UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

December,14 2001

Richard A. Smith, Esq.
Smith & Lowney, P.L.L.C.
2317 East John Street
Seattle, WA 98112

Re: Washington's Title V Program

Dear Mr. Smith:

The purpose of this letter is to respond to your letter of March 12, 2001, submitting comments on behalf of Pacific Air Improvement Resource, Waste Action Project, Washington Toxics Coalition, and Washington Environmental Council on Washington State's Clean Air Act Title V operating permit program. The comments were submitted in response to the United States Environmental Protection Agency's (EPA's) Notice of Comment Period on operating permit program deficiencies, published in the Federal Register on December 11, 2000. 65 FR 77,376. Pursuant to the settlement agreement discussed in that notice, EPA is publishing notices of deficiencies for individual operating permit programs, based on the issues raised in the comments that EPA agrees are deficiencies. EPA is also responding to other concerns raised in comments that EPA does not agree are deficiencies within the meaning of 40 CFR Part 70.

EPA has carefully reviewed all issues raised in your comments. As discussed in more detail in the enclosed Response to Comments (Response 16), EPA has identified one area raised in your comments where EPA believes that Washington's regulations do not meet the requirements of Title V and Part 70--Washington's exemption of "insignificant emission units" from certain permit content requirements. Therefore, EPA is issuing in a separate document a notice of deficiency for this issue.

With respect to three of the alleged implementation deficiencies identified in your comments--permits issued by Washington's Industrial Section, the prompt reporting of permit deviations, and an exemption from monitoring requirements under certain conditions-- EPA has received commitments from the relevant Washington permitting authorities providing that future permits will address these three areas of concern and will be issued consistent with state and federal requirements. EPA intends to monitor the permits issued by the Washington permitting authorities over the next three to six months to ensure that the Washington permitting authorities are addressing these implementation concerns in newly issued permits consistent with their letters of commitment. In light of the commitments of the

Washington permitting authorities to address these implementation concerns, however, EPA has determined that these issues do not represent deficiencies in Washington's implementation of the Title V program, provided the Washington permitting authorities fulfill these commitments. Each of these issues is discussed in more detail in the enclosed Response to Comments (Response 9, Response 10, and
Response 11).

With respect to the issuance of permits within the time frames required by the Clean Air Act, the Washington permitting authorities with outstanding permits have each submitted a commitment and a schedule providing for issuance of all outstanding permits no later than December 1, 2003. The milestones contained in the commitment letters reflect a proportional rate of permit issuance for each semiannual period for each of these permitting authorities. As long as these permitting authorities issue permits consistent with the semiannual milestones contained in their commitment letters, EPA will continue to consider that these Washington permitting authorities have taken "significant action" such that a notice of deficiency is not warranted. This issue is discussed in more detail in Response to Comment 15.

With respect to the other issues identified in your comments, although some issues raise permit-specific deficiencies, we do not believe that the issues are systemic and therefore do not constitute a deficiency within the meaning of 40 CFR Part 70. The enclosed Response to Comments also provides more detail on these other issues we have determined do not constitute deficiencies in Washington's Title V program.

We appreciate your interest and efforts in ensuring that Washington's Title V operating permit program meets all federal requirements. The public comment process is an important part of the Title V operating permits program. EPA encourages you and your clients to continue to submit comments on draft permits during the public comment process at the state level. These comments on draft permits will help the Washington permitting authorities to write better permits and assist EPA in its review of such permits.

If you have any questions regarding this letter or the enclosed Response to Comments, please contact Denise Baker at (206)553-8087 or Julie Vergeront at (206) 553-1497.

Sincerely,

/s/

Barbara McAllister, Director
Office of Air Quality

Enclosures

cc: Mary Burg, Washington State Department of Ecology

Tom Todd, Washington State Department of Ecology
Carol Kraege, Washington State Department of Ecology
Josh Whited, Washington Attorney General's Office
David Lauer, Benton Clean Air Authority
Richard Stedman, Olympic Air Pollution Control Authority
James Randles, Northwest Air Pollution Authority
Robert D. Elliott, Southwest Clean Air Agency
Eric Skelton, Spokane County Air Pollution Control Authority
Les Ornelas, Yakima Regional Clean Air Authority
Dennis J. McLerran, Puget Sound Clean Air Agency
Doug Brown, Ecology Northwest Regional Office
Myron Saikewicz, Ecology Southwest Regional Office
Grant Pfeifer, Ecology Eastern Regional Office Regions
Sue Billings, Ecology Central Regional Office

RESPONSE TO COMMENTS REGARDING ALLEGED DEFICIENCIES IN WASHINGTON'S TITLE V OPERATING PERMITS PROGRAM

I. BACKGROUND

A. Approval of Washington's Title V Program In General

The Clean Air Act (CAA) requires all State and local permitting authorities to develop operating permits programs that meet the requirements of title V of the Act, 42 USC 7661-7661f, and its implementing regulations, 40 CFR part 70. Washington's operating permits program was submitted in response to this directive. EPA granted interim approval to Washington's air operating permits program on November 9, 1994 (59 FR 55813). EPA repromulgated final interim approval of Washington's operating permits program on one issue, along with a notice of correction, on December 8, 1995 (60 FR 62992). After the State and local agencies that implement the Washington operating permits program revised their programs to address the conditions of the interim approval, EPA promulgated final full approval of Washington's title V operating permits program on August 13, 2001 (66 FR 42439), which became effective September 12, 2001.

The title V operating permits program in Washington is implemented by the Washington Department of Ecology (Ecology), the Washington Energy Facility Site Evaluation Commission (EFSEC), and seven local air pollution control authorities: the Benton County Clean Air Authority (BCCAA); the Northwest Air Pollution Authority (NWAPA); the Olympic Air Pollution Control Authority (OAPCA); the Puget Sound Clean Air Agency (PSCAA); the Spokane County Air Pollution Control Authority (SCAPCA); the Southwest Clean Air Agency (SWCAA); and the Yakima Regional Clean Air Authority (YRCAA). Operating permits issued by Ecology are issued by four separate offices: the Eastern Regional Office (ERO) in Spokane, the Central Regional Office (CRO) in Yakima, the Industrial Section in Olympia, and the Hanford Office in Richland.

B. Additional Public Comment Process on Title V Programs

On December 11, 2000 (65 FR 77376), EPA published a Federal Register notice notifying the public of the opportunity to submit comments identifying any programmatic or implementation deficiencies in State title V programs that had received interim or full approval. Pursuant to the settlement agreement discussed in that notice, EPA committed to respond on the merits of any such claims of deficiency on or before December 1, 2001, for those States, such as Washington, that have received interim approval and on or before April 1, 2002, for States that have received full approval. On March 12, 2001, EPA received comments from Smith & Lowney, PLLC, on behalf of Pacific Air Improvement Resource, Waste Action Project, Washington Toxics Coalition, and the Washington Environmental Council (the commenters). The commenters identified numerous alleged deficiencies in the title V operating permits programs administered by all Washington permitting authorities.

The comments received on Washington's title V program fall into two general categories. One category, which EPA refers to as alleged "program deficiencies" or "program authority deficiencies" relate to whether a permitting authority's regulations or legislation meet the requirements of title V and part 70. In other words, "program" issues relate to whether the permitting authority has adequate authority to carry out the title V program. The other category of comments, which EPA refers to as alleged "implementation deficiencies," relate to whether a permitting authority is issuing permits consistent with its EPA-approved program and Federal requirements. This distinction is reflected in the part 70 regulations identifying the criteria for withdrawal of State and local title V operating permits programs. See 40 CFR 70.10(c)(1).

In the case of most of the comments received during the 90-day comment period raising alleged "implementation deficiencies," that is, commenting on the adequacy of permits issued by Washington permitting authorities, the commenters raised the concern with respect to "Washington permitting authorities" in general. In addition, the commenters also generally identified examples in specific permits illustrating the concern. The commenters stated in their comments that, "Where stated in general and unless specifically directed at a particular program, these comments are applicable to all nine air operating permits programs in Washington State."

Therefore, in evaluating the comments raising implementation issues for Washington permitting authorities in general, EPA took a two pronged approach. First, EPA reviewed the specific examples identified by the commenters as illustrating the alleged deficiency. In addition, EPA reviewed in connection with each such alleged deficiency approximately three recent, randomly selected permits from each Washington local air permitting authority as well as from Ecology's CRO, ERO, and Industrial Section.[1] This added up to 32 permits.

EPA focused its evaluation of the alleged implementation deficiencies on recently issued permits. The title V operating permits program is a relatively new program and permitting authorities, as well as EPA, have been steadily gaining experience with the issuance of each permit. EPA believes this approach of reviewing the alleged deficiencies in connection with recently issued permits, as well as the permits of concern specifically identified by the commenters, best addresses the question of whether Washington permitting authorities are currently adequately administering and implementing the title V program consistent with the CAA, EPA's implementing regulations, and their approved title V programs.

II. RESPONSE TO COMMENTS

Comment 1: Content of Standard Application Form

[1]There are no part 70 sources subject to EFSEC's jurisdiction at this time. Therefore, EPA did not review any permits from EFSEC. In addition, some other permitting authorities have only issued one or two permits.

The standard application form developed by Ecology (Ecology Pub. No. 94-175, Dec. 1994) fails to require inclusion of all the "required data elements" specified by regulation. WAC 173-401-510(2); 40 CFR 70.5(c). The deficiencies in the permit application form are identified below. Without an application form calling for all required information, it is unlikely at best that an applicant will include all information necessary for a complete application. The application form is deficient in that it does not require:

a. Sufficient identification and description of all air pollution control equipment and compliance monitoring devices or activities as provided in WAC 173-401-510(2)(c)(v) and 40 CFR 70.5(c)(3)(v).

b. A description of limitations on source operation affecting emissions or any work practice standards for all regulated pollutants at the source as provided in WAC 173-401-510(2)(c)(vi) and 40 CFR 70.5(c)(3)(vi).

c. A description of the calculations on which emissions information is based as provided in WAC 173-401-510(2)(c)(viii) and 40 CFR 70.5(c)(3)(viii).

d. A description of all applicable requirements as provided in WAC 173-401-510(2)(d)(i) and 40 CFR 70.5(c)(4)(i). It is insufficient to require, as the Ecology's form does, merely the identification of such applicable requirements because a member of the public may not have easy access to identified regulations or previous agency orders.

e. In the initial compliance certification portion of Ecology's application form, a statement that the applicant will continue to comply with all applicable regulations as provided in WAC 173-401-510(2)(h)(ii)(A) and 40 CFR 70.5(c)(8)(ii)(A), or a statement that the applicant will meet applicable requirements that will become effective during the permit term, as provided in WAC 173-401-510(2)(h)(ii)(B) and 40 CFR 70.5(c)(8)(ii)(B). Furthermore, the instructions accompanying Ecology's application form are insufficient as to the "description of the compliance status of the source with respect to all applicable requirements" as provided in WAC 173-401-510(2)(h)(i) and 40 CFR 70.5(c)(8)(i). The cumulative result of these deficiencies is the inclusion of meaningless compliance certifications with permit applications. For example, see the June 7, 1995, application submitted to PSCAA by the Puget Sound Power & Light Co. Frederickson Generating Station. A standard form like the Illinois Environmental Protection Agency's Compliance Certification (Exhibit A) or EPA's own form (Exhibit B) should be required of all permit applicants.

f. All of the elements of a compliance schedule as provided in WAC 173-401-510(2)(h)(iii) and 40 CFR 70.5(c)(8)(iii). The form's instructions as to the compliance schedule are similarly deficient.

