision tracks as appropriate. Changes to the regulatory language that make reference to permit revision procedures were made in the first paragraph of section 71.11 and in section 71.11(l)(1). These sections make reference to specific types of permit revisions which in this promulgated rule are those permit revision procedures found in 40 CFR part 70, rather than the four-track permit revision procedures in the April 27, 1995 proposed part 71. Section 71.11(l)(1) describes the 30-day period within which a person may request review of a final permit decision. For significant modifications, the 30-day period begins with the service of notice of the permitting authority's action. This is unchanged from the proposal. For minor permit modifications and administrative amendments, the 30-day period begins on the date the minor permit modification or administrative amendment is effective.

Section 71.11(d)(3)(i)(D) has been modified in response to comments

received which noted that under the proposal a requirement to notify any unit of local government having jurisdiction over the area where a source is located would result in notices to components of government which have no relationship to air quality and its impacts. Promulgated section 71.11(d)(3)(i)(D) stipulates that the local emergency planning committee (not ''any'' unit of local government) and State agencies having authority under State law with respect to the operation of the source are among the entities to receive a copy of notices of activities described in section 71.11(d)(1)(i).

Additional changes to the regulatory language of section 71.11 relate to treatment of a final permit decision as enforceable and effective where review by the EAB has been requested. In proposed sections 71.11(i)(2) and 71.11(l)(6), the Agency proposed that a final permit decision would become effective immediately upon issuance of that decision unless a later effective date were specified in the decision. It was pointed out by several commenters that, in other EPA permitting programs, such as the Resource Conservation and Recovery Act and PSD programs, an appeal request stays the effectiveness of a final permit decision. See 40 CFR section 124.15(b)(2). The EPA agrees that it would be unfair to force permittees to comply with permit terms during the time that they are subject to appeal, and that the proposal was inappropriately inconsistent with part 124 on this point. Thus, sections 71.11(i)(2) and 71.11(l)(6) have been promulgated to conform to the longstanding Agency approach reflected in 40 CFR section 124.15, so that permittees are not unfairly required to comply with permit terms pending their review by the EAB. Under the final rule, those specific permit terms and conditions that are the subject of an appeal to EAB would be stayed, while the rest of the permit would become effective as otherwise provided in section 71.11(i)(2). Moreover, section 71.11 (i)(2) itself has been changed so that it better tracks part 124, which makes final permit issuance decisions immediately effective only where no comments requested a change in the draft permit; otherwise, permits are effective than sooner than 30 days after the issuance decision or following the conclusion of appeal proceedings, as applicable.

In response to comments which expressed concern that applicants should be able to appeal a final permit decision even in the absence of having commented on a draft permit, the Agency believes that applicants can appeal if the final permit differs from the draft permit, even if the applicant did not submit comments on the draft permit. The Agency does not believe it would be appropriate to allow applicants to appeal where the final permit is identical to the draft permit, and the applicant had not commented on the draft permit. It is a far more efficient use of resources to resolve permitting issues in the administrative issuance process, rather than to allow applicants to raise issues on draft permits for the first time on appeal. To further clarify the ability of the applicant to appeal a final permit, the following language has been added to section 71.11(l)(1): ''or other new grounds that were not reasonably foreseeable during the public comment period on the draft permit''.

Section 71.11(l)(6) has been added, incorporating language from 40 CFR part 124. Part 124 establishes general procedures clarifying the rules to which appellants are subject in all permit programs under part 124, and therefore EPA believes it is appropriate to extend these provisions to part 71 as well. This section outlines procedures for motions for reconsideration of appeals of final orders. It stipulates a 10 day deadline for motions, and notes that motions are to be directed to the EAB, unless the case had been referred to the Administrator by the Board, and in which the Administrator had issued the final order. The effective date of the final order is not stayed unless specifically so ordered by the Board.

One commenter suggested that the proposal's requirement of a right to appeal every permit decision would be overly burdensome, commenting that even de minimis revisions would be subject to appeal. The EPA notes that final part 71 permitting actions are final actions for purposes of judicial review under section 307(b)(1) of the Act. Consequently, EPA does not have the discretion to eliminate the opportunity for judicial review of final part 71 permitting actions. Moreover, EPA disagrees that requiring administrative appeal to the EAB as a prerequisite to judicial review is either redundant or jeopardizes a source's ability to rely on its permit. Requiring administrative exhaustion of remedies is longstanding practice in EPA permit programs, and EPA notes that States with approved part 70 programs generally require administrative appeal as a prerequisite to challenging permits in State court. Also, in requiring administrative exhaustion, litigation in Federal court over permit actions will often be avoided, thus conserving both public and private resources. Finally, since pending administrative appeal sources will be able to rely on the application shield, they will not be placed in any greater ''jeopardy'' than if they had directly appealed the final permit to Federal court.

Changes have been made to section 71.11(n) to replace the term ''Administrator'' with ''permitting authority,'' to allow for those circumstances where a State has been delegated a part 71 program by EPA.

IV. Administrative Requirements

A. Docket

The docket for this regulatory action is A–93–51. All the documents referenced in this preamble fall into one of two categories. They are either reference materials that are considered to be generally available to the public, or they are memoranda and reports prepared specifically for this rulemaking. Both types of documents can be found in Docket No. A–93–51.

B. Executive Order 12866

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant'' regulatory action. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

The EPA has estimated the annualized cost of the part 71 program based on the number of sources that would be subject to part 71 permitting requirements in the 8 States where EPA

believes the program will be implemented. A survey of those States showed that the number of part 71 sources in those States (many of which are not heavily industrialized) is much smaller than EPA's original estimates. The EPA had previously assumed that part 71 sources in 8 States would comprise 16 percent of all title V sources. However, in the States where EPA is likely to administer a part 71 program, the part 71 source population comprises slightly less than 6 percent of all title V sources. The estimated annualized cost of implementing the part 71 program is $19.8 million to the Federal government and $18.1 million to respondents, for a total of $37.9 million which reflects industry's total expected costs of complying with the program. Since any costs incurred by the Agency in administering a program would be recaptured through fees imposed on sources, the true cost to the Federal government is zero. The requirements for the costs result from section 502(d) of title V which mandates that EPA develop a Federal operating permits program. The draft regulatory impact analysis (RIA) was made available for public comment as part of the April 27, 1995 proposal. The primary difference between the current RIA and the prior draft is that the RIA now assesses impacts based on the streamlined permit revision procedures that were proposed for part 70 and 71 in August of 1995, in lieu of the more cumbersome 4-track permit revision procedure that was contained in the part 71 proposal. The proposed program is designed to improve air quality by: indirectly improving the quality of State-administered operating permits programs; encouraging the adoption of lower cost control strategies based on economic incentive approaches; improving the effectiveness of enforcement and oversight of source compliance; facilitating the implementation of other titles of the Act, such as title I; and improving the quality of emissions data and other source-related data.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601) requires EPA to consider potential impacts of proposed regulations on small entities. If a preliminary analysis indicates that a proposed regulation would have a significant adverse economic impact on a substantial number of small entities, then a regulatory flexibility analysis must be prepared.

The original part 70 rule and the recently proposed revisions to part 70 were determined to not have a significant adverse impact on small entities. *See* 57 FR 32250, 32294 (July 21, 1992), and 60 FR 45530, 45563 (Aug. 31, 1995). Similarly, a regulatory flexibility screening analysis of the part 71 rule revealed that the rule would not have a significant adverse impact on a substantial number of small entities, since few small entities would be subject to part 71 permitting requirements as a result of the rule's deferral of the requirement to obtain a permit for nonmajor sources.

Consequently, I hereby certify that the part 71 regulations will not have a significant adverse effect on a substantial number of small entities.

D. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq. and has assigned OMB control number 2060–0336.

The information is planned to be collected to enable EPA to carry out its obligations under the Act to determine which sources are subject to the Federal Operating Permits Program and what requirements should be included in permits for sources subject to the program. Responses to the collection of information will be mandatory under section 71.5(a) which requires owners or operators of sources subject to the program to submit a timely and complete permit application and under sections 71.6 (a) and (c) which require that permits include requirements related to recordkeeping and reporting. As provided in 42 U.S.C. 7661b(e), sources may assert a business confidentiality claim for the information collected under section 114(c) of the Act.

The annual average burden on sources for the collection of information is approximately 678,000 hours per year, or 329 hours per source. The annual cost for the collection of information to respondents is $18.1 million per year. The EPA has estimated the annualized costs based on the number of sources that would be subject to part 71 permitting requirements in the 8 States where EPA believes the program will be implemented, most of which have fewer than average number of part 71 sources per State. There is no burden for State and local agencies. The annual cost to the Federal government is $19.8 million (assuming part 71 programs are delegated), which is recovered from sources through permit fees. Thus, the total annual cost to sources would be $37.9 million. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The EPA is amending the table in 40 CFR part 9 of currently approved information collection request (ICR) control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

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 the Director, Regulatory Information Division, Office of Policy, Planning, and Evaluation, U.S. Environmental Protection Agency (2136), 401 M Street, S.W., Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence.

E. Unfunded Mandates Reform Act

As noted in the ICR document, today's action imposes no costs on State, local and Tribal governments. This is because the EPA incurs all costs in cases where it implements a part 71 program. A State, local, or Tribal government will incur costs where it elects to take delegation of a part 71 program. As noted in the ICR document, EPA expects that, of the estimated eight part 71 programs, States will take delegation of all eight programs. However, the costs of running these delegated programs do not represent costs imposed by today's action. This is because the costs of running a delegated part 71 program are essentially the same

as those of running an approved part 70 program. Furthermore, taking delegation is optional on the part of States. Regardless of whether a State, local, or Tribal agency chooses to take delegation of a part 71 program, the costs to these agencies imposed by this rule over and above the costs of existing part 70 requirements are zero.

Regarding the private sector, the EPA estimates that the total cost of complying with the part 71 program would be $37.9 million per year, assuming that the part 71 program is in effect in 8 States. The estimated costs of collection of information would be $18.1 million per year, and $19.8 million would be collected in fees.

For these reasons, EPA believes that the total direct costs to industry under today's action would not exceed $100 million in any 1 year. Therefore, the Agency concludes that it is not required by Section 202 of the Unfunded Mandates Reform Act of 1995 to provide a written statement to accompany this regulatory action because promulgation of the rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate or by the private sector, of $100,000,000 or more in any 1 year.

F. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedure Act (APA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule 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 the rule in today's Federal Register. This rule is not a ''major rule'' as defined by section 804(2) of the APA as amended.

List of Subjects

40 CFR Part 9

Reporting and Recordkeeping Requirements

40 CFR Part 55

Environmental Protection Air pollution control, Outer continental shelf, Operating permits.

