



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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Office of West Virginia  
Secretary Of State

**NOTICE OF PUBLIC COMMENT PERIOD**

AGENCY: Air Quality

TITLE-SERIES: 45-30

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Requirements for Operating Permits

CITE STATUTORY AUTHORITY: W. Va. Code § 22-5-4

COMMENTS LIMITED TO:

Oral and Written

DATE OF PUBLIC HEARING: 07/05/2022 6:00 PM

LOCATION OF PUBLIC HEARING:

Virtual. Register by 5:00pm 7/5/22 at <https://forms.gle/DKdxExuwnr1cQ53v6> or by calling Sandie Adkins or Stephanie Hammonds at (304)926-0475.

DATE WRITTEN COMMENT PERIOD ENDS: 07/05/2022 5:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

## PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule provides for the establishment of a comprehensive air quality permitting system consistent with the requirements of Title V of the Clean Air Act (CAA) and the state operating permit program requirements of 40 CFR Part 70. This rule establishes: (a) the obligation for a source to obtain a Title V operating permit; (b) applicability for other sources, including exemptions and deferred sources; (c) permit application, content, issuance, renewal, reopening, revision, review, suspension, modification, revocation and reissuance requirements, and (d) Title V fee requirements. All fees collected pursuant to this rule shall be expended solely to cover all reasonable direct and indirect costs required to administer the Title V operating permit program and accounted for in accordance with this rule.

## SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

### Summary of changes in the rule:

There are three main purposes for revising the rule.

The summary of changes to the rule are threefold. First, the fee structure is being revised as recommended by the U.S. EPA in its September 2021 Title V Program Evaluation Report, August 2019 Title V Permit Fee Evaluation Report, and May 2015 Title V Program Evaluation Report. Second, the rule was revised to comport with Revisions to the Petition Provisions of the Title V Permitting Program [85 Fed. Reg. 6431, February 5, 2020] and Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program [87 Fed. Reg. 19042, April 1, 2022]. Third, obsolete transitional language was removed, and other clarifications were made.

There are five main changes to the fee structure: (1.) Replaced the annual emissions only fee to an annual fee that includes an emissions fee, base fee, and complexity fee components. (2.) The emissions fee factor is a calculation based on the 3-yr average of DAQ Title V Fund expenses. The calculated emissions fee factor is multiplied by the amount of actual emissions released by the specific source to determine the emissions fee component. (3.) The emissions fee cap was removed. (4.) The Certified Emissions Statement (CES) was eliminated (emission reporting requirements remain.) and (5.) the Title V fee program does not reference the Rule 22 minor source fee program.

### Specific revisions to the rule include:

Section 1 - Expanded the scope under 1.1, replaced former rules with sunset provision under 1.5.

Section 2 - Revised definitions as follows:

2.7.b - Applicable requirements - struck repealed 45CSR15

2.10 - Clean Air Act - revised for consistency with other DAQ rules

2.24 - Hazardous air pollutant - revised for consistency with other DAQ rules

2.25 - Case-by-Case MACT - struck reference to reserved subsection

2.26.a.1 - Major Source - Struck reference to HAP table

2.26.c.1 - Major Source - Corrected citation

2.33.d - Regulated Air Pollutant - struck reference to Class I and II substances table

2.34.b - Regulated pollutant (for fee calculation) - struck reference to Class I and II substances table

2.39 - Secretary - revised for consistency with other DAQ rules

Section 4 (Application for Permits) -

Section 4.1.a - Struck obsolete language and moved requirement for new sources from 4.1.a.2 for clarification.

4.1.a.2 - Added 45CSR13 to permitting programs under Title I of the CAA. Requirement for new sources struck and added to 4.1.a for clarification.

4.1.a.4 - Deleted obsolete requirement.

Section 5 (Permit Content)

5.1.c.3.C.1 - Struck requirement relating to affirmative defense and replaced with reserved

5.1.c.3.C.2 - replaced telefax with email.

5.5 - Struck 45CSR15 (repealed).

5.7 - Struck (emergency affirmative defense) to be consistent with federal rule.

Section 6 (Permit Issuance, Renewal, Reopening and Revisions)

Clarified requirements, updated communication methodology, & made miscellaneous minor corrections.

6.1.b - Struck reference to obsolete section.

6.1.c - Struck 45CSR15 (repealed).

6.4.a.5 Removed reference to CAA Title I preconstruction permitting and added state specific program in lieu of and revised to more closely match federal counterpart language.

6.5.b.2 - inserted section 7 (permit review) into requirements that must be satisfied for completeness with the requirement.

6.5.b.3 Added to reflect current practice.

6.8.a.3.A.3-5 & 6.8.a.3.B - updated to more closely match the federal regulation.

6.8.a.4.A.4 - Inserted to match federal regulation.

6.8.a.4.C Struck redundant language.

6.8.e.3 - Added to match federal regulation.

Section 7 (Permit Review by U.S. EPA and Affected States)

Revised this section to add federal counterpart revisions to petitions and permit review requirements.

Section 8 (Fees)

There are five main changes to the fee structure:

(1) Replaced the annual emissions only fee to an annual fee that includes an emissions, base fee, and complexity fee components.

(2) The emissions fee factor is a calculation based on the 3-yr average of DAQ Title V Fund expenses. The calculated emissions fee factor is multiplied by the amount of actual emissions released by the specific source to determine the emissions fee component.

(3) The emissions fee cap was removed.

(4) The Certified Emissions Statement (CES) was eliminated. (Emission reporting requirements remain.)

(5) The Title V fee program does not reference the Rule 22 minor source fee program.

Section 9 (Transition Plan)

Striking this section because it is now obsolete.

Table 45-30A - Hazardous Air Pollutants - Struck this table consistent with the revised definition.

Table 45-30B - Class I and Class II Substances - Struck this table consistent with the revised definition.

Statement of circumstances requiring the rule:

There are three main purposes for revising the rule. First, the fee structure is being revised as recommended by the U.S. EPA in its September 2021 Title V Program Evaluation Report, August 2019 Title V Permit Fee Evaluation Report, and May 2015 Title V Program Evaluation Report. Federal regulations require that fees from Title V sources are sufficient to sustainably cover the Title V program costs. Currently, the fee structure is based solely on the amount of pollutants emitted by a source. Emissions have decreased approximately 80% from the time the Title V program was initially implemented; therefore, Title V program funding is a national issue, especially for those programs funded exclusively on an emissions fee basis. In West Virginia, the top ten sources (primarily coal fired power plants) contribute 60% of the revenue stream and some have publicly communicated the possibility of retiring as early as 2023. The proposed fee is being re-structured for diversification and sustainability. The proposed fee will continue to include an emissions component; however, it will also include a base fee component and a complexity fee component. The complexity fee is intended to account for the increased amount of work required to permit and enforce sources subject to federal air regulations. The intention for restructuring the fees is to ensure that this program is sustainably and adequately funded from a diversified mix of sources, that it can adjust to the projected future emissions changes, and to ensure the program remains in compliance with the federal Clean Air Act. The revised fee structure will not increase revenues to the program. Please refer to the fiscal note for additional details.

Second, the rule was revised to comport with Revisions to the Petition Provisions of the Title V Permitting Program final federal rule [85 Fed. Reg. 6431, February 5, 2020] and Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program. Third, obsolete transitional language was struck and other clarifications were made.

This rule is exempt from the Regulatory Moratorium of Executive Order 2-18 under condition (g) Updating state rules to comply with federal law requirements. There are two federal law requirements being addressed in this revision. First, the U.S. EPA issued three evaluation reports (September 2021, August 2019, and May 2015) recommending that the WV DAQ evaluate the fee structure provided in 45CSR30. The CAA requires that Title V fee revenue is adequate to cover the costs of its Title V program. Second, the rule was revised to comport with Revisions to the Petition Provisions of the Title V Permitting Program final federal rule [85 Fed. Reg. 6431, February 5, 2020] and Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program [87 Fed. Reg. 19042, April 1, 2022].

Determination of Stringency:

A federal counterpart to this rule exists. The determination of stringency indicates that this rule is no more stringent than its federal counterpart.

Consultation with the Environmental Protection Advisory Council:

The Environmental Protection Advisory Council received a copy of this proposed rule in advance of the scheduled June 9, 2022 meeting.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

Revenues of the State Government will not be impacted by this change. The Clean Air Act requires the Title V program to be adequately and sustainably funded by the WV DEP, Division of Air Quality. The Title V program does not receive funding from the general revenue account and is funded under a Special Revenue Account.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

Revisions to Section 8 of 45CSR30 are intended to maintain current revenue levels for the Title V Fund by restructuring the Title V fee calculation such that future revenues equate to the previous three fiscal year average of expenses.

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

The impact of this rule ensures that fees collected for the Title V program are sustainable into the future and will ensure that the State can retain primacy of the Title V program and that West Virginia sources will continue to be regulated by the WV DAQ and not the U.S. EPA. The revised fee structure will no longer be reliant on ten sources, consisting of 2% of the overall Title V sources, to fund 60% of the program revenues. It is worth noting that one of the higher emitting coal-fired power plants funds approximately 10% of the Title V expenditures under the current fee structure.

It is estimated the average major Title V source will pay \$24,000 and the average Title V deferred source will pay \$1,450 for annual operating fees, assuming there are not any power plant shutdowns. The proposed fees are \$3,500 and \$200 less per source on average, respectively. For comparison purposes only, if there are four power plant shutdowns it is estimated the average major Title V source will pay \$23,400 and the average Title V deferred source will pay \$1,800 for annual operating fees. The proposed fees are \$4,000 less and \$85 more per source on average, respectively.

D. FISCAL NOTE DETAIL:

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**Effect of Proposal**

**Fiscal Year**

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	<b>2022 Increase/Decrease (use "-")</b>	<b>2023 Increase/Decrease (use "-")</b>	<b>Fiscal Year (Upon Full Implementation)</b>
<b>1. Estimated Total Cost</b>	0	0	0
<b>Personal Services</b>	0	0	0
<b>Current Expenses</b>	0	0	0
<b>Repairs and Alterations</b>	0	0	0
<b>Assets</b>	0	0	0
<b>Other</b>	0	0	0
<b>2. Estimated Total Revenues</b>	0	0	0

**E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):**

The above estimates are based on a \$15,000 base fee component for major sources subject to Title V permits, a \$0 base fee component for deferred sources, a \$1,000 complexity fee component for any source subject to any New Source Performance Standards (NSPS), a \$1,000 fee complexity fee component for any source subject to any National Emissions Standards for Hazardous Air Pollutants (NESHAP), and an emissions fee component based on each sources actual emissions. The estimates also assume an investment revenue of \$86,200/year. The base and complexity fees will be adjusted by the CPI, beginning one fiscal year after the effective date of the rule. An emissions fee factor will be calculated annually based on the prior 3-year average of Title V expenses after subtracting investment revenue and base and complexity fee components and divided by the total actual annual Title V emissions.

The above estimates represent two scenarios. The first scenario assumed there will not be any shutdowns of any existing power plants. The second scenario assumes there will be four shutdowns of existing power plants and is provided for comparison purposes only.

The emission fee factor is \$10.65/ton assuming there will not be any power plant shutdowns and \$22.14/ton assuming there will be four power plant shutdowns and was calculated using the actual emissions from 2018 and the 3-year average Title V expenses from FY18, FY19, and FY20. For reference, the emissions fee factor to calculate the FY2020 fees was \$52.23/ton applied to actual emissions, capped at 4,000 tons per pollutant.

The U.S. EPA recommended that the WV DAQ analyze the funding structure in three separate program evaluation reports (2021, 2019, and 2015). Without the revised fee structure, future viability of the Title V program is vulnerable because 2% of the sources account for 60% of the revenue and the structure is not flexible in the event of changes to the mix of regulated sources resulting in projected revenue loss. Revisions to this rule would expand the number of sources contributing 60% of the revenue from the top 10 (2%) to the top 96 sources (20%) thus providing a more diversified and sustainable revenue stream.

Expenditures are not expected to increase because of this rule.

In accordance with W. Va. Code §22-1A 3(c), the Secretary has determined that this rule will not result in a taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

**Yes**

**Jason E Wandling -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

45CSR30

TITLE 45  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
AIR QUALITY

SERIES 30  
REQUIREMENTS FOR OPERATING PERMITS

**§45-30-1. General.**

1.1. Scope. -- This rule provides for the establishment of a comprehensive air quality permitting system consistent with the requirements of Title V of the Clean Air Act and the state operating permit program requirements of 40 CFR Part 70. This rule establishes:

1.1.a. The obligation for a source to obtain a Title V operating permit,

1.1.b. The applicability for other sources, including exemptions and deferred sources,

1.1.c. Permit application, content, issuance, renewal, reopening, revision, review, suspension, modification, revocation and reissuance requirements, and

1.1.d. Fee requirements.

1.1.e. All fees collected pursuant to this rule shall be expended solely to cover all reasonable direct and indirect costs required to administer the Title V operating permit program and accounted for in accordance with this rule.

1.2. Authority. -- W.Va. Code § 22-5-4.

1.3. Filing Date. -- ~~April 6, 2015.~~

1.4. Effective Date. -- ~~May 1, 2015.~~

1.5. ~~Former Rules. -- This legislative rule amends 45CSR30 "Requirements for Operating Permits" which was filed May 1, 2013, and which became effective June 1, 2013. Sunset Provision. -- Does not apply.~~

**§45-30-2. Definitions.**

2.1. "Actual emissions" means, for the purpose of sections 7 and 8, the actual total mass of regulated air pollutants emitted to the atmosphere during a particular calendar year and includes all routine as well as non-routine (e.g. abnormal or emergency operations) emissions.

2.2. "Affected source" means a source that includes one or more affected units under 45CSR33 and Title IV of the Clean Air Act (Acid Deposition Control).

2.3. "Affected states" are all states:

2.3.a. Whose air quality may be affected and that are contiguous to the state in which a Title V operating permit, permit modification or permit renewal is being proposed; or

2.3.b. That are within fifty (50) miles of the permitted source.

2.4. "Affected unit" means a fossil fuel-fired combustion device that is subject to emission reduction

requirements or limitations under 45CSR33 and Title IV of the Clean Air Act.

2.5. “Air pollutant” has the meaning ascribed to it in §302 of the Clean Air Act.

2.6. “Alternative operating scenario” or “AOS” means a scenario authorized in a permit pursuant to section 3 that involves a change at the source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

2.7. “Applicable requirements” means all of the following as they apply to emissions units in a Title V source.

2.7.a. Any standard or other requirement provided for in the State Implementation Plan approved by U.S. EPA or promulgated by U. S. EPA through rulemaking under Title I of the Clean Air Act that implements the relevant requirements of the Act, including any revisions to that State Implementation Plan;

2.7.b. 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 Clean Air Act, including any permits issued under 45CSR13, 45CSR14, ~~45CSR15~~, and 45CSR19;

2.7.c. Any standard or other requirement under §111, including §111(d), of the Clean Air Act;

2.7.d. Any standard or other requirements under §112 of the Clean Air Act, including any requirement concerning accident prevention under §112(r)(7) of the Clean Air Act, but not including the contents of any risk management plan required under §112(r) of the Clean Air Act;

2.7.e. Any standard or other requirement of the acid deposition control program under Title IV of the Clean Air Act or the regulations promulgated thereunder;

2.7.f. Any requirements established pursuant to §504(b) or §114(a)(3) of the Clean Air Act;

2.7.g. Any standard or other requirement under §§126(a)(1) and (c) of the Clean Air Act;

2.7.h. Any standard or other requirement governing solid waste incineration under §129 of the Clean Air Act;

2.7.i. Any standard or other requirement for consumer and commercial products under §183(e) of the Clean Air Act;

2.7.j. Any standard or other requirement for tank vessels under §183(f) of the Clean Air Act;

2.7.k. Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the Clean Air Act, unless the Secretary determines that such requirements need not be contained in a Title V permit pursuant to an exemption by U.S. EPA;

2.7.l. Any national ambient air quality standard or increment or visibility requirement under part C of Title I of the Clean Air Act, but only as it would apply to temporary sources permitted pursuant to §504(e) of the Clean Air Act;

2.7.m. Any emissions cap and related requirements established for the source by agreement with the Secretary and U.S. EPA or otherwise applicable under the rules of the West Virginia Department of Environmental Protection; and

2.7.n. Any requirement imposed pursuant to the provisions of 45CSR4 and 45CSR27 and any other



state-only requirement for state enforceable purposes only.

2.8. “Approved replicable methodology” or “ARM” means terms in a permit pursuant to section 3 that:

2.8.a. Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this rule, such that the protocol is based on sound scientific and/or mathematical principles and provides reproducible results using the same inputs; and

2.8.b. Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the ARM, or requirement of this rule, including where an ARM is used for determining applicability of a specific requirement to a particular change.

2.9 “Area source” means any non-major source subject to a standard or other requirement under §112 of the Clean Air Act.

2.10. “Clean Air Act” (“CAA”) means the federal Clean Air Act, as amended, 42 U.S.C. §7401, et seq., ~~as amended~~.

2.11. “Construction” means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emission unit) which would result in a change in actual emissions.

2.12. “Department of Environmental Protection” or “DEP” means the Department of Environmental Protection as created by the provisions of W.Va. Code §22-1-1 et seq.

2.13. “Designated representative” shall have the meaning given to it in §402(26) of the Clean Air Act and the regulations promulgated thereunder.

2.14. “Draft permit” means the version of a permit for which the Secretary offers public participation under subsection 6.8 or affected state review under subsection 7.2.

2.15. “Effective date of the operating permit program” means the date that U.S. EPA formally provides interim, partial, or full approval of the operating permit programs established under this rule.

2.16. “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 an enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

2.17. “Emission point” means a stack, vent, process unit, or a definable area (such as an open materials storage yard) from which the emission of any air pollutant occurs.

2.18. “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 §112(b) of the Clean Air Act. This term is not meant to alter or affect the definition of the term “affected unit” for purposes of Title IV of the Clean Air Act (Acid Deposition Control).

2.19. “Enforceable” means enforceable by the Secretary and U.S. EPA, unless specifically designated to mean otherwise.

2.20. “EPA” or “U.S. EPA” means the United States Environmental Protection Agency.

2.21. “Final permit” means the Title V operating permit issued pursuant to this rule that has completed all review procedures required under sections 6 and 7.

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

2.23. “General permit” means a Title V operating permit that meets the requirements of subsection 5.4.

2.24. “Hazardous air pollutant” or “HAP” means any substance listed ~~on Table 45-30A pursuant to section 112(b) of the Clean Air Act.~~

2.25. “Case-by-case maximum achievable control technology” or “MACT” means an emissions limitation requiring the application of the maximum degree of reduction and control which the Secretary determines is achievable for each source or category of source which requires a case-by-case MACT determination pursuant to the provisions of subsections 12.1,~~12.2,~~ and 12.3.

2.25.a. In the case of sources constructed or modified after the effective date of this rule, MACT shall not be less stringent than the most stringent emissions level that is achieved in practice by similar sources or processes.

2.25.b. For existing sources, MACT may be less stringent than MACT requirements for new or modified sources in the same category, but shall not be less stringent than the following:

2.25.b.1. For categories or subcategories with thirty (30) or more sources, the average emission limitation achieved by the best performing twelve (12) percent of the existing sources in the United States (for which the Secretary has or can reasonably obtain emission information). In making this determination the Secretary shall exclude sources that have achieved a level of emission rate or emission reduction equivalent to the lowest achievable emission rate (as defined in §171 of the Clean Air Act) applicable to the source category and prevailing at the time; or

2.25.b.2. The average emission limitation achieved by the best performing five (5) sources in the United States (for which the Secretary has or could reasonably obtain emissions information) within a category or subcategory with fewer than thirty (30) sources in the United States.

2.25.c. For all facilities, MACT shall represent the maximum degree of emission reduction that the Secretary determines is achievable taking into consideration the cost of achieving such emission reduction, and public health and environmental impacts.

2.25.d. MACT measures shall include but not be limited to measures which:

2.25.d.1. Reduce or eliminate the emission rate of hazardous air pollutants through process changes or substitution of materials;

2.25.d.2. Enclose or seal equipment or systems to eliminate hazardous air pollutant emissions;

2.25.d.3. Collect, capture, destroy and/or otherwise treat hazardous air pollutants released from a process, stack storage, or fugitive emissions point;

2.25.d.4. Are work practice or operational methods; or

2.25.d.5. Are a combination of the above.

2.26. “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 is described in subdivisions 2.26.a, 2.26.b, or 2.26.c. For the purpose 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 same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987, except that a research and development facility may be treated as a separate source from other stationary sources that are part of the same industrial grouping, are located on contiguous or adjacent property, and are under common control.

2.26.a. A major source under §112 of the Clean Air Act, which is defined as:

2.26.a.1. 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, ten (10) tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to §112(b) of the Clean Air Act, or twenty-five (25) tpy or more of any combination of such hazardous air pollutants. ~~Refer to Table 45-30A for a listing of hazardous air pollutants regulated pursuant to this rule. Notwithstanding the preceding sentence, e~~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

2.26.a.2. Radionuclides. -- In the event the Secretary obtains regulatory authority to implement federal requirements regarding radionuclides, the Secretary shall define “major source” consistent with the federal requirements.

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

2.26.b.1. Coal cleaning plants (with thermal dryers);

2.26.b.2. Kraft pulp mills;

2.26.b.3. Portland cement plants;

2.26.b.4. Primary zinc smelters;

2.26.b.5. Iron and steel mills;

2.26.b.6. Primary aluminum ore reduction plants;

2.26.b.7. Primary copper smelters;

2.26.b.8. Municipal incinerators (or combination thereof) capable of charging more than fifty (50) tons of refuse per day;

2.26.b.9. Hydrofluoric, sulfuric, or nitric acid plants;

2.26.b.10. Petroleum refineries;

2.26.b.11. Lime plants;

2.26.b.12. Phosphate rock processing plants;

- 2.26.b.13. Coke oven batteries;
- 2.26.b.14. Sulfur recovery plants;
- 2.26.b.15. Carbon black plants (furnace process);
- 2.26.b.16. Primary lead smelters;
- 2.26.b.17. Fuel conversion plants;
- 2.26.b.18. Sintering plants;
- 2.26.b.19. Secondary metal production plants;
- 2.26.b.20. Chemical process plants - the term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;
- 2.26.b.21. Fossil-fuel boilers (or combination thereof) totaling more than 150 million British thermal units per hour heat input;
- 2.26.b.22. Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
- 2.26.b.23. Taconite ore processing plants;
- 2.26.b.24. Glass fiber processing plants;
- 2.26.b.25. Charcoal production plants;
- 2.26.b.26. Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
- 2.26.b.27. Ammonium sulfate manufacturing plants;
- 2.26.b.28. Asphalt concrete plants;
- 2.26.b.29. Asphalt processing/roofing manufacturing plants;
- 2.26.b.30. Bulk gasoline terminals;
- 2.26.b.31. Dry cleaning plants;
- 2.26.b.32. Glass manufacturing plants;
- 2.26.b.33. Grain elevators;
- 2.26.b.34. Graphic arts (rotogravure) plants;
- 2.26.b.35. Hazardous waste incineration facilities;
- 2.26.b.36. Lead-acid battery manufacturing plants;
- 2.26.b.37. Mineral processing plants;

- 2.26.b.38. Natural gas processing facilities;
- 2.26.b.39. Phosphate fertilizer production and storage facilities;
- 2.26.b.40. Rubber tire manufacturing plants;
- 2.26.b.41. Sewage treatment plants;
- 2.26.b.42. Synthetic fiber production plants;
- 2.26.b.43. Surface coating and printing operations; and

2.26.b.44. Any other stationary source category, which as of August 7, 1980 is being regulated under §§111 or 112 of the Clean Air Act.

2.26.c. A major stationary source as defined in Part D of Title I of the Clean Air Act, including:

2.26.c.1. For ozone nonattainment areas, sources with the potential to emit one hundred (100) tons or more per year of volatile organic compounds (VOCs) or oxides of nitrogen (NOX) in areas classified as “marginal” or “moderate,” fifty (50) tons or more per year in areas classified as “serious,” twenty-five (25) tons or more per year in areas classified as “severe,” and ten (10) tons or more per year in areas classified as “extreme”; except that the references in this clause to one hundred (100), fifty (50), twenty-five (25), and ten (10) tons per year of nitrogen oxides shall not apply with respect to any source for which U.S. EPA has made a finding, under §1842(f)(1) or (2) of the Clean Air Act, that requirements under §1842(f) of the Clean Air Act do not apply;

2.26.c.2. For ozone transport regions established pursuant to §184 of the Clean Air Act, sources with the potential to emit fifty (50) tons or more per year of volatile organic compounds (VOCs);

2.26.c.3. For carbon monoxide (“CO”) nonattainment areas that are classified as “serious,” and in which stationary sources contribute significantly to carbon monoxide levels, sources with the potential to emit fifty (50) tons or more per year of carbon monoxide; and

2.26.c.4. For particulate matter (PM10) nonattainment areas classified as “serious,” sources with the potential to emit seventy (70) tons or more per year of PM10.

2.27. “Permit” means any permit or group of permits covering a source or sources of emissions that are issued, renewed, amended, or revised pursuant to this rule.

2.28. “Permit modification” means a revision to a Title V operating permit issued under this rule that meets the requirements of subsection 6.5.

2.29. “Permit revision” means any permit modification or administrative permit amendment.

2.30. “Person” means any and all persons, natural or artificial, including the State of West Virginia or any other State, the United States of America, any municipal, statutory, public, or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.31. “Potential to emit” means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable. This term does not alter or affect the use of this term for any other purposes under the Clean Air Act, or the term “capacity factor” as used in Title IV of the Clean Air Act (Acid

Deposition Control) or the regulations promulgated thereunder.

2.32. “Proposed permit” means the version of a permit that the Secretary proposes to issue and forwards to U.S. EPA for review in compliance with section 7.

2.33. “Regulated air pollutant” means the following:

2.33.a. Nitrogen oxides (NOX) or any volatile organic compound;

2.33.b. Any pollutant for which a national ambient air quality standard has been promulgated;

2.33.c. Any pollutant that is subject to any standard promulgated under §111 of the Clean Air Act;

2.33.d. Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Clean Air Act (§602). ~~Refer to Table 45-30B for a listing of Class I and II substances regulated pursuant to this rule;~~

2.33.e. Any pollutant subject to a standard or other requirement under §112 of the Clean Air Act, including §§112(g), (j), and (r), including the following:

2.33.e.1. Any pollutant subject to requirements under §112(j) of the Clean Air Act. If the U.S. EPA fails to promulgate a standard by the date established pursuant to §112(e) of the Clean Air 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 §112(e) of the Clean Air Act.

2.33.e.2. Any pollutant for which the requirements of §112(g)(2) of the Clean Air Act have been met, but only with respect to the individual source subject to that §112(g)(2) requirement.

2.33.f. Any other pollutant regulated by the West Virginia Department of Environmental Protection under an emission standard or ambient air quality standard.

2.34. “Regulated pollutant (for fee calculation),” which is used only for purposes of section 8, excludes greenhouse gases as defined in 40 CFR §86.1818-12(a) and means any “regulated air pollutant” except the following:

2.34.a. Carbon monoxide provided that emissions of carbon monoxide do not fall under the provisions of paragraph 2.26.c.3;

2.34.b. Any Class I or II substance which is a regulated air pollutant solely because it is listed pursuant to §602 of the Clean Air Act. ~~Refer to Table 45-30B for a listing of Class I and Class II substances;~~

2.34.c. Any pollutant that is a regulated air pollutant only because it is subject to a standard or regulation under §112(r) of the Clean Air Act; or

2.34.d. Any pollutant that is a regulated air pollutant solely because it is listed in 45CSR27.

2.35. “Relocation” means the physical movement of a source outside its existing plant boundaries.

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

2.37. “Research and development facility” means sources whose activities are conducted for nonprofit scientific or educational purposes; sources whose activities are conducted to test more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided that the activities do not include the production of an intermediate or final product for sale or exchange for commercial profit; a research or laboratory facility the primary purpose of which is to conduct research and development into

new processes and products, that is operated under the close supervision of technically trained personnel, and that is not engaged in the manufacture of products for sale or exchange for commercial profit; or the experimental firing of any fuel or combination of fuels in a boiler, heater, furnace, or dryer for the purpose of conducting research and development of more efficient combustion or more effective prevention or control of air pollutant emissions, provided that the heat generated is not used for production purposes or for producing a product for sale or exchange for commercial profit.

2.38. “Responsible official” means one of the following:

2.38.a. 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:

2.38.a.1. The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars), or

2.38.a.2. The delegation of authority to such representative is approved in advance by the Secretary;

2.38.b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

2.38.c. For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this rule, 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 U.S. EPA); or

2.38.d. For affected sources:

2.38.d.1. The designated representative in so far as actions, standards, requirements, or prohibitions under Title IV of the Clean Air Act (Acid Deposition Control) or the regulations promulgated thereunder are concerned; and

2.38.d.2. The designated representative for any other purposes under this rule.

2.39. “Secretary” means the Secretary of the Department of Environmental Protection or ~~such~~ other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §§22-1-6 or 22-1-8.

2.40. “Section 502(b)(10)” changes or “§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 enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

2.41. “Source” or “stationary source” means, for the purpose of this rule, any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under §112(b) of the Clean Air Act.

2.42. “Source-specific permit” means a single Title V operating permit addressing all of the relevant emission units and operations which are subject to applicable requirements at a particular source or major source.

2.43. “Subject to regulation” means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally applicable regulation codified by the Administrator, that

requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

2.43.a. Greenhouse gases, the air pollutant defined in 40 CFR §86.1818-12(a) as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the greenhouse gas emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO<sub>2</sub> equivalent emissions; and

2.43.b. The term tpy CO<sub>2</sub> equivalent emissions (CO<sub>2</sub>e) shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant greenhouse gases, by the gas's associated global warming potential published at Table A-1 to Subpart A of 40 CFR Part 98 - Global Warming Potentials, and summing the resultant value for each to compute a tpy CO<sub>2</sub>e. For purposes of this subdivision, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

2.44. "Title V operating permit" means a permit issued under the provisions of this rule.

2.45. "Title V source" means a source required to obtain a Title V operating permit.

2.46. "Volatile organic compound" (VOC) means the term as defined in 40 CFR §51.100(s).

2.47. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W.Va. Code §22-5-1 et seq. and 40 CFR §70.2.

### **§45-30-3. Applicability.**

#### **3.1. Permit requirement.**

3.1.a. On and after the effective date of the operating permit program, no person shall violate any requirement of a permit issued under this rule nor shall any person operate any of the following sources, except in compliance with a permit issued under section 6:

3.1.a.1. Any major source;

3.1.a.2. Any source, including an area source, subject to a standard or other requirements promulgated under §111 of the Clean Air Act;

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

3.1.a.4. Any affected source; and

3.1.b. If, on the effective date of the operating permit program, a source is not subject to enforceable emissions limitations or such other enforceable measures that require the continued operation and maintenance of air pollution control equipment and/or other operational limitations that make the source non-major, the source shall be treated as a major source subject to the requirements of this rule.



