QUESTIONS AND ANSWERS ON THE REQUIREMENTS OF OPERATING PERMITS PROGRAM REGULATIONS

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The U. S. Environmental Protection Agency

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INTRODUCTION

This document summarizes questions and answers (Q's & A's) on requirements and implementation of the Environmental Protection Agency's (EPA) final operating permits program regulations. The operating permits regulations were published on July 21, 1992, in Part 70 of Chapter I of Title 40 of the Code of Federal Regulations (57 FR 32250). These rules are mandated by Title V of the Clean Air Act (Act) as amended in 1990.

The contents of this document reflect a wide range of questions that have been asked of EPA concerning implementation of the operating permits program. In part, the document reflects audience questions and EPA's responses at workshops and conferences sponsored by EPA and by other groups at which EPA personnel participated as speakers. Workshop attendees included personnel from EPA Regional Offices, State and local permitting agencies, industry representatives, and other individuals from the interested public, including environmental groups.

Questions and answers are organized in chapters primarily according to the sections of the Part 70 regulations with additional topics covered in latter chapters.

This document is available in a WordPerfect 5.1 file on EPA's electronic bulletin boards and will be periodically updated by addition of more questions and answers. Each succeeding set of additions to this document will be indicated so the user can distinguish new material. As new material is added, it will be designated in WordPerfect "redline" font. "Redline" font appears differently (e.g., shading or dotted underline) according to the printer being used. Example:

(WordPerfect redline)

As each new addition of Q's & A's is made, the "redline" font will be removed from the previous addition so that only the latest material added will appear in "redline" font. Document updates will be recorded as they are made.

This document responds to many requests for information concerning implementation of Part 70. The contents are based on the Part 70 requirements and the requirements of Title V. Answers to questions are intended solely as guidance representing the Agency's current position on Part 70 implementation. The information contained herein is neither rulemaking nor final Agency action and cannot be relied upon to create any rights enforceable by any party. In addition, due to litigation underway, the Agency's position on aspects of the program discussed in this document may change. If so, answers will be

revised accordingly. As with periodic updates to this document, any change will be denoted with the Wordperfect "redline" font to distinguish any revised answer from a previous version.

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1.0 PROGRAM OVERVIEW

(No questions in this section at this time)

2.0 DEFINITIONS

2.1 Applicable Requirements

1. Is Title V applicable to sources under the Boiler and Industrial Furnace (BIF) rule?

No. The BIF rule falls under authority of the Resource Conservation and Recovery Act (RCRA), not Clean Air Act authority, and thus sources are not required to have a Title V permit if they are solely affected by the BIF rule.

2.2 Affected States

1. When is a State an "affected State?" What determines if a State is an "affected State?"

A State is an "affected State" if a part of it lies within a 50-mile radius of the permitted source, or if it is contiguous and if its air quality may be affected by the permit action. An affected State must include Indian lands where the tribe has an approved Title V program and is being treated as a State for purposes of Title V, but need not include a local permitting authority. Whereas Title V indicates the responsibility is to notify the affected State, the issuing agency may also notify the local permitting authority as well. Alternatively, it may notify only the local agency in lieu of the affected State, upon agreement with the affected State.

2.3 Major Source

1. What is the meaning of "contiguous" as used in the definition of source?

The definition of major source in section 70.2 requires that all commonly owned or controlled stationary sources on contiguous or adjacent properties be aggregated [if they are within the same Standard Industrial Code (SIC) major group] for the purposes of determining if the source is major. The definition of contiguous has the same meaning and application as under the PSD regulations and, in general, means properties that are touching or have a common edge or boundary. For a discussion of major source and the concept of what constitutes contiguous or adjacent property, refer to the preamble of the August 7, 1980 PSD final regulation (specifically, pages 52695 and 52696 of the Federal Register) as well as the EPA NSR Guidance Notebook (ref: determinations #3.18 and #3.25).

2.4 Potential to Emit

1. Is a source's potential to emit determined with or without consideration of control equipment?

Only control equipment and limits on operations, hours, fuel usage, etc., that are federally-enforceable limits and/or requirements may be considered in determining a source's potential to emit.

2.5 Regulated Air Pollutant

1. How does the permitting authority determine which volatile organic compounds (VOC's) are regulated air pollutants? For example, some States have a more limited list of VOC's, especially photochemically reactive organic chemicals, than EPA does.

Under EPA's definition, all compounds of carbon are VOC's and subject to Title V unless they are exempt as negligibly reactive, as described in the Federal Register (42 FR 35314, 44 FR 32042, 45 FR 32424, 45 FR 48942, and 57 FR 3941). The permitting authority should include as regulated pollutants all VOC's that are not exempted by EPA. More information on regulated air pollutants can be found in an April 26, 1993, memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards to Air Division Director, Regions I-X, "Definition of Regulated Air Pollutant for Purposes of Title V." The EPA's definition of VOC is as follows:

"Volatile organic compounds (VOC)" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions. This includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (HCFC-22); trifluoromethane (HFC-23); 1,2-dichloro 1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC-123); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro 1-fluoroethane (HCFC-141b); 1-chloro 1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); and perfluorocarbon compounds which fall into these classes:

o Cyclic, branched, or linear, completely fluorinated alkanes,

o Cyclic, branched, or linear, completely fluorinated ethers with no unsaturations,

o Cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations, and

o Sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

2. The Hazardous Organic National Emission Standards for Hazardous Air Pollutants (NESHAP), known as the HON, will require sources to meet a total hazardous air pollutants (HAP) emissions limit, but will regulate approximately 140 of the 189 specific pollutants identified in section 112(b). When the HON is promulgated, how many HAP's will be regulated under Title V as a result of the HON?

When the HON is promulgated, the approximately 140 HAP's will become regulated air pollutants as defined under Title V.

3. If a NESHAP is promulgated for one source category, is the pollutant considered "regulated" for all sources?

Yes. Except for section 112(g) modifications, if a standard is promulgated for one source category, the pollutant is considered "regulated" for all sources, regardless of type, for permitting purposes. For section 112(g), a determination of the Maximum Achievable Control Technology (MACT) with respect to one source causes a pollutant to be regulated only for that specific source.

2.6 Regulated Pollutant for Fees

2.7 Responsible Official

3.0 APPLICABILITY

3.1 Sources Covered - General

1. Are all major sources of HAP's subject to the Title V permitting program or will any of these sources be exempted? The 10/25 tons per year (tpy) major source definition in section 112 could affect numerous sources, especially if "lesser quantity cutoffs" are promulgated.

All major sources of HAP's are subject to Title V, whether the pollutants are regulated or not, and must obtain operating permits. Note the definition in section 112(a)(1) of major sources for HAP's. There is no legal option for regulatory exemption [see section 502(a) of the Act].

2. If the EPA establishes lesser quantity cutoffs than the 10/25 tpy major source threshold, what effect will lower limits have on permitting applicability?

The lesser quantity cutoffs would provide a lower definition of "major" and, as such, would require more sources of toxics to obtain Title V permits than required by the 10/25 ton per year cutoff.

3. What if a source is "major" within the meaning of section 112, but no NESHAP has been promulgated? Must that source get a permit?

Yes. It is its status as a major source that drives applicability, not the presence of particular regulatory requirements.

4. Under what rule is a permit issued when the permitting authority has no air toxic regulations?

The permit is issued under the Part 70 program as are other operating permits. If a permitting authority has no HAP's requirements and no NESHAP has been issued, then there are no air toxic requirements on the source, and the permit is "hollow" with respect to HAP's. The Title V permit would require reporting of emissions every 6 months and annual certification of HAP emissions from major sources even if no standards have been promulgated.

5. What arbitration process is available to a source in making an applicability determination?

Part 70 does not require an operating permits program to provide for an arbitration process with respect to

applicability determinations, other than to provide for judicial review in State court of final permit actions. However, a permitting authority may establish such a process as long as final action on the permit occurs within the time frames in Part 70.

6. Will Title V permits be required for major sources "grandfathered" from requirements such as New Source Performance Standards (NSPS)?

Yes. Applicability for Title V sources is based solely on potential to emit, not on whether a source is regulated. If a grandfathered source is determined to be a major source, it must have a Title V permit.

7. Are Title VI sources (chlorofluorocarbons) required to obtain a Title V permit? What if a permitting authority does not have authority to permit Title VI sources?

If a Title VI source is a major source, it is subject to Title V and must obtain a permit. Even if there are no applicable requirements, a source still must apply for a permit solely due to its status as a major source. When Title VI rules are promulgated, an applicable requirement will be created and a permitting authority must have or obtain the authority to incorporate Title VI requirements into the permit to keep responsibility for implementing its Part 70 program, unless EPA has decided that incorporation of the Title VI requirements into the permit is inappropriate.