40 CFR Part 71

Air pollution control, Prevention of significant deterioration, New source review, Fugitive emissions, Particulate matter, Volatile organic compounds, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead, Operating permits, Indian Tribes, Air pollution control—Tribal authority.

Dated: June 19, 1996.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

PART 9—[AMENDED]

1. In Part 9:

a. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 et seq., 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 et seq., 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 et seq., 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

b. Section 9.1 is amended by adding the new entries to the table under the indicated heading in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR Citation	OMB control No.
* * * * *	
Federal Operating Permit Programs	
71.5	2060–0336
71.6(a),(c),(d),(g)	2060–0336
71.7	2060–0336
71.9(e)–(j)	2060–0336
* * * * *	

PART 55—[AMENDED]

2. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (Act) (42 U.S.C. 7401, et seq.) as amended by Public Law 101–549.

3. Section 55.6 is amended by adding paragraph (c)(3) to read as follows:

§ 55.6 Permit requirements.

* * * * *

(c) * * *

(3) If the COA does not have an operating permits program approved pursuant to 40 CFR part 70 or if EPA has determined that the COA is not adequately implementing an approved program, the applicable requirements of 40 CFR part 71, the Federal operating permits program, shall apply to the OCS sources. The applicable requirements of 40 CFR part 71 will be implemented and enforced by the Administrator. The Administrator may delegate the authority to implement and enforce all or part of a Federal operating permits program to a State pursuant to § 55.11 of this part.

* * * * *

4. Section 55.10 is amended by revising paragraph (a)(1) and by adding paragraph (b) to read as follows:

§ 55.10 Fees.

(a) * * *

(1) The EPA will calculate and collect operating permit fees from OCS sources in accordance with the requirements of 40 CFR part 71.

* * * * *

(b) The OCS sources located beyond 25 miles of States' seaward boundaries. The EPA will calculate and collect operating permit fees from OCS sources in accordance with the requirements of 40 CFR part 71.

5. Section 55.13 is amended by adding paragraph (f) to read as follows:

§ 55.13 Federal requirements that apply to OCS sources.

* * * * *

(f) 40 CFR part 71 shall apply to OCS sources:

(1) Located within 25 miles of States' seaward boundaries if the requirements of 40 CFR part 71 are in effect in the COA.

(2) Located beyond 25 miles of States' seaward boundaries.

(3) When an operating permits program approved pursuant to 40 CFR part 70 is in effect in the COA and a Federal operating permit is issued to satisfy an EPA objection pursuant to 40 CFR 71.4(e).

* * * * *

PART 71—[AMENDED]

6. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

7. Subpart A of part 71 consisting of §§ 71.1 through 71.12 is added to read as follows:

Subpart A—Operating Permits

Sec.

Subpart A—Operating Permits

§ 71.1 Program overview.

(a) This part sets forth the comprehensive Federal air quality operating permits permitting program consistent with the requirements of title V of the Act (42 U.S.C. 7401 *et seq.*) and defines the requirements and the corresponding standards and procedures by which the Administrator will issue operating permits. This permitting program is designed to promote timely and efficient implementation of goals and requirements of the Act.

(b) All sources subject to the operating permit requirements of title V and this part shall have a permit to operate that assures compliance by the source with all applicable requirements.

(c) The requirements of this part, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or as modified by title IV of the Act and 40 CFR parts 72 through 78.

(d) Issuance of permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) and under the Clean Water Act (33 U.S.C. 1251 *et seq.*), whether issued by the State, the U.S. Environmental Protection Agency (EPA), or the U.S. Army Corps of Engineers.

(e) Nothing in this part shall prevent a State from administering an operating permits program and establishing more stringent requirements not inconsistent with the Act.

§ 71.2 Definitions.

The following definitions apply to part 71. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401 *et seq.*

Affected source shall have the meaning given to it in 40 CFR 72.2.

Affected States are:

(1) All States and Tribal areas whose air quality may be affected and that are contiguous to the State or Tribal area in which the permit, permit modification or permit renewal is being proposed; or that are within 50 miles of the permitted source. A Tribe and any associated Tribal area shall be treated as a State under this paragraph (1) only if EPA has determined that the Tribe is an eligible Tribe.

(2) The State or Tribal area in which a part 71 permit, permit modification, or permit renewal is being proposed. A Tribe and any associated Tribal area shall be treated as a State under this paragraph (2) only if EPA has determined that the Tribe is an eligible Tribe.

(3) Those areas within the jurisdiction of the air pollution control agency for the area in which a part 71 permit, permit modification, or permit renewal is being proposed.

Affected unit shall have the meaning given to it in 40 CFR 72.2.

Applicable requirement means all of the following as they apply to emissions units in a part 71 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or 40 CFR parts 72 through 78;

(6) Any requirements established pursuant to section 114(a)(3) or 504(b) of the Act;

(7) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(9) Any standard or other requirement for tank vessels, under section 183(f) of the Act;

(10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(11) Any standard or other requirement of the regulations promulgated at 40 CFR part 82 to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(12) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Delegate agency means the State air pollution control agency, local agency, other State agency, Tribal agency, or other agency authorized by the Administrator pursuant to § 71.10 to carry out all or part of a permit program under part 71.

Designated representative shall have the meaning given to it in section 402(26) of the Act and 40 CFR 72.2.

Draft permit means the version of a permit for which the permitting authority offers public participation under § 71.7 or § 71.11 and affected State review under § 71.8.

Eligible Indian Tribe or *eligible Tribe* means a Tribe that has been determined by EPA to meet the criteria for being treated in the same manner as a State, pursuant to the regulations implementing section 301(d)(2) of the Act.

Emissions allowable under the permit means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term ''unit'' for purposes of title IV of the Act.

EPA or the *Administrator* means the Administrator of the U.S. Environmental Protection Agency (EPA) or his or her designee.

Federal Indian reservation, Indian reservation or *reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Final permit means the version of a part 71 permit issued by the permitting

authority that has completed all review procedures required by §§ 71.7, 71.8, and 71.11.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 71 permit that meets the requirements of § 71.6(d).

Indian Tribe or *Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaskan 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.

Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)), belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining ''major source,'' a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(1) A major source under section 112 of the Act, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tpy or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, ''major source'' shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants or any group of stationary sources as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as ''marginal'' or ''moderate,'' 50 tpy or more in areas classified as ''serious''; 25 tpy or more in areas classified as ''severe,'' and 10 tpy or more in areas classified as ''extreme''; except that the references in this paragraph (3)(i) to 100, 50, 25, and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f) (1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as ''serious,'' and

(B) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM–10) nonattainment areas classified as ''serious,'' sources with the potential to emit 70 tpy or more of PM–10.

Part 70 permit means any permit or group of permits covering a part 70 source that has been issued, renewed, amended or revised pursuant to 40 CFR part 70.

Part 70 program or *State program* means a program approved by the Administrator under 40 CFR part 70.

Part 70 source means any source subject to the permitting requirements of 40 CFR part 70, as provided in §§ 70.3(a) and 70.3(b).

Part 71 permit, or *permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 71 source that has been issued, renewed, amended or revised pursuant to this part.

Part 71 program means a Federal operating permits program under this part.

Part 71 source means any source subject to the permitting requirements of this part, as provided in §§ 71.3(a) and 71.3(b).

*Permit modification m*eans a revision to a part 71 permit that meets the requirements of § 71.7(e).

Permit program costs means all reasonable (direct and indirect) costs required to administer an operating permits program, as set forth in § 71.9(b).

Permit revision means any permit modification or administrative permit amendment.

Permitting authority means one of the following:

(1) The Administrator, in the case of EPA-implemented programs;

(2) A delegate agency authorized by the Administrator to carry out a Federal permit program under this part; or

(3) The State air pollution control agency, local agency, other State agency, Indian Tribe, or other agency authorized by the Administrator to carry out a permit program under 40 CFR part 70.

Proposed permit means the version of a permit that the delegate agency proposes to issue and forwards to the Administrator for review in compliance with § 71.10(d).

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 of the Act or other requirements established under section 112 of the Act, including sections 112 (g), (j), and (r) of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to section 112(g)(2) requirements.

Regulated pollutant (for fee calculation), which is used only for purposes of § 71.9(c), means any regulated air pollutant except the following:

(1) Carbon monoxide;

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act.

Renewal means the process by which a permit is reissued at the end of its term.

Responsible official means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) the delegation of authority to such representative is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

(i) The designated representative insofar as actions, standards, requirements, or prohibitions under title IV of the Act or 40 CFR parts 72 through 78 are concerned; and

(ii) The designated representative for any other purposes under part 71.

Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term ''State'' also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas Islands. Where such meaning is clear from the context, ''State'' shall have its conventional meaning. For purposes of the acid rain program, the term ''State'' shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act.

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

§ 71.3 Sources Subject to Permitting Requirements.

(a) *Part 71 sources.* The following sources are subject to the permitting requirements under this part:

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

(b) *Source category exemptions.* (1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are exempted from the obligation to obtain a part 71 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 or part 71 permit at the time that the new standard is promulgated.

(3) Any source listed in paragraph (a) of this section exempt from the requirement to obtain a permit under this section may opt to apply for a permit under a part 71 program.

(4) The following source categories are exempted from the obligation to obtain a part 71 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 60, Subpart AAA—-Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 61, Subpart M—National Emission Standard for Hazardous Air

Pollutants for Asbestos, § 61.145, Standard for Demolition and Renovation.

(c) *Emissions units and part 71 sources.* (1) For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 71 program under paragraphs (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 71 program.

(d) *Fugitive emissions.* Fugitive emissions from a part 71 source shall be included in the permit application and the part 71 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

§ 71.4 Program implementation.

(a) *Part 71 programs for States.* The Administrator will administer and enforce a full or partial operating permits program for a State (excluding Tribal areas) in the following situations:

(1) A program for a State meeting the requirements of part 70 of this chapter has not been granted full approval under § 70.4 of this chapter by the Administrator by July 31, 1996, and the State's part 70 program has not been granted interim approval under § 70.4(d) of this chapter for a period extending beyond July 31, 1996. The effective date of such a part 71 program is July 31, 1996.

(2) An operating permits program for a State which was granted interim approval under § 70.4(d) of this chapter has not been granted full approval by the Administrator by the expiration of the interim approval period or July 31, 1996, whichever is later. Such a part 71 program shall be effective upon expiration of the interim approval or July 31, 1996 whichever is later.

(3) Any partial part 71 program will be effective only in those portions of a State that are not covered by a partial part 70 program that has been granted full or interim approval by the Administrator pursuant to § 70.4(c) of this chapter.