Response 1: EPA does not agree that the standard application form developed by Ecology fails to

require inclusion of all the required data elements. Part 70 states that the permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency, provided the standard application forms and attachments developed by the permitting authority include the elements set forth in 40 CFR 70.5(c)(1). Washington's regulations identify these same elements. See WAC 173-401-510(2).

In 1995, EPA issued a guidance document addressing the development of part 70 permit applications. See White Paper for Streamlined Development of Part 70 Permit Applications, July 10, 1995 (White Paper No. 1). The purpose of White Paper No. 1 was to respond to the concerns of industry and permitting authorities that preparation of initial permit applications was proving more costly and burdensome than necessary to achieve the goals of the title V program and to streamline and simplify the development of part 70 permit applications. See Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards to the Regional Air Directors, entitled "White Paper for Streamlined Development of Part 70 Permit Applications," dated July 10, 1995, that accompanied issuance of White Paper No. 1. EPA emphasized in White Paper No. 1 that, because the title V program was generally not intended by Congress to be a source of new substantive requirements, operating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than imposing new requirements or accomplishing other objectives. White Paper No. 1, pg. 1. For that reason, EPA urged States to keep part 70 permit application requirements to the minimum needed to identify applicable requirements. White Paper No. 1, pg. 5.

The commenters' first contention is that Ecology's standard application form does not require the applicant to provide sufficient information and description of air pollution control equipment and compliance monitoring devices or activities as provided in WAC 173-401-510(2)(c)(v) and 40 CFR 70.5(c)(3)(v). The commenters' concern appears to be that the information required by Ecology's standard application form is not sufficient, rather than that no such information is required by Ecology's form. EPA disagrees with the commenters that Ecology's standard application form, together with the instructions to the form, do not require the applicant to identify and describe air pollution control equipment and compliance monitoring devices or activities. In this regard, it is important to note that the terms "emission point" and "discharge point," as used in Ecology's form, are defined to include emission controls. The commenters have not provided any examples of information relevant to the determination and imposition of applicable requirements that have been omitted by applicants in Washington because of deficiencies in Ecology's form relating to air pollution control equipment and compliance monitoring devices or activities. EPA has clarified that, for part 70 purposes, descriptions of emission units themselves can be quite general and need not contain information such as UTM coordinates or model and serial numbers for equipment unless such information is needed to determine the applicability of or to impose an applicable requirement. White Paper No. 1, pg. 7. The same would obviously be true for control equipment. In short, EPA does not agree with the commenters that Ecology's application form, together with the instructions, does not require the applicant to provide sufficient information regarding air pollution control equipment and compliance monitoring devices or activities.

The commenters' second concern is that Ecology's application form and instructions do not require a description of limitations on source operation affecting emissions or any work practice standards for all regulated pollutants at the source, as provided in WAC 173-401-510(2)(c)(vi) and 40 CFR 70.5(c)(3)(vi). Although Ecology's form and instructions do not use the terms "limitations on source operation affecting emissions" or "work practice standards," this information is nonetheless required. The applicant is required to identify all applicable requirements, which would include any work practice standards and any enforceable limits on source operations. In addition, the application form and instructions require the submission of annual potential emissions, which is defined to include any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed that is federally enforceable. Again, the commenters have not identified any information relevant to the determination and imposition of all applicable requirements that has resulted or would likely result from the fact that Ecology's standard application form does not use the precise terms in part 70. Therefore, EPA does not agree that Ecology's application form and accompanying instructions are deficient in that they do not require a description of limitations on source operation affecting emissions or any work practice standards for all regulated pollutants.

The commenters' third contention is that Ecology's standard application form does not require calculations on which emissions information is based, as provided in WAC 173-401-510(2)(c)(viii) and 40 CFR 70.5(c)(3)(viii). EPA disagrees. The instructions to Ecology's standard application form require that applicants include all data, assumptions, and calculations used in calculating potential and actual emissions in an attachment to the application form. Moreover, EPA has interpreted 40 CFR 70.5(c)(3)(viii) as allowing the permit applicant to submit examples of the calculations performed to illustrate the methodology used and has clarified that efforts to exhaustively record such calculations in the application can be omitted. White Paper No. 1, pg. 16.

The commenters next contend that Ecology's standard application form does not require a description of all applicable requirements, as provided by WAC 173-401-510(2)(d)(i) and 40 CFR 70.5(c)(4)(i). In this regard, the commenters assert that it is insufficient to require merely the identification of applicable requirements because a member of the public may not have easy access to identified regulations or previous agency orders. EPA disagrees that Ecology's standard application form is deficient as it relates to the identification and description of all applicable requirements. Ecology's standard application form requires applicants to select from a list developed by Ecology of potentially applicable requirements that are applicable to the applicant's emission points or plant in general. Ecology's list includes the citation for each listed requirement, as well as a brief description of each requirement, and specifically cautions the applicant to consider and include requirements from regulatory orders. In White Paper No. 1, EPA clarified that part 70 does allow the cross-referencing of previously issued preconstruction and part 70 permits, as well as Federal, State or local laws, rules or regulations that affect the applicable requirements to which the applicant is subject. EPA further clarified that for cross-referencing in the permit application to be consistent with the requirements of part 70, the referenced materials must be currently applicable and available to the public and, in the case of referenced materials that are not published or readily available, such materials must be made

available as part of the public docket on the permit action. White Paper No. 1, pp. 20 and 21. EPA also clarified that applicants need not paraphrase or restate in their entirety regulations or other repositories of applicable requirements and that citations to applicable requirements can be used to streamline how applicable requirements are described in permit applications. White Paper No. 1, pg. 21. In response to the commenters' concern that the public may not have easy access to regulations or agency orders, EPA notes that Federal regulations, as well as Ecology's regulations, are available to the public on the internet. See http://.access.gpo.gov/nara/cfr/ index.html; http://www.ecy.wa.gov/laws-rules/ecywac.html#air. In the case of regulatory orders, any regulatory orders cross-referenced in the permit application should be available as part of the public docket for the permit action. The commenters have not provided any information to suggest that this is not being done.

With respect to the sufficiency of the initial compliance certification form that is part of Ecology's standard application form, the form, together with the instructions accompanying the form, do require all necessary information regarding compliance certification. EPA believes that the application form and its accompanying instructions must be read together and that one is not deficient if the required information is included on the other. Part 70 does not mandate that any particular requirements be placed on the application form itself or in the instructions that accompany the form. In addition, part 70 makes clear that the permitting authority has considerable discretion in developing application forms that best meet the permitting authority's needs. See 40 CFR 70.5(c).

Finally, the commenters contend that Ecology's standard application form does not contain all of the elements of a compliance schedule, as provided in WAC 173-401-510(2)(h)(iii) and 40 CFR 70.5(c)(8)(iii), and that the form's instructions as to the compliance schedule are similarly deficient. EPA disagrees. The instructions accompanying Ecology's standard application form state that: "Requirements that a source is not complying with should be identified in the compliance plan. For those requirements, the applicant must include a schedule of measures to achieve compliance with the applicable requirement in the compliance plan *required under WAC 173-401-501(2)(h)*." (emphasis added). WAC 173-401-510(2)(h) is identical to 40 CFR 70.5(c)(8).

In summary, EPA concludes that none of the issues identified by the commenters with respect to the sufficiency of Ecology's standard permit application form represents a program or implementation deficiency.

Comment 2: Use of Standard Application Form

All of the air operating permits programs in Washington must require applications from sources using a standard application form or forms developed by the Washington Department of Ecology. See WAC 173-401-510(1). None of the programs reviewed require permit applicants to actually use the application forms. Use of proper and thorough forms would standardize the applications and make them more understandable to the public. The failure of the permitting authorities to require use of adequate application forms by all applicants is a deficiency in the program. Use of proper standardized

forms would also enable electronic submission of applications and facilitate posting of applications on the internet.

Response 2: Part 70 states that each State title V program "shall provide for a standard application form or forms." 40 CFR 70.5(c). It further states that the permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency, provided the standard application forms and attachments developed by the permitting authority include the elements set forth in 40 CFR 70.5(c)(1).

Thus, part 70 clearly requires that States develop a standard application form. There is nothing in part 70 or in the preamble, however, to indicate that permitting authorities must require permit applicants to use the standard application form. Many permitting authorities have chosen to require all sources to use the standard permit application form. See Oregon Administrative Rules (OAR) 340-028-2120(1)(b)(A) and (3) . EPA believes part 70 gives permitting authorities the discretion, however, to determine whether, on a case-by-case basis, for certain categories of sources or for all sources, a specialized standard form or a form developed by the applicant is the most efficient means of providing the information required by part 70 and by the permitting authority's regulations. With respect to the comment that use of standardized forms would also enable electronic submission of applications and facilitate posting of applications on the internet, there is no requirement in part 70 that permit applications be submitted in electronic form.

WAC 173-401-510(1) states that Ecology "shall develop a standard application form or forms to be used by each permitting authority." Ecology has done so. See Ecology Pub. No. 94-175, Dec. 1994. That form provides that the required information must be provided on the standard application form "or the equivalent," indicating that permit applicants in Washington are not required to use the standard form. Ecology has advised us that, like part 70, the intent of WAC 173-401-510(1) was to require Ecology to develop a standard application form that Washington permitting authorities could use, but were not required to use. Similarly, according to Ecology, WAC 173-401-510(1) does not require that all permit applicants in Washington use Ecology's standard application form, so long as the required information is submitted. Therefore, EPA does not believe the failure of Washington permitting authorities to require sources to use Ecology's standard application form constitutes a program deficiency.

Comment 3: Public Notice of Receipt of Application

Under WAC 173-401-500(4) and –700(6), any permit application submitted to any of the Washington permitting authorities is automatically deemed complete sixty days after submission unless the permitting authority determines in writing that the application is incomplete. There is no provision for notice to the public when a permit application is received by a permitting authority and none is provided. This situation creates a deficiency in the programs. Given that permitting personnel at the permitting authorities who are already behind schedule to act on applications already submitted and that no notice is provided to the public to facilitate public review of newly received applications, it is likely that new permit applications will go unreviewed for completeness for sixty days or more following their

receipt. Thus, incomplete or insufficient permit applications will be deemed complete upon passage of the sixty-day period by default. To remedy this deficiency, the regulations should be changed to provide that no permit application is deemed complete until its completeness is determined in writing by the permitting authority. Furthermore, the public should be given prompt notice of the receipt of an application so that the public can review such application and identify issues of application incompleteness to the permitting authority. This notice would best be given by inclusion in the Washington State Permit Register and the posting of the permit application on the internet. On the basis of any or all of these deficiencies, EPA should make a formal finding that the Washington title V programs are deficient and require corrective action.

