ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1135 (and consolidated cases)

SIERRA CLUB, *et al*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Respondents.

Petition for Review of Final Action of the
United States Environmental Protection Agency

Proof Opening Brief and Addendum of Environmental Petitioners: Sierra Club, Coalition for a Safe Environment, Environmental Integrity Project, Louisiana Environmental Action Network and Friends of Hudson

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DATED: October 26, 2007

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB *et al.*,	)	
Petitioner,	)	
v.	)	No. 02-1135
	)	(and consolidated
U.S. ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON Administrator, U.S. Environmental Protection Agency,	)	cases)
Respondents.	)	

CERTIFICATE OF SIERRA CLUB AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), petitioners Sierra Club, Coalition for a Safe Environment, Environmental Integrity Project, Friends of Hudson and Louisiana Environmental Action Network (environmental petitioners) hereby submit the following certificate as to parties, rulings, and related cases.

(A) Parties and Amici.

(i) Parties, intervenors, and amici who appeared in the District Court.

This case is a petition for review of final action, not an appeal from the ruling of a district court.

(ii) Parties to this case.

Petitioner in Nos. 02-1135 and 03-1219 is Sierra Club; petitioner in consolidated case 02-1151 is National Environmental Development Association's Clean Air Regulatory Project; petitioner in consolidated case 02-1156 is Coalition for Clean Air Implementation; petitioners in consolidated case 02-1158 are American Portland Cement Alliance and Cement Kiln Recycling Coalition;

petitioner in consolidated case 02-1172 is Coalition for Responsible Waste Incineration; petitioner in consolidated case 02-1173 is American Chemistry Council, petitioners in consolidated case 06-1215 are Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network and Coalition for a Safe Environment and petitioner in consolidated case 07-1201 is Coalition for a Safe Environment. Respondents are the United States Environmental Protection Agency (EPA) and Stephen L. Johnson Administrator, US EPA. Intervenors are American Chemistry Council, National Environmental Development Association's Clean Air Regulatory Project, Alliance of Automobile Manufacturers, National Paint and Coatings Association, Coalition for Clean Air Implementation and Clean Air Implementation Project.

(iii) *Amici Curiae* in This Case

There are no *amici curiae.*

(iv) Circuit Rule 26.1, Sierra Club

(a) Sierra Club

Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club. Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

(b) Coalition for a Safe Environment

Coalition for a Safe Environment (CFASE) has no parent companies, and no publicly held company has a 10% or greater ownership interest in CFASE. CFASE, a nonprofit public benefit corporation registered in and existing under the laws of the State of California, has members in over twenty cities and in Mexico, is a environmental justice, public health and public safety

advocacy organization involved in International Trade Ports, Goods Movement, Transportation, Petroleum and Energy Industry issues.

(c) Environmental Integrity Project

Environmental Integrity Project (EIP) has no parent companies, and no publicly held company has a 10% or greater ownership interest in EIP. EIP, a corporation organized and existing under the laws of the District of Columbia, is a nonpartisan, nonprofit organization dedicated to effective enforcement of environmental laws.

(d) Friends of Hudson

Friends of Hudson (FOH) has no parent companies, and no publicly held company has a 10% or greater ownership interest in FOH. FOH, a corporation organized and existing under the laws of the State of New York, is a nonpartisan, nonprofit organization dedicated to ensuring a healthy, sustainable environment in the region.

(e) Louisiana Environmental Action Network

Louisiana Environmental Action Network (LEAN) has no parent companies, and no publicly held company has a 10% or greater ownership interest in LEAN. LEAN, a corporation organized and existing under the laws of the State of Louisiana, is a statewide network of 106 member groups and over 1700 individual members dedicated to fostering cooperation and communication between individual citizens and corporate and government organizations in an effort to assess and mend environmental problems in Louisiana.

(B) Rulings under Review.

Environmental petitioners seek review of the final actions (including the promulgation of regulations) taken by respondents; 67 Fed. Reg. 16582 (April 2, 2002), "National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j);" 68 Fed. Reg. (May 30, 2003), "National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j);" 71 Fed. Reg. 20446 (April 20, 2006), entitled "National Emission Standards for Hazardous Air Pollutants: General Provisions;" 72 Fed. Reg. 19385 (April 18, 2007), entitled "National Emission Standards for Hazardous Air Pollutants: General Provisions: Notice of Decision Denying Petition for Reconsideration."

(C) Related Cases

This case has been consolidated with Case Nos. 02-1151, 02-1156, 02-1158, 02-1172, 02-1173, 03-1219, 06-1215 and 07-1201, Environmental petitioners are unaware of any other case that is related within the meaning of D.C. Circuit Rule 28(a)(1)(C).

DATED: October 26, 2007

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(B) Court of Appeals. This Court has exclusive jurisdiction to review the final EPA actions challenged in this proceeding. 42 U.S.C. § 7607(b)(1).

(C) Timeliness. All four consolidated petitions for review were timely filed within the 60-day window of 42 U.S.C. § 7607(b)(1).

STATUTES AND REGULATIONS

Pertinent statutory and regulatory sections appear in an addendum to this brief.

STATEMENT OF ISSUES PRESENTED

1. Whether EPA's automatic exemption of all major sources of hazardous air pollutants from any obligation to comply with emission standards during periods of startup, shutdown, or malfunction contravenes the Clean Air Act's requirements that EPA: (1) set "emission standards" for such sources, 42 U.S.C. § 7412(c)(2), (d)(1); and (2) that emission standards limit emissions "on a continuous basis," 42 U.S.C. § 7602(k).

2. Whether EPA's automatic exemption of all major sources of hazardous air pollutants from any obligation to comply with emission standards during periods of startup, shutdown, or malfunction reflects an unreasonable interpretation of the Clean Air Act or is arbitrary and capricious.

3. Whether EPA's rule revisions unlawfully or arbitrarily fail to "assure compliance" with emission standards and with the general duty to minimize emissions, as required by Clean Air Act Title V, 42 U.S.C. § 7661c(a).

STATEMENT OF THE CASE

Petitioners challenge regulations promulgated by respondents (hereinafter "EPA" or "the agency") to govern the implementation and enforcement of all emission standards for all major sources of hazardous air pollutants (HAPs) under Clean Air Act § 112, 42 U.S.C. § 7412. At their "heart," these "General Provisions" "spell out the responsibilities of an owner or operator to comply with a relevant emission standard or other requirement." 58 Fed. Reg. 42760, 42761 (August 11, 1993), JA__. At issue are: (1) EPA's automatic exemption of all sources from any obligation to comply with any emission standards during periods of startup, shutdown, or malfunction (SSM); and (2) EPA's decision to eliminate requirements that sources develop and implement effective, enforceable and publicly available plans to control emissions of hazardous air pollutants during periods of SSM ("SSM plans").

STATEMENT OF FACTS

I. FACTUAL BACKGROUND.

Enacted in the Clean Air Act Amendments of 1990, the toxics provisions in § 112 list over one hundred specific pollutants as "hazardous." 42 U.S.C. § 7412(b)(1). *See National Lime Ass'n v. EPA*, 233 F.3d 625, 633 (D.C. Cir. 2000). They then direct EPA to list all categories of "major" sources of HAPs and to set "emission standards" for each one. 42 U.S.C. § 7412(c)(1) (listing requirement); 42 U.S.C. § 7412(c)(2), (d)(1) (emissions standards requirement).[1] The Clean Air Act defines "emission standard" to mean a requirement that limits emissions "on a continuous basis." 42 U.S.C. § 7602(k).

[1] Section 112(a)(1) defines a "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or

EPA has listed more than 170 categories of major sources of HAPs, 66 Fed. Reg. 8220, 8221 (January 30, 2001), JA__, and the total number of sources covered by its air toxics program easily exceeds 100,000. The General Provisions challenged here, which apply to all major sources of HAPs, provide that sources have no obligation to comply with emission standards when they are starting up, shutting down, or malfunctioning. 40 C.F.R. § 63.6(f), JA__ (compliance requirement for "non-opacity standards"); § 63.6(h), JA__ (compliance requirement for "opacity and visible emission standards"). At these times, sources' only obligation is to "operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. 63.6(e)(1)(i), JA__. This requirement, which was invented by EPA and does not purport to implement any provision in the Clean Air Act, is known as the "general duty to minimize emissions," or the "general duty" requirement. 70 Fed. Reg. 43992, 43993/2 (July 29, 2005), JA__.

EPA admits that "[i]n some industries, startup and shutdown events are numerous and routine." 68 Fed. Reg. 32586, 32592/2 (May 30, 2003), JA__. Further, although EPA defines "malfunction" to mean a "sudden, infrequent, and not reasonably preventable" event, the record and the attached declarations show that malfunctions are frequent and routine as well.[2] In California, for example, citizens who reviewed Exxon

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more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1).

[2] *See* 40 C.F.R. 63.2 JA__ ("Malfunction means any sudden, infrequent, and not reasonably preventable event, failure of air pollution control and monitoring equipment, process equipment, or process to operate in a normal or usual manner, which causes, or

Mobile's air permits found that refinery had operated for months with its air pollution control device malfunctioning. Comments of Environmental Integrity Project and Earthjustice ("EIP Comments"), Attachment B, Environmental Integrity Project, Gaming The System, How Off-the-Books Industrial Upset Emissions Cheat The Public Out of Clean Air (2004) ("Gaming The System") at 217, JA__. Jesse Marquez founder and director of the Communities for a Safe Environment based in Wilmington, California, states that at least one of the four refineries that operate in and around Wilmington malfunctions every week. Marquez Declaration at ¶ 5-6, JA__. Based on its study of malfunctions at seven Louisiana refineries, EIP concluded "[e]xcess emissions occurred routinely." *Id.* at 254, JA__. *See also* Declaration of Marti Sinclair at ¶¶ 18-24 __, JA__ (describing routine SSM events in the Cincinnati, Ohio area). *See generally* EIP Comments at Attachment D, JA__-__ (documenting SSM emissions at Dow facility); *id.* at Attachment E, JA__-__ (documents SSM emissions at BASF facility).

The excess emissions that occur during periods of SSM go largely unmeasured and unreported, and the total amount of excess pollution that occurs as a result of SSM events has never even been estimated. Gaming The System at 1-2, JA__. Where data are available, however, they show that SSM emissions during periods of SSM approach or even exceed total emissions reported during periods of normal operation. *Id.* at 2, JA__. In Texas, which had the "best system for reporting upset emissions," thirty facilities emitted more than forty-five million pounds of SSM emissions in just one year. *Id.* at 20, JA__. These emissions included more than three hundred thousand pounds of the only

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has the potential to cause, the emission limitations in an applicable standard to be exceeded.").

two HAPs for which there was specific reporting data, benzene and butadiene. *Id.* at 300, JA__.[3]

Whether they are reported or not, HAP emissions that occur during SSM can cause serious health adverse effects. Gaming The System at 9-10, JA__. Benzene, for example, is a known human carcinogen that EPA has identified as one of two chemicals posing the greatest national cancer risk. *Id.* at 9, JA__ (*citing* EPA, National Air Toxics Assessment, http://www.epa.gov.ttn/atw/nata/risksum). Butadiene has been listed by EPA "as one of the two most significant probable carcinogens contributing to regional cancer risk." *Id.*, JA__. When plants exceed their emission limits of even just these two HAPs, they increase the risk faced by people in neighboring communities. For example, as a result of malfunctions, the BASF refinery in Port Arthur, Texas emitted more than 90,000 extra pounds of benzene and more than 80,000 extra pounds of butadiene in one year. *Id.* at 6, JA__. By doing so, it increased the exposure of Port Arthur residents to these HAPs and, as a result, increased their risk of cancer and other adverse health effects.

[3] Simple arithmetic further illustrates how significant SSM emissions can be. Assume a facility that is permitted to emit 400 pounds of lead each year and meets that standard by controlling its lead emissions by 99% to 365 pounds per year. On average, that facility will emit about 1 pound of lead per day when operating normally. But if that facility malfunctions for a day and vents uncontrolled emissions directly to the air, its daily lead emissions will increase from 1 to 100 pounds. If such SSM periods add up to just 11 days out of the year, or approximately 3% of that facility's operating time in a 365-day year, it will emit 1100 extra pounds of lead. As a result of of operating in SSM mode just 3% of the time, that facility's total lead emissions will exceed 1400 pounds — more than 3 times the amount its 400 pound annual limit allows. *See* Sinclair Declaration at ¶ 18, JA__ ("In my work for Sierra Club, I have learned that many facilities routinely operate in SSM mode for 2-3% of the time and that some facilities have operated in SSM for more than 25% of the time.").

In some instances, a major source's malfunctions are easy to detect. Refinery malfunctions often are accompanied by visible "flaring" when excess gases that should be routed to the refineries' process equipment are instead burned off by flares at the end of a smokestack. Marquez Declaration at ¶ 7, JA__. During normal refinery operations flares look like an industrial-sized pilot light at the end of the stack, showing only a small blue flame. *Id. See id.*, Attachment A at 1, JA__(picture). During malfunctions, however, flares get much bigger, change color to yellow or orange, and generate huge amounts of smoke from burning the waste gases. *Id.*, Attachment A at 3, JA__ (picture). If the flaring occurs at night, it can light up the neighborhood. From many blocks away, neighbors can hear the roar of gases rushing through the stacks to the flare and the snapping of the flares' flames in the wind. *Id.* at ¶ 7, JA__. The smells can be overwhelming, causing people's eyes, throat, and lungs to burn, and making them gasp for air. *Id.* at ¶ 9-10, JA__. *See also* Declaration of Hilton Kelley at ¶ 2, JA__. Some people get sick for days as a result of their exposure to the pollution. Marquez Declaration at ¶¶ 10-12, 17, 20, JA__, __, __; Kelley Declaration at ¶ 2, JA__. Some are forced to seek shelter inside behind closed doors and windows. Marquez Declaration at ¶¶ 29, JA; Kelley Declaration at 2 __, JA__.

On September 12, 2005, three of the refineries operating in and around the Wilmington area of Los Angeles malfunctioned when workers for the Department of Water and Power accidentally caused a power blackout. CFASE Petition For Reconsideration, Attachment at ¶¶ 2 JA__. The refineries lost power for their process and pollution control systems, and flared huge quantities of toxic gases into the air. Returning home from Huntington Park, Jesse Marquez of CFASE could see the black

smoke hanging over Wilmington from more than ten miles away. *Id.* When Mr. Marquez arrived back in Wilmington, he found his neighbors in a state of panic and preparing to evacuate. *Id.* "The sky was filled with black smoke," as all three refineries flared at once, and Mr. Marquez "could smell burning oil, sulfur, methane gas and many other smells." *Id.* He recalls "[i]t was difficult to breath, at times I was choking and my eyes were burning." *Id.* By that evening Mr. Marquez was "feeling very sick" *Id.* After that malfunction event, CFASE surveyed 160 Wilmington residents and found that more than thirty percent experienced burning eyes and other symptoms, more than thirty-five percent were sickened, and more than forty-five percent experienced breathing problems. *Id.*

After the September 2005 event in Wilmington, Jane Williams, an air toxics activist with Sierra Club contacted California's South Coast Air Pollution Control District. She was informed that the refineries did not have backup power generators. CFASE Petition For Reconsideration at ¶ 3, JA__. She was further informed that "the district could not prosecute the refineries for the major toxic gas releases that occurred during the September 12 blackout because they occurred as a result of an upset/malfunction event." *Id.*

The refineries that malfunctioned in Wilmington on September 12, 2005 were never penalized for their excess emissions that day, and did not add backup systems to control their emissions during future power outages. On October 3, 2007, their power was cut again, and once again they blanketed the Wilmington area in pollution. Marquez Declaration at ¶¶ 14-17, JA__; *id.* Attachment A at 5-6, JA__.

ConocoPhillips Oil Refinery Wilmington

September 12, 2005

Borders Cities of Wilmington - San Pedro - Harbor City (San Pedro View 12:07pm)

II. STATUTORY BACKGROUND.

A. Section 112.

Congress enacted § 112 in the 1990 Amendments in response to EPA's decades-long failure to control hazardous air pollutants under the Clean Air Act's prior toxics provisions, which had relied on EPA to identify which pollutants were "hazardous" and then determine appropriate health-based standards for them. *National Lime Ass'n*, 233 F.3d at 633-634. The Act now requires EPA to set emission standards that reduce all the listed HAPs by the maximum degree achievable. 42 U.S.C. § 7412(c)(2), (d)(1), (d)(2). The Clean Air Act defines the term emission standard to mean "a requirement established by the State or Administrator which limits the quantity, rate, or concentration or emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. § 7602(k) (emphasis added).

To further ensure that EPA's standards are sufficiently protective, § 112(d)(3) further provides that regardless of EPA's views about what is "achievable," standards must be at least as stringent as the emission levels actually achieved by the best performing sources in each category. 42 U.S.C. § 7412(d)(3). *See Sierra Club v. EPA*, 479 F.3d 875, 879-880 (D.C. Cir. 2007); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001).

Congress considered the possibility that in some instances it might not be "feasible to prescribe or enforce an emission standard" under § 112, and provided in § 112(h) that under these circumstances the agency may set "work practice" or "operational" standards instead. 42 U.S.C. § 7412(h)(1). However, Congress strictly

limited this exception by defining "not feasible to prescribe or an enforce an emission standard" to include only situations where:

> (A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such a pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or
>
> (B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

42 U.S.C. § 7412(h)(2).

Although § 112 initially requires EPA to issue air toxics standards reflecting the maximum achievable degree of reduction in emissions, it ultimately requires EPA to: (1) evaluate its standards for each category of major sources eight years after promulgating them; and (2), determine whether those standards "provide an ample margin of safety to protect public health." 42 U.S.C. § 7412(f)(2)(A). If EPA's initial standards for a source category assure that the lifetime cancer risk to the individual most exposed to emissions from any source in that category is below one in one million and otherwise provide an ample margin of health to protect public health, EPA may leave them unchanged. *Id.* Otherwise, EPA must issue more stringent standards that will provide an ample margin of safety. *Id.* In either event, the standards in place after EPA's § 112(f) evaluation reflect the agency's determination that compliance with such standards is necessary to protect public health with an ample margin of safety.

B. Citizen Enforceability.

1. Section 304.

Further reflecting Congress' intent that all sources comply with emission standards on a continuous basis is the Clean Air Act's citizen suit provision, enacted in

the Clean Air Act Amendments of 1970. It provides that "any person may commence a civil action on his own behalf — (1) against any person … who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter…" 42 U.S.C. § 7604(a)(1). The citizen suit provision "reflects a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) (emphasis added).

2. Title V

In 1990, when Congress amended the Clean Air Act to create the Title V permit program, both regulators and legislators were dissatisfied with the existing compliance monitoring and enforcement under the Act. In particular, "there [was] no ready way to identify the extent of a source's compliance and noncompliance." S. Rep. No. 101-228, at 347 (1989), JA__. Some of the difficulty arose from the fact that "[a] source's pollution control obligations ... are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations." *Id.* In addition, "SIP regulations are often written to cover broad source categories, and may not make clear how a general regulation applies to a specific source." *Id.* Furthermore, prior to 1990, sources were "not required under the [State Implementation Plans] or other Clean Air Act provisions to submit periodic compliance reports to EPA or the States." *Id.* To address these problems, Congress included in Title V an array of new mechanisms to assure source compliance with applicable requirements. 42 U.S.C. § 7661 *et seq*.; *see also* 40 C.F.R.

Part 70 (EPA regulations establishing minimum elements of an approvable state Title V program).

Central to Title V is the requirement that each major air pollution source obtain an operating permit that identifies all applicable requirements under the Act. 42 U.S.C. § 7661a(a). A permit must include, *inter alia*, "enforceable limitations and standards, a schedule of compliance ... and such other conditions as are necessary to assure compliance with applicable requirements." 42 U.S.C. § 7661c(a)(emphasis added). *See also* 42 U.S.C. § 7661c(c) (a permit must include "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions."), 42 U.S.C. § 7661a(b)(5)(a state must "issue permits and assure compliance by all sources … with each applicable standard, regulation, or requirement under [the Act].").

Once a Title V permit is issued, the facility operator must, *inter alia*, "promptly report any deviations from permit requirements to the permitting authority," report the results of required monitoring "no less often than every 6 months," and "periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit." 42 U.S.C. § 7661b(b)(2); 42 U.S.C. § 7661c(a).

In sum, a Title V permit can be thought of as "a source-specific bible for Clean Air Act compliance." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996).

Congress intended for Title V permits to aid both the government and the public in monitoring and enforcing compliance with Clean Air Act requirements. Thus, Congress required an opportunity for public comment and a hearing on each proposed permit, and an opportunity for judicial review in state court. 42 U.S.C. § 7661a(b)(6).

Congress also established a mechanism by which the public can petition the EPA Administrator to veto a deficient permit, and to obtain federal judicial review of any EPA denial of such a petition. 42 U.S.C. § 7661d(b)(2).

The 1990 CAA Amendments further emphasized the importance of public involvement in overseeing Clean Air Act compliance by revising the Act's citizen suit provision in to state clearly that "any person" may file a lawsuit to enforce "any ... standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter ... any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f)(3)(defining "Emission standard or limitation under this chapter"), 42 U.S.C. § 7604(a)(1)(authorizing citizen suits to enforce an "emission standard or limitation"). To facilitate such citizen oversight, Congress declared that "any permit application, compliance plan, permit, and monitoring or compliance report" must be "ma[d]e available to the public." 42 U.S.C. § 7661a(b)(7). As the Senate Report accompanying the 1990 CAA Amendments explained, "[t]his system will enable the State, EPA, and the public to better determine the requirements to which the source is subject, and whether the source is meeting those requirements. Better enforcement will result for all air pollution requirements." S. Rep. No. 101-228, at 347, JA__ (emphasis added). *See also* 57 Fed. Reg. 32250, 32251/3 (July 21, 1992), JA__ (EPA stating same).

III. REGULATORY BACKGROUND.

A. 1994 Rulemaking.

Following the 1990 Amendments, EPA promulgated in 1994 its "General Provisions" for implementing the new air toxics standards that the Amendments required.

59 Fed. Reg. 12408 (March 16, 1994), JA__. A key responsibility addressed in that rulemaking was the obligation to comply with emission standards during periods of startup, shutdown and malfunction. In particular, EPA considered whether to require compliance at all times, as it did for pre-1990 air toxics standards, or allow sources to meet alternative operational requirements during SSM. 58 Fed. Reg. at 42776, JA__. Ultimately, EPA chose to exempt sources from compliance with emission standard during SSM events but, based on its concerns about creating a "blanket exemption" from compliance, the agency also required sources to develop and implement specific and enforceable "SSM plans." *Id.*, JA__ EPA described its approach as "a reasonable bridge between the difficulty associated with determining compliance with an emission standard during these [SSM] events and a blanket exemption from emission limits." *Id.*, JA__.

The 1994 regulations required that sources "develop and implement a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown and malfunction and a program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant standard." 40 C.F.R. § 63.6(e)(3) (1994), JA__. They further provided "Malfunctions shall be corrected as soon as practicable after their occurrence in accordance with the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section," and made clear that "Operation and maintenance requirements established pursuant to section 112 of the Act are enforceable independent of emissions limitations or other requirements in relevant standards. 40 C.F.R. § 63.6(e)(1)((ii)-(iii) (1994), JA__. EPA's preamble explained:

> Excess emissions are typically direct indications of noncompliance with the emission standards and, therefore, are directly enforceable. Without

> demonstrating that a startup, shutdown, or malfunction event caused the excess emissions, the owner or operator cannot certify compliance. In such instances where the excess emissions occurred during a startup, shutdown, or malfunction, the owner or operator must also have followed the plan to certify compliance.

59 Fed. Reg. at 12422, JA__.

Because SSM plan provisions were applicable requirements, the Clean Air Act and EPA's own regulations required that they be available to the public. *See supra* at __. SSM plans allowed EPA, State and local governments, and citizens — the parties that bring enforcement actions — to evaluate a source's claims that its exceedance of emission standards was caused by an SSM event. They spelled out in advance what types of malfunction a source anticipated and how it planned to respond. 40 C.F.R. § 63.6(e)(3)(i), JA__. *See also* 68 Fed. Reg. 32586, 32591 (May 30, 2003), JA__. (SSM plans "may include basic information about when the emission limitations in a MACT standard apply to a particular facility and when they do not."). Also, the SSM plan allowed outside parties to evaluate the adequacy of the steps a source took to minimize emissions during a SSM event, and thus determine whether the source complied with the general duty requirement. *See* 40 C.F.R. § 63.6(e)(1)(i)-(ii) (1994), JA__.

In sum, EPA mitigated its SSM exemption by requiring sources to develop and implement effective SSM plans and allowing the public to: (1) review SSM plans; (2) participate in the approval or disapproval of SSM plans and SSM plan revisions by permitting authorities; (3) enforce SSM plans' terms in court; and (4) use SSM plans to evaluate and enforce sources' compliance with both § 112 emission standards and with the general duty to minimize emissions during periods of SSM.

B. 2002 Rulemaking.

In 2002, EPA promulgated several changes to its General Provisions. 67 Fed. Reg. 16582 (April 5, 2002). Among other things, EPA retracted the requirement that SSM plans be incorporated by reference into sources' title V permits and thus eliminated the automatic public access to SSM plans that resulted from having them readily accessible at permitting authorities.[4] Sierra Club challenged EPA's revisions t in consolidated case No. 02-1135, and also filed a petition for administrative reconsideration with the agency. Sierra Club Petition For Reconsideration, JA__. EPA and Sierra Club then entered into settlement negotiations and reached a settlement pursuant to which EPA agreed to propose (*inter alia*) requiring SSM plans to be submitted to State permitting authorities and thus easily accessible for review by both these authorities and the public. No. 02-1135 was then stayed pending implementation of the settlement agreement, which provided that case would be dismissed if EPA issued final revisions that were the same in substance as those it agreed to propose, but could be returned to the Court's active docket if the agency failed to do so.

C. 2003 Rulemaking.

In its proposal pursuant to the settlement agreement, EPA expressly acknowledged that "the SSM plan is an integral part of the permit file, regardless of whether the plan is physically available at the EPA Regional Office or the permitting authority that has received delegation or is maintained only at the affected source." 67

[4] In the 2002 rulemaking, EPA also changed the provisions governing "hammer" permit applications that Clean Air Act § 112(j) requires when EPA has not issued § 112(d) emission standards by the deadline specified in § 112(e). 67 Fed. Reg. 16582, 16584-16585 (April 5, 2002), JA__. Those changes are not at issue in the present case.

Fed. Reg. 72875, 72880/2 (December 9, 2002), JA__. Accordingly, the agency agreed that "SSM plans must be made available to the public unless the submitter makes a satisfactory showing that disclosure would divulge methods or processes that are entitled to protection under the Trade Secrets Act." *Id.* (emphasis added). *See also* 67 Fed. Reg. at 72880/3, JA__ ("the applicable law generally requires that we provide public access to those portions of SSM plans which are not entitled to confidentiality under the Trade Secrets Act…") (emphasis added).

In its final rule under the settlement agreement, however, EPA took an entirely different position. EPA did not require SSM plans to be submitted to permitting authorities or that they be publicly available, and instead allowed plant owners to keep their SSM plans on-site, unseen by permitting authorities or the public. 68 Fed. Reg. 32586, 32591-2 (May 30, 2003), JA__. The final regulations provided that citizens could "ask" the permitting authority to request a facility's plan, but did not require permitting authorities to do so unless they deemed the request sufficiently "specific and reasonable." *Id.* at 32591/3, JA__. EPA did not revise its statutory interpretation that SSM plans were independently enforceable requirements for which the Clean Air Act required public access. Instead the agency based the changes on its own policy view that the "additional burdens" on plant owners from making their SSM plans publicly available "are not necessary to assure appropriate access to SSM plans." 68 Fed. Reg. at 32591/2, JA__.

Sierra Club challenged EPA's final rule in a new petition for review, No. 03-1219. The new case was consolidated with the previous challenge (No. 02-1135), which was returned to the Court's active docket under the terms of the settlement. In addition, because EPA failed to propose or provide any opportunity for comment on its restriction

of public access to SSM plans, NRDC submitted a petition for administrative reconsideration pointing out, *inter alia*, that EPA's decision to limit public access to SSM plans contravened Clean Air Act § 114(c) and § 503(e) as well as 40 C.F.R. § 70.4(b)(3)(viii). NRDC Petition For Reconsideration at 3-5, JA__. EPA then agreed to take comment on the new SSM provisions, and the consolidated cases were held in abeyance pending EPA's reconsideration proceedings.

D. 2006 Rulemaking.

With the consolidated cases held in abeyance, EPA waited more than two years before even proposing a response to the petition for reconsideration. 70 Fed. Reg. 43992 (July 29, 2005). Then, unable to square blocking public access to SSM plans with its interpretation of the Clean Air Act as requiring such access, EPA changed its statutory interpretation. Specifically, EPA argued for the first time that SSM plans are not applicable requirements with which sources must comply. Based on that new statutory interpretation, EPA proposed "to retract the requirement to implement the plan during periods of SSM," and claimed that it lacks statutory authority to require public access to SSM plans. *Id.* at 43993-43995, JA__. Under the new proposal, source owners had to prepare a SSM plan, but did not have to follow it during periods of SSM. Further, SSM plans did not have to be reviewed for adequacy or approved by any permitting authority, and could be kept secret from the public.

In response to adverse comment on its revisions, EPA revised its legal position yet again in the final rule. Specifically, the agency withdrew the claim that it lacked statutory authority to make SSM plans public, and argued instead that it may interpret the Act as either conferring or withholding such authority. 71 Fed. Reg. 20446, 20447 & n1

(April 20, 2006), JA__. However, to argue that its retraction of the requirement to implement SSM plans did not render the general duty requirement unenforceable (as pointed out by commenters), EPA relied heavily on new reporting requirements that it had not proposed for comment. 71 Fed. Reg. at 20448/2-3, JA__. These provide that, after emission standards have been exceeded during a SSM event, the source must report to its permitting authority the actions taken in response. *Id.*[5]

Several environmental groups challenged EPA's final rule in No. 06-1215. In addition, CFASE petitioned for administrative reconsideration of the arguments based on reporting requirements that EPA had not proposed. CFASE Petition For Reconsideration, JA__. No. 06-1215 was consolidated with the challenges to EPA's General Provisions rulemakings, and the consolidated cases were held in abeyance pending EPA's decision on the reconsideration petition.

E. 2007 Denial Of Reconsideration.

EPA denied the June 19, 2006 Petition For Reconsideration on April 18, 2007. 72 Fed. Reg. 19385 (April 18, 2007). CFASE petitioned for review of the agency's decision in No. 07-1201, and that case was consolidated with the previous petitions for review.

[5] EPA also used its reconsideration rulemaking to revise the SSM requirements in scores of its § 112 regulations for specific source categories. 71 Fed. Reg. at 71 Fed. Reg. at 20455-20472, JA__; 70 Fed. Reg. at 43998-44010, JA__. *See* Comments of EIP, *et al.* at 6, JA__. The agency provided no explanation for those changes other than a cursory statement in the final rule that it was revising the standards for specific source categories to make them consistent with the revised General Provisions. 71 Fed. Reg. at 20440/2, JA__.

STANDING

By breathing the air where they live, work, and recreate, Petitioners' members are directly exposed to emissions of hazardous air pollutants that occur during periods of startup, shutdown, and malfunction. Jesse Marquez and Maria Malahi of Coalition for a Safe Environment (CFASE), for example, are exposed constantly to the toxic emissions from refineries in his Wilmington, California neighborhood. Malahi Declaration at ¶ 8, JA__; Marquez Declaration at ¶¶ 3-6, JA__. *See also* Kelley Declaration at ¶ 2, JA__.

Exposure to SSM emissions sickens petitioners' members, and their children. It causes them to suffer burning in their eyes nose and throat, difficulty breathing, dizziness, and nausea. Malahi Declaration at ¶¶3-5, JA__; Marquez Declaration at ¶¶ 9-10, JA__; Kelley Declaration at ¶ 2, JA____. In some cases, it causes members to feel sick for days, to miss work, to miss school, and to forego other activities. Marquez Declaration at ¶¶ 10-11, 20, JA__, Kelley Declaration at ¶ 2, JA___.

Because SSM emissions include potent carcinogens, such as benzene, they also increase petitioners' risk of cancer and other serious adverse health effects. A recent Leukemia Public Health Survey by CFASE has shown "increased incidence of leukemia, leukemia deaths, and leukemia symptoms" in residents of the Wilmington and Carson neighborhoods of Los Angeles. Marquez Declaration at ¶ 18, JA__, Miller Declaration at ¶¶ 4, 6, JA__, __. Further, SSM emissions severely diminish the ability of petitioners' members and their children to enjoy daily life in their own homes, schools, and communities. Apart from the sickening symptoms they cause, SSM emissions foul the air that petitioners members breath and, often force them to stay inside and close they windows when they would prefer to be outside working or playing. Marquez Declaration at ¶ 21, JA__, Kelley Declaration at ¶4, JA__ Orr Declaration at ¶¶ 4, 6, JA__.

EPA's decision to exempt major sources of hazardous air pollution from compliance with air toxics emission standards during periods of SSM allows these sources — such as the refineries in Wilmington, California — to exceed emission standards during such periods with impunity. Thus, it prolongs and increases petitioners' members' exposure to hazardous air pollutants and diminishes their ability to enjoy their daily lives and recreational activities in and around their homes. If EPA's SSM exemption were vacated, these sources would have to comply with their emission standards at all times, and the injury to petitioners' members would be greatly reduced.

Petitioners' members also are injured by EPA's decisions to: (1) block public access to SSM plans; (2) eliminate the requirement that SSM plans and SSM plan revisions be reviewed and approved by permitting authorities in a process open to public participation; and (3) retract the requirement that sources comply with their SSM plans during periods of SSM. As EPA itself made clear when it promulgated the SSM plan requirements, they are designed to "[e]nsure that, at all times, owners or operators operate and maintain affected sources, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards." 40 C.F.R. § 63.6(e)(3)(A) (1994). Eliminating these requirements deprives petitioners' members of such assurance and thus increases their exposure to toxic pollutants and to the risk of adverse health effects such pollutants cause, and further diminishes their ability to enjoy daily life in their own homes and communities.

The challenged rules also injure both petitioners and their members by depriving them of information and procedural opportunities to which they have a right under the

Clean Air Act. Specifically, the public has a right to the information in SSM plans under Clean Air Act § 502(b)(8) and § 503(e). 42 U.S.C. § 7661a(b)(8), § 7661b(e). It is directly within the missions of Sierra Club, EIP, LEAN, Friends of Hudson, and CFASE to educate their members and the public about toxic emissions from major sources of hazardous air pollutants. Williams Declaration at ¶ 27; Sinclair Declaration at ¶ 34; Marquez Declaration at ¶¶ 26-28; Orr Declaration at ¶ 14; Falzon Declaration at ¶ 10; Scaheffer Declaration, JA__. Because SSM plans "may contain basic information about when the emission limitations in a MACT standard apply to a particular facility and when they do not." 68 Fed. Reg. at 32591, JA__, petitioners and their members would use SSM plans to distinguish between excess emission events are caused by SSM and those that are simply violations of the relevant emission standards. Petitioners would use the information in SSM plans to enforce emission standards and to educate their members and the public about sources' compliance with emission standards and the adequacy of the measures they take to minimize emissions during periods of SSM. Petitioners also would use the information in SSM plans to advocate for SSM plan provisions that would better protect them from toxic emissions during SSM events. CFASE, for example, would use that information to advocate for the inclusion of a backup power system in the Wilmington refineries' SSM plans to prevent the type of sickening pollution event that occurred on September 12, 2005 and again on October 4, 2007.

Petitioners and their members also are both injured by EPA's decision to eliminate the requirement that SSM plans and SSM plan revisions be reviewed and approved in a State permitting authority process that is open to public participation. As shown in the attached declarations, petitioners would use that opportunity to advocate for

more protective control measures during SSM and would use the information they obtained in the permitting process to educate their members and the public. *E.g.* Sinclair Declaration at ¶ 26-33.

Finally, in conjunction with its decision to exempt sources from compliance with emission standards during SSM, the agency's decision to also exempt sources from any obligation to adhere to their SSM plans effectively renders sources immune from liability for excess emissions during periods of SSM. Petitioners are harmed by being deprived of the ability to enforce Clean Air Act emission standards. Schaeffer Declaration at ¶¶ 2-3, JA__.

STANDARD OF REVIEW

The Act's judicial review provision provides *inter alia* for reversal of EPA action found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). When "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, . 842-43 (1984). Where Congress has failed to make its intent clear, step two of *Chevron* provides for judicial deference to reasonable agency interpretations of the statute. 467 U.S. at 845. However, a reviewing court still "must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether "the agency considered the matter in a detailed and reasoned fashion." *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). Unless otherwise expressly indicated, references in this brief to "unlawful" agency action address both violation of congressional intent under *Chevron* step one and

unreasonable agency interpretation under step two. Agency action is arbitrary and capricious if *inter alia* the agency fails to articulate a "rational connection between the facts found and the choices made," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 27, 43 (1983), or to "identif[y] and explain[] the reasoned basis for its decision," *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996).

ARGUMENT

I. EPA'S EXEMPTION FROM COMPLIANCE WITH EMISSION STANDARDS DURING SSM EVENTS IS UNLAWFUL AND ARBITRARY.

A. EPA's SSM Exemption Contravenes The Clean Air Act.

1. EPA's SSM Exemption Contravenes The Act's Requirement For Standards That Limit Emissions On a Continuous Basis.

The Clean Air Act directs EPA to issue "emission standards" for sources of hazardous air pollutants, and unambiguously defines that term to mean a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k) (emphasis added). *See* 42 U.S.C. § 7412(c)(2), (d)(1) (requiring "emission standards"). EPA's SSM exemption automatically excuses sources from compliance with emission standards whenever they start up, shut down, or malfunction, and thus allows sources to comply with emission standards on a basis that is not "continuous." 42 U.S.C. § 7602(k). Thus, EPA's exemption contravenes the Clean Air Act's requirements that EPA set "emission standards" for sources of hazardous air pollutants and that such standards limit emissions on a "continuous basis." *See* 42 U.S.C. § 7607(d)(9) (court may reverse EPA action that is not in accordance with law or in excess of statutory authority).

EPA does not identify any statutory support for its SSM exemption. Instead, the agency simply asserts that it has discretion to determine when emission standards apply. 68 Fed. Reg. at 32590/3, JA__ (responding to comment that the SSM exemption is unlawful, EPA states that it has "discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply." *See* 71 Fed. Reg. at 20449/1, JA__ (same).

The text of the Clean Air Act makes clear that Congress conferred no discretion on EPA with regard to when emission standards must limit emissions; it mandated that they do so "on a continuous basis." 42 U.S.C .§ 7602(k). EPA "has no constitutional or common law authority, but only those authorities conferred on it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). *See Chevron*, 467 U.S. at 842-843 (where "Congress has directly spoken to the precise question at issue…, that is the end of the matter"). The agency is attempting to read an exemption of its own making into the Clean Air Act and to eliminate the statutory requirement that emission standards apply "on a continuous basis" in favor of its own policy preference that they should instead apply only when the agency thinks it "reasonable," 68 Fed. Reg. at 32590/3, JA__. *See U.S. v. Olson*, 543 U.S. 43, 45 (2005) (rejecting interpretation that "reads into the Act something that is not there"); *Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004) ("we must give effect to every word of a statute wherever possible"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("We will not alter the text in order to satisfy the policy preferences of the Commissioner.").[6]

[6] To be sure, EPA may promulgate a work practice or operational standard where it is not feasible to prescribe or enforce an emission standard under § 112(h)(1), 42 U.S.C. § 7412(h)(1), and such standards could theoretically satisfy the continuous compliance

EPA suggests that its SSM exemption is saved from illegality by the "general duty to minimize emissions" during SSM events which, EPA states, "is intended to be a legally enforceable duty." 68 Fed. Reg. at 32590/3, JA__. Whether it is intended to be enforceable or not, the general duty requirement is neither an emission standard under § 112(d) nor a work practice or operational standard under § 112(h). Thus, notwithstanding the general duty requirement, EPA's SSM exemption unlawfully excuses sources from compliance with emission standards during periods of SSM.[7]

2. EPA's SSM Exemption Contravenes § 112(f).

Like Clean Air Act § 112(d), § 112(f) requires "emission standards." 42 U.S.C. § 7412(f)(2). Therefore, EPA's exemption of sources from emission standards during periods of SSM contravenes § 112(f) and § 302(k) for all the reasons given above with respect to § 112(d) and § 302(k). *See supra* at 24-25.

In addition, § 112(f)(2) requires EPA to review its § 112(d) standards, and either determine that they "provide an ample margin of safety to protect public health" or strengthen them so that they do provide the required margin. 42 U.S.C. § 7412(f)(2)(A). In either event, the resulting standards limit emissions to a level that EPA has determined

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requirement in § 302(k), 42 U.S.C. § 7602(k). But EPA does not claim that its General Provisions provide work practice or operational standards in lieu of emission standards. To the contrary, EPA simply insists it has discretion to determine that emission standards do not "apply" during SSM. 68 Fed. Reg. at 32590/3, JA__.

[7] Further, any claim that the general duty requirement is an emission standard would run afoul of § 112(d)(3)'s minimum stringency requirements for emission standards, which the general duty requirement does not purport to satisfy. 42 U.S.C. § 7412(d)(3). *See Sierra Club v. EPA*, 479 F.3d 875, 877-878 (D.C. Cir. 2007). Similarly, any claim that the general duty requirement is an operational or work practice standard would contravene § 112(h)(1), which requires EPA to demonstrate that setting emission standards is not feasible under § 112(h)(2). 42 U.S.C. § 7412(h)(1)-(2).

to be necessary to protect public health with an ample margin of safety. If emissions exceed those levels, they will not provide the required margin. *See supra* at 9. By allowing sources to exceed emission standards during periods of SSM, EPA's exemption contravenes § 112(f).