### 3.2. Exemptions and deferrals.

3.2.a. Except as provided in section 4, all sources listed in subsection 3.1 that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to §129(e) of the Clean Air Act may be deferred by the Secretary on a specific source category basis from the obligation to obtain a Title V operating permit under this rule. Any such deferral by the Secretary shall be consistent with the timetable established by U.S. EPA for non-major sources to which this rule applies except as provided under subdivision 4.1.a.

3.2.b. [Reserved].

3.2.c. Unless otherwise required by this rule to have a Title V operating permit, the following source categories are exempted from the obligation to obtain a Title V operating permit:

3.2.c.1. 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 (1988) - Standards of Performance for New Residential Wood Heaters; and

3.2.c.2. 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 (1984) - National Emission Standard for Hazardous Air Pollutants for Asbestos, 40 CFR §61.145, Standard for Demolition and Renovation.

3.2.d. As provided in this subdivision, the following units or activities within a stationary source subject to this rule may be deemed to be insignificant:

3.2.d.1. Flares used solely to indicate danger to the public.

3.2.d.2. Combustion units designed and used exclusively for comfort heating that use liquid petroleum gas or natural gas as fuel.

3.2.d.3. Comfort air conditioning or ventilation systems not used to remove air contaminants generated by or released from specific units of equipment.

3.2.d.4. Indoor or outdoor kerosene heaters.

3.2.d.5. Space heaters operating by direct heat transfer.

3.2.d.6. Repairs or maintenance where no structural repairs are made and where no new air pollutant emitting facilities are installed or modified.

3.2.d.7. Air contaminant detectors or recorders, combustion controllers or shutoffs.

3.2.d.8. Brazing, soldering or welding equipment used as an auxiliary to the principal equipment at the source.

3.2.d.9. Any consumer product used in the same manner as in normal consumer use, provided the use results in a duration and frequency of exposure which are not greater than those experienced by consumers, and which may include, but not be limited to, personal use items, janitorial cleaning supplies, office supplies and supplies to maintain copying equipment.

3.2.d.10. Equipment on the premises of industrial and manufacturing operations used solely for the purpose of preparing food for human consumption.

3.2.d.11. Portable generators.

3.2.d.12. Firefighting equipment and the equipment used to train firefighters.

3.2.d.13. Such other sources or activities as the Secretary may determine with EPA approval.

3.2.e. Potential emissions from the units or activities listed under subdivision 3.2.d. shall not be excluded in the determination as to whether a stationary source is a major source for the purpose of determining applicability of this rule; nor shall units subject to applicable requirements be deemed to be insignificant emission units. Units or activities deemed insignificant shall be identified in the permit application, and the owner or operator shall upon request provide sufficient information for the Secretary to verify that such units or activities are insignificant, provided that for all units or activities deemed insignificant because of their size, production rate or amount of pollutant emitted, or for which applicable requirements may apply, the owner or operator shall provide information sufficient for the Secretary to verify that the unit or activity is insignificant at the time the permit application is submitted.

### 3.3. Emission units and sources.

3.3.a. For major sources, the Secretary shall include in the permit all applicable requirements for all emission units in the major source.

3.3.b. For any non-major source, the Secretary shall include in the permit all applicable requirements for emission units that cause the source to be subject to this rule.

3.4. Fugitive emissions. -- Fugitive emissions from a source subject to this rule shall be included in the permit application and all operating permits issued under this rule 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.

## §45-30-4. Application for Permits.

4.1. Duty to apply. -- For each source, the owner or operator shall submit a timely and complete permit application in accordance with this section.

### 4.1.a. Timely application.

4.1.a.1. ~~Except as otherwise provided, applications for permits for sources which are in existence on the effective date of the operating permit program shall be submitted in accordance with the following schedule:~~

~~4.1.a.1.A. Applications for coal preparation plants as defined in 40 CFR §§60.250 and 251, whether major or minor sources, which are subject to performance standards under 40 CFR Part 60, Subpart Y, and all other coal preparation plants which are major sources shall be submitted to the Secretary within ninety (90) days of the effective date of the operating permit program.~~

~~4.1.a.1.B. Applications for natural gas processing plants or natural gas pipeline compressor engines subject to this rule shall be submitted to the Secretary within ninety (90) days of the effective date of the operating permit program.~~

~~4.1.a.1.C. Applications for all hot mix asphalt plants subject to the requirements of 40 CFR Part 60 Subpart I including area sources and all hot mix asphalt plants which are major sources shall be submitted to the Secretary within ninety (90) days of the effective date of the operating permit program.~~

~~4.1.a.1.D. Applications for glass manufacturing plants subject to this rule including area sources subject to 40 CFR Part 60 Subpart CC shall be submitted to the Secretary within one hundred eighty (180) days of the effective date of the operating permit program.~~

~~4.1.a.1.E. Applications for chemical manufacturing plants or any other stationary sources subject to the requirement of this rule which contain fewer than 100 emission points shall be submitted within one hundred eighty (180) days of the effective date of the operating permit program.~~

~~4.1.a.1.F. Application for all other stationary sources subject to this rule shall be submitted to the Secretary within twelve (12) months of the effective date of the operating permit program. An initial permit application is timely if the source submits the application within twelve (12) months after the source becomes subject to this rule.~~

4.1.a.2. Sources required to meet requirements under §112(g) of the Clean Air Act, or to have a permit under the preconstruction review program approved into the State Implementation Plan under Parts C or D of Title I of the Clean Air Act, including 45CSR13, 45CSR14, and 45CSR19, ~~or any other source which becomes subject to this rule after the effective date of the operating permit program~~ shall file a complete application to obtain the Title V operating permit or permit revision within twelve (12) months after commencing operation. Where an existing Title V operating permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation or the source may apply for a single permit in accordance with all applicable provisions and procedures of this rule and all applicable preconstruction permitting rules.

4.1.a.3. A permit renewal application is timely if it is submitted at least six (6) months prior to the date of permit expiration.

~~4.1.a.4. Applications for initial Phase II (as defined in Title IV of the Clean Air Act) acid deposition control permits shall be submitted to the Secretary by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for NOX.~~

~~4.1.a.5. Within eighteen (18) months following the date established by U.S. EPA's failure to timely promulgate a standard in accordance with the requirements of §112(e) of the Clean Air Act, the owner or operator of a major source subject to this paragraph shall file an application for a permit. If the owner or operator of a source has submitted a timely and complete application for a permit required by section 4, any failure to have a permit shall not be a violation of the requirements of this rule, unless the delay in final action is due to the failure of the applicant to timely submit information required or requested by the Secretary to process the application on forms to be made available by the Secretary.~~

4.1.b. Complete application. -- To be deemed complete, an application must provide all information required pursuant to subsection 4.3, except that applications for permit revision need supply such information only if it is related to the proposed change. Information required under subsection 4.3 must be sufficient for the Secretary to evaluate the subject source and its application and to determine all applicable requirements. A responsible official shall certify the submitted information consistent with subsection 4.4. Unless the Secretary determines that an application is not complete within sixty (60) days of receipt of the application, such application shall be deemed to be complete, except in the case of minor permit modifications made pursuant to subsection 6.5. Any application which is timely submitted and subsequently determined to be complete within the initial sixty (60) day completeness review period by the Secretary shall be deemed to be complete on the date that it was filed. If, during processing an application that has been determined or deemed to be complete, the Secretary determines that additional information is necessary to evaluate or take final action on that application, the Secretary 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 subsection 6.2, 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 Secretary.

4.1.c. Confidential information. -- In the case where a source has submitted information to the State under a claim of confidentiality pursuant to W.Va. Code §22-5-10 and 45CSR31, the Secretary may also require the source to submit a copy of such information directly to the U.S. EPA.

4.2. 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.

4.3. Standard application form and required information. -- The Secretary shall provide for a standard application form or forms. Information, as described below, for each emissions unit at a source which is not insignificant as defined in subdivision 3.2.d, shall be included in the application, except that a list of insignificant activities or emission units must be included in the application. An application shall contain all information necessary to determine the applicability of, or to impose, any applicable requirement, and to evaluate the fee amount required under section 8. The application forms shall include, but not be limited to, the elements specified below:

4.3.a. 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.

4.3.b. A description of the source's processes and products (by Standard Industrial Classification Code) including those associated with any proposed alternative operating scenario identified by the source.

4.3.c. The following emission-related information:

4.3.c.1. 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 qualify as insignificant emission units as defined in subdivision 3.2.d or are exempted under subsection 3.1. In the case of insignificant emission units or activities defined under subdivision 3.2.d, an applicant shall provide information regarding emissions to the extent required under subdivision 3.2.e. The Secretary 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 approved pursuant to section 8.

4.3.c.2. Identification and description of all points of emissions described in paragraph 4.3.c.1 in sufficient detail to establish the basis for fees and applicability of requirements of this rule, W.Va. Code §22-5-1 et seq., and the Clean Air Act.

4.3.c.3. Emissions rates in tons per year and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method. For emissions units subject to an annual emissions cap, tons per year can be reported as part of the aggregate emissions associated with the cap, except where more specific information is needed, including where necessary to determine and/or assure compliance with an applicable requirement.

4.3.c.4. The following information to the extent it is needed to determine or regulate emissions: fuels, fuel use, raw materials, production rates, and operating schedules.

4.3.c.5. Identification and description of air pollution control equipment and compliance monitoring devices or activities.

4.3.c.6. Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the source.

4.3.c.7. Other information required by any applicable requirements (including information related to stack height limitations developed pursuant to §123 of the Clean Air Act and 45CSR20, "Good Engineering Practices as Applicable to Stack Heights"), such as the location of emissions units, flow rates,

building dimensions, and stack parameters (including height, diameter, and plume temperature) for all regulated air pollutants.

4.3.c.8. Calculations or test data on which the information in paragraphs 4.3.c.1 through 4.3.c.7. above is based.

4.3.d. The following air pollution control requirements:

4.3.d.1. Citation and description of all applicable requirements;

4.3.d.2. Description of or reference to any applicable test method for determining compliance with each applicable requirement; and

4.3.d.3. A list of all effective air quality-related permits and orders and a list of all such permit applications which are pending action by the Secretary or U.S. EPA.

4.3.e. Other specific information that may be necessary to implement and enforce other requirements of the W.Va. Code §§22-5-1, et seq. and 22-18-1, et seq. or the Clean Air Act or to determine the applicability of such requirements.

4.3.f. An explanation of any proposed exemptions from otherwise applicable requirements.

4.3.g. Additional information as determined to be necessary by the Secretary to define proposed alternative operating scenarios identified by the source pursuant to subdivision 5.1.i or to define permit terms and conditions implementing any alternative operating scenario under subdivision 5.1.i or implementing subsection 5.8 or subdivision 5.1.j, or define alternative equivalent emission limits pursuant to paragraph 5.1.a.3. The permit application shall include documentation demonstrating that the source has obtained all authorization(s) required under the applicable requirements relevant to any proposed alternative operating scenario, or a certification that the source has submitted all relevant materials to the Secretary for obtaining such authorization(s).

4.3.h. A compliance plan for all sources that contains all the following:

4.3.h.1. A description of the compliance status of the source and a schedule for compliance by the source with respect to all applicable requirements, as follows:

4.3.h.1.A. For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

4.3.h.1.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.

4.3.h.1.C. A schedule of compliance, including a narrative description of how the source will achieve 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.

4.3.h.1.D. For applicable requirements associated with a proposed alternative operating scenario, a statement that the source will meet such requirements upon implementation of the alternative

operating scenario. If a proposed alternative operating scenario would implicate an applicable requirement 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 will satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

4.3.h.2. A schedule for submission of certified progress reports where applicable no less frequently than every six (6) months. For sources required to have a schedule of compliance to remedy a violation, a more frequent period no greater than once a month as specified by the Secretary.

4.3.h.3. The compliance plan content requirements specified in subdivision 4.3.h shall apply and be included in the acid deposition control portion of a compliance plan for an affected source except as specifically superseded by 45CSR33.

4.3.i. Requirements for compliance certification, including the following:

4.3.i.1. A certification of compliance with all applicable requirements by a responsible official consistent with subsection 4.4 and §114(a)(3) of the Clean Air Act;

4.3.i.2. A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

4.3.i.3. 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 Secretary; and

4.3.i.4. A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Clean Air Act and the rules of the West Virginia Department of Environmental Protection.

4.3.j. The use, where applicable, of nationally standardized forms for Title IV of the Clean Air Act portions of permit applications and compliance plans.

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

#### **§45-30-5. Permit Content.**

5.1. Standard permit requirements. -- Each Title V operating permit issued under section 6 shall include all applicable requirements that apply to the source at the time of permit issuance and the following elements:

5.1.a. Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include approved replicable methodologies identified by the source in its permit application as approved by Secretary, provided that no approved replicable methodology shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this rule or circumvent any applicable requirement that would apply as a result of implementing the approved replicable methodology.

5.1.a.1. 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.

5.1.a.2. The permit shall state that, where applicable requirements of the Clean Air Act are more stringent than any applicable requirement of 45CSR33, both provisions shall be incorporated into the permit and shall be enforceable by the Secretary and U.S. EPA.

5.1.a.3. If the rules promulgated by the Secretary pursuant to provisions of Title I of the Clean Air Act and contained in the State Implementation Plan allow a determination of an alternative equivalent emission limit at a source to be made in the permit issuance, renewal, or significant modification 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.

5.1.b. Permit duration. -- The Secretary shall issue permits for a fixed term of five (5) years for all sources regulated pursuant to this rule.

5.1.c. Monitoring and related recordkeeping and reporting requirements.

5.1.c.1. Each permit shall contain the following requirements with respect to monitoring:

5.1.c.1.A. All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to §§504(b) or 114(a)(3) of the Clean Air Act;

5.1.c.1.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 periods that are representative of the source's compliance with the permit, as reported pursuant to paragraph 5.1.c.3. 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 5.1.c.1; and

5.1.c.1.C. As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

5.1.c.2. With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require the following:

5.1.c.2.A. Records of monitoring information that include the following:

5.1.c.2.A.1. The date, place as defined in the permit, and time of sampling or measurements.

5.1.c.2.A.2. The date(s) analyses were performed.

5.1.c.2.A.3. The company or entity that performed the analyses.

5.1.c.2.A.4. The analytical techniques or methods used.

5.1.c.2.A.5. The results of such analyses.

5.1.c.2.A.6. The operating conditions existing at the time of sampling or measurement.

5.1.c.2.B. Retention of records of all required monitoring data and support information for a period of at least five (5) years from the date of 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. Where appropriate, the permit may allow records to be maintained in computerized form in lieu of the above records.

5.1.c.3. With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

5.1.c.3.A. Submittal of reports of any required monitoring at least every six (6) months, but no more often than once per month. 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 subsection 4.4. To the extent practicable, the schedule for submission of such reports shall be timed to coincide with other periodic reports required by the permit, including the permittees' compliance certifications.

5.1.c.3.B. 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 in accordance with any rules of the West Virginia Department of Environmental Protection.

5.1.c.3.C. In addition to monitoring reports required by the permit, supplemental reports and notices are deemed to be prompt if submitted in the following fashion:

~~5.1.c.3.C.1. Any deviation resulting from an emergency or upset condition, as defined in subsection 5.7, shall be reported by telephone or telefax within one (1) working day of the date on which the permittee becomes aware of the deviation, if the permittee desires to assert the affirmative defense authorized by subsection 5.7. A written report of such deviation, which shall include the probable cause of such deviations, and any corrective actions or preventive measures taken, shall be submitted and certified by a responsible official within ten (10) days of the deviation~~[Reserved].

5.1.c.3.C.2. Any deviation that poses an imminent and substantial danger to public health, safety, or the environment shall be reported to the Secretary immediately by telephone or ~~telefax~~email. A written report of such deviation, which shall include the probable cause of such deviation, and any corrective actions or preventive measures taken, shall be submitted by a responsible official within ten (10) days of the deviation.

5.1.c.3.C.3. Any other deviation that is identified in the permit as requiring more frequent reporting than the permittee's reports of required monitoring shall be reported on the schedule specified in the permit.

5.1.c.3.C.4. All reports of deviations shall identify the probable cause of the deviation and any corrective actions or preventative measures taken.

5.1.c.3.D. Every report submitted under this subsection shall be certified by a responsible official.

5.1.c.3.E. A permittee may request confidential treatment for information submitted under this subsection pursuant to the limitations and procedures of W.Va. Code §22-5-10 and 45CSR31.

5.1.d. A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under Title IV of the Clean Air Act or 45CSR33.

5.1.d.1. No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid deposition control program, provided that such increases do not require a permit revision under any other applicable requirement.



5.1.d.2. 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.

5.1.d.3. Any such allowance shall be accounted for according to the procedures established in rules promulgated under Title IV of the Clean Air Act.

5.1.e. A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portion of the permit.

5.1.f. Provisions stating the following:

5.1.f.1. Duty to comply. -- The permittee must comply with all conditions of the Title V operating permit. Any permit noncompliance constitutes a violation of the Code of West Virginia and Clean Air Act and is grounds for enforcement action by the Secretary or U.S. EPA; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

5.1.f.2. 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 the permit. However, nothing in this paragraph shall be construed as precluding consideration of a need to halt or reduce activity as a mitigating factor in determining penalties for noncompliance if the health, safety, or environmental impacts of halting or reducing operations would be more serious than the impacts of continued operations.

5.1.f.3. Permit actions. -- 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.

5.1.f.4. Property rights. The permit does not convey any property rights of any sort, nor any exclusive privilege.

5.1.f.5. Duty to provide information. -- The permittee shall furnish to the Secretary, within a reasonable time, any information that the Secretary 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 furnish to the Secretary copies of records required to be kept by the permit. For information claimed to be confidential, the permittee shall furnish such records to the Secretary and directly to U.S. EPA along with their claim of confidentiality.

5.1.g. Fees. -- A provision to ensure that a source pays fees to the Division of Air Quality consistent with section 8.

5.1.h. 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 and that are in accordance with all applicable requirements.

5.1.i. Terms and conditions for reasonably anticipated alternative operating scenarios identified by the source in its application and which are approved by the Secretary. Such terms and conditions:

5.1.i.1. 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 alternative operating scenario under which it is operating.;

5.1.i.2. Shall extend the permit shield described in subsection 5.6 to all terms and conditions under each such alternative operating scenario; and

5.1.i.3. Shall ensure that the terms and conditions of each such alternative operating scenario meet all applicable requirements and the requirements of this rule. The Secretary shall not approve a proposed alternative operating scenario into the permit until the source has obtained all authorizations required under any applicable requirement relevant to that alternative operating scenario.

5.1.j. 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:

5.1.j.1. Shall include all terms required under subsections 5.1 and 5.3 to determine compliance;

5.1.j.2. Shall extend the permit shield described in subsection 5.6 to all terms and conditions that allow such increases and decreases in emissions; and

5.1.j.3. Shall meet all applicable requirements and requirements of this rule.

## 5.2. Federally-enforceable requirements.

5.2.a. All terms and conditions in a permit issued pursuant to this rule, including any provisions designed to limit a source's potential to emit and excepting those provisions that are specifically designated in the permit as "state-enforceable only", are enforceable by the Secretary, U.S. EPA, and citizens under the Clean Air Act.

5.2.b. Notwithstanding subdivision 5.2.a, the Secretary shall specifically designate as not being federally enforceable under the Clean Air Act any terms and conditions included in the permit that are not required under the Clean Air Act nor under any of its applicable requirements. Terms and conditions of permits issued under this rule which are state enforceable only are not subject to the requirements of section 7 nor shall they be subject to objection, requests for permit reopening, or enforcement by U.S. EPA. Permit revisions and reopenings for state-only requirements shall be accomplished by using the procedures of section 6, except that such revisions are not subject to U.S. EPA or affected state review.

5.3. Compliance requirements. -- All Title V operating permits shall contain the following elements with respect to compliance:

5.3.a. Consistent with subdivision 5.1.c : 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 Title V operating permit shall contain a certification by a responsible official that meets the requirements of subsection 4.4.

5.3.b. 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 Secretary or an authorized designee of the Secretary to perform the following:

5.3.b.1. At all reasonable times (including all times in which the facility is in operation) enter upon the permittee's premises where a source is located or emissions related activity is conducted, or where records must be kept under the conditions of the permit;

5.3.b.2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

5.3.b.3. Inspect at reasonable times (including all times in which the facility is in operation) any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

5.3.b.4. Sample or monitor at reasonable times substances or parameters to determine compliance with the permit or applicable requirements or ascertain the amounts and types of pollutants discharged.

5.3.c. A schedule of compliance consistent with subdivision 4.3.h.

5.3.d. Progress reports consistent with an applicable schedule of compliance and subdivision 4.3.h to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the Secretary. Such progress reports shall contain the following:

5.3.d.1. 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

5.3.d.2. 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.

5.3.e. 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:

5.3.e.1. The frequency (not less than annually or a more frequent period as specified in the applicable requirement or by the Secretary) of submissions of compliance certifications;

5.3.e.2. In accordance with subdivision 5.1.c, a means for assessing or monitoring the compliance of the source with its emissions limitations, standards, and work practices;

5.3.e.3. A requirement that the compliance certification include the following:

5.3.e.3.A. The identification of each term or condition of the permit that is the basis of the certification;

5.3.e.3.B. The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period, as shown by test or monitoring data, records, and other information reasonably available to the permittee. Such methods and other means shall include, at a minimum, the methods and means required under subdivision 5.1.c;

5.3.e.3.C. The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in subparagraph 5.3.e.3.B. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under 40 CFR Part 64 occurred; and

5.3.e.3.D. Such other facts as the Secretary may require to determine the compliance status of the source;

5.3.e.4. A requirement that all compliance certifications be submitted to U.S. EPA as well as to the Secretary; and

5.3.f. Such other provisions as the Secretary may require to determine the compliance status of the source.

5.4. General permits.

5.4.a. The Secretary may, after notice and opportunity for public participation as contained in section 6, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other Title V operating permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the Secretary shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of subsection 5.6, the source shall be subject to enforcement action for operation without a Title V operating 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 Title IV of the Clean Air Act unless otherwise provided in rules promulgated by the Secretary in accordance with that Title IV of the Clean Air Act.

5.4.b. A general permit may be issued for the following purposes:

5.4.b.1. To establish terms and conditions to implement applicable requirements for a source category;

5.4.b.2. To establish terms and conditions to implement applicable requirements for specified categories of changes to permitted sources;

5.4.b.3. To establish terms and conditions for new requirements that apply to sources with existing permits; and

5.4.b.4. To establish enforceable caps on emissions from sources in a specified category.

5.4.c. Sources that would qualify for a general permit must apply to the Secretary for coverage under the terms of the general permit or must apply for a Title V operating permit consistent with section 4. The Secretary may, in the general permit, provide for applications which deviate from the requirements of section 4, provided that such applications meet the requirements of Title V of the Clean Air Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The Secretary may grant a request for a source to operate under a general permit without repeating the public participation procedures as required by subsection 6.8, and such grant shall not be a final permit action for judicial review.

5.4.d. The Secretary shall act within ninety (90) days to approve or deny a request to be covered under a general permit.

5.4.e. A source may apply for coverage under a general permit for some emissions units or activities even if the source must file a source-specific permit application for other emissions units or activities. In the event that both a general permit and a source-specific permit are granted to the same source, the source-specific permit shall incorporate the applicable general permit(s).

5.4.e.1. In the event that a source is issued a general permit for one or more emissions units at a source, any subsequent application for a source-specific permit shall include the source subject to the general permit. The incorporation of the general permit into the source-specific application shall subject the general permit source to all procedures and processes, including public comment, to which the entire application and permit process are subject. The terms and duration of any general permit incorporated under a source-specific permit shall be void upon the issuance of such source-specific permit and the terms and duration of such source-specific permit shall then control.

5.4.e.2. In the event that a source obtains a general permit subsequent to the issuance of a source-specific permit, such general permit shall be applicable only for the remainder of the term of the source-specific permit. The general permit source shall be included in the renewal application for the source specific permit and subject to all procedures and processes, including public comment, to which the renewal is subject.

5.5. Temporary sources. -- The Secretary 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. Temporary sources must comply with preconstruction review requirements under 45CSR13, 45CSR14, ~~45CSR15~~, and 45CSR19. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include provisions that will assure compliance with all applicable requirements at all authorized locations. The owner or operator shall notify the Secretary at least ten (10) days in advance of each change in location.

#### 5.6. Permit shield.

5.6.a. Except as otherwise provided in this rule, the Secretary shall include in a Title V operating 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:

5.6.a.1. Such applicable requirements are included and are specifically identified in the permit;  
or

5.6.a.2. The Secretary, 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 such a determination or a concise summary thereof.

5.6.b. A Title V operating permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

5.6.c. Nothing in subsection 5.6 or in any Title V operating permit shall alter or affect the following:

5.6.c.1. 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; or

5.6.c.2. The applicable requirements of the Code of West Virginia and Title IV of the Clean Air Act, consistent with §408(a) of the Clean Air Act.

5.6.c.3. The authority of the Administrator of U.S. EPA to require information under §114 of the Clean Air Act or to issue emergency orders under §303 of the Clean Air Act.

#### 5.7. ~~Emergency provision~~ [Reserved].

~~5.7.a. 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.~~

~~5.7.b. Effect of any emergency. — An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of subdivision 5.7.c are met.~~

~~5.7.c. The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~5.7.c.1. An emergency occurred and that the permittee can identify the cause(s) of the emergency;~~

~~5.7.e.2. The permitted facility was at the time being properly operated;~~

~~5.7.e.3. 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~~

~~5.7.e.4. Subject to the requirements of part 5.1.e.3.C.1, the permittee submitted notice of the emergency to the Secretary within one (1) working day of the time when emission limitations were exceeded due to the emergency and made a request for variance, and as applicable rules provide. This notice, report, and variance request fulfills the requirement of subparagraph 5.1.e.3.B. This notice must contain a detailed description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~5.7.d. In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.~~

~~5.7.e. This provision is in addition to any emergency or upset provision contained in any applicable requirement.~~

5.8. Operational flexibility. -- Each permit issued under this rule shall provide that a permittee may make changes within the facility, as provided by §502(b)(10) of the Clean Air Act. Such operational flexibility shall be provided in the permit in conformance with the permit application and applicable requirements. No such changes shall be a modification under any provision of Title I of the Clean Air Act promulgated by the Secretary (including 45CSR14 and 45CSR19), and the change shall not result in a level of emissions exceeding the emissions allowable under the permit.

5.8.a. Before making a change under this provision, the permittee shall provide advance written notice to the Secretary and to U.S. EPA, describing the change to be made, the date on which the change will occur, any changes in emissions, and any permit terms and conditions that are affected. The permittee shall thereafter maintain a copy of the notice with the permit, and the Secretary shall place a copy with the permit in the public file. The written notice shall be provided to the Secretary and U.S. EPA at least seven (7) days prior to the date that the change is to be made, except that this period may be shortened or eliminated as necessary for a change that must be implemented more quickly to address unanticipated conditions posing a significant health, safety, or environmental hazard. If less than seven (7) days notice is provided because of a need to respond more quickly to such unanticipated conditions, the permittee shall provide notice to the Secretary and U.S. EPA as soon as possible after learning of the need to make the change.

5.8.b. A permitted source may trade increases and decreases in emissions within the facility, where rules promulgated by the Secretary pursuant to provisions of Title I of the Clean Air Act and which are contained in the State Implementation Plan for West Virginia provide for such emissions trades without a permit modification. In such a case, the advance written notice provided by the permittee shall identify the applicable requirements allowing trading and shall state when the change will occur, the types and quantities of emissions to be traded, the permit terms or other applicable requirements with which the source will comply through emissions trading, and such other information as may be required by the Secretary.

5.8.c. The permit shield provided under subsection 5.6 shall not apply to changes made under subsection 5.8 except those provided for in subdivision 5.8.d. However, the protection of the permit shield will continue to apply to operations and emissions that are not affected by the change, provided that the permittee complies with the terms and conditions of the permit applicable to such operations and emissions. The permit shield may be reinstated for emissions and operations affected by the change:

5.8.c.1. If subsequent changes cause the facility's operations and emissions to revert to those authorized in the permit and the permittee resumes compliance with the terms and conditions of the permit, or

5.8.c.2. If the permittee obtains final approval of a significant modification to the permit to incorporate the change in the permit.

5.8.d. Upon the request of a permit applicant, the Secretary may issue a permit that contains terms and conditions 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 assure that the emissions trades are quantifiable, accountable, enforceable, and replicable, and comply with all applicable requirements and subdivision 5.1.j. The permit shield under subsection 5.6 shall apply to permit terms and conditions authorizing such increases and decreases in emissions. 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.

5.9. Off-permit changes. -- Except as provided in subdivision 5.9.e, a facility may make any change in its operations or emissions that is not addressed nor prohibited in its permit and which is not considered to be construction nor modification under any rule promulgated by the Secretary without obtaining an amendment or modification of its permit. Such changes shall be subject to the following requirements and restrictions:

5.9.a. The change must meet all applicable requirements and may not violate any existing permit term or condition.

5.9.b. The permittee must provide a written notice of the change to the Secretary and to U.S. EPA within two (2) business days following the date of the change. 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.

5.9.c. The change shall not qualify for the permit shield.

5.9.d. The permittee shall keep records describing all changes made at the source that result in emissions of regulated air pollutants, but not otherwise regulated under the permit, and the emissions resulting from those changes.

5.9.e. No permittee may make any change subject to any requirement under 45CSR33 or Title IV of the Clean Air Act pursuant to the provisions of subsection 5.9.

5.9.f. No permittee may make any changes which would require preconstruction review under any provision of Title I of the Clean Air Act (including 45CSR14 and 45CSR19) pursuant to the provisions of subsection 5.9.

#### **§45-30-6. Permit Issuance, Renewal, Reopenings and Revisions.**

6.1. Action on application.

6.1.a. A permit, permit modification, or renewal may be issued only if all of the following conditions have been met:

6.1.a.1. The Secretary 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 subsection 5.4;

6.1.a.2. Except for modifications qualifying for minor permit modification procedures under subdivision 6.5.a, the Secretary has complied with the public participation procedures for permit issuance specified under subsection 6.8;

6.1.a.3. The Secretary has complied with the requirements for notifying and responding to affected States as required by subsection 7.2;

6.1.a.4. The conditions of the permit provide for compliance with all applicable requirements and the requirements of this rule; and

6.1.a.5. The Secretary has provided a copy of the permit and any notices required under subsections 7.1 and 7.2 to U.S. EPA, and U.S. EPA has not objected to issuance of the permit under subsection 7.3 within the time period specified therein.

6.1.b. ~~Except as provided under the initial transition plan provided for under section 9~~ and as may be required by 45CSR33, the Secretary shall take final action on each permit application within twelve (12) months after the application is deemed complete.

6.1.c. Priority shall be given to taking action on applications for construction or modification under 45CSR13, 45CSR14, ~~45CSR15~~ or 45CSR19.

6.1.d. The Secretary shall promptly provide notice of the completeness to the applicant. Unless the Secretary requests additional information or otherwise notifies the applicant of incompleteness within sixty (60) days of receipt of an application, the application shall be deemed complete. No completeness determination need be made for minor permit modification applications pursuant to subdivision 6.5.a.

6.1.e. Following receipt and review of an application, the Secretary shall issue a draft permit, significant permit modification or renewal for public comment. In accordance with subsection 6.9, the Secretary shall develop 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 Secretary shall send this statement to the U.S. EPA and to any person who requests it.