Response 3: Part 70 states that "Unless the permitting authority determines that an application is not complete within 60 days of receipt of the application, such application shall be deemed complete, except as otherwise provided in § 70.7(a)(4) of this part." 40 CFR 70.5(a)(2). Section 70.7(a)(4) provides that:

> The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e)(2) and (3) of this section, the State program need not require a completeness determination.

40 CFR 70.7(a)(4).

The provisions of WAC 173-401-500(4) and –700(6) cited by the commenters are virtually identical to requirements of 40 CFR 70.5(a)(2) and 70.7(a)(4). Part 70 does not require that the permitting authority provide notice to the public of when a permit application is received. Thus, the issues raised by the commenters do not constitute a program deficiency.

Both part 70 and Washington's title V program do have provisions to address the situation where a permit that is deemed administratively complete by the passage of 60 days is later reviewed by the permitting authority and determined not to provide all information necessary to issue the permit. 40 CFR 70.5(a)(2) and WAC 173-401-500(4) state that if, while processing the application, the permitting authority determines that additional information is necessary to evaluate or take final action on the application, it may request such information in writing and set a reasonable deadline for response. The source's ability to maintain the application shield and operate without a permit, as set forth in 40 CFR 70.7(b) and WAC 173-401-705(2), continues only if the applicant submits any requested additional information by the deadline specified by the permitting authority. See 40 CFR 70.5(a)(2) and 70.7(b); WAC 173-401-500(4) and -705(2).

Comments 4: Changes Triggering Minor New Source Review

The Washington title V programs are deficient because post-permit issuance changes that trigger minor

new source review (NSR) may escape permit modification procedures under Washington regulations. Washington's program provides for certain changes to be made off permit or "not requiring permit revisions" under 40 CFR 70.4(b)(14). See WAC 173-401-722 and -724. Like the rules governing minor permit modifications, 40 CFR 70.4(b)(14) prohibits off-permit changes for "modifications under any provision of title I of the Act." Washington regulations include this prohibition, but overcome the hurdle by defining "title I modification" and "modifications under any provision of title I" as "any modification under Sections 111 … or 112 of the [Clean Air Act] and any physical change or change in the method of operations that is subject to the preconstruction review regulations promulgated under Parts C … and D … of Title I of the [Clean Air Act]." See WAC 173-401-200(33), -722(a)(i), and –724(1). Thus, minor NSR changes fall outside Washington's definition of "title I modification" and escape the need for significant modification procedure, contrary to Federal requirements. Defining "title I modification" as not including modifications that trigger minor NSR is legally unjustified.

Moreover, 40 CFR 70.7(e)(2)(i)(A) provides that minor modification procedures cannot be used for terms that "require or change a case-by-case determination of an emission limitation or other standard." Washington's minor NSR program requires facilities to employ "best available control technology" (BACT) when making changes that are covered by the minor NSR program. See WAC 173-400-112(a), -113(2), and 173-460-040(3)(b). A BACT determination is made on a case-by-case basis. WAC 173-400-030(10). Thus, part 70 strictly prohibits the use of minor permit modification procedures for this type of change. If minor NSR requirements do not qualify for incorporation under minor modification procedures, it is illogical to conclude that part 70 allows changes that trigger minor NSR to take place off permit.

Response 4: Washington's provisions for off-permit changes contain all of the provisions required by part 70 and are not deficient. Compare 40 CFR 70.4(b)(12) with WAC 173-401-724. The crux of the commenters' comment is that Washington has impermissibly broadened the class of changes that can qualify as off-permit changes because Washington has defined "title I modification" as excluding minor NSR changes. EPA disagrees.

At issue is whether the phrase "modifications under any provision of title I" as used in section 502(b)(10) of the CAA includes not only modifications subject to major NSR requirements of parts C and D of title I, but also modifications subject to minor NSR programs established by the States pursuant to section 110(a)(2)(C) of the CAA. In August 1994, EPA proposed to interpret the title I modification language of part 70 to include minor as well as major NSR modifications. See 55 FR 44460, 44527 (August 29, 1994). However, EPA received many comments from industry and States contesting this interpretation. These commenters argued that EPA had interpreted title I modification in the preamble to the May 1991 proposed part 70 rule to exclude minor NSR, see 56 FR 21712, 21746-47 and footnote 6 (May 10, 1991), and did not redefine it in the final July 1992 rule. As a result, these commenters argued that they were relying on the current rule to be interpreted consistent with the proposed rule preamble and that EPA could not change its interpretation without undertaking further rulemaking.

Based in part on the arguments raised by the commenters on the August 1994 proposed revisions to part 70, EPA revised its proposed interpretation of the definition of title I modification in the August 1995 supplemental notice to exclude modifications subject to minor NSR. In addition, EPA proposed regulatory language which defined title I modification as excluding the reference to section 110(a)(2) of the Act. See 60 FR 45530, 45545-46, 45565 (August 31, 1995). Although EPA has not yet adopted a final regulatory definition for the term, EPA's current interpretation is that title I modifications do not include changes subject to State minor NSR programs. This is consistent with the approach the States were advised to take under the current part 70 regulation.

EPA also disagrees with the commenters that the minor permit modification procedures of 40 CFR 70.7(e)(2)(i)(A) and WAC 173-401-725(2) cannot be used for changes triggering minor NSR because Washington's minor NSR program requires facilities to employ "Best Available Control Technology" or "BACT" when making changes that are covered by the minor NSR program. The language prohibiting minor permit modification procedures to be used in cases that require or change "a case-by case determination of an emission limit or other standard" refers to cases in which *the part 70 permit revision process* is being used to establish or change a case-by-case determination of an emission limit or standard. In the case of changes triggering minor NSR, the minor NSR provisions of WAC 173-400 set forth the procedural and substantive requirements for issuing the regulatory order allowing construction or modification of the new source. The regulatory order is then an "applicable requirement" which could be incorporated into the part 70 permit for the source through the minor permit modification procedures *provided* the other requirements of 40 CFR 70.7(e)(2)(i)(A) and WAC 173-401-725(2) are satisfied. In other words, BACT is established in the regulatory order, not in the part 70 permit. In summary, EPA disagrees that Washington's provisions for changes triggering minor NSR do not meet the requirements of part 70.

Comment 5: Administrative Amendment Procedures
Under 40 CFR 70.7(d)(1)(v), NSR terms can be incorporated into a part 70 permit using administrative amendment procedures, but only if the State's minor NSR program meets procedural requirements that are substantially equivalent to the requirements of 40 CFR 70.7 and 70.8—meaning a 30-day public comment period and an opportunity for EPA to object. A State minor NSR program that complies with the minimum Federal standards for minor NSR programs under 40 CFR 51.160-164 should come close to meeting that standard. Unfortunately, Washington's minor NSR program falls short of these minimum requirements or 40 CFR part 51. Thus, Washington permitting authorities clearly cannot use the administrative amendment procedures to incorporate terms from minor NSR permits into part 70 permits.

Response 5: Part 70 states that changes that can be made by administrative amendment include changes that incorporate into a part 70 permit the requirements from preconstruction review permits (also referred to as new source review or NSR permits) authorized under an EPA-approved program, provided that such a program meets the procedural requirements substantially equivalent to the requirements of 40 CFR 70.7 and 70.8 that would be applicable to the change if it were subject to review as a permit modification and compliance requirements substantially equivalent to those contained

in 40 CFR 70.6. The commenters are correct that Washington's general minor NSR program does not meet procedural requirements substantially equivalent to 40 CFR 70.7 and 70.8. Washington's EPA-approved NSR and title V programs, however, have special provisions that apply when a facility elects to integrate review of a notice of construction application[2] and an operating permit application or amendment. WAC 173-400-110(7)[3] provides that notice of construction applications designated for integrated review "shall be processed in accordance with operating permit program procedures and deadlines." WAC 173-401-500(10) states that, where a facility elects integrated review, the notice of construction application shall be processed in accordance with the procedures set forth in WAC 173-401-700 for issuing a part 70 permit and that the proposed order of approval shall be provided to EPA for review as provided in WAC 173-401-810. WAC 173-401-500(10) further states that, in the case of integrated review, the order of approval shall include compliance requirements for the new or modified emission units that meet the requirements of WAC 173-401-600 through -650. Thus, Washington permitting authorities can use the administrative amendment procedures to incorporate terms from orders of approval for new and modified sources into part 70 permits so long as the permitting authority follows the procedures for the review and processing of orders of approval set forth in WAC 173-400-110 and 173-401-500(10). This includes a 30-day public comment period and an opportunity for EPA to object to the order of approval. In summary, EPA disagrees that Washington's provisions for incorporating new source review changes into permits using administrative amendment procedures are deficient.

Comment 6: Visual Monitoring

The vast majority of permits rely on visual monitoring. Visual monitoring is necessarily subjective and can only be performed under certain weather and operating conditions. For example, the Ball Metal permit (PSCAA Permit No. 10249) requires quarterly inspections for visible emissions "while the equipment is in operation during daylight hours" yet makes no mention of ambient weather conditions (such as cloud cover) or location of inspection or distance from the source making this monitoring unacceptably subjective and lax.

Response 6: Washington permits do rely on visual monitoring for many purposes. For the reasons set out below, however, EPA does not agree that this is an indication of a deficiency in program implementation. However, EPA encourages the Washington permitting authorities to better explain and justify in the statement of basis the selection of all monitoring, including the use of visual emissions monitoring.

---

[2]Under Washington's minor NSR program, the facility files a "notice of construction application" and the permitting authority issues an "order of approval," rather than a permit.

[3]This provision was codified at WAC 173-400-110(3) at the time it was last approved by EPA as part of the Washington State Implementation Plan (SIP).

Visual monitoring, also known as visible emissions checks or "smoke/no smoke" observations, is used frequently in Washington permits both as a general, facility-wide monitoring strategy and as monitoring for specific emission units. This is not a compliance determination method for opacity (e.g., a reference test method such as Ecology Method 9A or EPA Method 9) but is instead a determination of whether there are *any* visible emissions from the source. Visible emissions checks are generally used as monitoring for sources which normally have no visible emissions. Because the goal is to determine whether there are visible emissions from the source, not the degree of opacity from the source, the ambient conditions and location of the observer during the observation are not essential.

If any visible emissions are detected from the source (the observation of visible emissions is not in and of itself a violation), the source is required to take corrective action as soon as possible to minimize visible emissions and/or to conduct a compliance determination for opacity. This process is repeated until no visible emissions are detected. The source is in violation of the permit if timely corrective action is not taken. The source is also in violation of the opacity standard (and the corresponding term in the permit) if a compliance test for opacity detects opacity above the limit or if there is other credible evidence of an opacity violation.

Visual monitoring can be a useful tool for assuring compliance with generally applicable opacity standards because it can be performed by minimally trained employees to detect problems with equipment or control devices which normally have no visible emissions, whereas a requirement to conduct the compliance test for opacity (e.g., Ecology Method 9A or EPA Method 9) requires a specially trained and certified observer.