3.2 Source Category Exemptions

1. What is meant by "deferral of nonmajor sources"? What sources may be deferred and until when?

Nonmajor sources are those that are subject to Title V but are not "major" as defined in section 70.2 (e.g., nonmajor sources include area sources subject to NSPS or NESHAP, and possibly some acid rain sources if they are below the major source threshold, which is unlikely).

Permitting authorities have the option of deferring nonmajor sources (other than acid rain affected sources and municipal waste incinerators) from the requirement to obtain a Title V permit. With respect to nonmajor sources, this deferral option will continue until EPA completes a rulemaking to consider whether to continue to defer nonmajor sources for the Title V program.

With respect to nonmajor sources subject to NSPS and NESHAP promulgated after the date of the Part 70 promulgation,

however, EPA will make a case-by-case decision on whether the standard should provide a deferral for nonmajor sources affected by the NSPS or NESHAP.

3.3 "Synthetic Minors"

1. Do permitting authorities have the option of expanding the applicability of Title V to synthetic minor sources (those sources that would otherwise be considered major sources but have taken a federally-enforceable restriction on their potential to emit)?

Yes, a permitting authority can expand Title V applicability to synthetic minor sources upon approval by EPA as part of the Part 70 program.

3.4 Emissions Unit Coverage

3.5 Fugitive Emissions

3.6 Applicability Duration

1. Is a source required to remain a permitted Title V source if its potential to emit falls below the applicable potential to emit threshold? For example, if a source reduces its potential to emit to less than 100 tons per year, is it still in Title V?

A source is subject to Title V as long as it is a major source based on the potential to emit of the entire source. Nonmajor sources are also subject to Title V if a NESHAP or NSPS applies to the source or if it is an affected source. Permitting authorities have the option of exempting nonmajor sources (except affected sources) until EPA takes rulemaking action on the applicability of Part 70 to nonmajor sources. After that action, nonmajor sources to which Part 70 becomes applicable will be required to obtain Title V permits.

Assuming the permitting authority exempts nonmajor sources, the requirement for a Title V permit would not apply to a source with federally-enforceable restrictions that limit its potential to emit to below the levels for a major source. (A source that restricts its potential to emit in a Title V permit, however, is still subject to Title V.) If a source's restriction of its potential to emit makes it a nonmajor source through a federally-enforceable mechanism other than a Title V permit (e.g., a source-specific SIP) and it is not otherwise subject to Title V, that source may avoid a Title V permit as long as the restriction applies, even after it has operated under a Title V permit. Even though a source is no

longer required to have a Title V operating permit, it must still comply with all applicable requirements.

A source that already has a Title V permit may avoid other requirements applicable to major sources, such as new MACT standards, by taking a restriction on its potential to emit to below the definition of "major" associated with those requirements, e.g., restricting HAP emissions to below the 10/25 tpy definition for major HAP sources. The restriction on potential to emit would have to be in the federally-enforceable portion of the permit.

Permitted sources that limit their potential to emit to below major source thresholds by making permanent physical limitations (such as by dismantling a portion of their facilities) can become nonmajor for Title V purposes without having a federally-enforceable limitation of their potential to emit.

The permitting authority always has approval authority over any federally-enforceable restrictions that would cause a source to become nonmajor, or over whether to include a source in its permitting program if it becomes nonmajor.

If a source becomes nonmajor and the permitting authority no longer requires it to have a Title V permit, the source still must comply with its permit and all Title V requirements until the federally-enforceable restrictions on its potential to emit are in place or the permitting authority recognizes the permanent physical limitations and releases it from the requirement for a permit.

3.7 Section 112(r) Sources

3.8 Area HAP's Sources

3.9 Acid Rain Source Obligations

1. Are Title IV affected sources covered by Phase I exempt from obtaining Title V permits from 1995-1999?

No. Section 70.3(b) expressly prohibits exempting affected sources from Title V permitting requirements, even though EPA will issue Phase I permits to affected sources for the Title IV requirements for this time period.

2. If a Phase I source holds a Title IV permit, does it also have to apply for a Title V permit?

Yes, since the Title IV permit addresses only Title IV requirements. The source would have to apply to the permitting authority for a Title V permit.

3.10 Non-Act Requirements

3.11 Radionuclide Sources

4.0 PROGRAM SUBMITTALS

4.1 Program Submittal Content

1. Does a State submittal have to include complete information on local permitting authorities?

Yes. If local agencies have a role in implementing the State program, their functions, structure, and staff must be addressed in the program description and personnel and funding statement in the same manner as they would be addressed for a State agency. This includes a program description which explains how the State intends to carry out its responsibilities to implement a Part 70 program. The State submittal must also include a personnel and funding statement which describes the organization and structure of the agency or agencies that will have responsibility for administering the program, delineating the responsibilities of each, including procedures for coordination and the designation of a "lead agency" to facilitate communications between EPA and other agencies if more than one agency has administrative responsibility for the program. The statement must also provide a description of the agency staff who will carry out the State program, including the number, occupation, and general duties of the employees.

If a local agency plans to administer its own program (and the Governor agrees), the local agency will be treated by EPA as a separate entity and will be required to provide the same program description and documentation as a State. This information could be submitted separately or with the State submittal.

2. Can a permitting authority submit a program containing pending regulations?

The program submittal must include "the regulations that comprise the program and evidence of their procedurally current adoption" [§70.4(b)(2)]. The EPA cannot approve a program that includes pending regulations. For purposes of the acid rain program and certain requirements related to implementation of section 112 of the Act, commitments to adopt future program provisions may be allowed in determining approvability of permit programs.

3. Are permitting authorities required to publish notice of the development of their programs?

The EPA requires permitting authorities to show that their program adoption was "procedurally correct," which means that the permitting authority used procedures that are normal and

appropriate for adoption of similar regulations in that agency. The EPA does not require notice if a permitting authority typically adopts rules using a procedure that does not employ a notice.

4. For purposes of program approval, does a permitting authority have to give public notice on any aspect of its program other than the permitting regulations?

The components of an operating permits program have to go through the proper adoption procedures, whatever those procedures are, prior to being submitted to EPA as part of the operating permits program. For some program elements, State or local procedures would require public notice. Otherwise, no public notice is required. The EPA will make the entire program available for public review in its approval process.

4.2 EPA Review of Program Submittals

1. Do existing State program elements have to be approved by EPA?

Yes, if they are to be included in a State's Part 70 program.

2. Will EPA accept portions of the operating permits program prior to submittal of the complete program?

Yes, EPA can informally review program elements and notify permitting authorities whether parts of their program appear to be approvable. Formal approval, however, requires an opportunity for, and consideration of, public comment on all parts of the program.

3. Will EPA formally approve parts of a program?

Under section 502(d)(1) of the Act, EPA is required to approve or disapprove a program within 1 year after receiving a complete program submittal. Approval or disapproval will be in terms of the whole program, not parts of a program. Under section 502(g) of the Act, EPA may grant interim approval to a program that substantially meets the requirements of Title V, but is not fully approvable. Interim approval will also be in terms of a whole program, not parts of a program.

4.3 Interim Approval

1. If a State legislature has not approved the authority to collect sufficient fees, can the State program be granted interim approval?

No. The ability to collect and retain sufficient permit fees is a minimum requirement under section 70.4 for interim

approval as well as full approval. If a program is granted interim approval for other reasons, the fees collected under the interim approved program would have to cover the costs of that program, the costs of making the changes needed before the program can receive full approval, plus any other program development costs.

4.4 Equivalent Program Elements

4.5 Attorney General's Opinion

4.6 Legal Authority

1. Timely delegation of NESHAP is important for smooth implementation of the operating permits program. How quickly must this transfer of NESHAP authority to permitting authorities be?

The general requirement is that operating permits programs must contain sufficient authority, or commitments to get sufficient authority, to include all section 112 applicable requirements in permits and assure compliance of the source with all those requirements. Permitting programs must provide that the permitting authority: (1) will not issue any permit unless it would assure compliance with section 112 standards; and (2) will reopen any major source permit that has 3 or more years before it expires to incorporate any newly promulgated section 112 standard(s).