EPA does not argue otherwise. Indeed, the whole point of EPA's exemption is to allow sources to exceed emission standards during periods of SSM.

B. EPA's SSM Exemption Is Unreasonable And Arbitrary.

As shown above, allowing EPA to determine when emission standards apply would deprive § 302(k)'s "emission standard" definition of meaning. *See supra* at 24-25. Thus, even if EPA's claim that it has discretion to determine when emission standards do and do not apply were entitled to *Chevron* deference, it would fail under *Chevron* step two. *See AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005) ("whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed"); *Halverson v. Slater*, 129 F.3d 180, 189 (D.C. Cir. 1997) (interpretation that deprived statutory interpretation of "virtually all effect" was unreasonable under *Chevron* step two). Moreover, EPA does not support its contention with any statutory language, and does not even attempt to square it with § 302(k). *See Rettig*, 744 F.2d at 151 (statutory interpretation fails under *Chevron* step two where agency did not "consider[] the matter in a reasoned and detailed fashion").

Even if EPA's exemption were lawful, the agency has never provided a rational explanation for its apparent belief that <u>all</u> sources should <u>automatically</u> be exempted from compliance under <u>all</u> SSM conditions. At most, EPA has suggested that there may be <u>some</u> times when an unavoidable technology failure should excuse noncompliance. *E.g.*

70 Fed. Reg. at 43993/2, JA__("The general duty clause is designed to recognize that technology-based standards may not always be met, as technology fails occasionally beyond the control of the owner or operator."); 58 Fed. Reg. at 42777 (SSM exemption "allows special situations to occur, such as unpredicted and reasonably unavoidable failures of air pollution control systems"). Such arguments do not even speak to excess emissions that occur during startup and shutdown, and are directly at odds with EPA's longstanding view that because "[s]tartup and shutdown are part of the normal operation of a source … it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods." 63 Fed. Reg. 8573, 8575 (Feb. 20, 1998), JA__. Further, EPA's arguments lend no support to EPA's automatic exemption from emission standards during all malfunctions, even those that are not the actual cause of the excess emissions. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary where agency fails to articulate a "rational connection between the facts found and the choices made").

Further, by removing the SSM-related safeguards and leaving only a blanket SSM exemption, *see supra* at 15-18, EPA creates the very situation it found unacceptable in previous General Provisions rulemakings and elsewhere. In its 1994 rule, EPA acknowledged that a "blanket exemption" from emission standards is unacceptable and, at the very least, needed to be mitigated by strict SSM plan requirements. 59 Fed. Reg. at 12423, JA__. EPA subsequently reminded its regional administrators that automatic SSM exemptions were "prohibited." Comments of EIP, Attachment C, JA__. *See also Rockgen Energy Ctr.* 8 E.A.D. 536, 550-554 (E.A.B. 1999) ("While it may be true that emission limitations are likely to be exceeded during startup and shutdown, EPA

guidance indicates that such exceedances are common and can be reduced or eliminated with careful planning."); *In re Tallmadge Generating Station*, PSD Appeal No. 02-12, at 27-28 (E.A.B., May 21, 2003), JA__ ("If MDEQ chooses to retain provisions that exempt facility emissions from compliance with BACT [best available control technology] and other emission limits during startup and shutdown events, the Department must make an on-the-record determination that such compliance is infeasible during startup and shutdown and include a discussion of the specific reasons for this conclusion of infeasibility."). *See also In re Indeck-Elwood*, 13 E.A.D. __, slip op. at 66-68, 75 (E.A.B. September 26, 2006) (finding that Clean Air Act § 302(k) prohibits automatic SSM exemptions). The direct and wholly unexplained conflict between EPA's condemnation of blanket SSM exemptions elsewhere and its creation of precisely such an exemption here renders the agency's rulemaking arbitrary. *See Missouri Public Service Comm'n. v. FERC*, 337 F.3d 1066, 1074 (D.C. Cir. 2003) (unexplained change of agency's position is arbitrary and capricious); *Independent Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) ("The treatment of cases A and B, where the two cases are factually indistinguishable, must be consistent.").

Also arbitrary is EPA's reliance on the claim that air toxics standards are "technology-based" to explain its SSM exemption. *E.g.*, 70 Fed. Reg. at 43993/2, JA__. First, the agency has rejected automatic SSM exemptions for technology-based "BACT" standards. *Compare* 42 U.S.C. § 7479(2)(C) (defining BACT) *with* 42 U.S.C. § 7412(d)(2)-(3). *See Independent Petroleum Ass'n*, 92 F.3d at 1260. Second, air toxics standards either are, or will shortly be, subject to the health-based requirements in Clean Air Act § 112(f)(2). *See supra* at 9. EPA has acknowledged repeatedly that because

SSM emissions can cause pollution levels to exceed the health-based air quality standards for non-hazardous air pollutants, they are unlawful. EIP Comments at 5, JA__ and attachment C. By the same token, SSM emissions can cause levels of hazardous air pollutants to exceed the levels necessary to protect public health with an ample margin of safety under § 112(f)(2). EPA's sole justification for prohibiting automatic SSM exemptions from non-HAP standards while promoting precisely such an exemption from HAP standards is the high-handed assertion that the logic that applies to one does not apply to the other. 71 Fed. Reg. at 20449/1, JA__ ("The SIP guidance cited by one commenter is not relevant to the scope of EPA's authority to consider periods of SSM in promulgating NESHAP standards."). *See Independent Petroleum Ass'n*, 92 F.3d at 1260 (disparate treatment of indistinguishable factual situations is arbitrary); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("An agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious.") (citation and internal quotation marks omitted). *See also* 42 U.S.C. § 7607(d)(6)(B) (requiring EPA to respond to significant comments). Finally, EPA failed completely to respond to comment that its SSM exemption contravenes § 112(f) and, for this reason as well, its rule violates Clean Air Act § 307(d)(6)(B) and is arbitrary.

C. This Court Can Review EPA's SSM Exemption.

Although EPA received repeated comments on the illegality of its SSM exemption in the course of its rulemaking — which covered more than six years, generated three separate proposals and necessitated three petitions for reconsideration — EPA now argues for the first time that its exemption for SSM has been on the books since 1994 and was not re-opened for comment in the subsequent challenged rulemakings. 71

Fed. Reg. at 20449/1, JA__. But rulemakings that significantly change the context for a regulatory provision can re-open it for comment, even if an agency does not change the provision itself. *Kennecott Utah Copper v. DOI*, 88 F.3d 1191, 1226-1227 (D.C. Cir. 1996). *See generally id.*, 88 F.3d at 1213-1215. *See also Environmental Defense v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006) ("A regulation may be constructively reopened when an agency or court changes the regulatory context in such a way that could not have been reasonably anticipated by the regulated entity and is onerous to its interests."). Here, EPA has completely changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption.

To avoid creating a "blanket exemption from emission limits," EPA's 1994 rule required that: (1) sources comply with their SSM plans during periods of SSM; (2) SSM plans be reviewed and approved by permitting authorities like any other applicable requirement; (3) SSM plans be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions be directly enforceable requirements. 59 Fed. Reg. at 12423, JA__. *See supra* at __. In the rulemakings challenged here, however, EPA has eliminated all of these safeguards. SSM plans are no longer enforceable requirements, and EPA has expressly retracted the requirement that sources comply with them. 71 Fed. Reg. at __, JA__. EPA also has eliminated any requirement that SSM plans be vetted for adequacy and any opportunity for citizens to see or object to them. 71 Fed. Reg. at __, JA__. *See supra* at __. These revisions "significantly altere[d] the stakes of judicial review," and thus

reopened the SSM exemption for comment. *Kennecott Utah Copper*, 88 F.3d at 1226-1227.

Finally, even if EPA had not reopened its SSM exemption, this Court could still review it. It is well established that challenges involving substantive legal defects may be raised outside the statutory limitations period by first petitioning the agency and then challenging the agency's denial of the petition. *Kennecott Utah Copper*, 88 F.3d at 1213. This Court has held that "circuitous process would be a waste of time and resources 'where an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds.'" *Id.* at 1214 (*quoting Public Citizen v. NRC*, 901 F.2d 147, 152-153 (D.C. Cir. 1990)). *Id.* EPA confirmed that it is retaining the SSM exemption, and stated its legal argument for doing so. 68 Fed. Reg. at 32590/2-3, JA__; 71 Fed. Reg. at 20449/1, JA__. Under these circumstances, the petition process would be a waste of time and resources.

II. EPA'S RULE UNLAWFULLY AND ARBITRARILY FAILS TO "ASSURE COMPLIANCE" WITH APPLICABLE REQUIREMENTS.

As explained above, the Clean Air Act requires sources to comply with emission standards at all times, including during SSM events. Even if the unlawfulness of EPA's SSM exemption could be overlooked, EPA's rule contravenes the Clean Air Act by eliminating any "assur[ance]" of "compliance" with emission standards or with the only obligation EPA now recognizes during periods of SSM, the general duty requirement. For this reason as well, the challenged regulatory revisions must be vacated.

A. Title V Permits Must Assure Compliance with the General Duty to Minimize Emissions.

EPA concedes that the "general duty to minimize emissions" set forth at 40 C.F.R. § 63.6(e)(1)(i) is an "applicable requirement" under Title V. 71 Fed. Reg. at 20450/1, JA__. Thus, each source's Title V permit must include conditions "necessary to assure compliance" with the general duty requirement. 42 U.S.C. § 7661c(a) ("[e]ach permit … shall include enforceable emission limitations and standards, a schedule of compliance, … and such other conditions as are necessary to assure compliance with applicable requirements.")(emphasis added). *See also* 42 U.S.C. § 7661c(c); 42 U.S.C. § 7661a(b)(5). EPA's revised rule strips Title V permits of any specificity regarding what a source must do to comply with its general duty to minimize emissions, and thus, does not "assure compliance" with that duty as required by Title V.

In directing that Title V permits include conditions sufficient to "assure compliance" with applicable requirements, Congress clearly intended for a Title V permit to clarify what an individual source must do to comply with a general obligation such as the "duty to minimize emissions." The term "assure" means "to make safe," "to give confidence to," "to make sure or certain," "to inform positively," or "to make certain the coming or attainment of." Merriam-Webster Online Dictionary (www.m-w.com/dictionary/assure) (visited Oct. 22, 2007). In accordance with that plain meaning, a permit cannot "assure" a source's compliance with a requirement as directed by Title V without clarifying what a source must do to comply with that requirement.

Legislative history confirms that plain reading of the statute. As the House Report accompanying the 1990 CAA Amendments emphasizes, "[t]here should not be matters applicable to the source under the Act that are not addressed in the permit. …

[T]he permit is the document that everyone should look at to know what a permittee should do to comply with the Act." H.R. Rep. No. 101-490, at 351 (1990), JA__.[8] More specifically, the Senate report states, "the permit will tailor and clarify how the general rules apply to the specific source." S. Rep. No. 101-228, at 347 (1989) (emphasis added), JA__. *See also, id.* ("The first benefit of the title V permit program is that, like the CWA program, it will clarify and make more readily enforceable a source's pollution control requirements. ... regulations are often written to cover broad source categories, and may not make clear how a general regulation applies to a specific source."); *id.* at 346 ("Operating permits are needed to … better enforce the requirements of the law by applying them more clearly to individual sources."), JA__.

B. By Gutting The SSM Plan Requirements, EPA Precludes Title V Permits From Assuring Compliance With The General Duty To Minimize Emissions.

EPA does not claim that the general duty requirement is specific enough to assure compliance with itself. Nor could the agency so argue; by itself, the "general duty" just states:

> At all times, including periods of startup, shutdown, and malfunction, owners or operators must operate and maintain any source, including associated pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards.

40 C.F.R. § 63.6(e)(1)(i). As Congress recognized when it enacted Title V, actions needed to fulfill this duty vary tremendously from source to source depending on the type of source, the type of equipment, and other source-specific characteristics. *See supra* at

[8] *See also,* S. Rep. No. 101-228, at 351 (1989),JA__("the permit is the document that everyone should look at to know what a permittee should do to comply with the Clean Air Act."); *id.* at 355 ("[O]nce a permit is properly issued to a source ... the permit becomes a comprehensive statement of the source's Act obligations."), JA__.

34-35. Even what qualifies as startup, shutdown, or malfunction varies depending upon individual source characteristics. Thus, without further clarification, neither government officials, nor the public—or even the source—can be "assure[d]" that the actions that a source takes to minimize emissions during SSM events are sufficient to comply with the general duty requirement.

Recognizing that more specificity is needed to "assure compliance" with a source's general duty to minimize emissions, EPA directly relied on SSM plans for this purpose when it promulgated the General Provisions in 1994. Specifically, EPA made clear that sources must prepare SSM plans that "describe[], in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction," 40 C.F.R. § 63.6(e)(3)(i). As shown above, EPA expressly required sources to implement their plans, ensured that the plans would be reviewed and approved by permitting authorities in a process open to the public, and made entirely clear that SSM plans must be available for public review. *See supra* at 13-15. The agency explained that "where ... excess emissions occur[] during a startup, shutdown, or malfunction, the owner or operator must also have followed the plan to certify compliance. If the owner or operator prepares a deficient plan, the EPA can request that the plan be upgraded and may consider enforcement actions." 59 Fed. Reg. at 12422, JA__. More recently, EPA stated: "The SSM plans must be drafted in a manner which satisfies the general duty to minimize emissions ... Thus, compliance with a properly drafted SSM plan during a period of startup, shutdown, or malfunction will necessarily also constitute compliance with the duty to minimize emissions ..." 68 Fed. Reg. 32586, 32590 (May 30, 2003), JA__.

Even now, EPA's regulations expressly state, "the purpose of the startup, shutdown, and malfunction plan is to ... [e]nsure that, at all times, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty to minimize emissions." *Id.* (emphasis added).

However, EPA has now revised its rules in ways that eliminate any possibility that SSM plans could serve to "assure compliance" with the general duty to minimize emissions. Specifically, under EPA's revised rules, plans (1) are not incorporated into a source's Title V permit as enforceable requirements, (2) need not be implemented, (3) need not be submitted to EPA or the state permitting authority for approval or review, and (4), can be kept secret from the public. *See* 71 Fed. Reg. at 20447/1-2, 20449/2, JA__-__, __. As explained below, a secret, unapproved, and unenforceable SSM plan cannot possibly "assure compliance" with the general duty requirement.

C. A Source's Preparation of a Secret, Unapproved, and Unenforceable SSM Plan Does Not "Assure Compliance" With the Source's General Duty to Minimize Emissions as Required by Title V.

1. To "Assure Compliance," SSM Plans Must be Included in a Source's Title V Permit.

The most obvious flaw in EPA's reliance on secret, unapproved and unenforceable SSM plans to assure compliance with the general duty to minimize emissions is that § 504(a) requires that the Title V permit itself "shall include ... conditions as are necessary to assure compliance with applicable requirements." 42 U.S.C. § 7661c(a)(emphasis added). Because SSM plans exist outside of the source's permit under EPA's rule and are not incorporated into the Title V permit by reference, they cannot possibly fulfill § 504(a)'s requirement. For this reason alone, EPA's rule

revisions are unlawful and its reliance on SSM plans to assure compliance with the general duty requirement is arbitrary.

2. To "Assure Compliance," SSM Plans Must be Implemented.

In addition, EPA does not require sources to implement their plans. *See* 71 Fed. Reg. 20447/1, JA__ (explaining that the rule revisions "remov[e] the requirement that the SSM plan must be followed."). Thus, sources are entirely free to ignore their plans during periods of SSM.

The Act makes clear that any mechanism designed to fulfill Title V's directive that permits "assure compliance" must be enforceable. Specifically, CAA § 504(a) explains that "conditions" necessary to assure compliance must be included in Title V permits (42 U.S.C. § 7661c(a)), and CAA § 304(a) authorizes citizens to enforce "any permit term or condition." 42 U.S.C. § 7604(a) (authorizing citizen suits to enforce "an emission standard or limitation"); 42 U.S.C. § 7604(f) (defining "emission limitation or standard" to include "any permit term or condition."). Likewise, CAA § 504(a) states, "[e]ach permit issued under this subchapter shall include enforceable emission limitations and standards." 42 U.S.C. § 7661c(a) (emphasis added). EPA's elimination of the requirement that a source implement its SSM plan contravenes these statutory requirements.

EPA contends that eliminating the requirement that a source implement its SSM plan "allows sources flexibility," specifically, "to deviate from their plans ... when necessary to due to unanticipated types of malfunctions" and "emergencies that are not amenable to strict adherence to the plan." 71 Fed. Reg. at 20447/1, JA__. EPA's desire to give sources "flexibility," however, does not trump the statutory directive that permits

include "enforceable" conditions sufficient to "assure compliance." *See, e.g., State of New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) ("EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.") (internal quotes omitted). In any event, EPA's Title V regulations already include an "emergency defense." *See* 40 C.F.R. § 70.7(g). Moreover, sources can and should prepare SSM plans that are sufficient to accommodate unforeseen events.

EPA's decision to make SSM plans unenforceable is also arbitrary. First, just requiring sources to write a plan and keep it somewhere in their files does little if anything to minimize emissions. Unless a source is required to implement its plan — *i.e.*, take the steps it has identified as necessary to minimize emissions during SSM — there can be no assurance that the source is meeting its general duty. Second, EPA's reliance on SSM plans that are merely hortatory directly conflicts with the agency's prior determinations that SSM plans can "assure compliance" only if they are implemented. *See* 40 C.F.R. § 63.6(e)(3)(i) (1994) (prior regulation stating that a source must "develop and implement" an SSM plan); 59 Fed. Reg. at 12422 ("[T]he owner or operator must also have followed the plan to certify compliance.")(emphasis added), 68 Fed. Reg. at 32590 ("compliance with a properly drafted SSM plan [will] constitute compliance with the duty to minimize emissions.") (emphasis added). EPA has never explained the 180-degree change in its position on this issue. *See Missouri Public Service Comm'n*, 337 F3d at 1074.

3. To "Assure Compliance," SSM Plans Must be Subject to EPA and Public Review.

EPA's decision to eliminate the vetting of SSM plans for adequacy further undermines the agency's reliance on them to assure compliance. As EPA concedes, compliance with just any SSM plan would be insufficient to assure compliance with the general duty requirement. Rather, as EPA admits, an SSM plan is only helpful in assuring compliance to the extent that it is "made in good faith and not deficient ." 71 Fed. Reg. at 20449/3, JA____ (emphasis added). *See also* 71 Fed. Reg. at 20452/1 ("If the permitting authority has reviewed a source's SSM plan and determined that it is adequate, information that the source followed that plan during an SSM event could be helpful to the regulator in determining whether to investigate the event.") (emphasis added). Thus, it is not enough for a Title V permit to state merely that the source must develop an SSM plan; rather, the plan itself must be subject to agency and public review during the Title V permitting process to confirm that it is sufficient to assure compliance.

The Act is clear that any source obligation designed to fulfill Title V's directive that permits "assure compliance" with applicable requirements must be subject to public and EPA review. At the outset, as discussed above, the Act specifies that such obligations must be "include[d]" in a Title V permit. The Act goes on to expressly mandate that the public be given an opportunity for comment and a hearing on all initial permits, all renewal permits, and all permit revisions. 42 U.S.C. § 7661a(b)(6). Likewise, the Act prohibits a State from issuing a permit without first giving EPA an opportunity to review and comment on its issuance. 42 U.S.C. § 7661d. The Act requires the EPA Administrator to object to a deficient permit. 42 U.S.C. § 7661d(b)(1). If EPA does not object to a proposed permit, any person may petition the agency to do so.

42 U.S.C. § 7661d(b)(2). "The Administrator shall issue an objection ... if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the Act." *Id.* In light of these extensive and detailed statutory provisions establishing procedures for EPA and public review of Title V permits, Congress plainly did not intend the key means by which EPA intends to assure a facility's compliance with an applicable requirement—here, the SSM plan—to evade such review.

Recent cases from the Second and Ninth Circuits confirm that source-prepared plans that are not subject to EPA review and approval cannot be relied upon to "assure compliance" with applicable environmental laws. In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit addressed Clean Water Act (CWA) provisions requiring, *inter alia*, that permits "assure compliance" with all applicable CWA requirements. 399 F.3d 486, 498 (2nd Cir. 2005). Environmental groups challenged EPA regulations allowing large concentrated animal feeding operations ("CAFOs") to develop their own nutrient management plans under the CWA without having those plans reviewed or approved by a permitting authority. The court found that without requiring review, the CAFO rule "does nothing to ensure" that each large CAFO had a plan that met relevant CWA requirements, and thus violated the CWA. *Id.* 498 (emphasis in original). Similarly, in *Environmental Defense Center, Inc. v. EPA*, the Ninth Circuit addressed the requirement in CWA § 402(p) that permits "require controls to reduce the discharge of pollutants to the maximum extent practicable." 344 F.3d 832, 854 (9th Cir. 2003). Environmental groups challenged EPA's regulations for small municipal separate storm sewer systems that allowed such systems to avoid getting a permit so long as they developed a stormwater management plan. *Id.* 854-855. The court found that because these plans did

not have to be reviewed by a permitting authority, the rule "would do less than require controls to reduce the discharge of pollutants to the maximum extent practicable." *Id.* 855 (emphasis in original). Accordingly, the court rejected EPA's rule as "contrary to the clear intent of Congress." *Id.* 856.

Consistent with *Waterkeeper Alliance* and *Environmental Defense Center*, EPA's attempt to rely on SSM plans that are not subject to EPA and public review to "assure compliance" with the general duty requirement should be rejected as contrary to Congress' clear intent.[9] Further, EPA's reliance on unreviewed and unapproved SSM plans should be rejected as arbitrary given EPA's admission that an SSM plan is only useful in assuring compliance if a permitting authority has found it to be "adequate," 71 Fed. Reg. at 20452/1, JA__. *See State Farm*, 463 U.S. at 42 (requiring "a rational connection between the facts found and the choices made.").

4. To "Assure Compliance," SSM Plans Must be Publicly Available.

Even if EPA had not stripped out all the other safeguards that originally cabined its SSM exemption, the agency's decision to block public access to SSM plans renders its rule unlawful and arbitrary. SSM plans fit squarely within the category of information that must be made publicly available under § 502(b)(8) and § 503(e). 42 U.S.C. § 7661a(b)(8); § 7661b(e). EPA's own regulations direct permitting authorities to make

[9] EPA seeks to distinguish these cases on the basis that they were addressing plans that were "binding" and that compliance with such plans constituted compliance with the statute. 71 Fed. Reg. at 20450. These distinctions make no difference. Like the present case, both cases address EPA's unlawful reliance on unapproved plans to fulfill a statutory requirement; indeed, the nutrient management plan at issue in *Waterkeeper Alliance* was intended to fulfill a nearly identical statutory requirement to the one at issue here: that permits "assure compliance" with applicable requirements, *see* 399 F.3d at 498.

all materials relevant to a permit's development available to the public during the public comment period, including "the permit draft, the application, all relevant supporting materials ... and all other materials available to the permitting authority that are relevant to the permit decision." 40 C.F.R. § 70.7(h)(2).[10] This statutory and regulatory language ensuring full public access to Title V-related documents is consistent with Congress' intent that Title V enable not just the government, but also the public, to monitor and enforce Clean Air Act requirements. *See, e.g.*, S. Rep. No. 101-228, at 347 (Title V permits will "enable the State, EPA, and the public to better determine the requirements to which the source is subject, and whether the source is meeting those requirements," which will lead to "[b]etter enforcement … for all air pollution control requirements.")(emphasis added).

Moreover, Congress required public access to key compliance information and enacted the Clean Air Act's citizen suit provision for a reason: it concluded that citizen enforcement was necessary to "assur[e]" that the Act would be implemented and enforced. *NRDC*, 510 F.2d at 700. By deliberately frustrating citizen enforcement, EPA contravenes Congress' intent that Clean Air Act requirements be both enforceable and enforced. Further, by simply dismissing Congress's reasons for enabling citizen enforcement without even acknowledging them, EPA acts arbitrarily.

D. EPA's Claim That Other General Provision Requirements Will Assure Compliance with the General Duty Requirement is Unavailing.

Presumably recognizing that a secret, unapproved and unenforceable SSM plan cannot fulfill Title V's requirement that "each permit" include conditions sufficient to

[10] *See also* § 70.4(b)(3)(viii)(a state permitting authority must "[m]ake available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report.").

"assure compliance" with the general duty requirement, EPA attempts to demonstrate that other regulatory provisions fulfill Title V's compliance assurance requirement. EPA's arguments are meritless.

First, EPA makes a half-hearted claim that the mere requirement that a source "develop" an SSM plan helps to assure compliance with the source's general duty to minimize emissions. 71 Fed Reg. at 20449/2, JA____. According to EPA, "[d]evelopment of SSM plans help sources to think through and document actions to take during SSM events" and that "[p]lans will help sources more expeditiously address SSM events to minimize emissions during those periods." *Id.* As EPA admits, however, a plan is only useful in assuring compliance to the extent that it is "adequate." *See* 71 Fed. Reg. at 20452/1. Thus, EPA's contention that compliance is assured simply by requiring a source to prepare a plan must be dismissed as contrary to Congress' intent and arbitrary.

Second, EPA claims that compliance with the general duty is assured by the requirement at 40 C.F.R. § 63.10(b)(2) that a source file a report after an SSM event detailing the steps it took to minimize emissions. According to EPA, "[a]ny member of the public could use the information in these reports to evaluate whether adequate steps were taken to meet the general duty requirement." 71 Fed. Reg. at 20448/3, JA____. As explained above, however, a key aspect of assuring compliance is making sure that a source knows what it must do to comply with the law before a violation occurs. Under EPA's approach, neither government regulators nor the public knows what steps a source plans to take to minimize emissions during an SSM event until after a potential violation occurs. Indeed, EPA is forced to recognize that there is no assurance that SSM plans are adequate to assure compliance by conceding that a source may violate the general duty

requirement whether it complies with its SSM plan or not. *See, e.g.,* 71 Fed. Reg. at 20449/3, JA____ (explaining that a permitting authority makes a determination of whether "emissions are minimized by following the plan" after an "SSM event occurs."). And, of course, because the plans are kept secret from the public, concerned citizens have no idea what a source might be planning to do to minimize emissions during SSM events until after they have been exposed to "excess emissions." *See, e.g., ,id.,* JA____ ("reports ... submitted by a facility when emission limitations are exceeded ... will allow the permitting authority and the public to determine whether emissions were minimized.")(emphasis added). A permitting approach that waits until a violation occurs before clarifying what a source must do to comply with an applicable requirement in no way "assure[s] compliance" with that requirement.

EPA's claim that post-violation report are sufficient to assure compliance with the general duty requirement is also flawed because even after such a report is filed, the public cannot be certain that the steps taken by the source were sufficient to comply with the general duty. Rather, absent any explanation in the permit as to what steps are sufficient to "minimize emissions," concerned citizens are left to make their own determination as to what is sufficient. Ultimately, under EPA's revised rule, the only way for the public to be sure as to whether the source complied with its duty to minimize emissions is to file a citizen suit and ask the court to resolve the issue.[11] But Congress intended Title V to simplify enforcement by clarifying at the time a permit is issued what a source must do to comply with an applicable requirement—not by leaving such a

[11] EPA appears to believe that the courts are the appropriate venue for the public to obtain basic information about source compliance, asserting that "[i]n any such citizen suit, plaintiffs can seek to obtain the SSM plan through discovery." 71 Fed. Reg. at 20448/3.

determination for a court to make once an enforcement action is filed. *See supra* at 10-12. Moreover, Congress intended Title V to promote improved compliance in the first place by ensuring that sources know what they must do to comply with the Act's requirements. *See, e.g.*, S. Rep. No. 101-228, at 347 (Title V permits "will benefit stationary sources by providing greater certainty as to what their pollution control obligations are."). By failing to establish what a source must do to minimize emissions during SSM events in the source's Title V permit before a violation occurs, EPA contravenes the statute. Moreover, by relying entirely on reports filed after a potential violation occurs to assure compliance prospectively, EPA acts arbitrarily. *See, e.g., Podewils v. NLRB*, 274 F.3d 536, 541 (D.C. Cir. 2001)(agency action arbitrary because reasoning "includes a logical flaw"), *Natl. Assn. of Govt. Employees v. FLRA* 363 F.3d 468, 475 (D.C. Cir. 2004) (agency abused discretion "by reaching a result that is illogical on its own terms")(internal quotes and citation omitted).[12]

E. EPA's Contention That an SSM Plan is "Not Necessary" to Assure Compliance With the General Duty to Minimize Emissions is Arbitrary.

Seeking to justify its decision to eliminate the requirement that sources implement their SSM plans and to allow sources to keep such plans secret from the public, EPA asserts that such plans are "not 'necessary' ... to determine whether [the] general duty has

[12] EPA admits that it revised its reporting requirements in its final 2006 rule. 72 Fed. Reg. at 19386/3, JA_. Contrary to EPA's claim, however, the agency did not provide an opportunity to comment on these requirements by including other reporting requirements in its proposal. Further, EPA did not attempt to argue at proposal that its reporting requirements assured compliance. Because it was impracticable to raise objections to these aspects of EPA's final rule during the comment period, the Clean Air Act required EPA to convene a proceeding for reconsideration. 42 U.S.C. § 7607(d)(7)(B). EPA's refusal to do so is unlawful and arbitrary.

been satisfied." 71 Fed. Reg. at 20450/1. Contrary to that assertion, however, EPA repeatedly stresses the central importance of SSM plans in assessing sources' compliance with the general duty. *See, e.g.*, 71 Fed. Reg. at 20450/1 ("[W]e note that the SSM plan is a useful tool for sources to demonstrate—and for permitting authorities to confirm—that the general duty to minimize emissions is met."); 71 Fed. Reg. at 20448/2 ("We expect owners and operators to continue to follow the SSM plans with respect to most SSM events because those plans should generally set forth the best way to minimize emissions. Those who fail to follow their plan will undergo additional scrutiny, as they do now, to determine if emissions were minimized during SSM periods." (emphasis added).

Indeed, a review of EPA's rule reveals that nearly all of the monitoring, recordkeeping, and reporting obligations contained therein are designed to track whether the source complies with its SSM plan. For example, the rule states that EPA's "[d]etermination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to ... review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section)." 40 C.F.R. § 63.6(e)(1)(i). Another provision requires a source to keep its current SSM plan and prior version from past 5 years on site and make these plans available to the EPA Administrator for inspection and copying. 40 C.F.R. § 63.6(e)(3)(v). The rule instructs that a source's SSM records must "demonstrate that the procedures specified in the plan were followed." 40 C.F.R. § 63.6(e)(3)(iii). Likewise, EPA's rule ties reporting timeframes for excess emissions to whether a source complied with its SSM plan. 40

C.F.R. § 63.8(d)(5)(ii). And of course, one cannot overlook the rule's declaration that the express "purpose" of an SSM plan is to ensure that a source complies with its general duty. 40 C.F.R. § 63.6(e)(3)(i).

In light of the above, EPA plainly does not believe its own argument that SSM plans are not "necessary" to monitor a source's compliance. Given that the Act expressly provides for citizen suit enforcement of Title V permits, *see supra* at 10-12, EPA's decision to deny public access to the very documents that EPA views as central to its own ability to enforce the general duty requirement is arbitrary. *See, e.g., Transactive Corp. v. United States*, 91 F.3d 232, 237(D.C. Cir. 1996)("A long line of precedent has established than an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently"), *see also, id.* 236 (agency action is arbitrary if agency did not "identif[y] and explain[] the reasoned basis for its decision.").

F. By Failing To Assure Compliance With the General Duty to Minimize Emissions, EPA Also Fails To Assure Compliance With The MACT Emission Limits.

Not only do EPA's rule revisions fail to assure compliance with the general duty to minimize emissions, but they also fail to assure compliance with the MACT emission limits, themselves. Specifically, given EPA's position that a MACT emission limit does not apply during an SSM event, it is impossible to know whether emissions in excess of such limit constitute a violation without knowing what qualifies as SSM for a particular source. *See*, *e.g.*, 59 Fed. Reg. at 12422 (a source is not in violation if "a startup, shutdown, or malfunction event caused the excess emissions."). Under EPA's revised rule, no such information will be included in Title V permits. Though such information presumably would be available in a source's SSM plan, *see* 68 Fed. Reg. at 32591, JA__,

EPA's decision not to incorporate the requirements of such plans into Title V permits, not to require sources to submit their plans for EPA and public review, and indeed, to allow sources to keep their plans secret from the public, eliminates any possibility that such plans could be relied upon to "assure compliance" with the MACT emission limits. *See supra* at 36-41. For this reason, as well, the court should reject EPA's revised rule as unlawful and arbitrary.

CONCLUSION

For the reasons given above, EPA's SSM exemption and its revisions to the SSM plan requirements are unlawful and arbitrary. Accordingly, petitioners respectfully request the Court to vacate each of the challenged rules and the SSM exemption in 40 C.F.R. § 63.6(f) and § 63.6(h).

DATED: October 26, 2007

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Proof Opening Brief of Environmental Petitioners** contains 13,726 words, as counted by counsel's word processing system.

DATED: October 26, 2007

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Attachment A

Declarations

Declaration Index

Coalition for a Safe Environment
Marie Malahi
Jesse Marquez

Environmental Integrity Project
Hilton Kelly
Eric Schaeffer

Friends of Hudson
Susan Falzon

Louisiana Environmental Action Network
Elizabeth Avants
Gary Miller
Mary Lee Orr

Sierra Club
Neil Carman
Marti Sinclair
Jane Williams

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135 (and consolidated cases)
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Respondents.	)	

DECLARATION OF MARIE MALAHI

1. I am a member of the Coalition For A Safe Environment (CFASE). I am 40 years old. I have been a member of CFASE since the year 2002 and believe and support CFASE's Mission Statement "To protect, promote, preserve and restore our Mother Earth's delicate ecology, environment, natural resources and wildlife. To attain Environmental Justice in international trade marine ports, goods movement transportation corridors, petroleum and energy industry communities."

2. I live at 861 West Santa Cruz Street, San Pedro, California 90731. I have lived in San Pedro 15 years with my family. San Pedro is the neighbor to Wilmington and a community in the City of Los Angeles and located in the Los Angeles Harbor area.

3. I live approximately one mile south of the ConocoPhillips Oil Refinery. I live within 4 miles to the Valero Oil Refinery and Shell Oil Refinery in Wilmington the and BP ARCO in Carson.

4. I and my entire family suffer from severe and chronic respiratory health problems. I believe that the previously mentioned oil refineries contribute significantly if not entirely to our respiratory health problems. I do know that when oil refineries begin to flare that I and my family begin to experience severe breathing problems and on numerous occasions over the past years I have had to rush my children for emergency treatment at our local hospital for severe asthma attacks.

5. I suffer from chronic sinusitis, chronic bronchitis and scleroderma. My husband Eliezer Malahi suffers from sinus infections, ear infections, has had ear surgery for the implantation of tubes in his ear and gets pneumonia. My son Matan Malahi age 11 suffers from asthma, chronic sinus problems, chronic ear infections, has had ear surgery and had tubes implanted in his ears, and had sinus surgery at age 4 years old. My daughter Adrielle is age 3 and suffers from asthma since age one. Both my children must use ambuterol for their asthma.

6. We must regularly purchase over the counter medicines because we do not have health insurance and can not afford the high cost of private insurance because we have preexisting conditions.

7. I have attached two photos of my children using a nebulizer to help them breath. My daughter Adrielle is one years old and my son Matan is 9 years old in these photographs. Attachment A at 1 and 2.

8. We can often hear the ConocoPhillips Oil Refinery flaring incidents because they are so loud especially at night when everything is quiet. We almost always smell the burning oil and various toxic chemicals burning since they smell so bad and stand out.

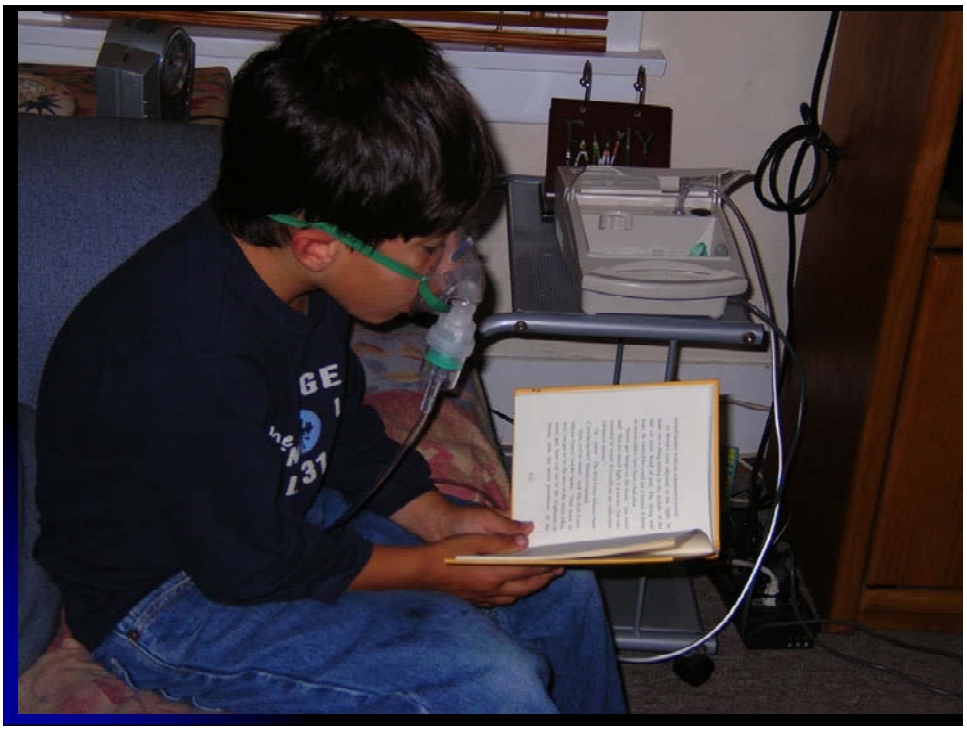
9. I believe that it is important for residents to have access to information regarding flaring incidents, emergency procedures and Start-up, Shut-down and Malfunction Plans (SSM).

It is important that I know what toxic chemicals that I and my children have been exposed too, so that when I go to the hospital I can tell the doctor the information so that they can prescribe the right medication and treatment.

10. The Coalition For A Safe Environment is the only organization that advocates on our behalf and provide us information.

11. I declare under penalty of perjury that the foregoing is true and correct. Executed this 26 day of October, 2007.

Marie Malahi



UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 02-1135 (and consolidated cases)

DECLARATION OF JESSE N. MARQUEZ

1. I am the founder, a member and executive director of Coalition For A Safe Environment (CFASE). I am 55 years old. Founded in April 2001, CFASE's Mission Statement is "To protect, promote, preserve and restore our Mother Earth's delicate ecology, environment, natural resources and wildlife. To attain Environmental Justice in international trade marine ports, goods movement transportation corridors, petroleum and energy industry communities." CFASE has members in 24 California cities, which include the City of Los Angeles communities of Wilmington, San Pedro and Harbor City, cities of Carson, Torrance and El Segundo where major oil refineries are located.

2. I live at 613 North Gulf Avenue, Wilmington, CA 90744. I was born in San Pedro, California and have lived in Wilmington all of my life. Wilmington and San Pedro are neighboring communities in the City of Los Angeles and located in the Los Angeles Harbor area.

3. My house is six blocks east of the ConocoPhillips Oil Refinery. My bedroom window faces west toward the oil refinery. Three other refineries are also located close by:

Valero Oil Refinery in Wilmington is approximately fifteen blocks east of my home, Shell/Tesoro Oil Refinery in Wilmington is approximately twenty blocks mid-northeast, and BP/ARCO Oil Refinery in the City of Carson that borders Wilmington is about three and one half miles northeast.

4. The business address of CFASE is 140 West Lomita Blvd., Wilmington, CA 90744. It is also within 20-25 blocks of all four refineries. The air in my neighborhood and community is always filled with the foul odor of petroleum industry hydrocarbons and toxic chemicals emitted by the oil refineries 24 hours a day, 7 days a week. I, my family, Wilmington, Los Angeles and Long Beach Harbor residents never have a clean air day.

5. When the wind comes from the west, as it does almost everyday, it blows an even stronger stench and visual blight of toxic air pollution from the ConocoPhillips Oil Refinery toward my home, the residences, places of employment, recreation locations, shopping locations and schools of numerous Wilmington, San Pedro, Harbor City, Long Beach and Carson Coalition For A Safe Environment members, member families, board of directors members, volunteers, student interns, visitors and employed staff.

6. Almost every week, the toxic air pollution from one of the refineries in Wilmington is significantly worse. This happens when some part of the refining process malfunctions, and one of the refineries flares or releases unflared (unburned) hydrocarbons, various toxic gases, chemicals, substances and particulate matter directly into the air. Some flares malfunction and on one recent occasion this year ConocoPhillips claimed the wind blew out the pilot flame, causing it to release unburned hydrocarbons, various toxic gases, chemicals, substances directly into the air.

7. The refineries use flares to burn off or release unburned hydrocarbons, various gases, chemicals and substances that they cannot use, treat or store. The flares in the refineries' stacks run all the time, like a pilot light in a home furnace. During normal operations, the flares burn only natural gas and can be seen as a small blue flame. Attachment A at 1. During flaring incidents, however, they burn all sorts of unprocessed hydrocarbons from the refining process. As a result, they turn different colors depending on the gases they have to vent out and shoot flames as far as 50-100 feet into the air. Some flames are so large they look like a bomb went off and are in the shape of mushroom clouds. Others are like volcanoes belching continuous black smoke clouds for hours and miles in all directions. Each refinery has numerous smoke stacks and you will often see many flaring at one time. I have taken numerous photographs of three smoke stacks flaring at the same time. When there is a major malfunction at night, the whole night sky is brightly lit. Attachment A at 2-3.