Many Washington permits, including the Ball Metal permit cited by the commenters, include a "facility-wide" requirement for monthly or quarterly visible emissions checks. See Ball Metal permit, section II.A.1(a). A similar requirement for a monthly or quarterly "walk-through" of the facility to inspect for possible problems is also often included. See Ball Metal permit, section II.A.1(c). Both of these monitoring provisions are designed to address monitoring for generally applicable requirements for the facility as a whole, including any emissions units that qualify as "insignificant" or that are otherwise not specifically addressed in the permit. This monitoring *supplements* other unit-specific monitoring.

For example, the Ball Metal permit includes additional monitoring designed to assure compliance with the opacity limit for the spray coating operation (section II.A.2(c)), which appears to be the only emission unit at this source likely to generate visible emissions. (The other emission units emit volatile organic compounds (VOCs) and are unlikely to ever have visible emissions even during upset conditions.) The permit requires that the spray booth filters be changed on a daily basis and that daily inspections be conducted of proper fan operation and to check for any evidence of abnormal odor or paint emissions. As noted by the commenters, a quarterly visual monitoring requirement alone would likely be too infrequent to assure compliance for the spray coating operation. However, in conjunction with the good operation and maintenance practices - the daily filter changes and inspections - this monitoring regime should reasonably assure compliance. In other words, the quarterly visual emissions check is part of a collective package of monitoring designed to assure the equipment, including the

control equipment, is operated properly and in a manner that will assure compliance with the opacity limit.

Another example of visible emissions monitoring is in the K-Ply permit (OAPCA Permit No. AOP 01-98). In this case, while not requiring that the observer be "certified" to conduct reference method readings, the permit does require that the observer be trained in the methodology and the permit also includes many of the key reference method requirements such as position of the observer. See K-Ply permit, section 9.3. However, the monitoring in the K-Ply permit does not require the use of an opacity compliance test (e.g., a reference method test) because it only requires that the observer note the presence or absence of visible emissions and to take corrective action if visible emissions are present. As in the Ball Metal permit, the visible emissions monitoring for the hog fuel boiler in the K-Ply is not intended to *determine* (as opposed to *assure*) compliance.

In addition, as in the Ball Metal permit, this is not the only monitoring for the hog fuel boiler in the K-Ply permit. The permit writer recognized that many factors potentially contribute to noncompliance with the opacity limit and included appropriate work practice and associated monitoring requirements, including specific operation and maintenance and fuel quality requirements. See K-Ply permit, sections 8.2 and 9.11. These monitoring provisions together can provide a reasonable assurance of compliance even though the visible emissions checks, alone, might not. In summary, although visible emissions checks are widely used in Washington, as they are in many States, they are generally only part of the monitoring regime required for an emission unit. In addition, the level of detail of a Reference Method 9 test is not needed for this monitoring method when used in this context because the goal is simply to determine whether or not any emissions are visible from units which should normally have none.

Comment 7: CEMS or COMS for "Grandfathered" Sources

The Washington operating permits programs are deficient in that they do not require Continuous Emissions Monitoring (CEMs) or Continuous Opacity Monitoring (COMs) systems to provide the monitoring information required by 70.6(a)(3)(i)(B) and 70.6(c)(1). EPA should ensure that permits require a CEM for any emission unit in a category regulated by an New Source Performance Standards (NSPS) or a National Emission Standards for Hazardous Air Pollutants (NESHAP) that would require a CEM but for "grandfathering."[4]

Response 7: For the reasons discussed below, EPA disagrees that the Washington operating permits programs are deficient based on their failure to require CEM/COMs and believes there are other ways to meet the criteria of 40 CFR 70.6(a)(3)(i)(B) and 70.6(c)(1). However, EPA encourages Washington permitting authorities to consider use of these monitoring devices, especially for larger emission units and units in a category regulated by an NSPS or NESHAP which would require a CEM

[4] The term "grandfathering" relates to standards that apply only to sources that are installed or modified after the effective date of the rule. A "grandfathered" source is a source that is not subject to a rule because the rule, by its terms, applies only to sources constructed or modified after the effective date of the rule and the source in question was in existence prior to the effective date of the rule.

but for "grandfathering."

The CAA specifically states that "continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance." See 42 U. S. C. 7654o(b). Moreover, although part 70 requires that the permit include monitoring that meets the criteria of 70.6(a)(3)(i)(B) and 70.6(c)(1), it does not require the use of CEMs or COMs except where those are already required by the underlying applicable requirement.

That a source is a "grandfathered source" in an NSPS or NESHAP category that requires a CEM/COM for units built after the effective date of the standard does not, by itself, indicate that a CEM/COM is necessary to assure compliance for "grandfathered" units. For example, a "grandfathered" electric arc furnace that is not subject to NSPS subpart AA because it is was constructed before the applicability date of that rule may also not be subject to the more stringent opacity and particulate limits in that standard. Therefore, the "grandfathered" source may have a much larger margin of compliance with the less stringent standards to which that source is subject and less stringent monitoring than a CEM may therefore be sufficient to assure compliance.

However, where an emission unit is not subject to an NSPS or NESHAP standard which requires a CEM/COM because it is "grandfathered," yet the unit is subject to similar emission limits, EPA believes it is reasonable to consider whether a CEM/COM may be needed to assure compliance. Under these circumstances, the permitting authority should discuss in the statement of basis whether a CEM/COM was considered, why the authority decided against that kind of monitoring, and how the monitoring in the permit assures compliance. See 40 CFR 70.7(a)(5) (permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions.); WAC 173-401-700(8)(same).

Comment 8: CEMs When Monthly Source Testing is Required

The Washington operating permits programs are deficient because they do not require CEMs in part 70 permits when monthly source testing is required by the permitting authority. If monthly source testing is necessary, then a CEM is necessary to ensure compliance. Examples of this deficiency are in air operating permits issued by Ecology's Industrial Section to some pulp mills (e.g., Simpson Tacoma Kraft, Boise Cascade Wallula, Fort James Camas, Georgia Pacific (Bellingham), Kimberly Clark).

Response 8: EPA disagrees that part 70 permits that require monthly source testing but do not also require CEMs are inherently deficient, provided that the permits otherwise meet the requirements of 40 CFR 70.6(a)(3)(i)(B) and 70.6(c)(1).[5] Monthly source testing could be an effective strategy for

[5]EPA recently clarified the scope of the title V monitoring requirements in two Orders responding to petitions under title V. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, Nov. 24, 2000 ("Pacificorp") (available on the internet at http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf), and In re Fort

assuring compliance in conjunction with other monitoring or, in the case of emission units with no control device and little variability in emissions, without additional monitoring provisions. In addition, there are some applications for which CEMS are not yet in general use (*e.g.*, particulate matter) or are not technically feasible (*e.g.*, a COMS in the case of a wet control system).

In summary, EPA does not believe that monthly source testing necessarily indicates the need for a CEM to assure compliance. Therefore, EPA does not agree that this issue represents a deficiency in Washington's operating permits programs. As discussed in more detail in response to Comment 9 below, however, in the permits identified by the commenters, EPA was unable to determine from the permit or permit record whether the monthly source testing, alone or in combination with other monitoring, for one or more applicable requirements, meets the criteria of 40 CFR 70.6(a)(3)(i)(B) and 70.6(c)(1). Please refer to Response to Comment 9 for further discussion of this issue.

Comment 9: Adequacy of Monitoring and Enforceability of Permit Terms

Part 70 permits issued by Washington permitting authorities include monitoring language that is frequently either unacceptably vague or simply undefined. Specifically, permits fail to specify testing or the relevant instruction or requirement (see Ball Metal); fail to provide specifics as to what a "complaint investigation" must entail (see Ball Metal); require annual emissions to be estimated based on unverified emission factors (see K-Ply); use opacity to infer compliance with a grain loading standard without correlating opacity to particulate levels (see K-Ply); use inappropriate triggers for establishing the frequency of source testing (see K-Ply); fail to fully list and adequately describe certain pollutants and provide adequate monitoring (see K-Ply); provide testing frequency that is insufficient to assure compliance based on the margin of compliance and variability of emissions over time (see Fort James).

Moreover, Washington permits include undefined language (such as "good industrial practice") to convey procedural and practice requirements, rending [sic] them subjective and virtually unenforceable. For example, in the Ball Metal permit (PSCAA Permit No. 10249), Section II(d) provides that any activity that can fall under the rubric of "insignificant emission unit" or "equipment" is regulated solely by the requirement to use "good industrial practice." Another example from this permit is the repeated statement that for various requirements, specified procedures must be employed "in most instances." This is problematic because it does not state when the specified procedures must be followed and when not. Note also that "most" means merely a majority of instances. A final example from the Ball Metal permit is the repeated use of vague time references such as "within a reasonable time," "as soon as possible," "on a timely basis," and "promptly" without further definition of the time frame. Such language leads to unenforceably vague permit conditions. Permits must include specific enforceable standards fully contained within the permit. Failure to do so leaves substantial portions of activity related to emissions effectively unregulated.

James Camas Mill, Petition X-1999-1, December 22, 2000 (http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf) for a complete discussion of these issues.

Washington operating permits are also generally not written with adequate attention to compliance and enforcement issues. Permit language and conditions are not designed to ensure compliance or to be enforceable. An example is the permit for the Fort James Camas Mill (Dept. of Ecology Permit No. 000025-6).

Response 9: Part 70 permits are complex and permit writing is a difficult skill. It is not unexpected that permits will occasionally fail to articulate clear and precise monitoring requirements or will include undefined language. Improvement is always possible. Public comment on any term that is believed to be vague, ambiguous, or deficient in any other way will help the Washington permitting authorities to write better permits and assist EPA in its review of such permits. Except with respect to Ecology's Industrial Section, however, EPA does not agree that part 70 permits issued by Washington permitting authorities contain monitoring and other conditions that are so unacceptably vague, undefined, or otherwise unenforceable or are so lacking in attention to compliance and enforcement issues as to constitute a deficiency in the implementation of Washington's title V program.

Industrial Section

EPA shares the commenters' concern that permits issued by the Industrial Section of the Washington State Department of Ecology need substantial improvement in the clarity, enforceability, and adequacy of support for monitoring and other conditions in its permits. In reaching this conclusion, EPA reviewed the five pulp mill permits issued by Industrial Section that were cited by the commenters in this comment and in response to Comment 8.[6]

In responding to these comment, EPA noted significant problems with all Industrial Section permits reviewed, including failure to ensure all permit terms are enforceable; to contain monitoring, recordkeeping, and reporting sufficient to assure compliance with all applicable requirements through all reasonably anticipated operating scenarios and to provide an adequate explanation of monitoring decisions in the statement of basis; and to adequately cite the origin and authority for each permit term and condition. In addition, several of the permits reviewed contain an overly broad permit shield or contain language that undermines the credible evidence rule.

EPA has worked early with the Industrial Section to ensure that these issues are being addressed and that its program is implemented consistent with its approved permitting program, the CAA, and EPA's implementing regulations. The problems identified by the commenters and EPA here do not indicate a deficiency with the regulations or legislation in Washington's approved title V program. Rather, the problems with the permits issued by the Industrial Section arise from the issuance of permits that are not consistent with its approved title V program and Federal requirements.