As part of the Part 70 program approval process, EPA will presume that a permitting authority will automatically implement new section 112 requirements unless the permitting authority advises EPA to the contrary. In effect, this approach automatically delegates authority to implement future section 112 standards. Alternatively, State or local law may allow direct incorporation of Federal standards into a permit without any interim steps to adopt standards as State or local rules or to seek formal delegation of that standard from EPA. This approach is obviously sufficient to meet the requirement for authority to implement section 112 requirements. Either of the preceding approaches should allow a permitting authority to incorporate new section 112 standards into permits as soon as EPA promulgates them.

A permitting authority may be legally required by State or local law, however, to request delegation of section 112 requirements before incorporating these requirements into permits. If so, the permitting authority must take the appropriate actions necessary to obtain delegation prior to issuing permits incorporating any requirements that rely on that delegation. Whether this delegation process would delay

permit issuance will depend largely on when the permitting authority initiates the request for delegation.

4.7 Partial Programs

4.8 Operational Flexibility

1. Which operational flexibility provisions is the permitting authority required to include in its Part 70 program?

Permitting authorities must adopt operational flexibility provisions found in sections 70.4(b)(12)(i) and (iii) of Part 70. Provision (i) requires permitting authorities to allow a source to contravene a limited set of "section 502(b)(10)" changes, such as changing to a different brand of complying paint. Provision (iii) requires permitting authorities to allow a source to set up permit terms that provide for emissions trading to meet an independent emissions cap. Allowing sources to trade increases and decreases in emissions in the permitted facility [provided for in section 70.4(b)(12)(ii)] is an optional element of a Part 70 program.

2. What regulatory authority do permitting authorities need for providing general operational flexibility and emissions trading within federally-enforceable caps?

The EPA knows of no special regulatory authority necessary for allowing the two required forms of operational flexibility (contravening certain permit terms and allowing emissions trading around an independent emissions cap).

3. With respect to the 7-day advance notice for section 502(b)(10) changes, or for making other changes to the permit without a revision as provided under section 70.4(b)(12), can a permitting authority increase the number of days for advance notification?

Yes. Section 70.4(b)(12) provides that a source must give at least a 7-day advance notice of any change made pursuant to section 502(b)(10). A time period greater than 7 days is consistent with the general approach of Part 70 which sets minimum standards which can be exceeded by permitting authorities and with the plain language of section 502(b)(10), which requires that notice be given "a minimum" of 7 days in advance of the change.

4. Can a source install a new paint line with emissions of 39 tons per year under the 502(b)(10) changes?

No. This may be an off-permit change, but it is not a section 502(b)(10) change because it does not contravene an express permit term. It could be an off-permit change (if the permitting authority allows such changes) if the permit did not specifically address or disallow it, and it would be added to the permit upon renewal. It presumptively also would require a preconstruction review permit under a State minor NSR program.

5. Can a source use the Title V provisions for changes without a permit revision to avoid preconstruction review?

Absolutely not. Preconstruction review is an applicable requirement, and nothing in Title V allows a source to avoid the need to obtain a construction permit. Some opportunities at the option of the permitting authority may exist for sources to program certain alternative scenarios into their Part 70 permit involving new or modified units, provided that the applicable NSR requirements would be met per specific conditions in the Part 70 permit. This, however, would not be avoiding preconstruction review, but would be providing for meeting the review requirements through another mechanism.

4.9 "Off Permit"

1. Is there any mechanism for prohibiting or enforcing against off-permit changes?

Under Part 70.4(b)(14), permitting authorities may prohibit off permit changes as a matter of State or local law. The EPA will not enforce such prohibitions, unless they are required by an applicable requirement of the Act. Off-permit changes must, of course, comply with all applicable requirements.

4.10 Transition Plan

1. How could permitting authorities make completeness determinations within 60 days if a landslide of applications are received one year after program approval?

Permitting authorities are encouraged to plan resources and anticipate the greater workload that will come during the initial submission of permit applications. They should also take reasonable measures to phase in the applications during the first year after EPA approves their programs. They can also consider requiring applications prior to program approval since all legal authorities and program provisions should have been adopted prior to program submittal to EPA, although this is not encouraged where significant issues appear outstanding with the approvability of the program submitted to EPA.

2. Can permitting authorities establish regulations and start issuing permits before their programs are approved? Will those permits be valid once the program is approved?

No. Permitting authorities cannot issue Title V permits before such time as EPA has approved the permit program (partial, interim, or full approval). Permits issued by a permitting authority under its own permit rules are not Title V permits and would have to be reissued after program approval to be valid for purposes of Title V. The primary reasons for this approach is that EPA has no authority to object to a State or local permit, and citizens have no opportunity to petition the Administrator to object or to file suit in Federal court for the Administrator to object to such permits.

However, EPA encourages constructive use of the period before program approval. For example, the permitting authority may require that some permit applications be submitted before EPA's approval of the program. The permitting authority could then get a head start on reviewing applications so that at least 1/3 of the permits could be issued in the first year after program approval as required by Title V.

4.11 Judicial Review

1. Can a final permit be challenged in Federal court after State judicial appeals have been exhausted? Specifically, can a permittee seek relief in Federal court for terms of a permit which it feels are inconsistent with the requirements of the Act, such as approved State or local requirements?

Federal judicial review is available where EPA denies a petition to object to the issuance of a permit. The permittee (or anyone else) must petition the Administrator to object to the permit within the time period outlined in section 70.8(d) [generally within 60 days of the expiration of the Administrator's 45-day review period]. Also, the petition must be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise such objections during that time or the grounds for objection arose after the period. If the Administrator fails to object to the permit, then the denial of the petition to object is subject to judicial review in Federal court under section 307 of the Act. The Federal court would then consider whether EPA fulfilled its obligation under section 505(b)(2) to object to the issuance of a permit if the permit is not in compliance with the requirements of the Act, including the requirements of the applicable implementation plan.

4.12 Implementation Agreements

1. When should the implementation agreement (IA) be submitted?

The May 10, 1991, proposal preamble indicated that the IA should be submitted when the permit program is submitted. While it is strongly encouraged, the IA is not required under Part 70 as part of the program. In response to workload concerns expressed by permitting authorities, EPA considers a reasonable goal for the IA to be signature by both parties by the time of permit program approval or shortly thereafter. Thus, the IA need not be submitted with the permit program.

2. Is a signed IA needed for program approval?

No. An IA is not a mandatory part of the operating permits program. The existence of an IA will define the various roles of EPA and of the permitting authority in implementing the program, but will not contain substantive issues such as regulatory interpretation. Accordingly, the IA will be available to the public through EPA or the permitting authority but will not be in the EPA docket or be subject to public comment. Program approval will not depend on a signed IA. The EPA will work with permitting authorities toward IA signature by the time EPA approves the program.

3. Can the IA be modified while the program is being reviewed?

The IA may be revised at any time upon mutual consent of the permitting authority and the EPA Regional Office.

5.0 PERMIT APPLICATIONS

5.1 Application Content

1. Will EPA provide a standard application form?

Permitting authorities are responsible for developing their own forms to meet the minimum requirements of section 70.5(c). The EPA intends to develop a sample application form for data management and Part 71 purposes and make it available for permitting authorities to review. As with model permits, permitting authorities have discretion in choosing whether to use the EPA form.

5.2 Timely and Complete Submittal

1. Do sources lose their ability to get an application shield if they fail to meet the application submittal deadline in the program? What if that deadline is earlier than the EPA application deadline?

Sources must submit their applications by the application deadline set in the approved program to have their applications deemed timely and to have a chance at getting an application shield. If the deadline is missed, no application shield is possible. The deadline in the approved program supersedes EPA's deadlines in Part 70.

2. Some permitting authorities have previously assisted sources in completing their permit applications. Is it acceptable for the permitting authority to complete certain aspects of a source's application as long as the required information is available in the proposed permit? If the permitting authority were to fill out these portions of the application, would the source be shielded?

The permitting authority retains reasonable flexibility to work with sources in completing applications, so long as the 18-month deadline for issuance or timely renewal is not jeopardized. If an application is submitted in a timely fashion and deemed complete enough to process, the source is shielded from enforcement action for operating without a permit, even though the permitting authority would be adding material to the application. In the situation where the permitting authority adds significant information to the application, the completed application may have to be returned to the source for certification. Upon certification, the application would be deemed submitted and complete and the shield would take effect. It would be critical for the permitting authority to inform the source if it were not

meeting an applicable requirement so a schedule of compliance could be prepared.

3. Can a permitting authority establish a 90-day period for determining whether a source application is complete?

No. The completeness determination must be made within 60 days in accordance with sections 70.5(a)(2) and 70.7(a)(4).