(b) *Part 71 programs for Tribal areas.* The Administrator may administer and enforce an operating permits program for a Tribal area, as defined in § 71.2, or by a rulemaking, when an operating permits program for the area which meets the requirements of part 70 of this chapter has not been granted full or interim approval by the Administrator by July 31, 1996.

(1) [Reserved]

(2) The effective date of a part 71 program for a Tribal area shall be November 15, 1997.

(3) Notwithstanding paragraph (b)(2) of this section, the Administrator, in consultation with the governing body of the Tribal area, may adopt an earlier effective date.

(4) Notwithstanding paragraph (i)(2) of this section, within 2 years of the effective date of the part 71 program for the Tribal area, the Administrator shall take final action on permit applications from part 71 sources that are submitted within the first full year after the effective date of the part 71 program.

(c) *Part 71 programs imposed due to inadequate implementation.* (1) The Administrator will administer and enforce an operating permits program for a permitting authority if the Administrator has notified the permitting authority, in accordance with § 70.10(b)(1) of this chapter, of the Administrator's determination that a permitting authority is not adequately administering or enforcing its approved operating permits program, or any portion thereof, and the permitting authority fails to do either of the following:

(i) Correct the deficiencies within 18 months after the Administrator issues the notice; or

(ii) Take significant action to assure adequate administration and enforcement of the program within 90 days of the Administrator's notice.

(2) The effective date of a part 71 program promulgated in accordance with this paragraph (c) shall be:

(i) Two years after the Administrator's notice if the permitting authority has not corrected the deficiency within 18 months after the date of the Administrator's notice; or

(ii) Such earlier time as the Administrator determines appropriate if the permitting authority fails, within 90 days of the Administrator's notice, to take significant action to assure adequate administration and enforcement of the program.

(d) *Part 71 programs for OCS sources.* (1) Using the procedures of this part, the Administrator will issue permits to any source which is an outer continental shelf (OCS) source, as defined under § 55.2 of this chapter, is subject to the requirements of part 55 of this chapter and section 328(a) of the Act, is subject to the requirement to obtain a permit under title V of the Act, and is either:

(i) Located beyond 25 miles of States' seaward boundaries; or

(ii) Located within 25 miles of States' seaward boundaries and a part 71 program is being administered and enforced by the Administrator for the corresponding onshore area, as defined in § 55.2 of this chapter, for that source.

(2) The requirements of § 71.4(d)(1)(i) shall apply on July 31, 1996.

(3) The requirements of § 71.4(d)(1)(ii) apply upon the effective date of a part 71 program for the corresponding onshore area.

(e) *Part 71 program for permits issued to satisfy an EPA objection.* Using the procedures of this part and 40 CFR 70.8 (c) or (d), or 40 CFR 70.7(g)(4) or (5) (i) and (ii), as appropriate, the Administrator will deny, terminate, revise, revoke or reissue a permit which has been proposed or issued by a permitting authority or will issue a part 71 permit when:

(1) A permitting authority with an approved part 70 operating permits program fails to respond to a timely objection to the issuance of a permit made by the Administrator pursuant to section 505(b) of the Act and § 70.8(c) and (d) of this chapter.

(2) The Administrator, under § 70.7(g) of this chapter, finds that cause exists to reopen a permit and the permitting authority fails to either:

(i) Submit to the Administrator a proposed determination of termination, modification, or revocation and reissuance, as appropriate; or

(ii) Resolve any objection EPA makes to the permit which the permitting authority proposes to issue in response to EPA's finding of cause to reopen, and to terminate, revise, or revoke and reissue the permit in accordance with that objection.

(3) The requirements of this paragraph (e) shall apply on July 31, 1996.

(f) *Use of selected provisions of this part.* The Administrator may utilize any or all of the provisions of this part to administer the permitting process for individual sources or take action on individual permits, or may adopt through rulemaking portions of a State or Tribal program in combination with provisions of this part to administer a Federal program for the State or Tribal area in substitution of or addition to the Federal program otherwise required by this part.

(g) *Public notice of part 71 programs.* In taking action to administer and enforce an operating permits program under this part, the Administrator will publish a notice in the Federal Register informing the public of such action and the effective date of any part 71 program as set forth in § 71.4 (a), (b), (c), or (d)(1)(ii). The publication of this part in the Federal Register on July 1, 1996

serves as the notice for the part 71 permit programs described in § 71.4(d)(1) (i) and (e). The EPA will also publish a notice in the Federal Register of any delegation of a portion of the part 71 program to a State, eligible Tribe, or local agency pursuant to the provisions of § 71.10. In addition to notices published in the Federal Register under this paragraph (g), the Administrator will, to the extent practicable, publish notice in a newspaper of general circulation within the area subject to the part 71 program effectiveness or delegation, and will send a letter to the Tribal governing body for an Indian Tribe or the Governor (or his or her designee) of the affected area to provide notice of such effectiveness or delegation.

(h) *Effect of limited deficiencies in State or Tribal programs.* The Administrator may administer and enforce a part 71 program in a State or Tribal area even if only limited deficiencies exist either in the initial program submittal for a State or eligible Tribe under part 70 of this chapter or in an existing State or Tribal program that has been approved under part 70 of this chapter.

(i) *Transition plan for initial permit issuance.* If a full or partial part 71 program becomes effective in a State or Tribal area prior to the issuance of part 70 permits to all part 70 sources under an existing program that has been approved under part 70 of this chapter, the Administrator shall take final action on initial permit applications for all part 71 sources in accordance with the following transition plan.

(1) All part 71 sources that have not received part 70 permits shall submit permit applications under this part within 1 year after the effective date of the part 71 program.

(2) Final action shall be taken on at least one-third of such applications annually over a period not to exceed 3 years after such effective date.

(3) Any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted on within 12 months of receipt of the complete application.

(4) Submittal of permit applications and the permitting of affected sources shall occur in accordance with the deadlines in title IV of the Act and 40 CFR parts 72 through 78.

(j) *Delegation of part 71 programs.* The Administrator may promulgate a part 71 program in a State or Tribal area and delegate part of the responsibility for administering the part 71 program to the State or eligible Tribe in accordance with the provisions of § 71.10; however, delegation of a part of a program will not constitute any type of approval of a State or Tribal operating permits program under part 70 of this chapter. Where only selected portions of a part 71 program are administered by the Administrator and the State or eligible Tribe is delegated the remaining portions of the program, the Delegation Agreement referred to in § 71.10 will define the respective roles of the State or eligible Tribe and the Administrator in administering and enforcing the part 71 operating permits program.

(k) *EPA administration and enforcement of part 70 permits.* When the Administrator administers and enforces a part 71 program after a determination and notice under § 70.10(b)(1) of this chapter that a State or Tribe is not adequately administering and enforcing an operating permits program approved under part 70 of this chapter, the Administrator will administer and enforce permits issued under the part 70 program until part 71 permits are issued using the procedures of part 71. Until such time as part 70 permits are replaced by part 71 permits, the Administrator will revise, reopen, revise, terminate, or revoke and reissue part 70 permits using the procedures of part 71 and will assess and collect fees in accordance with the provisions of § 71.9.

(l) *Transition to approved part 70 program.* The Administrator will suspend the issuance of part 71 permits promptly upon publication of notice of approval of a State or Tribal operating permits program that meets the requirements of part 70 of this chapter. The Administrator may retain jurisdiction over the part 71 permits for which the administrative or judicial review process is not complete and will address this issue in the notice of State program approval. After approval of a State or Tribal program and the suspension of issuance of part 71 permits by the Administrator:

(1) The Administrator, or the permitting authority acting as the Administrator's delegated agent, will continue to administer and enforce part 71 permits until they are replaced by permits issued under the approved part 70 program. Until such time as part 71 permits are replaced by part 70 permits, the Administrator will revise, reopen, revise, terminate, or revoke and reissue part 71 permits using the procedures of the part 71 program. However, if the Administrator has delegated authority to administer part 71 permits to a delegate agency, the delegate agency will revise, reopen, terminate, or revoke and reissue part 71 permits using the procedures of the approved part 70 program. If a part 71 permit expires prior to the issuance of a part 70 permit, all terms and conditions of the part 71 permit, including any permit shield that may be granted pursuant to § 71.6(f), shall remain in effect until the part 70 permit is issued or denied, provided that a timely and complete application for a permit renewal was submitted to the permitting authority in accordance with the requirements of the approved part 70 program.

(2) A State or local agency or Indian Tribe with an approved part 70 operating permits program may issue part 70 permits for all sources with part 71 permits in accordance with a permit issuance schedule approved as part of the approved part 70 program or may issue part 70 permits to such sources at the expiration of the part 71 permits.

(m) *Exemption for certain territories.* Upon petition by the Governor of Guam, American Samoa, the Virgin Islands, or the Commonwealth of the Northern Marianas Islands, the Administrator may exempt any source or class of sources in such territory from the requirement to have a part 71 permit under this chapter. Such an exemption does not exempt such source or class of sources from any requirement of section 112 of the Act, including the requirements of section 112 (g) or (j).

(1) Such exemption may be granted if the Administrator finds that compliance with part 71 is not feasible or is unreasonable due to unique geographical, meteorological, or economic factors of such territory, or such other local factors as the Administrator deems significant. Any such petition shall be considered in accordance with section 307(d) of the Act, and any exemption granted under this paragraph (m) shall be considered final action by the Administrator for the purposes of section 307(b) of the Act.

(2) The Administrator shall promptly notify the Committees on Energy and Commerce and on Interior and Insular Affairs of the House of Representatives and the Committees on Environment and Public Works and on Energy and Natural Resources of the Senate upon receipt of any petition under this paragraph (m) and of the approval or rejection of such petition and the basis for such action.

(n) *Retention of records.* The records for each draft, proposed, and final permit application, renewal, or modification shall be kept by the Administrator for a period of 5 years.

§ 71.5 Permit applications.

(a) *Duty to apply.* For each part 71 source, the owner or operator shall submit a timely and complete permit

application in accordance with this section.

(1) *Timely application.* (i) A timely application for a source which does not have an existing operating permit issued by a State under the State's approved part 70 program and is applying for a part 71 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish. Sources required to submit applications earlier than 12 months after the source becomes subject to the permit program will be notified of the earlier submittal date at least 6 months in advance of the date.

(ii) Part 71 sources required to meet the requirements under section 112(g) of the Act, or to have a permit under the preconstruction review program approved into the applicable implementation plan under part C or D of title I of the Act, shall file a complete application to obtain the part 71 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Sources required to submit applications earlier than 12 months after the source becomes subject to the permit program will be notified of the earlier submittal date at least 6 months in advance of the date. Where an existing part 70 or 71 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.