[6]Ecology's Industrial Section has jurisdiction over primary aluminum smelters and over sulfide and kraft pulp mills. To date, Industrial Section has issued all eight pulp mill part 70 permits and no aluminum smelter part 70 permits.

To address these concerns, EPA has received a letter from the Industrial Section in which the Industrial Section commits to promptly addressing these issues and ensuring that future permits will be issued consistent with State and Federal requirements. The letter includes commitments to:

- Have at least three permits reviewed in detail by an Assistant Attorney General and distribute feedback from the Assistant Attorney General to all Industrial Section permit writers to aid development of subsequent permits and amendments. This review will include appropriate citing of the origin and authority for each permit term and condition.

- Have all future permits reviewed by the Industrial Section's public involvement coordinator to maintain the clarity of permits.

- Pursue training in clear writing for all permit writers in the Industrial Section that is designed and tailored to fit the Industrial Section needs.

- Document how each of the following criteria were considered for every source where a monitoring decision is made.
    - Compliance history
    - Variability of the process or emission
    - Potential for Environmental Impact
    - Margin of compliance
    - Other technical considerations

- Take the following steps to ensure that monitoring conditions assure compliance including:
    - Continued regular attendance at the quarterly Washington air permit engineers meetings to help assure that Industrial Section permits are consistent, both in the level of documentation and monitoring requirements themselves, with other permits in the State.
    - Continued regular participation in the Washington Air Managers Work Group.
    - Review of the next three permits to be proposed by Industrial Section by an experienced permit writer from outside the section. Feedback from these reviews will be widely shared and discussed with all section staff.
    - Consideration of the following factors when developing parametric surrogate monitoring requirements:
        - Reliability and latitude built into the control technology
        - Margin of compliance
        - Ability of monitoring to account for process and control device operational variability
        - Parametric data obtained during source testing, supplemented, when appropriate, by engineering assessments and manufacturer's recommendations
        - Appropriateness of existing monitoring and procedures.

- Deletion of language from already issued permits at the next opportunity and in all newly issued

permits stating that requirements not specifically identified in the permit are considered inapplicable. The review by the Attorney General's Office will also address this issue.

- Deletion of language from already issued permits at the next opportunity and in all newly issued permits that could be considered to undermine the use of credible evidence. The review by the Attorney General's Office will also address this issue.

A copy of Industrial Section's letter is attached. In light of the commitment of Industrial Section to address the implementation concerns identified in Comment 9, EPA has determined that these issues do not represent deficiencies in Washington's implementation of the title V program, provided Industrial Section follows through on its commitment. Because there has not yet been a sufficient number of permits issued since receipt of this commitment for EPA to evaluate Industrial Section's actions to address these implementation concerns (primarily because there has not been enough time for Industrial Section to issue those permits in the time since it has made the commitment), EPA will monitor the permits issued by Industrial Section over the next three to six months to ensure that the Industrial Section is addressing these implementation concerns in newly issued permits consistent with its letters of commitment. If Industrial Section fails to meet its commitments or to address these issues in future permits, EPA intends to issue a notice of deficiency.

Other Washington Permitting Authorities

As discussed above, EPA does not agree that the permits issued by the other Washington permitting authorities contain monitoring and other conditions that are so unacceptably vague, undefined, or otherwise unenforceable or are so lacking in attention to compliance and enforcement issues as to constitute a deficiency in the implementation of Washington's title V program. In reaching this conclusion, EPA reviewed 25 permits, selected randomly, representing all other Washington permitting authorities. Included were a few early permits issued in 1996, 1997, and 1998 and permits issued quite recently. Although EPA identified the same issues noted in the Industrial Section permits in one or more of the 29 reviewed permits, EPA did not find the issues to be generally pervasive or serious with respect to any other permitting authority. Most permit conditions in most permits were well written, appropriately cited, with reasonable compliance monitoring strategies.

EPA also reviewed the permit records (i.e., the statement of basis) for each of these permits to assure that the monitoring decisions were adequately documented. EPA found that the permit records generally did a good job of documenting decision making that addressed an unusual situation or deviated from standard monitoring included for similar applicable requirements in other permits. For example, the permit record for the K-Ply permit (OAPCA Permit No. AOP 01-98) discusses in some detail the methodology used to develop an unusual requirement to monitor chloride in the fuel as part of the monitoring to assure compliance with the opacity standard. EPA did observe, however, that the permit records often failed to adequately document the basis for monitoring terms and strategies that were commonly used from permit to permit. For example, all permits reviewed included a general requirement to look for visible emissions periodically. Few permit records discussed how this term

assured compliance or how the frequency of monitoring was selected. Since monitoring decisions are made on a case-by-case basis, some explanation would be expected in each statement of basis. See 40 CFR 70.7(a)(5) (permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions.); WAC 173-401-700(8)(same).

Although the problems noted are not insignificant, EPA does not believe that they rise to the level of a program implementation deficiency because the permits are generally well written and the individual problems noted are not generally systemic in nature. Moreover, the most recently issued permits are generally for the most complex sources and are more complete, more clearly written, and better documented than the earlier permits issued to simpler sources. This is clearly the right trend, showing improvement in implementation over time as the permitting authorities gain knowledge and experience in implementing the part 70 program.

Because the problems noted by EPA in permits issued by the remaining Washington permitting authorities are not systemic and are of a nature that can be easily addressed in future permits and because these Washington permitting authorities have demonstrated a willingness to address and implement EPA guidance and comments on permits reviewed by EPA, EPA believes that the permit-specific issues identified in our review are more appropriately addressed by continuing EPA's participation in the quarterly meetings of the Washington permits engineers. During the next regularly scheduled meeting, EPA will discuss in detail the concerns identified by EPA in its program-wide review of the part 70 permits issued by Washington permitting authorities.

Comment 10: Prompt Reporting of Permit Deviations

Monitoring results, or other information indicating deviation or violation, may not be subject to a requirement for prompt reporting within a specified time of deviation or violation in permits issued by Washington permitting authorities. For example, in the Ball Metal permit (PSCAA Permit No. 10249) instances of deviation are required to be reported but without a specified time frame. Presumably, the deviation reporting is to be combined with the regular semiannual monitoring reporting, but this is insufficient to ensure prompt agency attention to deviations.

In addition, Washington's title V regulations are deficient because they do not require permittees to submit prompt reports of any deviation as required by 40 CFR 70.6(a)(3)(iii)(B). Instead, the Washington regulations attempt to merge the requirement that a permittee submit a prompt report of a deviation with the requirement to submit routine monitoring results every six months. WAC 173-401-615(3). A primary purpose of the title V program is to provide government regulators and concerned members of the public with a simple way to determine whether a permittee is operating in violation of applicable requirements. This goal is achieved, in part, by requiring title V facilities to submit prompt reports of any deviation from permit conditions and reports of any required monitoring at least every six months.

Washington's regulations, WAC 173-401-615(3) and WAC 173-400-107(3), incorporate the

essence of the part 70 requirements. While these regulations laudably define "prompt" for "deviations which represent a potential threat to human health or safety" as "as soon as possible, but in no case later than twelve hours after the deviation is discovered," they allow reporting of all other deviations to be merged with routine six-month monitoring report submittal. WAC 173-401-615(3)(b); see also WAC 173-400-107(3). Federal regulations require prompt reporting of all deviations, not just ones deemed to represent a threat to health or safety. The bifurcation in the Federal regulations of routine six month monitoring reporting and "prompt" reporting of any deviations infers that reporting within six months cannot be considered "prompt." As EPA stated in its notice proposing interim approval for Arizona's title V program, "prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A)." 60 FR 36,083 (July 13, 1995). Further, allowing reporting of deviations that are considered under an undefined standard to fall short of a threat to health or safety only every six months rather than "promptly" runs counter to a title V purpose to encourage compliance by regulatory and public scrutiny of violations.

Response 10: EPA disagrees that permits issued by Washington permitting authorities do not specify a time period for the reporting of permit deviations. All of the permits reviewed by EPA contain a standard permit term that not only requires that all permit deviations be reported, but also specifies *when* deviations must be reported.

The commenters cite to the Ball Metal permit (PSCAA Permit No. 10249) as an example of a permit that requires all instances of deviation to be reported but does not specify a time frame for when reporting is required. The commenters do not, however, provide a reference to the permit condition in the Ball Metal permit of concern to them. Condition V.Q.2 of the Ball Metal permit clearly requires that the permittee report to the permitting authority all instances of deviation from permit requirements and requires that all permit deviations be reported "no later than 30 days after the end of the month during which the deviation is discovered." In addition, deviations that "represent a potential threat to human health or safety" must be reported to the permitting authority "by FAX...as soon as possible but no later than 12 hours after such a deviation is discovered." EPA therefore disagrees that the Ball Metal permit does not require the prompt reporting of permit deviations or that the Ball Metal permit combines the requirement to promptly report permit deviations with the regular semiannual monitoring reporting requirement, which is contained in Condition V.Q.1. The other permits reviewed by EPA also specify a time frame for the reporting of all permit deviations.

A related concern raised by the commenters is that Washington's regulations for the reporting of permit deviations are deficient because they do not require permittees to submit "prompt" reports of any deviation as required by 40 CFR 70.6(a)(3)(iii)(B). That provision of part 70 states that permits shall require:

> Prompt reporting of permit deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective action or preventative measures taken. The permitting authority shall define "prompt" in each individual permit in relation to the degree and type of deviation likely to occur

> and the applicable requirement.

40 CFR 70.6(a)(3)(iii)(A).

Washington includes this language almost *verbatim* in its part 70 regulations. See WAC 173-401-615(3)(b).[7] Washington's regulation goes on to state that:

> For deviations which represent a potential threat to human health and safety, "prompt" means as soon as possible, but in no case later than twelve hours after the deviation is discovered. The source shall maintain a contemporaneous record of all deviations. All other deviations shall be reported no later than thirty days after the end of the month during which the deviation is discovered or as part of routine emission monitoring reports.

The Washington Attorney General's Office has stated that permitting authorities in Washington have the authority under this provision to exercise their discretion to require reporting of "other deviations" (that is, deviations that do not represent a potential threat to human health or safety) *either* no later than thirty days after the end of the month during which the deviation is discovered *or* as part of routine emission monitoring reports. A copy of the opinion letter is attached. In fact, of the 32 permits reviewed by EPA in evaluating this comment, all but nine require the reporting of all "other deviations" no later than 30 days after the end of the month in which the deviation is discovered. In these nine other part 70 permits, however, all "other deviations" can be reported as part of the six month monitoring report because that is the only "routine emission monitoring report" required in these permits.