5.3 Application Review

5.4 Insignificant Activities

1. Is there a de minimis level of emissions that does not require reporting in the permit application?

Yes, but these will be set by permitting agencies in their permit programs as approved by EPA. Under section 70.5(c), permitting authorities are given discretion to exempt insignificant activities on the basis of de minimis thresholds (such as size, emission levels, or production). Permitting authorities may also develop other criteria for exempting source activities from detailed description in the application. If exempted due to size, emissions levels, or production rate, the application must contain a list identifying how many activities or units are exempt because they are below the threshold. If the exemptions apply to entire source categories, then no information is required in the application on the exempted units. Emissions of a pollutant in a "major" amount can never be considered de minimis.

2. May a permitting authority exempt activities as insignificant if those activities are subject to applicable requirements?

In all cases the permitting authority must, at a minimum, require information in permit applications sufficient to determine the applicability of, and to impose, all applicable requirements of the Act and to confirm that no other requirements of the Act apply to the source. Exemptions for activities that are potentially subject to applicable requirements would clearly impede the permitting authority's ability to determine all applicable requirements in the permitting process. Such exemptions would not be approvable. The EPA will examine each permitting authority's criteria as part of the program approval process to ensure that the permitting authority's insignificant activity provisions do not exempt any activities or units from applicable requirements or fees.

3. If a permitting authority has EPA-approved insignificant activity levels for permit application purposes, can it use the insignificant levels to disregard emissions when it determines if a source is major?

No. All emissions must be considered in determining a source's potential to emit and whether it is major. The provision for insignificant activities or emissions levels is only in terms of what must be included in a permit application, not for purposes of determining if a source is major. Exemptions cannot be used by a source if doing so would interfere with the imposition of applicable requirements, applicability determinations, or the calculation of fees.

4. Will EPA approve exemptions for insignificant activities if those activities are currently exempted from requirements under current permitting programs?

The EPA may approve exemptions for insignificant activities if it determines that the activities exempted meet the test of being de minimis, that is, if requiring those activities to be included in the application would yield a gain of trivial or no value. In addition, section 70.5(c) provides that a permitting authority must require in permit applications all information necessary to determine the applicability of, and to impose, all applicable requirements. The EPA will follow these principles in evaluating proposed exemptions for insignificant activities. In determining whether an activity is insignificant, EPA will consider whether the activity has previously been exempted from permitting requirements. However, a prior practice of exemption will not in itself be viewed as controlling, but instead will be merely one factor considered by EPA.

5.5 Emissions Reporting

1. Must all emissions of regulated air pollutants, even those that do not make the source subject to Title V, be contained in a Title V permit application?

Yes. All emissions of regulated pollutants must be described in permit applications, whether those emissions caused the source to be major or not. Emissions of regulated pollutants from all units at a major source must be described, except for units exempted under the operating permits program as insignificant.

5.6 Confidential Information

1. If State law prevents the transmittal of confidential business information from the permitting authority to EPA, how can such information be submitted to EPA?

The permitting authority may require the source to submit the information directly to EPA, if the permitting authority cannot or does not do so itself. Regulations under 40 CFR Part 2 govern the handling of confidential information by EPA.

5.7 Compliance Plans

1. What happens if there is a disagreement between the permitting authority and the applicant over compliance plans?

Typically, the permitting authority will attempt to negotiate a compliance plan with the permittee. Many States have an appeals process involving a governing board or commissioners that help resolve disagreements. If this process fails and if a source submits an unacceptable compliance schedule, the permitting authority may deny the permit. Alternatively, the permitting authority may issue a permit with a compliance schedule with which the source does not agree. The source would then have the option of challenging the compliance schedule in State court.

5.8 Certification of Truth, etc.

5.9 Cross-Referencing

6.0 PERMIT CONTENT

6.1 General Permit Content

1. Must the SIP-approved emissions rate be included in the permit, or is a Control Technology Guideline reasonably available control technology limit sufficient?

The SIP-approved emissions rate is the applicable requirement and must be included in the permit.

2. What is a severability clause?

The severability clause is a provision that allows the rest of the permit to be enforceable when a part of the permit is judged illegal or void.

6.2 Equivalency Determination

6.3 Federal Enforceability

1. What are the limits on the additional requirements that a permitting authority can impose on a source in the non-federally-enforceable portion of the permit?

A permitting authority is free to add any "State-only" requirements to the extent allowed by State or local law. However, the permitting authority is also responsible for enforcing the federally-enforceably portion of the permit and EPA will exercise its enforcement oversight with regard to those terms and conditions.

2. If a facility takes a tighter limit to create emission credits, how is the new limit made federally enforceable?

The new limit is made federally enforceable by placing it in the federally-enforceable part of the Title V permit, along with appropriate compliance terms (e.g., monitoring, reporting, and recordkeeping).

3. What is the mechanism to change or reverse "State-only" conditions that became federally enforceable back to "State-only" status?

The mechanism for changing the designation from federally enforceable to "State-only" is the minor permit modification process. These changes, if "State-only," should not involve applicable requirements and could be removed from the federally-enforceable portion of the permit as long as none of the restrictions on minor permit modifications in section 70.7(e)(2)(i)(A) are violated. If any of the restrictions in

section 70.7(e)(2)(i)(A) are violated, then the permit would have to undergo a significant modification to remove the conditions from the federally-enforceable part of the permit.

6.4 Compliance Certification

1. Must a source submit a new compliance certification annually after submittal of initial certification in the permit application?

Yes. Certification of compliance with permit terms must be submitted annually or at such shorter intervals as may be required by the permitting authority.

6.5 Monitoring, Recordkeeping, Reporting

1. Do all monitoring reports have to be certified?

Yes. Section 70.6(c)(1) provides that any report required by a permit must be certified.

2. Must each permit contain testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance?

Yes. Section 70.6(a)(3) requires that each part 70 source have testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of its permit. If the source is subject to any underlying monitoring, testing, reporting, and recordkeeping requirements (such as requirements contained in the SIP or NSPS), these requirements must be in the source's permit. Regardless of the underlying requirements, sources must retain records for five years, report the results of all monitoring data (not just excess emissions) at least semi-annually, and promptly report deviations.

Additionally, permits must require periodic monitoring or testing. In situations where there are no underlying monitoring or testing requirements, or where those requirements are not periodic, the permitting authority will be required to "gap fill" and include periodic monitoring and testing requirements in the operating permit. This periodic monitoring or testing must be sufficient to yield reliable data that is representative of compliance.

In accordance with a statement in the preamble of the operating permit rule (57 FR 32278), the EPA is currently developing guidance that sets forth criteria for determining what constitutes periodic monitoring or testing. This applies similarly to situations where a source is subject to a work practice standard. The permit would need to contain some

means of periodically monitoring compliance with the work practice requirement. In such cases, and depending on the particular standard, periodic recordkeeping may be sufficient to satisfy the periodic monitoring or testing requirement. The permit would require these records to be kept for five years, require at least semi-annual reporting (and prompt reporting of deviations), and specify the means for determining compliance with work practice standards.

3. Does a source have to submit raw data on monitoring/testing as part of its monitoring report?

No. The permittee is not required to submit raw data, but is required to keep required monitoring data and support information. Support information includes all calibration and maintenance records for continuous monitoring, and copies of all reports required by the permit. Reports are required to contain the results of the monitoring required in the permit. This issue will be dealt with in greater detail in monitoring guidance EPA will be providing at a later date.

4. When does the 5-year period for retaining records start?

Records must be kept for five years from the time they are generated.

5. Must voluntary testing results be kept for a five-year period?

No. Only results from required tests must be kept for 5 years.

6. Must test results be kept at the plant, or can they be kept at a central location?

It is preferable for records to be kept at the plant, but they can be kept at a central location provided that inspectors have easy access to the data.

6.6 Inspection Provisions

1. What inspection requirements must be included in permits?

Section 70.6(c) requires all part 70 permits to contain inspection and entry requirements that require, upon presentation of credentials and other documents as may be required by law, the permittee to allow the permitting authority or an authorized representative to: (a) enter upon the 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; (b) have access to and copy, at reasonable times, any records that must be kept under

the conditions of the permit; (c) inspect at reasonable times any facilities, equipment, practices, or operations required under the permit; and (d) sample or monitor at reasonable times substances and parameters for the purpose of assuring compliance with the permit or applicable requirements. [See §70.6(c)(2)]

2. Are State or local inspectors required to give notice of inspection and entry before they arrive?

No. Section 70.6(c) provides that the permittee shall allow the permitting authority or an authorized representative, upon presentation of credentials and other documents, to enter upon the premises and, at reasonable times, to have access to and copy any records and conduct any inspections of facilities, equipment, practices, or operations that are regulated or required under the permit. Unannounced inspections should be part of any compliance monitoring or tracking program.