(iii) For purposes of permit renewal, a timely application is one that is submitted at least 6 months but not more that 18 months prior to expiration of the part 70 or 71 permit.

(iv) Applications for initial phase II acid rain permits shall be submitted to the permitting authority by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

(2) *Complete application.* To be deemed complete, an application must provide all information required pursuant to paragraph (c) of this section, except that applications for permit revision need supply such information only if it is related to the proposed change. To be found complete, an initial or renewal application must remit payment of fees owed under the fee schedule established pursuant to § 71.9(b). Information required under paragraph (c) of this section must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. A responsible official must certify the submitted information consistent with paragraph (d) of this section. Unless the permitting authority determines that an application is not complete within 60 days of receipt of the application, such application shall be deemed to be complete, except as otherwise provided in § 71.7(a)(4). If, while processing an application that has been determined or deemed to be complete, the permitting authority determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in § 71.7(b), shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the permitting authority.

(3) *Confidential information.* An applicant may assert a business confidentiality claim for information requested by the permitting authority using procedures found at part 2, subpart B of this chapter.

(b) *Duty to supplement or correct application.* Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(c) *Standard application form and required information.* The permitting authority shall provide sources a standard application form or forms. The permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below. An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the schedule established pursuant to § 71.9.

(1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager/contact.

(2) A description of the source's processes and products (by Standard Industrial Classification Code) including any associated with each alternate scenario identified by the source.

(3) The following emissions-related information:

(i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, except where such units are exempted under this paragraph (c). The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source, and other information necessary to collect any permit fees owed under the fee schedule established pursuant to § 71.9(b).

(ii) Identification and description of all points of emissions described in paragraph (c)(3)(i) of this section in sufficient detail to establish the basis for fees and applicability of requirements of the Act.

(iii) Emissions rates in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method.

(iv) The following information to the extent it is needed to determine or regulate emissions: fuels, fuel use, raw materials, production rates, and operating schedules.

(v) Identification and description of air pollution control equipment and compliance monitoring devices or activities.

(vi) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the part 71 source.

(vii) Other information required by any applicable requirement (including information related to stack height limitations developed pursuant to section 123 of the Act).

(viii) Calculations on which the information in paragraphs (c)(3) (i) through (vii) of this section is based.

(4) The following air pollution control requirements:

(i) Citation and description of all applicable requirements; and

(ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements.

(6) An explanation of any proposed exemptions from otherwise applicable requirements.

(7) Additional information as determined to be necessary by the permitting authority to define alternative operating scenarios identified by the source pursuant to § 71.6(a)(9) or to define permit terms and conditions implementing § 71.6(a)(10) or § 71.6(a)(13).

(8) A compliance plan for all part 71 sources that contains all the following:

(i) A description of the compliance status of the source with respect to all applicable requirements.

(ii) A description as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(C) For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(iii) A compliance schedule as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule 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. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

(v) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under parts 72 through 78 of this chapter with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

(9) Requirements for compliance certification, including the following:

(i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act;

(ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

(iii) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the permitting authority; and

(iv) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Act.

(10) The use of nationally-standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under parts 72 through 78 of this chapter.

(11) *Insignificant activities and emissions levels.* The following types of insignificant activities and emissions levels need not be included in permit applications. However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application. An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to calculate the fee amount required under the schedule established pursuant to § 71.9 of this part.

(i) *Insignificant activities:*

(A) Mobile sources;

(B) Air-conditioning units used for human comfort that are not subject to applicable requirements under title VI of the Act and do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process;

(C) Ventilating units used for human comfort that do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process;

(D) Heating units used for human comfort that do not provide heat for any manufacturing or other industrial process;

(E) Noncommercial food preparation;

(F) Consumer use of office equipment and products;

(G) Janitorial services and consumer use of janitorial products; and

(H) Internal combustion engines used for landscaping purposes.

(ii) *Insignificant emissions levels.* Emissions meeting the criteria in paragraph (c)(11)(ii)(A) or (c)(11)(ii)(B) of this section need not be included in the application, but must be listed with sufficient detail to identify the emission unit and indicate that the exemption applies. Similar emission units, including similar capacities or sizes, may be listed under a single description, provided the number of emission units is included in the description. No additional information is required at time of application, but the permitting authority may request additional information during application processing.

(A) *Emission criteria for regulated air pollutants, excluding hazardous air pollutants (HAP).* Potential to emit of regulated air pollutants, excluding HAP, for any single emissions unit shall not exceed 2 tpy.

(B) *Emission criteria for HAP.* Potential to emit of any HAP from any single emissions unit shall not exceed 1,000 lb per year or the de minimis level established under section 112(g) of the Act, whichever is less.

(d) Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

§ 71.6 Permit content.

(a) *Standard permit requirements.* Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any

difference in form as compared to the applicable requirement upon which the term or condition is based.

(ii) The permit shall state that, where an applicable requirement of the Act is more stringent than an applicable requirement of 40 CFR parts 72 through 78, both provisions shall be incorporated into the permit and shall be enforceable by the Administrator.

(iii) If an applicable implementation plan allows a determination of an alternative emission limit at a part 71 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the permitting authority elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(2) *Permit duration.* The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources, and for a term not to exceed 5 years in the case of all other sources. Notwithstanding this requirement, the permitting authority shall issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and shall review such permits at least every 5 years.

(3) *Monitoring and related recordkeeping and reporting requirements.* (i) Each permit shall contain the following requirements with respect to monitoring:

(A) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 114(a)(3) or 504(b) of the Act;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B); and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(ii) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, where applicable, the following:

(A) Records of required monitoring information that include the following:

(*1*) The date, place as defined in the permit, and time of sampling or measurements;

(*2*) The date(s) analyses were performed;

(*3*) The company or entity that performed the analyses;

(*4*) The analytical techniques or methods used;

(*5*) The results of such analyses; and

(*6*) The operating conditions as existing at the time of sampling or measurement;

(B) Retention of records of all required monitoring data and support information for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(iii) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

(A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with § 71.5(d).

(B) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame shall govern. Where the underlying applicable requirement fails to address the time frame for reporting deviations, reports of deviations shall be submitted to the permitting authority based on the following schedule:

(*1*) For emissions of a hazardous air pollutant or a toxic air pollutant (as identified in an applicable regulation) that continue for more than an hour in excess of permit requirements, the report must be made with 24 hours of the occurrence.

(*2*) For emissions of any regulated air pollutant, excluding those listed in paragraph (a)(3)(iii)(B)(*1*) of this section, that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours.

(*3*) For all other deviations from permit requirements, the report shall be contained in the report submitted in accordance with the timeframe given in paragraph (a)(3)(iii)(A).

(*4*) A permit may contain a more stringent reporting requirement than required by paragraphs (a)(3)(iii)(B)(*1*), (*2*), or (*3*).

If any of the above conditions are met, the source must notify the permitting authority by telephone or facsimile based on the timetable listed in paragraphs (a)(3)(iii)(B) (*1*) through (*4*) of this section. A written notice, certified consistent with § 71.5(d), must be submitted within 10 working days of the occurrence. All deviations reported under paragraph (a)(3)(iii)(A) of this section must also be identified in the 6 month report required under paragraph (a)(3)(iii)(A) of this section.

(C) For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any condition determined by observation, by data from any monitoring protocol, or by any other monitoring which is required by the permit that can be used to determine compliance, that identifies that an emission unit subject to a part 71 permit term or condition has failed to meet an applicable emission limitation or standard or that a work practice was not complied with or completed. For a condition lasting more than 24 hours which constitutes a deviation, each 24 hour period is considered a separate deviation. Included in the meaning of deviation are any of the following:

(*1*) A condition where emissions exceed an emission limitation or standard;

(*2*) A condition where process or control device parameter values demonstrate that an emission limitation or standard has not been met;

(*3*) Any other condition in which observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit.

(4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under 40 CFR parts 72 through 78.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program,

provided that such increases do not require a permit revision under any other applicable requirement.

(ii) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other applicable requirement.

(iii) Any such allowance shall be accounted for according to the procedures established in regulations 40 CFR parts 72 through 78.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(i) The permittee must comply with all conditions of the part 71 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(ii) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iii) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) The permit does not convey any property rights of any sort, or any exclusive privilege.

(v) The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, in the case of a program delegated pursuant to § 71.10, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

(7) A provision to ensure that a part 71 source pays fees to the Administrator consistent with the fee schedule approved pursuant to § 71.9.

(8) *Emissions trading.* A provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

(9) Terms and conditions for reasonably anticipated operating scenarios identified by the source in its application as approved by the permitting authority. Such terms and conditions:

(i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the scenario under which it is operating;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such operating scenario; and

(iii) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this part.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:

(i) Shall include all terms required under paragraphs (a) and (c) of this section to determine compliance;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions that allow such increases and decreases in emissions; and

(iii) Must meet all applicable requirements and requirements of this part.

(11) *Permit expiration.* A provision to ensure that a part 71 permit expires upon the earlier occurrence of the following events:

(i) twelve years elapses from the date of issuance to a solid waste incineration unit combusting municipal waste subject to standards under section 112(e) of the Act; or

(ii) five years elapses from the date of issuance; or

(iii) the source is issued a part 70 permit.

(12) *Off Permit Changes.* A provision allowing changes that are not addressed or prohibited by the permit, other than those subject to the requirements of 40 CFR parts 72 through 78 or those that are modifications under any provision of title I of the Act to be made without a permit revision, provided that the following requirements are met:

(i) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition;

(ii) Sources must provide contemporaneous written notice to the permitting authority (and EPA, in the case of a program delegated pursuant to § 71.10) of each such change, except for changes that qualify as insignificant under § 71.5(c)(11). Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change;

(iii) The change shall not qualify for the shield under § 71.6(f);

(iv) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

(13) *Operational flexibility.* Provisions consistent with paragraphs (a)(3)(i) through (iii) of this section to allow 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 and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions): Provided, that the facility provides the Administrator (in the case of a program delegated pursuant to § 71.10) and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days.

(i) The permit shall allow the permitted source to make section 502(b)(10) changes without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions).

(A) For each such change, the written notification required above shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(B) The permit shield described in § 71.6(f) shall not apply to any change made pursuant to this paragraph (a)(13)(i).

(ii) The permit may provide for the permitted source to trade increases and decreases in emissions in the permitted facility, where the applicable

implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph (a)(13)(ii) of this section. This provision is available in those cases where the permit does not already provide for such emissions trading.