8. From my home, I can hear as well as see and smell the ConocoPhillips Oil Refinery's flaring incidents. There is a loud continuous roar from the smokestacks as the gases rush out, and huge flames flapping and snapping in the air like a flag. I and my neighbors have been awakened numerous times with loud frightening sounds at all hours of the night, 10:00pm, 12:00am and 2:00am in the morning. We also hear the emergency alarms at the oil refinery blaring at all hours of the day and night. We also hear the fire department trucks horns blaring from east Wilmington to west Wilmington as they arrive on site.

9. The air pollution from the refinery has different odors depending on what is being flared or released unflared (unburned). On some occasions, there is a strong sulfur smell. On others, there is the smell of burning oil or diesel fuel exhaust. On still others, there is the

nauseous smell of methane. When a power failure causes the refineries to malfunction, I smell all of the different odors.

10. When a major flaring incident occurs, my eyes, throat and lungs burn, and I have extreme difficulty breathing and have to gasp for more air. I often experience choking, feel dizzy, have nausea and get an upset stomach. I also feel very tired and weak. On numerous days our members and their families are ill due to the flaring. On many days our members, staff, board members and volunteers cannot work on our community environmental, public health and public safety campaigns, projects, meetings, surveys and interviews because they do not feel well during and after flaring incidents.

11. Even after small flaring and non-flaring release incidents that occur for less than an hour, I have felt sick and had to use medication. . After almost every flaring incident I have to take an aspirin, a decongestant/antihistamine pill, use a nasal decongestant spray several times a day and lie down because I do not feel well. Major malfunctions at the refineries are much worse because they last for hours and pour out tons of toxic smoke and gas fumes. After a major flaring events, I am sick for the next 2-3 days and do not feel well enough to work or do anything except lay in bed. It can last longer due to the fact the refinery may not be able to immediately start-up, since it is still trouble shooting problems and may have to order and install new parts or equipment.

12. Like many of my neighbors, I do not have health insurance. The typical cost for asthma emergency treatment and staying over night is $10,000. Therefore, I cannot afford to go to the hospital each time emissions from the refineries cause me to suffer adverse health effects.

13. In my work with CFASE, I, my staff, volunteers, student interns and members gather information to document the malfunction events at the refineries in Wilmington, the air pollution

that results, and the effects of air pollution on the people who live here. We specifically photograph and film flaring incidents as they occur. We dial the toll free South Coast Air Quality Management District (SCAQMD) to report flaring and toxic chemical smells. We also conduct door-to-door public health surveys and information surveys. We call the refineries to obtain additional information regarding an event, and sometimes meet with refinery management and engineers. Calling the SCAQMD is almost a waste of time, because over 50% of the time the SCAQMD Inspector never arrives in time to witness a flaring incident and if they do not witness it they can not write up a notice of violation. They also never interview residents to determine any public health impacts. To get information regarding a flaring incident is very difficult. We can only obtain information by writing and filing a Public Records Request using the Freedom of Information Act, you have to know the name of the specific document(s) you are requesting, this could take weeks to obtain and is something that we do not have the time or resources to do often.

14. On Wednesday October 4, 2007, I was awakened at 2:00am from the sound of flaring at the ConocoPhillips Oil Refinery and could see the sky all lit up like a light bulb. Attachment A at 4-5. I could hear the roar of the gases rushing out of the smoke stack and I could see huge flames and black smoke clouds coming out of the smoke stack. The event lasted for hours. When I went outside to get a better view from the street corner I could see Valero Oil Refinery to the east also flaring. I also called ConocoPhillips during the day and I was told that there was a power outage from the City of Los Angeles Department of Water & Power and that it was not their fault and there was nothing they could do.

15. On Thursday, October 4, 2007, I was awakened again at midnight 12:00am from the sound of ConocoPhillips flaring. I called and reported the incident to the SCAQMD and an

Inspector got back to me that morning. He told me that there was a power outage the night before, that the refinery was trying to come back on-line and that there was nothing SCAQMD could do to stop the pollution. I also spoke to a refinery representative who stated that the refinery was trying to come back on-line. I also took photographs of the flaring.

16. On Friday, October 5, 2007, at approximately 12:30pm, I was leaving my home to attend a meeting in downtown Los Angeles of the Southern California Association of Governments (SCAG) Goods Movement Committee when I saw yellow smoke flaring from one of the smoke stacks at ConocoPhillips. I could smell sulfur and other chemicals burning. I immediately returned home to get my camera to take some photographs.

17. From the evening of Wednesday, October 3, 2007, I began to feel sick. I had a headache, could not breathe well, had to take aspirins, decongestant pill, and had to use a nasal spray to clear my sinuses which were blocked. I felt dizzy and weak.

18. I am aware that refineries emit many hazardous air pollutants. Benzene in particular is a known human carcinogen which causes leukemia, and EPA has described it as the worst national cancer risk driver. Our organization CFASE recently conducted a Leukemia Public Health Survey in the Wilmington and Carson community near BP/ARCO Oil Refinery and our survey has revealed that there is as increased incidence of leukemia, leukemia deaths and leukemia symptoms in residents.

19. By breathing numerous air pollutants in and around my home, my office, and throughout my neighborhood, I am exposed to the hazardous air pollutants emitted by the refineries that operate in and near Wilmington, California. When any of the refineries in Wilmington, Carson, Torrance and El Segundo increases its toxic emissions as a result of a startup, shutdown, or malfunction, my exposure to those toxic emissions is increased.

20. The increased hazardous air pollutant emissions that result from startups, shutdowns, and malfunctions at the refineries in and around Wilmington make the air here smell foul and, at times unbreathable. Frequently, these SSM emissions cause me to experience burning in my eyes, throat and lungs, extreme difficulty breathing, and the sensation of having to gasp for more air. They also cause me to choke, feel dizzy and disoriented, and to suffer from nausea and stomachs aches. In addition, they make me feel very tired and weak. On many occasions, these emissions have caused me to feel sick for days and to miss work, miss classes that I attend, miss community meetings, not enjoy life, not visit friends and stay home sick until I feel well. Because I do not have health insurance, these emissions also force me to spend money on over-the-counter medicines to try to treat the symptoms they cause.

21. The increased hazardous air pollutant emissions that result from startups, shutdowns, and malfunctions at the refineries in and around Wilmington diminish my ability to feel safe, to rest or sleep peacefully, and to enjoy everyday life and outdoor activities in my community. During startups, shutdowns, and malfunctions at night, the flares lighting up the sky and the roaring of the toxic gases as they rush out of the refineries' vents deprives me of the quiet enjoyment of my home and peace of mind.

22. In addition, my exposure to these emissions increases my risk of cancer and other serious adverse health effects and disabilities.

23. I am aware that refineries and other major sources of carcinogenic, toxic and hazardous air pollutants, chemicals and substances frequently exceed their emission standards during periods of startup, shutdown, and malfunction. I also am aware, however, that EPA has provided an automatic exemption from compliance with emission standards during periods of startup, shutdown, and malfunctions, for all major sources of hazardous air pollutants.

24. EPA's exemption allows refineries and other major sources of carcinogenic, toxic and hazardous air pollutants, chemicals and substances in Wilmington and elsewhere to exceed their emission standards during periods of startup, shutdown, and malfunction without incurring penalties or legal liability. If EPA's exemption did not exist, major sources of hazardous air pollutants would have to comply with their public safety health and air quality emission standards at all times. Thus, by allowing polluters to exceed their emission standards without facing penalties or legal liabilities, EPA's exemption prolongs and increases my exposure to hazardous air pollutants and to the increased risk of cancer and other adverse health effects that they cause. Likewise, it increases the damage to my interest and right to living in a safe community where the air is not dangerous and does not smell foul and where residents can sleep at night without being awakened by the roar and lights of refineries flaring their toxic gases.

25. I am aware that EPA also has decided to block citizens' access to the startup, shutdown, and malfunction plans that major sources of carcinogenic, toxic and hazardous air pollutants, chemicals and substances such as the refineries in and around Wilmington, must prepare. I am aware that EPA also has eliminated any requirement that such sources comply with their own startup, shutdown, and malfunction plans. I also am aware that EPA has eliminated the requirement that startup, shutdown and malfunction plans, and revisions to such plans, be reviewed and approved by State permitting authorities in a process that is open to participation and comment by the public.

26. As stated in paragraph 13, above, CFASE and I have worked extensively to reduce the toxic emissions that take place during SSM events at the refineries operating in and around Wilmington. By blocking public access to SSM plans, EPA deprives me of information to which I have a right under the Clean Air Act. If I could obtain access to startup, shutdown and

malfunction plans, I would use the information they contain to evaluate claims by refineries and other major sources of hazardous air pollutants that their excess emissions are not a basis for penalties or legal liability. I would also use the information in SSM plans to advocate for better and more protective measures that plants could take during startup, shutdown, and malfunction to minimize their excess emissions.

27. Allowing the public to better enforce the Clean Air Act would reduce the number of instances when public safety health and air quality emission standards are exceeded by the refineries in and around Wilmington. By blocking public access to startup, shutdown, and malfunction plans, EPA effectively prevents the public from evaluating claims by refineries and other major sources of hazardous air pollutants that their excess emissions are not a basis for penalties or legal liability and thus effectively prevents us from enforcing emission standards. By sharply reducing the public's ability to bring enforcement cases, EPA eliminates an important incentive for polluters to comply with emission standards, and increases the likelihood that they will not comply. Therefore, it increases my exposure to hazardous air pollutants, to the risk of adverse health effects these pollutants cause, and to my ability to enjoy life in my community.

28. By eliminating the requirement that major sources of hazardous air pollutants comply with their startup, shutdown and malfunction plans, EPA deprives me and other members of the public of the right to enforce sources' compliance with their SSM plans. Further, it eliminates any assurance that sources are taking all necessary steps to reduce emissions during periods of startup, shutdown and malfunction. Thus, EPA increases the likelihood that they will not take the most protective measures to reduce emissions during such periods. Therefore, it increases my exposure to toxic pollution and to the risk of adverse health effects that result, and increases the damage to my ability to enjoy life in my community.

29. If startup, shutdown and malfunction plans and revisions to such plans are reviewed and approved by permitting authorities in a process that is open to public participation, their protectiveness and adequacy can be better assured. For example on September 12, 2005 the City of Los Angeles Department of Water & Power accidentally cut a cable which caused the power to go out at ConocoPhillips Oil Refinery, Valero Oil Refinery and Shell Oil Refinery in Wilmington. Because none of these refineries had backup power sources, the loss of public power caused one of the worst flaring incidents in recent Los Angeles history. I have attached pictures of the pollution that day. Attachment A at 6-7.

On that date I was at an environmental justice organizations meeting in Huntington Park and not in Wilmington at the time the flaring started. When the meeting finished at approximately 3:30pm I checked my cell phone messages and heard the voice of one of my members terrified telling me that all the refineries in Wilmington were on fire and smoke was everywhere. I immediately left and had to take the Los Angeles Harbor I-110 Freeway south to get back to Wilmington. I could see huge black clouds of smoke in the distance and in the direction of Wilmington from over 10 miles away.

I went straight to my home to obtain my camera. When I arrived at home I could see Wilmington residents everywhere in a state of panic, outside on the front lawns, sidewalks and many were packing their cars to get away. Many of my neighbors came up to me to ask me what to do and was it safe? I told them it was best to leave the area until we knew what was happening and what chemicals were being released. I told them that if they chose not to leave to stay indoors, close all windows and doors and turn on their televisions and listen to the news. I chose not to leave and began to take photographs of ConocoPhillips Oil Refinery, then drove to

Valero Oil Refinery and then to Shell Oil Refinery. Seeing three oil refineries flaring at once was one of the most frightening experiences of my life. The sky was filled with black smoke.

I could smell burning oil, sulfur, methane gas and many other smells. It was difficult to breathe, at times I was choking and my eyes were burning. I did not leave because I knew it was important to take as many photographs as possible since that is one of our primary goals to document flaring incidents, I knew that this one was one of the worst in recent years and I did not know if anyone else was taking photos. That night I was feeling very sick and was close to going to Harbor General Hospital our local Los Angeles County emergency treatment hospital. But since I did not have health insurance I was more concerned about having to pay thousands of dollars in doctor bills which I did not have. I also knew that there would probably be a lot more people than normal due to the flaring and that I would be waiting all night, since I was not life threatening case.

The next week after the incident out organization had a meeting and we decided that we would conduct a public community health and safety survey of Wilmington residents while everything was still fresh in their memory. We interviewd160 resident and asked over 50 questions. Based on the questionnaires, 11.2% went to see a doctor, 21.8% had to use medication, 12.5% had to purchase medication, 93.7% smelled something in the air, 37.5% were personally sickened, 29.3% had family members sickened, 46.2% had breathing problems 31.2% eyes were burning and many other symptoms.

Making the event all the more frustrating to me and to others living in Wilmington was the fact that it was preventable. If the refineries had a backup power source, the loss of public power would not have caused the malfunction. Alternatively, the refineries could install vapor recovery systems, a currently available control technology that would divert all of the toxic gases

they currently flare into storage tanks. Thus, if we had a chance to participate in the review and approval of the refineries SSM plans, CFASE and I would have made clear to the South Coast Air Quality Management District that the refineries needed a backup power source or a vapor recovery system.. But we had no such opportunity and, not surprisingly, the same thing happened again two weeks ago. On October 3, 2007 the City of Los Angeles Department of Water & Power once again cut power to ConocoPhillips Oil Refinery and Valero Oil Refinery. Once again they flared huge quantities of toxic gases into the Wilmington area, with predictable results. Attachment A at 4-5.

30. By exempting startup, shutdown, and compliance plans from a public review process in which a State permitting authority determines their adequacy, EPA deprives me of the right to information that I could obtain in that process relating to sources' emissions during SSM, their measures to control such emissions, and the nature of events that a given source regards as SSM rather than a violation of emission standards. Likewise, EPA deprives me of the right to participate in the review and approval of SSM plans and SSM plan revisions by permitting authorities, a right I would exercise in the future as a means of protecting myself and my community from excess toxic pollution. In addition, by exempting SSM plans from the public review process, EPA increases the likelihood that SSM plans will not be adequately protective and thus increases the likelihood that I will be exposed to more toxic pollution. CFASE is one of the few community based public interest organizations in the United States that has some knowledge and expertise of SSM and how to prevent malfunctions, breakdowns and human errors.

31. EPA's decision to exempt major sources of hazardous air pollutants from compliance with emission standards during periods of startup, shutdown, and malfunction prevents CFASE

and me from enforcing emission standards against sources that exceed emission standards during such periods. In addition, it prevents CFASE and me from using emission standards to reduce the toxic pollution that is emitted during SSM, reduce public health exposure risk and from informing the community about the actual extent to which emission standards are exceeded during SSM.

32. If CFASE had access to startup, shutdown, and malfunction plans for the refineries in Wilmington, Carson, Torrance and El Segundo and other major sources, it would inform its members and the general public about these plans and their adequacy. CFASE would also use these plans to advocate for more effective technologies and safety controls, and appropriate public notification measures during periods of startup, shutdown, and malfunction. For example, we would advocate that oil refineries plans include the use of backup power systems, vapor recovery systems, more frequent and comprehensive equipment inspection systems and additional monitoring equipment to prevent the black clouds of toxic pollution that blanketed Wilmington twice in the last two years during power outages. By blocking public access to startup, shutdown, and malfunction plans, EPA deprives CFASE of information to which it has a right under the Clean Air Act. EPA also prevents CFASE from: (1) reviewing and evaluating SSM plans; (2) informing its members and the public about their contents and adequacy; and (3); advocating for more effective plans that would help to protect the community from hazardous air pollutant emissions during startup, shutdown and malfunction events.

33. If CFASE had an opportunity to participate in the review and approval of startup, shutdown, and malfunction plans and revisions to such plans by Federal, State and Regional permitting authorities, it would do so as a means to advocate for more protective plans that would better protect its members, staff, volunteers, student interns, board members and others

living in Wilmington, Carson, Torrance and El Segundo from refineries carcinogenic, toxic and hazardous air pollution, chemicals and substances. For example, we would advocate that refineries' plans include the use of backup emergency power systems, vapor recovery systems, more frequent and comprehensive equipment inspection systems and additional monitoring equipment to prevent the clouds of carcinogenic, toxic and hazardous air pollution, chemicals and substances that blanketed Wilmington, neighboring communities and cities twice in the last two years during power outages. By preventing CFASE from participating in review and approval of SSM plans and plan revisions by Federal, State and Regional permitting authorities, EPA deprives CFASE of information — to which CFASE has a right under the Clean Air Act — regarding sources' SSM plans, the adequacy of such plans, and the nature of events that sources regard as SSM. EPA also deprives CFASE of its right to participate in this process as well as of the opportunity to reduce the toxic pollution that is emitted during periods of SSM.

34. If CFASE had an opportunity to do so, it would work to ensure that the refineries in Wilmington, Carson, Torrance and El Segundo and other major sources actually implemented adequately protective startup, shutdown, and malfunction plans during periods of startup, shutdown and malfunction. Specifically, CFASE would review and evaluate the steps these sources took to control emissions during periods of startup shutdown and malfunction and determine whether they complied with their startup, shutdown and compliance plans. CFASE would inform its members and the public about sources' compliance and non-compliance with startup, shutdown, and compliance plans. CFASE would also seek to hold sources accountable for non-compliance with startup, shutdown, and compliance plans as a means to obtain better control of emissions and reduce toxic pollution in the community. In addition, if sources complied with their SSM plans but still emitted hazardous air pollutants into the neighborhood,

CFASE would use that information to evaluate the adequacy of sources' startup, shutdown and compliance plans, inform the public of the adequacy of such plans, and advocate for better and more effective plans with both the sources themselves and with State and Regional permitting authorities. By blocking public access to startup, shutdown, and malfunction plans, by preventing CFASE from participating in review and approval of plans and plan revisions by Federal, State and Regional permitting authorities, and by exempting sources from any obligation to comply with their startup shutdown and malfunction plans, EPA deprives CFASE of this advocacy opportunity to reduce the carcinogenic, toxic and hazardous air pollution, chemicals and substances in Wilmington, Carson, Torrance and El Segundo and elsewhere.

35. I declare under penalty of perjury that the foregoing is true and correct. Executed this 26 day of October, 2007.

Jesse N. Marquez

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 02-1135 (and consolidated case Nos. 03-1219, 06-1215, 07-1201)

DECLARATION OF HILTON KELLEY

I, Hilton Kelley, declare as follows:

1. I am a resident of Port Arthur in Jefferson County, Texas, where I reside at 910 Colorado Avenue, Port Arthur, Texas 77642. My home is approximately four to five miles from the Premcor and Motiva refineries. My office is located at 732 Texas Avenue, Port Arthur, Texas 77640, which is approximately 1 mile from the Premcor and Motiva refineries.

2. I often see the Premcor and Motiva facilities flaring. The flaring incidents often coincide with my eyes burning and watering and my throat hurting. On the 27th of July 2007 there was a storage tank spill at the Premcor / now Valero refinery facility there was heavy

sulfur and chemical odors that sent more than 38 residents to the hospital the smell was so bad many residents were throwing up and feeling very ill. many folk complained that they couldn't breath and they had to place towels over their nose and mouths to try and filter out the fumes and chemical odors so they could breath. On the 5th of August 2007 a week after the spill at Valero / Premcor refinery there was an explosion that sent people literally running from their homes. The explosion shook many of the homes and sent a yellowish green plume into the air resident didn't know what to think or do. Later we found out that Valero's Sulfur unit had exploded and it sent hundreds if not thousands of pounds of Sulfur into the air. On the 13th of September Hurricane Humberto hit the Port Arthur TX Community the storm knocked out electrical power through out the whole town, homes and all of the refineries in the immediate area (Chevron chemical, Motiva refinery and Valero) Flares at these facilities spewed out black smoke for at least five days and once again we were exposed to strong chemical odor through out the community these odors really make your stomach turn and your eyes burn, it takes your breath away literally.

3. I am worried about the long-term effects of hazardous air pollutants ("HAPs") on my health and that of my community. Specifically, I am worried about long-term effects such as premature death; cancer; respiratory illness; aggravation of heart conditions and asthma; permanent lung damage; reproductive, neurological, developmental, respiratory, and immunological problems; bio-mutations; and cardiovascular and central nervous system problems.

4. Many residents in our area don't let their kids play out side or go to the park due to the odors and the constant threat of an explosion or chemical leak. I like to jog but I have reframed from that activity out side because when you run you breath deeper than ordinary and I don't

want to inhale any more of this pollution than I have to. When ever driving, at all cost I try to avoid driving next to the refineries and chemical plants so I take an alternate root in stead.

5. I am currently a member of the Environmental Integrity Project ("EIP"), and I have been a member since 2004. I have worked with EIP for approximately five years to reduce air pollution in the Port Arthur, Texas area.

6. For example, I worked with EIP on its 2002 report entitled "Accidents Will Happen," which documented air pollution from malfunctions, startups and shutdowns at refineries and chemical plants in Port Arthur, Texas. More recently, I worked with EIP in opposing an expansion of the Motiva Enterprises, LLC ("Motiva") oil refinery in Port Arthur, Texas, which resulted in a settlement agreement in 2006.

7. In opposing the Motiva expansion, one of my goals was to enforce emissions standards. In so doing, I attempted to persuade the Texas Commission on Environmental Quality ("TCEQ") to consider potential violations from SSM emissions when permitting the expansion. However, those attempts were frustrated by the SSM rules.

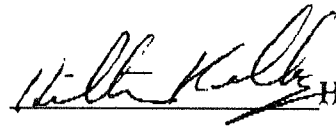
8. I have spent many hours reviewing TCEQ files and seeking to force TCEQ to issue stronger permits for facilities in Port Arthur. I have reviewed the web site of TCEQ at http://www2.tceq.state.tx.us/airperm/index.cfm?fuseaction=advsearch, which lists facilities with pending Title V permits in Jefferson County. This site indicates that numerous Title V permit amendments and renewals are pending, including an "initial review" of the Title V permit for the Premcor refinery in Port Arthur. *See* Appendix A. If SSM plans were available in Title V renewal proceedings, I would review those plans to ensure the health and safety of my community, and I would submit comments on those plans if I felt that they were insufficient.

9. I am concerned that U.S. Environmental Protection Agency's ("EPA's") rule amending the SSM requirements applicable to National Emission Standards for Hazardous Air Pollutants ("NESHAP") sources – such that sources are not required to implement an SSM plan or comply with emissions standards during SSM events, a permitting authority may deny public access to SSM plans, and sources are required to file a report documenting the steps that they took to minimize emissions only after SSM events – shields SSM plans from public review, renders the sources' duty to minimize emissions unenforceable, and violates the Clean Air Act's requirement that Title V permits contain provisions sufficient to assure compliance with the Act. In particular, I am concerned that the rule will allow industrial facilities near my home and office, including the Motiva and Premcor refineries, to avoid providing information sufficient to allow me to track whether or not these facilities are complying with federal air pollution control requirements. Without access to SSM plans before upsets occur, it will be impossible for me to determine whether these facilities are complying with their obligations under their permits and the Clean Air Act, and how potentially harmful their "upset" emissions may be to my health.

10. I am also concerned that if industrial facilities, including oil refineries, are not required to implement SSM plans and comply with emissions standards during SSM events, then their emissions will increase as there will be no way to deter violations and no threat of practical enforcement action for any SSM emissions.

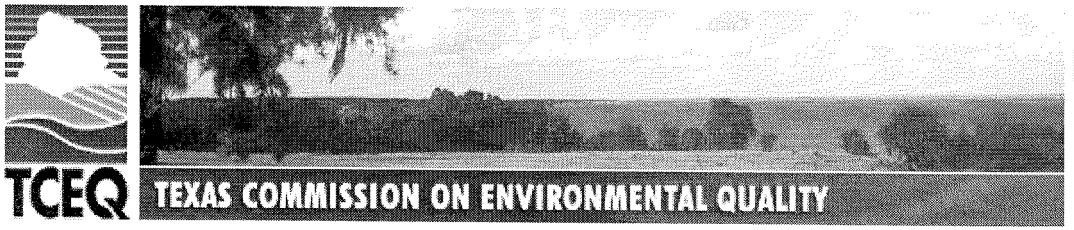
I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATE: October 23, 2007


Hilton Kelley

Appendix A

Pending TCEQ Title V Permitting Actions in Jefferson County, Texas



Air Permits Search Database (Title V and New Source Review)

Online Help Search Again Last Updated Date : 10/18/2007

Air Permitting Actions for:

county: JEFFERSON
program area: Both
project type: Any
permit type: FEDERAL (TITLE V) SITE PERMIT
unit type:
project status: Pending
order by: proj_num

Click on the Project Number to see details about that permit application.

Program Area	Permit Number	Permit Type	Permit Status	Project Number	STDX/PBR	Company Name	Customer Number	Project type	TCEQ Received Date	Technical Review Finished	Rene Date
FOP	1498	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	1498		THE PREMCOR REFINING GROUP INC	CN601420748	INITIAL REVIEW	01/15/98	01/08/07	01/08
FOP	1267	FEDERAL (TITLE V) SITE PERMIT	OPEN	8961		TOTAL PETROCHEMICALS USA INC	CN600582399	MINOR REVISION	08/30/06		
FOP	1509	FEDERAL (TITLE V) SITE	EFFECTIVE	9049		VEOLIA ES TECHNICAL	CN603069626	RENEWAL NOTICE	09/22/06		

		PERMIT				SOLUTIONS LLC				
FOP	2163	FEDERAL (TITLE V) SITE PERMIT	OPEN	9183		AK HA MANUFACTURING LLC		RENEWAL NOTICE	10/24/06	
FOP	2802	FEDERAL (TITLE V) SITE PERMIT	OPEN	9515		DCP MIDSTREAM LP	CN601229917	SIGNIFICANT REVISION	01/03/07	
FOP	2288	FEDERAL (TITLE V) SITE PERMIT	OPEN	9901		HUNTSMAN PETROCHEMICAL CORPORATION	CN600632848	ADMINISTRATIVE REVISION	01/29/07	
FOP	1327	FEDERAL (TITLE V) SITE PERMIT	OPEN	9905		TEXAS PETROCHEMICALS LP	CN600130322	MINOR REVISION	01/29/07	
FOP	1025	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	9956		UNION OIL COMPANY OF CALIFORNIA DBA UNOCAL PIPELINE COMPANY	CN600124879	RENEWAL NOTICE	01/25/07	
FOP	1269	FEDERAL (TITLE V) SITE PERMIT	OPEN	9958		DUPONT DOW ELASTOMERS LLC		RENEWAL NOTICE	01/25/07	
FOP	1620	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	9962		EQUISTAR CHEMICALS LP	CN600124705	RENEWAL NOTICE	01/25/07	
FOP	1960	FEDERAL (TITLE V) SITE PERMIT	OPEN	9970		LUCITE INTERNATIONAL INC	CN601448764	MINOR REVISION	02/01/07	
		FEDERAL (TITLE				THE PREMCOR				

FOP	2228	V) SITE PERMIT	OPEN	9972
FOP	2190	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10011
FOP	1317	FEDERAL (TITLE V) SITE PERMIT	OPEN	10114
FOP	1509	FEDERAL (TITLE V) SITE PERMIT	OPEN	10258
FOP	1657	FEDERAL (TITLE V) SITE PERMIT	OPEN	10350
FOP	2163	FEDERAL (TITLE V) SITE PERMIT	OPEN	10357
FOP	2954	FEDERAL (TITLE V) SITE PERMIT	OPEN	10436
FOP	2036	FEDERAL (TITLE V) SITE PERMIT	OPEN	10513
FOP	2286	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10652
FOP	2190	FEDERAL (TITLE V) SITE PERMIT	OPEN	10686

REFINING GROUP INC	CN601420748	MINOR REVISION	02/07/07		
EQUISTAR CHEMICALS LP	CN600124705	RENEWAL NOTICE	01/25/07		
HUNTSMAN PETROCHEMICAL CORPORATION	CN600632848	MINOR REVISION	03/13/07	09/17/07	01/0
VEOLIA ES TECHNICAL SOLUTIONS LLC	CN600130835	RENEWAL	04/19/07		
850 PINE STREET INC	CN603062266	MINOR REVISION	04/27/07		
AK HA MANUFACTURING LLC		RENEWAL	05/10/07		
INEOS USA LLC	CN602817884	INITIAL REVIEW	05/30/07		
EXXONMOBIL OIL CORPORATION	CN600920748	MINOR REVISION	06/04/07		
HUNTSMAN PETROCHEMICAL CORPORATION	CN600632848	RENEWAL NOTICE	07/02/07		
EQUISTAR CHEMICALS LP	CN600124705	RENEWAL	06/29/07		

FOP	1620	FEDERAL (TITLE V) SITE PERMIT	OPEN	10687
FOP	1409	FEDERAL (TITLE V) SITE PERMIT	OPEN	10700
FOP	1322	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10720
FOP	1327	FEDERAL (TITLE V) SITE PERMIT	OPEN	10721
FOP	2551	FEDERAL (TITLE V) SITE PERMIT	OPEN	10755
FOP	2965	FEDERAL (TITLE V) SITE PERMIT	OPEN	10770
FOP	1025	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10781
FOP	1269	FEDERAL (TITLE V) SITE PERMIT	OPEN	10812
FOP	1707	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10841
		FEDERAL (TITLE		

EQUISTAR CHEMICALS LP	CN600124705	RENEWAL	06/29/07
CHEMTRADE REFINERY SERVICES INC	CN600129993	RENEWAL	07/10/07
HUNTSMAN PETROCHEMICAL CORPORATION	CN600632848	RENEWAL NOTICE	07/26/07
TEXAS PETROCHEMICALS LP	CN600130322	RENEWAL NOTICE	07/26/07
BASF FINA PETROCHEMICALS LIMITED PARTNERSHIP	CN600128912	MINOR REVISION	07/09/07
BASF FINA PETROCHEMICALS LIMITED PARTNERSHIP	CN600128912	INITIAL REVIEW	07/19/07
UNION OIL COMPANY OF CALIFORNIA DBA UNOCAL PIPELINE COMPANY	CN600124879	ADMINISTRATIVE REVISION	
DUPONT PERFORMANCE ELASTOMERS LLC	CN600129571	RENEWAL	08/03/07
EXXONMOBIL OIL CORPORATION	CN600920748	OP-NOTIFY	08/07/07
BMC HOLDINGS		RENEWAL	

FOP	1645	V) SITE PERMIT	EFFECTIVE	10874
FOP	2294	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10878
FOP	1636	FEDERAL (TITLE V) SITE PERMIT	OPEN	10911
FOP	1212	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10932
FOP	1317	FEDERAL (TITLE V) SITE PERMIT	OPEN	10945
FOP	1877	FEDERAL (TITLE V) SITE PERMIT	OPEN	10957
FOP	1593	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10977
FOP	2000	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	10980
FOP	1998	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	11031
FOP	1707	FEDERAL (TITLE V) SITE PERMIT	OPEN	11047

INC	CN601307218	NOTICE	08/15/07
THE GOODYEAR TIRE & RUBBER COMPANY	CN600616049	RENEWAL NOTICE	08/15/07
ARKEMA INC	CN600124044	SIGNIFICANT REVISION	08/22/07
THE PREMCOR PIPELINE CO		RENEWAL NOTICE	
HUNTSMAN PETROCHEMICAL CORPORATION	CN600632848	SIGNIFICANT REVISION	09/05/07
BASF FINA PETROCHEMICALS LIMITED PARTNERSHIP	CN600128912	RENEWAL	09/06/07
THE GOODYEAR TIRE & RUBBER COMPANY	CN600616049	RENEWAL NOTICE	09/10/07
EXXONMOBIL OIL CORPORATION	CN600920748	RENEWAL NOTICE	09/10/07
EXXONMOBIL OIL CORPORATION	CN600920748	RENEWAL NOTICE	05/01/07
EXXONMOBIL OIL CORPORATION	CN600920748	RENEWAL	09/19/07

FOP	1493	FEDERAL (TITLE V) SITE PERMIT	OPEN	11091	OXBOW CALCINING LLC	CN602552424	MINOR REVISION	10/01/07
FOP	1657	FEDERAL (TITLE V) SITE PERMIT	OPEN	11127	850 PINE STREET INC	CN603062266	RENEWAL NOTICE	
FOP	1870	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	11129	EXXONMOBIL OIL CORPORATION	CN600920748	RENEWAL NOTICE	
FOP	1871	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	11130	EXXONMOBIL OIL CORPORATION	CN600920748	RENEWAL NOTICE	
FOP	1386	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	11181	MOTIVA ENTERPRISES LLC	CN600124051	OP-NOTIFY	10/16/07
FOP	1025	FEDERAL (TITLE V) SITE PERMIT	EFFECTIVE	11190	UNION OIL COMPANY OF CALIFORNIA DBA UNOCAL PIPELINE COMPANY	CN600124879	OP-NOTIFY	10/15/07

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135
	)	(and consolidated case
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Nos. 03-1219, 06-1215, 07-1201)
Respondents.	)	

DECLARATION OF SUSAN FALZON

1. I currently sit on the Board of Directors for Friends of Hudson. I have occupied a number of positions with Friends of Hudson since 1999, including deputy director and executive director.

2. I live at 21 Hawthorne Avenue, Troy, New York 12180. I also own a home in Athens, New York, and spend 2-3 days there each week. I work in Hudson, New York, 3-4 days each week.

3. My home in Athens is less than 15 miles from both the Lafarge and Glens Falls Lehigh Cement Plants. When I am at work in Hudson, New York, I am also less than 15 miles from the Glens Falls Lehigh Cement Plant. I pass the Lafarge plant each time I drive between Troy and Hudson, and between Troy and Athens.

4. I am aware that the cement plants emit hazardous air pollutants. When I am outside, I breathe the air. By doing so, I am exposed to hazardous air pollutants.

5. I am aware that EPA's General Provisions for its air toxics program establishes compliance requirements for major sources of hazardous air pollutants. Included in these requirements are facilities' obligations during periods of startup, shutdown and malfunction (SSM).

6. I am aware that EPA's General Provisions provide an automatic exemption from compliance with emission limits during SSM events for all major sources of hazardous air pollutants, including cement plants. As a result, cement plants like Lafarge and Glens Falls Lehigh are allowed to exceed emission limits during periods of SSM.

7. I understand that facilities can emit greater quantities of hazardous air pollutants during SSM events. When Lafarge or Glens Falls Lehigh are operating in SSM mode, emissions of hazardous air pollutants, including mercury and dioxin, increase. I am exposed to greater amounts of toxic air when Lafarge and Glens Falls Lehigh increase emissions during SSM events.

8. Since EPA's General Provisions do not require facilities to comply with emission standards during SSM events, it is more likely that emissions at Lafarge and Glens Falls Lehigh increase during SSM events. As a result of EPA exempting major sources of hazardous air pollutants from meeting emissions limits during periods of SSM, I am more likely to be exposed to greater quantities of hazardous air pollution being emitted from Lafarge and Glens Falls Lehigh. This additional exposure increases my risk of suffering adverse health effects.

9. I am concerned with EPA's decision to block public access to SSM plans. Since facilities are allowed to increase their emissions of hazardous air pollutants during SSM events, that information should be made available to individuals so we can be sure our health is being protected. Since EPA has decided to block public access to facilities' SSM plans, I am unable to

exercise my right to oversee facilities' activities. As such, EPA makes emission standards more difficult to enforce and thus eliminates an important incentive for polluters to comply with emission standards.

10. Holding polluters accountable for exceeding emission standards is within Friends of Hudson's mission statement. EPA's decision to exempt major sources of hazardous air pollutants from compliance with emission standards during SSM events prevents Friends of Hudson and me from enforcing emission standards against sources that exceed emission standards during periods of SSM.

11. By blocking public access to SSM plans, EPA denies Friends of Hudson and me information to which we have a right under the Clean Air Act. Therefore, we are prevented from informing the community about the actual extent of toxic pollution emissions during SSM events. EPA denies Friends of Hudson access to vital information that we would use to ensure that facilities take the most protective measures to limit emissions of hazardous air pollution during SSM events.

12. If Friends of Hudson had the opportunity to participate in the review and approval of SSM plans, it would advocate for the implementation of more protective measures at major sources of hazardous air pollution to limit its members' exposure to such toxins. By denying Friends of Hudson information regarding plants' SSM plans, EPA denies Friends of Hudson its right to participate in the review and approval processes of such plans, as well as the opportunity to reduce toxic air pollution.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of October, 2007.

Susan Falzon

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135
	)	(and consolidated case
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Nos. 03-1219, 06-1215, 07-1201)
Respondents.	)	

DECLARATION OF ELIZABETH AVANTS

1. I am a member of the Louisiana Environmental Action Network (LEAN) and have been since 1986.

2. I am also the co-leader of Alliance against Waste and Action to Restore the Environment (AWARE).

3. I live at 58135 Main Street, Plaquemine, LA 70764. I have lived in Iberville Parish for over 50 years.

4. I am exposed to emissions from a number of industrial complexes in my parish, including the Dow Chemical Plant and the Georgia Gulf Chemical Plant, which are both approximately two miles from my home.

5. For more than twenty years, I have advocated to limit emissions of toxic pollutants from the companies in and around my community. I have testified at permit hearings to urge the Louisiana State Department of Environmental Quality to include stringent emission limits in facilities' permits to operate.

6. Well-informed individuals are in the best position to protect public health and the environment. To help inform my neighbors and me, I have done extensive research on facilities' emission rates and permitting procedures. I have disseminated this information in letters to the editor, by word of mouth, and in flyers, which I have distributed at rallies and by going door-to-door in my community.

7. I spend considerable amounts of time outdoors on the weekends. I like to walk with my father and play with my grandchildren, who range in age from newborn to 12 years. I also spend 2 to 3 hours outside each weekend doing yard work. When I am outside with my family, I breathe the air. When my family is outside, they breathe the air. I am concerned that my children and grandchildren have never had a day when they have not breathed toxic air. I am also concerned about the effects of toxic air pollution on individuals whose health is already compromised.

8. I am aware that Dow Chemical and Georgia Gulf emit large amounts of hazardous air pollutants, including vinyl chloride, exposure to which can cause angiosarcoma, a rare liver cancer.

9. Three or four times a year, the LHC3 flare in the Dow facility gets so big it can be seen from the bridge in Baton Rouge, which is about 15 miles away. I have asked the state Department of Environmental Quality why the flares occur, and I understand that these flaring incidents occur during malfunction events, and that the flare is used for safety reasons to burn excess chemicals. I also understand that emissions of harmful air pollutants often exceed allowable limits during these malfunction events, as well as when the facilities are in startup and shutdown mode, and that my exposure and my family's exposure to harmful toxins increases as a result.

10. Occasionally, some of the facilities in my parish have incidents that cause greater emissions of black smoke, which is indicative of an upset.

11. I am aware of the EPA's General Provisions, which establish compliance requirements for major sources of hazardous air pollutants. EPA's General Provisions set out sources' compliance obligations during periods of startup, shutdown and malfunction (SSM). I am concerned that 1) EPA does not require facilities to comply with emissions limits during periods of SSM, 2) SSM plans are not subject to state review and approval in a process that is open to public participation, and 3) the EPA has decided to block public access to SSM plans.

12. EPA's General Provisions exempt major sources of hazardous air pollutants from compliance with emission standards during SSM events. As a result, major sources of hazardous air pollution, like Dow and Georgia Gulf, are allowed to exceed their emission standards during periods of SSM.

13. I am aware that sources' emissions of hazardous air pollution can increase during periods of startup, shutdown and malfunction. When Dow and Georgia Gulf are in SSM mode, their toxic emissions increase. As a result, my family and I are exposed to more toxic pollution than we would be ordinarily. By exempting facilities from complying with emission standards during SSM events, EPA's General Provisions increase the risk that facilities will exceed emissions limits, thereby allowing my exposure to greater quantities of harmful toxins.

14. By blocking public access to SSM plans, EPA deprives me of information to which I have a right under the Clean Air Act. If I had access to SSM plans, I would use the information to evaluate whether facilities such as Dow and Georgia Gulf are taking necessary steps to limit excess emissions during SSM events.

15. Because EPA has decided to block public access to SSM plans, I am denied access to information to which I am entitled. As a result, I am unable to advocate for better and more protective startup, shutdown and malfunction measures. If I had access to SSM plans, I would advocate for facilities to take more effective steps in reducing emissions during SSM events as a means to reducing the amount of toxic pollution to which my family and I are exposed.

16. As stated in paragraphs 5 and 6 above, I have advocated for more than 20 years to reduce harmful emissions in my community. By blocking my access to facilities' SSM plans, EPA deprives me of my right to fully participate and engage in advocacy to protect myself from exposure to harmful toxins.

17. If SSM plans were reviewed and approved by permitting authorities in a process that is open to public participation, I would participate in the process to ensure the protectiveness and adequacy of facilities' SSM plans. For example, I would advocate to include limits on the number of SSM events included in facilities' permits. In addition, I would inform my neighbors whether facilities in our community are taking the most protective steps to reduce emissions during SSM events, which would enable them to participate in the review processes as well. EPA deprives me and my neighbors of the right to participate in this process and the opportunity it would provide us to reduce toxic pollution

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of October, 2007.

Elizabeth Avants

Elizabeth Avants

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135
	)	(and consolidated case
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Nos. 03-1219, 06-1215, 07-1201)
Respondents.	)	

DECLARATION OF GARY MILLER

1. I am a member of the Louisiana Environmental Action Network (LEAN) and have been since 1997.

2. I live at 819 Maxine Drive, Baton Rouge, LA 70808.

3. I have Bachelors and Masters Degrees in chemical engineering, and a PhD in Engineering Science. I work as a consulting engineer with LEAN and other environmental organizations in Baton Rouge. In that capacity, I work to ensure that Louisiana correctly implements the 1990 amendments to the Clean Air Act by reviewing permits and state implementation plans, and by testifying personally at hearings. I also provide information which LEAN includes on the website and in newsletters to its members to increase public awareness.