6.7 General Permits

1. Can a general permit be incorporated into a larger permit?

Yes. Examples of general permits that might be incorporated would include those for small boilers, degreasers, and storage tanks that are part of a larger facility.

2. When general permits cover emission units at a facility that has an overall Title V permit, how are the permits related?

The facility-specific permit should identify all units covered by general permits and cross-reference the general permits by number or source category.

3. Can a major source be permitted under a general permit?

Yes.

4. Will sources that get general permits be subject to monitoring and reporting requirements on a specific pollutant basis? In other words, will a source that emits VOC's and gets a general permit be required to report by species (e.g., separate information for toluene, benzene, etc.)?

Whether a source gets a general or an individual permit does not affect the monitoring and reporting requirements to which it is subject. The permit, general or individual, must meet all requirements of section 70.6(a) and (c) regarding compliance provisions (monitoring, reporting, recordkeeping and compliance certification). Applicable requirements that control VOC emissions do not require the reporting of separate

species, while requirements under section 112 almost certainly will require reporting by certain species.

5. Can a general permit be modified?

General permits cannot be modified to accommodate individual source changes the way individual permits can be. General permits may include alternate scenarios, but source-by-source modifications are best handled by individual permits.

6. Can some units at a facility get a general permit after a Title V permit for the facility is issued, or must coverage under the general permit be established by the time the Title V permit is issued?

There is no reason why units could not be permitted under a general permit instead of a Title V permit, provided they qualify for the general permit. If they are part of a larger facility which already has a Title V permit, that permit would need to go through a significant modification, renewal, or reopening to remove those units, and during the process it would have to be indicated that those units are being covered by the general permit.

7. If a source is covered by a Title V permit, but some units are covered by a general permit, how do renewals work? Does the general permit renew at the expiration of the Title V permit or on the renewal cycle of the general permit?

A general permit can have only one renewal date and all sources covered by the general permit would get a permit renewal at that date. If a Title V source wants all units within its facility to undergo permit renewal on the same date, the units covered by the general permit can be removed from the general permit and added to the Title V permit. Another approach is for the permitting authority to set the renewal date of the general permit to be the same as the renewal date for the Title V source; however, this might cause other sources covered by the general permit to object. Alternatively, the permitting authority could write a general permit to cover only the units within the Title V source and set its renewal date to be the same as the renewal for the Title V source.

6.8 Permit Shield

1. Can a permit shield apply to requirements that do not apply to the source?

Yes, but section 70.6(f)(1)(ii) requires the permit to include a statement that the requirement(s) does not apply and why.

2. How extensively must a permit document that a requirement is "non-applicable" for purposes of the permit shield?

The permit must expressly state that a requirement does not apply and must include a determination by the permitting authority as to why the requirement does not apply. One purpose of this documentation is to focus public comment on the source's exemption or nonapplicability to a given requirement. The application should explain why the source is eligible for any exemption provided by the applicable requirement and address any specific exemption criteria contained in the requirement. For example, the application could state that the source is not subject to an NSPS because it was built prior to the date on which the NSPS took effect.

3. If a Title V permit is in place and the area becomes reclassified to nonattainment, is the source shielded until permit renewal?

If the permit provides a shield, the source is shielded to the limits of the shield until the permitting authority changes the shield. The source is never shielded from direct enforcement of newly applicable requirements adopted during the term of the permit. For example, if the State adopted a new SIP requirement necessary to bring the area back into attainment and EPA approved the SIP revision, the source would not be shielded from the new SIP requirement.

4. If an operating permit reflects an old SIP provision that has been replaced by a new SIP provision, is the source shielded from enforcement for failure to meet the new SIP provision?

No. The source may be shielded only from enforcement arising from provisions existing <u>at the time of permit issuance</u>. The source must comply with the new provision even if it is not in the permit.

6.9 <u>Alternative Scenarios</u>

1. What type of recordkeeping is required for alternative scenarios?

The same type of recordkeeping that is required for other emission limits in the permit. Each alternative operating scenario in a permit must satisfy the compliance requirements of section 70.6. In addition, the source must keep records of the scenario under which the source is operating at any given time.

6.10 <u>Emergency Defense/Updates</u>

6.11 Noncomplying Sources

1. Can noncomplying sources apply for and obtain a general permit?

Yes. However, to the extent the source will be subject to a source-specific schedule of compliance, general permits would not be appropriate. This schedule of compliance must contain a series of remedial measures with milestones for coming into compliance expeditiously. If the compliance schedule applies generically to all sources in a source category, general permits could be used.

6.12 Model Permits

6.13 Emissions Trading

1. Can a facility obtain emission increases under emissions trading provisions beyond those that an applicable requirement (i.e., NSPS) allows?

No.

2. Can a facility use the Title V emissions trading provisions to continue to operate when compliance with a MACT standard would be economically unfeasible?

No. Title V may not authorize a variance from any applicable requirement such as MACT.

7.0 PERMIT PROCESSING

7.1 General Process

7.2 Administrative Amendments

1. Part 70 allows processing of NSR permits as administrative amendments if the NSR program is "enhanced." Can this enhancement occur on a permit-by-permit basis?

Yes. NSR enhancement can occur for all NSR permits or on a permit-by-permit basis.

2. Can PSD requirements be incorporated into a Title V permit through an administrative permit amendment?

Yes. Any term or condition of a preconstruction review permit (such as PSD) can be incorporated into a Title V permit as an administrative permit amendment, if the "enhanced" preconstruction review program provides for: (1) review procedures "substantially equivalent" to Part 70 procedures (e.g., review by the public, affected States, and EPA); and (2) for compliance requirements substantially equivalent to the compliance requirements of Part 70.

3. Can an ownership change be made through an administrative amendment?

Yes, provided that the permitting authority determines that no other change to the permit is necessary, and provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new owners has been submitted.

7.3 Minor Modifications

1. Can a minor permit modification be used to modify a federally-enforceable limitation on a source's potential to emit?

No. This is prohibited by criterion number (4)(A) in section 70.7(e)(2)(i)(A).

2. Can a permitting authority require public review to be part of minor permit modification procedures?

Yes. Although operating permits programs are required to provide for an expeditious modification process, permitting authorities do have the discretion to require more stringent procedures including providing additional review for some or all minor permit modifications.

3. If a source submits a minor permit modification request and it is later determined that the modification is actually a significant modification, when does the violation period begin--at the time that the minor permit modification is approved, or when the decision that it is a significant modification is made?

Under the procedures set forth in section 70.7(e)(2) and (3), the violation period begins when the permitting authority determines that the change should have been a significant modification. Consistent with the ability to establish more stringent modification procedures, permitting authorities may establish an earlier date by which they would consider the violation to have begun.

7.4 Significant Modifications

7.5 Application Shield

7.6 Public Participation

1. During the issuance process, can a permitting authority give notice to EPA, affected States, and the public simultaneously?

Yes, provided EPA has a reasonable opportunity to review any comments received from the public or affected States. The minimum public comment period is 30 days and the EPA review period is 45 days. This would only allow EPA 15 days additional review after public and affected State review, assuming the permitting authority does not provide for a longer public comment period. Fifteen days may not be sufficient depending on the complexity of the permit. To provide for a longer EPA period for reviewing the results of public comment, the permitting authority could vary the beginning of EPA's review resulting in less overlap of EPA and public review where more EPA review after public comment would likely be needed.

2. Can a permitting authority provide opportunity for public comment and notice of the public hearing in the same notice?

Yes; however, the public hearing must be scheduled at least 30 days after public notice.

3. Can a person in one State comment on a permit in another State?

Yes. Anyone may comment, regardless of residency.

4. Can a permitting authority establish different public notice periods for different types of changes?

Yes, but the minimum notice periods specified in Part 70 must be met.

7.7 Renewals

7.8 Reopenings

1. Title V permits must include all applicable requirements of the Act. When must a newly promulgated NESHAP be incorporated into the Title V permit?

It must be incorporated into the permit at least at renewal time, even if the compliance date is in the future. In addition, a permit may need to be reopened earlier, depending on the compliance date specified in the NESHAP and the amount of time left to run on the permit term [see section 502(b)(9) of the Act regarding reopening of major source permits with three or more years remaining on their terms]. If the NESHAP is promulgated while a draft permit is being processed, the permitting authority must revise the permit to include the new requirements prior to issuance.

2. If a permit is reopened, is public participation required?

Yes, public participation is required for all permit reopenings.