EPA shares the commenters' concern with a permit requiring that only deviations that represent a potential threat to human health or safety must be reported more frequently than every six months, especially in light of the fact that the phrase "potential threat to human health and safety" is undefined and therefore left open to interpretation by the permittee. In response to this concern, EPA has worked early with Washington permitting authorities to ensure that permits issues by Washington permitting authorities define "prompt" for the purposes of reporting deviations in a manner that is consistent with their approved permitting program, the CAA and EPA's implementing regulations. Because Washington's regulations give Washington permitting authorities some discretion regarding the definition of "prompt" in individual permits, this alleged implementation deficiency does not indicate a deficiency with the regulations or legislation in Washington's approved title V program. EPA has

---

[7]WAC 173-400-107(3), which is also cited by the commenters, provides a defense to a penalty action in the case of excess emissions deemed to be "unavoidable." Although the language regarding the time period for reporting in WAC 173-400-107(3) is similar to the language in WAC 173-401-615(3)(b), WAC 173-400-107(3) is not relevant to the issue of prompt reporting requirements under part 70 because it only addresses the situation where the permittee seeks relief from penalties in an enforcement action. WAC 173-401-615(3)(b) addresses the reporting of all permit deviations, which is a part 70 requirement.

received commitments from all Washington permitting authorities providing that, unless or until Ecology revises WAC 173-401-615(3)(b), future permits will ensure that all "other deviations" will be reported no later than 30 days after the end of the month in which the permit deviation is discovered. Copies of these commitment letters are attached. Because there has not yet been a sufficient number of permits issued since receipt of these commitments for EPA to evaluate the Washington permitting authorities' actions to address this implementation concern (primarily because there has not been enough time for the Washington permitting authorities to issue those permits in the time since they have made the commitment), EPA will monitor the permits issued by Washington permitting authorities over the next three to six months to ensure that they are addressing this implementation concern in newly issued permits consistent with their letters of commitment. In light of the commitments of Washington permitting authorities to address this implementation concern, EPA has determined that this issue does not represent a deficiency in Washington's implementation of the title V program, provided the Washington permitting authorities fulfill their commitments.

Comment 11: Exemption from Monitoring

Many permits in Washington contain a general condition that allows the source to be excused from monitoring during periods of monitoring system breakdown, malfunction, repairs, calibration checks and acts of God "deemed by the Control Officer to be unavoidable," "except where an applicable requirement contains more stringent provisions." There are two problems with this. First, the permit should identify which specific applicable requirements contain more stringent provisions so that everyone knows which monitoring may and may not be excused. Second, the discretion for determining whether the condition interfering with monitoring is "unavoidable" is left to the "Control Officer." Not only is "Control Officer" undefined in the permit, but it is unacceptably subjective and preclusive of enforcement to allow the permittee to determine whether monitoring should be excused because of "unavoidable" activity or failure. This provision effectively allows permittees to shut down monitoring equipment at will.

Response 11: A typical example of the monitoring exemption provision of concern to the commenters is contained in section V.P. of the Ball Metal permit (PSCAA Permit No. 10249):

> Except where an applicable requirement contains more stringent provisions, the permittee shall recover valid monitoring and recordkeeping data for at least 90 percent of all periods over which data are averaged or, if no averaging is used, collected, during each month in which this permit requires monitoring of a process or parameter. Except where an applicable requirement contains more stringent provisions, the permittee is not required to monitor during any period that the monitored process does not operate, nor during periods of monitoring system breakdown, malfunction, repairs, calibration checks and acts of God deemed by the Control Officer to be unavoidable. In determining whether a monitoring failure was unavoidable, the Control Officer shall consider the following:
>
> > a) Whether the event was caused by poor or inadequate design, operation, maintenance, or any other reasonably preventable condition;

b) Whether the event was of a recurring pattern indicative of inadequate design operation, or maintenance; and

c) Whether the permittee took immediate and appropriate corrective action in a manner consistent with good air pollution control practice.

The monitoring reports required by Section V.Q shall include an explanation for any instance in which the permittee failed to meet the data recovery requirements of this condition for any monitored process or parameter. The explanation shall include the reason that the data was not collected and any action that the permittee will take to insure collection of such data in the future.

Similar monitoring conditions have been included in permits issued by SCAPCA, OAPCA, and Industrial Section.

EPA believes that part 70 permits can contain narrowly drawn exceptions to monitoring requirements created under the authority of title V and part 70. As EPA has previously advised Washington permitting authorities, however, such a provision can not apply to any monitoring provision that is itself an "applicable requirement," that is, imposed under some other Clean Air Act requirement. For example, no such general relief from monitoring requirements exists for NSPS monitoring provisions and neither the permitting authority nor EPA has the authority to create such an exemption absent Federal rulemaking.

Based on previous discussions with Washington permitting authorities, it is EPA's understanding that the language in the permit term of concern to the commenters that states "except where an applicable requirement contains provisions that are more stringent" is included to indicate that the permit term does not apply in the case of monitoring that is itself an applicable requirement. On further reflection, however, EPA agrees with the commenters that the language "except where an applicable requirement contains provisions that are more stringent" does not sufficiently identify the specific monitoring requirements that are subject to the monitoring exception. A major goal of the title V program was to clarify in a single document what requirements apply to a source and thus enhance compliance with Clean Air Act requirements. See 56 FR 21712, 21713 (May 10, 1991).

With respect to the use of the term "Control Officer," EPA does not agree that the term is too subjective. The term is defined in the Washington Clean Air Act as "the air pollution control officer of any authority." See RCW 70.94.030. "Authority" is defined as "any air pollution control agency whose jurisdictional boundaries are coextensive with the boundaries of one or more counties." Therefore, the Control Officer is the director of any local air pollution agency.

EPA agrees with the commenters, however, that the language could be interpreted to imply that the Control Officer has the sole authority to make the determination of whether monitoring should be excused, making this provision inherently subjective and unenforceable. Without the opportunity for review of the Control Officer's determination that the monitoring failure was "unavoidable" or without an opportunity for EPA or citizens to bring an enforcement action for violation of the monitoring

requirement if they believe the monitoring failure was not "unavoidable" under this general condition, EPA does not believe the permit contains monitoring that provides a reasonable assurance of compliance with all applicable requirements, as required by CAA section 504(a) and (c) and 40 CFR 70.6(a)(1), (a)(3)(i)(B), and (c)(1). EPA notes that, in a similar context, EPA stated it did not intend to approve SIP revisions that would allow a State director's decision regarding whether excess emissions should be excused from penalty to bar EPA's or citizens' ability to enforce applicable requirements. See Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Monitoring, and Robert Perciasepe, Assistant Administrator for Air And Radiation, to the Regional Administrators, entitled State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown (September 20, 1999) (1999 Excess Emission Policy).

With respect to the criteria for evaluating whether a monitoring malfunction is "unavoidable," EPA does not agree with the commenters that the determination of whether monitoring should be excused rests with the permittee or that the permittee can shut down monitoring at will. The provision of concern to the commenters places responsibility on the permittee to document and justify why a monitoring failure should be excused. Further, except in the case of OAPCA's and Industrial Section's provisions, the language in the provision issued in PSCAA and SCAPCA permits clearly identifies the criteria that must be considered in determining whether monitoring is excused.

EPA is concerned that the determination of whether a monitoring failure was "unavoidable" rests solely with the "Control Officer." Even with this concern, however, EPA believes it is clear that if the permittee were to shut down monitoring without good reason or were to fail to take immediate and appropriate corrective action, the monitoring lapse would not be excused and a violation would occur. EPA believes that, subject to the concerns discussed above with respect to the reference to "Control Officer, the criteria outlined in the general condition used by PSCAA and SCAPCA provide a reasonable assurance that monitoring will be excused only if the monitoring failure was truly "unavoidable," and that providing such an exception to monitoring created in the part 70 permit does not interfere with the requirement that the monitoring in the permit provide a reasonable assurance of compliance with all applicable requirements.

As discussed above, EPA has worked early with PSCAA, SCAPCA, OAPCA, and Industrial Section to ensure that any monitoring exemption included in a part 70 permit is consistent with their approved permitting program, the CAA and EPA's implementing regulations. This alleged implementation deficiency does not indicate a deficiency with the regulations or legislation in Washington's approved title V program, but instead relates to a term included in some permits issued by PSCAA, SCAPCA, OAPCA, and Industrial Section. EPA has received commitments from PSCAA, SCAPCA, OAPCA, and Industrial Section providing that future permits will address this concern and will be issued consistent with State and Federal requirements. Copies of these letters are attached. PSCAA has committed to deleting this provision from its permits entirely. SCAPCA, OAPCA, and Industrial Section have committed to clearly specifying in the permit the monitoring conditions to which any such monitoring exemption applies and to ensuring that any such provision does not state or imply that the determination of whether monitoring should be excused under certain conditions rests solely with the

Control Officer of the permitting authority. OAPCA and Industrial Section have also committed to including in any such condition criteria for determining whether a monitoring malfunction is "unavoidable" similar to the criteria used by SCAPCA. Because there has not yet been a sufficient number of permits issued since receipt of these commitments for EPA to evaluate these Washington permitting authorities' actions to address this implementation concern (primarily because there has not been enough time for the Washington permitting authorities to issue those permits in the time since they have made the commitment), EPA will monitor the permits issued by these Washington permitting authorities over the next three to six months to ensure that they are addressing this implementation concern in newly issued permits consistent with their letters of commitment. In light of the commitments of PSCAA, SCAPCA, and the OAPCA to address this implementation concern, EPA has determined that this issue does not represent a deficiency in Washington's implementation of the title V program provided these Washington permitting authorities fulfill their commitments.

Comment 12: Compliance Certifications

Washington permit programs are deficient because they do not require permittees to submit sufficient annual compliance certifications. Air operating permits must include requirements for submission of compliance certifications sufficient to assure compliance with the terms and conditions of the permit. WAC 173-401-630(1); 40 CFR 70.6(c)(1). Compliance certifications must include the following: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the method(s) used for determining the compliance status of the source, currently and over the annual or more frequent reporting period; and (v) such other facts as the permitting authority may require to determine the compliance status of the source. WAC 173-401-630(5)(a) and (c); 40 CFR 70.6(c)(5)(i) and (iii).

A review of all compliance certifications submitted to EPA by Washington sources indicates that the compliance certifications under Washington programs are deficient in that they do not include the requisite components. Many of these compliance certifications provide no useful information to the public whatsoever. Many are simply insufficient to determine the compliance status of the source.

In addition, the lack of a standard format for annual compliance certifications further frustrates the use of these certifications by the public to determine the compliance status of the reporting source. A standard form like the Illinois Environmental Protection Agency's Annual Compliance Certification should be required of all sources throughout Washington.

Response 12: As noted by the commenters, air operating permits must include requirements for submission of periodic compliance certifications sufficient to assure compliance with the terms and conditions of the permit. 40 CFR 70.6(c)(1). As also noted by the commenters, 40 CFR 70.6(c)(5) sets forth in more detail the requirements for these periodic compliance certifications. Washington's title V regulations require permittees to submit periodic compliance certifications annually and follow the compliance certification requirements of part 70 almost verbatim. See WAC 173-401-630(1) and (5). In addition, the commenters have not identified problems in the compliance certification language

included in permits issued by Washington permitting authorities and EPA has similarly not identified widespread concerns with how Washington permitting authorities are incorporating the periodic compliance certification requirements into their part 70 permits.

The commenters are correct that Washington permitting authorities have not developed a standard format for annual compliance certifications. Part 70 sets forth the requirements of what a compliance certification must contain and specifies that these requirements must be included in the permit. However, part 70 does not require that permitting authorities develop and require sources to use a standard format for annual compliance certification. Because Washington permitting authorities have regulations that meet the part 70 requirements for compliance certification and are issuing permits with the compliance certification provisions required by part 70, EPA disagrees that the Washington operating permit programs are deficient because they do not require permittees to submit sufficient annual compliance certifications.