4. There are many major sources of hazardous air pollution in and around my community. Particularly, the Dow Chemical Plant, the Exxon Chemical Plant, and the Exxon Refinery are all within 6 1/2 miles from where I live. These facilities emit large numbers of toxic air pollutants, including benzene and other human carcinogens.

5. On the weekends, I spend 2 to 3 hours in my yard. When I am outside, I breathe the air.

6. The community in which I live has been dubbed “cancer alley” due to the high rates of cancer. It is suspected that the high rates of cancer are caused by emissions from the hundreds of industrial facilities along the Mississippi River.

7. I am aware that hazardous air pollutants can be transported great distances by air currents. I am therefore exposed to hazardous air pollutants emitted by sources outside of the immediate area of my residence.

8. I am aware that hazardous air pollutants such as dioxin and mercury are deposited in the water and soil, where they persist for long periods of time and bioaccumulate in wildlife and livestock. I buy and consume locally grown produce. By consuming locally grown produce, I am exposed to hazardous air pollutants emitted from the sources in and around my community.

9. I am aware of EPA’s “General Provisions” for its air toxics program. I am aware that these provisions establish requirements regarding facilities’ obligations to comply with emission standards during periods of startup, shutdown or malfunction (SSM).

10. I am aware that major sources of hazardous air pollution are automatically exempt, under EPA’s General Provisions, from complying with emission standards during SSM events. As a result, facilities are allowed to emit greater quantities of hazardous air pollutants during SSM events than the Clean Air Act permits.

11. I am aware that facilities’ emissions of hazardous air pollution increase during SSM events.

12. Since EPA’s General Provisions allow facilities to exceed emission limits during SSM events, I am exposed more to harmful toxins. When facilities in my community operate in

SSM mode, their emissions of carcinogenic and other hazardous air pollutants increase. As a result, I am exposed to more toxic pollution and at an increased risk of adverse health effects. Also, the knowledge that I am being exposed to toxic chemicals diminishes my ability to enjoy daily life and activities in and around my home.

13. I am aware that EPA has decided to block public access to facilities SSM plans. In doing so, EPA has deprived me of information to which I have a right under the Clean Air Act. I am aware that the adequacy of facilities' SSM plans directly relates to the amount of toxic air pollutants facilities emit during SSM events. Inadequate SSM plans will increase toxic emissions in the air. By blocking my access to SSM plans, EPA prevents me from evaluating the effectiveness of the SSM plans at facilities in my community.

14. If I had access to SSM plans, I would more effectively advocate to reduce emissions of hazardous air pollutants in my community. I would also help prepare LEAN and its members to more effectively advocate for emissions reductions. By blocking public access to SSM plans, EPA has denied me access to information to which I have a right under the Clean Air Act. As a result, I am unable to fully participate in the review and approval processes of facilities' permits and operations.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of October, 2007.

Gary Miller

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135
	)	(and consolidated case
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Nos. 03-1219, 06-1215, 07-1201)
Respondents.	)	

DECLARATION OF MARY LEE ORR

1. I am the Executive Director of Louisiana Environmental Action Network (LEAN) and have been since 1988. Our office is located at 162 Croydon Avenue, Baton Rouge, LA 70806. I spend several hours each day at the LEAN office on Croydon Avenue.

2. I live at 1373 Crescent Drive, Baton Rouge, LA 70806.

3. There are many sources of hazardous air pollutants in the greater Baton Rouge metropolitan area. I have commented on and been involved in air issues since 1986. I live near the Exxon Chemical Plant, the Exxon Plastics Plant, the Exxon Resin Finishing Plant, the Exxon Polyolefins Plant, and the Honeywell Chemical Plant, and facilities along Scenic Highway, which are all within 15 miles from where I live and work.

4. I am on the board of directors of the Atchafalaya Basinkeeper.

5. I have two grown sons who both live in Baton Rouge. Air quality has been important to me since my sons were born. In particular, my youngest son was born with a lung disease that

makes him more likely to suffer from respiratory problems. On days where the air quality was particularly bad, I stayed indoors with my son instead of taking walks or playing in the park.

6. I enjoy spending time outside. I take walks every day and spend time in my yard when I can. When I am outside, I breathe the air. When the air quality is really bad, especially in the summer, I can often smell chemicals in the air. If I am close to one of the refineries, the smell is so strong I can taste it in my mouth. On days when the air quality is so bad, I stay in my home with the windows closed and the air conditioner on because I don't want to breathe toxic air pollution.

7. I am aware that chemical plants emit many hazardous air pollutants, including vinyl chloride, benzene, and toluene. Breathing vinyl chloride for long periods of time can result in permanent liver damage, immune reactions, nerve damage and liver cancer. Benzene is a human carcinogen. Toluene can cause kidney and liver damage, as well as severe nervous system disorders, including impairment to vision, memory and coordination.

8. Because there are so many major sources of hazardous air pollutants in the Baton Rouge area, there is flaring at one of the facilities almost as often as they are all operating normally. The flaring is often accompanied by smoke that gives off a pungent odor. I understand that this flaring occurs when the facility is malfunctioning, and thus burning off excess materials. I also understand that these facilities emit high amounts of hazardous air pollution during these flaring episodes. When the facilities emit more hazardous air pollutants, I am exposed more toxic pollution when I breathe.

9. I am aware that EPA's General Provisions for its air toxics program establish sources' compliance obligations during periods of startup, shutdown and malfunction (SSM). I am also aware that these General Provisions automatically exempt major sources of hazardous

air pollutants from meeting emission standards during periods of SSM. Because EPA exempts major sources of toxic air pollution from meeting emission limits during SSM events, sources are allowed to exceed emission limits during SSM events.

10. When the Exxon and Honeywell facilities startup, shutdown or malfunction, their toxic emissions increase. As a result, I am exposed to more hazardous air pollution.

11. Since EPA has eliminated the requirement that facilities' SSM plans be reviewed and approved by state permitting agencies, or that facilities comply with the SSM plans, it is more likely that facilities will exceed allowable emission levels during SSM events. When facilities emit more toxic pollution, I am exposed to more harmful chemicals. Without access to or the ability to enforce SSM plans, I have no effective way to ensure that my exposure is limited as much as possible.

12. In my capacity as Executive Director of LEAN, community members frequently contact me for information about air quality in and around Baton Rouge. In addition, I maintain email listservs and mailing lists that are used to update community members on permitting processes, educate them about the health hazards associated with the pollutants being emitted from the facilities, and inform them when one of the facilities has had an incident. By blocking public access to SSM plans, EPA deprives me of information that I would use to protect myself and my community from toxic air pollution.

13. If I had access to SSM plans, I would use them to advocate for more protective measures at facilities that would reduce the amount of toxic pollutants to which I am exposed during SSM events. Information on SSM plans would enable me to participate fully in the permitting processes of facilities near my home and workplace. Because EPA has decided to

block public access to SSM plans, my members and I cannot participate fully in the review and permitting processes of major sources of toxic air pollutants near our homes.

14. It is within the LEAN's mission statement to protect public health and the natural resources of Louisiana by requiring major sources of hazardous air pollutants to comply with the Clean Air Act. By blocking access to local facilities' SSM plans, EPA prevents LEAN from evaluating the effectiveness of the SSM plans, and we are unable to ensure that steps are taken to protect human health and the environment as much as possible.

15. Since EPA has decided to block public access to SSM plans, LEAN is unable to enforce emissions limits at facilities in and around Baton Rouge.

16. Without access to SSM plans, my members and I are unable to determine whether facilities, such as Honeywell, are taking every necessary step to limit emissions during SSM events. LEAN would use the information in SSM plans to advocate for more protective measures during SSM events, and to ensure that facilities implement the most protective measures during SSM events to limit emissions of hazardous air pollutants. By blocking public access to SSM plans, EPA denies LEAN the opportunity to fulfill its mission.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of October, 2007.

Mary Lee Orr

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 02-1135 (and consolidated case Nos. 03-1219, 06-1215, 07-1201)

DECLARATION OF DR. NEIL CARMAN

1. I am a member of the Sierra Club, and have been since 1992.

2. I am the Clean Air Program Director of the Sierra Club Lone Star Chapter.

3. I have 27 years of combined experience in the field of air pollution control.

4. I served 12 years (1980-1992) as a state environmental regulatory official at the Texas Air Control (TACB), now the Texas Commission on Environmental Quality, which has federal regulatory oversight of industrial plants in Texas. My years at the TACB were spent entirely in the field inspecting, for state and federal air regulatory compliance, a broad range of industrial plant sites, including Portland cement kilns, incinerators, oil refineries and petrochemical plants. I conducted compliance inspections at more than 200 industrial plants annually and participated in stack testing and fenceline monitoring activities.

5. More recently, I have 15 years working in environmental regulation and policy implementation primarily in the state of Texas with non-governmental organizations,

including Sierra Club's Lone Star Chapter, and nearly ten years with the Galveston-Houston Association for Smog Prevention. I served as an independent technical advisor to an innovative Houston-Channelview Source Reduction Project set up by citizens living near Lyondell Petrochemical and Equistar Chemical to cut toxic air emissions by over one million pounds by working together with officials from the two large Houston chemical companies on a voluntary basis.

6. I live at 2 Crystal Creek Trail in Austin, Texas 78737-9067.

7. My work frequently takes me to areas of the state with large petrochemical complexes such as Houston and Port Arthur. I frequently travel to fenceline communities around facilities that emit hazardous air pollutants, and often smell chemicals that I can identify as hazardous air pollutants that are unhealthy to breathe. For example, within the last six months, I have driven along the fenceline of Port Arthur refineries operated by Motiva and Valero Refining, chemical plants operated by Huntsman Petrochemicals and Chevron Chemical; Port Neches chemical operated by Huntsman Petrochemicals, Texas Petrochemicals, and Equistar; the Shell Deer Park Refinery-Chemical Plant complex in Houston, Valero Refining's Houston refinery, Citgo's Houston Refinery, Texas Petrochemicals Houston butadiene plant, Mobil Chemicals Houston plant, and Goodyear's Houston synthetic rubber plant.

8. I am aware that there are high levels of toxic pollutants in the ambient air in the areas of Houston in which I work. I have read the 2006 City of Houston and University of Texas Health Science Center report entitled "A Closer Look at Air Pollution in Houston: Identifying Priority Health Risks." (Attachment A) This report identifies twelve pollutants, including 1,3-butadiene and benzene, that are present in

Houston' air at levels that are definite risks to human health. It also identifies nine pollutants present at levels that are probable risks.

9. I am aware of and have participated in meetings regarding TCEQ's efforts to reduce emissions from startup, shutdown and malfunction (SSM) events. I am aware that during periods of SSM, and periods of malfunction in particular, Texas sources, including refineries and petrochemical plants, can emit quantities of hazardous air pollution that are vastly greater than those they emit while operating normally. For example, the two large chemical plants at Channelview operated by Equistar and Lyondell Petrochemicals have had significant SSM emissions during startups and shutdowns of their olefinic monomer process units resulting in large, thick, high opacity smoke plumes released from elevated flares which I observed during visits to the Channelview area in recent years. Maintenance activities would also result in such visible emissions events from the emergency flare systems.

10. I am also aware that SSM events do not necessarily have to result in excess emissions. For example, a source can experience a lightening strike to a generator, causing that generator to malfunction. If, however, the facility is equipped with a back-up generator, as many are, excess emissions can be significantly minimized or eliminated.

11. Likewise, during SSM events, many refineries and chemical plants route chemicals to a flare. Because flares are not 100% efficient, they release significant quantities of hazardous air pollutants, including benzene and butadiene. I am also familiar with the 2006 report by Industrial Professionals for Clean Air entitled, "Reducing Emissions from Plant Flares." (Attachment B) This paper reviews the

literature evaluating effects of operating parameters on flare efficiency, as well as recent approaches by industry and government to quantify and reduce hydrocarbon emissions from flares. I am aware that many refineries, including many in California have installed compressors to allow waste gases from upsets and routine operations to be recycled rather than flared. I am also aware that careful regulation of operating parameters, such as maintaining a careful balance between smokeless and oversteamed flaring is essential for maximizing reductions of SSM emissions from flares.

12. I am aware that EPA has promulgated "General Provisions" for its air toxics program and these provisions establish important requirements regarding the compliance obligations for sources under many categories of major sources of hazardous air pollutants.

13. EPA's General Provisions set out sources' compliance obligations during periods of startup, shutdown and malfunction.

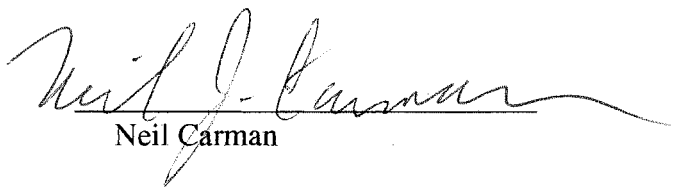
14. I am aware that EPA's General Provisions provide an automatic exemption from compliance with emission standards during periods of SSM for all major sources of hazardous air pollutants. This exemption allows these sources to exceed their emission standards with impunity during periods of SSM.

15. I am concerned that this broad general exemption from compliance during SSM allows sources to avoid technically feasible compliance with emission limits or other requirements, such as steam content control for flares, that could significantly reduce emissions of hazardous air pollutants.

16. By allowing sources to exceed emission standards during periods of SSM, EPA increases my exposure to hazardous air pollutants and to the resulting risk of adverse health effects.

17. By allowing sources not minimize emissions to the extent feasible during periods of SSM, EPA increases my exposure to hazardous air pollutants and to the resulting risk of adverse health effects.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22 day of October, 2007.



Neil Carman

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 02-1135 (and consolidated case Nos. 03-1219, 06-1215, 07-1201)

DECLARATION OF MARTI SINCLAIR

1. I am a member of the Sierra Club, and have been since 1992.

2. I am the chair of Sierra Club's national Air Committee, which is responsible for oversight of the Club's work on issues of air quality.

3. I also am the Environmental Justice Chair of the Conservation Committee of Sierra Club's Ohio Chapter.

4. Since 1994, I have worked on Sierra Club's behalf to improve efforts by EPA and Ohio to control and reduce emissions of hazardous air pollutants. For example, I commented extensively on EPA's proposed national regulations for municipal waste combustors, worked with the Sierra Club on developing air permits for the Formica and Moellering plants in Cincinnati, Ohio, and, last year, on developing comments on Ohio EPA's air toxics rule. Last year, I organized members of the public and groups to submit comments and to attend hearings on a draft permit for the installation of boilers at the Cognis facility in Cincinnati. Because I am aware that sources can emit vast quantities of hazardous air pollutants during periods of startup, shutdown and malfunction (SSM), I have worked specifically to ensure that regulations and permits contain

SSM provisions that are protective of public health.

5. As a Sierra Club volunteer, I worked extensively on a petition to US EPA challenging Ohio EPA's implementation and enforcement of the federal Clean Air Act. This petition effort resulted in substantive changes to the way Ohio EPA implements and enforces the federal Clean Air Act including cleaning out a vast backlog of enforcement cases. The petition process concluded in 2002. U.S. EPA Region 5 Administrator Thomas V. Skinner noted the following in a letter to Sierra Club through our attorney, "...Ohio EPA has taken steps in each program that should benefit its implementation of those programs... U.S. EPA has also followed up on many of the facility-specific concerns raised by the petitioners and commenters. Your involvement on behalf of your clients has highlighted the importance of these programs and the U.S. EPA recognizes your commitment to protect human health and the environment in Ohio."

6. My family and I live at 11986 Elm Grove Circle, Cincinnati, 45240. Our home is located in the same Miami River Valley as many major sources of hazardous air pollutants. According to US EPA's 2005 Toxic Release Inventory, Ohio ranks #1 nationally among the states for Hazardous Air Pollutant emissions and Hamilton County Ohio ranks #5 among Ohio counties for for Hazardous Air Pollutant emissions with more than 6 million pounds released as stack and fugitive emissions annually. My family's location in a highly polluted state and county cause me concern for our health. Every day, I spend significant amounts of time outside. Weather permitting, I garden for at least twenty minutes every day during the week. On weekends my family and I spend significant time walking in public parks in and around greater Cincinnati and attending local outdoor events.

7. When I am outside, I breathe the air. When my family is outside, they breathe the air. Outside air also circulates inside my home. Our family keeps our windows open day and night

weather permitting.

8. My office, where I work 4 days a week, is also in Cincinnati. While at work and commuting to and from my office, I breathe the polluted air in the Miami Valley.

9. I am aware that pollutants emitted in the Miami River Valley often remain and concentrate here.

10. My two children, who are eighteen and twenty-one years old have asthma. As a result, they have a greater sensitivity and are more at risk to air pollution than the population in general.

11. By breathing, my family and I are exposed to hazardous air pollutants emitted by sources operating in the Cincinnati area.

12. I am aware that hazardous air pollutants can be transported great distances by air currents. Therefore, by breathing, my family and I also are exposed to hazardous air pollutants emitted by sources that operate outside the Cincinnati area.

13. I am aware that hazardous air pollutants such as dioxins, mercury and polychlorinated biphenyls (PCBs) are deposited on water and soil, where they persist for long periods of time and bioaccumulate — especially in fish, meat and dairy products. By eating fish, meat and dairy products, my family and I are exposed to hazardous air pollutants emitted by sources in the Cincinnati area and also to hazardous air pollutants emitted elsewhere and transported to areas where the food that we eat is raised or caught.

14. According to the fish consumption advisory issued by the Ohio Department of Health, contaminants found in some Ohio fish include hazardous air pollutants such as PCBs and mercury. There are "do not eat" or "meal advise" advisories directed to all people for some or all fish species for certain Ohio water bodies such as Dick's Creek, the Great Miami River, and the Ohio River. In addition, all Ohio surface waters are under a statewide fish advisory, issued in

1997, for mercury contamination. This advisory limits consumption of all fish found in Ohio's waters for sensitive populations. Sensitive populations include women of childbearing age which includes my daughter and children under the age of six.

15. Until ten years ago, my family and I lived in Oklahoma, where we often enjoyed eating locally caught fish at community fish fries. Since moving to Ohio, we have refrained from eating locally caught fish because I am aware that they are unsafe to eat. My family would like to eat locally caught fish again, and would do so if the fish in Ohio's waters were made safe to eat again.

16. I am aware that EPA has promulgated "General Provisions" for its air toxics program and these provisions establish important requirements regarding the compliance obligations for sources under many categories of major sources of hazardous air pollutants.

17. I am aware that EPA's General Provisions provide an automatic exemption from compliance with emission standards during periods of SSM for all major sources of hazardous air pollutants. This exemption allows these sources to exceed their emission standards with impunity during periods of SSM.

18. I am aware that during periods of SSM, and periods of malfunction in particular, sources can emit quantities of hazardous air pollution that are vastly greater than those they emit while operating normally. For example, assume a facility that controls its emissions by 99% operates without controls during SSM periods and that SSM periods account for just 3% of its total operations: that facility's toxic emissions can be almost 200% greater than those from a facility that continues to control its emissions at all times, including periods of SSM. In my work for Sierra Club, I have learned that many facilities routinely operate in SSM mode for 2-3% of the time and that some facilities have operated in SSM for more than 25% of the time. By allowing

facilities to operate under SSM conditions without controlling emissions for any amount of time, EPA seriously undermines the environmental and public health protection that continuous compliance with Clean Air Act emission standards would otherwise provide.

19. Two major sources of hazardous air pollutants that have operated routinely in SSM mode are Cognis Corp. which makes specialty chemicals such as those used in personal care products, and Givaudan which makes flavoring products. The US EPA's 2005 Toxic Release Inventory data shows Cognis releasing 1/5 of the dioxin released into the air in Hamilton County, second only to Duke Energy countywide. Cognis and Givaudan emit, among other things sulfuric acid, hydrochloric acid, methanol, hydrogen fluoride, acetaldehyde, copper, lead, mercury, nickel, zinc, manganese, and ammonia.

20. Cognis has been operating with boilers in such poor condition that they have been malfunctioning for years and in 2005 their experienced workforce went out on strike which exacerbated the problem since the replacement workers had no experience operating the decrepit equipment.

21. The Ohio EPA exempts opacity exceedances if they occur during start up, shut down, or malfunction of a pollution source.

22. Opacity is used to measure compliance with particulate matter, which is used as a "surrogate" for metals in Cognis' emission standards. Therefore, opacity exceedances due to excess particulate matter have serious implications for metal air toxics emissions. Similarly, because methanol and total hydrocarbons are used as surrogates for gaseous organic toxics exceedances of standards for these pollutants also have air toxics implications.

23. Cognis reported excessive soot emissions during start up, shut down, and malfunctions of their boilers totaling 21 hours in 2003, 15 hours in 2004, and 77 hours in the first 3 quarters of

2005. However, as can be seen in the Ohio EPA's Findings and Orders quoted below, this is just the tip of the iceberg.

24. Shutdown of the process was one of the pollution control mechanisms put in place at Cognis. Quoting for the Ohio EPA Director's Findings and Orders issued on December 29, 2007:

- "29. On July 9, 2002, Respondents sent a letter to update HCDES....[E]missions units P010 and P017 were operated in violation of the Title V permit and/or PTI # 14-04576 and ORC...since April 17, 2001 and September 14, 2001, respectively. Respondents stated that based on the preliminary results, it was now simultaneously operating both the oxidizer and the scrubber systems in both buildings 60 and 68. Additionally, Respondents said that if the oxidizers failed, the process area would be shut down until repairs were completed...."

Additional malfunctions are further reported in those same Findings and Orders:

- "19. On November 30, 2001, Respondents sent a letter to the Hamilton County Department of Environmental Services ("HCDES"), Ohio EPA's contractual representative in Hamilton County, stating that the performance tests (i.e., stack tests) for emissions units P010 and P017 were being postponed due to internal equipment failure which prevented the units from achieving maximum operating conditions. "
- "20. On January 8, 2002, Respondents telephoned HCDES and stated that emissions unit P017 was not operating due to a failed transformer ..."
- "33. On November 11, 2002, Respondents sent HCDES a copy of the third

engineering study....The results indicated that there was a leak in building 60's oxidizer's preheater."

- 34. On November 27, 2002, Respondents sent a letter to HCDES ...[stating] that building 68's oxidizer had been examined and found to have one of the preheater tubes broken and approximately 50 percent of the other tubes leaking due to hairline fractures..."
- "50. On August 3, 2004, Respondents replied to the July 20, 2005 NOV. The Respondents had begun inspection of the baghouse controlling emissions unit B028 ... the inspection revealed that 19 of the 576 bags were broken..."
- "55. ...Respondents failed to comply with the PE limitation specified in the Respondents' Title V permit and PTI, from May 28, 2004 (the date of the first failed stack test) until December 8, 2004 (the date compliance was demonstrated), excluding approximately two months while the boiler only burned fuel oil or was shut down for maintenance, in violation of ORC..."
- "72. On March 23, 2006, Respondents' emissions unit B027 malfunctioned due to failed boiler tubes, resulting in heavy black smoke being emitted from the stack of the unit in excess of the opacity limitation in OAC Rule 3745-17-07. Respondents' April 10, 2006, report to HCDES stated that the malfunction was due to failed boiler tubes and the tripping out of some sections of the electrostatic precipitator serving emissions unit BO27 due to a large clinker bridging multiple wires. This malfunction event lasted from about 7:00 a.m. until 2:20 p.m. of the same day, when the boiler was shut down; and resulted in over 50 citizen complaints to HCDES. After shutting down the boiler, Respondents were able to

continue to operate by using a backup boiler. Ohio EPA finds that this malfunction was excessively long and in violation of OAC Rule 3745-15-06 and ORC ... "

- "76. On November 3, 2006, Respondents sent the results of the September 27, 2006 stack tests. The cover letter accompanying the results stated that Respondents believed the "high" emission rate was due to the catalyst in the incinerator (i.e., oxidizer) approaching the end of its useful life. Respondents stated that they had shut down emissions unit p010 and changed the catalyst on November 2, 2006."
- Hamilton County DES Complaint Investigation Report for Complaint #0621-05 for an incident occurring on 11/13/05 and reported by a complainant states, "A malfunction reported on Sunday 11/13 for Boiler #1 (B027) for a blown tube in the superheater. According to the report, "The incident reported at 3:00 PM was particulate emissions apparently from a start-up Boilers in start-up mode are exempt from VE [visible emissions] limitation until the exit temperature reaches 250 degrees F.... Smoke was due to a malfunction and subsequent start-up." The excursion lasted 4 minutes.
- Hamilton County DES Complaint Investigation Report for Complaint #0502-05 for an incident on September 15, 2005 states, "Two complainants called just before 8AM stating there was heavy smoke from stack #1 at Cognis. ... Just after they called, Cognis called in a Malfunction of Boiler #1 ..." The excursion lasted several minutes.
- Hamilton County DES Complaint Investigation Report for Complaint #0632-05

for an incident on 11/28/05 states, "... complaintant ...stated that there is black smoke ... pouring out of main stack. It has been occurring for approximately 3 hours....This malfunction was called into the agency's malfunction voice mail at 7:28 AM ..."

25. My home is approximately 8.4 miles from Cognis and 8.6 miles from Givaudan. My office is approximately 4.6 miles from Cognis and 3.5 miles from Givaudan. I have smelled the pollution from Cognis and Givaudan in the course of my daily life. The pollution from Cognis smells like rancid lard and other repulsive odors. The pollution from Givaudan smells like fermented fruit and sometimes an overwhelming buttery odor. When Cognis and Givaudan and other major sources startup, shutdown or malfunction, their toxic emissions increase. As a result, my family and I are exposed to more toxic pollution. The additional exposure to toxics increases our risk of suffering the adverse health effects that hazardous air pollutants can cause. In addition, the knowledge that we are being exposed to toxic pollution diminishes our ability to enjoy daily life and activities in and around our home.

26. I am aware that EPA also has decided to block citizens' access to the SSM plans that major sources of hazardous air pollutants, such as Cognis and Givaudan, must prepare. I am aware that EPA also has eliminated any requirement that such sources comply with their own SSM plans. I also am aware that EPA has eliminated the requirement that SSM plans, and revisions to such plans, be reviewed and approved by State permitting authorities in a process that is open to participation by the public.

27. I am concerned as to whether or not Cognis in Cincinnati has a SSM plan because another of their plants had no such plan. On December 19, 2003, US EPA Region V issued a Finding of Violation alleging that Cognis in Kankakee, Illinois, failed to have a SSM plan developed and

implemented by the required compliance date. Cognis in Cincinnati, Ohio filed an inaccurate Risk Management Plan which was corrected in 2003 subsequent to an audit by Ohio EPA. So, without a SSM plan review process open to participation by the public there is no way for citizens to be confident that such plans exist or that they accurately reflect operations at the facility.

28. As stated in paragraph 4, above, I have worked extensively on air regulations and permits and, in particular, have worked to obtain effective SSM provisions to protect against the vast amounts of hazardous air pollutants that sources can emit during periods of SSM. In addition, I have worked to enforce emission standards against polluters who have exceeded them. Given the opportunity, I would continue to work to obtain effective SSM plans and to enforce emission standards.

29. If I could obtain access to SSM plans, I could evaluate claims by major sources of hazardous air pollutants, such as Cognis and Givaudan that their excess emissions are not a basis for penalties or legal liability. By blocking public access to SSM plans, EPA deprives me of information to which I have a right under the Clean Air Act. In addition, EPA effectively prevents me and other members of the public from evaluating claims by polluters that their excess emissions are not a basis for penalties or legal liability and thus effectively prevents us from enforcing emission standards. I have evaluated such claims in the past as part of my work as a Sierra Club Ohio Chapter volunteer, and would do so in the future, if possible, as a means of protecting my family, myself, and my community from toxic pollution and the adverse health effects it causes.

30. Allowing me and other members of the public to better enforce the Clean Air Act would reduce the number of instances when emission standards are exceeded by the major sources of

hazardous air pollutants that operate in the Miami Valley and elsewhere. By blocking public access to SSM plans, EPA makes emission standards far more difficult to enforce and thus eliminates an important incentive for polluters to comply with their emission standards. Therefore, EPA's decision to block public access to SSM plans significantly increases the likelihood that they will not comply, and increases the likelihood that my family and I will be exposed to more toxic pollution and to the risk of adverse health effects that can result.

31. If we could obtain access to SSM plans, I and other members of the public could advocate for better and more protective measures that plants could take during SSM to minimize their excess emissions. By doing so, we could reduce both the frequency and duration of emission standard exceedances, and reduce the quantity of toxic pollutants that are emitted during these events. By blocking public access to SSM plans, EPA prevents me and other members of the public from advocating for more effective startup, shutdown, and malfunction measures. Thus, EPA deprives me of an opportunity to engage in advocacy in which I want to engage to protect myself, my family, and my community from toxic emissions. In addition, it significantly increases the likelihood that SSM plans will not be sufficiently protective and will fail to prevent the emission of excess toxic emissions into our community.

32. If there are specific steps that could reduce toxic emissions during periods of SSM, requiring sources to take those steps will better assure that they are taken and that toxic emissions will be reduced. By eliminating the requirement that major sources of hazardous air pollutants comply with their SSM plans, EPA eliminates any assurance that sources are taking all necessary steps to reduce emissions during periods of SSM. EPA also deprives me and other members of the right to enforce sources' compliance with their SSM plans. In addition, EPA deprives me of the protection from toxic emissions that full compliance with effective SSM plans would provide,

and increases the likelihood that sources of hazardous air pollutants will not take sufficiently protective measures to reduce emissions during periods of SSM.

33. If SSM plans and revisions to such plans are reviewed and approved by permitting authorities in a process that is open to public participation, their protectiveness and adequacy can be better assured. For example I have shared information with neighbors regarding the malfunction record at Cognis but I have been unable to develop recommendations for changes to the SSM plan or to work with others to develop recommendations or to complain about any failures by the plant to follow an SSM plan because I have never seen an SSM plan for the facility. By exempting SSM plans from this process, EPA deprives me of the right to participate in the review and approval of SSM plans and SSM plan revisions by permitting authorities, a right I have exercised in the past and would exercise in the future as a means of protecting myself, my family and my community from excess toxic pollution. In addition, EPA increases the likelihood that SSM plans will not be adequately protective and thus increases the likelihood that my family and I will be exposed to more toxic pollution.

34. Holding polluters accountable for exceeding emission standards is within Sierra Club's purposes which are "...to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environment.." Air pollution is an issue on which I have worked extensively in past and will continue to work in the future on Sierra Club's behalf. EPA's decision to exempt major sources of hazardous air pollution from compliance with emission standards during periods of SSM prevents Sierra Club and me from holding sources accountable for exceeding emission standards during such periods, from promoting responsible use of natural resources, and from educating and enlisting others in our work to reduce pollution and its harmful effects on people

and the environment. In addition, it prevents Sierra Club and me from reducing pollution in the Cincinnati area and elsewhere and from informing the community about the actual extent to which emission standards are exceeded.

35. EPA's amendments to the General Provisions also deprive Sierra Club and me personally of procedural rights regarding SSM plans. Before the April 5, 2002 amendments, the General Provisions required that SSM plans "be incorporated by reference into the source's title V permit." 40 C.F.R. § 63.6(3)(3)(i) (superseded). Thus, SSM plans were: (1) subject to the same notice and comment requirements as other Title V permit conditions; (2) subject to review and approval by EPA or State permitting authorities; and (3) enforceable by the public. As stated in paragraph 4-5, above, I have worked extensively on air regulations and permits and, in particular, have worked to obtain effective SSM provisions to protect against the vast amounts of hazardous air pollutants that sources can emit during periods of SSM. Given the opportunity, I would continue to work to obtain effective SSM plans.

36. EPA's amendments to the General Provisions deprive Sierra Club and me of any opportunity for: (1) notice and comment on SSM plans; (2) participation in the review and approval of SSM plans by EPA or the State permitting authority; (3) notice and comment on any changes to SSM plans; and (4) enforcement of the requirements in SSM plans where sources do not comply with them.

37. If Sierra Club had access to SSM plans for sources in the Cincinnati area and elsewhere, it would inform its members and the general public about these plans and their adequacy. Sierra Club would also use these plans to advocate for more effective measures during periods of SSM. By blocking public access to SSM plans, EPA prevents Sierra Club from: (1) reviewing and evaluating them; (2) informing its members and the public about their contents and adequacy;

and (3) advocating for more effective plans that would help to protect the community from toxic emissions during SSM events.

38. If Sierra Club had an opportunity to participate in the review and approval of SSM plans and revisions to such plans by State permitting authorities, it would do so as a means to advocate for more protective plans that would better protect its members and others. By blocking public access to SSM plans and by preventing Sierra Club from participating in review and approval of plans and plan revisions by State permitting authorities, EPA deprives Sierra Club of its right to participate in this process as well as of the opportunity to reduce the toxic pollution in the Cincinnati area and elsewhere.

39. If Sierra Club had an opportunity to do so, it would work to ensure that major sources of hazardous air pollutants actually implemented adequately protective SSM plans during periods of SSM. Specifically, Sierra Club would review and evaluate the steps these sources took to control emissions during periods of SSM and determine whether they complied with their SSM plans. Sierra Club would inform its members and the public about sources' compliance and non-compliance with SSM plans. Sierra Club would also seek to hold sources accountable for non-compliance with SSM plans as a means to obtain better control of emissions and reduce toxic pollution in the community. In addition, if sources complied with their SSM plans but still emitted additional toxic pollution into the neighborhood, Sierra Club would use that information evaluate the adequacy of sources' SSM plans, inform the public of the adequacy of such plans, and advocate for better and more effective plans with both the sources themselves and with State permitting authorities. By exempting sources from any obligation to comply with their SSM plans — as well as by blocking public access to SSM plans and preventing Sierra Club from participating in review and approval of plans and plan revisions by State permitting authorities

— EPA deprives Sierra Club of its right to enforce Clean Air Act requirements. In addition EPA deprives Sierra Club of information to which it has a right and also of its opportunity to reduce toxic pollution through enforcement and advocacy efforts related to SSM plan requirements.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of October, 2007.

mjsinclair

Marti Sinclair

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	No. 02-1135
	)	(and consolidated case
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Nos. 03-1219, 06-1215, 07-1201)
Respondents.	)	

DECLARATION OF JANE WILLIAMS

1. I am a member of the Sierra Club, and have been since 1997.

2. I am the chair of Sierra Club's Air Toxics Task Force, which is responsible for air toxics litigation, air toxics policy, and providing direct support to communities facing an air toxics problem.

3. I also am the executive director of California Communities Against Toxics, an environmental justice network in California.

4. Since 1994, I have worked to improve efforts by EPA and California to control and reduce emissions of hazardous air pollutants. For example, I commented extensively on EPA's proposed national regulations for medical waste incinerators and on EPA's proposed national regulations on hazardous waste combustors. I also worked with the EPA on developing air permits for the Calaveras Cement Kiln in Tehachapi, California. Because I am aware that sources can emit vast quantities of hazardous air pollutants during periods of startup, shutdown

and malfunction (SSM), I have worked specifically to ensure that regulations contain SSM provisions that are protective of public health.

5. My family and I live at 2137 Willowbrook Ave, Palmdale, CA and own a ranch at 3812 50th Street West in Rosamond, CA.

6. Every day, I spend significant amounts of time outside. I walk outside for at least thirty minutes every day during the week. My family and I spend significant time outdoors in and around my home in Palmdale and my family ranch in Rosamond, CA where we spend considerable amounts of time riding our horses, riding bikes, swimming, and recreating outdoors. When I am outside, I breathe the air. When my family is outside, they breathe the air.

7. Facilities located on United Street in Mojave were included in the Department of Toxic Substance Control investigation into a childhood cancer cluster in Rosamond that occurred in the mid-1980's. Emissions from these facilities were suspected of contributing to the prevalence of childhood cancer in Rosamond due to the magnitude of emissions and the prevailing weather patterns.

8. My two children, who are 6 and 21 years old, are often outdoors with me breathing outdoor air. My 6 year old son is more susceptible to air pollution because he breathes more air per pound of body weight than an adult and his body is still developing. As a result, he has a greater sensitivity and is more at risk to air pollution than the population in general.

9. By breathing, my family and I are exposed to hazardous air pollutants emitted by sources operating in the Mojave/Rosamond area.

10. I am aware that hazardous air pollutants can be transported great distances by air currents. Therefore, by breathing, my family and I also are exposed to hazardous air pollutants emitted by sources that operate outside the immediate area of my residence.

11. I am aware that hazardous air pollutants such as dioxins, mercury and polychlorinated biphenyls (PCBs) are deposited on water and soil, where they persist for long periods of time and bioaccumulate in wildlife and livestock. By eating fish, meat and dairy products, my family and I are exposed to hazardous air pollutants emitted by sources in the Mojave/Rosamond area and also to hazardous air pollutants emitted elsewhere and transported to areas where the food that we eat is raised or caught.

13. Among the facilities to whose emissions my family and I are exposed are the California Portland Cement Kiln in Mojave, the National Cement Kiln in Lebec, and the PRC DeSoto International facility which manufactures adhesives and sealants located at 11601 United Street in Mojave. These facilities emit hazardous air pollutants known to be carcinogens, developmental toxicants, neurotoxicants and respiratory toxicants. The Rexall Industrial Inc, facility operates at 46147 7th street in Lancaster emits hazardous air pollutants that are suspected to be carcinogens and known to be respiratory toxicants. I drive by the Rexall facility three days per week and live within 20 miles of it. Hazardous air pollutant emissions from the National Cement, Portland Cement, PRC DeSoto and Rexall facilities, as all facilities in the categories enumerated in paragraph 12, above and located in the Antelope Valley air basin where my family and I live are of grave concern to me because I am raising my young son in the air shadow of these facilities.

14. I am aware that EPA has promulgated "General Provisions" for its air toxics program and these provisions establish important requirements regarding the compliance obligations for sources under many categories of major sources of hazardous air pollutants.

15. EPA's General Provisions set out sources' compliance obligations during periods of startup, shutdown and malfunction (SSM).

16. I am aware that EPA's General Provisions provide an automatic exemption from compliance with emission standards during periods of SSM for all major sources of hazardous air pollutants. This exemption allows these sources to exceed their emission standards with impunity during periods of SSM.

17. I am aware that during periods of SSM, and periods of malfunction in particular, sources can emit quantities of hazardous air pollution that are vastly greater than those they emit while operating normally. For example, medical waste incinerators can emit up to 50 times more dioxin during malfunction than under normal operating procedures, according to the California Air Resources Board. Cement kilns can be expected to also emit much more air pollution during SSM events, as well as the industrial furnace at PRC De Soto. These increases in emissions from SSM events will add to the already large existing emissions from these facilities.

18. Major sources of hazardous air pollutants that have operated routinely in startup, shutdown and malfunction mode in the Rosamond/Mojave area include California Portland Cement, which makes cement, and National Cement, which makes cement. These sources emit particulate matter, nitrogen oxides, dioxin, mercury, lead, carbon monoxide, and sulfur dioxide, among other things. There are some of the largest sources of mercury, PM 2.5, and nitrogen oxides in the country.

19. My home is approximately 10 miles from the California Portland cement plant and 20 miles from the National Cement plant in Lebec. I often have smelled the pollution from California Portland in the course of my daily life. The pollution from California Portland smells dusty and chemical-like. The pollution from National Cement, which I often drive by, smells like burning tires.

20. When National Cement and California Portland and other major sources startup,

shutdown or malfunction, their toxic emissions increase. As a result, my family and I are exposed to more toxic pollution. The additional exposure to toxics increases our chance of suffering the adverse health effects that hazardous air pollutants can cause. In addition, being forced to breath the pollution from these major sources, and the knowledge that we are being exposed to toxic chemicals, diminishes our ability to enjoy daily life and activities in and around our home.

21. I am aware that EPA also has decided to block citizens' access to the startup, shutdown, and malfunction plans that major sources of hazardous air pollutants must prepare. I am aware that EPA also has eliminated any requirement that such sources comply with their own startup, shutdown, and malfunction plans. I also am aware that EPA has eliminated the requirement that startup, shutdown and malfunction plans, and revisions to such plans, be reviewed and approved by State permitting authorities in a process that is open to participation by the public.

22. As stated in paragraph 4, above, I have worked extensively on air regulations and permits and, in particular, have worked to obtain effective SSM provisions to protect against the vast amounts of hazardous air pollutants that sources can emit during periods of SSM. In addition, I have worked to enforce emission standards against polluters who have exceeded them. Given the opportunity, I would continue to work to obtain SSM plans and to enforce emission standards.

23. By blocking public access to SSM plans, EPA deprives me of information to which I have a right under the Clean Air Act. If I could obtain access to SSM plans, I would evaluate claims by major sources of hazardous air pollutants, such as California Portland Cement and National Cement that their excess emissions are not a basis for penalties or legal liability. By

blocking public access to SSM plans, EPA effectively prevents me and other members of the public from evaluating claims by polluters that their excess emissions are not a basis for penalties or legal liability and thus effectively prevents us from enforcing emission limits. I have evaluated such claims in the past as part of my work with Sierra Club's air toxics task force, and would do so in the future, if possible, as a means of protecting my family, myself, and my community from toxic pollution and the adverse health effects it causes. By blocking public access to SSM plans, EPA makes emission standards far more difficult to enforce and thus eliminates an important incentive for polluters to comply with their emission standards. Therefore, EPA also significantly increases the likelihood that major sources will not comply with their emission standards at all times and the likelihood that my family and I will be exposed to more toxic pollution and the risk of adverse health effects that result.