3. If a permit is reopened, is the entire permit reviewed, or only those provisions that caused the permit to be reopened?

The review need cover only those provisions that caused the permit to be reopened or that are affected by it.

4. When a permit has been reopened, when does the new permit take effect?

The permit is effective upon issuance, just as for any permit issuance, renewal, or significant modification. The old permit terms remain in effect until the reopening process is completed (i.e., the revised permit is issued).

7.9 Title I Modifications

7.10 Permit Denial

7.11 Temporary Sources

8.0 PERMIT REVIEW

8.1 EPA Review

1. How will EPA review the reopening of a permit when that reopening is in response to an earlier EPA objection?

The EPA will focus on the adequacy of the applicant's response to EPA's objections and any other parts of the permit affected by the changes.

8.2 Affected State Review

1. Should notice to affected States be given to the State or to a local agency (e.g., district)?

Notice should at least go to the State. Upon agreement with affected States, notice may also be provided to local agencies.

2. When the border between two States falls in the middle of one of the Great Lakes, must a notice of a draft permit for a source which is within 50 miles of the border be sent to the other State for review by affected States as required in §70.8?

Yes. The neighboring State would be considered an "affected State" because the air at the border (over the Lake) is considered part of the State's "ambient air." The neighboring State is entitled to review the permit.

8.3 Public Participation

1. Must the permitting authority hold the permit for 60 days in response to a citizen's petition, or can it issue the permit?

The permitting authority can issue the permit at the end of EPA's 45-day review. At the end of EPA's review period, citizens can petition EPA to object to a permit. If EPA does not object, the citizens can then go to Federal court. Citizen petitions do not stay a permit that has been issued.

8.4 Data Management

9.0 PERMIT FEES

9.1 Presumptive Minimum Program Cost

9.2 Fee Demonstration

1. Are there any restrictions on how permitting authorities design their fee structure?

In general, permitting authorities may design their fee programs as they see fit in accordance with State or local law. The restrictions imposed by Title V are that sufficient fee revenue must be collected to fund the direct and indirect permit program costs and that required Title V activities be funded solely through permit fees from sources subject to the permitting program.

2. How often are permit fees calculated? Are they recalculated when there is a permit modification or renewal?

This is a matter left to the permitting authorities. They may recalculate fees annually or whenever new emission inventories are available. Or, they may choose to impose fees based on processing costs for applications, permit modifications, and/or renewals.

3. Does EPA have to review every update in a permit program fee schedule (i.e., how and from what sources fees are collected)?

In general, no. An accounting will be required, however, if a permitting authority makes a significant change in the fee structure. The implementation agreement would be one means of delineating the standard for determining whether a change in the fee structure is significant enough to warrant EPA review and approval. Insignificant changes (such as CPI adjustments) can be made without EPA review.

4. Can the fee program be approved before the rest of the permit program?

No. The EPA will grant approval only to the entire program. Permitting authorities that want informal review of their fee programs are encouraged to submit these to the Regional Offices prior to the full program submittal and may get informal EPA approval.

9.3 Funded Program Costs

1. Must a permitting authority collect enough permit fee revenue to cover the entire cost of its pollution control program for stationary sources?

Only the direct and indirect costs of operating permit program activities [including activities specifically listed in Section 502(b)(3)(A)] must be recovered through permit fees. The Act and regulations do not provide an exhaustive list of direct and indirect costs that must be recouped through permit fees. The way the permitting authority's program is designed will determine the extent to which activities are related to the operating permit program and must be covered by permit fees.

2. Can a permitting authority use permit fees to fund its entire air program?

The Act does not prohibit a permitting authority from assessing fees in addition to those required by the Act and using those additional fees for purposes other than supporting the permit program. However, permit fees collected for the purpose of funding required operating permit program activities cannot be used for other air program activities. Permitting authorities must also provide EPA with periodic accountings that demonstrate that all of the costs of required activities under Part 70 are paid for solely by permit fees.

3. Must permit fees be sufficient to cover the cost of pollution prevention programs applicable to a source?

Such costs would not be required permit program costs unless the requirements were applicable requirements (e.g., contained in the approved SIP) or otherwise directly incurred in the permitting program. Few, if any, pollution prevention programs are currently applicable requirements.

4. Can court costs to a permitting authority for defending legal challenges to a permit (e.g., by a third party or the permittee) be covered by Title V fees?

Yes. A legal challenge to a permit issued by the permitting authority is part of the permit issuance process. Therefore, costs to the permitting authority associated with the legal challenge are required to be covered by permit fees.

5. Do the Part 70 regulations prohibit States from allocating Title V permit fees to another State agency?

States may allocate permit fees to other State (or local) agencies responsible for, or providing support for, some part of the permit program. The State must provide permit fee revenue to the other agency sufficient to cover its costs of implementing or supporting the part of the program for which it is responsible.

6. What are indirect costs?

The term is not defined in the Act, and the line between direct and indirect costs is sometimes difficult to draw. Because both direct and indirect costs must be covered by permit fees, the distinction between them is not important. Some examples of indirect costs are the costs of administration and technical support (such as managerial costs, secretarial/clerical costs, labor indirect costs, copying costs, contracted services, accounting and billing) and overhead.

9.4 Fee Schedule

1. How should a local program design its permit fee structure when one or two sources would contribute 50 percent of the fees? What would happen if these sources moved out of the local program's jurisdiction? Should the program's fee structure be changed?

Adequate fees are required to support the program regardless of the particular situation. The permitting authority has broad discretion to design its fee structure as it deems appropriate, as long as the goal of program support is achieved. Fee structures can be redesigned any time the program needs change.

2. Can a permitting authority use fees from mobile sources to support the Part 70 program?

No. All of the required costs of the Part 70 program must be funded through permit fees solely from sources subject to the operating permit program.

3. Can permitting authorities collect permit fees from a source for the emissions which exceed 4000 tpy?

Yes. The 4000 tpy figure is an optional limit in the methodology for determining the presumptive minimum program cost. The Act and regulations do not address whether permitting authorities should use 4000 tpy as a cap in their fee schedules.

4. Can a permitting authority charge permit fees for any air pollutant?

Yes, the Act and regulations do not govern on what emissions a permitting authority may base its fee schedule. Permitting authorities can impose fees on any emissions consistent with State or local law. However, for purposes of a permitting authority using the $25/tpy (CPI adjusted) presumptive minimum

program cost method, the permitting authority must base its calculations solely on emissions of "regulated pollutants (for presumptive fee calculation)" as defined in section 70.2.

5. Can a permitting authority base its permit fees on allowable emissions instead of actual emissions?

Yes. The Act or Part 70 does not prescribe any specific method by which permitting authorities must impose fees. A permitting authority may calculate fees differently for different classes or categories of Part 70 sources and for different pollutants (provided the total of fees collected is sufficient to meet the program costs). A permitting authority can use application fees, service-based fees, emissions fees based on either actual or allowable emissions, other types of fees, or any combination thereof. Part 70, however, requires actual emissions to be used as the basis for calculating the presumptive minimum program costs.

6. Can a permitting authority charge permit fees for sources that are not subject to any emissions limits?

Yes. For example, major sources must be permitted, even though some are not subject to emissions limits (e.g., major sources of HAP's for which no MACT standard has yet been issued). These sources can be charged permit fees because they are subject to the program.

7. If a permitting authority shows EPA that its fees are more than $25/tpy (adjusted) does it have to charge fees on a per ton basis?

No. The $25/tpy (CPI adjusted) figure is merely a mechanism for estimating the presumptive minimum program cost. If collected permit fees in the aggregate meet or exceed the presumptive minimum program cost, the permitting authority can design its fee schedule as it sees fit.

8. Can permitting authorities charge lower fees for sources in attainment areas?

Yes, provided the fee structure results in collecting fee revenue sufficient to fund the Part 70 program.

9.5 Small Business Program Funding

9.6 Phase I Source Fee Exemption

1. In what cases are acid rain sources exempt from the Title V permit fee provisions during Phase I of the Acid Rain Program?

Section 408(c)(4) of the Act provides that "during the years 1995 through 1999 inclusive, no fee shall be required to be paid under section 502(b)(3) or under section 110(a)(2)(L) with respect to emissions from any unit which is an affected unit under section 404." This means that permitting authorities may not use emissions-based fees from affected units under section 404 for any purpose related to the approval of their operating permits programs for the period from 1995 through 1999. However, before 1995 and after 1999, permitting authorities may collect and use emissions-based fees to support their program. Permitting authorities are also free to collect application fees and other non-emissions-based fees from all affected sources during Phase I and Phase II.