The commenters also allege that the annual compliance certifications being submitted by permittees in Washington are deficient because the certifications do not include the requisite components, provide no useful information to the public, and are insufficient to determine the compliance status of the permittee. EPA has reviewed the information provided by the commenters in Appendix D to their comments, which is a summary of the 48 compliance certifications reviewed by the commenters. EPA has also independently reviewed these compliance certifications. EPA looked for four types of information in each certification: (1) the identification of each term or condition of the permit that was the basis of the certification; (2) the compliance status; (3) whether compliance was continuous or intermittent; and (4) the method(s) used for determining the compliance status of the source. These were the same types of information required by part 70 and sought by the commenters. In general, EPA and the commenters concluded that three out of every four compliance certifications: (a) identified each term or condition; (b) identified whether compliance was continuous or intermittent; and (c) described the methods used for determining the compliance status. However, regarding the issue of whether Washington compliance certifications included the status of compliance, EPA reached a different conclusion from the commenters. Whereas the commenters suggested that only 17 of 48 certifications included this information, EPA's review found this information in 41 of 48 certifications.

EPA shares the commenters' concerns that some of the annual compliance certifications that have been submitted by permittees in Washington do not appear to contain all of the information required by their permits or are overly vague. The majority of the compliance certifications reviewed by EPA, however, did include all of the required information. EPA therefore does not believe at this time that the deficiencies in some individual compliance certifications submitted by permittees in Washington are so widespread as to support a determination that Washington permitting authorities are failing to act on violations of permits or other part 70 program requirements. EPA emphasizes, however, that it is the responsibility of the part 70 permitting authority to review compliance certifications submitted by permittees, request follow-up information where necessary, and take appropriate enforcement action against permittees that are not meeting the compliance certification requirements of their permits.

As discussed above, part 70 does not require permitting authorities to develop a standard format for periodic compliance certifications. Some permitting authorities have chosen to do so and EPA has also developed a standard annual compliance certification form for use by permittees subject to the Federal operating permits program. See http://www.epa.gov/oar/oaqps/permits/p71forms.html. Ecology has recently committed to developing and distributing to Washington local air permitting authorities and to sources permitted by Ecology a standard annual compliance certification form that sources in Washington may use in submitting their annual compliance certifications. Ecology has committed to taking this action by June 1, 2002. Although, as discussed above, EPA does not agree that failure to have such a form constitutes a deficiency in Washington's title V program, EPA supports development of a standard form for periodic compliance certifications and believes that development of such a form will assist permittees in Washington in preparing compliance certifications that meet the requirements of part 70 and will facilitate review of compliance certifications in Washington by regulatory authorities and the public.

Comment 13: Excess Emissions

Washington's use of the "excess emissions" exception in part 70 permits constitutes a program deficiency. First, the excess emissions rule, WAC 173-400-107, threatens to swallow the concept of enforceable emissions standards whole. Essentially, this rule allows the permitting authority to excuse "emissions of an air pollutant in excess of any applicable emission standard," WAC 173-400-030(25), if it was unavoidable in an informal agency determination not subject to public notice, review or challenge. Without provision for public notice, opportunity for comment, and opportunity for challenge, nothing prevents the arbitrary application of this exception to shield sources from enforcement. Please see the Department of Ecology's file on the Boise Cascade Wallula facility for an example of this.

Second, WAC 173-400-107(2) is unclear on the vital point of whether excess emissions "excused" as unavoidable are merely not subject to agency penalty assessment, or are not subject to penalty assessment by EPA or in the context of a citizen suit, or are to be simply considered not "violations" of the underlying emissions standards in any context. Third, WAC 173-107(3) allows reporting of excess emissions in an undefined time frame. Excess emissions deemed to be unavoidable are required to be reported "as soon as possible." This is vague, unenforceable, and inappropriate for inclusion in a process apparently designed to alleviate permittees of liability for permit violations. Finally, the only provision of the Federal rules at all comparable to WAC 173-400-107 is the 40 CFR 70.6(g) "emergency provision." In general, 40 CFR 70.6(g) is more tightly written than WAC 173-400-107 and the Washington rule should be changed to conform to the Federal rule.

Response 13: EPA does not agree that Washington's inclusion of WAC 173-400-107 in its part 70 permits constitutes a title V program deficiency. WAC 173-400-107 states, in part:

> (1) The owner or operator of a source shall have the burden of proving to ecology or the authority or the decision-making authority in an enforcement action that excess emissions were unavoidable. This determination shall be a condition to obtaining relief

> under sections (4), (5), and (6).
>
> (2) Excess emissions determined to be unavoidable under the procedures and criteria in this section shall be excused and not subject to penalty.

WAC 173-400-107 then goes on to set forth requirements for the reporting of excess emissions and the demonstration the source must make to claim excess emissions as "unavoidable."

EPA approved this provision as part of the Washington SIP in 1995. See 60 FR 28726 (June 2, 1995) (final rule); 60 FR 9802, 9805 (February 22, 1995). As a requirement of the Washington SIP, it is an "applicable requirement" to be included in part 70 permits issued by Washington permitting authorities.

Although WAC 173-400-107 is currently approved in the Washington SIP, EPA does have some concerns regarding whether this regulation is consistent with the guidance EPA has issued to States regarding the types of excess emissions provisions that States may, consistent with the Clean Air Act, incorporate into SIPs. See 1999 Excess Emissions Policy; Memorandum from Kathleen M. Bennett, Assistant Administrator for Air And Radiation, to the Regional Administrators, entitled Policy Regarding Excess Emissions During Startup, Shutdown, Scheduled, Maintenance, and Malfunctions (February 15, 1983) (1983 Excess Emissions Policy).

The commenters note in particular their concern that WAC 173-400-107 is unclear on the issue of whether excess emissions "excused" as unavoidable are merely not subject to agency penalty assessment, or are not subject to penalty assessment by EPA or in the context of a citizen suit, or are to be simply considered not "violations" of the underlying emissions standards in any context. EPA agrees that this is an important issue. EPA has long maintained that all excess emissions are violations of applicable emission limitations and that, to be consistent with title I of the Clean Air Act, a State excess emission rule that provides an affirmative defense can only apply to actions for penalties and not to actions for injunctive relief. See 1999 Excess Emission Policy, pg. 2, and Attachment pg. 1; 1982 Excess Emission Policy, Attachment, pp. 1-2. EPA's approval of WAC 173-400-107 was based on its understanding that, under WAC 173-400-107, excess emissions in Washington are still violations, the regulation provides only relief from penalties in an enforcement action, and the regulation does not preclude an action for injunctive relief.

Another concern expressed by the commenters is whether a determination by a Washington permitting authority that excess emissions are "unavoidable" and should not be subject to penalty is binding on EPA and citizens. Again, EPA's position is that a State director's decision regarding whether excess emissions should be excused from penalty does not bar EPA's or citizens' ability to enforce applicable requirements because such an approach would be inconsistent with the regulatory scheme established in title I of the Clean Air Act. See 1999 Excess Emission Policy, pg. 3, Attachment pg. 2. EPA believes the language of the rule that refers to "ecology or the authority or the decision-making authority" makes

clear that the State director's decision would not be binding on the "decision-making authority" in an action brought by EPA or citizens against the source in Federal court, and this was EPA's understanding when it approved WAC 173-400-107 as part of the Washington SIP.

The commenters are also concerned that WAC 173-400-107 does not specify a definite outside time frame for the reporting of excess emissions that are alleged by the source to be unavoidable, instead requiring such excess emissions to be reported "as soon as possible." However, WAC 173-401-615(3)(b), which addresses the reporting of permit deviations for part 70 sources, requires that deviations that represent a potential threat to human health or safety must be reported "as soon as possible, but no later than 12 hours after the deviation is discovered." Thus, for part 70 sources, there is an outside time limit for excess emissions that represent a potential threat to human health or safety, as well as for all other permit deviations.

EPA intends to discuss these and other potential concerns with WAC 173-400-107 with the State of Washington and to request clarifying opinions or regulatory changes where appropriate to ensure Washington's excess emission provision is consistent with the requirements of title I of the Clean Air Act. In addition, in the Performance Partnership Agreement between Washington and EPA, EPA has committed to conduct a review of Washington's State/local compliance programs during the first calendar quarter of 2002. Environmental Performance Partnership Agreement between Washington State Department of Ecology and US Environmental Protection Agency for July 1, 2001 to June 30, 2003 (signed and dated July 18, 2001), p. 26. At that time, EPA will be reviewing, among other things, Washington's application of WAC 173-400-107 against part 70 sources in Washington. As stated above, however, WAC 173-400-107 is currently approved as part of the Washington SIP and, as such, is an applicable requirement to be included in part 70 permits issued by Washington permitting authorities.

Another concern raised by the commenters is that WAC 173-400-107 does not meet the requirements of 40 CFR 70.6(g), the "emergency" provision in the part 70 regulations. Washington does have an emergency provision in its title V program that is almost identical to 40 CFR 70.6(g). See WAC 173-401-645. Part 70 makes clear, however, that the emergency provision of 40 CFR 70.6(g) is "in addition to any emergency or upset condition contained in any applicable requirement." 40 CFR 70.6(g)(5). As discussed above, WAC 173-400-107 is an applicable requirement because it is part of the Washington SIP. See 40 CFR 70.2 (definition of "applicable requirement").

Comment 14: Credible Evidence

Washington operating permits include credible evidence rule language that tends to indicate that credible evidence can be used only to show compliance with permit conditions instead of to show either compliance or non-compliance. For example, the Puget Sound Energy, Inc. (Frederickson) permit uses the following language:

> For the purpose of submitting compliance certifications or establishing whether or not a person

> has violated or is in violation of this permit, nothing shall preclude the use, including the exclusive use, of any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

Although this language appears to be similar or identical to that in EPA regulations, it is insufficient as permit condition language. Permits should use EPA's recommended permit language to clarify the intent of the credible evidence rule and to ensure that it may be used by agency or citizen enforcers in any enforcement action:

> Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance.

Response 14: EPA disagrees that the issue raised by the commenters constitutes a deficiency. As acknowledged by the commenters, the credible evidence language used in permits issued by Washington permitting authorities is similar or identical to the language in the credible evidence rule revisions. See 40 CFR 51.212(c), 52.12(c), 52.33(a), 60.11(g), and 61.12; see also 62 FR 8328 (February 24, 1997). EPA disagrees that the language in the Puget Sound Energy, Inc. (Frederickson) permit tends to indicate that credible evidence can be used only to show compliance with permit conditions. The language in that permit clearly states that other credible evidence may be used to establish whether or not a person "has violated or is in violation of this permit." EPA also disagrees that the language in the credible evidence rule revisions or in the Washington permit cited by the commenters is insufficient as a permit condition. Indeed, this is the same language that has been used in Federal operating permits issued by Region 10 to title V sources in Indian Country under 40 CFR part 71.[8]

Comment 15: Permit Issuance Rate

All of the Washington operating permits programs received interim approval in December 1994. Pursuant to 42 USC 7661b(c), 40 CFR 70.4(11) and WAC 173-401-700(3), Washington permitting authorities were required to act on one-third of all initial applications they received by December 1995 in each of the three years following December 1994. These statutory and regulatory requirements were to ensure that permitting authorities acted on all initial applications within three years of program approval. None of the Washington operating permits programs met these requirements. Several of the Washington permitting authorities, including Ecology, PSCCA, NWAPA, SWCAA, and SCAPCA have yet to act on all of the applications received by December 1995.