24. If we could obtain access to SSM plans, I and other members of the public would advocate for better and more protective measures that plants could take during startup, shutdown, and malfunction to minimize their excess emissions. By doing so, we could reduce both the frequency and duration of emission standard exceedances, and reduce the quantity of toxic pollutants that are emitted during these events. By blocking public access to startup, shutdown, and malfunction plans, EPA prevents me and other members of the public from advocating for more effective startup, shutdown, and malfunction measures. Thus, EPA deprives me of an opportunity to engage in advocacy in which I want to engage to protect myself, my family, and my community from toxic emissions. In addition, it significantly increases the likelihood that SSM plans will not be sufficiently protective and will fail to prevent SSM events that will increase my exposure and my family's exposure to toxic emissions.

25. By eliminating the requirement that major sources of hazardous air pollutants comply with their startup, shutdown and malfunction plans, EPA deprives me and other members of the right to enforce sources' compliance with their SSM plans. Further, it eliminates any assurance that sources are taking all necessary steps to minimize emissions during periods of startup, shutdown and malfunction, deprives me and my family of protection from toxic emissions that full compliance with effective SSM plans would provide.

26. If startup, shutdown and malfunction plans and revisions to such plans are reviewed and approved by permitting authorities in a process that is open to public participation, their protectiveness and adequacy can be better assured. For example, limiting the number of SSM events annually in the facility's permits, and forcing the permitting agency to call in a permit and modify it if SSM limits are exceeded is one way to reduce emissions from facilities. By exempting startup, shutdown, and compliance plans from this public review process, EPA deprives me of the right to information that I could obtain in that process relating to sources' emissions during SSM, their measures to control such emissions, and the nature of events that a given source regards as SSM rather than a violation of emission standards. Likewise, EPA deprives me of the right to participate in the review and approval of SSM plans and SSM plan revisions by permitting authorities, a right I have exercised in the past and would exercise in the future as a means of protecting myself, my family and my community from excess toxic pollution. In addition, EPA increases the likelihood that SSM plans will not be adequately protective when it denies public review of the SSM plans, and thus increases the likelihood that my family and I will be exposed to more toxic pollution.

27. Holding polluters accountable for exceeding emission standards is within Sierra Club's mission of protecting the earth ecosystems and resources and is an issue on which I have

worked on extensively in the past and will continue to work in the future on Sierra Club's behalf. EPA's decision to exempt major sources of hazardous air pollution from compliance with emission standards during periods of startup, shutdown, and malfunction prevents Sierra Club and me from enforcing emission standards against sources that exceed emission standards during such periods. In addition, it prevents Sierra Club and me from using emission standards to reduce the toxic pollution that is emitted during SSM and from informing the community about the actual extent to which emission standards are exceeded during SSM.

28. If Sierra Club had access to startup, shutdown, and malfunction plans for sources in the nation, it would inform its members and the general public about these plans and their adequacy. Sierra Club would also use these plans to advocate for more effective measures during periods of startup, shutdown, and malfunction which would help reduce emissions from these facilities. By blocking public access to startup, shutdown, and malfunction plans, EPA deprives Sierra Club of information to which it has a right under the Clean Air Act. EPA also prevents Sierra Club from: (1) reviewing and evaluating SSM plans; (2) informing its members and the public about their contents and adequacy; and (3) advocating for more effective plans that would help to protect the community from toxic emissions during startup, shutdown and malfunction events.

29. If Sierra Club had an opportunity to participate in the review and approval of startup, shutdown, and malfunction plans and revisions to such plans by State permitting authorities, it would do so as a means to advocate for more protective plans that would better protect its members and others. By preventing Sierra Club from participating in review and approval of plans and plan revisions by State permitting authorities, EPA deprives Sierra Club of information — to which Sierra Club has a right under the Clean Air Act — regarding source's SSM plans,

the adequacy of such plans, and the nature of events that sources regard as SSM. EPA also deprives Sierra Club of its right to participate in this process as well as of the opportunity to reduce the toxic pollution.

30. If Sierra Club had an opportunity to do so, it would work to ensure that major sources of hazardous air pollutants actually implemented adequately protective startup, shutdown, and malfunction plans during periods of startup, shutdown and malfunction. Specifically, Sierra Club would review and evaluate the steps these sources took to control emissions during periods of startup shutdown and malfunction and determine whether they complied with their startup, shutdown and compliance plans. Sierra Club would inform its members and the public about sources' compliance and non-compliance with startup, shutdown, and compliance plans. Sierra Club would also seek to hold sources accountable for non-compliance with startup, shutdown, and compliance plans as a means to obtain better control of emissions and reduce toxic pollution in the community. In addition, if sources complied with their SSM plans but still emitted additional toxic pollution into the neighborhood, Sierra Club would use that information evaluate the adequacy of sources' startup, shutdown and compliance plans, inform the public of the adequacy of such plans, and advocate for better and more effective plans with both the sources themselves and with State permitting authorities. By exempting sources from any obligation to comply with their startup shutdown and malfunction plans — as well as by blocking public access to SSM plans and preventing Sierra Club from participating in review and approval of plans and plan revisions by State permitting authorities — EPA deprives Sierra Club of its right to enforce Clean Air Act requirements. In addition EPA deprives Sierra Club of information to which it has a right and also of its opportunity to reduce toxic pollution through enforcement and advocacy efforts related to SSM plan requirements.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of October, 2007.

Jane Williams

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42 U.S.C.A. § **7412**

Effective: August 05, 1999

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER I--PROGRAMS AND ACTIVITIES
PART A--AIR QUALITY AND EMISSIONS LIMITATIONS

§ 7412. Hazardous air pollutants

(a) Definitions

For purposes of this section, except subsection (r) of this section--

(1) Major source

The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source

The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source

The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source

The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification

The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect

The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit

The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator

The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source

The term "existing source" means any stationary source other than a new source.

(11) Carcinogenic effect

Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)

92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide
56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine

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

78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol
106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine

584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane
108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds [FN1]
0	Glycol ethers [FN2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers [FN3]
0	Nickel Compounds
0	Polycylic Organic Matter [FN4]
0	Radionuclides (including radon) [FN5]
0	Selenium Compounds

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

[FN1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[FN2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R-(OCH_2CH_2)_n-OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups
R' = R, H, or groups which, when removed, yield glycol ethers with the structure: $R-(OCH_2CH)_n-OH$. Polymers are excluded from the glycol category.
[FN3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.
[FN4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100° C.
[FN5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects [FN1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant

not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods

The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead

The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15,

1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories

The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories

In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8- tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a stand-

ard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such cat-

egory or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that--

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) Priorities

In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider--

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a

rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on--

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most ex-

posed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source--

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such in-

crease in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that--

(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if--

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4)

through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7414 of this title.

(D) For each source granted an alternative emission limitation under this paragraph there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed--

(A) best available control technology (as defined in section 7479(3) of this title), or

(B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The Administrator may issue such rules and guidance as are necessary to implement this paragraph.

(7) Extension for new sources

A source for which construction or reconstruction is commenced after the date an emission standard applicable to such source is proposed pursuant to subsection (d) of this section but before the date an emission standard applicable to such source is proposed pursuant to subsection (f) of this section shall not be required to comply with the emission standard under subsection (f) of this section until the date 10 years after the date construction or reconstruction is commenced.

(8) Coke ovens

(A) Any coke oven battery that complies with the emission limitations established under subsection (d)(8)(C) of this section, subparagraph (B), and subparagraph (C), and complies with the provisions of subparagraph (E), shall not be required to achieve emission limitations promulgated under subsection (f) of this section until January 1, 2020.

(B)(i) Not later than December 31, 1992, the Administrator shall promulgate emission limitations for coke oven emissions from coke oven batteries. Notwithstanding paragraph (3) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 1998. Such emission limitations shall reflect the lowest achievable emission rate as defined in section 7501 of this title for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than--

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

with an exclusion for emissions during the period after the closing of self-sealing oven doors (or the total mass emissions equivalent). The rulemaking in which such emission limitations are promulgated shall also establish an appropriate measurement methodology for determining compliance with such emission limitations, and shall establish

such emission limitations in terms of an equivalent level of mass emissions reduction from a coke oven battery, unless the Administrator finds that such a mass emissions standard would not be practicable or enforceable. Such measurement methodology, to the extent it measures leaking doors, shall take into consideration alternative test methods that reflect the best technology and practices actually applied in the affected industries, and shall assure that the final test methods are consistent with the performance of such best technology and practices.

(ii) If the Administrator fails to promulgate such emission limitations under this subparagraph prior to the effective date of such emission limitations, the emission limitations applicable to coke oven batteries under this subparagraph shall be--

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

or the total mass emissions equivalent (if the total mass emissions equivalent is determined to be practicable and enforceable), with no exclusion for emissions during the period after the closing of self-sealing oven doors.

(C) Not later than January 1, 2007, the Administrator shall review the emission limitations promulgated under subparagraph (B) and revise, as necessary, such emission limitations to reflect the lowest achievable emission rate as defined in section 7501 of this title at the time for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than the emission limitation promulgated under subparagraph (B). Notwithstanding paragraph (2) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 2010.

(D) At any time prior to January 1, 1998, the owner or operator of any coke oven battery may elect to comply with emission limitations promulgated under subsection (f) of this section by the date such emission limitations would otherwise apply to such coke oven battery, in lieu of the emission limitations and the compliance dates provided under subparagraphs (B) and (C) of this paragraph. Any such owner or operator shall be legally bound to comply with such emission limitations promulgated under subsection (f) of this section with respect to such coke oven battery as of January 1, 2003. If no such emission limitations have been promulgated for such coke oven battery, the Administrator shall promulgate such emission limitations in accordance with subsection (f) of this section for such coke oven battery.

(E) Coke oven batteries qualifying for an extension under subparagraph (A) shall make available not later than January 1, 2000, to the surrounding communities the results of any risk assessment performed by the Administrator to determine the appropriate level of any emission standard established by the Administrator pursuant to subsection (f) of this section.

(F) Notwithstanding the provisions of this section, reconstruction of any source of coke oven emissions qualifying for an extension under this paragraph shall not subject such source to emission limitations under subsection (f) of this section more stringent than those established under subparagraphs (B) and (C) until January 1, 2020. For the purposes of this subparagraph, the term "reconstruction" includes the replacement of existing coke oven battery capacity with new coke oven batteries of comparable or lower capacity and lower potential emissions.

(j) Equivalent emission limitation by permit

(1) Effective date

The requirements of this subsection shall apply in each State beginning on the effective date of a permit program established pursuant to subchapter V of this chapter in such State, but not prior to the date 42 months after November 15, 1990.

(2) Failure to promulgate a standard

In the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning 18 months after such date (but not prior to the effective date of a permit program under subchapter V of this chapter), the owner or operator of any major source in such category or subcategory shall submit a permit application under paragraph (3) and such owner or operator shall also comply with paragraphs (5) and (6).

(3) Applications

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit. If the owner or operator of a source has submitted a timely and complete application for a permit required by this subsection, any failure to have a permit shall not be a violation of paragraph (2), unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application. The Administrator shall not later than 18 months after November 15, 1990, and after notice and opportunity for comment, establish requirements for applications under this subsection including a standard application form and criteria for determining in a timely manner the completeness of applications.

(4) Review and approval

Permit applications submitted under this subsection shall be reviewed and approved or disapproved according to the provisions of section 7661d of this title. In the event that the Administrator (or the State) disapproves a permit application submitted under this subsection or determines that the application is incomplete, the applicant shall have up to 6 months to revise the application to meet the objections of the Administrator (or the State).

(5) Emission limitation

The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d) of this section. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of subsection (i)(5) of this section. For purposes of the preceding sentence, the reduction required by subsection (i)(5)(A) of this section shall be achieved by the date on which the relevant standard should have been promulgated under subsection (d) of this section. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i) of this section.

(6) Applicability of subsequent standards

If the Administrator promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to paragraph (5), provided that the source shall have the compliance

period provided under subsection (i) of this section. If the Administrator promulgates a standard under subsection (d) of this section that would be applicable to the source in lieu of the emission limitation established by permit under this subsection after the date on which the permit has been issued, the Administrator (or the State) shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator providing such source a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the emissions limitation established by paragraph (5), whichever is earlier.

(k) Area source program

(1) Findings and purpose

The Congress finds that emissions of hazardous air pollutants from area sources may individually, or in the aggregate, present significant risks to public health in urban areas. Considering the large number of persons exposed and the risks of carcinogenic and other adverse health effects from hazardous air pollutants, ambient concentrations characteristic of large urban areas should be reduced to levels substantially below those currently experienced. It is the purpose of this subsection to achieve a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources.

(2) Research program

The Administrator shall, after consultation with State and local air pollution control officials, conduct a program of research with respect to sources of hazardous air pollutants in urban areas and shall include within such program--

(A) ambient monitoring for a broad range of hazardous air pollutants (including, but not limited to, volatile organic compounds, metals, pesticides and products of incomplete combustion) in a representative number of urban locations;

(B) analysis to characterize the sources of such pollution with a focus on area sources and the contribution that such sources make to public health risks from hazardous air pollutants; and

(C) consideration of atmospheric transformation and other factors which can elevate public health risks from such pollutants.

Health effects considered under this program shall include, but not be limited to, carcinogenicity, mutagenicity, teratogenicity, neurotoxicity, reproductive dysfunction and other acute and chronic effects including the role of such pollutants as precursors of ozone or acid aerosol formation. The Administrator shall report the preliminary results of such research not later than 3 years after November 15, 1990.

(3) National strategy

(A) Considering information collected pursuant to the monitoring program authorized by paragraph (2), the Administrator shall, not later than 5 years after November 15, 1990, and after notice and opportunity for public comment, prepare and transmit to the Congress a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas.

(B) The strategy shall--

(i) identify not less than 30 hazardous air pollutants which, as the result of emissions from area sources, present the

greatest threat to public health in the largest number of urban areas and that are or will be listed pursuant to subsection (b) of this section, and

(ii) identify the source categories or subcategories emitting such pollutants that are or will be listed pursuant to subsection (c) of this section. When identifying categories and subcategories of sources under this subparagraph, the Administrator shall assure that sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified hazardous air pollutants are subject to standards pursuant to subsection (d) of this section.

(C) The strategy shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this or other laws (including, but not limited to, the Toxic Substances Control Act [15 U.S.C.A. § 2601 et seq.], the Federal Insecticide, Fungicide and Rodenticide Act [7 U.S.C.A. § 136 et seq.] and the Resource Conservation and Recovery Act [42 U.S.C.A. § 6901 et seq.]) or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants emitted by stationary sources of not less than 75 per centum, considering control of emissions of hazardous air pollutants from all stationary sources and resulting from measures implemented by the Administrator or by the States under this or other laws.

(D) The strategy may also identify research needs in monitoring, analytical methodology, modeling or pollution control techniques and recommendations for changes in law that would further the goals and objectives of this subsection.

(E) Nothing in this subsection shall be interpreted to preclude or delay implementation of actions with respect to area sources of hazardous air pollutants under consideration pursuant to this or any other law and that may be promulgated before the strategy is prepared.

(F) The Administrator shall implement the strategy as expeditiously as practicable assuring that all sources are in compliance with all requirements not later than 9 years after November 15, 1990.

(G) As part of such strategy the Administrator shall provide for ambient monitoring and emissions modeling in urban areas as appropriate to demonstrate that the goals and objectives of the strategy are being met.

(4) Areawide activities

In addition to the national urban air toxics strategy authorized by paragraph (3), the Administrator shall also encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area. From the funds available for grants under this section, the Administrator shall set aside not less than 10 per centum to support areawide strategies addressing hazardous air pollutants emitted by area sources and shall award such funds on a demonstration basis to those States with innovative and effective strategies. At the request of State or local air pollution control officials, the Administrator shall prepare guidelines for control technologies or management practices which may be applicable to various categories or subcategories of area sources.

(5) Report

The Administrator shall report to the Congress at intervals not later than 8 and 12 years after November 15, 1990, on actions taken under this subsection and other parts of this chapter to reduce the risk to public health posed by the release of hazardous air pollutants from area sources. The reports shall also identify specific metropolitan areas that continue to experience high risks to public health as the result of emissions from area sources.

(*l*) State programs

(1) In general

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

(2) Guidance

Not later than 12 months after November 15, 1990, the Administrator shall publish guidance that would be useful to the States in developing programs for submittal under this subsection. The guidance shall also provide for the registration of all facilities producing, processing, handling or storing any substance listed pursuant to subsection (r) of this section in amounts greater than the threshold quantity. The Administrator shall include as an element in such guidance an optional program begun in 1986 for the review of high-risk point sources of air pollutants including, but not limited to, hazardous air pollutants listed pursuant to subsection (b) of this section.

(3) Technical assistance

The Administrator shall establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies and, on a cost recovery basis, to others on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring. The Administrator shall use the authority of section 7403 of this title to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Where appropriate, such activity shall be conducted with not-for-profit organizations. The Administrator may conduct research on methods for preventing, measuring and controlling emissions and evaluating associated health and environment risks. All information collected under this paragraph shall be available to the public.

(4) Grants

Upon application of a State, the Administrator may make grants, subject to such terms and conditions as the Administrator deems appropriate, to such State for the purpose of assisting the State in developing and implementing a program for submittal and approval under this subsection. Programs assisted under this paragraph may include program elements addressing air pollutants or extremely hazardous substances other than those specifically subject to this section. Grants under this paragraph may include support for high-risk point source review as provided in paragraph (2) and support for the development and implementation of areawide area source programs pursuant to subsection (k) of this section.

(5) Approval or disapproval

Not later than 180 days after receiving a program submitted by a State, and after notice and opportunity for public comment, the Administrator shall either approve or disapprove such program. The Administrator shall disapprove any program submitted by a State, if the Administrator determines that--

(A) the authorities contained in the program are not adequate to assure compliance by all sources within the State with each applicable standard, regulation or requirement established by the Administrator under this section;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the Administrator under paragraph (2) or is not likely to satisfy, in whole or in part, the objectives of this chapter.

If the Administrator disapproves a State program, the Administrator shall notify the State of any revisions or modifications necessary to obtain approval. The State may revise and resubmit the proposed program for review and approval pursuant to the provisions of this subsection.

(6) Withdrawal

Whenever the Administrator determines, after public hearing, that a State is not administering and enforcing a program approved pursuant to this subsection in accordance with the guidance published pursuant to paragraph (2) or the requirements of paragraph (5), the Administrator shall so notify the State and, if action which will assure prompt compliance is not taken within 90 days, the Administrator shall withdraw approval of the program. The Administrator shall not withdraw approval of any program unless the State shall have been notified and the reasons for withdrawal shall have been stated in writing and made public.

(7) Authority to enforce

Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section.

(8) Local program

The Administrator may, after notice and opportunity for public comment, approve a program developed and submitted by a local air pollution control agency (after consultation with the State) pursuant to this subsection and any such agency implementing an approved program may take any action authorized to be taken by a State under this section.

(9) Permit authority

Nothing in this subsection shall affect the authorities and obligations of the Administrator or the State under subchapter V of this chapter.

(m) Atmospheric deposition to Great Lakes and coastal waters

(1) Deposition assessment

The Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall conduct a program to identify and assess the extent of atmospheric deposition of hazardous air pollutants (and in the discretion of the Administrator, other air pollutants) to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters. As part of such program, the Administrator shall--

(A) monitor the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters, including monitoring of the Great Lakes through the monitoring network established pursuant to paragraph (2) of this subsection and designing and deploying an atmospheric monitoring network for coastal waters pursuant to paragraph (4);

(B) investigate the sources and deposition rates of atmospheric deposition of air pollutants (and their atmospheric transformation precursors);

(C) conduct research to develop and improve monitoring methods and to determine the relative contribution of atmospheric pollutants to total pollution loadings to the Great Lakes, the Chesapeake Bay, Lake Champlain, and coastal waters;

(D) evaluate any adverse effects to public health or the environment caused by such deposition (including effects resulting from indirect exposure pathways) and assess the contribution of such deposition to violations of water quality standards established pursuant to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.] and drinking water standards established pursuant to the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.]; and

(E) sample for such pollutants in biota, fish, and wildlife of the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters and characterize the sources of such pollutants.

(2) Great Lakes monitoring network

The Administrator shall oversee, in accordance with Annex 15 of the Great Lakes Water Quality Agreement, the establishment and operation of a Great Lakes atmospheric deposition network to monitor atmospheric deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) to the Great Lakes.

(A) As part of the network provided for in this paragraph, and not later than December 31, 1991, the Administrator shall establish in each of the 5 Great Lakes at least 1 facility capable of monitoring the atmospheric deposition of hazardous air pollutants in both dry and wet conditions.

(B) The Administrator shall use the data provided by the network to identify and track the movement of hazardous air pollutants through the Great Lakes, to determine the portion of water pollution loadings attributable to atmospheric deposition of such pollutants, and to support development of remedial action plans and other management plans as required by the Great Lakes Water Quality Agreement.

(C) The Administrator shall assure that the data collected by the Great Lakes atmospheric deposition monitoring network is in a format compatible with databases sponsored by the International Joint Commission, Canada, and the several States of the Great Lakes region.

(3) Monitoring for the Chesapeake Bay and Lake Champlain

The Administrator shall establish at the Chesapeake Bay and Lake Champlain atmospheric deposition stations to monitor deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) within the Chesapeake Bay and Lake Champlain watersheds. The Administrator shall determine the role of air deposition in the pollutant loadings of the Chesapeake Bay and Lake Champlain, investigate the sources of air pollutants deposited in the watersheds, evaluate the health and environmental effects of such pollutant loadings, and shall sample such pollutants in biota, fish and wildlife within the watersheds, as necessary to characterize such effects.

(4) Monitoring for coastal waters

The Administrator shall design and deploy atmospheric deposition monitoring networks for coastal waters and their watersheds and shall make any information collected through such networks available to the public. As part of this effort, the Administrator shall conduct research to develop and improve deposition monitoring methods, and to determine the relative contribution of atmospheric pollutants to pollutant loadings. For purposes of this subsection, "coastal

waters" shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C.A. § 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C.A. § 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of Title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of--

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal waters cause or contribute to exceedances [FN2] of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.] or, with respect to the Great Lakes, exceedances [FN2] of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements promulgated pursuant to this paragraph with respect to coastal waters shall only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress

within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide

The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections [FN3] 7411 of this title and this section.

(6) Hydrofluoric acid

Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities

In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

(o) National Academy of Sciences study

(1) Request of the Academy

Within 3 months of November 15, 1990, the Administrator shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of--

(A) risk assessment methodology used by the Environmental Protection Agency to determine the carcinogenic risk associated with exposure to hazardous air pollutants from source categories and subcategories subject to the requirements of this section; and

(B) improvements in such methodology.

(2) Elements to be studied

In conducting such review, the National Academy of Sciences should consider, but not be limited to, the following--

(A) the techniques used for estimating and describing the carcinogenic potency to humans of hazardous air pollutants; and

(B) the techniques used for estimating exposure to hazardous air pollutants (for hypothetical and actual maximally exposed individuals as well as other exposed individuals).

(3) Other health effects of concern

To the extent practicable, the Academy shall evaluate and report on the methodology for assessing the risk of adverse human health effects other than cancer for which safe thresholds of exposure may not exist, including, but not limited to, inheritable genetic mutations, birth defects, and reproductive dysfunctions.

(4) Report

A report on the results of such review shall be submitted to the Senate Committee on Environment and Public Works, the House Committee on Energy and Commerce, the Risk Assessment and Management Commission established by section 303 of the Clean Air Act Amendments of 1990 and the Administrator not later than 30 months after November 15, 1990.

(5) Assistance

The Administrator shall assist the Academy in gathering any information the Academy deems necessary to carry out this subsection. The Administrator may use any authority under this chapter to obtain information from any person, and to require any person to conduct tests, keep and produce records, and make reports respecting research or other activities conducted by such person as necessary to carry out this subsection.

(6) Authorization

Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out this subsection.

(7) Guidelines for carcinogenic risk assessment

The Administrator shall consider, but need not adopt, the recommendations contained in the report of the National Academy of Sciences prepared pursuant to this subsection and the views of the Science Advisory Board, with respect to such report. Prior to the promulgation of any standard under subsection (f) of this section, and after notice and opportunity for comment, the Administrator shall publish revised Guidelines for Carcinogenic Risk Assessment or a detailed explanation of the reasons that any recommendations contained in the report of the National Academy of Sciences will not be implemented. The publication of such revised Guidelines shall be a final Agency action for purposes of section 7607 of this title.

(p) Mickey Leland National Urban Air Toxics Research Center

(1) Establishment

The Administrator shall oversee the establishment of a National Urban Air Toxics Research Center, to be located at a university, a hospital, or other facility capable of undertaking and maintaining similar research capabilities in the areas of epidemiology, oncology, toxicology, pulmonary medicine, pathology, and biostatistics. The center shall be known as the Mickey Leland National Urban Air Toxics Research Center. The geographic site of the National Urban Air Toxics Research Center should be further directed to Harris County, Texas, in order to take full advantage of the well developed scientific community presence on-site at the Texas Medical Center as well as the extensive data previously compiled for the comprehensive monitoring system currently in place.

(2) Board of Directors

The National Urban Air Toxics Research Center shall be governed by a Board of Directors to be comprised of 9 members, the appointment of which shall be allocated pro rata among the Speaker of the House, the Majority Leader of the Senate and the President. The members of the Board of Directors shall be selected based on their respective academic and professional backgrounds and expertise in matters relating to public health, environmental pollution and industrial hygiene. The duties of the Board of Directors shall be to determine policy and research guidelines, submit views from center sponsors and the public and issue periodic reports of center findings and activities.

(3) Scientific Advisory Panel

The Board of Directors shall be advised by a Scientific Advisory Panel, the 13 members of which shall be appointed by the Board, and to include eminent members of the scientific and medical communities. The Panel membership may include scientists with relevant experience from the National Institute of Environmental Health Sciences, the Center for Disease Control, the Environmental Protection Agency, the National Cancer Institute, and others, and the Panel shall conduct peer review and evaluate research results. The Panel shall assist the Board in developing the research agenda, reviewing proposals and applications, and advise on the awarding of research grants.

(4) Funding

The center shall be established and funded with both Federal and private source funds.

(q) Savings provision

(1) Standards previously promulgated

Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990] shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments. Except as provided in paragraph (4), any standard under this section which has been promulgated, but has not taken effect, before such date shall not be affected by such Amendments unless modified as provided in this section before such date or under such Amendments. Each such standard shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) of this section within 10 years after the date of enactment of the Clean Air Act Amendments of 1990. If a timely petition for review of any such standard under section 7607 of this title is pending on such date of enactment, the standard shall be upheld if it complies with this section as in effect before that date. If any such standard is remanded to the Administrator, the Administrator may in the Administrator's discretion apply either the requirements of this section, or those of this section as in effect before the date of enactment of the Clean Air Act Amendments of 1990.

(2) Special rule

Notwithstanding paragraph (1), no standard shall be established under this section, as amended by the Clean Air Act Amendments of 1990, for radionuclide emissions from (A) elemental phosphorous plants, (B) grate calcination elemental phosphorous plants, (C) phosphogypsum stacks, or (D) any subcategory of the foregoing. This section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from such plants and stacks.

(3) Other categories

Notwithstanding paragraph (1), this section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], shall remain in effect for radionuclide emissions from non-Department of Energy Federal facilities that are not licensed by the Nuclear Regulatory Commission, coal-fired utility and industrial boilers, underground uranium mines, surface uranium mines, and disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

(4) Medical facilities

Notwithstanding paragraph (1), no standard promulgated under this section prior to November 15, 1990, with respect to medical research or treatment facilities shall take effect for two years following November 15, 1990, unless the Administrator makes a determination pursuant to a rulemaking under subsection (d)(9) of this section. If the Administrator determines that the regulatory program established by the Nuclear Regulatory Commission for such facilities does not provide an ample margin of safety to protect public health, the requirements of this section shall fully apply to such facilities. If the Administrator determines that such regulatory program does provide an ample margin of safety to protect the public health, the Administrator is not required to promulgate a standard under this section for such facilities, as provided in subsection (d)(9) of this section.

(r) Prevention of accidental releases

(1) Purpose and general duty

It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of Title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph. Nothing in this section shall be interpreted, construed, implied or applied to create any liability or basis for suit for compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases of such substances.

(2) Definitions

(A) The term "accidental release" means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

(B) The term "regulated substance" means a substance listed under paragraph (3).

(C) The term "stationary source" means any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.

(D) The term "retail facility" means a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.

(3) List of substances

The Administrator shall promulgate not later than 24 months after November 15, 1990, an initial list of 100 substances which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment. For purposes of promulgating such list, the Administrator shall use, but is not limited to, the list of extremely hazardous substances published under the Emergency Planning and Community Right-to-Know Act of 1986 [42 U.S.C.A. § 11001 et seq.], with such modifications as the Administrator deems appropriate. The initial list shall include chlorine, anhydrous ammonia, methyl chloride, ethylene oxide, vinyl chloride, methyl isocyanate, hydrogen cyanide, ammonia, hydrogen sulfide, toluene diisocyanate, phosgene, bromine, anhydrous hydrogen chloride, hydrogen fluoride, anhydrous sulfur dioxide, and sulfur trioxide. The initial list shall include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases. Regulations establishing the list shall include an explanation of the basis for establishing the list. The list may be revised from time to time by the Administrator on the Administrator's own motion or by petition and shall be reviewed at least every 5 years. No air pollutant for which a national primary ambient air quality standard has been established shall be included on any such list. No substance, practice, process, or activity regulated under subchapter VI of this chapter shall be subject to regulations under this subsection. The Administrator shall establish procedures for the addition and deletion of substances from the list established under this paragraph consistent with those applicable to the list in subsection (b) of this section.

(4) Factors to be considered

In listing substances under paragraph (3), the Administrator--

(A) shall consider--

(i) the severity of any acute adverse health effects associated with accidental releases of the substance;

(ii) the likelihood of accidental releases of the substance; and

(iii) the potential magnitude of human exposure to accidental releases of the substance; and

(B) shall not list a flammable substance when used as a fuel or held for sale as a fuel at a retail facility under this subsection solely because of the explosive or flammable properties of the substance, unless a fire or explosion caused by the substance will result in acute adverse health effects from human exposure to the substance, including the unburned fuel or its combustion byproducts, other than those caused by the heat of the fire or impact of the explosion.

(5) Threshold quantity

At the time any substance is listed pursuant to paragraph (3), the Administrator shall establish by rule, a threshold

quantity for the substance, taking into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance and the amount of the substance which, as a result of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health for which the substance was listed. The Administrator is authorized to establish a greater threshold quantity for, or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer.

(6) Chemical Safety Board

(A) There is hereby established an independent safety board to be known as the Chemical Safety and Hazard Investigation Board.

(B) The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation. The terms of office of members of the Board shall be 5 years. Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairperson shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.

(C) The Board shall--

(i) investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages;

(ii) issue periodic reports to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible and may include in such reports proposed rules or orders which should be issued by the Administrator under the authority of this section or the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.] to prevent or minimize the consequences of any release of substances that may cause death, injury or other serious adverse effects on human health or substantial property damage as the result of an accidental release; and

(iii) establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

(D) The Board may utilize the expertise and experience of other agencies.

(E) The Board shall coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety. The Board shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead agency for the investigation of releases which are transportation related. The Board shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate. The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities. In no event

shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.

(F) The Board is authorized to conduct research and studies with respect to the potential for accidental releases, whether or not an accidental release has occurred, where there is evidence which indicates the presence of a potential hazard or hazards. To the extent practicable, the Board shall conduct such studies in cooperation with other Federal agencies having emergency response authorities, State and local governmental agencies and associations and organizations from the industrial, commercial, and nonprofit sectors.

(G) No part of the conclusions, findings, or recommendations of the Board relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages arising out of any matter mentioned in such report.

(H) Not later than 18 months after November 15, 1990, the Board shall publish a report accompanied by recommendations to the Administrator on the use of hazard assessments in preventing the occurrence and minimizing the consequences of accidental releases of extremely hazardous substances. The recommendations shall include a list of extremely hazardous substances which are not regulated substances (including threshold quantities for such substances) and categories of stationary sources for which hazard assessments would be an appropriate measure to aid in the prevention of accidental releases and to minimize the consequences of those releases that do occur. The recommendations shall also include a description of the information and analysis which would be appropriate to include in any hazard assessment. The Board shall also make recommendations with respect to the role of risk management plans as required by paragraph (8)(B) [FN4] in preventing accidental releases. The Board may from time to time review and revise its recommendations under this subparagraph.

(I) Whenever the Board submits a recommendation with respect to accidental releases to the Administrator, the Administrator shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Administrator will--

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Administrator not to implement a recommendation of the Board or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Administrator setting forth the reasons for such determination.

(J) The Board may make recommendations with respect to accidental releases to the Secretary of Labor. Whenever the Board submits such recommendation, the Secretary shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Secretary will--

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Secretary not to implement a recommendation or to implement a recommendation only in

part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Secretary setting forth the reasons for such determination.

(K) Within 2 years after November 15, 1990, the Board shall issue a report to the Administrator of the Environmental Protection Agency and to the Administrator of the Occupational Safety and Health Administration recommending the adoption of regulations for the preparation of risk management plans and general requirements for the prevention of accidental releases of regulated substances into the ambient air (including recommendations for listing substances under paragraph (3)) and for the mitigation of the potential adverse effect on human health or the environment as a result of accidental releases which should be applicable to any stationary source handling any regulated substance in more than threshold amounts. The Board may include proposed rules or orders which should be issued by the Administrator under authority of this subsection or by the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.]. Any such recommendations shall be specific and shall identify the regulated substance or class of regulated substances (or other substances) to which the recommendations apply. The Administrator shall consider such recommendations before promulgating regulations required by paragraph (7)(B).

(L) The Board, or upon authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board, may for the purpose of carrying out duties authorized by subparagraph (C)--

(i) hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence and may require by order that any person engaged in the production, processing, handling, or storage of extremely hazardous substances submit written reports and responses to requests and questions within such time and in such form as the Board may require; and

(ii) upon presenting appropriate credentials and a written notice of inspection authority, enter any property where an accidental release causing a fatality, serious injury or substantial property damage has occurred and do all things therein necessary for a proper investigation pursuant to subparagraph (C) and inspect at reasonable times records, files, papers, processes, controls, and facilities and take such samples as are relevant to such investigation.

Whenever the Administrator or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.].

(M) In addition to that described in subparagraph (L), the Board may use any information gathering authority of the Administrator under this chapter, including the subpoena power provided in section 7607(a)(1) of this title.

(N) The Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties. The Board is authorized without regard to section 5 of Title 41 to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person.

(O) After the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii) it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The Administrator is authorized to enforce any regulation or requirements established by the Board pursuant to subparagraph (C)(iii) using the authorities of sections 7413 and 7414 of this title. Any request for information from the owner or operator of a stationary source made by the Board or by the Administrator under this section shall be treated, for purposes of sections 7413, 7414, 7416, 7420, 7603, 7604 and 7607 of this title and any other enforcement provisions of this chapter, as a request made by the Administrator under section 7414 of this title and may be enforced by

the Chairperson of the Board or by the Administrator as provided in such section.

(P) The Administrator shall provide to the Board such support and facilities as may be necessary for operation of the Board.

(Q) Consistent with subsection (G) [FN5] and section 7414(c) of this title any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person's competitive position, the Board shall consider such record, report, or information or particular portion thereof confidential in accordance with section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, and authorized representatives of the United States concerned with carrying out this chapter or when relevant under any proceeding under this chapter. This subparagraph does not constitute authority to withhold records, reports, or information from the Congress.

(R) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget request, or other budget information, legislative recommendation, prepared testimony for congressional hearings, recommendation or study to the President, the Secretary of Labor, the Administrator, or the Director of the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No report of the Board shall be subject to review by the Administrator or any Federal agency or to judicial review in any court. No officer or agency of the United States shall have authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony, comments, recommendations or reports to any officer or agency of the United States for approval or review prior to the submission of such recommendations, testimony, comments or reports to the Congress. In the performance of their functions as established by this chapter, the members, officers and employees of the Board shall not be responsible to or subject to supervision or direction, in carrying out any duties under this subsection, of any officer or employee or agent of the Environmental Protection Agency, the Department of Labor or any other agency of the United States except that the President may remove any member, officer or employee of the Board for inefficiency, neglect of duty or malfeasance in office. Nothing in this section shall affect the application of Title 5 to officers or employees of the Board.

(S) The Board shall submit an annual report to the President and to the Congress which shall include, but not be limited to, information on accidental releases which have been investigated by or reported to the Board during the previous year, recommendations for legislative or administrative action which the Board has made, the actions which have been taken by the Administrator or the Secretary of Labor or the heads of other agencies to implement such recommendations, an identification of priorities for study and investigation in the succeeding year, progress in the development of risk-reduction technologies and the response to and implementation of significant research findings on chemical safety in the public and private sector.

(7) Accident prevention

(A) In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source. Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.

(B)(i) Within 3 years after November 15, 1990, the Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases. The Administrator shall utilize the expertise of the Secretaries of Transportation and Labor in promulgating such regulations. As appropriate, such regulations shall cover the use, operation, repair, replacement, and maintenance of equipment to monitor, detect, inspect, and control such releases, including training of persons in the use and maintenance of such equipment and in the conduct of periodic inspections. The regulations shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment. The regulations shall cover storage, as well as operations. The regulations shall, as appropriate, recognize differences in size, operations, processes, class and categories of sources and the voluntary actions of such sources to prevent such releases and respond to such releases. The regulations shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later.

(ii) The regulations under this subparagraph shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment. Such plan shall provide for compliance with the requirements of this subsection and shall also include each of the following:

(I) a hazard assessment to assess the potential effects of an accidental release of any regulated substance. This assessment shall include an estimate of potential release quantities and a determination of downwind effects, including potential exposures to affected populations. Such assessment shall include a previous release history of the past 5 years, including the size, concentration, and duration of releases, and shall include an evaluation of worst case accidental releases;

(II) a program for preventing accidental releases of regulated substances, including safety precautions and maintenance, monitoring and employee training measures to be used at the source; and

(III) a response program providing for specific actions to be taken in response to an accidental release of a regulated substance so as to protect human health and the environment, including procedures for informing the public and local agencies responsible for responding to accidental releases, emergency health care, and employee training measures.

At the time regulations are promulgated under this subparagraph, the Administrator shall promulgate guidelines to assist stationary sources in the preparation of risk management plans. The guidelines shall, to the extent practicable, include model risk management plans.

(iii) The owner or operator of each stationary source covered by clause (ii) shall register a risk management plan prepared under this subparagraph with the Administrator before the effective date of regulations under clause (i) in such form and manner as the Administrator shall, by rule, require. Plans prepared pursuant to this subparagraph shall also be submitted to the Chemical Safety and Hazard Investigation Board, to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source, and shall be available to the public under section 7414(c) of this title. The Administrator shall establish, by rule, an auditing system to regularly review and, if necessary, require revision in risk management plans to assure that the plans comply with this subparagraph. Each such plan shall be updated periodically as required by the Administrator, by rule.

(C) Any regulations promulgated pursuant to this subsection shall to the maximum extent practicable, consistent with this subsection, be consistent with the recommendations and standards established by the American Society of Mechanical Engineers (ASME), the American National Standards Institute (ANSI) or the American Society of Testing Materials (ASTM). The Administrator shall take into consideration the concerns of small business in promulgating regulations under this subsection.

(D) In carrying out the authority of this paragraph, the Administrator shall consult with the Secretary of Labor and the Secretary of Transportation and shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the Occupational Safety and Health Administration or the Department of Transportation. Nothing in this subsection shall be interpreted, construed or applied to impose requirements affecting, or to grant the Administrator, the Chemical Safety and Hazard Investigation Board, or any other agency any authority to regulate (including requirements for hazard assessment), the accidental release of radionuclides arising from the construction and operation of facilities licensed by the Nuclear Regulatory Commission.

(E) After the effective date of any regulation or requirement imposed under this subsection, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement. Each regulation or requirement under this subsection shall for purposes of sections 7413, 7414, 7416, 7420, 7604, and 7607 of this title and other enforcement provisions of this chapter, be treated as a standard in effect under subsection (d) of this section.

(F) Notwithstanding the provisions of subchapter V of this chapter or this section, no stationary source shall be required to apply for, or operate pursuant to, a permit issued under such subchapter solely because such source is subject to regulations or requirements under this subsection.

(G) In exercising any authority under this subsection, the Administrator shall not, for purposes of section 653(b)(1) of Title 29, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(H) Public access to off-site consequence analysis information

(i) Definitions

In this subparagraph:

(I) Covered person

The term "covered person" means--

(aa) an officer or employee of the United States;

(bb) an officer or employee of an agent or contractor of the Federal Government;

(cc) an officer or employee of a State or local government;

(dd) an officer or employee of an agent or contractor of a State or local government;

(ee) an individual affiliated with an entity that has been given, by a State or local government, responsibility for preventing, planning for, or responding to accidental releases;

(ff) an officer or employee or an agent or contractor of an entity described in item (ee); and

(gg) a qualified researcher under clause (vii).

(II) Official use

The term "official use" means an action of a Federal, State, or local government agency or an entity referred to in subclause (I)(ee) intended to carry out a function relevant to preventing, planning for, or responding to accidental releases.

(III) Off-site consequence analysis information

The term "off-site consequence analysis information" means those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios, and any electronic data base created by the Administrator from those portions.

(IV) Risk management plan

The term "risk management plan" means a risk management plan submitted to the Administrator by an owner or operator of a stationary source under subparagraph (B)(iii).