6.1.f. The submittal of a complete application shall not affect the requirement that any source have all preconstruction permits required under the rules of the West Virginia Department of Environmental Protection except that a source may, with approval of the Secretary, elect to file a single permit application to obtain any required preconstruction permits and a Title V operating permit or permit revision, if the procedures required by the applicable preconstruction rule and all requirements of the preconstruction permitting rules are complied with in the issuance of a Title V operating permit.

6.2. Requirement for a permit. -- Except as provided in paragraph 6.5.a.5, subsection 5.8, and as further provided in this subsection, no source may operate after the time that it is required to submit a timely and complete application under this rule except in compliance with an effective permit under this rule. If a source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a Title V operating permit is not a violation of this rule until the Secretary takes final action on the permit application, except as noted in this subsection. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to subdivision 6.1.d and as required by subdivision 4.1.b, the applicant fails to submit by the deadline specified in writing by the Secretary any additional information identified as being needed to process the application.

### 6.3. Permit renewal and expiration.

6.3.a. Permits being renewed are subject to the same procedural requirements, including those for public participation, that apply to initial permit issuance.

6.3.b. Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with subsection 6.2 and paragraph 4.1.a.3.

6.3.c. If the Secretary fails to take final action to deny or approve a timely and complete permit



application before the end of the term of the previous permit, the permit shall not expire until the renewal permit has been issued or denied, and any permit shield granted for the permit shall continue in effect during that time.

6.4. Administrative permit amendments.

6.4.a. An “administrative permit amendment” is a permit revision that:

6.4.a.1. Corrects typographical errors;

6.4.a.2. 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;

6.4.a.3. Requires more frequent monitoring or reporting by the permittee;

6.4.a.4. Allows for a change in ownership or operational control of a source where the Secretary 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 Secretary;

6.4.a.5. Incorporate into the Title V operating permit all provisions required under ~~this rule and all preconstruction requirements under Title I of the Clean Air Act (including requirements of 45CSR13, 45CSR14 and 45CSR19)~~ provided that procedural requirements substantially equivalent to sections 6 and 7 and compliance requirements substantially equivalent to section 5 have been satisfied, as applicable if the change was subject to review as a significant permit modification; or

6.4.a.6. Is approved pursuant to 45CSR33.

6.4.b. An administrative permit amendment may be made by the Secretary consistent with the following:

6.4.b.1. The Secretary shall take no more than sixty (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 the Secretary designates any such permit revisions as having been made pursuant to subsection 6.4.

6.4.b.2. The Secretary shall submit a copy of the revised permit to the U.S. EPA.

6.4.b.3. The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.

6.4.c. The Secretary may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in subsection 5.6 for administrative permit amendments made pursuant to paragraph 6.4.a.5, which meets the relevant requirements of sections 5, 6, and 7 for significant permit modifications.

6.5. Permit modification. -- A permit modification is any revision or modification to a Title V operating permit that cannot be accomplished under the provisions for administrative permit amendments under subsection 6.4. Permit modifications for the purposes of the acid deposition control portion of the permit shall be governed by 45CSR33.

6.5.a. Minor permit modification procedures.

6.5.a.1. Criteria.

6.5.a.1.A. Minor permit modification procedures may be used only for those permit modifications that:

6.5.a.1.A.1. Do not violate any applicable requirement;

6.5.a.1.A.2. Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

6.5.a.1.A.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 air quality impacts, or a visibility or increment analysis;

6.5.a.1.A.4. Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and which permit or condition has been used to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include, but are not limited to, a federally enforceable emissions cap used to avoid classification as a modification under any provision of Title I or any alternative emissions limit approved pursuant to regulations promulgated under §112(i)(5) of the Clean Air Act;

6.5.a.1.A.5. Do not involve preconstruction review under Title I of the Clean Air Act or 45CSR14 and 45CSR19; and

6.5.a.1.A.6. Are not required under any rule of the Secretary to be processed as a significant modification.

6.5.a.1.B. Notwithstanding subparagraph 6.5.a.1.A, 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 rules of the West Virginia Department of Environmental Protection which are approved by U.S. EPA as part of the State Implementation Plan under the Clean Air Act, or which may be otherwise provided for in the Title V operating permit issued under this rule.

6.5.a.1.C. When a permit is modified, only the conditions subject to modification can be reopened, and all other conditions of the permit remain in effect.

6.5.a.2. Application. -- An application requesting the use of minor permit modification procedures shall meet the requirements of subsection 4.3 and shall include the following:

6.5.a.2.A. A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

6.5.a.2.B. The source's suggested draft permit;

6.5.a.2.C. Certification by a responsible official, consistent with subsection 4.4, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

6.5.a.2.D. Completed forms for the Secretary to use to notify U.S. EPA and affected states as required under section 7.

6.5.a.3. U.S. EPA and affected states notification. --

6.5.a.3.A. Within five (5) working days of receipt of a complete permit modification application, the Secretary shall meet the obligation under subdivisions 7.1.a and 7.2.a to notify U.S. EPA and affected states of the requested permit modification. The proposed permit shall be the same as the draft

permit for this purpose.

6.5.a.3.B. The Secretary shall promptly send any notice required under subdivision 7.2.b to U.S. EPA.

6.5.a.3.C. All ~~such~~ notifications shall be ~~by certified mail, return receipt requested~~ made in writing.

6.5.a.4. Timetable for issuance. -- The Secretary shall not issue a final permit modification until after U.S. EPA's forty-five (45) day review period or until U.S. EPA has notified the Secretary that U.S. EPA will not object to the issuance of the permit modification, whichever is first, although the Secretary may approve the permit modification prior to that time. Within ninety (90) days of the Secretary's receipt of an application under minor permit modification procedure or fifteen (15) days after the end of U.S. EPA's forty-five (45) day review period under subsection 7.3, whichever is later, the Secretary shall:

6.5.a.4.A. Issue the permit modification as proposed;

6.5.a.4.B. Deny the permit modification application;

6.5.a.4.C. Determine that the requested modification does not meet the minor permit modification procedure criteria and should be reviewed under the significant modification procedures; or

6.5.a.4.D. Revise the draft permit modification and transmit to U.S. EPA, and, if appropriate, affected states, the new proposed permit modification in accordance with subdivisions 7.1.a and 7.2. In the event that draft permit modifications are made, the Secretary shall utilize the same procedures outlined in paragraph 6.5.a.4.

6.5.a.5. Permittee's ability to make change. -- A permittee may not make a change to a source proposed in a minor permit modification application unless it has submitted the permit application at least seven (7) days prior to making the proposed change. After the source makes the proposed change allowed by the preceding sentence, and until the Secretary takes any of the actions specified in subparagraphs 6.5.a.4.A through 6.5.a.4.C, 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 and violation of the proposed terms and conditions is relevant in considering any sanction.

6.5.a.6. Permit shield. -- The permit shield under subsection 5.6 shall not extend to minor permit modifications.

6.5.b. Significant modification procedures.

6.5.b.1. Criteria. -- Significant modification procedures shall be used for applications requesting significant permit modifications that do not qualify as minor permit modifications or as administrative amendments including, but not limited to, the following:

6.5.b.1.A. Modifications under any provision of Title I of the Clean Air Act, except those that qualify for processing as administrative permit amendments under subsection 6.4 or any rule of the Secretary required under Title I of the Clean Air Act;

6.5.b.1.B. A significant change in existing monitoring permit terms or conditions, or constitute a relaxation of reporting or recordkeeping permit terms or conditions;

6.5.b.1.C. A change to 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;

6.5.b.1.D. Establishment of or change to a permit or condition for which there is no corresponding underlying applicable requirement, and

6.5.b.1.E. Proposed changes which in the judgement of the Secretary would require decisions to be made on significant or complex issues that generate or are likely to generate significant material adverse comment from the public, affected states, or U.S. EPA with respect to the determination of applicable requirements or air quality impacts.

6.5.b.2. Significant permit modifications shall meet all requirements of sections 6 and 7, including those for applications, for public participation, review by affected states and review by U.S. EPA as they apply to permit issuance and permit renewal. The Secretary shall complete the review process for significant permit modifications within six (6) months after receipt of a complete application.

6.5.b.3. When a permit is modified, only the conditions subject to modification can be reopened, and all other conditions of the permit remain in effect.

#### 6.6. Reopening for cause.

6.6.a. Each issued permit shall include provisions specifying the conditions under which the permit will be opened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

6.6.a.1. Additional applicable requirements under the Clean Air Act or the Secretary's rules become applicable to a major source with a remaining permit term of three (3) or more years. Such a reopening shall be completed not later than eighteen (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 has been extended pursuant to one of the following:

6.6.a.1.A. The permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to subsection 5.6 may extend beyond the original permit term until renewal; or

6.6.a.1.B. All the terms and conditions of the permit including any permit shield that may be granted pursuant to subsection 5.6 shall remain in effect until the renewal permit has been issued or denied.

6.6.a.2. Additional requirements (including excess emissions requirements) become applicable to an affected source under 45CSR33 and Title IV of the Clean Air Act or other rules of the West Virginia Department of Environmental Protection. Upon approval by U.S. EPA, excess emissions offset plans shall be incorporated into the permit.

6.6.a.3. The Secretary or U.S. EPA 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.

6.6.a.4. The Secretary or U.S. EPA determines that the permit must be revised or revoked and reissued to assure compliance with the applicable requirements.

6.6.b. 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. Such reopening shall be made as expeditiously as practicable.

6.6.c. Reopenings under subdivision 6.6.a shall not be initiated before a notice of such intent is provided to the source by the Secretary at least thirty (30) days in advance of the date that the permit ~~is to~~ will be reopened, except that the Secretary may provide a shorter time period in the case of an emergency. The notice shall include a statement of the reasons for the reopening of the permit. Until such time as a permit is reissued pursuant to the reopening, the source shall be entitled to the continued protection of any permit shield provided in the permit, unless the Secretary specifically suspends the shield upon a finding that such suspension is necessary to implement applicable requirements.

#### 6.7. Reopenings for cause resulting from U.S. EPA notice.

6.7.a. The Secretary shall, within ninety (90) days after receipt of a notification from U.S. EPA that cause exists to terminate, modify, or revoke and reissue a permit, forward to U.S. EPA a proposed determination of termination, modification, or revocation and reissuance, as is appropriate. The Secretary may request an extension of this ninety (90) day period for an additional ninety (90) days if the Secretary finds that a new or revised permit application is necessary or that the Secretary must require the permittee to submit additional information.

6.7.b. The Secretary shall have ninety (90) days from receipt of a U.S. EPA objection to resolve any objection that U.S. EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with U.S. EPA's objection. In accordance with the Clean Air Act and federal rules promulgated thereunder, U.S. EPA has authority to terminate, modify, or revoke and reissue a Title V operating permit after failure of the State and permit holder to resolve a U.S. EPA objection and upon proper notice to the permit holder.

6.8. Public participation. -- Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:

#### 6.8.a. Public notice.

##### 6.8.a.1. Scope:

6.8.a.1.A. Public notice shall be given that the following actions have occurred:

6.8.a.1.A.1. A draft permit has been prepared, and

6.8.a.1.A.2. A hearing has been scheduled pursuant to subparagraph 6.8.a.2.B.

6.8.a.1.B. Public notices may describe more than one (1) permit or permit part.

##### 6.8.a.2. Timing.

6.8.a.2.A. Public notice of the preparation of a draft permit shall allow at least thirty (30) days for public comment. Upon request of the permit applicant the public comment period may be extended for an additional thirty (30) days. Further extension of the comment period may be granted by the Secretary for good cause shown but in no case may the further extension exceed an additional thirty (30) days.

6.8.a.2.B. Public notice of a public hearing shall be given at least thirty (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 (2) notices may be combined.

6.8.a.3. Methods. -- Public notice shall be given by the following methods:

6.8.a.3.A. By mailing or emailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this subparagraph may waive his or her rights to receive notice for any classes and categories or permits):

6.8.a.3.A.1. The applicant;

6.8.a.3.A.2. Any other State or Federal agency which the Secretary knows has issued or is required to issue a permit for the same facility or activity under the Federal Resource Conservation and Recovery Act (RCRA) or other relevant statutes;

6.8.a.3.A.3. ~~Federal, State, and interstate agencies with jurisdiction over public health and the environment, the State Historic Preservation Unit of the Department of Culture and History when new site acquisition is involved, and~~ Other appropriate government authorities, including the Federal Land Manager when Federal Class I areas, as defined in 45CSR14, are potentially affected; and

6.8.a.3.A.4. Persons on a mailing list developed by:

~~6.8.a.3.A.4.(a). Including those who request in writing to be on the list;~~

~~6.8.a.3.A.4.(b). Soliciting persons for "area lists" from participants in past permit proceedings in that area; and~~

~~6.8.a.3.A.4.(c). Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters or environmental bulletins. (The Secretary may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Secretary may delete from the list the names of any person who fails to respond to such a request.)~~

~~6.8.a.3.A.5. Any unit of local government having jurisdiction over the area where the facility is proposed to be located, the Secretary using generally accepted methods that enable interested parties to subscribe to the mailing list. The Secretary may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Secretary may delete from the list the name of any person who fails to respond to such a request within a reasonable timeframe.~~

6.8.a.3.B. By the Secretary publishing the public notice as a Class I legal advertisement in a newspaper in of general circulation for the county in the area where the emission will occur.

6.8.a.3.C. 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.

6.8.a.4. Contents.

6.8.a.4.A. All public notices. -- All public notices issued under this rule shall contain the following minimum information:

6.8.a.4.A.1. Name and address of the Division of Air Quality;

6.8.a.4.A.2. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of general permits;

6.8.a.4.A.3. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit, when there is no application;

6.8.a.4.A.4. The emissions change associated with any significant permit

modification.

~~6.8.a.4.A.5.~~ Name, address, and telephone number or an email or website address of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, fact sheet, and the application;

~~6.8.a.4.A.56.~~ A brief description of the comment procedures required by subdivisions 6.8.b and 6.8.c and the time and place of any hearing that will be held, including 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; and

6.8.a.4.B. Public notices for hearings. -- In addition to the requirements of subparagraph 6.8.a.4.A, public notice of a hearing shall contain the following information:

6.8.a.4.B.1. Reference to the date of previous public notices relating to the permit;

6.8.a.4.B.2. Date, time, and place of the hearing; and

6.8.a.4.B.3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

~~6.8.a.4.C. In addition to the general public notice described in subparagraph 6.8.a.4.A, all persons identified in paragraph 6.8.a.3 shall be mailed a copy of the fact sheet, if any, and notification of where to inspect or how to receive a copy of the draft permit and application.~~

6.8.b. Public comments and requests for public hearings. -- During the public comment period provided under subdivision 6.8.a, any interested person may submit written comments on the draft permit and may request a public hearing, if no public hearing has already been scheduled. The Secretary shall grant such a request for a hearing if he or she concludes that a public hearing is appropriate after consideration of the criteria in paragraph 6.8.c.1. Any request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be responded to as provided in subdivision ~~6.8.e~~ 6.8.e.

6.8.c. Public hearings.

6.8.c.1. The Secretary shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The Secretary may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

6.8.c.2. 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 under paragraph 6.8.a.2 shall automatically be extended to ten (10) days after the close of any public hearings under subdivision 6.8.c.

6.8.c.3. A recording or written transcript of the hearing shall be made available to the public, upon request.

6.8.c.4. Any public hearing required under the provisions of subsection 6.8 shall be held in the general area or the county in which a facility is located.

6.8.d. Reopening of the public comment period.

6.8.d.1. If any data, information or arguments submitted during the public comment period raise substantial new questions concerning a permit, or if as a result of comments submitted by someone

other than the permit applicant, the Secretary determines to revise any condition of the permit that has been subject to initial public notice, the Secretary shall take one (1) or more of the following actions:

6.8.d.1.A. Prepare a new draft permit, appropriately modified, under section 5;

6.8.d.1.B. Prepare a revised fact sheet under subsection 6.9; or

6.8.d.1.C. Reopen or extend the comment period under subdivision 6.8.a. to give interested persons an opportunity to comment on the information or arguments submitted.

6.8.d.2. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice shall define the scope of the reopening.

6.8.e. Response to comments.

6.8.e.1. At the time that any final permit is issued, the Secretary shall issue a response to comments. This response shall:

6.8.e.1.A. Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

6.8.e.1.B. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

6.8.e.2. The response to comments shall be ~~delivered~~provided to any person who commented or any person who requests the same.

6.8.e.3. The Secretary shall keep a record of the commenters, the issues raised, and written comments received during the public participation process.

6.9. Fact sheet.

6.9.a. A fact sheet shall be prepared for every draft permit (including general permits) and for every facility or activity subject to this rule. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Secretary shall send this fact sheet to the applicant and, on request, to any other person and to the persons required under paragraph 6.8.a.3.

6.9.b. When a term or condition of the final permit differs from the draft permit the Secretary shall prepare a statement of basis that briefly describes each change from the changes in the draft permit and the reasons for the changes. The statement of basis shall be sent to the applicant, and to any other person upon request.

6.9.c. The fact sheet shall include, when applicable:

6.9.c.1. A brief description of the type of facility or activity which is the subject of the draft permit;

6.9.c.2. The type and quantity of emissions which are proposed to be or are being discharged;

6.9.c.3. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

6.9.c.4. Reasons why any requested variances or alternatives to required standards do or do not appear justified;



6.9.c.5. A description of the procedures for reaching a final decision on the draft permit including;

6.9.c.5.A. The beginning and ending dates of the comment period under subdivision 6.8.a and the address where comments will be received;

6.9.c.5.B. Procedures for requesting a hearing and the nature of that hearing; and

6.9.c.5.C. Any other procedures by which the public may participate in the final decision.

6.9.c.6. Name~~and~~, telephone number, and email of a person to contact for additional information;

6.9.c.7. Any calculations or other necessary explanation of the derivation of specific emissions limitations and conditions including a citation to the applicable emission regulations, control technology guideline, or performance standard provisions and reasons why they are applicable or an explanation of how any alternative emission limitations were developed; and

6.9.c.8. When appropriate, a sketch or detailed description of the location of the emission source(s) described in the application.

#### **§45-30-7. Permit Review by U.S. EPA and Affected States.**

##### **7.1. Transmission of information to U.S. EPA.**

7.1.a. The Secretary shall provide to the U.S. EPA a copy of each permit application (including any application for a significant or minor permit modification), each fact sheet, each proposed permit, and each final Title V operating permit. The applicant may be required by the Secretary to provide a copy of the permit application (including the compliance plan) directly to the U.S. EPA. Upon agreement with the U.S. EPA, the Secretary may submit to the U.S. EPA 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 U.S. EPA's national database management system.

7.1.b. If significant comment is received during the public participation process, the Secretary shall provide to U.S. EPA a written response to comments on the draft permit and an explanation of how those public comments and the response to comments document are available to the public.

7.1.c. Sequential review. If the public participation process for a draft permit concludes before the proposed permit is submitted to the Administrator, the fact sheet and the written response to comments, if significant comment was received during the public participation process under subsection 6.8, shall be submitted with the proposed permit along with other supporting materials required under subdivision 7.1.a, excepting the final permit. U.S. EPA's forty-five (45) day review period for the proposed permit will begin when said materials have been received.

7.1.d. Concurrent review. If the Secretary submits a proposed permit to U.S. EPA before the public participation process on the draft permit has been completed, the fact sheet shall be submitted with the proposed permit along with other supporting materials required under subdivision 7.1.a, excepting the final permit and the written response to comments.

7.1.d.1. If the Secretary receives significant comment on the draft permit during the public participation process under subsection 6.8, U.S. EPA will no longer consider the submitted permit as a permit proposed to be issued under the CAA.

7.1.d.2. If required by paragraph 7.1.d.1, the Secretary shall make revisions as needed to the permit and fact sheet to address such public comments and prepare a written response to comments according to subdivision 6.8.e. The Secretary shall submit the proposed permit and supporting material required under subdivision 7.1.a, excepting the final permit, to U.S. EPA after the public comment period has closed. U.S. EPA's review will begin after the proposed permit and supporting materials have been received.

7.1.e. The Secretary shall retain for five (5) years such records and submit to U.S. EPA such information as U.S. EPA may reasonably require to ascertain whether the state Title V operating permit program complies with the requirements of the Clean Air Act.

## 7.2. Review by affected states.

7.2.a. The Secretary shall give notice of each draft permit to any affected state on or before the time that the Secretary provides this notice to the public under subsection 6.8, except to the extent subdivision 6.5.a allows the timing of the notice to be different.

7.2.b. The Secretary, as part of the submittal of the proposed permit to U.S. EPA, (or as soon as possible after the submittal for minor permit modification procedures allowed under subdivision 6.5.a) shall notify U.S. EPA and any affected state in writing of any refusal by the Secretary to accept recommendations for the proposed permit that the affected state submitted during the public or affected state review period. The notice shall include the Secretary's reasons for not accepting any such recommendation. The Secretary is not required to accept recommendations that are not based on applicable requirements or the requirements of this rule.

## 7.3. U.S. EPA objection.

7.3.a. A permit shall not be issued by the Secretary if U.S. EPA objects in writing to the issuance of the permit within forty-five (45) days of the receipt of the proposed permit ~~and all necessary supporting information pursuant to §505 of the Clean Air Act.~~

~~7.3.b. For consideration by the Secretary as a~~ Any U.S. EPA objection under subdivision 7.3.a, the objection must contain a statement of U.S. EPA's reasons for objection and a description of the terms and conditions that U.S. EPA believes the permit must include to respond to the objections. U.S. EPA must provide the permit applicant a copy of the objection.

7.4. Public petitions to the U.S. EPA. -- If the U.S. EPA does not object in writing under subsection 7.3, any person may petition U.S. EPA within sixty (60) days after the expiration of U.S. EPA's forty-five (45)-day review period to make such objection. The petitioner shall provide a copy of such petition to the Secretary and to the applicant. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in subsection 6.8, 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. If the U.S. EPA objects to the permit as a result of a petition filed under this subsection, the Secretary shall not issue the permit until U.S. EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the forty-five (45)-day review period and prior to an U.S. EPA objection. ~~In accordance with the provisions of the Clean Air Act and federal rules promulgated thereunder, U.S. EPA may issue, deny, modify, terminate, or revoke a Title V permit upon failure of the Secretary to resolve a U.S. EPA objection to a proposed permit or if the Secretary issues a permit prior to the receipt of a U.S. EPA objection under subsections 7.3 and 7.4~~

7.4.a. If the Secretary issued the permit prior to receiving the U.S. EPA's objection, the U.S. EPA will modify, terminate, or revoke such permit consistent with the requirements of 40CFR §§ 70.7(g)(4) or (g)(5)(i) and (ii) except in unusual circumstances. The Secretary may thereafter only issue a permit that satisfies the U.S. EPA's objection. The permittee will not be in violation of the requirement to submit a

timely and complete application.

7.4.b. Each public petition shall meet all requirements provided in 40CFR § 70.12.

7.4.c. In reviewing public petitions, U.S. EPA will consider documents identified in 40CFR § 70.13.

7.4.d. Each public petition shall be submitted in accordance with 40CFR § 70.14.

7.5. Prohibition on default issuance. -- No Title V operating permit (including a permit renewal or modification) shall be issued by the Secretary until affected states and U.S. EPA have had an opportunity to review the proposed permit as required under this section.

#### **§45-30-8. Fees.**

~~8.1. After the effective date of this rule, all stationary sources which are or will be required to obtain an operating permit under this rule shall pay fees in accordance with the following:~~

~~8.1.a. Transition fees. -- Annual fees for all stationary sources shall be due on or before July 1, 1994, in the amount of fifteen (15) dollars per ton for actual emissions of all regulated pollutants (for fee calculation) discharged during the calendar year 1993.~~

~~8.1.b. Title V operating permit fees. -- On July 1, 2015, and on July 1 of each year thereafter annual fees for all stationary sources requiring Title V operating permits shall be twenty-eight (28) dollars per ton subject to an adjustment enumerated in subdivision 8.1.e, for actual emissions of all regulated pollutants (for fee calculation) discharged during the most recent calendar year or portion thereof.~~

~~8.1.c. On or before May 1, 1995 and each May 1 thereafter, the Secretary shall determine whether to adjust the fees required under subdivision 8.1.b to adequately reflect the reasonable cost of the Title V operating permit program. The Secretary may make such an adjustment in fees of up to \$2 per ton. The fees adjusted pursuant to this subdivision are not cumulative and shall remain adjusted for not more than one year.~~

~~8.1.d. No fee shall be required under this rule with respect to emissions from any affected unit under §404 of the Clean Air Act until the period beginning January 1, 2000. Thereafter, fees will be calculated in accordance with subdivision 8.1.b.~~

~~8.1.d.1. Facilities which contain only affected units under §404 of the Clean Air Act continue to be subject to fees under 45CSR22 until the period beginning January 1, 2000.~~

~~8.1.d.2. Facilities which contain affected units under §404 of the Clean Air Act and other affected units, under 45CSR33 and Title IV of the Clean Air Act, continue to be subject to fees under 45CSR22 for the entire facility until the period beginning January 1, 2000, and are subject to fees for such other affected units calculated in accordance with subdivisions 8.1.a and 8.1.b.~~

~~8.2. Fee cap. -- In determining fees under section 8, emissions of each regulated pollutant (for fee calculation) by a source in excess of four thousand tons per year (4,000 tpy) shall not be included in fee calculations.~~

~~8.3. Minimum fees. -- Any non-major source required to have a Title V operating permit under this rule shall pay fees in accordance with subsection 8.1, unless such calculated fees are less than the minimum fee of \$200.00 per year. In such cases where the calculated fee is less than the minimum fee, the source shall be subject to the minimum fee.~~

~~8.4. Consumer price index riser. -- Fees calculated for each fiscal year under the fee schedule in~~

~~subdivision 8.1.b shall be increased by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1993. For purposes of this clause:~~

~~—— 8.4.a. The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all urban consumers published by the Department of Labor, as of the close of the twelve (12) month period ending on August 31 of each calendar year, and~~

~~—— 8.4.b. The revision of the Consumer Price Index, if any, which is most consistent with the Consumer Price Index for 1993 shall be used.~~

~~—— 8.5. Fee merger. — Any source subject to annual operating certificate fees under 45CSR22 “Air Quality Management Fee Program” and subject to fees under this rule shall be required to pay only the higher calculated fee.~~

~~—— 8.6. Penalties and interest. — Any person who operates a stationary source in violation of section 8 shall be subject to a penalty equal to five (5) percent of the Title V operating permit fee for each calendar month or portion thereof in which the violation continues in addition to the annual fee required to be paid under section 8. Fees due for the fiscal year beginning July 1 shall not be subject to any penalties if paid on or before July 31 of that fiscal year. This penalty for delinquent payment is separate from and unrelated to any other penalties assessed by a court or collected by the Secretary pursuant to W.Va. Code §22-5-1 et seq., or any rules of the West Virginia Department of Environmental Protection.~~

~~—— 8.7. Certified emissions statement.~~

~~—— 8.7.a. Fees will be based upon a certified emissions statement from a responsible official. The certified emissions statement shall contain an accurate accounting of the actual emissions of all regulated air pollutants and all regulated pollutants (for fee calculation) from the source as defined in subsections 2.33 and 2.34 for the most recent calendar year.~~

~~—— 8.7.b. Each certified emissions statement shall be subject to review by the Secretary. The Secretary shall make or shall require the responsible official to make such adjustments or corrections to the certified emissions as the Secretary determines to be necessary.~~

~~—— 8.7.b.1. The source shall be liable for any increased fees resulting from any adjustments to the certified emissions statements made pursuant to subdivision 8.7.b.~~

~~—— 8.7.b.2. The Secretary shall not issue a Title V operating permit until such adjustments have been made and any such liability satisfied.~~

~~—— 8.7.b.3. The Secretary shall credit the source with any decreasing adjustments to the certified emissions statement made pursuant to subdivision 8.7.b.~~

~~—— 8.7.b.4. The Secretary shall periodically provide or publish information and criteria for the purpose of emission statement and permit application preparation. Such information may be provided by reference to available U.S. EPA or other documents.~~

~~—— 8.7.c. Fees and certified emissions statements shall be due on July 1, 1994, and on July 1 of each year thereafter.~~

~~—— 8.8. Beginning in 1995, the Secretary shall, on or before October 1 of each fiscal year, prepare an accounting of all Title V fees received in the previous fiscal year and the manner in which they were used to fund the Title V operating permit program.~~

~~—— 8.1. All stationary sources subject to this rule shall pay annual fees in accordance with subsection 8.1.~~

A source's Title V fee is calculated by adding the Consumer Price Index (CPI) adjusted base fee component (BF) under subdivision 8.1.a, the Consumer Price Index (CPI) adjusted complexity fee component (CF) under subdivision 8.1.a, and the emissions fee component (EF) under subdivision 8.1.b as follows:

$$\text{Title V Fee} = \text{BF} + \text{CF} + \text{EF}$$

8.1.a. Title V base fee (BF) and complexity fee (CF) components.

8.1.a.1. Permit Source Base Fee (PSBF). All sources required to obtain a Title V operating permit shall pay an annual base fee of \$15,000.

8.1.a.2. Deferred Source Base Fee (DSBF). All sources subject to this rule that are deferred from the obligation to obtain a Title V operating permit shall pay an annual base fee of \$0.

8.1.a.3. Complexity Fee (CF111). All sources subject to an applicable standard promulgated under CAA §111 and 45CSR16, 45CSR18 and 45CSR23 shall pay an annual complexity fee of \$1,000. The CF111 fee is independent of the number of standards to which the source is subject.

8.1.a.4. Complexity Fee (CF112). All sources subject to an applicable standard promulgated under CAA §112, except for §112(r) which is exempt, and 45CSR34 shall pay an annual complexity fee of \$1,000. The CF112 fee is independent of the number of standards to which the source is subject.

8.1.a.5. Base and complexity fees required by paragraphs 8.1.a.1 through 8.1.a.4 shall be adjusted annually by the consumer price index (CPI) specified in paragraph 8.1.a.6.

8.1.a.6. Consumer price index (CPI) riser. Effective July 1, 2024, the Title V base and complexity fees shall be increased by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the reference calendar year 2023. For this rule:

8.1.a.6.A. The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers (CPI-U) published by the U.S. Bureau of Labor Statistics, as of the close of the twelve (12) month period ending on August 31 of each calendar year.

8.1.a.6.B. The CPI-U area coverage is U.S. city average, the series title is all items, and the index base period is 1982-84 equals 100 or the revision of the CPI most consistent with this paragraph.

8.1.a.6.C. On or before June 1, 2024, and each June 1 thereafter, the Secretary shall determine the CPI riser for the coming fiscal year. The fees adjusted pursuant to paragraph 8.1.a.6 are not cumulative and shall remain adjusted for not more than one year.

8.1.a.6.D. The CPI riser shall be calculated using the formula specified in paragraph 8.1.a.7.

8.1.a.7. CPI Riser Calculation. The formula to determine the annual CPI Riser is:

$$\text{CPI riser} = ((\text{CPI current year} - \text{CPI reference year}) / (\text{CPI reference year})) + 1$$

8.1.b. Title V emissions fee component (EF). On July 1 each year, annual Title V emissions fees for all stationary sources subject to this rule shall be calculated by multiplying the dollars per ton (\$/ton) emissions fee factor (EFF) under paragraph 8.1.b.1 by the source's actual emissions (AE) of all regulated pollutants (for fee calculation) discharged during the most recent calendar year or portion thereof. The formula to determine the EF is:

$$\text{EF} = \text{EFF} \times \text{AE}$$

Where:

EF is the source's emissions fee component.