(A) Under this paragraph (a)(13)(ii), the written notification required above shall include such information as may be required by the provision in the applicable implementation plan authorizing the emissions trade, including at a minimum, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the applicable implementation plan, and the pollutants emitted subject to the emissions trade. The notice shall also refer to the provisions with which the source will comply in the applicable implementation plan and that provide for the emissions trade.

(B) The permit shield described in § 71.6(f) shall not extend to any change made under this paragraph (a)(13)(ii). Compliance with the permit requirements that the source will meet using the emissions trade shall be determined according to requirements of the applicable implementation plan authorizing the emissions trade.

(iii) The permit shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under § 71.6 (a) and (c) to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The permitting authority shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements.

(A) Under this paragraph (a)(13)(iii), the written notification required above shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(B) The permit shield described in § 71.6(f) may extend to terms and conditions that allow such increases and decreases in emissions.

(b) *Federally-enforceable requirements.* All terms and conditions in a part 71 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

(c) *Compliance requirements.* All part 71 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document (including reports) required by a part 71 permit shall contain a certification by a responsible official that meets the requirements of § 71.5(d).

(2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the permitting authority or an authorized representative to perform the following:

(i) Enter upon the permittee's premises where a part 71 source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) As authorized by the Act, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with § 71.5(c)(8).

(4) Progress reports consistent with an applicable schedule of compliance and § 71.5(c)(8) to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:

(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(i) The frequency (not less than annually or such more frequent periods as specified in the applicable requirement or by the permitting authority) of submissions of compliance certifications;

(ii) In accordance with § 71.6(a)(3), a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include the following:

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The compliance status;

(C) Whether compliance was continuous or intermittent;

(D) The method(s) used for determining the compliance status of the source, currently and over the reporting period consistent with paragraph (a)(3) of this section; and

(E) Such other facts as the permitting authority may require to determine the compliance status of the source;

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority; and

(v) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Act.

(6) Such other provisions as the permitting authority may require.

(d) *General permits.* (1) The permitting authority may, after notice and opportunity for public participation provided under § 71.11, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part 71 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part 71 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain

program unless otherwise provided in 40 CFR parts 72 through 78.

(2) Part 71 sources that would qualify for a general permit must apply to the permitting authority for coverage under the terms of the general permit or must apply for a part 71 permit consistent with § 71.5. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of § 71.5, provided that such applications meet the requirements of title V of the Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under § 71.11, the permitting authority may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

(e) *Temporary sources.* The permitting authority may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the permitting authority at least 10 days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

(f) *Permit shield.* (1) Except as provided in this part, the permitting authority may expressly include in a part 71 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part 71 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this paragraph or in any part 71 permit shall alter or affect the following:

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section;

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act; or

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(g) *Emergency provision.* (1) *Definition.* An ''emergency'' means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) *Effect of an emergency.* An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

§ 71.7 Permit issuance, renewal, reopenings, and revisions.

(a) *Action on application.* (1) A permit, permit modification, or renewal may be issued only if all of the following conditions have been met:

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under § 71.6(d);

(ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (1) and (2) of this section, the permitting authority has complied with the requirements for public participation under this section or § 71.11, as applicable;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 71.8(a);

(iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

(v) In the case of a program delegated pursuant to § 71.10, the Administrator has received a copy of the proposed permit and any notices required under § 71.10(d) and has not objected to issuance of the permit under § 71.10(g) within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under § 71.4(i) or under 40 CFR part 72 or title V of the Act for the permitting of affected sources under the acid rain program, the permitting authority shall take final action on each permit application (including a request for permit modification or renewal) within 18 months after receiving a complete application.

(3) The permitting authority shall ensure that priority is given to taking action on applications for construction or modification under title I, parts C and D of the Act.

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the

application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e) (1) and (2) of this section, the permitting authority need not make a completeness determination.

(5) The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to any person who requests it, and to EPA, in the case of a program delegated pursuant to § 71.10.

(6) The submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under title I of the Act.

(b) *Requirement for a permit.* Except as provided in the following sentence, § 71.6(a)(13), and paragraphs (e)(1)(v) and e(2)(v) of this section, no part 71 source may operate after the time that it is required to submit a timely and complete application under this part, except in compliance with a permit issued under this part. If a part 71 source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a part 71 permit is not a violation of this part until the permitting authority takes final action on the permit application, except as noted in this section. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section, and as required by § 71.5(c), the applicant fails to submit by the deadline specified in writing by the permitting authority any additional information identified as being needed to process the application.

(c) *Permit renewal and expiration.* (1) (i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State review, and EPA review (in the case of a program delegated pursuant to § 71.10) that apply to initial permit issuance.

(ii) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 71.5(a)(1)(iii).

(2) In the case of a program delegated pursuant to § 71.10, if the permitting authority fails to act in a timely way on permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate or revoke and reissue the permit.

(3) If a timely and complete application for a permit renewal is submitted, consistent with § 71.5(a)(2), but the permitting authority has failed to issue or deny the renewal permit before the end of the term of the previous part 70 or 71 permit, then the permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to § 71.6(f) may extend beyond the original permit term until renewal; or all the terms and conditions of the permit including any permit shield that may be granted pursuant to § 71.6(f) shall remain in effect until the renewal permit has been issued or denied.

(d) *Administrative permit amendments.* (1) An ''administrative permit amendment'' is a permit revision that:

(i) Corrects typographical errors;

(ii) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;

(iii) Requires more frequent monitoring or reporting by the permittee;

(iv) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority;

(v) Incorporates into the part 71 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§ 71.7 and 71.8 (and § 71.10 in the case of a delegated program) that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in § 71.6; or

(vi) Incorporates any other type of change which the Administrator has determined to be similar to those in paragraphs (d)(1)(i) through (iv) of this section.

(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by 40 CFR part 72.

(3) *Administrative permit amendment procedures.* An administrative permit amendment may be made by the permitting authority consistent with the following:

(i) The permitting authority shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected States provided that it designates any such permit revisions as having been made pursuant to this paragraph.

(ii) The permitting authority shall submit a copy of the revised permit to the Administrator in the case of a program delegated pursuant to § 71.10.

(iii) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.

(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in § 71.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§ 71.6, 71.7, and 71.8 for significant permit modifications.

(e) *Permit modifications.* A permit modification is any revision to a part 71 permit that cannot be accomplished under the provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by 40 CFR part 72.

(1) *Minor permit modification procedures.*

(i) Criteria.

(A) Minor permit modification procedures may be used only for those permit modifications that:

(*1*) Do not violate any applicable requirement;

(*2*) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

(*3*) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(*4*) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(*i*) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and

(*ii*) An alternative emissions limit approved pursuant to regulations

promulgated under section 112(i)(5) of the Act;

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

(*6*) Are not required to be processed as a significant modification.

(B) Notwithstanding paragraphs (e)(1)(i)(A) and (e)(2)(i) of this section, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.

(ii) *Application.* An application requesting the use of minor permit modification procedures shall meet the requirements of § 71.5(c) and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(B) The source's suggested draft permit;

(C) Certification by a responsible official, consistent with § 71.5(d), that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(D) Completed forms for the permitting authority to use to notify affected States (and the Administrator in the case of a program delegated pursuant to § 71.10) as required under §§ 71.8 and 71.10(d).

(iii) *EPA and affected State notification.* Within 5 working days of receipt of a complete permit modification application, the permitting authority shall meet its obligation under § 71.8(a) to notify affected States (and its obligation under § 71.10(d) to notify the Administrator in the case of a program delegated pursuant to § 71.10) of the requested permit modification. In the case of a program delegated pursuant to § 71.10, the permitting authority promptly shall send any notice required under § 71.8(b) to the Administrator.

(iv) *Timetable for issuance.* In the case of a program delegated pursuant to § 71.10, the permitting authority may not issue a final permit modification until after EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, whichever is first, although the permitting authority can approve the permit modification prior to that time. Within 90 days of the permitting authority's receipt of an application under minor permit modification procedures (or 15 days after the end of the Administrator's 45-day review period under § 71.10(g) in the case of a program delegated pursuant to § 71.10, whichever is later), the permitting authority shall:

(A) Issue the permit modification as proposed;

(B) Deny the permit modification application;

(C) Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(D) Revise the draft permit modification (and, in the case of a program delegated pursuant to § 71.10, transmit to the Administrator the new proposed permit modification as required by § 71.10(d)).

(v) *Source's ability to make change.* The source may make the change proposed in its minor permit modification application immediately after it files such application. After the source makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions specified in paragraphs (e)(1)(iv) (A) through (C) of this section, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(vi) *Permit shield.* The permit shield under § 71.6(f) may not extend to minor permit modifications.

(2) *Group processing of minor permit modifications.* Consistent with this paragraph, the permitting authority may modify the procedure outlined in paragraph (e)(1) of this section to process groups of a source's applications for certain modifications eligible for minor permit modification processing.

(i) *Criteria.* Group processing of modifications may be used only for those permit modifications:

(A) That meet the criteria for minor permit modification procedures under paragraph (e)(1)(i)(A) of this section; and

(B) That collectively are below the threshold level of 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in § 71.2, or 5 tpy, whichever is least.

(ii) *Application.* An application requesting the use of group processing procedures shall meet the requirements of § 71.5(c) and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.

(B) The source's suggested draft permit.

(C) Certification by a responsible official, consistent with § 71.5(d), that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(2)(i)(B) of this section.

(E) Certification, consistent with § 71.5(d), that, in the case of a program delegated pursuant to § 71.10, the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.

(F) Completed forms for the permitting authority to use to notify affected States as required under § 71.8 (and the Administrator as required under § 71.10(d) in the case of a program delegated pursuant to § 71.10).

(iii) *EPA and affected State notification.* On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(2)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligation under § 71.8(a) to notify affected States (and its obligation under § 71.10(d) to notify EPA in the case of a program delegated pursuant to § 71.10) of the requested permit modification. The permitting authority shall send any notice required under § 71.8(b) to the Administrator in the case of a program delegated pursuant to § 71.10.

(iv) *Timetable for issuance.* The provisions of paragraph (e)(1)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(1)(iv) (A) through (D) of this section within 180 days of receipt of the application (or, in the case of a program delegated pursuant to § 71.10, 15 days

after the end of the Administrator's 45-day review period under § 71.10(g), whichever is later).

(v) *Source's ability to make change.* The provisions of paragraph (e)(1)(v) of this section shall apply to modifications eligible for group processing.

(vi) *Permit shield.* The provisions of paragraph (e)(1)(vi) of this section shall also apply to modifications eligible for group processing.