Units exempted from fees pursuant to §408(c)(4) would include any Phase I affected units (listed in Table A of Title IV) and any substitution units. The EPA is examining the issue of whether compensating units (under a reduced utilization plan) are entitled to the fee exemption.

Finally, opt-in units under section 410 of the Act are not entitled to the fee exemption of section 408(c)(4). (Opt-in units include industrial sources of sulfur dioxide (SO2) and any existing utility units serving generators smaller than 25 MWe.)

10.0 FEDERAL OVERSIGHT AND SANCTIONS

(No questions in this section at this time)

11.0 ENFORCEMENT AUTHORITY

11.1 Enforcement Authority

11.2 Criminal Authority

1. Are corporations or individuals criminally liable for false statements, certifications, or representations?

Pursuant to sections 302(e), 502(a), and 70.11, both could be liable depending upon the facts of the particular case. If an individual (i.e., the responsible official) has control and authority over the business of the source, and that individual's actions and conduct result in a violation of the permit program, then that person could be held individually liable.

2. If a source certifies noncompliance as required and then continues to operate, is this a knowing violation subject to criminal liability?

The EPA will exercise prosecutorial discretion to reserve criminal enforcement for egregious cases. If the source negotiates with EPA or the permitting authority in good faith and agrees to an expeditious compliance schedule, then EPA and the permitting authority will probably pursue the violation as a civil enforcement action.

3. If a municipality does not have adequate criminal enforcement authority, how can it get program approval?

To receive program approval, a local agency must have the ability to fine sources. The ability to refer enforcement to a State prosecutor is one method of achieving such authority.

12.0 PROGRAM INTERFACE

12.1 SIP

1. Can a permitting authority enforce a Federal Implementation Plan (FIP) requirement in a Title V permit?

To get approval, operating permits programs must have authority to include FIP requirements in the permit, and to enforce any permit terms.

2. Can a source use the Title V off-permit provisions (changes not addressed or prohibited by the permit and not subject to Title IV provisions or are not a Title I modification) to avoid a SIP requirement?

No. An express condition for off-permit changes is that they may not violate applicable requirements. Sources have no permit shield with respect to off-permit changes, so either EPA, the permitting authority, or citizens may enforce any requirements of the Act that would apply to the off-permit activity. State Implementation Plan requirements are applicable requirements, and a source may not use the off-permit provisions to violate them.

3. Can a permitting authority use its SIP to restrict the use of alternative operating scenarios in a Title V permit?

Yes, any alternative scenario has to comply with both the SIP and all other applicable requirements, so it can be used only to the extent that it does not violate a SIP requirement.

4. In the past, primarily the SIP was the means for the implementation, maintenance, and enforcement of measures needed to attain and maintain NAAQS. What will the role of the SIP be after the implementation of Title V?

SIP's are still the plan for achieving the NAAQS and the means of translating the NAAQS into source emission limits. Such limits are required to be placed into permits. The permit may not violate a SIP, but the permit may set equivalent limits or engage in emissions trading to the extent that the SIP allows the permit to do so. SIP's are independently enforceable, unless a valid permit shield exists (i.e., section 504(f) of the Act states that compliance with the permit is deemed to be compliance with all applicable requirements of the Act, provided that the permit includes those requirements or the permit states that other provisions are not applicable to the source, which it would if properly issued). New SIP requirements (i.e., those adopted after permit issuance) may not be shielded.

12.2 Section 112

12.3 New Source Review

1. Are BACT and Lowest Achievable Emission Rate (LAER) requirements under the SIP federally enforceable?

Yes. A BACT or LAER provision is a case-by-case determination that is contained in a pre-construction permit under Title I. They are applicable requirements and as such are federally enforceable.

2. How can permitting authorities ensure that requirements they have placed in NSR permits are not compromised in the Title V permit? For example, can a Title V permit employ alternate scenarios (or operational flexibility provisions) that avoid the need to undergo State NSR review? How can a permitting authority ensure that Title V permits enforce NSR conditions?

All terms and conditions of preconstruction permits are applicable requirements for purposes of Title V and must be placed in Title V permits. Alternate scenarios are provisions to allow flexibility in meeting applicable requirements, not violating them. State NSR provisions are not changed and cannot be avoided merely by issuing Title V permits. Permitting authorities concerned about sources avoiding NSR may place a condition in their Title V permits that alerts the source of its duty to apply for a NSR permit if certain changes are made.

3. Can Title V permit revisions change previous NSR conditions?

No. Title V permits cannot, in general, change a requirement of an NSR permit. The Part 70 permit revision process, however, may suffice for making a change when the NSR and Part 70 programs are integrated.

4. Can a permit establish an emissions cap that allows a source to exceed unit-specific PSD requirements as long as emissions fall within the cap?

No. PSD requirements are applicable requirements and are Title V permit terms with which sources must comply.

12.4 Acid Rain

1. What are the differences between a Phase I source and a Phase II source?

Phase I sources are specifically identified in the Act, and include units with electrical generating output of at least 100 megawatts. Phase II sources are all other units with a generating capacity of at least 25 megawatts.

2. How is the Acid Rain Program different from other programs under the Act?

The Acid Rain Program uses traditional and innovative market-based approaches to reduce SO2 and nitrogen oxides (NOx) emissions. For SO2, the program utilizes the concept of an "allowance," which is an authorization to emit one ton of SO2. Sources can buy, sell, trade, or bank allowances. A source's acid rain emissions limit will be the number of allowances that each unit holds, which is very flexible and could vary throughout the year if the source participates in the allowance market and trades allowances with other sources. For NOx, the statute allows "emissions averaging" across two or more sources, as long as total annual emissions are equivalent to or less than what the sources would have emitted had they complied with their applicable emission rates. Both these approaches allow sources flexibility in determining how compliance will be achieved under the Acid Rain Program, but neither affects a source's obligation to comply with other emissions limitations under the Act.

Continuous emissions monitoring (CEM) is instrumental in ensuring that mandated reductions of SO2 and NOx are achieved; stringent monitoring and reporting requirements are being implemented to help ensure that these goals are met. By requiring that each affected unit account for each ton of emissions it emits, the Acid Rain Program will provide the means for ensuring whether a source is in compliance or not (through the comparison of annual emissions emitted by a source with the allowances it holds). Continuous emissions monitoring also instills confidence in the "currency" (SO2 allowances) being used in the allowance trading market.

Another unique and significant feature of the Acid Rain Program is the provision requiring that affected sources with more emissions than allowances at the end of a year (i.e., the source is out of compliance) pay an automatic penalty of $2000.00 for every ton of SO2 for which the source did not hold an allowance, and $2000 for every ton of NOx above the level necessary to comply with the emission rate required of

the source. These penalties are to be paid to EPA in both Phase I and Phase II of the Acid Rain Program. In addition, the source must offset its excess SO2 emissions in the next calendar year.

3. If there are no Phase I or Phase II sources within the jurisdiction of a permitting authority, will the permitting authority still be required to promulgate regulations to implement the Acid Rain Program?

All States in the continental United States, including all local permitting authorities within the State boundaries, must have the capability to implement the Acid Rain Program to receive a fully approved operating permits program. Even though a permitting authority has no Phase I or Phase II units, new utility sources may be built or sources in the jurisdiction of the agency may choose to opt-in to the program. The permitting authority therefore needs to be prepared to issue acid rain permits in the event of either of these possibilities. Alaska and Hawaii, however, need not promulgate regulations to implement the Acid Rain Program since the program applies only to the continental United States. (Similarly, Guam, the Virgin Islands, Puerto Rico and the Trust Territories need not promulgate Acid Rain Program regulations.)

4. How can permitting authorities reconcile the Phase II acid rain permit application deadline (January 1, 1996) with the Title V permit application deadline?

Permitting authorities should encourage sources to submit their acid rain application with the rest of their Title V application. However, if the acid rain portion of the permit application is submitted after the Title V deadline (but no later than January 1, 1996), the permitting authority may choose to either: delay processing the permit until receipt of the Acid Rain portion of the application, or process the Title V application immediately, then later revise the permit once the acid rain application is received. Note that the deadline for submitting the acid rain application (which, at the permitting authority's discretion, may be <u>before</u> the January 1, 1996 deadline), does not alter the Part 70 deadline for submitting the other pieces of the Title V permit application.

5. How can permitting authorities reconcile the Phase II acid rain permit issuance deadline (December 31, 1997) with the Title V permit issuance deadlines in light of the mandatory 5 year permit term?