EFF (\$/ton) is the emission fee factor under paragraph 8.1.b.1.

AE (tons) is the source's actual emissions of all regulated pollutants (for fee calculation) discharged during the most recent calendar year or portion thereof.

8.1.b.1. On or before June 1, 2023, and each June 1 thereafter, the Secretary shall calculate the emissions fee factor (EFF) (\$/ton) in accordance with the following formula:

$$\text{EFF} = [\text{TVE} - \text{TVI} - (\text{PSBF} \times \text{TPS}) - (\text{DSBF} \times \text{TDS}) - (\text{CF111} \times \text{T111}) - (\text{CF112} \times \text{T112})] / \text{TAE}$$

Where:

EFF (\$/ton) is the emission fee factor for calculating emissions fees in subdivision 8.1.b.

TVE is the three (3) fiscal year average of expenses under Air Quality Fund 3336/9310.

TVI is the interest earned from Air Quality Fund 3336/9310 for the fiscal year.

PSBF is the source base fee under paragraph 8.1.a.1 adjusted by the CPI.

TPS is the total number of sources required to obtain a permit subject to paragraph 8.1.a.1.

DSBF is the deferred source base fee under paragraph 8.1.a.2 adjusted by the CPI.

TDS is the total number of deferred sources subject to paragraph 8.1.a.2.

CF111 is the complexity fee for sources subject to paragraph 8.1.a.3 adjusted by the CPI.

T111 is the total number of sources subject to paragraph 8.1.a.3.

CF112 is the complexity fee for sources subject to paragraph 8.1.a.4 adjusted by the CPI.

T112 is the total number of sources subject to paragraph 8.1.a.4.

TAE is the total amount of actual emissions (tons) of all regulated pollutants (for fee calculation) for all sources subject to this rule, as reported for the most recent calendar year.

8.1.b.2. The fiscal year is the period from July 1 through June 30. For the purpose of the calculation under paragraph 8.1.b.1:

8.1.b.2.A. The fiscal year shall be the last completed fiscal year and

8.1.b.2.B. The three (3) fiscal year average shall be the last three completed fiscal years.

8.2. Penalties and interest. Any person who operates a stationary source in violation of section 8 shall be subject to a penalty equal to five (5) percent of the fees required under section 8 for each calendar month or portion thereof in which the violation continues in addition to the annual fees required to be paid under section 8. Fees due for the fiscal year beginning July 1 shall not be subject to any penalties if paid on or before July 31 of that fiscal year. This penalty for delinquent payment is separate from and unrelated to any other penalties assessed by a court or collected by the Secretary pursuant to W.Va. Code §22-5-1 et seq., or any rules of the West Virginia Department of Environmental Protection.

### 8.3. Actual Emissions.

8.3.a. The emissions fee (EF) component will be based upon an accurate accounting of the source's actual emissions of all regulated pollutants (for fee calculation) from the most recent calendar year. For sources subject to paragraph 8.1.a.1, the actual emissions shall be submitted to the Secretary no later than March 31 of each year and shall account for emissions from the previous calendar year. For deferred sources subject to paragraph 8.1.a.2, the actual emissions shall be submitted to the Secretary no later than May 1 of each year and shall account for emissions from the previous calendar year.

8.3.b. Emissions submitted by a source are subject to review by the Secretary. The Secretary shall make or shall require the source to make such adjustments or corrections to the emissions as the Secretary deems necessary.

8.3.b.1. The source shall be liable for any increased fees resulting from any adjustments to emissions made pursuant to subdivision 8.3.b.

8.3.b.2. The Secretary shall credit the source with any decreasing adjustments to the emissions made pursuant to subdivision 8.3.b.

8.3.c. Fees are due by July 31 of each year.

8.4. On or before October 1, the Secretary shall prepare an accounting of all Title V fees received in the previous fiscal year and shall include how the fees were used to fund the Title V operating permit program.

### **§45-30-9. ~~Transition plan.~~ [Reserved]**

~~— 9.1. The Secretary shall assign for review and processing each application for operating permit and shall set a timetable for the issuance of each permit in accordance with the following criteria:~~

~~—— 9.1.a. Date of receipt of application;~~

~~—— 9.1.b. Relative complexity of the application;~~

~~—— 9.1.c. Anticipated schedule for federal and state enactment of new applicable requirements which are anticipated to be incorporated into the permit;~~

~~—— 9.1.d. Type and amounts of air pollutants that will be discharged;~~

~~—— 9.1.e. Availability and particular training of reviewing staff; and~~

~~—— 9.1.f. Attainment status of area in which the stationary source is located or other geographical factors.~~

~~— 9.2. Notwithstanding other provisions of section 9, the Secretary may re-prioritize or reclassify any permit application based on changes in regulatory requirements, area attainment status, or other relevant factors.~~

~~— 9.3. In establishing and periodically revising the timetable required in subsection 9.1, the Secretary shall assure that final action is taken on at least one third of all Title V permit applications annually over a period not to exceed three (3) years from the effective date of the operating permit program.~~

### **§45-30-10. Enforcement.**

10.1. General. -- The provisions of this rule may be enforced by all of the applicable provisions of W.Va. Code §22-5-1, et seq.

10.2. Violations. -- Civil penalties shall be recoverable for the violation of any applicable requirement, permit condition, fee or filing requirement, duty to allow or carry out inspections, entry or monitoring activity, requirement for submission of reports, rule of the West Virginia Department of Environmental Protection or order of the Secretary. Such violations shall constitute serious violations for purposes of civil enforcement as contained in W.Va. Code §22-5-6.

10.3. Federal enforcement. -- For purposes of federal enforcement of any Title V operating permit or provision established under this rule, any reference to the Secretary shall also mean the Administrator of the U.S. EPA.

10.4. Tampering prohibited. -- Pursuant to W.Va. Code §22-5-6, criminal penalties shall be recoverable against any person who knowingly renders inaccurate any required emission or process monitoring device or method.

#### **§45-30-11. Permit Suspension, Modification, Revocation and Reissuance.**

The Secretary may suspend, modify, or revoke and reissue a Title V operating permit in accordance with the provisions contained in W.Va. Code §22-5-5.

#### **§45-30-12. Authority of the Secretary to Establish Applicable Requirements.**

12.1. After the effective date of the Title V operating permit program, the Secretary shall determine and apply case-by-case MACT standards to each category contained in the "Initial List of Categories of Sources Under 112(c)(1) of the Clean Air Act Amendments of 1990," 57 Fed. Reg. 31576 (July 16, 1992) for each source category or subcategory for which U.S. EPA fails to timely promulgate a standard in accordance with the requirements of §112(e) of the Clean Air Act.

12.2. [ Reserved.]

12.3. After the effective date of the operating permit program, the Secretary shall determine and apply case-by-case MACT standards to construction or reconstruction of any major source of hazardous air pollutants where no applicable emissions limitations have been adopted by the Secretary. Such MACT standards must be equivalent to any applicable standard (if any) promulgated for such sources by U.S. EPA.

12.4. In determining case-by-case MACT standards, the Secretary shall grant reasonable compliance schedules for existing sources, as provided under §112(e) of the Clean Air Act, and shall not require application for MACT under paragraph 4.1.a.54 where a source has met the early reduction requirement of §112(i)(5) of the Clean Air Act.

12.5. The Secretary may accept delegation of authority from U.S. EPA to administer permits issued by U.S. EPA under the provisions of 45CSR33 and Title IV of the Clean Air Act.

12.6. The Secretary may accept delegation of authority to administer permits issued by U.S. EPA under the early reduction program for hazardous air pollutants of §112(i)(5) of the Clean Air Act. Such authority shall include the ability to collect emission-based fees under section 8.

12.7. The Secretary may incorporate any provision into a permit which has been proposed by or agreed to by a permit applicant and which does not conflict with any applicable requirement. All such provisions shall be enforceable after issuance of a final permit.

#### **§45-30-13. Severability.**



13.1. The provisions of this rule are severable and if any provision or part thereof shall be held invalid, unconstitutional, or inapplicable to any person or circumstance, such invalidity, unconstitutionality, or inapplicability shall not affect or impair any other remaining provisions, sections, or parts of this rule or their application to any persons and circumstances.

**§45-30-14. Conflict with Other Rules.**

14.1. If a source is required to obtain an operating permit pursuant to this rule and is also required to obtain an operating permit under any other rule of the Secretary (not including preconstruction permits), then the provisions of this rule shall supersede the provisions of such other rule of the Secretary which requires an operating permit.

TABLE 45.30A

## HAZARDOUS AIR POLLUTANTS

CAS	
Number	Chemical Name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Aerolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl) phthalate (DEHP)
542881	Bis(chloromethyl) ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
133062	Captan
63252	Carbaryl
75150	Carbon disulfide
56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate

106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidine
111444	Dichloroethyl ether Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline(N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene
119937	3,3-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropene)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene 1,6-diisocyanate
680319	Hexamethyl phosphoramidate
110543	Hexane
302012	Hydrazine
7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform(1,1,1-Trichloroethane)

60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4 Methylene bis (2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4' Methylene dianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4 Nitrobiphenyl
100027	4 Nitrophenol
79469	2 Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloro-nitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol
106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3 Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2 Dichloropropane)
75569	Propylene oxide
75558	1,2 Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin

~~|         |  |
|---------|--|
| 540841  | 2,2,4-Trimethylpentane                         |
| 108054  | Vinyl acetate                                  |
| 593602  | Vinyl bromide                                  |
| 75014   | Vinyl chloride                                 |
| 75354   | Vinylidene chloride (1,1-Dichloroethylene)     |
| 1330207 | Xylenes (isomers and mixture)                  |
| 95476   | o-Xylenes                                      |
| 108383  | m-Xylenes                                      |
| 106423  | p-Xylenes                                      |
| 0       | Antimony Compounds                             |
| 0       | Arsenic Compounds (inorganic including arsine) |
| 0       | Beryllium Compounds                            |
| 0       | Cadmium Compounds                              |
| 0       | Chromium Compounds                             |
| 0       | Cobalt Compounds                               |
| 0       | Coke Oven Emissions                            |
| 0       | Cyanide Compounds <sup>1</sup>                 |
| 0       | Glycol ethers <sup>2</sup>                     |
| 0       | Lead Compounds                                 |
| 0       | Manganese Compounds                            |
| 0       | Mercury Compounds                              |
| 0       | Fine mineral fibers <sup>3</sup>               |
| 0       | Nickel Compounds                               |
| 0       | Polycyclic Organic Matter <sup>4</sup>         |
| 0       | Radionuclides (including radon) <sup>5</sup>   |
| 0       | Selenium Compounds                             |~~

~~NOTE: For all listings above which contain the word “compounds” and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemicals (i.e., antimony, arsenic, etc.) as part of that chemical’s infrastructure.~~

~~<sup>1</sup>X’CN where X = H’ or any other group where a formal dissociation may occur. For example KCN or Ca(CN)<sub>2</sub>~~

~~<sup>2</sup>Includes mono and di ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-(OCH<sub>2</sub>CH<sub>2</sub>)<sub>n</sub>-OR’.~~

~~Where:~~

~~n = 1, 2, or 3~~

~~R = alkyl C7 or less; or~~

~~R = phenyl or alkyl substituted phenyl;~~

~~R’ = H or alkyl C7 or less; or~~

~~OR’ constituting of carboxylic acid ester, sulfate, phosphate, nitrate, or sulfonate.~~

~~The substance ethylene glycol monobutyl ether (EGBE, 2-Butoxyethanol) (CAS Number 111-76-2) is deleted from the list of hazardous air pollutants established by 42 U.S.C. 7412(b)(1).~~

~~<sup>3</sup>Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.~~

—<sup>4</sup>~~Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.~~

—<sup>5</sup>~~A type of atom which spontaneously undergoes radioactive decay.~~

TABLE 45.30B

## CLASS I AND CLASS II SUBSTANCES

Class I Substances	Class II Substances
<p>Group I</p> <p><del>chlorofluorocarbon 11 (CFC 11)</del></p> <p><del>chlorofluorocarbon 12 (CFC 12)</del></p> <p><del>chlorofluorocarbon 113 (CFC 113)</del></p> <p><del>chlorofluorocarbon 114 (CFC 114)</del></p> <p><del>chlorofluorocarbon 115 (CFC 115)</del></p> <p>Group II</p> <p><del>halon 1211</del></p> <p><del>halon 1301</del></p> <p><del>halon 2402</del></p> <p>Group III</p> <p><del>chlorofluorocarbon 13 (CFC 13)</del></p> <p><del>chlorofluorocarbon 111 (CFC 111)</del></p> <p><del>chlorofluorocarbon 112 (CFC 112)</del></p> <p><del>chlorofluorocarbon 211 (CFC 211)</del></p> <p><del>chlorofluorocarbon 212 (CFC 212)</del></p> <p><del>chlorofluorocarbon 213 (CFC 213)</del></p> <p><del>chlorofluorocarbon 214 (CFC 214)</del></p> <p><del>chlorofluorocarbon 215 (CFC 215)</del></p> <p><del>chlorofluorocarbon 216 (CFC 216)</del></p> <p><del>chlorofluorocarbon 217 (CFC 217)</del></p> <p>Group IV</p> <p>carbon tetrachloride</p> <p>Group V</p> <p>methyl chloroform</p> <p>— This list also includes the isomers of the substances listed above, other than 1,1,2-trichloroethane (an isomer of methyl chloroform).</p>	<p><del>hydrochlorofluorocarbon 21 (HCFC 21)</del></p> <p><del>hydrochlorofluorocarbon 22 (HCFC 22)</del></p> <p><del>hydrochlorofluorocarbon 31 (HCFC 31)</del></p> <p><del>hydrochlorofluorocarbon 121 (HCFC 121)</del></p> <p><del>hydrochlorofluorocarbon 122 (HCFC 122)</del></p> <p><del>hydrochlorofluorocarbon 123 (HCFC 123)</del></p> <p><del>hydrochlorofluorocarbon 124 (HCFC 124)</del></p> <p><del>hydrochlorofluorocarbon 131 (HCFC 131)</del></p> <p><del>hydrochlorofluorocarbon 132 (HCFC 132)</del></p> <p><del>hydrochlorofluorocarbon 133 (HCFC 133)</del></p> <p><del>hydrochlorofluorocarbon 141 (HCFC 141)</del></p> <p><del>hydrochlorofluorocarbon 142 (HCFC 142)</del></p> <p><del>hydrochlorofluorocarbon 221 (HCFC 221)</del></p> <p><del>hydrochlorofluorocarbon 222 (HCFC 222)</del></p> <p><del>hydrochlorofluorocarbon 223 (HCFC 223)</del></p> <p><del>hydrochlorofluorocarbon 224 (HCFC 224)</del></p> <p><del>hydrochlorofluorocarbon 225 (HCFC 225)</del></p> <p><del>hydrochlorofluorocarbon 226 (HCFC 226)</del></p> <p><del>hydrochlorofluorocarbon 231 (HCFC 231)</del></p> <p><del>hydrochlorofluorocarbon 232 (HCFC 232)</del></p> <p><del>hydrochlorofluorocarbon 233 (HCFC 233)</del></p> <p><del>hydrochlorofluorocarbon 234 (HCFC 234)</del></p> <p><del>hydrochlorofluorocarbon 235 (HCFC 235)</del></p> <p><del>hydrochlorofluorocarbon 241 (HCFC 241)</del></p> <p><del>hydrochlorofluorocarbon 242 (HCFC 242)</del></p> <p><del>hydrochlorofluorocarbon 243 (HCFC 243)</del></p> <p><del>hydrochlorofluorocarbon 244 (HCFC 244)</del></p> <p><del>hydrochlorofluorocarbon 251 (HCFC 251)</del></p> <p><del>hydrochlorofluorocarbon 252 (HCFC 252)</del></p> <p><del>hydrochlorofluorocarbon 253 (HCFC 253)</del></p> <p><del>hydrochlorofluorocarbon 261 (HCFC 261)</del></p> <p><del>hydrochlorofluorocarbon 262 (HCFC 262)</del></p> <p><del>hydrochlorofluorocarbon 271 (HCFC 271)</del></p> <p>— This list also includes the isomers of the substances listed above.</p>

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible

methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Particulate matter, Volatile organic compounds.

Dated: January 21, 2020.

**James Gulliford,**

*Regional Administrator, Region 7.*

For the reasons stated in the preamble, the EPA is amending 40 CFR part 52 as set forth below:

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

- 1. The authority citation for part 52 continues to read as follows:

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

#### Subpart AA—Missouri

- 2. In § 52.1320, the table in paragraph (c) is amended by revising the entry “10–6.330” to read as follows:

#### § 52.1320 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

#### EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
*	*	*	*	*
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
10–6.330	Restiction of Emissions From Batch-type Charcoal Kilns.	3/30/2019	2/5/2020, [insert <b>Federal Register</b> citation].	
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[FR Doc. 2020–01300 Filed 2–4–20; 8:45 am]

**BILLING CODE 6560–50–P**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 70

[EPA–HQ–OAR–2016–0194; FRL–10004–56–OAR]

**RIN 2060–AS61**

#### Revisions to the Petition Provisions of the Title V Permitting Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is revising its regulations to streamline and clarify

processes related to submission and review of title V petitions. This final rule implements changes in three key areas: Method of petition submittal to the agency, required content and format of petitions, and administrative record requirements for permits. In the first area, the EPA is establishing an electronic submittal system as the preferred method of submittal, with specified email and physical addresses as alternate routes to submit petitions. By doing so, the agency anticipates (and has already seen) improved tracking of petitions. To help petitioners in preparing their petitions, as well as the EPA in reviewing and responding to petitions, the EPA is finalizing its proposal to incorporate certain content and format requirements into the regulations, codifying practices that the EPA has described in prior orders

responding to petitions and the preamble to the proposal for this rule. Finally, the EPA is requiring permitting authorities to prepare a written response to comments (RTC) document if significant comments are received during the public participation process on a draft permit, and requiring that the RTC, when applicable, be sent to the agency with the proposed permit and necessary documents including the statement of basis for its 45-day review. This change is anticipated to provide more complete permit records during the EPA’s 45-day review period for proposed permits, the 60-day petition window, and the EPA’s review of any petition submitted, and thus reduce the likelihood that the Administrator will grant a petition because of an incomplete permit record.



**DATES:** The effective date of this final rule is April 6, 2020.

**ADDRESSES:** The EPA has established a docket for this action, identified by Docket ID No. EPA-HQ-OAR-2016-0194. All documents in the docket are listed in the <http://www.regulations.gov> website. Although listed in the index, some information might not be publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically in <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For further general information on this action, contact Ms. Carrie Wheeler, Office of Air Quality Planning and Standards (OAQPS), Air Quality Policy Division, U.S. EPA, Mail Code C504-03, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; by telephone at (919) 541-9771; or by email at [wheeler.carrie@epa.gov](mailto:wheeler.carrie@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. General Information**

###### *A. Does this action apply to me?*

Entities potentially affected directly by the revisions to the EPA's regulations include anyone who may submit a title V petition on a proposed title V permit prepared by a state, local or tribal title V permitting authority pursuant to its EPA-approved title V permitting program. Entities also potentially affected by this rule include state, local and tribal permitting authorities responsible for implementing the title V permitting program. Entities that may be interested in, though not directly affected by, this rule include owners and operators of major stationary sources or other sources that are subject to the title V permitting requirements, as well as the general public who would have an interest in knowing about title V permitting actions and associated public hearings but do not intend to submit a petition.

###### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at the regulations section of our Title V Operating Permits website, under Regulatory Actions, at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

###### *C. How is this document organized?*

The information presented in this document is organized as follows:

- I. General Information
  - A. Does this action apply to me?
  - B. Where can I get a copy of this document and other related information?
  - C. How is this document organized?
- II. Background for Final Rulemaking
- III. Summary of the Final Rule Requirements
  - A. Petition Submission
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    - 2. Required Copies of the Petition to the Permitting Authority and Applicant
  - B. Required Petition Content and Format
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- IV. Responses to Significant Comments on the Proposed Rule
  - A. Electronic Submittal System for Petitions
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    - 3. EPA Response
  - D. Documents That May Be Considered in Reviewing Petitions
    - 1. Summary of Proposal
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- V. Implementation
- VI. Determination of Nationwide Scope and Effect
- VII. Environmental Justice Considerations
- VIII. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
  - C. Paperwork Reduction Act (PRA)
  - D. Regulatory Flexibility Act (RFA)
  - E. Unfunded Mandates Reform Act (UMRA)
  - F. Executive Order 13132: Federalism
  - G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  - I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - J. National Technology Transfer and Advancement Act

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

L. Congressional Review Act (CRA)  
M. Determination Under CAA Section 307(d)

##### **IX. Statutory Authority**

##### **II. Background for Final Rulemaking**

Title V of the CAA establishes an operating permit program. Section 505 of the CAA requires permitting authorities to submit each proposed title V permit to the EPA Administrator ("Administrator") for review for a 45-day period before issuing the permit as final. The Administrator shall object to issuance of the permit if the Administrator determines that the permit contains provisions that are not in compliance with the applicable requirements under the CAA. If the Administrator does not object to the permit during the 45-day EPA review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action (hereinafter "title V petition" or "petition").<sup>1</sup> As the EPA explained in proposing the initial title V regulations, the title V petition opportunity serves an important purpose because title V permits are frequently complex documents, and given the brevity of the agency review period there may be occasions when the EPA does not recognize during that review period that certain permit provisions are not in compliance with applicable requirements of the Act. 56 FR 21751 (May 10, 1991). Following more than 20 years of experience with title V petitions, and taking into account feedback from various stakeholders, the agency proposed changes to 40 CFR part 70 that were intended to provide clarity and transparency to the petition process and to improve the efficiency of that process. 81 FR 57822 (August 24, 2016).

In that proposed rule, the EPA discussed five key areas, each of which was anticipated to increase stakeholder access to and understanding of the petition process and aid the EPA's review of petitions. First, the EPA proposed regulatory provisions that provide direction as to how petitions should be submitted to the agency. Second, the EPA proposed regulatory provisions that describe the expected format and minimum required content for title V petitions. Third, the proposal required that permitting authorities respond in writing to any significant

<sup>1</sup> The procedural requirements for title V petitions are addressed in section 505(b)(2) of the CAA and in 40 CFR 70.8(d) of the current implementing regulations.

comments received during the public comment period for draft title V permits, and to provide that response and statement of basis with the proposed title V permit to the EPA for the agency's 45-day review period.<sup>2</sup> Fourth, guidance was provided in the form of "recommended practices" for various stakeholders to help ensure title V permits have complete administrative records and comport with the requirements of the Clean Air Act (CAA or Act). Fifth, to increase familiarity with the post-petition process, the preamble presented information on the agency's interpretation of certain title V provisions of the CAA and its implementing regulations regarding the steps following an EPA objection in response to a title V petition, as previously discussed in specific title V orders. The agency did not propose to take any action in connection with the fourth and the fifth areas. Rather, the discussion on those topics was provided purely for purposes of increasing public awareness.<sup>3</sup>

This final rulemaking notice does not repeat all the discussion from the proposal, but interested readers are referred to the preamble of the proposed rule for additional background and for the discussion on the fourth and fifth areas, which are not discussed further in this notice.

### III. Summary of the Final Rule Requirements

This section provides a summary of the requirements of the final rule. Further discussion of these requirements, including implementation and summaries of our responses to significant comments received on the proposed rule, are provided in subsequent sections. In this final action, three of the key areas mentioned in Section II of this document are addressed: Requirements related to the submission of petitions; required petition content and format; and administrative record requirements for proposed permits submitted to EPA for review. First, the EPA is finalizing a regulatory provision requiring that

petitioners use one of three identified methods for petition submittal, with a preference for petitions to enter the agency through the electronic submittal system. Second, petition content and format requirements are being changed to describe the information expected by, and necessary for, the agency to effectively review a claim of permit or permit process deficiency. Third, the EPA is finalizing a requirement for permitting authorities to respond in writing to significant comments (when such comments are received during the public comment period). The permitting authority must provide certain documents including the statement of basis and (when applicable) the written response to comment document along with the proposed permit for the EPA's 45-day review period. To provide additional clarity and transparency around the petition process, the agency is also finalizing the proposed regulatory text describing the documents that may be considered when reviewing title V petitions. Finally, as described below in this preamble the EPA intends, where practicable, to make key dates publicly available on the EPA Regional websites (*i.e.*, the end of the agency's 45-day review period and the end of the 60-day period in which a petition can be submitted).

#### A. Petition Submission

##### 1. Petition Submission to EPA

As proposed, the EPA is adding a new provision to part 70 that requires petitions to be submitted using one of three methods listed in the new § 70.14, using specific information provided on the title V petitions website. Petitioners are encouraged to submit title V petitions through the electronic submittal system, the agency's preferred method. The EPA has developed an electronic submittal system for title V petitions through the Central Data Exchange (CDX), and information on how to access and use the system is available at the title V petitions website: <http://www.epa.gov/title-v-operating-permits/title-v-petitions>. While the current electronic submittal system was designed using CDX, the EPA recognizes that adjustments to the system or an entirely different electronic submittal system may be needed in the future. Therefore, the title V petitions website will provide access to the designated electronic submittal system in use at any given time, which will remain the primary and preferred method for receiving title V petitions. The electronic submittal system allows for a direct route to the appropriate agency

staff, and it also provides immediate confirmation that the EPA has received the petition and any attachments.

There are two other acceptable methods for submitting a title V petition listed in 40 CFR 70.14. First, the petition may be submitted to the agency through the email address designated for that purpose on the title V petitions website. The current email address for this purpose is: [titlevpetitions@epa.gov](mailto:titlevpetitions@epa.gov). This address was originally established as an alternative method for use in instances when the electronic submittal system is not available, and the agency anticipates that this type of electronic submission would primarily be used if a petitioner experiences technical difficulty when trying to submit a petition through the electronic submittal system. Second, the new § 70.14 provides for submission of a petition in paper to a designated physical address. The EPA is providing this alternative because it recognizes that there may be situations in which electronic submission is not feasible. The agency anticipates that this alternative would mainly be used by petitioners without access to the internet at the time of petition submittal. The current address designated for submission of paper petitions (by mail or by courier) is: U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, Operating Permits Group Leader, 109 T.W. Alexander Dr. (C504–05), Research Triangle Park, NC 27711. Additional information on these alternative methods for submittal is available at the title V petitions website.

As described in our responses to comments in Section IV of this document, the EPA is making this change to improve the tracking of petitions and to reduce confusion for petitioners. The agency strives to make the submittal system easy to use and to provide to petitioners automatic receipts that give assurance a petition was received within the required time frame. Since the public comment period for the proposal closed, all title V petitions entering the agency that the EPA is aware of have been electronically received through the CDX system or [titlevpetitions@epa.gov](mailto:titlevpetitions@epa.gov). Some duplicate paper copies have also been sent to the new physical address. The regulatory text at § 70.14 finalized in this action explains that once a petition and any attachments have been successfully submitted using one method (*e.g.*, once an automatic receipt is received through the CDX system), duplicate copies should not be submitted via another method. Duplicate submissions are unnecessary, and if petitioners only submit a petition using one method, it

<sup>2</sup> The term "statement of basis" is not defined in the CAA or in 40 CFR part 70; however, it is often used to refer to the requirement in 40 CFR 70.7(a)(5) for a permitting authority to provide a statement that sets forth the legal and factual basis for the permit conditions. Permitting authorities may call it "statement of basis" or may choose alternate language to identify this document.

<sup>3</sup> Additionally, in the interest of transparency and clarity, the preamble included a discussion of certain prior interpretations and applications of the title V provisions. The agency did not propose to change or solicit comment on these prior interpretations or applications, but rather, it repeated the information as a convenience for the public.

will expedite the administrative process and improve the EPA's efficiency in reviewing petitions. Consistent with the discussion in the proposal, the regulatory revisions finalized in this action also provide that the agency is not obligated to consider petitions submitted through any means other than the three identified in this rule.

## 2. Required Copies of the Petition to the Permitting Authority and Applicant

The EPA is also finalizing a revision to the part 70 regulations to add language to 40 CFR 70.8(d) that requires the petitioner to provide copies of its petition to the permitting authority and the permit applicant. Section 505(b)(2) of the Act already contains this requirement, but it was not previously specified in the part 70 regulations. This revision now fills that gap in the regulations.

### *B. Required Petition Content and Format*

#### 1. Required Petition Content

As proposed, the EPA is revising part 70 to require standard content that must be included in a title V petition, laying out the agency's expectations with more specificity to assist petitioners in understanding how to make their petitions complete and to enhance the EPA's ability to review and respond to them promptly. Under the revisions finalized in this action, a new section of the title V part 70 regulations, 40 CFR 70.12, adds the following list of required elements:

- Identification of the proposed permit on which the petition is based.<sup>4</sup> A petition would be required to provide the permit number, version number, or any other information by which the permit can be readily identified. In addition, the petition must specify whether the relevant permit action is an initial issuance, renewal, or modification/revision, including minor modifications/revisions.
- Identification of Petition Claims. Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with the applicable requirements under the Act or requirements under part 70. Any argument or claim the petitioner wishes the EPA to consider in support of each issue raised must be contained within

the body of the petition or in an attachment, provided that the body of the petition provides a specific citation to the referenced information in the attachment and an explanation of how that information supports the claim. In determining whether to object, the Administrator will not consider information incorporated into the petition by reference. The EPA is finalizing this requirement because merely incorporating by reference an argument or claim presented elsewhere (for example, in comments offered during the public comment period on a draft permit, or, as another example, in claims raised in a different title V petition) is generally not sufficient to demonstrate that the Administrator must object to a particular title V permit. Yet, without such a requirement, petitioners might be tempted to rely on such incorporation rather than fully presenting the claim to the agency in the petition with an adequate demonstration of why an objection is appropriate to the particular permit at issue. The full presentation of claims in the petition should help expedite the administrative process and improve the EPA's efficiency in reviewing petitions. However, petitions may and should still provide citations to support each claim presented in the petition (e.g., citations to caselaw, statutory and regulatory provisions, or portions of the permit record), along with an explanation of how the cited material supports the claim, as needed. For each claim raised, the new § 70.12 provides that the petition must identify the following:

- The specific grounds for an objection, citing to a specific permit term or condition where applicable.
- The applicable requirement under the CAA or requirement under part 70 that is not met. The term "applicable requirement" of the CAA for title V purposes is defined in 40 CFR 70.2. Note that under that definition, the term "applicable requirement" includes only requirements under the Clean Air Act, and does not include other requirements (e.g., under the Endangered Species Act or the Clean Water Act) to which a source may be subject.
- An explanation of how the term or condition in the proposed permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement under the CAA or requirement under part 70.
- If the petition claims that the permitting authority did not provide for the public participation procedures required under 40 CFR 70.7(h), the petition must identify specifically the

required public participation procedure that was not provided.