(3) *Significant modification procedures.*

(i) *Criteria.* Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. Every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

(ii) Significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA (in the case of a program delegated pursuant to § 71.10), as they apply to permit issuance and permit renewal. The permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.

(f) *Reopening for cause.* (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 71 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions have been extended pursuant to paragraph (c)(3) of this section.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists, and shall be made as expeditiously as practicable.

(3) Reopenings under paragraph (f)(1) of this section shall not be initiated before a notice of such intent is provided to the part 71 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time period in the case of an emergency.

(g) *Reopenings for cause by EPA for delegated programs.* (1) In the case of a program delegated pursuant to § 71.10, if the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph (f) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such notification, forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this 90-day period for an additional 90 days if he or she finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph (g)(2) of this section or fails to resolve any objection pursuant to paragraph (g)(4) of this section, the Administrator will terminate, modify, or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days' notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraphs (g) (1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

§ 71.8 Affected State review.

(a) *Notice of draft permits.* When a part 71 operating permits program becomes effective in a State or Tribal area, the permitting authority shall provide notice of each draft permit to any affected State, as defined in § 71.2, on or before the time that the permitting authority provides this notice to the public pursuant to § 71.7 or § 71.11(d) except to the extent § 71.7(e)(1) or (2) requires the timing of the notice to be different.

(b) *Notice of refusal to accept recommendations.* Prior to issuance of the final permit, the permitting authority shall notify any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part. In the case of a program delegated pursuant to § 71.10, the permitting authority shall include such notice as part of the submittal of the proposed permit to the Administrator (or as soon as possible after the submittal for minor permit modification procedures allowed under § 71.7(e)(1) or (2)).

(c) *Waiver of notice requirements.* The Administrator may waive the requirements of paragraph (a) of this section for any category of sources (including any class, type, or size within such category) other than major sources by regulation for a category of sources nationwide.

(d) *Notice provided to Indian Tribes.* The permitting authority shall provide notice of each draft permit to any federally recognized Indian Tribe whose air quality may be affected by the permitting action and whose reservation

or Tribal area is contiguous to the jurisdiction in which the part 71 permit is proposed or is within 50 miles of the permitted source.

§ 71.9 Permit fees

(a) *Fee requirement.* The owners or operators of part 71 sources shall pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs, in accordance with the procedures described in this section.

(b) *Permit program costs.* These costs include, but are not limited to, the costs of the following activities as they relate to a part 71 program:

(1) Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;

(2) Processing permit reopenings;

(3) General administrative costs of the permit program, including transition planning, interagency coordination, contract management, training, informational services and outreach activities, assessing and collecting fees, the tracking of permit applications, compliance certifications, and related data entry;

(4) Implementing and enforcing the terms of any part 71 permit (not including any court costs or other costs associated with an enforcement action), including adequate resources to determine which sources are subject to the program;

(5) Emissions and ambient monitoring, modeling, analyses, demonstrations, preparation of inventories, and tracking emissions, provided these activities are needed in order to issue and implement part 71 permits; and

(6) Providing direct and indirect support to small business stationary sources in determining applicable requirements and in receiving permits under this part (to the extent that these services are not provided by a State Small Business Stationary Source Technical and Environmental Compliance Assistance Program).

(c) *Establishment of fee schedule.* (1) For part 71 programs that are administered by EPA, each part 71 source shall pay an annual fee in the amount of $32 per ton (as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section) times the total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions.

(2) For part 71 programs that are fully delegated pursuant to § 71.10:

(i) Where the EPA has not suspended its part 71 fee collection pursuant to paragraph (c)(2)(ii) of this section, the annual fee for each part 71 source shall be $24 per ton (as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section) times the total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions.

(ii) Where the delegate State collects fees from part 71 sources under State law which are sufficient to fund the delegated part 71 program, the EPA may suspend its collection of part 71 fees. The specific terms and conditions regarding the suspension of fee collection will be addressed in the applicable delegation agreement pursuant to § 71.10.

(3) For part 71 programs that are administered by EPA with contractor assistance, the per ton fee shall vary depending on the extent of contractor involvement and the cost to EPA of contractor assistance. The EPA shall establish a per ton fee that is based on the contractor costs for the specific part 71 program that is being administered, using the following formula:

Cost per ton=(E×32)+[(1 − E)×$\$C$]

Where E represents EPA's proportion of total effort (expressed as a percentage of total effort) needed to administer the part 71 program, 1–E represents the contractor's effort, and C represents the contractor assistance cost on a per ton basis. C shall be computed by using the following formula:

C=[B+T+N] divided by 12,300,000

Where B represents the base cost (contractor costs), where T represents travel costs, and where N represents nonpersonnel data management and tracking costs.

(4) For programs that are delegated in part, the fee shall be computed using the following formula:

Cost per ton=(E×32)+(D×24)+[(1 − E − D)×$\$C$]

Where E and D represent, respectively, the EPA and delegate agency proportions of total effort (expressed as a percentage of total effort) needed to administer the part 71 program, 1 − E − D represents the contractor's effort, and C represents the contractor assistance cost on a per ton basis. C shall be computed using the formula for contractor assistance cost found in paragraph (c)(3) of this section and shall be zero if contractor assistance is not utilized.

(5) The following emissions shall be excluded from the calculation of fees under paragraph (c)(1) through (c)(4) of this section:

(i) The amount of a part 71 source's actual emissions of each regulated pollutant (for fee calculation) that the source emits in excess of four thousand (4,000) tpy;

(ii) A part 71 source's actual emissions of any regulated pollutant (for fee calculation) already included in the fee calculation; and

(iii) The insignificant quantities of actual emissions not required to be listed or calculated in a permit application pursuant to § 71.5(c)(11).

(6) ''Actual emissions'' means the actual rate of emissions in tpy of any regulated pollutant (for fee calculation) emitted from a part 71 source over the preceding calendar year. Actual emissions shall be calculated using each emissions unit's actual operating hours, production rates, in-place control equipment, and types of materials processed, stored, or combusted during the preceding calendar year.

(7) Notwithstanding the provisions of paragraph (c) (1) through (4) of this section, if the Administrator determines that the fee structures provided in paragraphs (c)(1) through (4) of this section do not reflect the costs of administering a part 71 program, then the Administrator shall by rule set a fee which adequately reflects permit program costs for that program.

(d) *Prohibition on fees with respect to emissions from affected units.* Notwithstanding any other provision of this section, during the years 1995 through 1999 inclusive, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act.

(e) *Submission of initial fee calculation work sheets and fees.* (1) Each part 71 source shall complete and submit an initial fee calculation work sheet as provided in paragraphs (e)(2), (f), and (g) of this section and shall complete and submit fee calculation work sheets thereafter as provided in paragraph (h) of this section. Calculations of actual or estimated emissions and calculation of the fees owed by a source shall be computed by the source on fee calculation work sheets provided by EPA. Fee payment of the full amount must accompany each initial fee calculation work sheet.

(2) The fee calculation work sheet shall require the source to submit a report of its actual emissions for the preceding calendar year and to compute fees owed based on those emissions. For sources that have been issued part 70 or part 71 permits, actual emissions shall be computed using compliance methods required by the most recent permit. If actual emissions cannot be determined

using the compliance methods in the permit, the actual emissions should be determined using federally recognized procedures. If a source commenced operation during the preceding calendar year, the source shall estimate its actual emissions for the current calendar year. In such a case, fees for the source shall be based on the total emissions estimated.

(3) The initial fee calculation worksheet shall be certified by a responsible official consistent with § 71.5(d).

(f) *Deadlines for submission.* (1) When EPA withdraws approval of a part 70 program and implements a part 71 program, part 71 sources shall submit initial fee calculation work sheets and fees in accordance with the following schedule:

(i) Sources having SIC codes between 0100 and 2499 inclusive shall complete and submit fee calculation work sheets and fees within 6 months of the effective date of the part 71 program;

(ii) Sources having SIC codes between 2500 and 2999 inclusive shall complete and submit fee calculation work sheets and fees within 7 months of the effective date of the part 71 program;

(iii) Sources having SIC codes between 3000 and 3999 inclusive shall complete and submit fee calculation work sheets and fees within 8 months of the effective date of the part 71 program;

(iv) Sources having SIC codes higher than 3999 shall complete and submit fee calculation work sheets and fees within 9 months of the effective date of the part 71 program.

(2) Sources that are required under either paragraph (f)(1) or (g) of this section to submit fee calculation work sheets and fees between January 1 and March 31 may estimate their emissions for the preceding calendar year in lieu of submitting actual emissions data. If the source's initial fee calculation work sheet was based on estimated emissions for the source's preceding calendar year, then the source shall reconcile the fees owed when it submits its annual emissions report, as provided in paragraph (h)(3) of this section.

(3) When EPA implements a part 71 program that does not replace an approved part 70 program, part 71 sources shall submit initial fee calculation work sheets and initial fees when submitting their permit applications in accordance with the requirements of § 71.5(a)(1).

(4) Notwithstanding the above, sources that become subject to the part 71 program after the program's effective date shall submit an initial fee calculation work sheet and initial fees when submitting their permit applications in accordance with the requirements of § 71.5(a)(1).

(g) *Fees for sources that are issued part 71 permits following an EPA objection pursuant to § 71.4(e).* Fees for such sources shall be determined as provided in paragraph (c)(1) of this section. However, initial fee calculation work sheets for such sources and full payment of the initial fee shall be due three months after the date on which the source's part 71 permit is issued.

(h) *Annual emissions reports*—(1) *Deadlines for submission.* Each part 71 source shall submit an annual report of its actual emissions for the preceding calendar year, a fee calculation work sheet (based on the report), and full payment of the annual fee each year on the anniversary date of its initial fee calculation work sheet, except that sources that were required to submit initial fee calculation work sheets between January 1 and March 31 inclusive shall submit subsequent annual emissions reports and fee calculation work sheets by April 1.

(2) Annual emissions reports and fee calculation worksheets shall be certified by a responsible official consistent with § 71.5(d).

(3) For sources that have been issued part 70 or part 71 permits, actual emissions shall be computed using methods required by the most current permit for determining compliance.

(4) If the source's initial fee calculation work sheet was based on estimated emissions for the source's current or preceding calendar year, then the source shall reconcile the fees owed when it submits its annual emissions report. The source shall compare the estimated emissions from the initial work sheet and the actual emissions from the report and shall enter such information on the fee calculation work sheet that accompanies the annual report. The source shall recompute the initial fee accordingly and shall remit any underpayment with the report and work sheet. The EPA shall credit any overpayment to the source's account.

(i) *Recordkeeping requirements.* Part 71 sources shall retain, in accordance with the provisions of § 71.6(a)(3)(ii), all work sheets and other materials used to determine fee payments. Records shall be retained for 5 years following the year in which the emissions data is submitted.