(ii) Regulations

Not later than 1 year after the date of enactment of this subparagraph, the President shall--

(I) assess--

(aa) the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet; and

(bb) the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases; and

(II) based on the assessment under subclause (I), promulgate regulations governing the distribution of off-site consequence analysis information in a manner that, in the opinion of the President, minimizes the likelihood of accidental releases and the risk described in subclause (I)(aa) and the likelihood of harm to public health and welfare, and--

(aa) allows access by any member of the public to paper copies of off-site consequence analysis information for a limited number of stationary sources located anywhere in the United States, without any geographical restriction;

(bb) allows other public access to off-site consequence analysis information as appropriate;

(cc) allows access for official use by a covered person described in any of items (cc) through (ff) of clause (i)(I) (referred to in this subclause as a 'State or local covered person') to off-site consequence analysis information relating to stationary sources located in the person's State;

(dd) allows a State or local covered person to provide, for official use, off-site consequence analysis information relating to stationary sources located in the person's State to a State or local covered person in a contiguous State; and

(ee) allows a State or local covered person to obtain for official use, by request to the Administrator, off-site consequence analysis information that is not available to the person under item (cc).

(iii) Availability under freedom of information act

(I) First year

Off-site consequence analysis information, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of Title 5, during the 1-year period beginning on the date of enactment of this subparagraph.

(II) After first year

If the regulations under clause (ii) are promulgated on or before the end of the period described in subclause (I), off-site consequence analysis information covered by the regulations, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of Title 5, after the end of that period.

(III) Applicability

Subclauses (I) and (II) apply to off-site consequence analysis information submitted to the Administrator before, on, or after the date of enactment of this subparagraph.

(iv) Availability of information during transition period

The Administrator shall make off-site consequence analysis information available to covered persons for official use in a manner that meets the requirements of items (cc)through (ee) of clause (ii)(II), and to the public in a form that does not make available any information concerning the identity or location of stationary sources, during the period--

(I) beginning on the date of enactment of this subparagraph; and

(II) ending on the earlier of the date of promulgation of the regulations under clause (ii) or the date that is 1 year after the date of enactment of this subparagraph.

(v) Prohibition on unauthorized disclosure of information by covered persons

(I) In general

Beginning on the date of enactment of this subparagraph, a covered person shall not disclose to the public off-site consequence analysis information in any form, or any statewide or national ranking of identified stationary sources derived from such information, except as authorized by this subparagraph (including the regulations promulgated under clause (ii)). After the end of the 1-year period beginning on the date of enactment of this subparagraph, if regulations have not been promulgated under clause (ii), the preceding sentence shall not apply.

(II) Criminal penalties

Notwithstanding section 7413 of this title, a covered person that willfully violates a restriction or prohibition established by this subparagraph (including the regulations promulgated under clause (ii)) shall, upon conviction, be fined for an infraction under section 3571 of Title 18, (but shall not be subject to imprisonment) for each unauthorized disclosure of off-site consequence analysis information, except that subsection (d) of such section 3571 shall not apply to a case in which the offense results in pecuniary loss unless the defendant knew that such

loss would occur. The disclosure of off-site consequence analysis information for each specific stationary source shall be considered a separate offense. The total of all penalties that may be imposed on a single person or organization under this item shall not exceed $1,000,000 for violations committed during any 1 calendar year.

(III) Applicability

If the owner or operator of a stationary source makes off-site consequence analysis information relating to that stationary source available to the public without restriction--

(aa) subclauses (I) and (II) shall not apply with respect to the information; and

(bb) the owner or operator shall notify the Administrator of the public availability of the information.

(IV) List

The Administrator shall maintain and make publicly available a list of all stationary sources that have provided notification under subclause (III)(bb).

(vi) Notice

The Administrator shall provide notice of the definition of official use as provided in clause (i)(III) and examples of actions that would and would not meet that definition, and notice of the restrictions on further dissemination and the penalties established by this Act to each covered person who receives off-site consequence analysis information under clause (iv) and each covered person who receives off-site consequence analysis information for an official use under the regulations promulgated under clause (ii).

(vii) Qualified researchers

(I) In general

Not later than 180 days after the date of enactment of this subparagraph, the Administrator, in consultation with the Attorney General, shall develop and implement a system for providing off-site consequence analysis information, including facility identification, to any qualified researcher, including a qualified researcher from industry or any public interest group.

(II) Limitation on dissemination

The system shall not allow the researcher to disseminate, or make available on the Internet, the off-site consequence analysis information, or any portion of the off-site consequence analysis information, received under this clause.

(viii) Read-only information technology system

In consultation with the Attorney General and the heads of other appropriate Federal agencies, the Administrator shall establish an information technology system that provides for the availability to the public of off-site consequence analysis information by means of a central data base under the control of the Federal Government that contains information that users may read, but that provides no means by which an electronic or mechanical copy of the information may be made.

(ix) Voluntary industry accident prevention standards

The Environmental Protection Agency, the Department of Justice, and other appropriate agencies may provide technical assistance to owners and operators of stationary sources and participate in the development of voluntary industry standards that will help achieve the objectives set forth in paragraph (1).

(x) Effect on State or local law

(I) In general

Subject to subclause (II), this subparagraph (including the regulations promulgated under this subparagraph) shall supersede any provision of State or local law that is inconsistent with this subparagraph (including the regulations).

(II) Availability of information under State law

Nothing in this subparagraph precludes a State from making available data on the off-site consequences of chemical releases collected in accordance with State law.

(xi) Report

(I) In general

Not later than 3 years after the date of enactment of this subparagraph, the Attorney General, in consultation with appropriate State, local, and Federal Government agencies, affected industry, and the public, shall submit to Congress a report that describes the extent to which regulations promulgated under this paragraph have resulted in actions, including the design and maintenance of safe facilities, that are effective in detecting, preventing, and minimizing the consequences of releases of regulated substances that may be caused by criminal activity. As part of this report, the Attorney General, using available data to the extent possible, and a sampling of covered stationary sources selected at the discretion of the Attorney General, and in consultation with appropriate State, local, and Federal governmental agencies, affected industry, and the public, shall review the vulnerability of covered stationary sources to criminal and terrorist activity, current industry practices regarding site security, and security of transportation of regulated substances. The Attorney General shall submit this report, containing the results of the review, together with recommendations, if any, for reducing vulnerability of covered stationary sources to criminal and terrorist activity, to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate and other relevant committees of Congress.

(II) Interim report

Not later than 12 months after the date of enactment of this subparagraph, the Attorney General shall submit to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate, and other relevant committees of Congress, an interim report that includes, at a minimum--

(aa) the preliminary findings under subclause (I);

(bb) the methods used to develop the findings; and

(cc) an explanation of the activities expected to occur that could cause the findings of the report under subclause (I) to be different than the preliminary findings.

(III) Availability of information

Information that is developed by the Attorney General or requested by the Attorney General and received from a covered stationary source for the purpose of conducting the review under subclauses(I) and (II) shall be exempt from disclosure under section 552 of Title 5, if such information would pose a threat to national security.

(xii) Scope

This subparagraph--

(I) applies only to covered persons; and

(II) does not restrict the dissemination of off-site consequence analysis information by any covered person in any manner or form except in the form of a risk management plan or an electronic data base created by the Administrator from off-site consequence analysis information.

(xiii) Authorization of appropriations

There are authorized to be appropriated to the Administrator and the Attorney General such sums as are necessary to carry out this subparagraph (including the regulations promulgated under clause (ii)), to remain available until expended.

(8) Research on hazard assessments

The Administrator may collect and publish information on accident scenarios and consequences covering a range of possible events for substances listed under paragraph (3). The Administrator shall establish a program of long-term research to develop and disseminate information on methods and techniques for hazard assessment which may be useful in improving and validating the procedures employed in the preparation of hazard assessments under this subsection.

(9) Order authority

(A) In addition to any other action taken, when the Administrator determines that there may be an imminent and substantial endangerment to the human health or welfare or the environment because of an actual or threatened accidental release of a regulated substance, the Administrator may secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The Administrator may also, after notice to the State in which the stationary source is located, take other action under this paragraph including, but not limited to, issuing such orders as may be necessary to protect human health. The Administrator shall take action under section 7603 of this title rather than this paragraph whenever the authority of such section is adequate to protect human health and the environment.

(B) Orders issued pursuant to this paragraph may be enforced in an action brought in the appropriate United States district court as if the order were issued under section 7603 of this title.

(C) Within 180 days after November 15, 1990, the Administrator shall publish guidance for using the order authorities established by this paragraph. Such guidance shall provide for the coordinated use of the authorities of this paragraph with other emergency powers authorized by section 9606 of this title, sections 311(c), 308, 309 and 504(a) of the Federal Water Pollution Control Act [33 U.S.C.A. §§ 1321(c), 1318, 1319 and 1364(a)], sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act [42 U.S.C.A. §§ 6927, 6928, 6934, and 6973], sections 1445 and 1431 of the

Safe Drinking Water Act [42 U.S.C.A. §§ 300j-4 and 300i], sections 5 and 7 of the Toxic Substances Control Act [15 U.S.C.A. §§ 2604, 2606], and sections 7413, 7414, and 7603 of this title.

(10) Presidential review

The President shall conduct a review of release prevention, mitigation and response authorities of the various Federal agencies and shall clarify and coordinate agency responsibilities to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources which may exist. The President may utilize the resources and solicit the recommendations of the Chemical Safety and Hazard Investigation Board in conducting such review. At the conclusion of such review, but not later than 24 months after November 15, 1990, the President shall transmit a message to the Congress on the release prevention, mitigation and response activities of the Federal Government making such recommendations for change in law as the President may deem appropriate. Nothing in this paragraph shall be interpreted, construed or applied to authorize the President to modify or reassign release prevention, mitigation or response authorities otherwise established by law.

(11) State authority

Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in effect under this subsection or that applies to a substance not subject to this subsection.

(s) Periodic report

Not later than January 15, 1993 and every 3 years thereafter, the Administrator shall prepare and transmit to the Congress a comprehensive report on the measures taken by the Agency and by the States to implement the provisions of this section. The Administrator shall maintain a database on pollutants and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to--

(1) a status report on standard-setting under subsections (d) and (f) of this section;

(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

(3) development and implementation of the national urban air toxics program; and

(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.

[FN1] So in original. Probably should be "effects".

[FN2] So in original.

[FN3] So in original. Probably should be "section".

[FN4] So in original. Probably should be paragraph "(7)(B)".

[FN5] So in original. Probably should be "subparagraph".

MEMORANDA OF PRESIDENT

DELEGATION OF AUTHORITY TO REVIEW EMERGENCY RELEASE AUTHORITIES AND PREPARE AND TRANSMIT TO THE CONGRESS A MESSAGE CONCERNING SUCH AUTHORITIES

<Aug. 19, 1993, 58 F.R. 52397>

Memorandum for the Administrator of the Environmental Protection Agency

WHEREAS, the Environmental Protection Agency, the agencies and departments that are members of the National Response Team (authorized under Executive Order No. 12580, 52 Fed.Reg. 2923 (1987)) [set out as a note under section 9615 of this title], and other Federal agencies and departments undertake emergency release prevention, mitigation, and response activities pursuant to various authorities;

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 112(r)(10) of the Clean Air Act (the "Act") (section 7412(r)(10) of title 42 of the United States Code) [subsec. (r)(10) of this section] and section 301 of title 3 of the United States Code [section 301 of Title 3, The President], and in order to provide for the delegation of certain functions under the Act [42 U.S.C.A. § 7401 et seq.], I hereby:

(1) Authorize you, in coordination with agencies and departments that are members of the National Response Team and other appropriate agencies and departments, to conduct a review of release prevention, mitigation, and response authorities of Federal agencies in order to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources that may exist, to the extent such review is required by section 112(r)(10) of the Act; and

(2) Authorize you, in coordination with agencies and departments that are members of the National Response Team and other appropriate agencies and departments, to prepare and transmit a message to the Congress concerning the release prevention, mitigation, and response activities of the Federal Government with such recommendations for change in law as you deem appropriate, to the extent such message is required by section 112(r)(10) of the Act.

The authority delegated by this memorandum may be further redelegated within the Environmental Protection Agency.

You are hereby authorized and directed to publish this memorandum in the **Federal Register.**

WILLIAM J. CLINTON

MEMORANDA OF PRESIDENT

DELEGATION OF AUTHORITY TO CONDUCT ASSESSMENTS AND PROMULGATE REGULATIONS ON PUBLIC ACCESS TO OFF-SITE CONSEQUENCE ANALYSIS INFORMATION

<Jan. 27, 2000, 65 F.R. 8631>

Memorandum for the Attorney General[,] the Administrator of the Environmental Protection Agency[,] and the Director of the Office of Management and Budget

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 112(r)(7)(H) of the Clean Air Act ("Act") (**42** U.S.C. **7412**(r)(7)(H)) [subsec. (r)(7)(H) of this section], as added by section 3 of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (Public Law 106-40), and section 301 of title 3, United States Code, I hereby delegate to:

(1) the Attorney General the authority vested in the President under section 112(r)(7)(H)(i)(II)(aa) of the Act [subsec.

(r)(7)(H)(i)(II)(aa) of this section] to assess the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet;

(2) the Administrator of the Environmental Protection Agency (EPA) the authority vested in the President under section 112(r)(7)(H)(ii)(I)(bb) of the Act [subsec. (r)(7)(H)(ii)(I)(bb) of this section] to assess the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases; and

(3) the Attorney General and the Administrator of EPA, jointly, the authority vested in the President under section 112(r)(7)(H)(ii)(II) of the Act [subsec. (r)(7)(H)(ii)(II) of this section] to promulgate regulations, based on these assessments, governing the distribution of off-site consequence analysis information. These regulations, in proposed and final form, shall be subject to review and approval by the Director of the Office of Management and Budget.

The Administrator of EPA is authorized and directed to publish this memorandum in the **Federal Register.**

WILLIAM J. CLINTON

Current through P.L. 110-96 approved 10-16-07

END OF DOCUMENT

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE **42**. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER I--PROGRAMS AND ACTIVITIES
PART C--PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY
SUBPART I--CLEAN AIR

➡ **§ 7479.** Definitions

For purposes of this part--

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE **42**. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III--GENERAL PROVISIONS

§ 7602. Definitions

When used in this chapter--

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means--

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct ma-

terial) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.. [FN1]

(*l*) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) Indian tribe.--The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.--The term "VOC" means volatile organic compound, as defined by the Administrator.

(t) PM-10.--The term "PM-10" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS and CTG.--The term "NAAQS" means national ambient air quality standard. The term "CTG" means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.--The term "NO_x" means oxides of nitrogen.

(w) CO.--The term "CO" means carbon monoxide.

(x) Small source.--The term "small source" means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) Federal implementation plan.--The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) Stationary source.--The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

[FN1] So in original.

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UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III--GENERAL PROVISIONS

➡§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee

thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or [FN1]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),, [FN2] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [FN3] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations. [FN4]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

[FN1] So in original. The word "or" probably should not appear.

[FN2] So in original.

[FN3] So in original. The semicolon probably should be comma.

[FN4] So in original. The period probably should be a comma.

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UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III--GENERAL PROVISIONS

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [FN1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [FN2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [FN2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regula-

tions for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [FN3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of

this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in

this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary

or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [FN4] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

[FN1] So in original. Probably should be "this".

[FN2] So in original.

[FN3] So in original. The word "to" probably should not appear.

[FN4] So in original. Probably should be "sections".

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UNITED STATES CODE ANNOTATED
TITLE **42**. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V--PERMITS

§ 7661. Definitions

As used in this subchapter--

(1) Affected source

The term "affected source" shall have the meaning given such term in subchapter IV-A of this chapter.

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term "schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term "permitting authority" means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

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Subpart Z [Reserved]

63.569–63.599 [Reserved]

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

SOURCE: 57 FR 61992, Dec. 29, 1992, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 59 FR 12430, Mar. 16, 1994, unless otherwise noted.

§ 63.1 Applicability.

(a) *General.* (1) Terms used throughout this part are defined in §63.2 or in the Clean Air Act (Act) as amended in 1990, except that individual subparts of this part may include specific definitions in addition to or that supersede definitions in §63.2.

(2) This part contains national emission standards for hazardous air pollutants (NESHAP) established pursuant to section 112 of the Act as amended November 15, 1990. These standards regulate specific categories of stationary sources that emit (or have the potential to emit) one or more hazardous air pollutants listed in this part pursuant to section 112(b) of the Act. This section explains the applicability of such standards to sources affected by them. The standards in this part are independent of NESHAP contained in 40 CFR part 61. The NESHAP in part 61 promulgated by signature of the Administrator before November 15, 1990 (i.e., the date of enactment of the Clean Air Act Amendments of 1990) remain in effect until they are amended, if appropriate, and added to this part.

(3) No emission standard or other requirement established under this part shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established by the Administrator pursuant to other authority of the Act (section 111, part C or D or any other authority of this Act), or a standard issued under State authority. The Administrator may specify in a specific standard under this part that facilities subject to other provisions under the Act need only comply with the provisions of that standard.

(4)(i) Each relevant standard in this part 63 must identify explicitly whether each provision in this subpart A is or is not included in such relevant standard.

(ii) If a relevant part 63 standard incorporates the requirements of 40 CFR part 60, part 61 or other part 63 standards, the relevant part 63 standard must identify explicitly the applicability of each corresponding part 60, part 61, or other part 63 subpart A (General) provision.

(iii) The General Provisions in this subpart A do not apply to regulations developed pursuant to section 112(r) of the amended Act, unless otherwise specified in those regulations.

(5) [Reserved]

(6) To obtain the most current list of categories of sources to be regulated under section 112 of the Act, or to obtain the most recent regulation promulgation schedule established pursuant to section 112(e) of the Act, contact the Office of the Director, Emission Standards Division, Office of Air Quality Planning and Standards, U.S. EPA (MD–13), Research Triangle Park, North Carolina 27711.

(7)–(9) [Reserved]

(10) For the purposes of this part, time periods specified in days shall be measured in calendar days, even if the word ''calendar'' is absent, unless otherwise specified in an applicable requirement.

(11) For the purposes of this part, if an explicit postmark deadline is not specified in an applicable requirement for the submittal of a notification, application, test plan, report, or other written communication to the Administrator, the owner or operator shall postmark the submittal on or before the number of days specified in the applicable requirement. For example, if a notification must be submitted 15 days before a particular event is scheduled to take place, the notification shall be postmarked on or before 15 days preceding the event; likewise, if a notification must be submitted 15 days after a particular event takes place, the notification shall be postmarked on or before 15 days following the end of the event. The use of reliable non-Government mail carriers that provide indications of verifiable delivery of information required to be submitted to the

Administrator, similar to the postmark provided by the U.S. Postal Service, or alternative means of delivery agreed to by the permitting authority, is acceptable.

(12) Notwithstanding time periods or postmark deadlines specified in this part for the submittal of information to the Administrator by an owner or operator, or the review of such information by the Administrator, such time periods or deadlines may be changed by mutual agreement between the owner or operator and the Administrator. Procedures governing the implementation of this provision are specified in § 63.9(i).

(b) *Initial applicability determination for this part.* (1) The provisions of this part apply to the owner or operator of any stationary source that—

(i) Emits or has the potential to emit any hazardous air pollutant listed in or pursuant to section 112(b) of the Act; and

(ii) Is subject to any standard, limitation, prohibition, or other federally enforceable requirement established pursuant to this part.

(2) [Reserved]

(3) An owner or operator of a stationary source who is in the relevant source category and who determines that the source is not subject to a relevant standard or other requirement established under this part must keep a record as specified in § 63.10(b)(3).

(c) *Applicability of this part after a relevant standard has been set under this part.* (1) If a relevant standard has been established under this part, the owner or operator of an affected source must comply with the provisions of that standard and of this subpart as provided in paragraph (a)(4) of this section.

(2) Except as provided in § 63.10(b)(3), if a relevant standard has been established under this part, the owner or operator of an affected source may be required to obtain a title V permit from a permitting authority in the State in which the source is located. Emission standards promulgated in this part for area sources pursuant to section 112(c)(3) of the Act will specify whether—

(i) States will have the option to exclude area sources affected by that standard from the requirement to obtain a title V permit (i.e., the standard will exempt the category of area sources altogether from the permitting requirement);

(ii) States will have the option to defer permitting of area sources in that category until the Administrator takes rulemaking action to determine applicability of the permitting requirements; or

(iii) If a standard fails to specify what the permitting requirements will be for area sources affected by such a standard, then area sources that are subject to the standard will be subject to the requirement to obtain a title V permit without any deferral.

(3)–(4) [Reserved]

(5) If an area source that otherwise would be subject to an emission standard or other requirement established under this part if it were a major source subsequently increases its emissions of hazardous air pollutants (or its potential to emit hazardous air pollutants) such that the source is a major source that is subject to the emission standard or other requirement, such source also shall be subject to the notification requirements of this subpart.

(d) [Reserved]

(e) If the Administrator promulgates an emission standard under section 112(d) or (h) of the Act that is applicable to a source subject to an emission limitation by permit established under section 112(j) of the Act, and the requirements under the section 112(j) emission limitation are substantially as effective as the promulgated emission standard, the owner or operator may request the permitting authority to revise the source's title V permit to reflect that the emission limitation in the permit satisfies the requirements of the promulgated emission standard. The process by which the permitting authority determines whether the section 112(j) emission limitation is substantially as effective as the promulgated emission standard must include, consistent with part 70 or 71 of this chapter, the opportunity for full public, EPA, and affected State review (including the opportunity for EPA's objection) prior to the permit revision

being finalized. A negative determination by the permitting authority constitutes final action for purposes of review and appeal under the applicable title V operating permit program.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16595, Apr. 5, 2002]

§ 63.2 Definitions.

The terms used in this part are defined in the Act or in this section as follows:

Act means the Clean Air Act (42 U.S.C. 7401 *et seq.*, as amended by Pub. L. 101–549, 104 Stat. 2399).

Actual emissions is defined in subpart D of this part for the purpose of granting a compliance extension for an early reduction of hazardous air pollutants.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her authorized representative (e.g., a State that has been delegated the authority to implement the provisions of this part).

Affected source, for the purposes of this part, means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act. Each relevant standard will define the ''affected source,'' as defined in this paragraph unless a different definition is warranted based on a published justification as to why this definition would result in significant administrative, practical, or implementation problems and why the different definition would resolve those problems. The term ''affected source,'' as used in this part, is separate and distinct from any other use of that term in EPA regulations such as those implementing title IV of the Act. Affected source may be defined differently for part 63 than affected facility and stationary source in parts 60 and 61, respectively. This definition of ''affected source,'' and the procedures for adopting an alternative definition of ''affected source,'' shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002.

Alternative emission limitation means conditions established pursuant to sections 112(i)(5) or 112(i)(6) of the Act by the Administrator or by a State with an approved permit program.

Alternative emission standard means an alternative means of emission limitation that, after notice and opportunity for public comment, has been demonstrated by an owner or operator to the Administrator's satisfaction to achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under a relevant design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act.

Alternative test method means any method of sampling and analyzing for an air pollutant that is not a test method in this chapter and that has been demonstrated to the Administrator's satisfaction, using Method 301 in Appendix A of this part, to produce results adequate for the Administrator's determination that it may be used in place of a test method specified in this part.

Approved permit program means a State permit program approved by the Administrator as meeting the requirements of part 70 of this chapter or a Federal permit program established in this chapter pursuant to title V of the Act (42 U.S.C. 7661).

Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.

Commenced means, with respect to construction or reconstruction of an affected source, that an owner or operator has undertaken a continuous program of construction or reconstruction or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or reconstruction.

Compliance date means the date by which an affected source is required to be in compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established by the Administrator (or a State

being finalized. A negative determination by the permitting authority constitutes final action for purposes of review and appeal under the applicable title V operating permit program.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16595, Apr. 5, 2002]

§ 63.2 Definitions.

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Actual emissions is defined in subpart D of this part for the purpose of granting a compliance extension for an early reduction of hazardous air pollutants.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her authorized representative (e.g., a State that has been delegated the authority to implement the provisions of this part).

Affected source, for the purposes of this part, means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act. Each relevant standard will define the ''affected source,'' as defined in this paragraph unless a different definition is warranted based on a published justification as to why this definition would result in significant administrative, practical, or implementation problems and why the different definition would resolve those problems. The term ''affected source,'' as used in this part, is separate and distinct from any other use of that term in EPA regulations such as those implementing title IV of the Act. Affected source may be defined differently for part 63 than affected facility and stationary source in parts 60 and 61, respectively. This definition of ''affected source,'' and the procedures for adopting an alternative definition of ''affected source,'' shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002.

Alternative emission limitation means conditions established pursuant to sections 112(i)(5) or 112(i)(6) of the Act by the Administrator or by a State with an approved permit program.

Alternative emission standard means an alternative means of emission limitation that, after notice and opportunity for public comment, has been demonstrated by an owner or operator to the Administrator's satisfaction to achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under a relevant design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act.

Alternative test method means any method of sampling and analyzing for an air pollutant that is not a test method in this chapter and that has been demonstrated to the Administrator's satisfaction, using Method 301 in Appendix A of this part, to produce results adequate for the Administrator's determination that it may be used in place of a test method specified in this part.

Approved permit program means a State permit program approved by the Administrator as meeting the requirements of part 70 of this chapter or a Federal permit program established in this chapter pursuant to title V of the Act (42 U.S.C. 7661).

Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.

Commenced means, with respect to construction or reconstruction of an affected source, that an owner or operator has undertaken a continuous program of construction or reconstruction or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or reconstruction.

Compliance date means the date by which an affected source is required to be in compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established by the Administrator (or a State

with an approved permit program) pursuant to section 112 of the Act.

Compliance schedule means: (1) In the case of an affected source that is in compliance with all applicable requirements established under this part, a statement that the source will continue to comply with such requirements; or

(2) In the case of an affected source that is required to comply with applicable requirements by a future date, a statement that the source will meet such requirements on a timely basis and, if required by an applicable requirement, a detailed schedule of the dates by which each step toward compliance will be reached; or

(3) In the case of an affected source not in compliance with all applicable requirements established under this part, a schedule of remedial measures, including an enforceable sequence of actions or operations with milestones and a schedule for the submission of certified progress reports, where applicable, leading to compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established pursuant to section 112 of the Act for which the affected source is not in compliance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

Construction means the on-site fabrication, erection, or installation of an affected source. Construction does not include the removal of all equipment comprising an affected source from an existing location and reinstallation of such equipment at a new location. The owner or operator of an existing affected source that is relocated may elect not to reinstall minor ancillary equipment including, but not limited to, piping, ductwork, and valves. However, removal and reinstallation of an affected source will be construed as reconstruction if it satisfies the criteria for reconstruction as defined in this section. The costs of replacing minor ancillary equipment must be considered in determining whether the existing affected source is reconstructed.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this part, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) is a comprehensive term that may include, but is not limited to, continuous emission monitoring systems, continuous opacity monitoring systems, continuous parameter monitoring systems, or other manual or automatic monitoring that is used for demonstrating compliance with an applicable regulation on a continuous basis as defined by the regulation.

Continuous opacity monitoring system (COMS) means a continuous monitoring system that measures the opacity of emissions.

Continuous parameter monitoring system means the total equipment that may be required to meet the data acquisition and availability requirements of this part, used to sample, condition (if applicable), analyze, and provide a record of process or control system parameters.

Effective date means:

(1) With regard to an emission standard established under this part, the date of promulgation in the FEDERAL REGISTER of such standard; or

(2) With regard to an alternative emission limitation or equivalent emission limitation determined by the Administrator (or a State with an approved permit program), the date that the alternative emission limitation or equivalent emission limitation becomes effective according to the provisions of this part.

Emission standard means a national standard, limitation, prohibition, or other regulation promulgated in a subpart of this part pursuant to sections 112(d), 112(h), or 112(f) of the Act.

Emissions averaging is a way to comply with the emission limitations specified in a relevant standard, whereby an affected source, if allowed under a subpart of this part, may create emission credits by reducing emissions from specific points to a level below that required by the relevant standard, and

those credits are used to offset emissions from points that are not controlled to the level required by the relevant standard.

EPA means the United States Environmental Protection Agency.

Equivalent emission limitation means any maximum achievable control technology emission limitation or requirements which are applicable to a major source of hazardous air pollutants and are adopted by the Administrator (or a State with an approved permit program) on a case-by-case basis, pursuant to section 112(g) or (j) of the Act.

Excess emissions and continuous monitoring system performance report is a report that must be submitted periodically by an affected source in order to provide data on its compliance with relevant emission limits, operating parameters, and the performance of its continuous parameter monitoring systems.

Existing source means any affected source that is not a new source.

Federally enforceable means all limitations and conditions that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator. Examples of federally enforceable limitations and conditions include, but are not limited to:

(1) Emission standards, alternative emission standards, alternative emission limitations, and equivalent emission limitations established pursuant to section 112 of the Act as amended in 1990;

(2) New source performance standards established pursuant to section 111 of the Act, and emission standards established pursuant to section 112 of the Act before it was amended in 1990;

(3) All terms and conditions in a title V permit, including any provisions that limit a source's potential to emit, unless expressly designated as not federally enforceable;

(4) Limitations and conditions that are part of an approved State Implementation Plan (SIP) or a Federal Implementation Plan (FIP);

(5) Limitations and conditions that are part of a Federal construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by the EPA in accordance with 40 CFR part 51;

(6) Limitations and conditions that are part of an operating permit where the permit and the permitting program pursuant to which it was issued meet all of the following criteria:

(i) The operating permit program has been submitted to and approved by EPA into a State implementation plan (SIP) under section 110 of the CAA;

(ii) The SIP imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits and provides that permits which do not conform to the operating permit program requirements and the requirements of EPA's underlying regulations may be deemed not ''federally enforceable'' by EPA;

(iii) The operating permit program requires that all emission limitations, controls, and other requirements imposed by such permits will be at least as stringent as any other applicable limitations and requirements contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the SIP, or that are otherwise ''federally enforceable'';

(iv) The limitations, controls, and requirements in the permit in question are permanent, quantifiable, and otherwise enforceable as a practical matter; and

(v) The permit in question was issued only after adequate and timely notice and opportunity for comment for EPA and the public.

(7) Limitations and conditions in a State rule or program that has been approved by the EPA under subpart E of this part for the purposes of implementing and enforcing section 112; and

(8) Individual consent agreements that the EPA has legal authority to create.

Fixed capital cost means the capital needed to provide all the depreciable components of an existing source.

Force majeure means, for purposes of § 63.7, an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents the

owner or operator from complying with the regulatory requirement to conduct performance tests within the specified timeframe despite the affected facility's best efforts to fulfill the obligation. Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility.

Fugitive emissions means those emissions from a stationary source that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Under section 112 of the Act, all fugitive emissions are to be considered in determining whether a stationary source is a major source.

Hazardous air pollutant means any air pollutant listed in or pursuant to section 112(b) of the Act.

Issuance of a part 70 permit will occur, if the State is the permitting authority, in accordance with the requirements of part 70 of this chapter and the applicable, approved State permit program. When the EPA is the permitting authority, issuance of a title V permit occurs immediately after the EPA takes final action on the final permit.

Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence.

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Monitoring means the collection and use of measurement data or other information to control the operation of a process or pollution control device or to verify a work practice standard relative to assuring compliance with applicable requirements. Monitoring is composed of four elements:

(1) Indicator(s) of performance—the parameter or parameters you measure or observe for demonstrating proper operation of the pollution control measures or compliance with the applicable emissions limitation or standard. Indicators of performance may include direct or predicted emissions measurements (including opacity), operational parametric values that correspond to process or control device (and capture system) efficiencies or emissions rates, and recorded findings of inspection of work practice activities, materials tracking, or design characteristics. Indicators may be expressed as a single maximum or minimum value, a function of process variables (for example, within a range of pressure drops), a particular operational or work practice status (for example, a damper position, completion of a waste recovery task, materials tracking), or an interdependency between two or among more than two variables.

(2) Measurement techniques—the means by which you gather and record information of or about the indicators of performance. The components of the measurement technique include the detector type, location and installation specifications, inspection procedures, and quality assurance and quality control measures. Examples of measurement techniques include continuous emission monitoring systems, continuous opacity monitoring systems, continuous parametric monitoring systems, and manual inspections that include making records of process conditions or work practices.

(3) Monitoring frequency—the number of times you obtain and record monitoring data over a specified time interval. Examples of monitoring frequencies include at least four points equally spaced for each hour for continuous emissions or parametric monitoring systems, at least every 10 seconds for continuous opacity monitoring systems, and at least once per operating day (or week, month, etc.) for work practice or design inspections.

(4) Averaging time—the period over which you average and use data to verify proper operation of the pollution control approach or compliance with the emissions limitation or standard. Examples of averaging time include a 3-hour average in units of the emissions limitation, a 30-day rolling average emissions value, a daily average of a control device operational parametric range, and an instantaneous alarm.

New affected source means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory that is subject to a section 112(d) or other relevant standard for new sources. This definition of ''new affected source,'' and the criteria to be utilized in implementing it, shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002. Each relevant standard will define the term ''new affected source,'' which will be the same as the ''affected source'' unless a different collection is warranted based on consideration of factors including:

(1) Emission reduction impacts of controlling individual sources versus groups of sources;

(2) Cost effectiveness of controlling individual equipment;

(3) Flexibility to accommodate common control strategies;

(4) Cost/benefits of emissions averaging;

(5) Incentives for pollution prevention;

(6) Feasibility and cost of controlling processes that share common equipment (e.g., product recovery devices);

(7) Feasibility and cost of monitoring; and

(8) Other relevant factors.

New source means any affected source the construction or reconstruction of which is commenced after the Administrator first proposes a relevant emission standard under this part establishing an emission standard applicable to such source.

One-hour period, unless otherwise defined in an applicable subpart, means any 60-minute period commencing on the hour.

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. For continuous opacity monitoring systems, opacity means the fraction of incident light that is attenuated by an optical medium.

Owner or operator means any person who owns, leases, operates, controls, or supervises a stationary source.

Performance audit means a procedure to analyze blind samples, the content of which is known by the Administrator, simultaneously with the analysis of performance test samples in order to provide a measure of test data quality.

Performance evaluation means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

Performance test means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

Permit modification means a change to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661).

Permit program means a comprehensive State operating permit system established pursuant to title V of the Act (42 U.S.C. 7661) and regulations codified in part 70 of this chapter and applicable State regulations, or a comprehensive Federal operating permit system established pursuant to title V of the Act and regulations codified in this chapter.

Permit revision means any permit modification or administrative permit amendment to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661).

Permitting authority means: (1) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under part 70 of this chapter; or

(2) The Administrator, in the case of EPA-implemented permit programs under title V of the Act (42 U.S.C. 7661).

Pollution Prevention means *source reduction* as defined under the Pollution Prevention Act (42 U.S.C. 13101–13109). The definition is as follows:

(1) *Source reduction* is any practice that:

(i) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(ii) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

(2) The term *source reduction* includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control.

(3) The term *source reduction* does not include any practice that alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

Reconstruction, unless otherwise defined in a relevant standard, means the replacement of components of an affected or a previously nonaffected source to such an extent that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable new source; and

(2) It is technologically and economically feasible for the reconstructed source to meet the relevant standard(s) established by the Administrator (or a State) pursuant to section 112 of the Act. Upon reconstruction, an affected source, or a stationary source that becomes an affected source, is subject to relevant standards for new sources, including compliance dates, irrespective of any change in emissions of hazardous air pollutants from that source.

Regulation promulgation schedule means the schedule for the promulgation of emission standards under this part, established by the Administrator pursuant to section 112(e) of the Act and published in the FEDERAL REGISTER.

Relevant standard means:

(1) An emission standard;

(2) An alternative emission standard;

(3) An alternative emission limitation; or

(4) An equivalent emission limitation established pursuant to section 112 of the Act that applies to the collection of equipment, activities, or both regulated by such standard or limitation. A relevant standard may include or consist of a design, equipment, work practice, or operational requirement, or other measure, process, method, system, or technique (including prohibition of emissions) that the Administrator (or a State) establishes for new or existing sources to which such standard or limitation applies. Every relevant standard established pursuant to section 112 of the Act includes subpart A of this part, as provided by § 63.1(a)(4), and all applicable appendices of this part or of other parts of this chapter that are referenced in that standard.

Responsible official means one of the following:

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

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

(ii) The delegation of authority to such representative is approved in advance by the Administrator.

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

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

(4) For affected sources (as defined in this part) applying for or subject to a title V permit: ''responsible official'' shall have the same meaning as defined in part 70 or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever is applicable.

Run means one of a series of emission or other measurements needed to determine emissions for a representative operating period or cycle as specified in this part.

Shutdown means the cessation of operation of an affected source or portion of an affected source for any purpose.

Six-minute period means, with respect to opacity determinations, any one of the 10 equal parts of a 1-hour period.

Source at a Performance Track member facility means a major or area source located at a facility which has been accepted by EPA for membership in the Performance Track Program (as described at *www.epa.gov/PerformanceTrack*) and is still a member of the Program. The Performance Track Program is a voluntary program that encourages continuous environmental improvement through the use of environmental management systems, local community outreach, and measurable results.

Standard conditions means a temperature of 293 K (68 °F) and a pressure of 101.3 kilopascals (29.92 in. Hg).

Startup means the setting in operation of an affected source or portion of an affected source for any purpose.

State means all non-Federal authorities, including local agencies, interstate associations, and State-wide programs, that have delegated authority to implement: (1) The provisions of this part and/or (2) the permit program established under part 70 of this chapter. The term State shall have its conventional meaning where clear from the context.

Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant.

Test method means the validated procedure for sampling, preparing, and analyzing for an air pollutant specified in a relevant standard as the performance test procedure. The test method may include methods described in an appendix of this chapter, test methods incorporated by reference in this part, or methods validated for an application through procedures in Method 301 of appendix A of this part.

Title V permit means any permit issued, renewed, or revised pursuant to Federal or State regulations established to implement title V of the Act (42 U.S.C. 7661). A title V permit issued by a State permitting authority is called a part 70 permit in this part.

Visible emission means the observation of an emission of opacity or optical density above the threshold of vision.

Working day means any day on which Federal Government offices (or State government offices for a State that has obtained delegation under section 112(l)) are open for normal business. Saturdays, Sundays, and official Federal (or where delegated, State) holidays are not working days.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16596, Apr. 5, 2002; 68 FR 32600, May 30, 2003; 69 FR 21752, Apr. 22, 2004; 72 FR 27443, May 16, 2007]

§ 63.3 Units and abbreviations.

Used in this part are abbreviations and symbols of units of measure. These are defined as follows:

(a) *System International (SI) units of measure:*

A = ampere
g = gram
Hz = hertz
J = joule

(ii) Notice of opportunity for the applicant to present, in writing, within 30 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator to enable further action on the application.

(4) A final determination to deny any application for approval will be in writing and will specify the grounds on which the denial is based. The final determination will be made within 60 calendar days of presentation of additional information or arguments (if the application is complete), or within 60 calendar days after the final date specified for presentation if no presentation is made.

(5) Neither the submission of an application for approval nor the Administrator's approval of construction or reconstruction shall—

(i) Relieve an owner or operator of legal responsibility for compliance with any applicable provisions of this part or with any other applicable Federal, State, or local requirement; or

(ii) Prevent the Administrator from implementing or enforcing this part or taking any other action under the Act.

(f) *Approval of construction or reconstruction based on prior State preconstruction review.* (1) Preconstruction review procedures that a State utilizes for other purposes may also be utilized for purposes of this section if the procedures are substantially equivalent to those specified in this section. The Administrator will approve an application for construction or reconstruction specified in paragraphs (b)(3) and (d) of this section if the owner or operator of a new affected source or reconstructed affected source, who is subject to such requirement meets the following conditions:

(i) The owner or operator of the new affected source or reconstructed affected source has undergone a preconstruction review and approval process in the State in which the source is (or would be) located and has received a federally enforceable construction permit that contains a finding that the source will meet the relevant promulgated emission standard, if the source is properly built and operated.

(ii) Provide a statement from the State or other evidence (such as State regulations) that it considered the factors specified in paragraph (e)(1) of this section.

(2) The owner or operator must submit to the Administrator the request for approval of construction or reconstruction under this paragraph (f)(2) no later than the application deadline specified in paragraph (d)(1) of this section (see also § 63.9(b)(2)). The owner or operator must include in the request information sufficient for the Administrator's determination. The Administrator will evaluate the owner or operator's request in accordance with the procedures specified in paragraph (e) of this section. The Administrator may request additional relevant information after the submittal of a request for approval of construction or reconstruction under this paragraph (f)(2).

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16598, Apr. 5, 2002]

§ 63.6 Compliance with standards and maintenance requirements.

(a) *Applicability.* (1) The requirements in this section apply to the owner or operator of affected sources for which any relevant standard has been established pursuant to section 112 of the Act and the applicability of such requirements is set out in accordance with § 63.1(a)(4) unless—

(i) The Administrator (or a State with an approved permit program) has granted an extension of compliance consistent with paragraph (i) of this section; or

(ii) The President has granted an exemption from compliance with any relevant standard in accordance with section 112(i)(4) of the Act.

(2) If an area source that otherwise would be subject to an emission standard or other requirement established under this part if it were a major source subsequently increases its emissions of hazardous air pollutants (or its potential to emit hazardous air pollutants) such that the source is a major source, such source shall be subject to the relevant emission standard or other requirement.

(b) *Compliance dates for new and reconstructed sources.* (1) Except as specified in paragraphs (b)(3) and (4) of this

section, the owner or operator of a new or reconstructed affected source for which construction or reconstruction commences after proposal of a relevant standard that has an initial startup before the effective date of a relevant standard established under this part pursuant to section 112(d), (f), or (h) of the Act must comply with such standard not later than the standard's effective date.

(2) Except as specified in paragraphs (b)(3) and (4) of this section, the owner or operator of a new or reconstructed affected source that has an initial startup after the effective date of a relevant standard established under this part pursuant to section 112(d), (f), or (h) of the Act must comply with such standard upon startup of the source.