- Identification of where the issue in the claim was raised with reasonable specificity during the public comment period provided for in 40 CFR 70.7(h), citing to any relevant page numbers in the public comment as submitted and attaching the submitted public comment to the petition. If the grounds for the objection were not raised during the public comment period, the petitioner must demonstrate that it was impracticable to raise such objections within the period unless they arose after such a period, as required by section 505(b)(2) of the Act and 40 CFR 70.8(d).

- Unless the exception under CAA section 505(b)(2) and 40 CFR 70.8(d) discussed in the immediately preceding bullet applies, the petition must identify where the permitting authority responded to the public comment, including the specific page number(s) in the document where the response appears, and explain how the permitting authority's response to the comment is inadequate to address the claimed deficiency. If the written RTC does not address the public comment at all or if there is no RTC, the petition should state that.

In addition to including all specified content, it is important that the information provided in the petition or any analysis completed by the petitioner also be accurate. However, including all the required content would not necessarily result in the Administrator granting an objection on any particular claim raised in a petition. For example, a petitioner could include all the required information but not demonstrate noncompliance, or the petition might point to a specific permit term as not being adequate to comply with a standard established under the CAA, but the EPA may determine that the standard does not apply to the source.

CAA Section 505(b)(2) and the implementing regulations at 40 CFR 70.8(d) provide for a 60-day window in which to file a title V petition, which runs from the expiration of the EPA's 45-day review period. A petition received after the 60-day petition deadline is not timely; therefore, it is important that the agency have sufficient information to determine if a petition was timely filed. Timeliness may be shown by the electronic receipt date generated upon submittal of the petition through the agency's electronic submittal system, the date and time the emailed petition was received, or the postmark date generated for a paper copy mailed to the agency's designated

<sup>4</sup> The proposed permit is the version of the permit the permitting authority forwards to the EPA for the agency's 45-day review under CAA section 505(b)(1). A proposed permit may be for any of the following permit actions: Initial permit, renewal permit, or permit modification/revision.

physical address.<sup>5</sup> It is helpful, but not required, for the petition to provide key dates, such as the end of the public comment period provided under 40 CFR 70.7(h) (or parallel regulations in an EPA-approved state, local or tribal title V permitting program), or the conclusion of the EPA's 45-day review period for the proposed permit.

The use of incorporation by reference of other documents, in whole or in part, into petitions has created inefficiencies in the EPA's review of such petitions. As noted earlier in this section, under "identification of petition issues" in the new mandatory content requirements, the EPA requires any claim or argument a petitioner wishes the EPA to consider in support of an issue raised as a petition claim to be included in the body of a petition, or if reference is made to an attachment, the body of the petition must provide a specific citation to the referenced information and an explanation of how the referenced information supports the claim. Merely incorporating a claim or argument into a petition by reference from another document is inconsistent with the petitioner's demonstration obligations under the statute and would extend the petition review time as the agency spends time searching for and then attempting to decipher the petitioner's intended claim. In the EPA's experience, where claims have been incorporated by reference it is typically not clear that the specific grounds for objection have been adequately presented by the petitioner, which could lead to the EPA denying because the petition has failed to meet the demonstration burden. Relatedly, petitioners have sometimes used incorporation by reference to include comments from a comment letter in a petition, but a comment letter alone would typically not address a state's response to the comment. *See, e.g. In the Matter of Consolidated Environmental Management, Inc.—Nucor Steel Louisiana*, Order on Petition Numbers VI–2010–05, VI–2011–06 and VI–2012–07 (January 30, 2014) at 16 (noting that the "mere incorporation by reference . . . without any attempt to explain how these

comments relate to an argument in the petition and without confronting [the State's] reasoning supporting the final permit is not sufficient to satisfy the petitioner's demonstration burden"). In practice, the EPA has found that the incorporation of public comments or other documents by reference into a petition can lead to confusion concerning the rationale for the petitioner's arguments, as it is frequently unclear which part of the comment or document is incorporated, how it relates to the particular argument in the petition, and the precise intent of the incorporation. In addition, the incorporation of comments or other documents by reference increases the agency's review time, as the EPA would have to review more than one document in an attempt to fully determine the argument that a petitioner is making.

The EPA intends this change to help ensure that petitions received clearly state the main points in the petition, and if petitioners want to support their claim with attachment of additional materials, that they cite to the information in the attachment with an explanation as to why they are citing to it. The full presentation of claims in the petition is anticipated to help expedite the administrative process and improve the EPA's efficiency in reviewing petitions. However, petitions may and should still provide citations to support each claim presented in the petition (e.g., citations to caselaw, statutory and regulatory provisions, or portions of the permit record), along with an explanation of how the cited material supports the claim, as needed. To illustrate, the EPA provided an example claim in the proposal, and this still serves as a concise and effective presentation of a hypothetical claim that includes all pieces of required content, including citations to two exhibits. *See* 81 FR 57836 (August 24, 2016).

For further transparency and clarity, the EPA reiterates from the proposal that some types of information are not necessary to include when preparing an effective petition. In doing so, the EPA hopes to ease the effort associated with preparing a petition while promoting succinctness. For example, while a petitioner needs to cite to the legal authority supporting its specific claim, a petition does not need to include background or history on general aspects of the CAA. If a petitioner wishes to include additional information for an alternate purpose unrelated to the EPA's review of the specific petition claim, the EPA recommends appending this information to the petition as a separate

document and identifying the purpose for which it is provided.

As described in our responses to comments in Section IV of this document, commenters generally supported the regulatory text the EPA is finalizing in 40 CFR 70.12. A few commenters requested clarity on particular elements such as timeliness and the inclusion of information within the body of the petition, and in response the agency revised the regulatory text and supplemented the descriptions in this preamble with additional information that may provide further explanation as to the expectations for petitions. The EPA anticipates that these mandatory petition content requirements will help petitioners to succinctly focus their claims and present them effectively. Further, it will likely decrease the instances in which the Administrator denies a petition because the petitioner did not provide an adequate demonstration.

## 2. Required Petition Format

In this final rule, the EPA requires the use of a standard format that follows the same order as identified in the previous section regarding the list of required petition content. Regulatory language to this effect is included in the new provision, 40 CFR 70.12. The EPA anticipates this standard organization will reduce review time as the general location of specific details will now be the same in every petition received. These format requirements may help petitioners better understand what is, and what isn't, necessary in an effective title V petition.

Most commenters addressed content and format together; only two commenters submitted supportive comments specifically focused on format only. Therefore, the EPA addressed relevant comments on both content and format in Section IV of this document and is finalizing the formatting requirements as proposed.

### C. Administrative Record Requirements

#### 1. Response to Comments

Under the existing 40 CFR 70.7(h)(5), a permitting authority is required to keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill the obligation under CAA section 505(b)(2) to determine whether a title V petition may be granted. This provision also currently requires that such records be available to the public. As proposed, the EPA is revising 40 CFR 70.7 and adding new regulatory language that requires that a permitting authority also respond

<sup>5</sup> The agency notes that it does not generally expect that petitioners would need to include additional information in the petition itself to demonstrate that the petition was timely submitted, as the electronic receipt date from the electronic submittal system, the receipt date on the email submission, or the postmark date generated for a paper copy mailed to the agency's designated physical address should generally be sufficient to determine whether a submission was timely. However, if the petitioner wishes to provide additional explanation regarding a petition's timeliness, they may do so in the petition.

in writing to significant comments received during the public participation process for a draft title V permit.<sup>6</sup> Such responses can be (and often are) prepared and collected together in one RTC document, which can be made available to the public in various ways, such as by posting on the permitting authority's website.

Significant comments in this context include, but are not limited to, comments that concern whether the title V permit includes terms and conditions addressing federal applicable requirements and requirements under part 70, including adequate monitoring and related recordkeeping and reporting requirements. It is the responsibility of the permitting authority to determine, in the first instance, if a comment submitted during the public comment period on a draft permit is significant.

## 2. Statement of Basis

The statement of basis document, which describes the legal and factual basis for the permit terms or conditions, is a necessary component for an effective permit review. The existing regulations in place prior to today's action required permitting authorities to send this "statement of basis" to the EPA and "to any other person who requests it" but did not identify a particular time frame for doing so. 40 CFR 70.7(a)(5) (2018). In most situations, the permitting authority makes the statement of basis document available for the public comment period on the draft permit, for the EPA's 45-day review period, and during the 60-day petition period. To address any occasions where it may be absent during these steps in the permit issuance process, the EPA is finalizing new language in the part 70 regulations that reaffirms its importance and requires its inclusion at all points in the permit review process for every permit. To that end, the EPA is revising 40 CFR 70.4(b), 70.7(h) and 70.8(a) to specifically identify that the statement of basis document is a required document, to be included during the public comment period and the EPA's 45-day review period.<sup>7</sup> Commenters suggested the originally proposed language be changed, as the "statement of basis" is not a term defined under 40 CFR 70.2. Therefore, in this final rule, the EPA has revised the new regulatory text to refer

to "the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis')"

## 3. Correction to Incorrect Reference

In this final rule, the EPA is also amending 40 CFR 70.4(b) to correct a reference. The regulations at 70.4(b) address the requirements for initial state submissions for part 70 operating permit programs, with 70.4(b)(3) requiring that the submission include a legal opinion that demonstrates that the state has adequate legal authority to carry out several listed functions. One of those functions relates to public availability of certain information for title V permitting. Specifically, the existing language in 40 CFR 70.4(b)(3)(viii) read: "Make available to the public any permit application, compliance plan, permit, and monitoring and compliance, certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 115(c) of the Act." However, the parallel statutory provision in CAA section 503(e) refers to section 114(c) of the Act, not 115(c), stating that: "The contents of a permit shall not be entitled to protection under section 7414(c) of this title." Consistent with the focus of 40 CFR 70.4(b)(3)(viii), CAA section 114(c) pertains to the availability of records, reports, and information to the public, whereas CAA section 115(c) is a reciprocity provision for a statutory section addressing endangerment of public health or welfare in foreign countries from air pollution emitted in the United States. Therefore, the EPA is revising the citation in the last sentence of 40 CFR 70.4(b)(3)(viii) to correctly refer to section 114(c) of the Act to ensure the regulations comport with CAA section 503(e).

## 4. Commencement of the EPA 45-Day Review Period

The agency considers both the statement of basis and the written RTC (where applicable) to be integral components of the permit record. Having access to these critical documents during the EPA's 45-day review period should improve the efficiency of the agency's review. Further, such access also ensures that these documents are completed and available during the petition period under CAA section 505(b)(2). Therefore, the EPA is revising part 70 to require that any proposed permit that is transmitted to the agency for its 45-day review must include both the statement of basis and the written RTC (where

applicable) among the necessary information as described in 40 CFR 70.8.

While many permitting authorities use a sequential review process, in which the public comment period (which typically lasts 30 days) closes before the proposed permit is sent to the EPA for its 45-day review, other permitting authorities conduct the public comment period and 45-day EPA review period concurrently for some permits, particularly in situations where the permitting authority does not anticipate receiving significant public comments on the draft permit. This process is commonly referred to as "concurrent" (or "parallel") review. This final rule now distinguishes between the two review processes by identifying the different document(s) required for each.

For sequential review, the permitting authority must submit the necessary documents including the statement of basis and a written RTC (if a significant comment was received during the public comment period) with the proposed permit as described in 40 CFR 70.8(a)(1) and 40 CFR 70.8(a)(1)(i). The Administrator's 45-day review period for this proposed permit will not begin until all such materials have been received by the EPA.

For concurrent review, the permitting authority must submit the necessary documents including the statement of basis with the proposed permit to begin the EPA's 45-day review, per 40 CFR 70.8(a)(1) and 40 CFR 70.8(a)(1)(ii). Because the public comment period is not yet complete, the written RTC is not required at this time. However, if a significant public comment is received during the public participation process, the Administrator will no longer consider the submitted permit a proposed permit. In such instances, the permitting authority will need to consider those comments, make any necessary revisions to the permit or permit record, prepare a written RTC, and submit the revised proposed permit to the EPA with the RTC, the statement of basis, and any other required supporting information, with any revisions that were made to address the public comments, in order to start the EPA's 45-day review period.

## 5. Notification to the Public

Because the 60-day petition period runs from the end of the EPA's 45-day review period, and the date a proposed permit is received by the EPA has not always been apparent, the petition deadline has sometimes been unclear to members of the public who might be interested in submitting petitions. To

<sup>6</sup> The EPA is aware that many permitting authorities elect to respond to all comments. While the EPA does not require permitting authorities to respond to all comments (but rather all *significant* comments), the Agency does not intend to discourage permitting authorities from that practice.

<sup>7</sup> The text in 40 CFR 70.7(a)(5) remains unchanged.

date, the agency has encouraged permitting authorities to provide notifications to the public or interested stakeholders regarding the timing of proposal of permits to the EPA, for example by making that information available either online or in the publication in which public notice of the draft permit was given. The EPA continues to encourage this practice. In addition, the agency intends to post when a proposed permit is received and the corresponding 60-day deadline for submitting a petition on the EPA Regional Office websites where practicable. However, the responsibility for ensuring that a petition is timely submitted ultimately rests with the petitioner, so stakeholders should feel free to contact the relevant staff in the appropriate EPA Regional Office if they have questions about the timing of the petition process for draft permits of interest to them.

#### *D. Documents That May Be Considered in Reviewing Petitions*

Questions regarding what can be or is considered during the petition review may have left stakeholders uncertain as to what to provide for the EPA's consideration during its review of a petition. At proposal, the EPA tried to address some of those concerns with new regulatory text under 40 CFR 70.13. With some minor revisions intended as clarification, the agency is now finalizing the text, which indicates that information considered generally includes the administrative record for the proposed permit, and the petition, including the petition attachments. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5), sometimes referred to as the 'statement of basis'; any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit is available during the agency's review of a petition on a proposed permit, that document may also be considered as part of making a determination whether to grant or deny the petition.

The EPA sometimes refers to resources outside the petition and the

administrative record for the proposed permit to more fully evaluate whether there is a demonstrated flaw in the permit, permit record, or permit process. For example, the EPA may refer to statements the agency made at the time of the 1992 operating permit program final rule, or to statements made in prior relevant title V response orders. Other examples might include statements made by the agency when finalizing or revising new source performance standards for a particular source category, or requirements in an approved state implementation plan or approved title V program that might apply to the source's permit in question. However, the petition review process generally focuses primarily on the administrative record for the proposed permit and on the petition itself as the new regulatory text in 40 CFR 70.13 explains.

#### **IV. Responses to Significant Comments on the Proposed Rule**

The EPA received 30 comments on the proposed rule. In this section, we summarize the major comments and our responses. For details on all comments and our responses, please refer to the RTC document in the docket for this rulemaking.

##### *A. Electronic Submittal System for Petitions*

###### **1. Summary of Proposal**

The EPA proposed regulatory language that encouraged the use of the agency's electronic submittal system for title V petitions. Alternative methods for submittal were also identified in the proposed rule, including a designated email address and a specific physical address listed in the proposal and on the title V petition website. Relatedly, the EPA also proposed a revision to 40 CFR 70.8(d) to require the petitioner to provide copies of its petition to the permitting authority and the permit applicant in order to make the language consistent with the language in section 505(b)(2) of the Act.

###### **2. Summary of Comments**

Ten commenters supported the centralized petition intake via the electronic submittal system. In addition, two commenters suggested identifying at least one physical address within the Code of Federal Regulations for when agency websites might be down, while another commenter cautioned against being too specific in the regulations as systems, names, or addresses may change. As the database was functional at the time of proposal, one commenter submitted a petition and suggested

improvements for the database. This commenter recommended modifying the database to provide an electronic receipt that states the date of submission to both those who electronically file a public petition, and to the relevant EPA personnel. The commenter further noted experiencing some difficulty with the email system while submitting a title V petition before the close of the comment period on the proposed rule.

No adverse comments were received regarding the new language proposed for 40 CFR 70.8(d) to require a petitioner to provide copies of its petition to the permitting authority and permit applicant.

###### **3. EPA Response**

We appreciate commenter support for the electronic submittal system and the alternate methods for submittal we identified. We agree with the comments noting that these changes reduce confusion, both for petitioners submitting petitions and well as for agency personnel in trying to locate a submitted petition. Further, we agree with those commenters that view this specification of methods as a streamlining measure—it is more efficient to track petitions when they enter the agency through one of the three direct routes, and these changes help ensure that the staff providing an initial review of petitions can access them in a timely manner.

The EPA recognizes the concerns regarding database and email functionality identified by one commenter. Upon reviewing the comment, agency staff tested and adjusted the database to ensure that automatic notification of receipt was functional. The EPA intended the system to generate automatic receipts at submittal, and thanks the commenter for bringing the issue to our attention so that it could be addressed. However, we do not understand either comment as objecting to the proposed changes to the regulatory text to require use of one of the three identified submission methods. Rather, the EPA takes these comments as providing constructive feedback to make the available systems more useful.

Since the public comment period on the proposal closed, all title V petitions entering the agency have been electronically received through the CDX system or [titlevpetitions@epa.gov](mailto:titlevpetitions@epa.gov). Though the agency noted at proposal that there is no need to submit petitions through more than one method, several petitioners sent a duplicate paper copy to the specified physical address—these were also successfully received. We recognize that these petitioners may

have opted to send petitions through more than one method to ensure timely delivery while this rulemaking was in the proposal stage; now that we are finalizing these changes, the EPA continues to promote the submittal of petitions through the electronic submittal system and reiterates the agency's preference that only one method of submission be used for a petition to reduce the confusion and inefficiencies that can arise from duplicate submissions.

The agency disagrees with commenters that suggest a specific physical address should be listed in the Code of Federal Regulations and agrees with the comment that cautioned against providing too much specificity in the regulations as systems, names, or addresses may change. While we understand that there are instances where electronic systems may be down, they are not likely to be unavailable for the entire 60-day petition period. Further, if such information were printed in the Code of Federal Regulations and an update needed to be made, the EPA would need to prepare notification of that change to be published; in the meantime, potential petitioners may be submitting petitions through the outdated information printed in the Code of Federal Regulations as the change is being processed. This could create confusion, cause delays, and add to agency printing costs.

As noted earlier, since proposal the agency has received all petitions through either the CDX database or [titlevpetitions@epa.gov](mailto:titlevpetitions@epa.gov), with some duplicate petitions sent to the specified physical address. This further supports our decision not to list a specific physical address in the Code of Federal Regulations, as the process appears to now be working smoothly for both petitioners and the agency.

## *B. Required Petition Content and Format*

### 1. Summary of Proposal

To assist the public with preparing their petitions, as well as to assist the EPA in review of petitions, the agency proposed to establish key mandatory content that must be included in title V petitions. These proposed requirements were based on statutory requirements under CAA section 505(b)(2) and aspects of the demonstration standard as interpreted by the EPA in numerous orders responding to title V petitions. The agency's proposal would require that any information a petitioner wanted considered in support of an issue raised as a petition claim be included in the

body of the petition because information incorporated by reference into a petition would not be considered. The EPA also proposed to establish format requirements to further assist the agency in its review process. To illustrate how the material that would be required under the proposed regulatory revisions could be presented succinctly and effectively, the agency included an "example claim." Further, the EPA solicited comment on questions regarding whether it should impose page limits on title V petitions.

### 2. Summary of Comments

Nine commenters generally supported the proposal for content and formatting requirements as a means to provide more consistency in petition submissions, with some suggested changes. However, two commenters opposed the changes because they believed the proposal was too restrictive and created additional barriers to public engagement in the process. A couple of commenters were also concerned about the potential restrictiveness of the proposal to disregard information incorporated only by reference into petitions, and the proposed requirement that "all pertinent information in support of each issue raised as a petition claim shall be incorporated within the body of the petition." Finally, of the ten commenters that provided responses to the questions posed by the EPA regarding page limits, only two commenters supported such a measure.

### 3. EPA Response

Commenters generally supported the proposed new content and format requirements and the EPA is largely finalizing those as proposed. The content that will now be required by the agency is consistent with statements and conclusions that the EPA previously made in title V petition orders and summarized in the proposal, and it is the key information the EPA focuses on when reviewing petition claims of potential title V permitting deficiencies. Detailing the specific information necessary for evaluating a petition claim should increase public transparency and understanding of the title V petition and review process; thus, the EPA disagrees with the commenters that found the content and format requirements to be too restrictive and unduly burdensome. Incorporating this information into the regulatory text means that petitioners can consult the regulations to determine what content and format is required for petitions, rather than needing to discern the EPA's practices and preferences on these key points from responses to prior title V

petitions. The EPA anticipates that these mandatory petition content requirements and standard formatting will, thus, help petitioners to succinctly focus their claims and present them effectively. Further, the EPA expects these requirements to reduce the instances in which petitioners fail to provide an adequate demonstration because they are not aware of the weight the EPA puts on particular information when reviewing petition claims. With these changes, the EPA anticipates receiving petitions that more clearly articulate the petition claims and the basis for them, focusing on key information, including the alleged deficiency in the permit or permit process; the applicable requirements under the CAA or requirements under 40 CFR part 70 that are in question; where the issue was raised during the public comment period (or a demonstration as to why it was impracticable to do so or that the grounds for the objection arose after the public comment period closed); how the state responded to the comment; and why the state's response allegedly does not adequately address the issue.

Regarding the proposed requirement that "all pertinent information in support of each issue raised as a petition claim shall be contained within the body of the petition," the agency recognizes the concern raised by a commenter that requiring "all" such information to be included in the petition itself may occasionally be too rigorous a standard. The EPA's original intent was to receive petitions that clearly state main points in the petition, and if petitioners want to support their claim with additional attachment materials, in the petition they could cite to the information in the attachment with an explanation as to why they are citing to it. To illustrate, the EPA provided an example claim in the proposal, and this still serves as a good indication of a concise and effective presentation of a hypothetical claim that includes all pieces of required content, including citations to two exhibits. See 81 FR 57836 (August 24, 2016). To address the commenter concern and provide additional clarity on expected content, the agency is revising the regulatory text to read "[a]ny arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must be contained within the body of the petition."

Finalizing these changes to the regulatory text falls within the EPA's inherent discretion to formulate procedures to discharge its obligations under CAA section 505(b)(2). The revisions are aimed in part at helping



petitioners ensure that they are including in their petitions the necessary information to satisfy the demonstration burden. Specifically, to compel an objection by the EPA, CAA section 505(b)(2) requires the petitioner to demonstrate that a permit is not in compliance with requirements of the Act, including requirements of the applicable implementation plan. The Act does not dictate all the information that must be included or the format in which that information should be presented; nor does it address what kind of showing must be made in order to demonstrate that an objection is warranted. Courts have determined that the term “demonstrates” in CAA section 505(b)(2) is ambiguous and have accordingly deferred to the EPA’s reasonable interpretation of that term. *See, e.g., MacClarence v. EPA*, 596 F.3d 1123, 1130–31 (9th Cir. 2010) (finding the EPA’s expectation that a petition provide “references, legal analysis, or evidence” a reasonable interpretation of the term “demonstrates” under CAA section 505(b)(2)). Similar procedural requirements have been established for other EPA programs and processes, including the procedures for appeals filed with the Environmental Appeals Board. *See* 78 FR 5281 (January 25, 2013) (adopting revisions to “codify current procedural practices, clarify existing review procedures, and simplify the permit review process”). The importance of the demonstration burden in determining whether to grant an objection in response to a petition was discussed in more detail in the proposal and in several title V orders. *See, e.g., In the Matter of Consolidated Environmental Management, Inc.—Nucor Steel Louisiana*, Order on Petition Numbers VI–2011–06 and VI–2012–07 (June 19, 2013) at 4–7.

Finally, the EPA appreciates commenters that responded to our request for comment on whether page limits should be established for title V petitions as a means of promoting concise petitions and to further facilitate efficient and expeditious review of petitions by the EPA. Commenters generally opposed setting page limits as they could unduly limit a petitioner’s ability to explain deficiencies. The agency will not be taking any action regarding page limits at this time.

### C. Administrative Record Requirements

#### 1. Summary of Proposal

The EPA proposed to revise 40 CFR 70.7 to require a permitting authority to respond in writing to significant comments received during the public participation process for a draft permit.

The agency proposed a regulatory revision to 40 CFR 70.8 that would require a written RTC and the statement of basis document to be included as part of the proposed permit record that is sent to the EPA for its review under CAA section 505(b)(1). Under the proposal, if no significant comments were received during a public comment period, the permitting authority would be expected to prepare and submit to EPA for its 45-day review a statement to that effect. In addition, to stress the importance of the statement of basis document, the EPA proposed to revise 40 CFR 70.4(b), 70.7(h), and 70.8(a) to specifically identify the statement of basis document as a necessary part of the permit record throughout the permitting process. Further, the agency proposed to amend an incorrect reference in 40 CFR 70.4(b)(3)(viii) that cited to section 115(c) of the Act, rather than the correct section 114(c) of the Act. Finally, the EPA proposed to revise 40 CFR 70.7(h)(7) to require that within 30 days of sending the proposed permit to the EPA, that permitting authorities must provide notification to the public that the proposed permit and the response to significant public comments are available. Relatedly, the agency suggested another means to notify the public could be for the EPA to post when a proposed permit is received and the corresponding 60-day deadline for submitting a petition on the EPA Regional Office websites.

#### 2. Brief Summary of Comments

Twelve commenters supported the proposed requirement that permitting authorities prepare a written RTC, while three opposed because they believe the written RTC should be optional. Commenters also expressed concern over the proposed requirement to respond to “significant” comments for various reasons. Identifying the statement of basis as a necessary part of the permit record was supported by two commenters; however, clarification was requested by three commenters, as “statement of basis” is not a defined term in the regulations. Regarding the proposed requirement to submit the RTC and statement of basis with the proposed permit, two commenters indicated support. Sixteen commenters urged the EPA to clarify that concurrent or parallel review remains permissible, given that the proposed revisions to the regulatory text could be read to preclude it.<sup>8</sup> The agency interprets those

<sup>8</sup> In concurrent review, also sometimes referred to as parallel review, the EPA’s 45-day review and the public comment period (which typically lasts 30 days) occur during overlapping times. For

comments to potentially support providing necessary information with the proposed permit if it does not prevent the practice of concurrent review. On the other hand, one commenter opposes concurrent review, asserting it is unnecessary and unworkable, in the commenter’s view. Twelve commenters opposed the proposed requirement for permitting authorities to notify the public that the proposed permit was sent to the EPA, while only one commenter supported it. Finally, eight commenters supported the agency’s suggestion to post relevant dates for submitting petitions.

#### 3. EPA Response

The EPA is finalizing the requirement to prepare a written RTC when significant comments are received on a draft permit. This requirement was based on a recommendation from the Clean Air Act Advisory Committee’s (CAAAC’s) Title V Task Force.<sup>9</sup> Commenters generally supported this change. While three commenters did not support this new requirement because they believe it should be optional and/or could expose permitting authorities to allegations of failure to respond to comments, under general principles of administrative law, it is incumbent upon an administrative agency to respond to significant comments raised during the public comment period. *See, e.g., Home Box Office v. FCC*, 567 F. 2d 935 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”) The EPA has long held the view that RTCs for the proposed permit can play a critical role in the agency’s formulation of a response to a title V petition on that proposed permit. *See, e.g. In the Matter of Consolidated Edison Company*

sequential review, the EPA’s 45-day review period does not begin until the public comment period ends.

<sup>9</sup> In 2004, the Clean Air Act Advisory Committee (CAAAC) established a Task Force to evaluate the title V program. The 18-member panel, comprised of industry, state, and environmental group representatives, identified what Committee members believed was and was not working well. After hosting public meetings and receiving written feedback, and compiling the information with the personal experience of panel members, the Title V Task Force issued a final report that highlighted concerns and recommendations for improvement. Under Recommendation 1, the majority of Task Force members agreed that if a permitting authority receives comments on a draft permit, it is essential that the permitting authority prepare a written response to comments. *See* Final Report to the Clean Air Act Advisory Committee on the Title V Implementation Experience: Title V Implementation Experience (April 2006). The Title V Task Force Final Report is available at: <https://www.epa.gov/caaac/final-report-clean-air-act-advisory-committee-title-v-implementation-experience>.



*Hudson Avenue Generating Station*, Order on Petition Number II–2002–10 (September 30, 2003) at 8 (noting that the permitting authority “has an obligation to respond to significant public comments and adequately explain the basis of its decision”). See, also, *In the Matter of Onyx Environmental*

*Services*, Petition V–2005–1 (February 1, 2006) at 7; *In the Matter of Louisiana Pacific Corporation*, Order on Permit Number V–2006–3 (November 5, 2007) at 4–5; *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Permit Number 24–510–01886 (April 14, 2010) at 7. The agency has denied petition claims where the Petitioner fails to acknowledge or react to a permitting authority’s final reasoning in the RTC. See, *In the Matter of Gallatin Fossil Plant*, Order on Permit Number 561209 (January 25, 2018) at 10. See, also, *In the Matter of Consolidated Environmental Management, Inc.—Nucor Steel Louisiana*, Order on Petition Nos. VI–2011–06 and VI–2012–07 at 7 (June 19, 2013). Thus, the EPA does not agree with the assertion by some commenters that a written response to significant comments should be optional. Moreover, it is to the benefit of the permitting authority to respond to significant comments, as it is an opportunity to further refine the permit record and/or articulate the permitting authority’s rationale for decisions made in the permitting process. As the issues raised in a title V petition must generally be raised with reasonable specificity during the public comment period, responding to public comments gives the permitting authority a chance to address any issues that may become the basis for a petition. However, if the permitting authority does not respond to such comments in writing, it may not be clear to the EPA in reviewing a title V petition whether or how the permitting authority addressed the concerns raised during the public participation process. Without the availability of the written RTC during the petition period, there may be an increased likelihood of granting a particular claim on the basis that the state provided an inadequate rationale or permit record. See, e.g., *In the Matter of Scrubgrass Generating Company, L.P.*, Order on Petition Number III–2016–5 (May 12, 2017) at 12 (granting petition claim because the permitting authority did not respond to significant comments).

Several commenters raised concerns regarding the term “significant comment,” with some suggesting that permitting authorities should be required to respond instead to all comments. The agency recognizes that a

permitting authority’s obligation to respond to public comments is informed by long history of administrative law and practice and thus is not creating a new definition of this term through this rulemaking. However, in the interests of providing some guidance on how the agency understands the term, the EPA notes that its interpretation of this phrase is informed by the D.C. Circuit’s framing of the relevant inquiry in its review of regulatory actions by federal agencies. For example, that court has explained that: “only comments which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency.” *Home Box Office*, 567 F.2d at 35 n. 58 (D.C. Cir. 1977). The court has also explained that an agency’s response to public comments is critical to enable the reviewing body “to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.” *Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993). Thus, the requirement to address significant public comments is relevant to assuring the reviewing body that the agency’s decision was based on a “consideration of the relevant factors.” *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (quoting *Covad Commc’ns v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006)).

The agency further notes that it is the responsibility of the permitting authority to determine in the first instance whether a comment is significant. The agency is not creating a requirement to respond to all comments because it understands that some comments submitted during the public comment process may not be relevant or material to the permitting proceeding. See *Nat’l Ass’n of Regulatory Util. Comm’rs v. F.E.R.C.*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) (“The doctrine obliging agencies to address significant comments leaves them free to ignore insignificant ones.”) The agency recognizes that some permitting authorities do respond to all comments; this new requirement does not preclude that practice. To the contrary, the agency encourages that practice because it creates a clear record that the permitting authority understood and responded to each comment. In finalizing this change to require permitting authorities to respond in writing to significant comments, the EPA aims to promote more consistency among permitting authorities in meeting the minimum requirements under part 70 and to have more complete permit

records for the benefit of the permitting authority, the source, the public, and the EPA.