---

[8]The commenters quote alternative credible evidence language, which they assert is "EPA's recommended permit language." The commenters do not cite the origin of this language, however, and EPA is not aware of any "recommended" language regarding credible evidence. In any event, as noted above, the credible evidence language used by Washington permitting authorities is sufficient.

These same statutory and regulatory requirements mandate that permitting authorities act on later-submitted applications within eighteen months of their completion. None of the Washington State permit programs have consistently acted on permit applications within eighteen months of application completion. Due to the failure of Washington permitting authorities to consistently take timely action on permit applications, EPA should make a formal finding of deficiency and require corrective action.

Response 15: Under the CAA, the permitting authority is required to take final action on each complete permit application within 18 months, or such lesser time as approved by EPA, after receiving a complete application, except as provided in the permitting authority's transition plan for initial permit applications. In the case of initial permit applications, the permitting authority may take up to three years from the effective date of the program to take final action on the application. 42 USC 7661b(c); 40 CFR 70.4(b)(4) and 70.7(a)(2). As noted by the commenters, Washington's title V program contains comparable provisions. WAC 173-401-700(2) and (3).

As also noted by the commenters, not all Washington permitting authorities have met these requirements. Ecology, BCCAA, PSCAA, NWAPA, SCAPCA, and SWCAA have still not acted on all initial part 70 permit applications, although more than three years has passed since December 9, 1994, the effective date of Washington's title V program. In addition, Ecology, PSCAA, NWAPA, and SCAPCA have still not taken final action on one or more later submitted permit application within 18 months of receipt of the complete application.

EPA believes this alleged implementation deficiency merits special consideration. A number of other permitting authorities throughout the United States have also not issued permits at the rate required by the CAA. Because of the sheer number of permits that remain to be issued, EPA believes that many permitting authorities will need a period of up to two years to issue their remaining permits. If a permitting authority has submitted a commitment to issue its remaining permits on a set schedule, EPA interprets this commitment as evidence that the permitting authority has already taken "significant action" to correct the problem and thus does not consider the failure to have issued all permits to be a deficiency at this time. To be acceptable to EPA, EPA expects that the commitment establish semiannual milestones for permit issuance, which provide that the permitting authority will issue a proportional number of the outstanding permits during each six-month period leading to issuance of all outstanding permits as expeditiously as practicable, but no later than December 1, 2003.

Ecology, BCCAA, PSCAA, NWAPA, SCAPCA, and SWCAA have each submitted a commitment and a schedule providing for issuance of all outstanding permits no later than December 1, 2003. The milestones contained in the commitment letters reflect a proportional rate of permit issuance for each semiannual period for each of these permitting authorities. Copies of the commitment letters are attached. EPA will monitor these permitting authorities' compliance with their commitments by performing semiannual evaluations. As long as these permitting authorities issue permits consistent with the semiannual milestones contained in their commitment letters, EPA will continue to consider that these permitting authorities have taken "significant action" such that a notice of deficiency is not warranted. If a permitting authority fails to meet its milestones, EPA intends to issue a notice of

deficiency and determine the appropriate time to provide for the permitting authority to issue the outstanding permits.

Comment 16: Insignificant Emission Units
Applicable regulations do not exempt insignificant emission units (IEUs) subject to applicable requirements from the testing, monitoring, recordkeeping, reporting, compliance, and compliance certification requirements of 40 CFR 70.6. It is a program deficiency that Washington's title V program expressly excludes IEUs subject to generally applicable requirements from these requirements of 40 CFR 70.6. EPA should make a formal finding of deficiency and require corrective action.

Response 16: EPA agrees with the commenters that Washington's title V program is deficient in that it exempts IEUs subject to generally applicable requirements from testing, monitoring, recordkeeping, reporting, and compliance certification requirements, contrary to 40 CFR 70.6.
Part 70 authorizes EPA to approve as part of a State program a list of insignificant activities and emission levels (IEUs) which need not be included in the permit application, provided that an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the EPA-approved schedule. See 40 CFR 70.5(c). Nothing in part 70, however, authorizes a State to exempt IEUs from the testing, monitoring, recordkeeping, reporting, or compliance certification requirements of 40 CFR 70.6.

Washington's regulations contain criteria for identifying IEUs. See WAC 173-401-200(16), -530, -532, and -533. Sources that are subject to a Federally-enforceable requirement other than a requirement of the State Implementation Plan that applies generally to all sources in Washington (a so-called "generally applicable requirement") are not deemed "insignificant" under Washington's program even if they otherwise qualify under one of the five lists. See WAC 173-401-530(2)(a). Washington's regulations also expressly state that no permit application can omit information necessary to determine the applicability of, or to impose any applicable requirement. See WAC 173-401-510(1). In addition, WAC 173-401-530(1) and (2)(b) provide that designation of an emission unit as an IEU does not exempt the unit from any applicable requirements and that the permit must contain all applicable requirements that apply to IEUs. The Washington program, however, specifically exempts IEUs from testing, monitoring, recordkeeping, and reporting requirements except where such requirements are specifically imposed in the applicable requirement itself. See WAC 173-401-530(2)(c). The Washington program also exempts IEUs from compliance certification requirements. See WAC 173-401-530(2)(d).

Because EPA does not believe that part 70 exempts IEUs from the testing, monitoring, recordkeeping, reporting, and compliance certification requirements of 40 CFR 70.6, EPA initially determined that Ecology must revise its IEU regulations as a condition of full approval. See 60 FR at 62993-62997 (final interim approval of Washington's operating permits program based on exemption of IEUs from certain permit content requirements); 60 FR 50166 (September 28, 1995) (proposed interim approval of Washington's operating permits program on same basis). The Western States

Petroleum Association (WSPA), together with several other companies and the Washington Department of Ecology, challenged EPA's determination that Ecology must revise its IEU regulations as a condition of full approval. See 66 FR at 19. On June 17, 1996, the Ninth Circuit found in favor of the petitioners. WSPA v. EPA, 87 F.3d 280 (9th Cir. 1996). The Ninth Circuit did not opine on whether EPA's position was consistent with part 70. It did, however, find that EPA had acted inconsistently in its title V approvals, and had failed to explain the departure from precedent that the Court perceived in the Washington interim approval. The Court then remanded the matter to EPA, instructing EPA to give full approval to Washington's IEU regulations.

In light of the Court's order in the WSPA case, EPA determined that it must give full approval to Washington's IEU regulations. Therefore, on August 13, 2001, EPA published a Federal Register notice granting final full approval to Washington's title V program notwithstanding what EPA believed to be a deficiency in its IEU regulations. 66 FR 42439-42440 (August 13, 2001). Nonetheless, as EPA stated in its final full approval of Washington's program, EPA maintained its position that part 70 does not allow the exemption of IEUs subject to generally applicable requirements from the testing, monitoring, recordkeeping, reporting, and compliance certification requirements of 40 CFR 70.6 and intended to issue a notice of deficiency in another rulemaking action if the deficiencies in Washington's IEU regulations were not promptly addressed.

Since issuance of the Court's order in WSPA case, EPA has carefully reviewed the IEU provisions of those eight title V programs identified by the Court as inconsistent with EPA's decision on Washington's regulations. EPA has determined that three of the title V programs identified by the WSPA Court (Massachusetts; North Dakota; Knox County, Tennessee) are in fact consistent with EPA's position that insignificant sources subject to applicable requirements may not be exempt from permit content requirements. See 61 FR 39338 (July 29, 1996). North Carolina, Florida, and Jefferson County, Kentucky have made revisions to their IEU provisions. EPA has approved the changes made by North Carolina and Florida. 65 FR 38744, 38745 (June 22, 2000)(Forsyth County, North Carolina); 66 FR 45941 (August 31, 2001)(all other North Carolina permitting authorities); 66 FR 49837 (October 1, 2001) (Florida). EPA has not yet taken action on the changes made by Jefferson County, Kentucky. EPA has notified Ohio and Hawaii that their provisions for IEUs do not conform to the requirements of part 70 and must be revised. If Ohio and Hawaii do not revise their provisions for IEUs to conform to part 70, EPA intends to issue notices of deficiencies to these permitting authorities in accordance with the time frames set forth in the December 11, 2000 Federal Register notice soliciting comments on title V program deficiencies. See 65 FR 77376. Having addressed the inconsistencies identified by the Ninth Circuit when it ordered EPA to approve Washington's IEU provisions, EPA is now notifying Washington that it must bring its IEU provisions into alignment with the requirements of part 70 and other State and local title V programs or face withdrawal of its title V operating permits program. Accordingly, in a Federal Register notice being signed by EPA today, EPA is issuing a notice of deficiency to Washington permitting authorities because Washington's regulations exempt IEUs subject to applicable requirements from the monitoring,

recordkeeping, reporting and compliance certification requirements of part 70.[9]

III. Conclusion

EPA has thoroughly reviewed all issues raised by the commenters. As discussed above, EPA agrees with the commenters that Washington's exemption of "insignificant emission units" from certain permit content requirements constitutes a deficiency in Washington's title V program. EPA is therefore issuing in a separate document a notice of deficiency for this issue.

With respect to three of the alleged implementation deficiencies identified by the commenters-- permits issued by Washington's Industrial Section, the prompt reporting of permit deviations, and an exemption from monitoring requirements under certain conditions-- EPA has received commitments from Washington permitting authorities providing that future permits will address these three areas of concern and will be issued consistent with State and Federal requirements. EPA intends to monitor the permits issued by the Washington permitting authorities over the next three to six months to ensure that the Washington permitting authorities are addressing these implementation concerns in newly issued permits consistent with their letters of commitment. In light of the commitments of the Washington permitting authorities to address these implementation concerns, however, EPA has determined that these issues do not represent deficiencies in Washington's implementation of the title V program, provided the Washington permitting authorities fulfill these commitments.

With respect to the issuance of permits within the time frames required by the Clean Air Act, the Washington permitting authorities with outstanding permits have each submitted a commitment and a schedule providing for issuance of all outstanding permits no later than December 1, 2003. The milestones contained in the commitment letters reflect a proportional rate of permit issuance for each semiannual period for each of these permitting authorities. As long as these permitting authorities issue permits consistent with the semiannual milestones contained in their commitment letters, EPA will continue to consider that these Washington permitting authorities have taken "significant action" such that a notice of deficiency is not warranted.

With respect to the other concerns identified by the commenters, EPA has determined that the concerns do not raise to the level of deficiencies in Washington's title V program.

[9]Because WAC 173-401-530(2)(c) and (d), the regulations that exempt IEUs from certain permit content requirements, apply throughout the State of Washington, the notice of deficiency applies to all State and local agencies that implement Washington's operating permits program.