(j) *Fee assessment errors.* (1) If EPA determines than a source has completed the fee calculation work sheet incorrectly, the permitting authority shall bill the applicant for the corrected fee or credit overpayments to the source's account.

(2) Each source notified by the permitting authority of additional amounts due shall remit full payment within 30 days of receipt of an invoice from the permitting authority.

(3) An owner or operator of a part 71 source who thinks that the assessed fee is in error shall provide a written explanation of the alleged error to the permitting authority along with the assessed fee. The permitting authority shall, within 90 days of receipt of the correspondence, review the data to determine whether the assessed fee was in error. If an error was made, the overpayment shall be credited to the account of the part 71 source.

(k) *Remittance procedure.* (1) Each remittance under this section shall be in United States currency and shall be paid by money order, bank draft, certified check, corporate check, or electronic funds transfer payable to the order of the U.S. Environmental Protection Agency.

(2) Each remittance shall be sent to the Environmental Protection Agency to the address designated on the fee calculation work sheet or the invoice.

(l) *Penalty and interest assessment.* (1) The permitting authority shall assess interest on payments which are received later than the date due. The interest rate shall be the sum of the Federal short-term rate determined by the Secretary of the Treasury in accordance with section 6621(a)(2) of the Internal Revenue Code of 1986, plus 3 percentage points.

(2) The permitting authority shall assess a penalty charge of 50 percent of the fee amount if the fee is not paid within 30 days of the payment due date.

(3) If a source underpays the fee owed, except as provided in paragraph (l)(4) of this section, the permitting authority shall assess a penalty charge of 50 percent on the amount by which the fee was underpaid. Interest shall also be assessed, computed under paragraph (l)(1) of this section, on the amount by which the fee was underpaid.

(4) If a source bases its initial fee calculation on estimated emissions from the source's current or preceding calendar year, as provided under paragraph (h)(4) of this section, and underpays its fee based on an underestimation of these emissions, the permitting authority shall assess a penalty charge of 50 percent on certain of these underpayments, according to the following provisions:

(i) The penalty charge shall be assessed whenever a source's underpayment exceeds the underpayment penalty cutoff established in paragraph (l)(4)(iii) of this section. The penalty amount shall be 50

percent of the portion of the underpayment which is in excess of the underpayment penalty cutoff.

(ii) Where a source is subject to a penalty for underpayment pursuant to paragraph (l)(4)(i) of this section, interest as computed under paragraph (l)(1) of this section shall be assessed on that portion of the underpayment which is in excess of the underpayment penalty cutoff established in paragraph (l)(4)(iii) of this section.

(iii) The underpayment penalty cutoff for a source shall be the sum of the following:

(A) 50 percent of the portion of the initial fee amount which was calculated from estimated emissions of HAP listed pursuant to 112(b) of the Act, and

(B) 20 percent of the portion of initial fee amount which was calculated from estimated emissions of the remainder of the regulated air pollutants (for fee calculation).

(m) *Failure to remit fees.* The permitting authority shall not issue a final permit or permit revision until all fees, interest and penalties assessed against a source under this section are paid. The initial application of a source shall not be found complete unless the source has paid all fees owed.

(n) *Adjustments of fee schedules.*

(1) The fee schedules provided in paragraphs (c) (1) through (4) of this section shall remain in effect until December 31, 1996. Thereafter, the fee schedules shall be changed annually by the percentage, if any, of any annual increase in the Consumer Price Index.

(2) Part 71 permit program costs and fees will be reviewed by the Administrator at least every 2 years, and changes will be made to the fee schedule as necessary to reflect permit program costs.

(3) When changes to a fee schedule are made based on periodic reviews by the Administrator, the changes will be published in the Federal Register.

(o) *Use of revenue.* All fees, penalties, and interest collected under this part shall be deposited in a special fund in the U.S. Treasury, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the activities required by this part.

§ 71.10 Delegation of part 71 program.

(a) *Delegation of part 71 program*. The Administrator may delegate, in whole or in part, with or without signature authority, the authority to administer a part 71 operating permits program to a State, eligible Tribe, local, or other non-State agency in accordance with the provisions of this section. In order to be delegated authority to administer a part 71 program, the delegate agency must submit a legal opinion from the Attorney General from the State, or the attorney for the State, local, interstate, or eligible Tribal agency that has independent legal counsel, stating that the laws of the State, locality, interstate compact or Indian Tribe provide adequate authority to carry out all aspects of the delegated program. A Delegation of Authority Agreement (Agreement) shall set forth the terms and conditions of the delegation, shall specify the provisions that the delegate agency shall be authorized to implement, and shall be entered into by the Administrator and the delegate agency. The Agreement shall become effective upon the date that both the Administrator and the delegate agency have signed the Agreement. Once delegation becomes effective, the delegate agency will be responsible, to the extent specified in the Agreement, for administering the part 71 program for the area subject to the Agreement.

(b) *Publication of Notice of Delegation of Authority Agreement.* The Administrator shall publish a notice in the Federal Register informing the public of any delegation of a portion of the part 71 program to a State, eligible Tribe, or local agency.

(c) *Revision or revocation of Delegation of Authority Agreement.* An Agreement may be modified, amended, or revoked, in part or in whole, by the Administrator after consultation with the delegate agency.

(d) *Transmission of information to the Administrator.*

(1) When a part 71 program has been delegated in accordance with the provisions of this section, the delegate agency shall provide to the Administrator a copy of each permit application (including any application for permit modification), each proposed permit, and each final part 71 permit. The applicant may be required by the delegate agency to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the delegate agency may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.

(2) The Administrator may waive the requirements of paragraph (d)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources by regulation for a category of sources nationwide.

(e) *Retention of records.* The records for each draft, proposed, and final permit, and application for permit renewal or modification shall be kept for a period of 5 years by the delegate agency. The delegate agency shall also submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the delegate agency is implementing, administering, and enforcing the delegated part 71 program in compliance with the requirements of the Act and of this part.

(f) *Prohibition of default issuance.* (1) For the purposes of Federal law and title V of the Act, when a part 71 program has been delegated in accordance with the provisions of this section, no part 71 permit (including a permit renewal or modification) will be issued until affected States have had an opportunity to review the draft permit as required pursuant to § 71.8(a) and EPA has had an opportunity to review the proposed permit.

(2) To receive delegation of signature authority, the legal opinion submitted by the delegate agency pursuant to paragraph (a) of this section shall certify that no applicable provision of State, local or Tribal law requires that a part 71 permit or renewal be issued after a certain time if the delegate agency has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA and affected States.

(g) *EPA objection.* (1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit for which an application must be transmitted to the Administrator under paragraph (d)(1) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information. When a part 71 program has been delegated in accordance with the provisions of this section, failure of the delegate agency to do any of the following shall constitute grounds for an objection by the Administrator:

(i) Comply with paragraph (d) of this section;

(ii) Submit any information necessary to review adequately the proposed permit;

(iii) Process the permit under the procedures required by §§ 71.7 and 71.11; or

(iv) Comply with the requirements of § 71.8(a).

(2) Any EPA objection under paragraph (g)(1) of this section shall include a statement of the Administrator's reason(s) for objection and a description of the terms and conditions that the permit must include to respond to the objection. The Administrator will provide the permit applicant a copy of the objection.

(3) If the delegate agency fails, within 90 days after the date of an objection under paragraph (g)(1) of this section, to revise and submit to the Administrator the proposed permit in response to the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this part.

(h) *Public petitions.* In the case of a delegated program, any interested person may petition the Administrator to reopen a permit for cause as provided in § 71.11(n).

(i) *Appeal of permits.* When a part 71 program has been delegated with signature authority in accordance with the provisions of this section, any person or affected State that submitted recommendations or comments on the draft permit, or that participated in the public hearing process may petition the Environmental Appeals Board in accordance with § 71.11(l)(1).

(j) *Nondelegable conditions.* (1) The Administrator's authority to object to the issuance of a part 71 permit cannot be delegated to an agency not within EPA.

(2) The Administrator's authority to act upon petitions submitted pursuant to paragraph (h) of this section cannot be delegated to an agency not within EPA.

§ 71.11 Administrative record, public participation, and administrative review.

The provisions of this section shall apply to all permit proceedings. Notwithstanding the preceding sentence, paragraphs (a) through (h) and paragraph (j) of this section shall not apply to permit revisions qualifying as minor permit modifications or administrative amendments, except that public notice of the granting of appeals of such actions under paragraph (l)(3) of this section shall be provided pursuant to paragraph (d)(1)(i)(E) of this section, and except that affected States shall be provided notice of minor permit modifications under § 71.8 as pursuant to paragraph (d)(3)(i)(B) of this section.

(a) *Draft permits.* (1) The permitting authority shall promptly provide notice to the applicant of whether the application is complete pursuant to § 71.7(a)(3).

(2) Once an application for an initial permit, permit revision, or permit renewal is complete, the permitting authority shall decide whether to prepare a draft permit or to deny the application.

(3) If the permitting authority initially decides to deny the permit application, it shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit and follows the same procedures as any draft permit prepared under this section. If the permitting authority's final decision is that the initial decision to deny the permit application was incorrect, it shall withdraw the notice of intent to deny and proceed to prepare a draft permit under paragraph (a)(4) of this section.

(4) If the permitting authority decides to prepare a draft permit, it shall prepare a draft permit that contains the permit conditions required under § 71.6.

(5) All draft permits prepared under this section shall be publicly noticed and made available for public comment.

(b) *Statement of basis.* The permitting authority shall prepare a statement of basis for every draft permit subject to this section. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the initial decision. The statement of basis shall be sent to the applicant and, on request, to any other person.

(c) *Administrative record for draft permits.*

(1) The provisions of a draft permit shall be based on the administrative record defined in this section.

(2) For preparing a draft permit, the administrative record shall consist of:

(i) The application and any supporting data furnished by the applicant;

(ii) The draft permit or notice of intent to deny the application or to terminate the permit;

(iii) The statement of basis;

(iv) All documents cited in the statement of basis; and

(v) Other documents contained in the supporting file for the draft permit.

(3) Material readily available at the permitting authority or published material that is generally available, and that is included in the administrative record under paragraphs (b) and (c) of this section need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis.

(d) *Public notice of permit actions and public comment period.*

(1) *Scope.*

(i) The permitting authority shall give public notice that the following actions have occurred:

(A) A permit application has been initially denied under paragraph (a) of this section;

(B) A draft permit has been prepared under paragraph (a) of this section;

(C) A hearing has been scheduled under paragraph (f) of this section; and

(D) A public comment period has been reopened under paragraph (h) of this section;

(E) An appeal has been granted under paragraph (l)(3) of this section.