While commenters were supportive of the revisions to the regulatory text to further highlight the importance of the statement of basis to permit records, they raised the point that “statement of basis” is not a defined term in 40 CFR 70.2. Commenters suggested instead to refer to the “statement required by § 70.7(a)(5).” The EPA frequently uses the term “statement of basis” to refer to the statement required by § 70.7(a)(5). To that end, the EPA will be adjusting the language to now read “the statement required by § 70.7(a)(5) (sometimes referred to as the ‘statement of basis’),” for clarity.

We agree with the commenters that stated that these changes provide more access to and better understanding of permitting decisions, and provide better protection for public health. The EPA still believes the RTC (where applicable) and statement of basis are two critical documents in the administrative record for a proposed permit, and it notes that they generally provide beneficial details and explanations for terms and conditions found in the permit. When these documents are unavailable for the EPA’s 45-day review period, the EPA usually cannot provide as effective a review under CAA section 505(b)(1) as when a full administrative record, including these documents, is available during that review. Moreover, when these documents are also unavailable for the 60-day petition period, potential petitioners may be missing important information to determine whether to submit a petition or may not be able to provide a full argument in support of any issues they may raise in a petition.

Commenters raised concerns, however, with the proposed regulatory text, stating that it could be read to preclude concurrent review, a practice preferred by some permitting authorities and sources in some situations.<sup>10</sup> As EPA noted in the preamble to the proposal, the EPA recognized that some permitting authorities run the public comment period and the 45-day EPA review period concurrently and the agency proposed regulatory text intended to make clear that this practice may continue, as long as no significant comment was received. If a significant public comment was received, the Administrator would no longer consider

<sup>10</sup> As noted above, in concurrent review, also sometimes referred to as parallel review, the EPA’s 45-day review and the public comment period (which typically lasts 30 days) occur during overlapping times. For sequential review, the EPA’s 45-day review period does not begin until the public comment period ends.

the submitted permit as a proposed permit. In such instances, the permitting authority would need to make any necessary revisions to the permit or permit record, and per the regulations that we proposed, submit the revised proposed permit to the EPA with the RTC and statement of basis. Moreover, this submission would need to be accompanied by any other required supporting information under 40 CFR 70.8(a)(1), and any revisions that were made to address the public comments, in order to start the EPA's 45-day review period. This reflected, and continues to reflect, the EPA's understanding of how such concurrent permitting programs should—and in most cases, do—operate.

After evaluating the regulatory text and comments, the EPA recognized that alterations to the proposed regulatory text would more clearly effectuate the agency's desired change to require RTC availability (when applicable) without slowing the permit process in situations where concurrent review is used properly. Therefore, to respond to commenters, the EPA is finalizing changes to the regulatory text that more clearly specify how the new administrative record requirement works for each of the two permit review processes:

*Sequential review:* The permitting authority must submit the necessary documents including the statement of basis and a written RTC (if significant comment was received during the public comment period) with the proposed permit per 40 CFR 70.8(a)(1)(i). The Administrator's 45-day review period for this proposed permit will not begin until such materials (except the final permit) have been received by the EPA.

*Concurrent review:* The permitting authority must submit the necessary documents including the statement of basis with the proposed permit to begin the EPA's 45-day review per 40 CFR 70.8(a)(1)(ii). However, if a significant public comment is received during the public participation process on the draft permit, the Administrator will no longer consider the submitted permit a proposed permit for purposes of its review under CAA section 505(b)(1) and its implementing regulations. In such instances, the permitting authority would need to make any necessary revisions to the permit and/or other documents in the permit record to address the comments, and submit the revised proposed permit to the EPA with the necessary documents—including the written RTC and

statement of basis—in order to start the EPA's 45-day review period.<sup>11</sup>

The final regulatory text addresses concerns from many commenters and will still provide more complete permit records for the EPA's 45-day review period, as well as during the 60-day petition period. For example, the regulatory text clarifies that the documents in 40 CFR 70.8(a)(1), except the final permit, are required for the EPA's 45-day review. Although the final text adopted in 40 CFR 70.8(a)(1)(i) and (ii) differs from the regulatory text in the agency's proposal, it remains wholly consistent with the description of the EPA's intent for the regulation as set forth in the preamble to the proposal. See 81 FR at 57839.

Permitting authorities and sources that wish to conduct concurrent review will still be able to do so; in situations where no significant comments are received on a draft title V permit this may serve as a streamlining measure. Where significant comments are received on a draft permit undergoing concurrent review or for a proposed permit being reviewed sequentially, the EPA will now have the benefit of both the RTC and statement of basis along with the other necessary documents it receives under 40 CFR 70.8(a)(1). Many permitting authorities were already sending a written RTC (where applicable) and a statement of basis along with the proposed permit for the EPA's review; this change provides more consistency and clarity for all stakeholders. For the first time, the agency is addressing the appropriate use of concurrent review explicitly in the regulations, increasing the transparency around the practice. Further, this is responsive to a recommendation from the CAAAC's Title V Task Force, which stated that “it is essential that the permitting authority prepare a written response to comments” and that it should be “available to the public prior to the start of the 60-day period for petitioning the EPA Administrator to object to the permit.”<sup>12</sup> This revision to the part 70 rules, along with the other

<sup>11</sup> The EPA expects that the permitting authority would withdraw the initial permit submission if significant comments are received during the public participation process on a draft permit that has been submitted for concurrent review. If EPA later finds that a significant comment was received and the initial permit submission is not withdrawn, the permit submission will no longer be considered a proposed permit.

<sup>12</sup> The majority of Task Force members also recommended that if a permitting authority received public comments (from anyone other than the permittee) during the public comment period, the RTC described in Recommendation 1 should be provided to the EPA for consideration during its 45-day review period. See Title V Task Force Final Report Recommendation 2 at 239.

changes to the administrative record requirements discussed in this preamble, are within the EPA's inherent discretion to formulate procedures to discharge its obligations under CAA sections 505(b)(1) and 505(b)(2).

The EPA is not finalizing its proposal to revise 40 CFR 70.7(h)(7) to require that within 30 days of sending the proposed permit to the EPA, that permitting authorities provide notification that the proposed permit and the RTC are available to the public. Commenters expressed concern about the proposed requirement (at times referred to in comments as “second notice”) as being burdensome and unnecessary. Further, many commenters stated that the EPA is in the best position to track the relevant dates for all parties, including potential petitioners. The agency agrees with these commenters and therefore, the EPA will, where practicable, post the agency's 45-day review period end date, as well as the end date for the 60-day window in which a petition may be submitted on a proposed permit, on the EPA Regional websites. Where dates are not listed, the EPA expects that websites will list a point of contact (or contacts) that can provide such information when requested.<sup>13</sup> The EPA continues to encourage permitting authorities to provide notifications to the public or interested stakeholders regarding the timing of proposal of permits to the EPA, for example by making that information available either online or in the publication in which the public notice of the draft permit was given.

#### *D. Documents That May Be Considered in Reviewing Petitions*

##### *1. Summary of Proposal*

The EPA proposed regulatory text (40 CFR 70.13) that described the information considered when petitions are reviewed, which generally includes, but is not limited to, the petition itself, including attachments to the petition, and the administrative record for the proposed permit. The administrative record for a proposed permit includes the draft and proposed permits; any permit applications relating to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments; relevant

<sup>13</sup> The agency is working toward a national electronic permitting system that will have the capability to track relevant dates; however, this system will not be in operation before this final action is published. At this time, listing relevant dates or points of contact to obtain relevant dates on the EPA Regional websites is an effective means to convey the information to interested stakeholders.

supporting materials made available to the public per 40 CFR 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that were made available to the public. If a final permit was available during the petition review period, that may also be considered.

## 2. Summary of Comments

Five comments were received regarding the proposed 40 CFR 70.13. Four of the commenters opposed the phrase “generally includes, but is not limited to” as they found it overly broad; believing that it could be interpreted to allow the EPA to consider unlimited information when reviewing a petition (particularly if it was not presented to the permitting authority first during the public comment period on a draft permit). One commenter suggested new language that would prohibit the consideration of responses or comments submitted by a permitting authority concerning the merits of a public petition when deciding whether to grant or deny that petition.

## 3. EPA Response

The EPA understands the concerns voiced by commenters that the proposed language might be read to allow for unlimited information to be reviewed by the EPA when determining whether to grant or deny a petition. However, section 505(b)(2) of the CAA requires that a petition be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or the objections arose after such period). Based on these four comments, the EPA has removed “but not limited to” from the proposed § 70.13 so that the final text states “generally includes the administrative record for the proposed permit and the petition, including attachments to the petition.” As noted in Section III.D of this document, there are instances in which the EPA would appropriately refer to resources outside the petition and the administrative record for the proposed permit to more fully evaluate whether there is a demonstrated flaw in the permit, permit record, or permit process. This final regulatory text still allows for such reference, while hopefully alleviating some commenter concerns.

The EPA also understands the concern raised by the commenter that permitting authority comments on a petition should not be considered.

While at this time the agency is not adding new language to § 70.13, the EPA generally focuses on the information identified in the administrative record and has highlighted when permitting authorities have the opportunity to provide information and complete the permit record. As noted in the preamble to the proposed rule, permitting authorities have at least three opportunities to provide material for the permit record and ensure that it comports with the CAA: The draft, proposed, and final permit. The EPA was and is recommending practices for permitting authorities when preparing title V permits that can minimize the likelihood that a petition will be submitted on a title V permit. For example, they may fully address significant comments on draft permits and ensure the permit or permit record includes adequate rationale for the decisions made. *See* 81 FR 57841.

## V. Implementation

The implementation section of the proposal for this rulemaking solicited comment as to whether revisions to any approved state or local programs would be necessary if the proposed revisions to the part 70 regulations were finalized. 81 FR 57842 (August 24, 2016). Five comments regarding implementation and potential state or local rule changes were received. Two commenters noted that no implementation timeline was included with the proposed rule. Another commenter stated that the proposal did not specify whether the proposed revisions would apply to permits that are undergoing public comment or EPA review at the time the rule is finalized. Finally, one state commenter indicated the rule as proposed would not require changes to its rules, while two commenters from state or local agencies indicated that state rule changes may be necessary to reflect the proposed requirements. One of the latter commenters pointed only to a “change relating to the eligibility of minor modifications for petitions” as an example of something they believed might require a state rule change. Yet the proposal regarding the availability of an opportunity to file a petition on a minor permit modification was not a proposed change in the underlying requirements but rather a proposed change to the regulatory text intended to clarify the operation of the existing regulations. *See, e.g.,* 57 FR 32283 (July 21, 1992) (addressing the availability of EPA’s 45-day review period and petition opportunities for minor permit modifications under the part 70 rules). Other than this point, these two commenters did not specify any

particular aspects of the proposed revisions that might require changes to state rules.

In light of the small number of comments received indicating any potential need for state or local rule changes, the EPA anticipates that the final rule provisions can generally be implemented without changes to state or local rules. However, the agency intends to handle any necessary state or local program revisions on a case-by-case basis under 40 CFR 70.4(i). The EPA expects any permitting authority that needs to revise its rules in order to implement any of the changes in this final rule to notify its respective Regional Office and initiate the program revision process per 40 CFR 70.4(i).

The effective date of this rule is April 6, 2020, and the requirements in this rule will apply prospectively after that date, including for proposed permits and title V petitions. For example, the agency intends to begin applying the rules regarding petition format and content prospectively to petitions that are submitted to the EPA on or after the effective date for this rule. A significant portion of the revisions finalized in this action generally reflect current practice, and the agency is providing for 60 days between publication of this rule and the effective date in order to allow more time for stakeholders to prepare for the rule changes. Thus, the agency anticipates a transition with minimal disruption.

## VI. Determination of Nationwide Scope and Effect

Section 307(b)(1) of the CAA indicates the Federal Courts of Appeal in which petitions for review of final actions by the EPA must be filed. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if: (i) The agency action consists of “nationally applicable regulations promulgated, or final action taken, by the Administrator under [the CAA]”; or (ii) such action is locally or regionally applicable, but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.”

As described in this section, this final action is nationally applicable for purposes of CAA section 307(b)(1). To the extent a court finds this final action to be locally or regionally applicable, for the reasons explained in this section, the EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This action addresses

revisions to the EPA's regulations in part 70 for operating permit programs, and these regulations apply to permitting programs across the country.

For this reason, this final action is nationally applicable or, in the alternative, the EPA finds that this action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). Thus, pursuant to CAA section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**.

## VII. Environmental Justice Considerations

This final action revises the part 70 regulations to improve the title V petition submittal, review and response processes. The revision and guidance provided in the proposed rule should increase the transparency and clarity of the petition process for all stakeholders. First, the establishment of centralized petition submittal intake is expected to reduce or eliminate confusion over where to submit a petition. When using the preferred method of an electronic petition submittal through the agency's electronic submittal system, a petitioner should also have the immediate assurance that the petition and any attachments were received. However, alternative submittal methods are still available options for members of the public, including those that experience technical difficulties when trying to submit a petition or for those that do not have access to electronic submittal mechanisms. Second, the content and format requirements for petitions provide instruction and clarity on what must be included in a title V petition. The EPA expects this change will assist petitioners in providing all the critical information for their petitions in an effective manner, which may also increase the agency's efficiency in responding to petitions. Third, requiring permitting authorities to respond to public comments in a written document that (where applicable) is available during the 60-day opportunity to file a petition provides increased availability of information regarding permits for the public in general and petitioners specifically. This final action does not compel any specific changes to the requirements to provide opportunities for public participation in permitting nor does it finalize any particular permit action that may affect the fair treatment and meaningful involvement of all people. Based on these changes, the EPA disagrees with the commenter that stated the proposed changes would

“further erode rather than advance Environmental Justice principles by making it more difficult for those who live and work near major sources of air pollution to bring deficiencies in Title V permits to EPA's attention and to effectively demand the public health protections guaranteed by the [CAA].”

When preparing for the proposed rule, the agency participated in community calls where the EPA presented a brief overview and announcement of the rulemaking effort. The EPA also held a webinar on September 13, 2016, where the agency described the title V petition process, the content of the proposed rule, and when and how to submit comments.

## VIII. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

### B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

### C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0243 for the title V part 70 program. The revisions to part 70 finalized in this action fall under “Permitting Authority Activities” already accounted for in the supporting statement for the Information Collection Request (ICR). For example, the activity of “permit issuance” includes formalizing permits, placing copies of final permits on public websites, entering information into the EPA's permit website, and providing copies to sources. In addition, “response to public comments” includes analyzing public comments and revising the draft permit accordingly when appropriate. The preparation of the RTC, where applicable, and its submittal to the EPA for its 45-day review is an action that many permitting authorities already take and can be accounted for under the existing activities in the approved program ICR.

### D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This final rule will not impose any requirements directly on small entities. Entities potentially affected directly by this proposal include anyone that chooses to submit a title V petition on a proposed title V permit prepared by an EPA-approved state, local or tribal title V permitting authority. Other entities directly affected may include state, local, and tribal governments and none of these governments are small governments. Other types of small entities are not directly subject to the requirements of this action.

### E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. Many permitting authorities were already preparing the RTC document, but through this rulemaking it is now a requirement. Associated costs are hard to quantify, but are anticipated to be minimal, as permitting authorities were already required to collect and consider public comments and it will be a new task for a small number of permitting authorities.

### F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This final action codifies practices that are already undertaken by many permitting authorities. Preparing a written response to comment document is an activity already conducted by many permitting authorities, and is a practice that was recommended by the CAAAC's Title V Task Force, which was composed of various stakeholders, including states. The availability of an RTC will reduce the likelihood of an EPA determination to grant a petition due to an inadequate rationale relied upon by a permitting authority.

### G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federal recognized tribal governments,

nor preempt tribal law. The Southern Ute Indian Tribe has an EPA-approved operating permit program under 40 CFR part 70 and could be impacted. At the proposal stage, the EPA conducted outreach to the tribes through a call with the National Tribal Air Association. Further, the agency offered to consult with the Southern Ute Indian tribe. The EPA solicited comment from affected tribal communities on the implications of this rulemaking, although none were received.

*H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This final action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*J. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action does not have disproportionately high and adverse human health and environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This rulemaking is primarily administrative and procedural in nature; it focuses on streamlining and clarifying the title V petition submittal, review, and response processes, as well as on ensuring that EPA timely receives information it needs to effectively review proposed permits and title V petitions. The regulatory revisions in this action, as well as the guidance that was provided in the preamble to the proposed rule, should increase the transparency and clarity of the petition process for all stakeholders. See 81 FR

57822 (August 24, 2016). The general public as well as potential petitioners are expected to benefit by having better notification of permits and review deadlines (e.g., the EPA intends, where possible to post on the EPA Regional websites when a proposed permit is received and the corresponding 60-day deadline for submitting a petition) and by better access to permitting decision information (e.g., the permitting authority’s written response to comments). Additional information is contained in Section V of this notice.

*L. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

*M. Determination Under CAA Section 307(d)*

Section 307(d)(1)(V) of the CAA provides that the provisions of the CAA section 307(d) apply to “such other actions as the administrator may determine.” Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this final action is subject to the provisions of CAA section 307(d).

**IX. Statutory Authority**

The statutory authority for this final action is provided by 42 U.S.C. 7401 *et seq.*

**List of Subjects in 40 CFR Part 70**

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

Dated: January 14, 2020.

**Andrew R. Wheeler,**  
*Administrator.*

For the reasons stated in the preamble, title 40, Chapter I of the Code of Federal Regulations is amended as follows:

**PART 70—STATE OPERATING PERMIT PROGRAMS**

■ 1. The authority citation for the part 70 continues to read as follows:

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

■ 2. Section 70.4 is amended by revising paragraph (b)(3)(viii) to read as follows:

**§ 70.4 State program submittals and transition.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(viii) Make available to the public any permit application, statement required by § 70.7(a)(5) (sometimes referred to as the ‘statement of basis’), compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit itself shall not be entitled to protection under section 114(c) of the Act.

\* \* \* \* \*

■ 3. Section 70.7 is amended by revising paragraphs (h)(2) and (5) and adding paragraph (h)(6) to read as follows:

**§ 70.7 Permit issuance, renewal, reopenings, and revisions.**

\* \* \* \* \*

(h) \* \* \*

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain additional information, including copies of the permit draft, the statement required by § 70.7(a)(5) (sometimes referred to as the ‘statement of basis’) for the draft permit, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority (except for publicly-available materials and publications) that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

\* \* \* \* \*

(5) The permitting authority shall keep a record of the commenters and of the issues raised during the public participation process, as well as records of the written comments submitted during that process, so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.

(6) The permitting authority must respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and

any such comments raised during any public hearing on the permit.

■ 4. Section 70.8 is amended by revising paragraphs (a)(1), (c)(1), and (d) to read as follows:

**§ 70.8 Permit review by EPA and affected States.**

(a) *Transmission of information to the Administrator.* (1) The permit program must require that the permitting authority provide to the Administrator a copy of each permit application (including any application for significant or minor permit modification), the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'), each proposed permit, each final permit, and, if significant comment is received during the public participation process, the written response to comments (which must include a written response to all significant comments raised during the public participation process on the draft permit and recorded under § 70.7(h)(5) of this part), and an explanation of how those public comments and the permitting authority's responses are available to the public. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority 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.

(i) Where the public participation process for a draft permit concludes before the proposed permit is submitted to the Administrator, the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis') and the written response to comments, if significant comment was received during the public participation process, must be submitted with the proposed permit along with other supporting materials required in § 70.8(a)(1) of this part, excepting the final permit. The Administrator's 45-day review period for this proposed permit will not begin until such materials have been received by the EPA.

(ii) In instances where the Administrator has received a proposed permit from a permitting authority before the public participation process on the draft permit has been completed,

the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis') must be submitted with the proposed permit along with other supporting materials, required in § 70.8(a)(1) of this part, excepting the final permit and the written response to comments. If the permitting authority receives significant comment on the draft permit during the public participation process, but after the submission of the proposed permit to the Administrator, the Administrator will no longer consider the submitted proposed permit as a permit proposed to be issued under section 505 of the Act. In such instances, the permitting authority must make any revisions to the permit and permit record necessary to address such public comments, including preparation of a written response to comments (which must include a written response to all significant comments raised during the public participation process on the draft permit and recorded under § 70.7(h)(5) of this part), and must submit the proposed permit and the supporting material required under § 70.8(a)(1)(i) of this part, excepting the final permit, to the Administrator after the public comment period has closed. This later submitted permit will then be considered as a permit proposed to be issued under section 505 of the Act, and the Administrator's review period for the proposed permit will not begin until all required materials have been received by the EPA.

\* \* \* \* \*

(c) \* \* \*

(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 (a) 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 required under § 70.8(a)(1), including under § 70.8(a)(1)(i) or (ii) where applicable.

\* \* \* \* \*

(d) *Public petitions to the Administrator.* The program shall provide that, if the Administrator does not object in writing under paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection. The petitioner shall provide a copy of such petition to the permitting authority and the applicant. Any such

petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in § 70.7(h) of this part, 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. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the permitting authority has issued a permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in § 70.7(g)(4) or (g)(5)(i) and (ii) of this part except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

\* \* \* \* \*

■ 5. Add § 70.12 to read as follows:

**§ 70.12 Public petition requirements.**

(a) *Standard petition requirements.* Each public petition sent to the Administrator under § 70.8(d) of this part must include the following elements in the following order:

(1) *Identification of the proposed permit on which the petition is based.* The petition must provide the permit number, version number, or any other information by which the permit can be readily identified. The petition must specify whether the permit action is an initial permit, a permit renewal, or a permit modification/revision, including minor modifications/revisions.

(2) *Identification of petition claims.* Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under this part. Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must be contained within the body of the petition, or if reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along

with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. For each claim raised, the petition must identify the following:

- (i) The specific grounds for an objection, citing to a specific permit term or condition where applicable.
- (ii) The applicable requirement as defined in § 70.2, or requirement under this part, that is not met.
- (iii) An explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under this part.
- (iv) If the petition claims that the permitting authority did not provide for a public participation procedure required under § 70.7(h), the petition must identify specifically the required public participation procedure that was not provided.

(v) Identification of where the issue was raised with reasonable specificity during the public comment period provided for in § 70.7(h), citing to any relevant page numbers in the public comment submitted to the permitting authority and attaching this public comment to the petition. If the grounds for the objection were not raised with reasonable specificity during the public comment period, the petitioner must demonstrate that such grounds arose after that period, or that it was impracticable to raise such objections within that period, as required under § 70.8(d) of this part.

(vi) Unless the grounds for the objection arose after the public comment period or it was impracticable to raise the objection within that period such that the exception under § 70.8(d) applies, the petition must identify where the permitting authority responded to the public comment, including page number(s) in the publicly available written response to comment, and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment. If the response to comment document does not address the public comment at all, the petition must state that.

(b) *Timeliness.* In order for the EPA to be able to determine whether a petition was timely filed, the petition must have or be accompanied by one of the following: A date or time stamp of receipt through EPA's designated electronic submission system as

described in § 70.14; a date or time stamp on an electronic submission through EPA's designated email address as described in § 70.14; or a postmark date generated for a paper copy mailed to EPA's designated physical address.

■ 6. Add § 70.13 to read as follows:

**§ 70.13 Documents that may be considered in reviewing petitions.**

The information that the Administrator considers in making a determination whether to grant or deny a petition submitted under § 70.8(d) of this part on a proposed permit generally includes the petition itself, including attachments to the petition, and the administrative record for the proposed permit. For purposes of this paragraph, the administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2) of this part. If a final permit is available during the agency's review of a petition on a proposed permit, that document may also be considered as part of making a determination whether to grant or deny the petition.

■ 7. Add § 70.14 to read as follows:

**§ 70.14 Submission of petitions.**

Any petition to the Administrator must be submitted through the Operating Permits Group in the Air Quality Policy Division in the Office of Air Quality Planning and Standards, using one of the three following methods, as described at the EPA Title V Petitions website: An electronic submission through the EPA's designated submission system identified on that website (the agency's preferred method); an electronic submission through the EPA's designated email address listed on that website; or a paper submission to the EPA's designated physical address listed on that website. Any necessary attachments must be submitted together with the petition, using the same method as for the petition. Once a petition has been successfully submitted using one of these three methods, the petitioner

should not submit additional copies of the petition using another method. The Administrator is not obligated to consider petitions submitted to the agency using any method other than the three identified in this section.

[FR Doc. 2020-01099 Filed 2-4-20; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 180209147-8509-02; RTID 0648-XX039]

#### Fisheries of the Northeastern United States; Small-Mesh Multispecies Fishery; Inseason Adjustment to the Southern Red Hake Possession Limit

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; inseason adjustment.

**SUMMARY:** NMFS announces that the commercial per-trip possession limit for southern red hake has been reduced for the remainder of the 2019 fishing year. Regulations governing the small-mesh multispecies fishery require this action to prevent the southern red hake total allowable landing limit from being exceeded. This announcement informs the public of the reduced southern red hake possession limit.

**DATES:** Effective February 3, 2020, through April 30, 2020.

**FOR FURTHER INFORMATION CONTACT:** Laura Hansen, Fishery Management Specialist, (978) 281-9225.

**SUPPLEMENTARY INFORMATION:** Regulations governing the red hake fishery are found at 50 CFR part 648. The small-mesh multispecies fishery is managed primarily through a series of exemptions from the Northeast Multispecies Fisheries Management Plan. The regulations describing the process to adjust inseason commercial possession limits of southern red hake are described in §§ 648.86(d)(4) and 648.90(b)(5). These regulations require the NMFS Regional Administrator, Greater Atlantic Region, to reduce the southern red hake per-trip possession limit from 5,000 lb (2,268 kg) to the incidental limit of 400 lb (181 kg) when landings are projected to reach or exceed 90 percent of the total allowable landings (TAL), unless such a reduction is expected to prevent the TAL from



the safety zone and shall travel at the minimum speed necessary to maintain a safe course. Vessels operating within the safety zone shall not come within 25 yards of a tall ship unless authorized by the cognizant Captain of the Port, their designated representative, or the on-scene official patrol.

(3) When a tall ship approaches any vessel that is moored or anchored, the stationary vessel must stay moored or anchored while it remains within the tall ship's safety zone unless ordered by or given permission from the cognizant Captain of the Port, their designated representative, or the on-scene official patrol to do otherwise.

(d) *Effective period.* This section is effective from 12:01 a.m. on June 24, 2022, through 12:01 a.m. on August 29, 2022.

(e) *Navigation rules.* The navigation rules shall apply at all times within a tall ships safety zone.

Dated: March 23, 2022.

**M.J. Johnston,**

Rear Admiral, U.S. Coast Guard, Commander,  
Ninth Coast Guard District.

[FR Doc. 2022-06559 Filed 3-31-22; 8:45 am]

BILLING CODE 9110-04-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 70 and 71

[EPA-HQ-OAR-2016-0186; FRL-8961-01-OAR]

RIN 2060-AV39

### Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and the Federal Operating Permit Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is re-proposing a document, first proposed in 2016, which would remove the emergency affirmative defense provisions found in the regulations for state and federal operating permit programs under the Clean Air Act (CAA). The purpose of these provisions has been to establish an affirmative defense that sources can assert in civil enforcement cases when noncompliance with certain emission limitations in operating permits occurs because of qualifying "emergency" circumstances. These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the enforcement

structure of the CAA and court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is consistent with other EPA actions involving affirmative defenses and would harmonize the enforcement and implementation of emission limitations across different CAA programs.

**DATES:** Comments must be received on or before May 16, 2022.

*Public hearing:* If anyone contacts EPA requesting a public hearing by April 6, 2022, the EPA will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** *Comments:* You may send comments, identified by Docket ID No. EPA-HQ-OAR-2016-0186, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.

- Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Include Docket ID No. EPA-HQ-OAR-2016-0186 in the subject line of the message.

- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2016-0186.

*Instructions:* All submissions received must include the Docket ID No. EPA-HQ-OAR-2016-0186 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID-19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** For information about this proposed rule, contact Corey Sugerik, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: 919-541-3223; email address: [sugerik.corey@epa.gov](mailto:sugerik.corey@epa.gov).

**SUPPLEMENTARY INFORMATION:** The information presented in this document is organized as follows:

- I. General Information
- II. Background
- III. Proposed Action
- IV. Implementation
- V. Environmental Justice Considerations
- VI. Statutory and Executive Order Reviews
- VII. Statutory Authority

### I. General Information

#### A. Entities Potentially Affected by This Action

Entities potentially affected by this proposed rulemaking include federal, state, local and tribal air pollution control agencies that administer title V operating permit programs, and owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

#### B. Obtaining a Copy of This Document and Other Related Information

The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2016-0186. All documents in the dockets are listed in <https://www.regulations.gov/>. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either in the docket for this action, Docket ID No. EPA-HQ-OAR-2016-0186, or electronically at <https://www.regulations.gov/>.

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

#### C. Preparing Comments for the EPA

*Instructions.* Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2016-0186, at <https://www.regulations.gov/> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov/> any information you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.



Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that the Agency can respond rapidly as conditions change regarding COVID-19.

**Submitting CBI.** Do not submit information containing CBI to the EPA through <https://www.regulations.gov/>. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions*. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Our preferred method to receive CBI is for it to be transmitted

electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, [oaqpscbi@epa.gov](mailto:oaqpscbi@epa.gov), and should include clear CBI markings as described later. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email [oaqpscbi@epa.gov](mailto:oaqpscbi@epa.gov) to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2016-0186. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

#### *D. Participation in Virtual Public Hearing*

Please note that because of the current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact Ms. Pamela Long at (919) 541-0641 or by email at [long.pam@epa.gov](mailto:long.pam@epa.gov). If requested, the virtual hearing will be held on April 18, 2022. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

Upon publication of this document in the **Federal Register**, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions> or contact Ms. Pamela Long at (919) 541-0641 or by email at [long.pam@epa.gov](mailto:long.pam@epa.gov). The last day to pre-register to speak at the hearing will be April 13, 2022. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have five minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to [long.pam@epa.gov](mailto:long.pam@epa.gov). The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Ms. Pamela Long at (919) 541-0641 or by email at [long.pam@epa.gov](mailto:long.pam@epa.gov) to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with Ms. Pamela Long and describe your needs by April 8, 2022. The EPA may not be able to arrange accommodations without advanced notice.

## **II. Background**

The EPA has promulgated permitting regulations for the operation of major and certain other sources of air pollutants under title V of the CAA. These regulations, codified in 40 CFR parts 70 and 71, contain the requirements for state operating permit programs and the federal operating permit program, respectively. These regulations currently contain identical provisions describing an affirmative defense that sources may be able to assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances. These "emergency" affirmative defense provisions are located at 40 CFR 70.6(g) and 71.6(g).

In 2016, the EPA proposed a rule to remove these affirmative defense provisions from the title V regulations.