(3) The owner or operator of an affected source for which construction or reconstruction is commenced after the proposal date of a relevant standard established under this part pursuant to section 112(d), 112(f), or 112(h) of the Act but before the effective date (that is, promulgation) of such standard shall comply with the relevant emission standard not later than the date 3 years after the effective date if:

(i) The promulgated standard (that is, the relevant standard) is more stringent than the proposed standard; for purposes of this paragraph, a finding that controls or compliance methods are ''more stringent'' must include control technologies or performance criteria and compliance or compliance assurance methods that are different but are substantially equivalent to those required by the promulgated rule, as determined by the Administrator (or his or her authorized representative); and

(ii) The owner or operator complies with the standard as proposed during the 3-year period immediately after the effective date.

(4) The owner or operator of an affected source for which construction or reconstruction is commenced after the proposal date of a relevant standard established pursuant to section 112(d) of the Act but before the proposal date of a relevant standard established pursuant to section 112(f) shall not be required to comply with the section 112(f) emission standard until the date 10 years after the date construction or reconstruction is commenced, except that, if the section 112(f) standard is promulgated more than 10 years after construction or reconstruction is commenced, the owner or operator must comply with the standard as provided in paragraphs (b)(1) and (2) of this section.

(5) The owner or operator of a new source that is subject to the compliance requirements of paragraph (b)(3) or (4) of this section must notify the Administrator in accordance with § 63.9(d)

(6) [Reserved]

(7) When an area source becomes a major source by the addition of equipment or operations that meet the definition of new affected source in the relevant standard, the portion of the existing facility that is a new affected source must comply with all requirements of that standard applicable to new sources. The source owner or operator must comply with the relevant standard upon startup.

(c) *Compliance dates for existing sources.* (1) After the effective date of a relevant standard established under this part pursuant to section 112(d) or 112(h) of the Act, the owner or operator of an existing source shall comply with such standard by the compliance date established by the Administrator in the applicable subpart(s) of this part. Except as otherwise provided for in section 112 of the Act, in no case will the compliance date established for an existing source in an applicable subpart of this part exceed 3 years after the effective date of such standard.

(2) If an existing source is subject to a standard established under this part pursuant to section 112(f) of the Act, the owner or operator must comply with the standard by the date 90 days after the standard's effective date, or by the date specified in an extension granted to the source by the Administrator under paragraph (i)(4)(ii) of this section, whichever is later.

(3)–(4) [Reserved]

(5) Except as provided in paragraph (b)(7) of this section, the owner or operator of an area source that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source

shall be subject to relevant standards for existing sources. Such sources must comply by the date specified in the standards for existing area sources that become major sources. If no such compliance date is specified in the standards, the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective.

(d) [Reserved]

(e) *Operation and maintenance requirements.* (1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty to minimize emissions requires that the owner or operator reduce emissions from the affected source to the greatest extent which is consistent with safety and good air pollution control practices. The general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

(ii) Malfunctions must be corrected as soon as practicable after their occurrence. To the extent that an unexpected event arises during a startup, shutdown, or malfunction, an owner or operator must comply by minimizing emissions during such a startup, shutdown, and malfunction event consistent with safety and good air pollution control practices.

(iii) Operation and maintenance requirements established pursuant to section 112 of the Act are enforceable independent of emissions limitations or other requirements in relevant standards.

(2) [Reserved]

(3) *Startup, shutdown, and malfunction plan.* (i) The owner or operator of an affected source must develop a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard. The startup, shutdown, and malfunction plan does not need to address any scenario that would not cause the source to exceed an applicable emission limitation in the relevant standard. This plan must be developed by the owner or operator by the source's compliance date for that relevant standard. The purpose of the startup, shutdown, and malfunction plan is to—

(A) Ensure that, at all times, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty to minimize emissions established by paragraph (e)(1)(i) of this section;

(B) Ensure that owners or operators are prepared to correct malfunctions as soon as practicable after their occurrence in order to minimize excess emissions of hazardous air pollutants; and

(C) Reduce the reporting burden associated with periods of startup, shutdown, and malfunction (including corrective action taken to restore malfunctioning process and air pollution control equipment to its normal or usual manner of operation).

(ii) [Reserved]

(iii) When actions taken by the owner or operator during a startup or shutdown (and the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards), or malfunction (including actions taken to correct a malfunction) are consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, the owner or operator must keep records for that event which demonstrate that the procedures specified in the plan were followed. These records may take the form of a ''checklist,'' or other effective form of recordkeeping that confirms conformance with the startup, shutdown, and malfunction plan and describes the actions taken for that event. In addition, the owner or operator must keep records of these events as specified in paragraph 63.10(b), including records of the occurrence and duration of each startup or shutdown (if the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards), or malfunction of operation and each malfunction of the air pollution control and monitoring equipment. Furthermore, the owner or operator shall confirm that actions taken during the relevant reporting period during periods of startup, shutdown, and malfunction were consistent with the affected source's startup, shutdown and malfunction plan in the semiannual (or more frequent) startup, shutdown, and malfunction report required in § 63.10(d)(5).

(iv) If an action taken by the owner or operator during a startup, shutdown, or malfunction (including an action taken to correct a malfunction) is not consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, and the source exceeds any applicable emission limitation in the relevant emission standard, then the owner or operator must record the actions taken for that event and must report such actions within 2 working days after commencing actions inconsistent with the plan, followed by a letter within 7 working days after the end of the event, in accordance with § 63.10(d)(5) (unless the owner or operator makes alternative reporting arrangements, in advance, with the Administrator).

(v) The owner or operator must maintain at the affected source a current startup, shutdown, and malfunction plan and must make the plan available upon request for inspection and copying by the Administrator. In addition, if the startup, shutdown, and malfunction plan is subsequently revised as provided in paragraph (e)(3)(viii) of this section, the owner or operator must maintain at the affected source each previous (i.e., superseded) version of the startup, shutdown, and malfunction plan, and must make each such previous version available for inspection and copying by the Administrator for a period of 5 years after revision of the plan. If at any time after adoption of a startup, shutdown, and malfunction plan the affected source ceases operation or is otherwise no longer subject to the provisions of this part, the owner or operator must retain a copy of the most recent plan for 5 years from the date the source ceases operation or is no longer subject to this part and must make the plan available upon request for inspection and copying by the Administrator. The Administrator may at any time request in writing that the owner or operator submit a copy of any startup, shutdown, and malfunction plan (or a portion thereof) which is maintained at the affected source or in the possession of the owner or operator. Upon receipt of such a request, the owner or operator must promptly submit a copy of the requested plan (or a portion thereof) to the Administrator. The owner or operator may elect to submit the required copy of any startup, shutdown, and malfunction plan to the Administrator in an electronic format. If the owner or operator claims that any portion of such a startup, shutdown, and malfunction plan is confidential business information entitled to protection from disclosure under section 114(c) of the Act or 40 CFR 2.301, the material which is claimed as confidential must be clearly designated in the submission.

(vi) To satisfy the requirements of this section to develop a startup, shutdown, and malfunction plan, the owner or operator may use the affected source's standard operating procedures

(SOP) manual, or an Occupational Safety and Health Administration (OSHA) or other plan, provided the alternative plans meet all the requirements of this section and are made available for inspection or submitted when requested by the Administrator.

(vii) Based on the results of a determination made under paragraph (e)(1)(i) of this section, the Administrator may require that an owner or operator of an affected source make changes to the startup, shutdown, and malfunction plan for that source. The Administrator must require appropriate revisions to a startup, shutdown, and malfunction plan, if the Administrator finds that the plan:

(A) Does not address a startup, shutdown, or malfunction event that has occurred;

(B) Fails to provide for the operation of the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with the general duty to minimize emissions established by paragraph (e)(1)(i) of this section;

(C) Does not provide adequate procedures for correcting malfunctioning process and/or air pollution control and monitoring equipment as quickly as practicable; or

(D) Includes an event that does not meet the definition of startup, shutdown, or malfunction listed in §63.2.

(viii) The owner or operator may periodically revise the startup, shutdown, and malfunction plan for the affected source as necessary to satisfy the requirements of this part or to reflect changes in equipment or procedures at the affected source. Unless the permitting authority provides otherwise, the owner or operator may make such revisions to the startup, shutdown, and malfunction plan without prior approval by the Administrator or the permitting authority. However, each such revision to a startup, shutdown, and malfunction plan must be reported in the semiannual report required by §63.10(d)(5). If the startup, shutdown, and malfunction plan fails to address or inadequately addresses an event that meets the characteristics of a malfunction but was not included in the startup, shutdown, and malfunction plan at the time the owner or operator developed the plan, the owner or operator must revise the startup, shutdown, and malfunction plan within 45 days after the event to include detailed procedures for operating and maintaining the source during similar malfunction events and a program of corrective action for similar malfunctions of process or air pollution control and monitoring equipment. In the event that the owner or operator makes any revision to the startup, shutdown, and malfunction plan which alters the scope of the activities at the source which are deemed to be a startup, shutdown, or malfunction, or otherwise modifies the applicability of any emission limit, work practice requirement, or other requirement in a standard established under this part, the revised plan shall not take effect until after the owner or operator has provided a written notice describing the revision to the permitting authority.

(ix) The title V permit for an affected source must require that the owner or operator develop a startup, shutdown, and malfunction plan which conforms to the provisions of this part, but may do so by citing to the relevant subpart or subparagraphs of paragraph (e) of this section. However, any revisions made to the startup, shutdown, and malfunction plan in accordance with the procedures established by this part shall not be deemed to constitute permit revisions under part 70 or part 71 of this chapter and the elements of the startup, shutdown, and malfunction plan shall not be considered an applicable requirement as defined in §70.2 and §71.2 of this chapter. Moreover, none of the procedures specified by the startup, shutdown, and malfunction plan for an affected source shall be deemed to fall within the permit shield provision in section 504(f) of the Act.

(f) *Compliance with nonopacity emission standards*—(1) *Applicability.* The non-opacity emission standards set forth in this part shall apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart. If a startup, shutdown, or malfunction of one portion of an affected source does not affect the ability of particular emission points within other

portions of the affected source to comply with the non-opacity emission standards set forth in this part, then that emission point must still be required to comply with the non-opacity emission standards and other applicable requirements.

(2) *Methods for determining compliance.* (i) The Administrator will determine compliance with nonopacity emission standards in this part based on the results of performance tests conducted according to the procedures in § 63.7, unless otherwise specified in an applicable subpart of this part.

(ii) The Administrator will determine compliance with nonopacity emission standards in this part by evaluation of an owner or operator's conformance with operation and maintenance requirements, including the evaluation of monitoring data, as specified in § 63.6(e) and applicable subparts of this part.

(iii) If an affected source conducts performance testing at startup to obtain an operating permit in the State in which the source is located, the results of such testing may be used to demonstrate compliance with a relevant standard if—

(A) The performance test was conducted within a reasonable amount of time before an initial performance test is required to be conducted under the relevant standard;

(B) The performance test was conducted under representative operating conditions for the source;

(C) The performance test was conducted and the resulting data were reduced using EPA-approved test methods and procedures, as specified in § 63.7(e) of this subpart; and

(D) The performance test was appropriately quality-assured, as specified in § 63.7(c).

(iv) The Administrator will determine compliance with design, equipment, work practice, or operational emission standards in this part by review of records, inspection of the source, and other procedures specified in applicable subparts of this part.

(v) The Administrator will determine compliance with design, equipment, work practice, or operational emission standards in this part by evaluation of an owner or operator's conformance with operation and maintenance requirements, as specified in paragraph (e) of this section and applicable subparts of this part.

(3) *Finding of compliance.* The Administrator will make a finding concerning an affected source's compliance with a non-opacity emission standard, as specified in paragraphs (f)(1) and (2) of this section, upon obtaining all the compliance information required by the relevant standard (including the written reports of performance test results, monitoring results, and other information, if applicable), and information available to the Administrator pursuant to paragraph (e)(1)(i) of this section.

(g) *Use of an alternative nonopacity emission standard.* (1) If, in the Administrator's judgment, an owner or operator of an affected source has established that an alternative means of emission limitation will achieve a reduction in emissions of a hazardous air pollutant from an affected source at least equivalent to the reduction in emissions of that pollutant from that source achieved under any design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act, the Administrator will publish in the FEDERAL REGISTER a notice permitting the use of the alternative emission standard for purposes of compliance with the promulgated standard. Any FEDERAL REGISTER notice under this paragraph shall be published only after the public is notified and given the opportunity to comment. Such notice will restrict the permission to the stationary source(s) or category(ies) of sources from which the alternative emission standard will achieve equivalent emission reductions. The Administrator will condition permission in such notice on requirements to assure the proper operation and maintenance of equipment and practices required for compliance with the alternative emission standard and other requirements, including appropriate quality assurance and quality control requirements, that are deemed necessary.

(2) An owner or operator requesting permission under this paragraph shall, unless otherwise specified in an applicable subpart, submit a proposed test

plan or the results of testing and monitoring in accordance with §63.7 and §63.8, a description of the procedures followed in testing or monitoring, and a description of pertinent conditions during testing or monitoring. Any testing or monitoring conducted to request permission to use an alternative nonopacity emission standard shall be appropriately quality assured and quality controlled, as specified in §63.7 and §63.8.

(3) The Administrator may establish general procedures in an applicable subpart that accomplish the requirements of paragraphs (g)(1) and (g)(2) of this section.

(h) *Compliance with opacity and visible emission standards*—(1) *Applicability*. The opacity and visible emission standards set forth in this part must apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart. If a startup, shutdown, or malfunction of one portion of an affected source does not affect the ability of particular emission points within other portions of the affected source to comply with the opacity and visible emission standards set forth in this part, then that emission point shall still be required to comply with the opacity and visible emission standards and other applicable requirements.

(2) *Methods for determining compliance*. (i) The Administrator will determine compliance with opacity and visible emission standards in this part based on the results of the test method specified in an applicable subpart. Whenever a continuous opacity monitoring system (COMS) is required to be installed to determine compliance with numerical opacity emission standards in this part, compliance with opacity emission standards in this part shall be determined by using the results from the COMS. Whenever an opacity emission test method is not specified, compliance with opacity emission standards in this part shall be determined by conducting observations in accordance with Test Method 9 in appendix A of part 60 of this chapter or the method specified in paragraph (h)(7)(ii) of this section. Whenever a visible emission test method is not specified, compliance with visible emission standards in this part shall be determined by conducting observations in accordance with Test Method 22 in appendix A of part 60 of this chapter.

(ii) [Reserved]

(iii) If an affected source undergoes opacity or visible emission testing at startup to obtain an operating permit in the State in which the source is located, the results of such testing may be used to demonstrate compliance with a relevant standard if—

(A) The opacity or visible emission test was conducted within a reasonable amount of time before a performance test is required to be conducted under the relevant standard;

(B) The opacity or visible emission test was conducted under representative operating conditions for the source;

(C) The opacity or visible emission test was conducted and the resulting data were reduced using EPA-approved test methods and procedures, as specified in §63.7(e); and

(D) The opacity or visible emission test was appropriately quality-assured, as specified in §63.7(c) of this section.

(3) [Reserved]

(4) *Notification of opacity or visible emission observations.* The owner or operator of an affected source shall notify the Administrator in writing of the anticipated date for conducting opacity or visible emission observations in accordance with §63.9(f), if such observations are required for the source by a relevant standard.

(5) *Conduct of opacity or visible emission observations*. When a relevant standard under this part includes an opacity or visible emission standard, the owner or operator of an affected source shall comply with the following:

(i) For the purpose of demonstrating initial compliance, opacity or visible emission observations shall be conducted concurrently with the initial performance test required in §63.7 unless one of the following conditions applies:

(A) If no performance test under §63.7 is required, opacity or visible emission observations shall be conducted within 60 days after achieving the maximum production rate at which a new or reconstructed source will be operated, but not later than 120 days after initial

startup of the source, or within 120 days after the effective date of the relevant standard in the case of new sources that start up before the standard's effective date. If no performance test under § 63.7 is required, opacity or visible emission observations shall be conducted within 120 days after the compliance date for an existing or modified source; or

(B) If visibility or other conditions prevent the opacity or visible emission observations from being conducted concurrently with the initial performance test required under § 63.7, or within the time period specified in paragraph (h)(5)(i)(A) of this section, the source's owner or operator shall reschedule the opacity or visible emission observations as soon after the initial performance test, or time period, as possible, but not later than 30 days thereafter, and shall advise the Administrator of the rescheduled date. The rescheduled opacity or visible emission observations shall be conducted (to the extent possible) under the same operating conditions that existed during the initial performance test conducted under § 63.7. The visible emissions observer shall determine whether visibility or other conditions prevent the opacity or visible emission observations from being made concurrently with the initial performance test in accordance with procedures contained in Test Method 9 or Test Method 22 in appendix A of part 60 of this chapter.

(ii) For the purpose of demonstrating initial compliance, the minimum total time of opacity observations shall be 3 hours (30 6-minute averages) for the performance test or other required set of observations (e.g., for fugitive-type emission sources subject only to an opacity emission standard).

(iii) The owner or operator of an affected source to which an opacity or visible emission standard in this part applies shall conduct opacity or visible emission observations in accordance with the provisions of this section, record the results of the evaluation of emissions, and report to the Administrator the opacity or visible emission results in accordance with the provisions of § 63.10(d).

(iv) [Reserved]

(v) Opacity readings of portions of plumes that contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity emission standards.

(6) *Availability of records.* The owner or operator of an affected source shall make available, upon request by the Administrator, such records that the Administrator deems necessary to determine the conditions under which the visual observations were made and shall provide evidence indicating proof of current visible observer emission certification.

(7) *Use of a continuous opacity monitoring system.* (i) The owner or operator of an affected source required to use a continuous opacity monitoring system (COMS) shall record the monitoring data produced during a performance test required under § 63.7 and shall furnish the Administrator a written report of the monitoring results in accordance with the provisions of § 63.10(e)(4).

(ii) Whenever an opacity emission test method has not been specified in an applicable subpart, or an owner or operator of an affected source is required to conduct Test Method 9 observations (see appendix A of part 60 of this chapter), the owner or operator may submit, for compliance purposes, COMS data results produced during any performance test required under § 63.7 in lieu of Method 9 data. If the owner or operator elects to submit COMS data for compliance with the opacity emission standard, he or she shall notify the Administrator of that decision, in writing, simultaneously with the notification under § 63.7(b) of the date the performance test is scheduled to begin. Once the owner or operator of an affected source has notified the Administrator to that effect, the COMS data results will be used to determine opacity compliance during subsequent performance tests required under § 63.7, unless the owner or operator notifies the Administrator in writing to the contrary not later than with the notification under § 63.7(b) of the date the subsequent performance test is scheduled to begin.

(iii) For the purposes of determining compliance with the opacity emission

standard during a performance test required under § 63.7 using COMS data, the COMS data shall be reduced to 6-minute averages over the duration of the mass emission performance test.

(iv) The owner or operator of an affected source using a COMS for compliance purposes is responsible for demonstrating that he/she has complied with the performance evaluation requirements of § 63.8(e), that the COMS has been properly maintained, operated, and data quality-assured, as specified in § 63.8(c) and § 63.8(d), and that the resulting data have not been altered in any way.

(v) Except as provided in paragraph (h)(7)(ii) of this section, the results of continuous monitoring by a COMS that indicate that the opacity at the time visual observations were made was not in excess of the emission standard are probative but not conclusive evidence of the actual opacity of an emission, provided that the affected source proves that, at the time of the alleged violation, the instrument used was properly maintained, as specified in § 63.8(c), and met Performance Specification 1 in appendix B of part 60 of this chapter, and that the resulting data have not been altered in any way.

(8) *Finding of compliance.* The Administrator will make a finding concerning an affected source's compliance with an opacity or visible emission standard upon obtaining all the compliance information required by the relevant standard (including the written reports of the results of the performance tests required by § 63.7, the results of Test Method 9 or another required opacity or visible emission test method, the observer certification required by paragraph (h)(6) of this section, and the continuous opacity monitoring system results, whichever is/are applicable) and any information available to the Administrator needed to determine whether proper operation and maintenance practices are being used.

(9) *Adjustment to an opacity emission standard.* (i) If the Administrator finds under paragraph (h)(8) of this section that an affected source is in compliance with all relevant standards for which initial performance tests were conducted under § 63.7, but during the time such performance tests were conducted fails to meet any relevant opacity emission standard, the owner or operator of such source may petition the Administrator to make appropriate adjustment to the opacity emission standard for the affected source. Until the Administrator notifies the owner or operator of the appropriate adjustment, the relevant opacity emission standard remains applicable.

(ii) The Administrator may grant such a petition upon a demonstration by the owner or operator that—

(A) The affected source and its associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance tests;

(B) The performance tests were performed under the conditions established by the Administrator; and

(C) The affected source and its associated air pollution control equipment were incapable of being adjusted or operated to meet the relevant opacity emission standard.

(iii) The Administrator will establish an adjusted opacity emission standard for the affected source meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity emission standard at all times during which the source is meeting the mass or concentration emission standard. The Administrator will promulgate the new opacity emission standard in the FEDERAL REGISTER.

(iv) After the Administrator promulgates an adjusted opacity emission standard for an affected source, the owner or operator of such source shall be subject to the new opacity emission standard, and the new opacity emission standard shall apply to such source during any subsequent performance tests.

(i) *Extension of compliance with emission standards.* (1) Until an extension of compliance has been granted by the Administrator (or a State with an approved permit program) under this paragraph, the owner or operator of an affected source subject to the requirements of this section shall comply with all applicable requirements of this part.

(2) *Extension of compliance for early reductions and other reductions*—(i) *Early reductions.* Pursuant to section 112(i)(5) of the Act, if the owner or operator of an existing source demonstrates that the source has achieved a reduction in emissions of hazardous air pollutants in accordance with the provisions of subpart D of this part, the Administrator (or the State with an approved permit program) will grant the owner or operator an extension of compliance with specific requirements of this part, as specified in subpart D.

(ii) *Other reductions.* Pursuant to section 112(i)(6) of the Act, if the owner or operator of an existing source has installed best available control technology (BACT) (as defined in section 169(3) of the Act) or technology required to meet a lowest achievable emission rate (LAER) (as defined in section 171 of the Act) prior to the promulgation of an emission standard in this part applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to the BACT or LAER installation, the Administrator will grant the owner or operator an extension of compliance with such emission standard that will apply until the date 5 years after the date on which such installation was achieved, as determined by the Administrator.

(3) *Request for extension of compliance.* Paragraphs (i)(4) through (i)(7) of this section concern requests for an extension of compliance with a relevant standard under this part (except requests for an extension of compliance under paragraph (i)(2)(i) of this section will be handled through procedures specified in subpart D of this part).

(4)(i)(A) The owner or operator of an existing source who is unable to comply with a relevant standard established under this part pursuant to section 112(d) of the Act may request that the Administrator (or a State, when the State has an approved part 70 permit program and the source is required to obtain a part 70 permit under that program, or a State, when the State has been delegated the authority to implement and enforce the emission standard for that source) grant an extension allowing the source up to 1 additional year to comply with the standard, if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 1-year extension of compliance is insufficient to dry and cover mining waste in order to reduce emissions of any hazardous air pollutant. The owner or operator of an affected source who has requested an extension of compliance under this paragraph and who is otherwise required to obtain a title V permit shall apply for such permit or apply to have the source's title V permit revised to incorporate the conditions of the extension of compliance. The conditions of an extension of compliance granted under this paragraph will be incorporated into the affected source's title V permit according to the provisions of part 70 or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever are applicable.

(B) Any request under this paragraph for an extension of compliance with a relevant standard must be submitted in writing to the appropriate authority no later than 120 days prior to the affected source's compliance date (as specified in paragraphs (b) and (c) of this section), except as provided for in paragraph (i)(4)(i)(C) of this section. Nonfrivolous requests submitted under this paragraph will stay the applicability of the rule as to the emission points in question until such time as the request is granted or denied. A denial will be effective as of the date of denial. Emission standards established under this part may specify alternative dates for the submittal of requests for an extension of compliance if alternatives are appropriate for the source categories affected by those standards.

(C) An owner or operator may submit a compliance extension request after the date specified in paragraph (i)(4)(i)(B) of this section provided the need for the compliance extension arose after that date, and before the otherwise applicable compliance date and the need arose due to circumstances beyond reasonable control of the owner or operator. This request must include, in addition to the information required in paragraph (i)(6)(i) of this section, a statement of the reasons additional time is needed and the date when the owner or operator first

learned of the problems. Nonfrivolous requests submitted under this paragraph will stay the applicability of the rule as to the emission points in question until such time as the request is granted or denied. A denial will be effective as of the original compliance date.

(ii) The owner or operator of an existing source unable to comply with a relevant standard established under this part pursuant to section 112(f) of the Act may request that the Administrator grant an extension allowing the source up to 2 years after the standard's effective date to comply with the standard. The Administrator may grant such an extension if he/she finds that such additional period is necessary for the installation of controls and that steps will be taken during the period of the extension to assure that the health of persons will be protected from imminent endangerment. Any request for an extension of compliance with a relevant standard under this paragraph must be submitted in writing to the Administrator not later than 90 calendar days after the effective date of the relevant standard.

(5) The owner or operator of an existing source that has installed BACT or technology required to meet LAER [as specified in paragraph (i)(2)(ii) of this section] prior to the promulgation of a relevant emission standard in this part may request that the Administrator grant an extension allowing the source 5 years from the date on which such installation was achieved, as determined by the Administrator, to comply with the standard. Any request for an extension of compliance with a relevant standard under this paragraph shall be submitted in writing to the Administrator not later than 120 days after the promulgation date of the standard. The Administrator may grant such an extension if he or she finds that the installation of BACT or technology to meet LAER controls the same pollutant (or stream of pollutants) that would be controlled at that source by the relevant emission standard.

(6)(i) The request for a compliance extension under paragraph (i)(4) of this section shall include the following information:

(A) A description of the controls to be installed to comply with the standard;

(B) A compliance schedule, including the date by which each step toward compliance will be reached. At a minimum, the list of dates shall include:

(*1*) The date by which on-site construction, installation of emission control equipment, or a process change is planned to be initiated; and

(*2*) The date by which final compliance is to be achieved.

(*3*) The date by which on-site construction, installation of emission control equipment, or a process change is to be completed; and

(*4*) The date by which final compliance is to be achieved;

(C)—(D)

(ii) The request for a compliance extension under paragraph (i)(5) of this section shall include all information needed to demonstrate to the Administrator's satisfaction that the installation of BACT or technology to meet LAER controls the same pollutant (or stream of pollutants) that would be controlled at that source by the relevant emission standard.

(7) Advice on requesting an extension of compliance may be obtained from the Administrator (or the State with an approved permit program).

(8) *Approval of request for extension of compliance.* Paragraphs (i)(9) through (i)(14) of this section concern approval of an extension of compliance requested under paragraphs (i)(4) through (i)(6) of this section.

(9) Based on the information provided in any request made under paragraphs (i)(4) through (i)(6) of this section, or other information, the Administrator (or the State with an approved permit program) may grant an extension of compliance with an emission standard, as specified in paragraphs (i)(4) and (i)(5) of this section.

(10) The extension will be in writing and will—

(i) Identify each affected source covered by the extension;

(ii) Specify the termination date of the extension;

(iii) Specify the dates by which steps toward compliance are to be taken, if appropriate;

(iv) Specify other applicable requirements to which the compliance extension applies (e.g., performance tests); and

(v)(A) Under paragraph (i)(4), specify any additional conditions that the Administrator (or the State) deems necessary to assure installation of the necessary controls and protection of the health of persons during the extension period; or

(B) Under paragraph (i)(5), specify any additional conditions that the Administrator deems necessary to assure the proper operation and maintenance of the installed controls during the extension period.

(11) The owner or operator of an existing source that has been granted an extension of compliance under paragraph (i)(10) of this section may be required to submit to the Administrator (or the State with an approved permit program) progress reports indicating whether the steps toward compliance outlined in the compliance schedule have been reached. The contents of the progress reports and the dates by which they shall be submitted will be specified in the written extension of compliance granted under paragraph (i)(10) of this section.

(12)(i) The Administrator (or the State with an approved permit program) will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 30 calendar days after receipt of sufficient information to evaluate a request submitted under paragraph (i)(4)(i) or (i)(5) of this section. The Administrator (or the State) will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted. The 30-day approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete.

(ii) When notifying the owner or operator that his/her application is not complete, the Administrator will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 30 calendar days after he/she is notified of the incomplete application, additional information or arguments to the Administrator to enable further action on the application.

(iii) Before denying any request for an extension of compliance, the Administrator (or the State with an approved permit program) will notify the owner or operator in writing of the Administrator's (or the State's) intention to issue the denial, together with—

(A) Notice of the information and findings on which the intended denial is based; and

(B) Notice of opportunity for the owner or operator to present in writing, within 15 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator (or the State) before further action on the request.

(iv) The Administrator's final determination to deny any request for an extension will be in writing and will set forth the specific grounds on which the denial is based. The final determination will be made within 30 calendar days after presentation of additional information or argument (if the application is complete), or within 30 calendar days after the final date specified for the presentation if no presentation is made.

(13)(i) The Administrator will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 30 calendar days after receipt of sufficient information to evaluate a request submitted under paragraph (i)(4)(ii) of this section. The 30-day approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The Administrator (or the State) will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 15 calendar days after receipt of the original application and within 15 calendar days after receipt of any supplementary information that is submitted.

(ii) When notifying the owner or operator that his/her application is not complete, the Administrator will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 15 calendar days after he/she is notified of the incomplete application, additional information or arguments to the Administrator to enable further action on the application.

(iii) Before denying any request for an extension of compliance, the Administrator will notify the owner or operator in writing of the Administrator's intention to issue the denial, together with—

(A) Notice of the information and findings on which the intended denial is based; and

(B) Notice of opportunity for the owner or operator to present in writing, within 15 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator before further action on the request.

(iv) A final determination to deny any request for an extension will be in writing and will set forth the specific grounds on which the denial is based. The final determination will be made within 30 calendar days after presentation of additional information or argument (if the application is complete), or within 30 calendar days after the final date specified for the presentation if no presentation is made.

(14) The Administrator (or the State with an approved permit program) may terminate an extension of compliance at an earlier date than specified if any specification under paragraph (i)(10)(iii) or (iv) of this section is not met. Upon a determination to terminate, the Administrator will notify, in writing, the owner or operator of the Administrator's determination to terminate, together with:

(i) Notice of the reason for termination; and

(ii) Notice of opportunity for the owner or operator to present in writing, within 15 calendar days after he/she is notified of the determination to terminate, additional information or arguments to the Administrator before further action on the termination.

(iii) A final determination to terminate an extension of compliance will be in writing and will set forth the specific grounds on which the termination is based. The final determination will be made within 30 calendar days after presentation of additional information or arguments, or within 30 calendar days after the final date specified for the presentation if no presentation is made.

(15) [Reserved]

(16) The granting of an extension under this section shall not abrogate the Administrator's authority under section 114 of the Act.

(j) *Exemption from compliance with emission standards.* The President may exempt any stationary source from compliance with any relevant standard established pursuant to section 112 of the Act for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16599, Apr. 5, 2002; 68 FR 32600, May 30, 2003; 71 FR 20454, Apr. 20, 2006]

§ 63.7 Performance testing requirements.

(a) *Applicability and performance test dates.* (1) The applicability of this section is set out in § 63.1(a)(4).

(2) Except as provided in paragraph (a)(4) of this section, if required to do performance testing by a relevant standard, and unless a waiver of performance testing is obtained under this section or the conditions of paragraph (c)(3)(ii)(B) of this section apply, the owner or operator of the affected source must perform such tests within 180 days of the compliance date for such source.

(i)–(viii) [Reserved]

(ix) Except as provided in paragraph (a)(4) of this section, when an emission standard promulgated under this part is more stringent than the standard proposed (see § 63.6(b)(3)), the owner or operator of a new or reconstructed source subject to that standard for which construction or reconstruction

standard or in the source's title V permit], but it shall be submitted at least 60 days before the performance test if the site-specific test plan required under paragraph (c) of this section is not submitted.

(iii) Any application for a waiver of a performance test shall include information justifying the owner or operator's request for a waiver, such as the technical or economic infeasibility, or the impracticality, of the affected source performing the required test.

(4) *Approval of request to waive performance test.* The Administrator will approve or deny a request for a waiver of a performance test made under paragraph (h)(3) of this section when he/she—

(i) Approves or denies an extension of compliance under § 63.6(i)(8); or

(ii) Approves or disapproves a site-specific test plan under § 63.7(c)(3); or

(iii) Makes a determination of compliance following the submission of a required compliance status report or excess emissions and continuous monitoring systems performance report; or

(iv) Makes a determination of suitable progress towards compliance following the submission of a compliance progress report, whichever is applicable.

(5) Approval of any waiver granted under this section shall not abrogate the Administrator's authority under the Act or in any way prohibit the Administrator from later canceling the waiver. The cancellation will be made only after notice is given to the owner or operator of the affected source.

[59 FR 12430, Mar. 16, 1994, as amended at 65 FR 62215, Oct. 17, 2000; 67 FR 16602, Apr. 5, 2002; 72 FR 27443, May 16, 2007]

§ 63.8 Monitoring requirements.

(a) *Applicability.* (1) The applicability of this section is set out in § 63.1(a)(4).

(2) For the purposes of this part, all CMS required under relevant standards shall be subject to the provisions of this section upon promulgation of performance specifications for CMS as specified in the relevant standard or otherwise by the Administrator.

(3) [Reserved]

(4) Additional monitoring requirements for control devices used to comply with provisions in relevant standards of this part are specified in § 63.11.

(b) *Conduct of monitoring.* (1) Monitoring shall be conducted as set forth in this section and the relevant standard(s) unless the Administrator—

(i) Specifies or approves the use of minor changes in methodology for the specified monitoring requirements and procedures (see § 63.90(a) for definition); or

(ii) Approves the use of an intermediate or major change or alternative to any monitoring requirements or procedures (see § 63.90(a) for definition).

(iii) Owners or operators with flares subject to § 63.11(b) are not subject to the requirements of this section unless otherwise specified in the relevant standard.

(2)(i) When the emissions from two or more affected sources are combined before being released to the atmosphere, the owner or operator may install an applicable CMS for each emission stream or for the combined emissions streams, provided the monitoring is sufficient to demonstrate compliance with the relevant standard.

(ii) If the relevant standard is a mass emission standard and the emissions from one affected source are released to the atmosphere through more than one point, the owner or operator must install an applicable CMS at each emission point unless the installation of fewer systems is—

(A) Approved by the Administrator; or

(B) Provided for in a relevant standard (e.g., instead of requiring that a CMS be installed at each emission point before the effluents from those points are channeled to a common control device, the standard specifies that only one CMS is required to be installed at the vent of the control device).

(3) When more than one CMS is used to measure the emissions from one affected source (e.g., multiple breechings, multiple outlets), the owner or operator shall report the results as required for each CMS. However, when one CMS is used as a backup to another CMS, the owner or operator shall report the results from the CMS used to meet the monitoring requirements of this part. If both such CMS are used

during a particular reporting period to meet the monitoring requirements of this part, then the owner or operator shall report the results from each CMS for the relevant compliance period.

(c) *Operation and maintenance of continuous monitoring systems.* (1) The owner or operator of an affected source shall maintain and operate each CMS as specified in this section, or in a relevant standard, and in a manner consistent with good air pollution control practices. (i) The owner or operator of an affected source must maintain and operate each CMS as specified in § 63.6(e)(1).

(ii) The owner or operator must keep the necessary parts for routine repairs of the affected CMS equipment readily available.

(iii) The owner or operator of an affected source must develop a written startup, shutdown, and malfunction plan for CMS as specified in § 63.6(e)(3).

(2)(i) All CMS must be installed such that representative measures of emissions or process parameters from the affected source are obtained. In addition, CEMS must be located according to procedures contained in the applicable performance specification(s).

(ii) Unless the individual subpart states otherwise, the owner or operator must ensure the read out (that portion of the CMS that provides a visual display or record), or other indication of operation, from any CMS required for compliance with the emission standard is readily accessible on site for operational control or inspection by the operator of the equipment.

(3) All CMS shall be installed, operational, and the data verified as specified in the relevant standard either prior to or in conjunction with conducting performance tests under § 63.7. Verification of operational status shall, at a minimum, include completion of the manufacturer's written specifications or recommendations for installation, operation, and calibration of the system.

(4) Except for system breakdowns, out-of-control periods, repairs, maintenance periods, calibration checks, and zero (low-level) and high-level calibration drift adjustments, all CMS, including COMS and CEMS, shall be in continuous operation and shall meet minimum frequency of operation requirements as follows:

(i) All COMS shall complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(ii) All CEMS for measuring emissions other than opacity shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(5) Unless otherwise approved by the Administrator, minimum procedures for COMS shall include a method for producing a simulated zero opacity condition and an upscale (high-level) opacity condition using a certified neutral density filter or other related technique to produce a known obscuration of the light beam. Such procedures shall provide a system check of all the analyzer's internal optical surfaces and all electronic circuitry, including the lamp and photodetector assembly normally used in the measurement of opacity.

(6) The owner or operator of a CMS that is not a CPMS, which is installed in accordance with the provisions of this part and the applicable CMS performance specification(s), must check the zero (low-level) and high-level calibration drifts at least once daily in accordance with the written procedure specified in the performance evaluation plan developed under paragraphs (e)(3)(i) and (ii) of this section. The zero (low-level) and high-level calibration drifts must be adjusted, at a minimum, whenever the 24-hour zero (low-level) drift exceeds two times the limits of the applicable performance specification(s) specified in the relevant standard. The system shall allow the amount of excess zero (low-level) and high-level drift measured at the 24-hour interval checks to be recorded and quantified whenever specified. For COMS, all optical and instrumental surfaces exposed to the effluent gases must be cleaned prior to performing the zero (low-level) and high-level drift adjustments; the optical surfaces and instrumental surfaces must be cleaned when the cumulative automatic zero compensation, if applicable, exceeds 4 percent opacity. The CPMS must be

calibrated prior to use for the purposes of complying with this section. The CPMS must be checked daily for indication that the system is responding. If the CPMS system includes an internal system check, results must be recorded and checked daily for proper operation.

(7)(i) A CMS is out of control if—

(A) The zero (low-level), mid-level (if applicable), or high-level calibration drift (CD) exceeds two times the applicable CD specification in the applicable performance specification or in the relevant standard; or

(B) The CMS fails a performance test audit (e.g., cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit; or

(C) The COMS CD exceeds two times the limit in the applicable performance specification in the relevant standard.

(ii) When the CMS is out of control, the owner or operator of the affected source shall take the necessary corrective action and shall repeat all necessary tests which indicate that the system is out of control. The owner or operator shall take corrective action and conduct retesting until the performance requirements are below the applicable limits. The beginning of the out-of-control period is the hour the owner or operator conducts a performance check (e.g., calibration drift) that indicates an exceedance of the performance requirements established under this part. The end of the out-of-control period is the hour following the completion of corrective action and successful demonstration that the system is within the allowable limits. During the period the CMS is out of control, recorded data shall not be used in data averages and calculations, or to meet any data availability requirement established under this part.

(8) The owner or operator of a CMS that is out of control as defined in paragraph (c)(7) of this section shall submit all information concerning out-of-control periods, including start and end dates and hours and descriptions of corrective actions taken, in the excess emissions and continuous monitoring system performance report required in §63.10(e)(3).

(d) *Quality control program.* (1) The results of the quality control program required in this paragraph will be considered by the Administrator when he/she determines the validity of monitoring data.

(2) The owner or operator of an affected source that is required to use a CMS and is subject to the monitoring requirements of this section and a relevant standard shall develop and implement a CMS quality control program. As part of the quality control program, the owner or operator shall develop and submit to the Administrator for approval upon request a site-specific performance evaluation test plan for the CMS performance evaluation required in paragraph (e)(3)(i) of this section, according to the procedures specified in paragraph (e). In addition, each quality control program shall include, at a minimum, a written protocol that describes procedures for each of the following operations:

(i) Initial and any subsequent calibration of the CMS;

(ii) Determination and adjustment of the calibration drift of the CMS;

(iii) Preventive maintenance of the CMS, including spare parts inventory;

(iv) Data recording, calculations, and reporting;

(v) Accuracy audit procedures, including sampling and analysis methods; and

(vi) Program of corrective action for a malfunctioning CMS.

(3) The owner or operator shall keep these written procedures on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, the owner or operator shall keep previous (i.e., superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. Where relevant, e.g., program of corrective action for a malfunctioning CMS, these written procedures may be incorporated as part of the affected source's startup, shutdown, and malfunction plan to avoid duplication of planning and recordkeeping efforts.

(e) *Performance evaluation of continuous monitoring systems*—(1) *General.*

When required by a relevant standard, and at any other time the Administrator may require under section 114 of the Act, the owner or operator of an affected source being monitored shall conduct a performance evaluation of the CMS. Such performance evaluation shall be conducted according to the applicable specifications and procedures described in this section or in the relevant standard.

(2) *Notification of performance evaluation*. The owner or operator shall notify the Administrator in writing of the date of the performance evaluation simultaneously with the notification of the performance test date required under § 63.7(b) or at least 60 days prior to the date the performance evaluation is scheduled to begin if no performance test is required.

(3)(i) *Submission of site-specific performance evaluation test plan*. Before conducting a required CMS performance evaluation, the owner or operator of an affected source shall develop and submit a site-specific performance evaluation test plan to the Administrator for approval upon request. The performance evaluation test plan shall include the evaluation program objectives, an evaluation program summary, the performance evaluation schedule, data quality objectives, and both an internal and external QA program. Data quality objectives are the pre-evaluation expectations of precision, accuracy, and completeness of data.

(ii) The internal QA program shall include, at a minimum, the activities planned by routine operators and analysts to provide an assessment of CMS performance. The external QA program shall include, at a minimum, systems audits that include the opportunity for on-site evaluation by the Administrator of instrument calibration, data validation, sample logging, and documentation of quality control data and field maintenance activities.