The Federal acid rain rules require permitting authorities to issue all phase II permits by December 31, 1997 with terms lasting 5 years from the permit's effective date. The effective date can be no later than January 1, 2000. The EPA will provide guidance in the future on how these dates can best be reconciled with the Title V issuance deadlines.

6. How will the acid rain requirements under Phase II be integrated into the operating permit?

The acid rain requirements under Phase II will be a discrete segment in the operating permit. Acid rain requirements will be different from other permit requirements, and must be included in the Title V permit whether or not other SO2 or NOx requirements are more stringent. Both the acid rain requirements for SO2 and NOx must be included in the Title V permit, and both are enforceable.

7. What are some of the permitting differences between Title IV and Title V?

a. Designated representative: Under the acid rain rules, only the "designated representative" (DR) or "alternate designated representative" (ADR) for a source is authorized to make acid rain related submissions. These persons must file a certificate of representation with EPA before they can assume their duties as the DR and ADR. Part 70's "responsible official" does not qualify as a designated representative unless EPA has received a certificate of representation from that individual. The EPA will maintain an electronically accessible list of designated representatives and alternate designated representatives.

b. Administrator's right to intervene: The acid rain rules require that the permitting authority allow EPA to intervene in any appeal of an acid rain permit. By participating in a permitting authority's appeal process, EPA will be able to support a permitting authority's decision on a permit or bring to light and resolve differences of opinion early so that a veto of the acid rain permit can be avoided.

c. 90 day appeal period: Unlike Part 70, the acid rain rules limit the period by which the acid rain portion of an operating permit can be appealed administratively. Part 70 does not specify a period by which an administrative appeal must be filed. Both Part 70 and the acid rain rules limit the judicial appeal period to 90 days. However, unlike Part 70, the acid rain rules do

not allow a judicial appeal beyond 90 days under any circumstance.

d. Application is binding and enforceable as a permit: The Federal acid rain rules state that a source's complete acid rain permit application is binding and enforceable. The purpose of this provision is to ensure that a source has the equivalent of an acid rain permit in the unlikely case that a permit is not issued before the beginning of Phase II (January 1, 2000) or by the expiration date of a previously issued permit.

e. Mandatory permit shield: The acid rain portion of every operating permit is covered by a permit shield. This shield assures the source that if it operates in accordance with a permit issued in accordance with Title IV, the source is deemed to be operating in compliance with the Acid Rain Program.

f. Permit revisions: Under the acid rain rules there are four different types of permit revisions: permit modifications, administrative amendments, fast-track modifications, and automatic amendments. The acid rain rules identify in which situations one or more of these types of revisions can be used.

The permit modification is essentially the same thing as a significant modification under Part 70; in fact, the acid rain rules cite the Part 70 regulations for the process. Similarly, the acid rain rules cite Part 70 for the procedure for administrative amendments.

Both the fast-track modification and the automatic amendment are unique to Part 72. The fast-track modification procedure can be used at the source's option for certain kinds of revisions that would normally go through the permit modification procedure. If selected, the source, instead of the permitting authority, is required to meet the public notice requirements of Part 70 at the same time that it sends its request for a modification to the permitting authority. Public comments are sent to both the permitting authority and the source, and once the comment period is over, the permitting authority acts on the revision as it would normally under the permit modification procedure.

The automatic amendment is a change to the permit that does not require any action by the permitting authority. This type of amendment is effected when there is a change to the number of allowance in a source's Allowance Tracking System account maintained by EPA. For instance,

the purchase or deduction of allowances triggers an automatic amendment.

g. Permit issuance procedures. In general, acid rain permits are to be issued using Part 70 procedures. However, there are a few exceptions. For instance, within 10 days of determining whether an acid rain application is complete, the permitting authority is required to notify the EPA of that determination. Another example is that Part 72 requires the permitting authority to notify EPA of any state or judicial appeal within 30 days of the filing of the appeal. Other differences between the Title IV and Title V permit issuance procedures can be found in S-600 of the model acid rain rule.

8. What will be the practical effect of the different permit revision procedures for acid rain and operating permits?

Only two elements differ between the two revision processes: (1) the acid rain rules do not allow the minor permit amendment procedure; and (2) acid rain has a fast-track modification procedure which is different from the Part 70 program.

Source changes that constitute minor permit amendments under Part 70 would probably not require a permit revision under Part 72. Similarly, changes that are fast-track modifications under the Acid Rain Program are governed by the Part 72 permit revision procedures, rather than the Part 70 procedures, because the changes are specific to acid rain. Therefore, no conflict exists between the two procedures: source changes that can be executed through the minor permit amendment procedure under Part 70 would probably require no separate revision procedure under Part 72, and changes that are fast-track modifications under Part 72 would require no separate revision procedure under Part 70.

Finally, note that "permit modifications" in Part 72 follow the same procedures as "significant modifications" in Part 70.

9. Could one permit review process (to include public participation) be developed to issue the entire Title V permit, including the acid rain portion?

Yes, with one caveat. When permitting authorities issue their operating permits, the Phase II acid rain requirements will simply be one "chapter" of that permit. Therefore, the permit will be subjected to only one public review process that will cover the entire permit. The EPA will also review the permit only once, looking at acid rain and other requirements

simultaneously. The caveat comes when the permitting authority reopens the permit to add the acid rain NOx requirements. The NOx portion of the acid rain application is due January 1, 1998, a day after the permitting authority is required to issue the initial acid rain permit. Because the NOx requirements must also undergo public review, a second public review process will be required when NOx is incorporated in the source's permit.

10. Who will be reviewing the acid rain portion of operating permits during EPA's 45-day review period before permit issuance?

The EPA expects the Regional Offices to review individual permits, with EPA Headquarters support provided on an "as needed" basis, similar to the NSR process.

11. Phase II sources are required to submit Phase II permit applications by January 1, 1996. Do Phase I sources also have to submit Phase II applications by January 1, 1996, even though the Phase I permit just became effective in 1995?

Yes. Both Phase I and Phase II sources have to submit Phase II permit applications by January 1, 1996.

12. What happens if the permitting authority issues the Title V permit before the acid rain portion of the operating permits program is in place?

So long as the permit program is approved before July 1, 1996, the permitting authority will be responsible for issuing the Phase II acid rain permit. (See section 408(d)(3) of the Act.) If the permitting authority has already issued the Title V permit, that permit would be reopened to include the Phase II acid rain requirements. EPA recommends, however, that permitting authorities plan their timing of Title V permit issuance for the affected utility sources so that permits need not be reopened to include acid rain.

If the permitting authority does not have an approved program that includes acid rain by July 1, 1996, EPA is responsible for issuing the Phase II permit.

13. Will EPA require permitting authorities to track Phase II sulfur dioxide allowances?

No. The EPA is responsible for tracking allowances in both Phase I and Phase II. However, EPA plans to give permitting authorities view-only access to computerized records in the allowance tracking system.

14. How does the NOx portion of the Acid Rain Program differ from the SO2 portion?

The NOx portion of the Acid Rain Program will also be flexible, but will not utilize an allowance trading system (Congress did not provide for an allowance program for NOx). A source has the option of meeting the applicable NOx emission rate out right, applying for a NOx averaging plan (where the average rate of several units may not exceed a given amount), or applying for an alternative emissions limitation. In addition, the concept of banking is also under consideration. This rule is not yet final, so only general language regarding NOx will be required in operating permit program submittals.

15. What should permitting authorities do about including NOx requirements in their operating permits program submittals, since these rules are not yet final?

Since Part 76 (NOx) has not yet been finalized, a permitting authority must only demonstrate that it has the ability to integrate NOx requirements (once the NOx rule is finalized) in it's Title V submittal. The EPA will provide permitting authorities with guidance on how to amend their legal authority as needed to include NOx requirements once the final rule has been promulgated.

12.5 Enhanced Monitoring

12.6 Stratospheric Ozone

13.0 MISCELLANEOUS

13.1 Indian Lands

1. For an Indian reservation located within a State, is the State program required to include sources within the Indian reservation? Would the State be sanctioned for submitting a program that did not cover the sources within the Indian reservation?

States in general do not have jurisdiction for purposes of regulating air quality on an Indian reservation. This can be changed by an agreement or treaty between the tribe and the State. A State would be expected to include in its program sources on an Indian reservation only if it could prove it had jurisdiction over the reservation. A State would not be subject to sanctions unless the State had jurisdiction over the reservation and had not submitted or implemented a program for the sources on the Indian lands. For sources on Indian lands not covered by a State program or by an operating permits program administered by an Indian tribe, the Federal government is responsible for permitting.

13.2 Pollution Prevention

14.0 PART 71

(No questions in this section at this time)