81 FR 38645 (June 14, 2016), also available online at: <https://www.govinfo.gov/content/pkg/FR-2016-06-14/pdf/2016-14104.pdf> (the 2016 Proposal). The 2016 Proposal contains a detailed discussion of the background for this proposal, as well as the purpose, basis, rationale, and legal justification for this proposal. The EPA directs readers to the 2016 Proposal for further information. In summary, the EPA based the 2016 Proposal on the interpretation that the enforcement structure of the CAA, embodied in sections 113 and 304, precludes affirmative defense provisions that would operate to limit a court's authority or discretion to determine the appropriate remedy in an enforcement action. 81 FR 38650. This interpretation is informed by the 2014 *NRDC v. EPA* decision from the U.S. Court of Appeals for the D.C. Circuit.<sup>1</sup> The EPA believes that the reasoning and logic of that decision extend to regulations concerning operating permit programs under title V. This view aligns the EPA's position on affirmative defenses in title V with positions taken in other CAA program areas, including EPA policy relating to the treatment of startup, shutdown, and malfunction (SSM) periods in state implementation plans (SIPs). (The EPA's policy with respect to SIPs is discussed in an action taken in 2015, see 80 FR 33839 (June 12, 2015) (the 2015 SSM SIP Policy), and in the Agency's September 30, 2021, memorandum reinstating the 2015 SSM SIP Policy.)<sup>2</sup> This title V interpretation also aligns with EPA's position on affirmative defenses in New Source Performance Standards (NSPS) under CAA section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) under CAA section 112.<sup>3</sup>

The EPA did not finalize the 2016 Proposal. Instead, in a notation accompanying the Spring 2018 Unified Agenda of Federal Regulatory and Deregulatory Actions, the EPA stated: "The EPA is withdrawing this action via the reg agenda because the agency does

not plan to move forward with this rulemaking due to other pending priorities."<sup>4</sup>

Although the EPA did not move forward at that time with the proposal to remove the emergency affirmative defense provisions from the Title V regulations, the EPA continued to evaluate SSM provisions, including affirmative defenses, in SIPs. In October 2020, the EPA issued a guidance memorandum that, among other things, expressly superseded a portion of the EPA's interpretation of affirmative defenses presented in the 2015 SSM SIP Policy.<sup>5</sup> However, on September 30, 2021, the EPA issued a guidance memorandum that withdrew the October 2020 memorandum in its entirety and reinstated the legal and policy positions expressed in the 2015 SSM SIP Policy in their entirety.<sup>6</sup> Thus, the EPA's current interpretation of affirmative defenses in the context of SIPs is the interpretation set out in the 2015 SSM SIP Policy. As noted in a preceding paragraph, this interpretation in the context of SIPs is similar to the interpretation expressed in the 2016 Proposal for the title V rules.

### III. Proposed Action

In this action, the EPA is again proposing to remove the title V emergency affirmative defense provisions, 40 CFR 70.6(g) and 71.6(g). These provisions are inconsistent with the EPA's interpretation of the CAA's

<sup>4</sup> A copy of the entry on the Regulatory Agenda is available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2060-AS96>. See also <https://www.regulations.gov/docket/EPA-HQ-OAR-2016-0186/unified-agenda> (indicating that the proposed rule was withdrawn on February 23, 2018).

<sup>5</sup> Memorandum, Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans, 6 (October 9, 2020), available at <https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sips-guidance-memo.pdf>. In 2020, EPA also took action relating to an SSM-related affirmative defense in a SIP for Texas, withdrawing a SSM "SIP call" in part because the SIP-based affirmative defense was deemed to not be inconsistent with the CAA. See 85 FR 7232 (February 7, 2020); see also 85 FR 23,700 (April 28, 2020) (SIP call withdrawal relating to North Carolina) and 85 FR 73,218 (November 17, 2020) (SIP call withdrawal relating to Iowa). Petitions for review of these withdrawal actions were filed in the United States Court of Appeals for the D.C. Circuit. See *Sierra Club v. EPA*, No. 20–1115.

<sup>6</sup> September 2021 SSM SIP Memo, *supra* note 2. This memorandum also announced an intent to revisit, among other things, the 2020 action withdrawing the SSM affirmative defense-related SIP call for Texas. *Id.* at 5. On December 17, 2021, the United States Court of Appeals for the D.C. Circuit granted the EPA's request for a voluntary remand of that 2020 Texas SIP call withdrawal action, as well as the similar SIP call withdrawal actions relating to North Carolina and Iowa, in light of EPA's stated intent to reconsider those actions. *Sierra Club v. EPA*, No. 20–1115.

enforcement structure and court decisions from the U.S. Court of Appeals for the D.C. Circuit—primarily the 2014 *NRDC v. EPA* decision. In summary, the EPA interprets the enforcement structure of the CAA, embodied in sections 113 and 304, to preclude affirmative defense provisions that would operate to limit a court's authority or discretion to determine the appropriate remedy in an enforcement action. The title V affirmative defense provisions the EPA proposes to remove, 40 CFR 70.6(g) and 71.6(g), set forth just such limitations and, consequently, are inconsistent with the rationale of *NRDC* and the enforcement structure of the CAA. The Agency's view that these title V affirmative defense provisions are inconsistent with the CAA and D.C. Circuit precedent is consistent with the EPA's current interpretation of affirmative defenses in the context of other CAA programs, including SIPs and regulations under CAA sections 111 and 112.<sup>7</sup>

Except as modified or updated herein, the EPA is re-proposing the 2016 Proposal. The EPA previously received comments on the 2016 Proposal, including the legal interpretation upon which that former proposal—and the current proposal—are based. The EPA will consider all comments received on the 2016 Proposal as the Agency moves forward with the current rulemaking. Accordingly, commenters need not submit duplicate comments on the current proposal.<sup>8</sup> However, the EPA welcomes comments providing additional information not previously submitted to the Agency.

### IV. Implementation

The nature and focus of the proposed action are to remove the affirmative defense provisions from the EPA's regulations at 40 CFR 70.6(g) and 71.6(g). The EPA is not proposing any specific finding with respect to individual state programs or state-issued title V permits that may contain similar provisions. However, if the EPA finalizes this rule as proposed and removes the affirmative defense provisions at 40 CFR 70.6 and 71.6, the Agency expects that some state, local, and tribal permitting authorities will need to remove similar provisions from their EPA-approved part 70 program regulations and submit program

<sup>7</sup> See September 2021 SSM SIP Memo. The EPA's interpretation with respect to affirmative defenses in regulations under CAA sections 111 or 112 has not changed since the 2016 Proposal. See *supra* note 3 and accompanying text.

<sup>8</sup> Comments received on the 2016 Proposal are contained in the same docket as the current proposal: Docket ID No. EPA-HQ-OAR-2016-0186.

<sup>1</sup> 749 F.3d 1055 (D.C. Cir. 2014).

<sup>2</sup> See Memorandum, Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy, 3–4 (September 30, 2021), available at <https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf> (September 2021 SSM SIP Memo).

<sup>3</sup> E.g., 85 FR 71490 (November 9, 2020) (proposed rule removing affirmative defense from the NESHAP for polyvinyl chloride and copolymers production); 81 FR 40955 (June 23, 2016) (final rule removing affirmative defense from the NSPS and emission guidelines for commercial and institutional solid waste incineration units); see also 81 FR 38649 n.21 (June 14, 2016) (discussion of other NSPS and NESHAP rules in 2016 Proposal).

revisions to the EPA. The EPA also expects that these permitting authorities will need to remove such provisions from individual title V permits. This process will proceed consistent with the existing regulations concerning program and permit revisions. *See, e.g.*, 40 CFR 70.4(a), 70.4(i), 70.7. The EPA's expectations regarding this process are discussed in the 2016 Proposal.

## V. Environmental Justice Considerations

The Agency proposes to remove affirmative defense provisions from the EPA's operating permit program regulations. If the rule is finalized, it may also be necessary for state, local and tribal permitting authorities to remove similar affirmative defense provisions from program regulations and from individual title V operating permits. None of these changes would alter the obligations of sources to comply with the underlying emission limits and other standards contained within title V operating permits.

Based on these considerations, the EPA expects that, if this action becomes final as proposed, the effects on minority populations, low-income populations and/or indigenous peoples would not be disproportionately high and adverse.

## VI. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for part 70 state operating permit programs) and 2060–0336 (for part 71 federal operating permit program). In this action, the EPA is proposing to remove certain provisions from the EPA's regulations, which, if finalized, could result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, states could eventually be required to submit program revisions to the EPA outlining any necessary changes to their regulations and their plans to remove provisions from individual permits.

However, this action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

### C. Regulatory Flexibility Act (RFA)

I certify that this action would not have a significant economic impact on a substantial number of small entities under the RFA. This action would not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, would not be directly subjected to the requirements of this action.

### D. Unfunded Mandates Reform Act (UMRA)

This action would not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and would not significantly or uniquely affect small governments. The action would impose no enforceable duty on any state, local or tribal governments or the private sector.

### E. Executive Order 13132: Federalism

This action does not have federalism implications. It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has tribal implications. However, it would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. One tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. These tribal governments may be required to take actions if this rule is finalized, including program revisions (for part 70 programs) and eventual permit revisions (for both part 70 and delegated part 71 programs), but these actions will not require substantial compliance costs. The EPA previously consulted with tribal officials when developing the 2016 Proposal and is

planning to offer a similar consultation for the current proposal. The EPA also solicits comment from affected tribal governments on the implications of this rulemaking.

### G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

### H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

### I. National Technology Transfer and Advancement Act (NTTA)

This rulemaking does not involve technical standards.

### J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action would not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in section V of this action preamble titled, “Environmental Justice Considerations”.

## VII. Statutory Authority

The statutory authority for this action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator the authority to establish a federal operating permit program. Additionally, the Administrator determines that this proposed action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section

307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to “such other actions as the Administrator may determine.” 42 U.S.C. 7607(d)(1)(V).

#### List of Subjects

##### 40 CFR Part 70

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

##### 40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

**Michael Regan,**  
Administrator.

For the reasons stated in the preamble, the EPA proposes to amend title 40 CFR parts 70 and 71 as follows:

#### PART 70—STATE OPERATING PERMIT PROGRAMS

■ 1. The authority citation for part 70 continues to read as follows:

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

##### § 70.6 [Amended]

■ 2. In § 70.6, remove and reserve paragraph (g).

#### PART 71—FEDERAL OPERATING PERMIT PROGRAMS

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

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

##### § 71.6 [Amended]

■ 4. In § 71.6, remove and reserve paragraph (g).

[FR Doc. 2022–06907 Filed 3–31–22; 8:45 am]

**BILLING CODE 6560–50–P**

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 131

[EPA–HQ–OW–2015–0174; FRL–7253.1–01–OW]

**RIN 2040–AG21**

#### Restoring Protective Human Health Criteria in Washington

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) has determined that Washington’s human health criteria

(HHC) are not protective of Washington’s designated uses and are not based on sound scientific rationale and, accordingly, is proposing to restore protective HHC for Washington’s waters. EPA partially approved and partially disapproved Washington’s HHC in November 2016, and simultaneously promulgated federal HHC based on sound scientific rationale. In May 2019, EPA reversed its November 2016 disapproval and approved Washington’s HHC, and in June 2020 withdrew the 2016 HHC that EPA promulgated for Washington. Based on the best scientific information and analyses currently available, and consideration of these past decisions, EPA has concluded that Washington’s existing HHC are not based on sound scientific rationale and are therefore not protective of the applicable designated uses in Washington. EPA is therefore proposing to reinstate the protective and science-based federal HHC that EPA withdrew in June 2020 to protect Washington’s waters, including waters where tribes hold treaty-reserved rights to fish.

**DATES:** Comments must be received on or before May 31, 2022. *Public Hearing:* EPA will hold two public hearings during the public comment period. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearings.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OW–2015–0174, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Standards and Health Protection Division Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

*Instructions:* All submissions received must include the Docket ID No. EPA–HQ–OW–2015–0174 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the

“Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only, to reduce the risk of transmitting COVID–19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

EPA is offering two public hearings on this proposed rulemaking. Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

**FOR FURTHER INFORMATION CONTACT:** Erica Fleisig, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–1057; email address: [fleisig.eric@epa.gov](mailto:fleisig.eric@epa.gov).

**SUPPLEMENTARY INFORMATION:** This proposed rulemaking is organized as follows:

- I. Public Participation
  - A. Written Comments
  - B. Public Hearings
- II. General Information
  - A. Does this action apply to me?
- III. Background
  - A. Statutory and Regulatory Background
  - B. General Recommended Approach for Deriving Human Health Criteria
  - C. Prior EPA Actions Related to Washington’s Human Health Criteria
- IV. Administrator’s Determination That New or Revised HHC are Necessary for Washington
  - A. Existing Criteria Are Not Protective of Designated Uses of Waters in the State of Washington
  - B. Clean Water Act 303(c)(4)(B) Administrator’s Determination
- V. Derivation of Human Health Criteria for Washington
  - A. Scope of EPA’s Proposal
  - B. Washington-Specific Human Health Criteria Inputs
  - C. Proposed Human Health Criteria for Washington
  - D. Applicability
  - E. Alternative Regulatory Approaches and Implementation Mechanisms
- VI. Economic Analysis
  - A. Identifying Affected Entities
  - B. Method for Estimating Costs to Point Sources
  - C. Results
- VII. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Paperwork Reduction Act

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This content is from the eCFR and is authoritative but unofficial.

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## **Title 40 - Protection of Environment**

### **Chapter I - Environmental Protection Agency**

#### **Subchapter C - Air Programs**

#### **Part 70 State Operating Permit Programs**

- § 70.1 Program overview.
- § 70.2 Definitions.
- § 70.3 Applicability.
- § 70.4 State program submittals and transition.
- § 70.5 Permit applications.
- § 70.6 Permit content.
- § 70.7 Permit issuance, renewal, reopenings, and revisions.
- § 70.8 Permit review by EPA and affected States.
- § 70.9 Fee determination and certification.
- § 70.10 Federal oversight and sanctions.
- § 70.11 Requirements for enforcement authority.
- § 70.12 Public petition requirements.
- § 70.13 Documents that may be considered in reviewing petitions.
- § 70.14 Submission of petitions.

#### **Appendix A to Part 70**

Approval Status of State and Local Operating Permits Programs

## **PART 70 - STATE OPERATING PERMIT PROGRAMS**

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

**Source:** 57 FR 32295, July 21, 1992, unless otherwise noted.

### **§ 70.1 Program overview.**

- (a) The regulations in this part provide for the establishment of comprehensive State air quality permitting systems consistent with the requirements of title V of the Clean Air Act (Act) (42 U.S.C. 7401, *et seq.*). These regulations define the minimum elements required by the Act for State operating permit programs and the corresponding standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs.

- (b) All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.
- (c) Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional or more stringent requirements not inconsistent with this Act. The EPA will approve State program submittals to the extent that they are not inconsistent with the Act and these regulations. No permit, however, can be less stringent than necessary to meet all applicable requirements. In the case of Federal intervention in the permit process, the Administrator reserves the right to implement the State operating permit program, in whole or in part, or the Federal program contained in regulations promulgated under title V of the Act.
- (d) The requirements of part 70, 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 modified in regulations promulgated under title IV of the Act (acid rain program).
- (e) Issuance of State permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act and under the Clean Water Act, whether issued by the State, the U.S. Environmental Protection Agency (EPA), or the U.S. Army Corps of Engineers.
- (f) States that choose to receive electronic documents must satisfy the requirements of 40 CFR Part 3 - (Electronic reporting) in their program.

[57 FR 32295, July 21, 1992, as amended at 70 FR 59887, Oct. 13, 2005]

## § 70.2 Definitions.

The following definitions apply to part 70. 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 the regulations promulgated under title IV of the Act.

**Affected States** are all States:

- (1) Whose air quality may be affected and that are contiguous to the State in which a part 70 permit, permit modification or permit renewal is being proposed; or
- (2) That are within 50 miles of the permitted source.

**Affected unit** shall have the meaning given to it in the regulations promulgated under title IV of the Act.

**Alternative operating scenario (AOS)** means a scenario authorized in a part 70 permit that involves a change at the part 70 source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

**Applicable requirement** means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective 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 the regulations promulgated thereunder;
- (6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;
- (7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;
- (8) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;
- (9) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;
- (10) Any standard or other requirement for tank vessels under section 183(f) of the Act;
- (11) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;
- (12) Any standard or other requirement of the regulations promulgated 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
- (13) 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.

*Approved replicable methodology (ARM)* means part 70 permit terms that:

- (1) Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this part, such that the protocol is based on sound scientific and/or mathematical principles and provides reproducible results using the same inputs; and
- (2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the ARM, or requirement of this part, including where an ARM is used for determining applicability of a specific requirement to a particular change.

*Designated representative* shall have the meaning given to it in section 402(26) of the Act and the regulations promulgated thereunder.

*Draft permit* means the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.

**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.

**The EPA or the Administrator** means the Administrator of the EPA or his designee.

**Final permit** means the version of a part 70 permit issued by the permitting authority that has completed all review procedures required by §§ 70.7 and 70.8 of this part.

**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 70 permit that meets the requirements of § 70.6(d).

**Major source** means any stationary source (or any group of stationary sources that are located on one or more continuous 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. State programs may adopt the following provision: For onshore activities belonging to Standard Industrial Classification (SIC) Major Group 13: Oil and Gas Extraction, pollutant emitting activities shall be considered adjacent if they are located on the same surface site; or if they are located on surface sites that are located within  $\frac{1}{4}$  mile of one another (measured from the center of the equipment on the surface site) and they share equipment. Shared equipment includes, but is not limited to, produced fluids storage tanks, phase separators, natural gas dehydrators or emissions control devices. Surface site, as used in the introductory text of this definition, has the same meaning as in 40 CFR 63.761.

(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 tons per year (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, 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 subject to regulation (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 - The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;
- (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 or treated as classified as “Marginal” or “Moderate,” 50 tpy or more in areas classified or treated as classified as “Serious,” 25 tpy or more in areas classified or treated as classified as “Severe,” and 10 tpy or more in areas classified or treated as classified as “Extreme”; except that the references in this paragraph 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 or treated as 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 or treated as classified as “Serious,” sources with the potential to emit 70 tpy or more of PM-10.

*Part 70 permit or permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

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

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

*Permit modification* means a revision to a part 70 permit that meets the requirements of § 70.7(e) of this part.

*Permit program costs* means all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in § 70.9(b) of this part (whether such costs are incurred by the permitting authority or other State or local agencies that do not issue permits directly, but that support permit issuance or administration).

*Permit revision* means any permit modification or administrative permit amendment.

*Permitting authority* means either of the following:

- (1) The Administrator, in the case of EPA-implemented programs; or
- (2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part.

*Potential to emit* means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation

is enforceable by the Administrator. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in title IV of the Act or the regulations promulgated thereunder.

*Proposed permit* means the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8.

*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 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) requirement.

*Regulated pollutant (for presumptive fee calculation)*, which is used only for purposes of § 70.9(b)(2), 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 to a standard promulgated under or established by title VI of the Act;
- (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; or
- (4) Greenhouse gases.

*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 representatives 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 in so far as actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder are concerned; and
  - (ii) The designated representative for any other purposes under part 70.

**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 Mariana 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.

**Subject to regulation** means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

- (1) **Greenhouse gases (GHGs)**, the air pollutant defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO<sub>2</sub> equivalent emissions.
- (2) The term *tpy CO<sub>2</sub> equivalent emissions (CO<sub>2</sub>e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A-1 to subpart A of part 98 of this chapter - Global Warming Potentials, and summing the resultant value for each to compute a tpy CO<sub>2</sub>e. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from

agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

**Whole program** means a part 70 permit program, or any combination of partial programs, that meet all the requirements of these regulations and cover all the part 70 sources in the entire State. For the purposes of this definition, the term "State" does not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

[57 FR 32295, July 21, 1992, as amended at 66 FR 59166, Nov. 27, 2001; 69 FR 31505, June 3, 2004; 72 FR 24078, May 1, 2007; 74 FR 51438, Oct. 6, 2009; 75 FR 31607, June 3, 2010; 76 FR 43507, July 20, 2011; 80 FR 12318, Mar. 6, 2015; 80 FR 64659, Oct. 23, 2015; 81 FR 35633, June 3, 2016]

### § 70.3 Applicability.

(a) **Part 70 sources.** A State program with whole or partial approval under this part must provide for permitting of the following sources:

- (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 this 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, may be exempted by the State from the obligation to obtain a part 70 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 section 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 permit at the time that the new standard is promulgated.
- (3) [Reserved]
- (4) The following source categories are exempted from the obligation to obtain a part 70 permit:
  - (i) All sources and source categories that would be required to obtain a permit solely because they are subject to 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 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 70 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 70 program under paragraph (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 70 program.

- (d) **Fugitive emissions.** Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 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.

[57 FR 32295, July 21, 1992, as amended at 70 FR 75346, Dec. 19, 2005]

## § 70.4 State program submittals and transition.

- (a) **Date for submittal.** Not later than November 15, 1993, the Governor of each State shall submit to the Administrator for approval a proposed part 70 program, under State law or under an interstate compact, meeting the requirements of this part. If part 70 is subsequently revised such that the Administrator determines that it is necessary to require a change to an approved State program, the required revisions to the program shall be submitted within 12 months of the final changes to part 70 or within such other period as authorized by the Administrator.
- (b) **Elements of the initial program submission.** Any State that seeks to administer a program under this part shall submit to the Administrator a letter of submittal from the Governor or his designee requesting EPA approval of the program and at least three copies of a program submission. The submission shall contain the following:
  - (1) A complete program description describing how the State intends to carry out its responsibilities under this part.
  - (2) The regulations that comprise the permitting program, reasonably available evidence of their procedurally correct adoption, (including any notice of public comment and any significant comments received on the proposed part 70 program as requested by the Administrator), and copies of all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program or restrict its implementation. The State shall include with the regulations any criteria used to determine insignificant activities or emission levels for purposes of determining complete applications consistent with § 70.5(c) of this part.
  - (3) A legal opinion from the Attorney General for the State, or the attorney for those State, local, or interstate air pollution control agencies that have independent legal counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific states, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State states and regulations at the time the statement is signed and shall be fully

effective by the time the program is approved. To qualify as "independent legal counsel," the attorney signing the statement required by this section shall have full authority to independently represent the State agency in court on all matters pertaining to the State program. The legal opinion shall also include a demonstration of adequate legal authority to carry out the requirements of this part, including authority to carry out each of the following:

- (i) Issue permits and assure compliance with each applicable requirement and requirement of this part by all part 70 sources.
- (ii) Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into part 70 permits consistent with § 70.6.
- (iii) Issue permits for a fixed term of 5 years in the case of permits with acid rain provisions and issue all other permits for a period not to exceed 5 years, except for permits issued for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act.
- (iv) 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 review such permits at least every 5 years. No permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.
- (v) Incorporate into permits all applicable requirements and requirements of this part.
- (vi) Terminate, modify, or revoke and reissue permits for cause.
- (vii) Enforce permits, permit fee requirements, and the requirement to obtain a permit, as specified in § 70.11.
- (viii) Make available to the public any permit application, statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'), compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit itself shall not be entitled to protection under section 114(c) of the Act.
- (ix) Not issue a permit if the Administrator timely objects to its issuance pursuant to § 70.8(c) of this part or, if the permit has not already been issued, to § 70.8(d) of this part.
- (x) Provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to § 70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws.
- (xi) Provide that, solely for the purposes of obtaining judicial review in State court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program. If the State program allows sources to make changes subject to post hoc review [as set forth in §§ 70.7(e)(2) and (3) of this part], the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State court.

- (xii) Provide that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than 90 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.
  - (xiii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.
- (4) Relevant permitting program documentation not contained in the State regulations, including the following:
    - (i) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program; and
    - (ii) Relevant guidance issued by the State to assist in the implementation of its permitting program, including criteria for monitoring source compliance (e.g., inspection strategies).
  - (5) A complete description of the State's compliance tracking and enforcement program or reference to any agreement the State has with EPA that provides this information.
  - (6) A showing of adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of their submittal, except for initial permit applications, for which the permitting authority may take up to 3 years from the effective date of the program to take final action on the application, as provided for in the transition plan.
  - (7) A demonstration, consistent with § 70.9, that the permit fees required by the State program are sufficient to cover permit program costs.
  - (8) A statement that adequate personnel and funding have been made available to develop, administer, and enforce the program. This statement shall include the following:
    - (i) A description in narrative form of the scope, structure, coverage, and processes of the State program.
    - (ii) A description of the organization and structure of the agency or agencies that will have responsibility for administering the program, including the information specified in this paragraph. If more than one agency is responsible for administration of a program, the responsibilities of each agency must be delineated, their procedures for coordination must be set forth, and an agency shall be designated as a "lead agency" to facilitate communications between EPA and the other agencies having program responsibility.
    - (iii) A description of the agency staff who will carry out the State program, including the number, occupation, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.



- (iv) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.
  - (v) An estimate of the permit program costs for the first 4 years after approval, and a description of how the State plans to cover those costs.
- (9) A commitment from the State to submit, at least annually to the Administrator, information regarding the State's enforcement activities including, but not limited to, the number of criminal and civil, judicial and administrative enforcement actions either commenced or concluded; the penalties, fines, and sentences obtained in those actions; and the number of administrative orders issued.
- (10) A requirement under State law that, if a timely and complete application for a permit renewal is submitted, consistent with § 70.5(a)(2), but the State has failed to issue or deny the renewal permit before the end of the term of the previous permit, then:
- (i) The permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to § 70.6(f) may extend beyond the original permit term until renewal; or
  - (ii) All the terms and conditions of the permit including any permit shield that may be granted pursuant to § 70.6(f) shall remain in effect until the renewal permit has been issued or denied.
- (11) A transition plan providing a schedule for submittal and final action on initial permit applications for all part 70 sources. This plan shall provide that:
- (i) Submittal of permit applications by all part 70 sources (including any sources subject to a partial or interim program) shall occur within 1 year after the effective date of the permit program;
  - (ii) 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;
  - (iii) Any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted on within 9 months of receipt of the complete application; and
  - (iv) Submittal of permit applications and the permitting of affected sources shall occur in accordance with the deadlines in title IV of the Act and the regulations promulgated thereunder.
- (12) Provisions consistent with paragraphs (b)(12)(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 the terms of total emissions): *Provided*, That the facility provides the Administrator and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different time frame for emergencies. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit. The following provisions implement this requirement of an approvable part 70 permit program:
- (i) The program shall allow permitted sources 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 § 70.6(f) of this part shall not apply to any change made pursuant to this paragraph (b)(12)(i) of this section.
- (ii) The program may provide for permitted sources 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 (b)(12)(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 (b)(12)(ii) of this section, 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 § 70.6(f) of this part shall not extend to any change made under this paragraph (b)(12)(ii) of this section. 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 program shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under § 70.6 (a) and (c) of this part 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 (b)(12)(iii) of this section, 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 § 70.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.
- (13) Provisions for adequate, streamlined, and reasonable procedures for expeditious review of permit revisions or modifications. The program may meet this requirement by using procedures that meet the requirements of § 70.7(e) or that are substantially equivalent to those provided in § 70.7(e) of this part.

- (14) If a State allows changes that are not addressed or prohibited by the permit, other than those described in paragraph (b)(15) of this section, to be made without a permit revision, provisions meeting the requirements of paragraphs (b)(14) (i) through (iii) of this section. Although a State may, as a matter of State law, prohibit sources from making such changes without a permit revision, any such prohibition shall not be enforceable by the Administrator or by citizens under the Act unless the prohibition is required by an applicable requirement. Any State procedures implementing such a State law prohibition must include the requirements of paragraphs (b)(14) (i) through (iii) of this section.
  - (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 of each such change, except for changes that qualify as insignificant under the provisions adopted pursuant to § 70.5(c) of this part. 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 § 70.6(f) of this part.
  - (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.
- (15) Provisions prohibiting sources from making, without a permit revision, changes that are not addressed or prohibited by the part 70 permit, if such changes are subject to any requirements under title IV of the Act or are modifications under any provision of title I of the Act.
- (16) Provisions requiring the permitting authority to implement the requirements of §§ 70.6 and 70.7 of this part.

(c) ***Partial programs.***

- (1) The EPA may approve a partial program that applies to all part 70 sources within a limited geographic area (e.g., a local agency program covering all sources within the agency's jurisdiction). To be approvable, any partial program must, at a minimum, ensure compliance with all of the following applicable requirements, as they apply to the sources covered by the partial program:
  - (i) All requirements of title V of the Act and of part 70;
  - (ii) All applicable requirements of title IV of the Act and regulations promulgated thereunder which apply to affected sources; and
  - (iii) All applicable requirements of title I of the Act, including those established under sections 111 and 112 of the Act.
- (2) Any partial permitting program, such as that of a local air pollution control agency, providing for the issuance of permits by a permitting authority other than the State, shall be consistent with all the elements required in paragraphs (b) (1) through (16) of this section.
- (3) Approval of any partial program does not relieve the State from its obligation to submit a whole program or from application of any sanctions for failure to submit a fully-approvable whole program.
- (4) Any partial program may obtain interim approval under paragraph (d) of this section if it substantially meets the requirements of this paragraph (c) of this section.

(d) *Interim approval.*

- (1) If a program (including a partial permit program) submitted under this part substantially meets the requirements of this part, but is not fully approvable, the Administrator may by rule grant the program interim approval.
- (2) Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources shall become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall expire at the end of their fixed term, unless renewed under a part 70 program.
- (3) The EPA may grant interim approval to any program if it meets each of the following minimum requirements and otherwise substantially meets the requirements of this part:
  - (i) **Adequate fees.** The program must provide for collecting permit fees adequate for it to meet the requirements of § 70.9 of this part.
  - (ii) **Applicable requirements.**
    - (A) The program must provide for adequate authority to issue permits that assure compliance with the requirements of paragraph (c)(1) of this section for those major sources covered by the program.
    - (B) Notwithstanding paragraph (d)(3)(ii)(A) of this section, where a State or local permitting authority lacks adequate authority to issue or revise permits that assure compliance with applicable requirements established exclusively through an EPA-approved minor NSR program, EPA may grant interim approval to the program upon a showing by the permitting authority of compelling reasons which support the interim approval.
    - (C) Any part 70 permit issued during an interim approval granted under paragraph (d)(3)(ii)(B) of this section that does not incorporate minor NSR requirements shall:
      - (1) Note this fact in the permit;
      - (2) Indicate how citizens may obtain access to excluded minor NSR permits;
      - (3) Provide a cross reference, such as a listing of the permit number, for each minor NSR permit containing an excluded minor NSR term; and
      - (4) State that the minor NSR requirements which are excluded are not eligible for the permit shield under § 70.6(f).
    - (D) A program receiving interim approval for the reason specified in (d)(3)(ii)(B) of this section must, upon or before granting of full approval, institute proceedings to reopen part 70 permits to incorporate excluded minor NSR permits as terms of the part 70 permits, as required by § 70.7(f)(1)(iv). Such reopening need not follow full permit issuance procedures nor the notice requirement of § 70.7(f)(3), but may instead follow the permit revision procedure in effect under the State's approved part 70 program for incorporation of minor NSR permits.
  - (iii) **Fixed term.** The program must provide for fixed permit terms, consistent with paragraphs (b)(3)(iii) and (iv) of this section.