(ii) No public notice is required when a request for permit revision, revocation and reissuance, or termination has been denied under paragraph (a)(2) of this section. Written notice of that denial shall be given to the requester and to the permittee.

(iii) Public notices may describe more than one permit or permit action.

(2) *Timing.* (i) Public notice of the preparation of a draft permit, (including a notice of intent to deny a permit application), shall allow at least 30 days for public comment.

(ii) Public notice of a public hearing shall be given at least 30 days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

(iii) The permitting authority shall provide such notice and opportunity for participation to affected States on or before the time that the permitting authority provides this notice to the public.

(3) *Methods.* Public notice of activities described in paragraph (d)(1)(i) of this section shall be given by the following methods:

(i) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under paragraph (d) of this section may waive his or her rights to receive notice for any permit):

(A) The applicant;

(B) Affected States;

(C) Air pollution control agencies of affected States, Tribal and local air pollution control agencies which have jurisdiction over the area in which the source is located, the chief executives of the city and county where the source is located, any comprehensive regional land use planning agency and any State or Federal Land Manager whose lands may be affected by emissions from the source;

(D) The local emergency planning committee having jurisdiction over the

area where the source is located, and State agencies having authority under State law with respect to the operation of such source;

(E) Persons on a mailing list developed by:

(*1*) Including those who request in writing to be on the list;

(*2*) Soliciting persons for ''area lists'' from participants in past permit proceedings in that area; and

(*3*) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and, where deemed appropriate by the permitting authority, in such publications as regional and State funded newsletters, environmental bulletins, or State law journals. The permitting authority may update the mailing list from time to time by requesting written indication of continued interest from those listed. The permitting authority may delete from the list the name of any person who fails to respond to such a request.

(ii) By publication of a notice in a daily or weekly newspaper of general circulation within the area affected by the source.

(iii) By any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) *Contents*—(i) *All public notices.* All public notices issued under this subpart shall contain the following minimum information:

(A) The name and address of the permitting authority processing the permit;

(B) The name and address of the permittee or permit applicant and, if different, of the facility regulated by the permit, except in the case of draft general permits;

(C) The activity or activities involved in the permit action;

(D) The emissions change involved in any permit revision;

(E) The name, address, and telephone number of a person whom interested persons may contact for instructions on how to obtain additional information, such as a copy of the draft permit, the statement of basis, the application, relevant supporting materials, and other materials available to the permitting authority that are relevant to the permitting decision.

(F) A brief description of the comment procedures required by paragraph (e) of this section, a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision;

(G) The location of the administrative record, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant are available as part of the administrative record; and

(H) Any additional information considered necessary or proper.

(ii) *Public notices for hearings.* Public notice of a hearing may be combined with other notices required under paragraph (d)(1) of this section. Any public notice of a hearing under paragraph (f) of this section shall contain the following information:

(A) The information described in paragraph (d)(4)(i) of this section;

(B) Reference to the date of previous public notices relating to the permit;

(C) The date, time, and place of the hearing; and

(D) A brief description of the nature and purpose of the hearing, including the applicable rules and the comment procedures.

(5) All persons identified in paragraphs (d)(3)(i) (A), (B), (C), (D), and (E) of this section shall be mailed a copy of the public hearing notice described in paragraph (d)(4)(ii) of this section.

(e) *Public comments and requests for public hearings.* During the public comment period provided under paragraph (a) of this section, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised at the hearing. All comments shall be considered in making the final decision and shall be answered as provided in paragraph (j) of this section. The permitting authority will keep a record of the commenters and of the issues raised during the public participation process, and such records shall be available to the public.

(f) *Public hearings.* (1) The permitting authority shall hold a hearing whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit.

(2) The permitting authority may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

(3) Public notice of the hearing shall be given as specified in paragraph (d) of this section.

(4) Whenever a public hearing is held, the permitting authority shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

(5) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under paragraph (d) of this section shall be automatically extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(6) A tape recording or written transcript of the hearing shall be made available to the public.

(g) *Obligation to raise issues and provide information during the public comment period.* All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the permitting authority's initial decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing). Any supporting materials that are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. In the case of a program delegated pursuant to § 71.10, if requested by the Administrator, the permitting authority shall make supporting materials not already included in the administrative record available to EPA. The permitting authority may direct commenters to provide such materials directly to EPA. A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted to the extent that a commenter who requests additional time demonstrates the need for such time.

(h) *Reopening of the public comment period.* (1) The permitting authority may order the public comment period reopened if the procedures of paragraph (h) of this section could expedite the decision making process. When the public comment period is reopened under paragraph (h) of this section, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the permitting authority's initial decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their

position, including all supporting material, by a date not less than 30 days after public notice under paragraph (h)(2) of this section, set by the permitting authority. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than 20 days after the date set for filing of the material, set by the permitting authority.

(2) Public notice of any comment period under this paragraph (h) shall identify the issues to which the requirements of paragraphs (h)(1) through (4) of this section shall apply.

(3) On its own motion or on the request of any person, the permitting authority may direct that the requirements of paragraph (h)(1) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying the requirements of paragraph (h)(1) of this section will substantially expedite the decision making process. The notice of the draft permit shall state whenever this has been done.

(4) A comment period of longer than 30 days may be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they may be granted to the extent the permitting authority finds it necessary.

(5) If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the permitting authority may take one or more of the following actions:

(i) Prepare a new draft permit, appropriately modified;

(ii) Prepare a revised statement of basis, and reopen the comment period; or

(iii) Reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted.

(6) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused the reopening. The public notice shall define the scope of the reopening.

(7) Public notice of any of the above actions shall be issued under paragraph (d) of this section.

(i) *Issuance and effective date of permit.* (1) After the close of the public comment period on a draft permit, the permitting authority shall issue a final permit decision. The permitting authority shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a permit. For the purposes of this section, a final permit decision means a final decision to issue, deny, revise, revoke and reissue, renew, or terminate a permit.

(2) A final permit decision shall become effective 30 days after the service of notice of the decision, unless:

(i) A later effective date is specified in the decision;

(ii) Review is requested under paragraph (l) of this section (in which case the specific terms and conditions of the permit which are the subject of the request for review shall be stayed); or

(iii) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

(j) *Response to comments.* (1) At the time that any final permit decision is issued, the permitting authority shall issue a response to comments. This response shall:

(i) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(ii) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(2) Any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in paragraph (k) of this section. If new points are raised or new material supplied during the public comment period, the permitting authority may document its response to those matters by adding new materials to the administrative record.

(3) The response to comments shall be available to the public.

(4) The permitting authority will notify in writing any affected State of any refusal to accept recommendations for the permit that the State submitted during the public or affected State review period.

(k) *Administrative record for final permits.* (1) The permitting authority shall base final permit decisions on the administrative record defined in paragraph (k)(2) of this section.

(2) The administrative record for any final permit shall consist of:

(i) All comments received during any public comment period, including any extension or reopening;

(ii) The tape or transcript of any hearing(s) held;

(iii) Any written material submitted at such a hearing;

(iv) The response to comments and any new materials placed in the record;

(v) Other documents contained in the supporting file for the permit;

(vi) The final permit;

(vii) The application and any supporting data furnished by the applicant;

(viii) The draft permit or notice of intent to deny the application or to terminate the permit;

(ix) The statement of basis for the draft permit;

(x) All documents cited in the statement of basis;

(xi) Other documents contained in the supporting file for the draft permit.

(3) The additional documents required under paragraph (k)(2) of this section should be added to the record as soon as possible after their receipt or publication by the permitting authority. The record shall be complete on the date the final permit is issued.

(4) Material readily available at the permitting authority, or published materials which are generally available and which are included in the administrative record under the standards of paragraph (j) of this section need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or in the response to comments.

(l) *Appeal of permits.* (1) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period on the draft permit. The 30-day period within which a person may request review under this section begins with the service of notice of the permitting authority's action unless a later date is specified in that notice, except that the 30-day period within which a person may request review of a minor permit modification or administrative amendment begins upon the effective date of such action to revise the permit. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues raised were raised during the public comment period (including any public hearing) to the extent required by these regulations unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless

the grounds for such objection arose after such period, and, when appropriate, a showing that the condition in question is based on:

(i) A finding of fact or conclusion of law which is clearly erroneous; or

(ii) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(2) The Board may also decide on its initiative to review any condition of any permit issued under this part. The Board must act under paragraph (l) of this section within 30 days of the service date of notice of the permitting authority's action.

(3) Within a reasonable time following the filing of the petition for review, the Board shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Board under paragraph (l)(1) or (2) of this section shall be given as provided in paragraph (d) of this section. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the permit applicant and to the person(s) requesting review.

(4) A petition to the Board under paragraph (l)(1) of this section is, under 42 U.S.C. 307(b), a prerequisite to seeking judicial review of the final agency action.

(5) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by the permitting authority and agency review procedures are exhausted. A final permit decision shall be issued by the permitting authority:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(6) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Board. Motions for reconsideration directed to the Administrator, rather than to the Board, will not be considered, except in cases that the Board has referred to the Administrator and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Board.

(m) *Computation of time.* (1) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(2) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event, except as otherwise provided.

(3) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(4) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

(n) *Public petitions to the Permitting Authority.*

(1) Any interested person (including the permittee) may petition the permitting authority to reopen a permit for cause, and the permitting authority may commence a permit reopening on its own initiative. However, the permitting authority shall not revise, revoke and reissue, or terminate a permit except for the reasons specified in § 71.7(f)(1) or § 71.6(a)(6)(i). All requests shall be in writing and shall contain facts or reasons supporting the request.

(2) If the permitting authority decides the request is not justified, it shall send the requester a brief written response giving a reason for the decision. Denials of requests for revision, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the permitting authority may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts. The Board may direct the permitting authority to begin revision, revocation and reissuance, or termination proceedings under paragraph (n)(3) of this section. The appeal shall be considered denied if the Board takes no action within 60 days after receiving it. This informal appeal is, under 42 U.S.C. 307, a prerequisite to seeking judicial review of EPA action in denying a request for revision, revocation and reissuance, or termination.

(3) If the permitting authority decides the request is justified and that cause exists to revise, revoke and reissue or terminate a permit, it shall initiate proceedings to reopen the permit pursuant to § 71.7(f) or § 71.7(g).

§ 71.12 Prohibited acts.

Violations of any applicable requirement; any permit term or condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or order issued by the permitting authority pursuant to this part are violations of the Act and are subject to full Federal enforcement authorities available under the Act.

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