- (iv) **Public participation.** The program must provide for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions, except for modifications qualifying for minor permit modification procedures under § 70.7(e) of this part.
  - (v) **EPA and affected State review.** The program must allow EPA an opportunity to review each proposed permit, including permit revisions, and to object to its issuance consistent with § 70.8(c) of this part. The program must provide for affected State review consistent with § 70.8(b) of this part.
  - (vi) **Permit issuance.** The program must provide that the proposed permit will not be issued if EPA objects to its issuance.
  - (vii) **Enforcement.** The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.
  - (viii) **Operational flexibility.** The program must 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, consistent with paragraph (b)(12) of this section.
  - (ix) **Streamlined procedures.** The program must provide for streamlined procedures for issuing and revising permits and determining expeditiously after receipt of a permit application or application for a permit revision whether such application is complete.
  - (x) **Permit application.** The program submittal must include copies of the permit application and reporting form(s) that the State will use in implementing the interim program.
  - (xi) **Approval of AOSs.** The program submittal must include provisions to insure that AOSs requested by the source as approved by the permitting authority are included in the part 70 permit pursuant to § 70.6(a)(9).
- (e) **EPA review of permit program submittals.** Within 1 year after receiving a program submittal, the Administrator shall approve or disapprove the program, in whole or in part, by publishing a notice in the FEDERAL REGISTER. Prior to such notice, the Administrator shall provide an opportunity for public comment on such approval or disapproval. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain full approval. The Administrator shall approve State programs that conform to the requirements of this part.
- (1) Within 60 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete enough to warrant review by EPA for either full, partial, or interim approval. If EPA finds that a State's submission is complete, the 1-year review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the 1-year review period shall not begin until all the necessary information is received by EPA.
  - (2) If the State's submission is materially changed during the 1-year review period, the Administrator may extend the review period for no more than 1 year following receipt of the revised submission.
  - (3) In any notice granting interim or partial approval, the Administrator shall specify the changes or additions that must be made before the program can receive full approval and the conditions for implementation of the program until that time.
- (f) **State response to EPA review of program -**

- (1) **Disapproval.** The State shall submit to EPA program revisions or modifications required by the Administrator's action disapproving the program, or any part thereof, within 180 days of receiving notification of the disapproval.
  - (2) **Interim approval.** The State shall submit to EPA changes to the program addressing the deficiencies specified in the interim approval no later than 6 months prior to the expiration of the interim approval.
- (g) **Effective date.** The effective date of a part 70 program, including any partial or interim program approved under this part, shall be the effective date of approval by the Administrator.
- (h) **Individual permit transition.** Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program, except that the Administrator will continue to issue phase I acid rain permits. After program approval, EPA shall retain jurisdiction over any permit (including any general permit) that it has issued unless arrangements have been made with the State to assume responsibility for these permits. Where EPA retains jurisdiction, it will continue to process permit appeals and modification requests, to conduct inspections, and to receive and review monitoring reports. If any permit appeal or modification request is not finally resolved when the federally-issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved. Upon request by a State, the Administrator may delegate authority to implement all or part of a permit issued by EPA, if a part 70 program has been approved for the State. The delegation may include authorization for the State to collect appropriate fees, consistent with § 70.9 of this part.
- (i) **Program revisions.** Either EPA or a State with an approved program may initiate a program revision. Program revision may be necessary when the relevant Federal or State statutes or regulations are modified or supplemented. The State shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures.
- (1) If the Administrator determines pursuant to § 70.10 of this part that a State is not adequately administering the requirements of this part, or that the State's permit program is inadequate in any other way, the State shall revise the program or its means of implementation to correct the inadequacy. The program shall be revised within 180 days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years if the State demonstrates that additional legal authority is necessary to make the program revision.
  - (2) Revision of a State program shall be accomplished as follows:
    - (i) The State shall submit a modified program description, Attorney General's statement, or such other documents as EPA determines to be necessary.
    - (ii) After EPA receives a proposed program revision, it will publish in the FEDERAL REGISTER a public notice summarizing the proposed change and provide a public comment period of at least 30 days.
    - (iii) The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Act.
    - (iv) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of nonsubstantial program revisions may be given by a letter from the Administrator to the Governor or a designee.

(v) The Governor of any State with an approved part 70 program shall notify EPA whenever the Governor proposes to transfer all or part of the program to any other agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until the revision has been approved by the Administrator under this paragraph.

(3) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as he determines are necessary.

(j) **Sharing of information.**

(1) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction and in a form specified by the Administrator, including computer-readable files to the extent practicable. If the information has been submitted to the State under a claim of confidentiality, the State may require the source to submit this information to the Administrator directly. Where the State submits information to the Administrator under a claim of confidentiality, the State shall submit that claim to EPA when providing information to EPA under this section. Any information obtained from a State or part 70 source accompanied by a claim of confidentiality will be treated in accordance with the regulations in part 2 of this chapter.

(2) The EPA will furnish to States with approved programs the information in its files that the State needs to implement its approved program. Any such information submitted to EPA under a claim of confidentiality will be subject to the regulations in part 2 of this chapter.

(k) **Administration and enforcement.** Any State that fails to adopt a complete, approvable part 70 program, or that EPA determines is not adequately administering or enforcing such program shall be subject to certain Federal sanctions as set forth in § 70.10 of this part.

[57 FR 32295, July 21, 1992, as amended at 61 FR 31448, June 20, 1996; 61 FR 56370, Oct. 31, 1996; 66 FR 27010, May 15, 2001; 74 FR 51438, Oct. 6, 2009; 85 FR 6444, Feb. 5, 2020]

## § 70.5 Permit applications.

(a) **Duty to apply.** For each part 70 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 applying for a part 70 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.

(ii) Part 70 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 70 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Where an existing part 70 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 prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed. In no event shall this time be greater than 18 months.

(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.** The program shall provide criteria and procedures for determining in a timely fashion when applications are complete. 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. 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. The program shall require that a responsible official 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 § 70.7(a)(4) of this part. 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 § 70.7(b) of this part, 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.** In the case where a source has submitted information to the State under a claim of confidentiality, the permitting authority may also require the source to submit a copy of such information directly to the Administrator.

(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 State program under this part shall provide for a standard application form or forms. Information as described below for each emissions unit at a part 70 source shall be included in the application. The Administrator may approve as part of a State program a list of insignificant activities and emissions levels which 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 evaluate the fee amount required under the schedule approved pursuant to § 70.9 of this part. 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:

(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 (SIC) Code) including those associated with any proposed AOS identified by the source.



(3) The following emission-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) of this section. 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 approved pursuant to § 70.9(b) of this part.
- (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 rate in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method. For emissions units subject to an annual emissions cap, tpy can be reported as part of the aggregate emissions associated with the cap, except where more specific information is needed, including where necessary to determine and/or assure compliance with an applicable requirement.
- (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 70 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 proposed AOSs identified by the source pursuant to § 70.6(a)(9) of this part or to define permit terms and conditions implementing any AOS under § 70.6(a)(9) or implementing § 70.4(b)(12) or § 70.6(a)(10) of this part. The permit application shall include documentation demonstrating that the source has obtained all authorization(s) required under the applicable requirements relevant to any proposed AOSs, or a certification that the source has submitted all relevant materials to the appropriate permitting authority for obtaining such authorization(s).

- (8) A compliance plan for all part 70 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.
    - (D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.
  - (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.
    - (D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement 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 will satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.
  - (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 title IV of the Act 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 title IV of the Act.

(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.

[57 FR 32295, July 21, 1992, as amended at 74 FR 51438, Oct. 6, 2009]

## § 70.6 Permit content.

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

(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include ARMs identified by the source in its part 70 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would apply as a result of implementing the ARM.

(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 regulations promulgated under title IV of the Act, 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 70 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the State 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 monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;
- (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) of this section; 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 § 70.5(d) of this part.
  - (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. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.
- (4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under title IV of the Act or the regulations promulgated thereunder.
  - (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 promulgated under title IV of the Act.
- (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 70 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, 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 70 source pays fees to the permitting authority consistent with the fee schedule approved pursuant to § 70.9 of this part.

(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 AOSs 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 AOS 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 AOS; and

(iii) Must ensure that the terms and conditions of each AOS meet all applicable requirements and the requirements of this part. The permitting authority shall not approve a proposed AOS into the part 70 permit until the source has obtained all authorizations required under any applicable requirement relevant to that AOS.

(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.

(b) **Federally-enforceable requirements.**

(1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

(2) Notwithstanding paragraph (b)(1) of this section, the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.

- (c) **Compliance requirements.** All part 70 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 70 permit shall contain a certification by a responsible official that meets the requirements of § 70.5(d) for this part.
  - (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 70 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 § 70.5(c)(8) of this part.
  - (4) Progress reports consistent with an applicable schedule of compliance and § 70.5(c)(8) of this part 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 § 70.6(a)(3) of this part, 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 all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):
      - (A) The identification of each term or condition of the permit that is the basis of the certification;

- (B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;
- (C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and
- (D) 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.

(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 § 70.7(h) of this part, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part 70 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 70 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 regulations promulgated under title IV of the Act.

(2) Part 70 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 70 permit consistent with § 70.5 of this part. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of § 70.5 of this part, 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 § 70.7(h) of this part, 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 70 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 70 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 70 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.

[57 FR 32295, July 21, 1992, as amended at 62 FR 54946, Oct. 22, 1997; 66 FR 12876, Mar. 1, 2001; 66 FR 55884, Nov. 5, 2001; 68 FR 38523, June 27, 2003; 74 FR 51439, Oct. 6, 2009; 79 FR 43667, July 28, 2014]

## § 70.7 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 condition 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 § 70.6(d) of this part;
  - (ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (2) and (3) of this section, the permitting authority has complied with the requirements for public participation under paragraph (h) of this section;
  - (iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 70.8(b) of this part;
  - (iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and
  - (v) The Administrator has received a copy of the proposed permit and any notices required under §§ 70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under § 70.8(c) of this part within the time period specified therein.
- (2) Except as provided under the initial transition plan provided for under § 70.4(b)(11) of this part or under regulations promulgated under title IV of title V of the Act for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.
- (3) The program shall also contain reasonable procedures to ensure 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) (2) and (3) of this section, the State program need not require 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 EPA and to any other person who requests it.
  - (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, § 70.4(b)(12)(i), and paragraphs (e) (2)(v) and (3)(v) of this section, no part 70 source may operate after the time that it is required to submit a timely and complete application under an approved permit program, except in compliance with a permit issued under a part 70 program. The program shall provide that, if a part 70 source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a part 70 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 § 70.5(a)(2) of this part, 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) The program shall provide that:
    - (i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State and EPA review, that apply to initial permit issuance; and
    - (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 § 70.5(a)(1)(iii) of this part.
  - (2) If the permitting authority fails to act in a timely way on a permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate or revoke and reissue the permit.
- (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 70 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 §§ 70.7 and 70.8 of this part 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 § 70.6 of this part; or
  - (vi) Incorporates any other type of change which the Administrator has determined as part of the approved part 70 program 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 regulations promulgated under title IV of the Act.
- (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.
  - (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 § 70.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§ 70.6, 70.7, and 70.8 for significant permit modifications.
- (e) **Permit modification.** A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's 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 regulations promulgated under title IV of the Act.
  - (1) **Program description.** The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.
  - (2) **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:
    - (A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and
    - (B) 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 by the State program to be processed as a significant modification.
- (B) Notwithstanding paragraphs (e)(2)(i)(A) and (e)(3)(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 § 70.5(c) of this part 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 § 70.5(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 the Administrator and affected States as required under § 70.8.
- (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 § 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modification. The permitting authority promptly shall send any notice required under § 70.8(b)(2) to the Administrator.
- (iv) **Timetable for issuance.** 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 § 70.8(c), 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 transmit to the Administrator the new proposed permit modification as required by § 70.8(a) of this part.
  - (v) **Source's ability to make change.** The State program may allow the source to 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)(2)(v) (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 § 70.6(f) of this part may not extend to minor permit modifications.
- (3) **Group processing of minor permit modifications.** Consistent with this paragraph, the permitting authority may modify the procedure outlined in paragraph (e)(2) 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)(2)(i)(A) of this section; and
    - (B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (e)(3)(i)(B) (1) and (2) of this section, this threshold shall be 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 § 70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:
      - (1) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that would be imposed by immediate permit modification review, and
      - (2) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.
  - (ii) **Application.** An application requesting the use of group processing procedures shall meet the requirements of § 70.5(c) of this part 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 § 70.5(d) of this part, 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)(3)(i)(B) of this section.
  - (E) Certification, consistent with § 70.5(d) of this part, that 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 the Administrator and affected States as required under § 70.8 of this part.
- (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)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligations under §§ 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under § 70.8(b)(2) of this part to the Administrator.
- (iv) **Timetable for issuance.** The provisions of paragraph (e)(2)(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)(2)(iv) (A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45-day review period under § 70.8(c) of this part, whichever is later.
- (v) **Source's ability to make change.** The provisions of paragraph (e)(2)(v) of this section shall apply to modifications eligible for group processing.
- (vi) **Permit shield.** The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.
- (4) **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. The State program shall contain criteria for determining whether a change is significant. At a minimum, 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) The State program shall provide that significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA, 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 70 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 has been extended pursuant to § 70.4(b)(10) (i) or (ii) of this part.
  - (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 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 Administrator or the permitting authority 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. Such reopening 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 70 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.*

- (1) 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 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.
- (h) **Public participation.** Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:
  - (1) Notice shall be given by one of the following methods: By publishing the notice in a newspaper of general circulation in the area where the source is located (or in a State publication designed to give general public notice) or by posting the notice, for the duration of the public comment period, on a public Web site identified by the permitting authority, if the permitting authority has selected Web site noticing as its "consistent noticing method." The consistent noticing method shall be used for all draft permits subject to notice under this paragraph. If Web site noticing is selected as the consistent noticing method, the draft permit shall also be posted, for the duration of the public comment period, on a public Web site identified by the permitting authority. In addition, notice shall be given to persons on a mailing list developed by the permitting authority using generally accepted methods (e.g., hyperlink sign-up function or radio button on an agency Web site, sign-up sheet at a public hearing, etc.) that enable interested parties to subscribe to the mailing list. 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 within a reasonable timeframe. The permitting authority may use other means to provide adequate notice to the affected public;
  - (2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain additional information, including copies of the permit draft, the statement required by § 70.7(a)(5) (sometimes referred to as the "statement of basis") for the draft permit, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority (except for publicly-available materials and publications) that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);
  - (3) The permitting authority shall provide such notice and opportunity for participation by affected States as is provided for by § 70.8 of this part;
  - (4) **Timing.** The permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.

- (5) The permitting authority shall keep a record of the commenters and of the issues raised during the public participation process, as well as records of the written comments submitted during that process, so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.
- (6) The permitting authority must respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and any such comments raised during any public hearing on the permit.

[57 FR 32295, July 21, 1992, as amended at 81 FR 71630, Oct. 18, 2016; 85 FR 6444, May 6, 2020]

## § 70.8 Permit review by EPA and affected States.

### (a) *Transmission of information to the Administrator.*

- (1) The permit program must require that the permitting authority provide to the Administrator a copy of each permit application (including any application for significant or minor permit modification), the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'), each proposed permit, each final permit, and, if significant comment is received during the public participation process, the written response to comments (which must include a written response to all significant comments raised during the public participation process on the draft permit and recorded under § 70.7(h)(5) of this part), and an explanation of how those public comments and the permitting authority's responses are available to the public. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority 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.
  - (i) Where the public participation process for a draft permit concludes before the proposed permit is submitted to the Administrator, the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis') and the written response to comments, if significant comment was received during the public participation process, must be submitted with the proposed permit along with other supporting materials required in § 70.8(a)(1) of this part, excepting the final permit. The Administrator's 45-day review period for this proposed permit will not begin until such materials have been received by the EPA.
  - (ii) In instances where the Administrator has received a proposed permit from a permitting authority before the public participation process on the draft permit has been completed, the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis') must be submitted with the proposed permit along with other supporting materials, required in § 70.8(a)(1) of this part, excepting the final permit and the written response to comments. If the permitting authority receives significant comment on the draft permit during the public participation process, but after the submission of the proposed permit to the Administrator, the Administrator will no longer consider the submitted proposed permit as a permit proposed to be issued under section 505 of the Act. In such instances, the permitting authority must make any revisions to the permit and permit record necessary to address such public comments, including preparation of a written response to comments (which must include a written

response to all significant comments raised during the public participation process on the draft permit and recorded under § 70.7(h)(5) of this part), and must submit the proposed permit and the supporting material required under § 70.8(a)(1)(i) of this part, excepting the final permit, to the Administrator after the public comment period has closed. This later submitted permit will then be considered as a permit proposed to be issued under section 505 of the Act, and the Administrator's review period for the proposed permit will not begin until all required materials have been received by the EPA.

- (2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:
  - (i) By regulation for a category of sources nationwide, or
  - (ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.
- (3) Each State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.

**(b) *Review by affected States.***

- (1) The permit program shall provide that the permitting authority give notice of each draft permit to any affected State on or before the time that the permitting authority provides this notice to the public under § 70.7(h) of this part, except to the extent § 70.7(e) (2) or (3) of this part requires the timing of the notice to be different.
- (2) The permit program shall provide that the permitting authority, 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 § 70.7(e) (2) or (3) of this part], shall notify the Administrator and 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.

**(c) *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 (a) 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 required under § 70.8(a)(1), including under § 70.8(a)(1)(i) or (ii) where applicable.
- (2) Any EPA objection under paragraph (c)(1) of this section shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections. The Administrator will provide the permit applicant a copy of the objection.
- (3) Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:

- (i) Comply with paragraphs (a) or (b) of this section;
  - (ii) Submit any information necessary to review adequately the proposed permit; or
  - (iii) Process the permit under the procedures approved to meet § 70.7(h) of this part except for minor permit modifications.
- (4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act.
- (d) **Public petitions to the Administrator.** The program shall provide that, if the Administrator does not object in writing under paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection. The petitioner shall provide a copy of such petition to the permitting authority and the applicant. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in § 70.7(h) of this part, 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. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the permitting authority has issued a permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in § 70.7(g)(4) or (g)(5)(i) and (ii) of this part except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.
- (e) **Prohibition on default issuance.** Consistent with § 70.4(b)(3)(ix) of this part, for the purposes of Federal law and title V of the Act, no State program may provide that a part 70 permit (including a permit renewal or modification) will issue until affected States and EPA have had an opportunity to review the proposed permit as required under this section. When the program is submitted for EPA review, the State Attorney General or independent legal counsel shall certify that no applicable provision of State law requires that a part 70 permit or renewal be issued after a certain time if the permitting authority 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.

[57 FR 32295, July 21, 1992, as amended at 85 FR 6445, Feb. 5, 2020]

## § 70.9 Fee determination and certification.

- (a) **Fee requirement.** The State program shall require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.
- (b) **Fee schedule adequacy.**
- (1) The State program shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs. These costs include, but are not limited to, the costs of the following activities as they relate to the operating permit program for stationary sources:

- (i) Preparing generally applicable regulations or guidance regarding the permit program or its implementation or enforcement;
- (ii) 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;
- (iii) General administrative costs of running the permit program, including the supporting and tracking of permit applications, compliance certification, and related data entry;
- (iv) Implementing and enforcing the terms of any part 70 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;
- (v) Emissions and ambient monitoring;
- (vi) Modeling, analyses, or demonstrations;
- (vii) Preparing inventories and tracking emissions; and
- (viii) Providing direct and indirect support to sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act in determining and meeting their obligations under this part.

(2)

- (i) The Administrator will presume that the fee schedule meets the requirements of paragraph (b)(1) of this section if it would result in the collection and retention of an amount not less than \$25 per year [as adjusted pursuant to the criteria set forth in paragraph (b)(2)(iv) of this section] times the total tons of the actual emissions of each regulated pollutant (for presumptive fee calculation) emitted from part 70 sources and any GHG cost adjustment required under paragraph (b)(2)(v) of this section.
- (ii) The State may exclude from such calculation:
  - (A) The actual emissions of sources for which no fee is required under paragraph (b)(4) of this section;
  - (B) The amount of a part 70 source's actual emissions of each regulated pollutant (for presumptive fee calculation) that the source emits in excess of four thousand (4,000) tpy;
  - (C) A part 70 source's actual emissions of any regulated pollutant (for presumptive fee calculation), the emissions of which are already included in the minimum fees calculation; or
  - (D) The insignificant quantities of actual emissions not required in a permit application pursuant to § 70.5(c).
- (iii) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for presumptive fee calculation) emitted from a part 70 source over the preceding calendar year or any other period determined by the permitting authority to be representative of normal source operation and consistent with the fee schedule approved pursuant to this section. Actual emissions shall be calculated using the unit's actual operating hours, production

rates, and in-place control equipment, types of materials processed, stored, or combusted during the preceding calendar year or such other time period established by the permitting authority pursuant to the preceding sentence.

- (iv) The program shall provide that the \$25 per ton per year used to calculate the presumptive minimum amount to be collected by the fee schedule, as described in paragraph (b)(2)(i) of this section, shall be increased each year by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989.
  - (A) The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year.
  - (B) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for the calendar year 1989 shall be used.
- (v) **GHG cost adjustment.** The amount calculated in paragraph (b)(2)(i) of this section shall be increased by the GHG cost adjustment determined as follows: For each activity identified in the following table, multiply the number of activities performed by the permitting authority by the burden hours per activity, and then calculate a total number of burden hours for all activities. Next, multiply the burden hours by the average cost of staff time, including wages, employee benefits and overhead.

Activity	Burden hours per activity
GHG completeness determination (for initial permit or updated application)	43
GHG evaluation for a permit modification or related permit action	7
GHG evaluation at permit renewal	10

- (3) The State program's fee schedule may include emissions fees, application fees, service-based fees or other types of fees, or any combination thereof, to meet the requirements of paragraph (b)(1) or (b)(2) of this section. Nothing in the provisions of this section shall require a permitting authority to calculate fees on any particular basis or in the same manner for all part 70 sources, all classes or categories of part 70 sources, or all regulated air pollutants, provided that the permitting authority collects a total amount of fees sufficient to meet the program support requirements of paragraph (b)(1) of this section.
- (4) 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.
- (5) The State shall provide a detailed accounting that its fee schedule meets the requirements of paragraph (b)(1) of this section if:
  - (i) The State sets a fee schedule that would result in the collection and retention of an amount less than that presumed to be adequate under paragraph (b)(2) of this section; or

- (ii) The Administrator determines, based on comments rebutting the presumption in paragraph (b)(2) of this section or on his own initiative, that there are serious questions regarding whether the fee schedule is sufficient to cover the permit program costs.
- (c) **Fee demonstration.** The permitting authority shall provide a demonstration that the fee schedule selected will result in the collection and retention of fees in an amount sufficient to meet the requirements of this section.
- (d) **Use of Required Fee Revenue.** The Administrator will not approve a demonstration as meeting the requirements of this section, unless it contains an initial accounting (and periodic updates as required by the Administrator) of how required fee revenues are used solely to cover the costs of meeting the various functions of the permitting program.

[57 FR 32295, July 21, 1992, as amended at 80 FR 64659, Oct. 23, 2015]

## § 70.10 Federal oversight and sanctions.

- (a) **Failure to submit an approvable program.**
  - (1) If a State fails to submit a fully-approvable whole part 70 program, or a required revision thereto, in conformance with the provisions of § 70.4, or if an interim approval expires and the Administrator has not approved a whole part 70 program:
    - (i) At any time the Administrator may apply any one of the sanctions specified in section 179(b) of the Act; and
    - (ii) Eighteen months after the date required for submittal or the date of disapproval by the Administrator, the Administrator will apply such sanctions in the same manner and with the same conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.
  - (2) If full approval of a whole part 70 program has not taken place within 2 years after the date required for such submission, the Administrator will promulgate, administer, and enforce a whole program or a partial program as appropriate for such State.
- (b) **State failure to administer or enforce.** Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part and of any agreement between the State and the Administrator concerning operation of the program.
  - (1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering or enforcing a part 70 program, or any portion thereof, the Administrator will notify the permitting authority of the determination and the reasons therefore. The Administrator will publish such notice in the FEDERAL REGISTER.
  - (2) If, 90 days after issuing the notice under paragraph (c)(1) of this section, the permitting authority fails to take significant action to assure adequate administration and enforcement of the program, the Administrator may take one or more of the following actions:
    - (i) Withdraw approval of the program or portion thereof using procedures consistent with § 70.4(e) of this part;
    - (ii) Apply any of the sanctions specified in section 179(b) of the Act;
    - (iii) Promulgate, administer, or enforce a Federal program under title V of the Act.

- (3) Whenever the Administrator has made the finding and issued the notice under paragraph (c)(1) of this section, the Administrator will apply the sanctions under section 179(b) of the Act 18 months after that notice. These sanctions will be applied in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.
- (4) Whenever the Administrator has made the finding and issued the notice under paragraph (c)(1) of this section, the Administrator will, unless the State has corrected such deficiency within 18 months after the date of such finding, promulgate, administer, and enforce, a whole or partial program 2 years after the date of such finding.
- (5) Nothing in this section shall limit the Administrator's authority to take any enforcement action against a source for violations of the Act or of a permit issued under rules adopted pursuant to this section in a State that has been delegated responsibility by EPA to implement a Federal program promulgated under title V of the Act.
- (6) Where a whole State program consists of an aggregate of partial programs, and one or more partial programs fails to be fully approved or implemented, the Administrator may apply sanctions only in those areas for which the State failed to submit or implement an approvable program.

(c) ***Criteria for withdrawal of State programs.***

- (1) The Administrator may, in accordance with the procedures of paragraph (c) of this section, withdraw program approval in whole or in part whenever the approved program no longer complies with the requirements of this part, and the permitting authority fails to take corrective action. Such circumstances, in whole or in part, include any of the following:
  - (i) Where the permitting authority's legal authority no longer meets the requirements of this part, including the following:
    - (A) The permitting authority fails to promulgate or enact new authorities when necessary; or
    - (B) The State legislature or a court strikes down or limits State authorities to administer or enforce the State program.
  - (ii) Where the operation of the State program fails to comply with the requirements of this part, including the following:
    - (A) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
    - (B) Repeated issuance of permits that do not conform to the requirements of this part;
    - (C) Failure to comply with the public participation requirements of § 70.7(h) of this part;
    - (D) Failure to collect, retain, or allocate fee revenue consistent with § 70.9 of this part; or
    - (E) Failure in a timely way to act on any applications for permits including renewals and revisions.
  - (iii) Where the State fails to enforce the part 70 program consistent with the requirements of this part, including the following:
    - (A) Failure to act on violations of permits or other program requirements;



- (B) Failure to seek adequate enforcement penalties and fines and collect all assessed penalties and fines; or
- (C) Failure to inspect and monitor activities subject to regulation.
- (d) **Federal collection of fees.** If the Administrator determines that the fee provisions of a part 70 program do not meet the requirements of § 70.9 of this part, or if the Administrator makes a determination under paragraph (c)(1) of this section that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under title V of the Act, collect reasonable fees to cover the Administrator's costs of administering the provisions of the permitting program promulgated by the Administrator, without regard to the requirements of § 70.9 of this part.

## § 70.11 Requirements for enforcement authority.

All programs to be approved under this part must contain the following provisions:

- (a) **Enforcement authority.** Any agency administering a program shall have the following enforcement authority to address violations of program requirements by part 70 sources:
  - (1) To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.
  - (2) To seek injunctive relief in court to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.
  - (3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following:
    - (i) Civil penalties shall be recoverable for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than \$10,000 per day per violation. State law shall not include mental state as an element of proof for civil violations.
    - (ii) Criminal fines shall be recoverable against any person who knowingly violates any applicable requirement; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than \$10,000 per day per violation.
    - (iii) Criminal fines shall be recoverable against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. These fines shall be recoverable in a maximum amount of not less than \$10,000 per day per violation.
- (b) **Burden of proof.** The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent required under the Act.
- (c) **Appropriateness of penalties and fines.** A civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate to the violation.

## § 70.12 Public petition requirements.

- (a) **Standard petition requirements.** Each public petition sent to the Administrator under § 70.8(d) of this part must include the following elements in the following order:
- (1) **Identification of the proposed permit on which the petition is based.** The petition must provide the permit number, version number, or any other information by which the permit can be readily identified. The petition must specify whether the permit action is an initial permit, a permit renewal, or a permit modification/revision, including minor modifications/revisions.
  - (2) **Identification of petition claims.** Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under this part. Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must be contained within the body of the petition, or if reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. For each claim raised, the petition must identify the following:
    - (i) The specific grounds for an objection, citing to a specific permit term or condition where applicable.
    - (ii) The applicable requirement as defined in § 70.2, or requirement under this part, that is not met.
    - (iii) An explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under this part.
    - (iv) If the petition claims that the permitting authority did not provide for a public participation procedure required under § 70.7(h), the petition must identify specifically the required public participation procedure that was not provided.
    - (v) Identification of where the issue was raised with reasonable specificity during the public comment period provided for in § 70.7(h), citing to any relevant page numbers in the public comment submitted to the permitting authority and attaching this public comment to the petition. If the grounds for the objection were not raised with reasonable specificity during the public comment period, the petitioner must demonstrate that such grounds arose after that period, or that it was impracticable to raise such objections within that period, as required under § 70.8(d) of this part.
    - (vi) Unless the grounds for the objection arose after the public comment period or it was impracticable to raise the objection within that period such that the exception under § 70.8(d) applies, the petition must identify where the permitting authority responded to the public comment, including page number(s) in the publicly available written response to comment, and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment. If the response to comment document does not address the public comment at all, the petition must state that.

- (b) **Timeliness.** In order for the EPA to be able to determine whether a petition was timely filed, the petition must have or be accompanied by one of the following: A date or time stamp of receipt through EPA's designated electronic submission system as described in § 70.14; a date or time stamp on an electronic submission through EPA's designated email address as described in § 70.14; or a postmark date generated for a paper copy mailed to EPA's designated physical address.

[85 FR 6445, Feb. 5, 2020]

### **§ 70.13 Documents that may be considered in reviewing petitions.**

The information that the Administrator considers in making a determination whether to grant or deny a petition submitted under § 70.8(d) of this part on a proposed permit generally includes the petition itself, including attachments to the petition, and the administrative record for the proposed permit. For purposes of this paragraph, the administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2) of this part. If a final permit is available during the agency's review of a petition on a proposed permit, that document may also be considered as part of making a determination whether to grant or deny the petition.

[85 FR 6446, Feb. 5, 2020]

### **§ 70.14 Submission of petitions.**

Any petition to the Administrator must be submitted through the Operating Permits Group in the Air Quality Policy Division in the Office of Air Quality Planning and Standards, using one of the three following methods, as described at the EPA Title V Petitions website: An electronic submission through the EPA's designated submission system identified on that website (the agency's preferred method); an electronic submission through the EPA's designated email address listed on that website; or a paper submission to the EPA's designated physical address listed on that website. Any necessary attachments must be submitted together with the petition, using the same method as for the petition. Once a petition has been successfully submitted using one of these three methods, the petitioner should not submit additional copies of the petition using another method. The Administrator is not obligated to consider petitions submitted to the agency using any method other than the three identified in this section.

[85 FR 6446, Feb. 5, 2020]