(iii) The owner or operator of an affected source shall submit the site-specific performance evaluation test plan to the Administrator (if requested) at least 60 days before the performance test or performance evaluation is scheduled to begin, or on a mutually agreed upon date, and review and approval of the performance evaluation test plan by the Administrator will occur with the review and approval of the site-specific test plan (if review of the site-specific test plan is requested).

(iv) The Administrator may request additional relevant information after the submittal of a site-specific performance evaluation test plan.

(v) In the event that the Administrator fails to approve or disapprove the site-specific performance evaluation test plan within the time period specified in § 63.7(c)(3), the following conditions shall apply:

(A) If the owner or operator intends to demonstrate compliance using the monitoring method(s) specified in the relevant standard, the owner or operator shall conduct the performance evaluation within the time specified in this subpart using the specified method(s);

(B) If the owner or operator intends to demonstrate compliance by using an alternative to a monitoring method specified in the relevant standard, the owner or operator shall refrain from conducting the performance evaluation until the Administrator approves the use of the alternative method. If the Administrator does not approve the use of the alternative method within 30 days before the performance evaluation is scheduled to begin, the performance evaluation deadlines specified in paragraph (e)(4) of this section may be extended such that the owner or operator shall conduct the performance evaluation within 60 calendar days after the Administrator approves the use of the alternative method. Notwithstanding the requirements in the preceding two sentences, the owner or operator may proceed to conduct the performance evaluation as required in this section (without the Administrator's prior approval of the site-specific performance evaluation test plan) if he/she subsequently chooses to use the specified monitoring method(s) instead of an alternative.

(vi) Neither the submission of a site-specific performance evaluation test plan for approval, nor the Administrator's approval or disapproval of a plan, nor the Administrator's failure to approve or disapprove a plan in a timely manner shall—

(A) Relieve an owner or operator of legal responsibility for compliance with any applicable provisions of this part or with any other applicable Federal, State, or local requirement; or

(B) Prevent the Administrator from implementing or enforcing this part or taking any other action under the Act.

(4) *Conduct of performance evaluation and performance evaluation dates.* The owner or operator of an affected source shall conduct a performance evaluation of a required CMS during any performance test required under §63.7 in accordance with the applicable performance specification as specified in the relevant standard. Notwithstanding the requirement in the previous sentence, if the owner or operator of an affected source elects to submit COMS data for compliance with a relevant opacity emission standard as provided under §63.6(h)(7), he/she shall conduct a performance evaluation of the COMS as specified in the relevant standard, before the performance test required under §63.7 is conducted in time to submit the results of the performance evaluation as specified in paragraph (e)(5)(ii) of this section. If a performance test is not required, or the requirement for a performance test has been waived under §63.7(h), the owner or operator of an affected source shall conduct the performance evaluation not later than 180 days after the appropriate compliance date for the affected source, as specified in §63.7(a), or as otherwise specified in the relevant standard.

(5) *Reporting performance evaluation results.* (i) The owner or operator shall furnish the Administrator a copy of a written report of the results of the performance evaluation simultaneously with the results of the performance test required under §63.7 or within 60 days of completion of the performance evaluation if no test is required, unless otherwise specified in a relevant standard. The Administrator may request that the owner or operator submit the raw data from a performance evaluation in the report of the performance evaluation results.

(ii) The owner or operator of an affected source using a COMS to determine opacity compliance during any performance test required under §63.7 and described in §63.6(d)(6) shall furnish the Administrator two or, upon request, three copies of a written report of the results of the COMS performance evaluation under this paragraph. The copies shall be provided at least 15 calendar days before the performance test required under §63.7 is conducted.

(f) *Use of an alternative monitoring method.*—(1) *General.* Until permission to use an alternative monitoring procedure (minor, intermediate, or major changes; see definition in §63.90(a)) has been granted by the Administrator under this paragraph (f)(1), the owner or operator of an affected source remains subject to the requirements of this section and the relevant standard.

(2) After receipt and consideration of written application, the Administrator may approve alternatives to any monitoring methods or procedures of this part including, but not limited to, the following:

(i) Alternative monitoring requirements when installation of a CMS specified by a relevant standard would not provide accurate measurements due to liquid water or other interferences caused by substances within the effluent gases;

(ii) Alternative monitoring requirements when the affected source is infrequently operated;

(iii) Alternative monitoring requirements to accommodate CEMS that require additional measurements to correct for stack moisture conditions;

(iv) Alternative locations for installing CMS when the owner or operator can demonstrate that installation at alternate locations will enable accurate and representative measurements;

(v) Alternate methods for converting pollutant concentration measurements to units of the relevant standard;

(vi) Alternate procedures for performing daily checks of zero (low-level) and high-level drift that do not involve use of high-level gases or test cells;

(vii) Alternatives to the American Society for Testing and Materials (ASTM) test methods or sampling procedures specified by any relevant standard;

(viii) Alternative CMS that do not meet the design or performance requirements in this part, but adequately demonstrate a definite and consistent

relationship between their measurements and the measurements of opacity by a system complying with the requirements as specified in the relevant standard. The Administrator may require that such demonstration be performed for each affected source; or

(ix) Alternative monitoring requirements when the effluent from a single affected source or the combined effluent from two or more affected sources is released to the atmosphere through more than one point.

(3) If the Administrator finds reasonable grounds to dispute the results obtained by an alternative monitoring method, requirement, or procedure, the Administrator may require the use of a method, requirement, or procedure specified in this section or in the relevant standard. If the results of the specified and alternative method, requirement, or procedure do not agree, the results obtained by the specified method, requirement, or procedure shall prevail.

(4)(i) *Request to use alternative monitoring procedure.* An owner or operator who wishes to use an alternative monitoring procedure must submit an application to the Administrator as described in paragraph (f)(4)(ii) of this section. The application may be submitted at any time provided that the monitoring procedure is not the performance test method used to demonstrate compliance with a relevant standard or other requirement. If the alternative monitoring procedure will serve as the performance test method that is to be used to demonstrate compliance with a relevant standard, the application must be submitted at least 60 days before the performance evaluation is scheduled to begin and must meet the requirements for an alternative test method under § 63.7(f).

(ii) The application must contain a description of the proposed alternative monitoring system which addresses the four elements contained in the definition of monitoring in § 63.2 and a performance evaluation test plan, if required, as specified in paragraph (e)(3) of this section. In addition, the application must include information justifying the owner or operator's request for an alternative monitoring method, such as the technical or economic infeasibility, or the impracticality, of the affected source using the required method.

(iii) The owner or operator may submit the information required in this paragraph well in advance of the submittal dates specified in paragraph (f)(4)(i) above to ensure a timely review by the Administrator in order to meet the compliance demonstration date specified in this section or the relevant standard.

(iv) Application for minor changes to monitoring procedures, as specified in paragraph (b)(1) of this section, may be made in the site-specific performance evaluation plan.

(5) *Approval of request to use alternative monitoring procedure.* (i) The Administrator will notify the owner or operator of approval or intention to deny approval of the request to use an alternative monitoring method within 30 calendar days after receipt of the original request and within 30 calendar days after receipt of any supplementary information that is submitted. If a request for a minor change is made in conjunction with site-specific performance evaluation plan, then approval of the plan will constitute approval of the minor change. Before disapproving any request to use an alternative monitoring method, the Administrator will notify the applicant of the Administrator's intention to disapprove the request together with—

(A) Notice of the information and findings on which the intended disapproval is based; and

(B) Notice of opportunity for the owner or operator to present additional information to the Administrator before final action on the request. At the time the Administrator notifies the applicant of his or her intention to disapprove the request, the Administrator will specify how much time the owner or operator will have after being notified of the intended disapproval to submit the additional information.

(ii) The Administrator may establish general procedures and criteria in a relevant standard to accomplish the requirements of paragraph (f)(5)(i) of this section.

(iii) If the Administrator approves the use of an alternative monitoring method for an affected source under

paragraph (f)(5)(i) of this section, the owner or operator of such source shall continue to use the alternative monitoring method until he or she receives approval from the Administrator to use another monitoring method as allowed by § 63.8(f).

(6) *Alternative to the relative accuracy test.* An alternative to the relative accuracy test for CEMS specified in a relevant standard may be requested as follows:

(i) *Criteria for approval of alternative procedures.* An alternative to the test method for determining relative accuracy is available for affected sources with emission rates demonstrated to be less than 50 percent of the relevant standard. The owner or operator of an affected source may petition the Administrator under paragraph (f)(6)(ii) of this section to substitute the relative accuracy test in section 7 of Performance Specification 2 with the procedures in section 10 if the results of a performance test conducted according to the requirements in § 63.7, or other tests performed following the criteria in § 63.7, demonstrate that the emission rate of the pollutant of interest in the units of the relevant standard is less than 50 percent of the relevant standard. For affected sources subject to emission limitations expressed as control efficiency levels, the owner or operator may petition the Administrator to substitute the relative accuracy test with the procedures in section 10 of Performance Specification 2 if the control device exhaust emission rate is less than 50 percent of the level needed to meet the control efficiency requirement. The alternative procedures do not apply if the CEMS is used continuously to determine compliance with the relevant standard.

(ii) *Petition to use alternative to relative accuracy test.* The petition to use an alternative to the relative accuracy test shall include a detailed description of the procedures to be applied, the location and the procedure for conducting the alternative, the concentration or response levels of the alternative relative accuracy materials, and the other equipment checks included in the alternative procedure(s). The Administrator will review the petition for completeness and applicability. The Administrator's determination to approve an alternative will depend on the intended use of the CEMS data and may require specifications more stringent than in Performance Specification 2.

(iii) *Rescission of approval to use alternative to relative accuracy test.* The Administrator will review the permission to use an alternative to the CEMS relative accuracy test and may rescind such permission if the CEMS data from a successful completion of the alternative relative accuracy procedure indicate that the affected source's emissions are approaching the level of the relevant standard. The criterion for reviewing the permission is that the collection of CEMS data shows that emissions have exceeded 70 percent of the relevant standard for any averaging period, as specified in the relevant standard. For affected sources subject to emission limitations expressed as control efficiency levels, the criterion for reviewing the permission is that the collection of CEMS data shows that exhaust emissions have exceeded 70 percent of the level needed to meet the control efficiency requirement for any averaging period, as specified in the relevant standard. The owner or operator of the affected source shall maintain records and determine the level of emissions relative to the criterion for permission to use an alternative for relative accuracy testing. If this criterion is exceeded, the owner or operator shall notify the Administrator within 10 days of such occurrence and include a description of the nature and cause of the increased emissions. The Administrator will review the notification and may rescind permission to use an alternative and require the owner or operator to conduct a relative accuracy test of the CEMS as specified in section 7 of Performance Specification 2.

(g) *Reduction of monitoring data.* (1) The owner or operator of each CMS must reduce the monitoring data as specified in paragraphs (g)(1) through (5) of this section.

(2) The owner or operator of each COMS shall reduce all data to 6-minute averages calculated from 36 or more data points equally spaced over each 6-minute period. Data from CEMS for

measurement other than opacity, unless otherwise specified in the relevant standard, shall be reduced to 1-hour averages computed from four or more data points equally spaced over each 1-hour period, except during periods when calibration, quality assurance, or maintenance activities pursuant to provisions of this part are being performed. During these periods, a valid hourly average shall consist of at least two data points with each representing a 15-minute period. Alternatively, an arithmetic or integrated 1-hour average of CEMS data may be used. Time periods for averaging are defined in § 63.2.

(3) The data may be recorded in reduced or nonreduced form (e.g., ppm pollutant and percent O_2 or ng/J of pollutant).

(4) All emission data shall be converted into units of the relevant standard for reporting purposes using the conversion procedures specified in that standard. After conversion into units of the relevant standard, the data may be rounded to the same number of significant digits as used in that standard to specify the emission limit (e.g., rounded to the nearest 1 percent opacity).

(5) Monitoring data recorded during periods of unavoidable CMS breakdowns, out-of-control periods, repairs, maintenance periods, calibration checks, and zero (low-level) and high-level adjustments must not be included in any data average computed under this part. For the owner or operator complying with the requirements of § 63.10(b)(2)(vii)(A) or (B), data averages must include any data recorded during periods of monitor breakdown or malfunction.

[59 FR 12430, Mar. 16, 1994, as amended at 64 FR 7468, Feb. 12, 1999; 67 FR 16603, Apr. 5, 2002; 71 FR 20455, Apr. 20, 2006]

§ 63.9 Notification requirements.

(a) *Applicability and general information.* (1) The applicability of this section is set out in § 63.1(a)(4).

(2) For affected sources that have been granted an extension of compliance under subpart D of this part, the requirements of this section do not apply to those sources while they are operating under such compliance extensions.

(3) If any State requires a notice that contains all the information required in a notification listed in this section, the owner or operator may send the Administrator a copy of the notice sent to the State to satisfy the requirements of this section for that notification.

(4)(i) Before a State has been delegated the authority to implement and enforce notification requirements established under this part, the owner or operator of an affected source in such State subject to such requirements shall submit notifications to the appropriate Regional Office of the EPA (to the attention of the Director of the Division indicated in the list of the EPA Regional Offices in § 63.13).

(ii) After a State has been delegated the authority to implement and enforce notification requirements established under this part, the owner or operator of an affected source in such State subject to such requirements shall submit notifications to the delegated State authority (which may be the same as the permitting authority). In addition, if the delegated (permitting) authority is the State, the owner or operator shall send a copy of each notification submitted to the State to the appropriate Regional Office of the EPA, as specified in paragraph (a)(4)(i) of this section. The Regional Office may waive this requirement for any notifications at its discretion.

(b) *Initial notifications.* (1)(i) The requirements of this paragraph apply to the owner or operator of an affected source when such source becomes subject to a relevant standard.

(ii) If an area source that otherwise would be subject to an emission standard or other requirement established under this part if it were a major source subsequently increases its emissions of hazardous air pollutants (or its potential to emit hazardous air pollutants) such that the source is a major source that is subject to the emission standard or other requirement, such source shall be subject to the notification requirements of this section.

(iii) Affected sources that are required under this paragraph to submit

SUBCHAPTER C—AIR PROGRAMS (CONTINUED)

PART 64—COMPLIANCE ASSURANCE MONITORING

Sec.

AUTHORITY: 42 U.S.C. 7414 and 7661–7661f.

SOURCE: 62 FR 54940, Oct. 22, 1997, unless otherwise noted.

§ 64.1 Definitions.

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

Act means the Clean Air Act, as amended by Pub.L. 101–549, 42 U.S.C. 7401, *et seq.*

Applicable requirement shall have the same meaning as provided under part 70 of this chapter.

Capture system means the equipment (including but not limited to hoods, ducts, fans, and booths) used to contain, capture and transport a pollutant to a control device.

Continuous compliance determination method means a method, specified by the applicable standard or an applicable permit condition, which:

(1) Is used to determine compliance with an emission limitation or standard on a continuous basis, consistent with the averaging period established for the emission limitation or standard; and

(2) Provides data either in units of the standard or correlated directly with the compliance limit.

Control device means equipment, other than inherent process equipment, that is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere. The types of equipment that may commonly be used as control devices include, but are not limited to, fabric filters, mechanical collectors, electrostatic precipitators, inertial separators, afterburners, thermal or catalytic incinerators, adsorption devices (such as carbon beds), condensers, scrubbers (such as wet collection and gas absorption devices), selective catalytic or non-catalytic reduction systems, flue gas recirculation systems, spray dryers, spray towers, mist eliminators, acid plants, sulfur recovery plants, injection systems (such as water, steam, ammonia, sorbent or limestone injection), and combustion devices independent of the particular process being conducted at an emissions unit (e.g., the destruction of emissions achieved by venting process emission streams to flares, boilers or process heaters). For purposes of this part, a control device does not include passive control measures that act to prevent pollutants from forming, such as the use of seals, lids, or roofs to prevent the release of pollutants, use of low-polluting fuel or feedstocks, or the use of combustion or other process design features or characteristics. If an applicable requirement establishes that particular equipment which otherwise meets this definition of a control device does not constitute a control device as applied to a particular pollutant-specific emissions unit, then that definition shall be binding for purposes of this part.

Data means the results of any type of monitoring or method, including the results of instrumental or non-instrumental monitoring, emission calculations, manual sampling procedures, recordkeeping procedures, or any other form of information collection procedure used in connection with any type of monitoring or method.

Emission limitation or standard means any applicable requirement that constitutes an emission limitation, emission standard, standard of performance or means of emission limitation as defined under the Act. An emission limitation or standard may be expressed in terms of the pollutant, expressed either

as a specific quantity, rate or concentration of emissions (e.g., pounds of SO_2 per hour, pounds of SO_2 per million British thermal units of fuel input, kilograms of VOC per liter of applied coating solids, or parts per million by volume of SO_2) or as the relationship of uncontrolled to controlled emissions (e.g., percentage capture and destruction efficiency of VOC or percentage reduction of SO_2). An emission limitation or standard may also be expressed either as a work practice, process or control device parameter, or other form of specific design, equipment, operational, or operation and maintenance requirement. For purposes of this part, an emission limitation or standard shall not include general operation requirements that an owner or operator may be required to meet, such as requirements to obtain a permit, to operate and maintain sources in accordance with good air pollution control practices, to develop and maintain a malfunction abatement plan, to keep records, submit reports, or conduct monitoring.

Emissions unit shall have the same meaning as provided under part 70 of this chapter.

Exceedance shall mean a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement) consistent with any averaging period specified for averaging the results of the monitoring.

Excursion shall mean a departure from an indicator range established for monitoring under this part, consistent with any averaging period specified for averaging the results of the monitoring.

Inherent process equipment means equipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that the owner or operator documents is installed and operated primarily for purposes other than compliance with air pollution regulations. Equipment that must be operated at an efficiency higher than that achieved during normal process operations in order to comply with the applicable emission limitation or standard is not inherent process equipment. For the purposes of this part, inherent process equipment is not considered a control device.

Major source shall have the same meaning as provided under part 70 or 71 of this chapter.

Monitoring means any form of collecting data on a routine basis to determine or otherwise assess compliance with emission limitations or standards. Recordkeeping may be considered monitoring where such records are used to determine or assess compliance with an emission limitation or standard (such as records of raw material content and usage, or records documenting compliance with work practice requirements). The conduct of compliance method tests, such as the procedures in appendix A to part 60 of this chapter, on a routine periodic basis may be considered monitoring (or as a supplement to other monitoring), provided that requirements to conduct such tests on a one-time basis or at such times as a regulatory authority may require on a non-regular basis are not considered monitoring requirements for purposes of this paragraph. Monitoring may include one or more than one of the following data collection techniques, where appropriate for a particular circumstance:

(1) Continuous emission or opacity monitoring systems.

(2) Continuous process, capture system, control device or other relevant parameter monitoring systems or procedures, including a predictive emission monitoring system.

(3) Emission estimation and calculation procedures (e.g., mass balance or stoichiometric calculations).

(4) Maintenance and analysis of records of fuel or raw materials usage.

(5) Recording results of a program or protocol to conduct specific operation and maintenance procedures.

(6) Verification of emissions, process parameters, capture system parameters, or control device parameters using portable or in situ measurement devices.

(7) Visible emission observations.

(8) Any other form of measuring, recording, or verifying on a routine basis

emissions, process parameters, capture system parameters, control device parameters or other factors relevant to assessing compliance with emission limitations or standards.

Owner or operator means any person who owns, leases, operates, controls or supervises a stationary source subject to this part.

Part 70 or 71 permit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall also refer to a permit issued, renewed, amended, revised, or modified under any federal permit program promulgated under title V of the Act.

Part 70 or 71 permit application shall mean an application (including any supplement to a previously submitted application) that is submitted by the owner or operator in order to obtain a part 70 or 71 permit.

Permitting authority shall have the same meaning as provided under part 70 or 71 of this chapter.

Pollutant-specific emissions unit means an emissions unit considered separately with respect to each regulated air pollutant.

Potential to emit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall be applied with respect to an ''emissions unit'' as defined under this part in addition to a ''stationary source'' as provided under part 70 or 71 of this chapter.

Predictive emission monitoring system (PEMS) means a system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

Regulated air pollutant shall have the same meaning as provided under part 70 or 71 of this chapter.

§64.2 Applicability.

(a) *General applicability.* Except for backup utility units that are exempt under paragraph (b)(2) of this section, the requirements of this part shall apply to a pollutant-specific emissions unit at a major source that is required to obtain a part 70 or 71 permit if the unit satisfies all of the following criteria:

(1) The unit is subject to an emission limitation or standard for the applicable regulated air pollutant (or a surrogate thereof), other than an emission limitation or standard that is exempt under paragraph (b)(1) of this section;

(2) The unit uses a control device to achieve compliance with any such emission limitation or standard; and

(3) The unit has potential pre-control device emissions of the applicable regulated air pollutant that are equal to or greater than 100 percent of the amount, in tons per year, required for a source to be classified as a major source. For purposes of this paragraph, ''potential pre-control device emissions'' shall have the same meaning as ''potential to emit,'' as defined in §64.1, except that emission reductions achieved by the applicable control device shall not be taken into account.

(b) *Exemptions*—(1) *Exempt emission limitations or standards.* The requirements of this part shall not apply to any of the following emission limitations or standards:

(i) Emission limitations or standards proposed by the Administrator after November 15, 1990 pursuant to section 111 or 112 of the Act.

(ii) Stratospheric ozone protection requirements under title VI of the Act.

(iii) Acid Rain Program requirements pursuant to sections 404, 405, 406, 407(a), 407(b), or 410 of the Act.

(iv) Emission limitations or standards or other applicable requirements that apply solely under an emissions trading program approved or promulgated by the Administrator under the Act that allows for trading emissions within a source or between sources.

(v) An emissions cap that meets the requirements specified in §70.4(b)(12) or §71.6(a)(13)(iii) of this chapter.

(vi) Emission limitations or standards for which a part 70 or 71 permit specifies a continuous compliance determination method, as defined in §64.1. The exemption provided in this paragraph (b)(1)(vi) shall not apply if the applicable compliance method includes an assumed control device emission reduction factor that could be affected by the actual operation and maintenance of the control device

emissions, process parameters, capture system parameters, control device parameters or other factors relevant to assessing compliance with emission limitations or standards.

Owner or operator means any person who owns, leases, operates, controls or supervises a stationary source subject to this part.

Part 70 or 71 permit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall also refer to a permit issued, renewed, amended, revised, or modified under any federal permit program promulgated under title V of the Act.

Part 70 or 71 permit application shall mean an application (including any supplement to a previously submitted application) that is submitted by the owner or operator in order to obtain a part 70 or 71 permit.

Permitting authority shall have the same meaning as provided under part 70 or 71 of this chapter.

Pollutant-specific emissions unit means an emissions unit considered separately with respect to each regulated air pollutant.

Potential to emit shall have the same meaning as provided under part 70 or 71 of this chapter, provided that it shall be applied with respect to an ''emissions unit'' as defined under this part in addition to a ''stationary source'' as provided under part 70 or 71 of this chapter.

Predictive emission monitoring system (PEMS) means a system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

Regulated air pollutant shall have the same meaning as provided under part 70 or 71 of this chapter.

§64.2 Applicability.

(a) *General applicability.* Except for backup utility units that are exempt under paragraph (b)(2) of this section, the requirements of this part shall apply to a pollutant-specific emissions unit at a major source that is required to obtain a part 70 or 71 permit if the unit satisfies all of the following criteria:

(1) The unit is subject to an emission limitation or standard for the applicable regulated air pollutant (or a surrogate thereof), other than an emission limitation or standard that is exempt under paragraph (b)(1) of this section;

(2) The unit uses a control device to achieve compliance with any such emission limitation or standard; and

(3) The unit has potential pre-control device emissions of the applicable regulated air pollutant that are equal to or greater than 100 percent of the amount, in tons per year, required for a source to be classified as a major source. For purposes of this paragraph, ''potential pre-control device emissions'' shall have the same meaning as ''potential to emit,'' as defined in §64.1, except that emission reductions achieved by the applicable control device shall not be taken into account.

(b) *Exemptions*—(1) *Exempt emission limitations or standards.* The requirements of this part shall not apply to any of the following emission limitations or standards:

(i) Emission limitations or standards proposed by the Administrator after November 15, 1990 pursuant to section 111 or 112 of the Act.

(ii) Stratospheric ozone protection requirements under title VI of the Act.

(iii) Acid Rain Program requirements pursuant to sections 404, 405, 406, 407(a), 407(b), or 410 of the Act.

(iv) Emission limitations or standards or other applicable requirements that apply solely under an emissions trading program approved or promulgated by the Administrator under the Act that allows for trading emissions within a source or between sources.

(v) An emissions cap that meets the requirements specified in §70.4(b)(12) or §71.6(a)(13)(iii) of this chapter.

(vi) Emission limitations or standards for which a part 70 or 71 permit specifies a continuous compliance determination method, as defined in §64.1. The exemption provided in this paragraph (b)(1)(vi) shall not apply if the applicable compliance method includes an assumed control device emission reduction factor that could be affected by the actual operation and maintenance of the control device

(such as a surface coating line controlled by an incinerator for which continuous compliance is determined by calculating emissions on the basis of coating records and an assumed control device efficiency factor based on an initial performance test; in this example, this part would apply to the control device and capture system, but not to the remaining elements of the coating line, such as raw material usage).

(2) *Exemption for backup utility power emissions units.* The requirements of this part shall not apply to a utility unit, as defined in §72.2 of this chapter, that is municipally-owned if the owner or operator provides documentation in a part 70 or 71 permit application that:

(i) The utility unit is exempt from all monitoring requirements in part 75 (including the appendices thereto) of this chapter;

(ii) The utility unit is operated for the sole purpose of providing electricity during periods of peak electrical demand or emergency situations and will be operated consistent with that purpose throughout the part 70 or 71 permit term. The owner or operator shall provide historical operating data and relevant contractual obligations to document that this criterion is satisfied; and

(iii) The actual emissions from the utility unit, based on the average annual emissions over the last three calendar years of operation (or such shorter time period that is available for units with fewer than three years of operation) are less than 50 percent of the amount in tons per year required for a source to be classified as a major source and are expected to remain so.

§64.3 Monitoring design criteria.

(a) *General criteria.* To provide a reasonable assurance of compliance with emission limitations or standards for the anticipated range of operations at a pollutant-specific emissions unit, monitoring under this part shall meet the following general criteria:

(1) The owner or operator shall design the monitoring to obtain data for one or more indicators of emission control performance for the control device, any associated capture system and, if necessary to satisfy paragraph (a)(2) of this section, processes at a pollutant-specific emissions unit. Indicators of performance may include, but are not limited to, direct or predicted emissions (including visible emissions or opacity), process and control device parameters that affect control device (and capture system) efficiency or emission rates, or recorded findings of inspection and maintenance activities conducted by the owner or operator.

(2) The owner or operator shall establish an appropriate range(s) or designated condition(s) for the selected indicator(s) such that operation within the ranges provides a reasonable assurance of ongoing compliance with emission limitations or standards for the anticipated range of operating conditions. Such range(s) or condition(s) shall reflect the proper operation and maintenance of the control device (and associated capture system), in accordance with applicable design properties, for minimizing emissions over the anticipated range of operating conditions at least to the level required to achieve compliance with the applicable requirements. The reasonable assurance of compliance will be assessed by maintaining performance within the indicator range(s) or designated condition(s). The ranges shall be established in accordance with the design and performance requirements in this section and documented in accordance with the requirements in §64.4. If necessary to assure that the control device and associated capture system can satisfy this criterion, the owner or operator shall monitor appropriate process operational parameters (such as total throughput where necessary to stay within the rated capacity for a control device). In addition, unless specifically stated otherwise by an applicable requirement, the owner or operator shall monitor indicators to detect any bypass of the control device (or capture system) to the atmosphere, if such bypass can occur based on the design of the pollutant-specific emissions unit.

(3) The design of indicator ranges or designated conditions may be:

(i) Based on a single maximum or minimum value if appropriate (e.g., maintaining condenser temperatures a certain number of degrees below the condensation temperature of the applicable compound(s) being processed) or

source,'' effective July 2, 2007. For the convenience of the user, the revised text is set forth as follows:

§ 70.2 Definitions.

* * * * *

Major source * * *

(2) * * *

(xx) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

* * * * *

§ 70.3 Applicability.

(a) *Part 70 sources.* A State program with whole or partial approval under this part must provide for permitting of the following sources:

(1) Any major source;

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

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

(4) Any affected source; and

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

(b) *Source category exemptions.* (1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act, may be exempted by the State from the obligation to obtain a part 70 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

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

(3) [Reserved]

(4) The following source categories are exempted from the obligation to obtain a part 70 permit:

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

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, subpart M—National Emission Standard for Hazardous Air Pollutants for Asbestos, §61.145, Standard for Demolition and Renovation.

(c) *Emissions units and part 70 sources.* (1) For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 70 program under paragraph (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program.

(d) *Fugitive emissions.* Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

[57 FR 32295, July 21, 1992, as amended at 70 FR 75346, Dec. 19, 2005]

§ 70.4 State program submittals and transition.

(a) *Date for submittal.* Not later than November 15, 1993, the Governor of each State shall submit to the Administrator for approval a proposed part 70 program, under State law or under an interstate compact, meeting the requirements of this part. If part 70 is

subsequently revised such that the Administrator determines that it is necessary to require a change to an approved State program, the required revisions to the program shall be submitted within 12 months of the final changes to part 70 or within such other period as authorized by the Administrator.

(b) *Elements of the initial program submission.* Any State that seeks to administer a program under this part shall submit to the Administrator a letter of submittal from the Governor or his designee requesting EPA approval of the program and at least three copies of a program submission. The submission shall contain the following:

(1) A complete program description describing how the State intends to carry out its responsibilities under this part.

(2) The regulations that comprise the permitting program, reasonably available evidence of their procedurally correct adoption, (including any notice of public comment and any significant comments received on the proposed part 70 program as requested by the Administrator), and copies of all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program or restrict its implementation. The State shall include with the regulations any criteria used to determine insignificant activities or emission levels for purposes of determining complete applications consistent with § 70.5(c) of this part.

(3) A legal opinion from the Attorney General for the State, or the attorney for those State, local, or interstate air pollution control agencies that have independent legal counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific states, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State states and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as ''independent legal counsel,'' the attorney signing the statement required by this section shall have full authority to independently represent the State agency in court on all matters pertaining to the State program. The legal opinion shall also include a demonstration of adequate legal authority to carry out the requirements of this part, including authority to carry out each of the following:

(i) Issue permits and assure compliance with each applicable requirement and requirement of this part by all part 70 sources.

(ii) Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into part 70 permits consistent with § 70.6.

(iii) Issue permits for a fixed term of 5 years in the case of permits with acid rain provisions and issue all other permits for a period not to exceed 5 years, except for permits issued for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act.

(iv) Issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and review such permits at least every 5 years. No permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

(v) Incorporate into permits all applicable requirements and requirements of this part.

(vi) Terminate, modify, or revoke and reissue permits for cause.

(vii) Enforce permits, permit fee requirements, and the requirement to obtain a permit, as specified in § 70.11.

(viii) Make available to the public any permit application, compliance plan, permit, and monitoring and compliance, certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 115(c) of the Act.

(ix) Not issue a permit if the Administrator timely objects to its issuance pursuant to §70.8(c) of this part or, if the permit has not already been issued, to §70.8(d) of this part.

(x) Provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to §70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws.

(xi) Provide that, solely for the purposes of obtaining judicial review in State court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program. If the State program allows sources to make changes subject to post hoc review [as set forth in §§70.7(e)(2) and (3) of this part], the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State court.

(xii) Provide that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than 90 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.

(xiii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

(4) Relevant permitting program documentation not contained in the State regulations, including the following:

(i) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program; and

(ii) Relevant guidance issued by the State to assist in the implementation of its permitting program, including criteria for monitoring source compliance (e.g., inspection strategies).

(5) A complete description of the State's compliance tracking and enforcement program or reference to any agreement the State has with EPA that provides this information.

(6) A showing of adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of their submittal, except for initial permit applications, for which the permitting authority may take up to 3 years from the effective date of the program to take final action on the application, as provided for in the transition plan.

(7) A demonstration, consistent with §70.9, that the permit fees required by the State program are sufficient to cover permit program costs.

(8) A statement that adequate personnel and funding have been made available to develop, administer, and enforce the program. This statement shall include the following:

(i) A description in narrative form of the scope, structure, coverage, and processes of the State program.

(ii) A description of the organization and structure of the agency or agencies that will have responsibility for administering the program, including the information specified in this paragraph. If more than one agency is responsible for administration of a program, the responsibilities of each agency must be

delineated, their procedures for coordination must be set forth, and an agency shall be designated as a ''lead agency'' to facilitate communications between EPA and the other agencies having program responsibility.

(iii) A description of the agency staff who will carry out the State program, including the number, occupation, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(iv) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(v) An estimate of the permit program costs for the first 4 years after approval, and a description of how the State plans to cover those costs.

(9) A commitment from the State to submit, at least annually to the Administrator, information regarding the State's enforcement activities including, but not limited to, the number of criminal and civil, judicial and administrative enforcement actions either commenced or concluded; the penalties, fines, and sentences obtained in those actions; and the number of administrative orders issued.

(10) A requirement under State law that, if a timely and complete application for a permit renewal is submitted, consistent with §70.5(a)(2), but the State has failed to issue or deny the renewal permit before the end of the term of the previous permit, then:

(i) The permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to §70.6(f) may extend beyond the original permit term until renewal; or

(ii) All the terms and conditions of the permit including any permit shield that may be granted pursuant to §70.6(f) shall remain in effect until the renewal permit has been issued or denied.

(11) A transition plan providing a schedule for submittal and final action on initial permit applications for all part 70 sources. This plan shall provide that:

(i) Submittal of permit applications by all part 70 sources (including any sources subject to a partial or interim program) shall occur within 1 year after the effective date of the permit program;

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

(iii) Any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted on within 9 months of receipt of the complete application; and

(iv) Submittal of permit applications and the permitting of affected sources shall occur in accordance with the deadlines in title IV of the Act and the regulations promulgated thereunder.

(12) Provisions consistent with paragraphs (b)(12)(i) through (iii) of this section to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in the terms of total emissions): *Provided,* That the facility provides the Administrator and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different time frame for emergencies. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit. The following provisions implement this requirement of an approvable part 70 permit program:

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

(A) For each such change, the written notification required above shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and

any permit term or condition that is no longer applicable as a result of the change.

(B) The permit shield described in §70.6(f) of this part shall not apply to any change made pursuant to this paragraph (b)(12)(i) of this section.

(ii) The program may provide for permitted sources to trade increases and decreases in emissions in the permitted facility, where the applicable implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph (b)(12)(ii) of this section. This provision is available in those cases where the permit does not already provide for such emissions trading.

(A) Under this paragraph (b)(12)(ii) of this section, the written notification required above shall include such information as may be required by the provision in the applicable implementation plan authorizing the emissions trade, including at a minimum, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the applicable implementation plan, and the pollutants emitted subject to the emissions trade. The notice shall also refer to the provisions with which the source will comply in the applicable implementation plan and that provide for the emissions trade.

(B) The permit shield described in §70.6(f) of this part shall not extend to any change made under this paragraph (b)(12)(ii) of this section. Compliance with the permit requirements that the source will meet using the emissions trade shall be determined according to requirements of the applicable implementation plan authorizing the emissions trade.

(iii) The program shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under §70.6 (a) and (c) of this part to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The permitting authority shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements.

(A) Under this paragraph (b)(12)(iii) of this section, the written notification required above shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(B) The permit shield described in §70.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.

(13) Provisions for adequate, streamlined, and reasonable procedures for expeditious review of permit revisions or modifications. The program may meet this requirement by using procedures that meet the requirements of §70.7(e) or that are substantially equivalent to those provided in §70.7(e) of this part.

(14) If a State allows changes that are not addressed or prohibited by the permit, other than those described in paragraph (b)(15) of this section, to be made without a permit revision, provisions meeting the requirements of paragraphs (b)(14) (i) through (iii) of this section. Although a State may, as a matter of State law, prohibit sources from making such changes without a permit revision, any such prohibition shall not be enforceable by the Administrator or by citizens under the Act unless the prohibition is required by an applicable requirement. Any State procedures implementing such a State law prohibition must include the requirements of paragraphs (b)(14) (i) through (iii) of this section.

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

(ii) Sources must provide contemporaneous written notice to the permitting authority and EPA of each such change, except for changes that qualify as insignificant under the provisions adopted pursuant to §70.5(c) of this part. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change.

(iii) The change shall not qualify for the shield under §70.6(f) of this part.

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

(15) Provisions prohibiting sources from making, without a permit revision, changes that are not addressed or prohibited by the part 70 permit, if such changes are subject to any requirements under title IV of the Act or are modifications under any provision of title I of the Act.

(16) Provisions requiring the permitting authority to implement the requirements of §§70.6 and 70.7 of this part.

(c) *Partial programs.* (1) The EPA may approve a partial program that applies to all part 70 sources within a limited geographic area (e.g., a local agency program covering all sources within the agency's jurisdiction). To be approvable, any partial program must, at a minimum, ensure compliance with all of the following applicable requirements, as they apply to the sources covered by the partial program:

(i) All requirements of title V of the Act and of part 70;

(ii) All applicable requirements of title IV of the Act and regulations promulgated thereunder which apply to affected sources; and

(iii) All applicable requirements of title I of the Act, including those established under sections 111 and 112 of the Act.

(2) Any partial permitting program, such as that of a local air pollution control agency, providing for the issuance of permits by a permitting authority other than the State, shall be consistent with all the elements required in paragraphs (b) (1) through (16) of this section.

(3) Approval of any partial program does not relieve the State from its obligation to submit a whole program or from application of any sanctions for failure to submit a fully-approvable whole program.

(4) Any partial program may obtain interim approval under paragraph (d) of this section if it substantially meets the requirements of this paragraph (c) of this section.

(d) *Interim approval.* (1) If a program (including a partial permit program) submitted under this part substantially meets the requirements of this part, but is not fully approvable, the Administrator may be rule grant the program interim approval.

(2) Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources shall become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall expire at the end of their fixed term, unless renewed under a part 70 program.

(3) The EPA may grant interim approval to any program if it meets each of the following minimum requirements and otherwise substantially meets the requirements of this part:

(i) *Adequate fees.* The program must provide for collecting permit fees adequate for it to meet the requirements of §70.9 of this part.

(ii) *Applicable requirements.* (A) The program must provide for adequate authority to issue permits that assure compliance with the requirements of paragraph (c)(1) of this section for those major sources covered by the program.

(B) Notwithstanding paragraph (d)(3)(ii)(A) of this section, where a State or local permitting authority lacks adequate authority to issue or revise permits that assure compliance with applicable requirements established exclusively through an EPA-approved minor NSR program, EPA may grant interim approval to the program

upon a showing by the permitting authority of compelling reasons which support the interim approval.

(C) Any part 70 permit issued during an interim approval granted under paragraph (d)(3)(ii)(B) of this section that does not incorporate minor NSR requirements shall:

(*1*) Note this fact in the permit;

(*2*) Indicate how citizens may obtain access to excluded minor NSR permits;

(*3*) Provide a cross reference, such as a listing of the permit number, for each minor NSR permit containing an excluded minor NSR term; and

(*4*) State that the minor NSR requirements which are excluded are not eligible for the permit shield under §70.6(f).

(D) A program receiving interim approval for the reason specified in (d)(3)(ii)(B) of this section must, upon or before granting of full approval, institute proceedings to reopen part 70 permits to incorporate excluded minor NSR permits as terms of the part 70 permits, as required by §70.7(f)(1)(iv). Such reopening need not follow full permit issuance procedures nor the notice requirement of §70.7(f)(3), but may instead follow the permit revision procedure in effect under the State's approved part 70 program for incorporation of minor NSR permits.

(iii) *Fixed term.* The program must provide for fixed permit terms, consistent with paragraphs (b)(3) (iii) and (iv) of this section.

(iv) *Public participation.* The program must provide for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions, except for modifications qualifying for minor permit modification procedures under §70.7(e) of this part.

(v) *EPA and affected State review.* The program must allow EPA an opportunity to review each proposed permit, including permit revisions, and to object to its issuance consistent with §70.8(c) of this part. The program must provide for affected State review consistent with §70.8(b) of this part.

(vi) *Permit issuance.* The program must provide that the proposed permit will not be issued if EPA objects to its issuance.

(vii) *Enforcement.* The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.

(viii) *Operational flexibility.* The program must allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the act and the changes do not exceed the emissions allowable under the permit, consistent with paragraph (b)(12) of this section.

(ix) *Streamlined procedures.* The program must provide for streamlined procedures for issuing and revising permits and determining expeditiously after receipt of a permit application or application for a permit revision whether such application is complete.

(x) *Permit application.* The program submittal must include copies of the permit application and reporting form(s) that the State will use in implementing the interim program.

(xi) *Alternative scenarios.* The program submittal must include provisions to insure that alternate scenarios requested by the source are included in the part 70 permit pursuant to §70.6(a)(9) of this part.

(e) *EPA review of permit program submittals.* Within 1 year after receiving a program submittal, the Administrator shall approve or disapprove the program, in whole or in part, by publishing a notice in the FEDERAL REGISTER. Prior to such notice, the Administrator shall provide an opportunity for public comment on such approval or disapproval. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain full approval. The Administrator shall approve State programs that conform to the requirements of this part.

(1) Within 60 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete enough to warrant review by EPA for either full, partial, or interim approval. If EPA finds that a State's submission is complete, the 1-year review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of

receipt of the State's submission. If EPA finds that a State's submission is incomplete, the 1-year review period shall not begin until all the necessary information is received by EPA.

(2) If the State's submission is materially changed during the 1-year review period, the Administrator may extend the review period for no more than 1 year following receipt of the revised submission.

(3) In any notice granting interim or partial approval, the Administrator shall specify the changes or additions that must be made before the program can receive full approval and the conditions for implementation of the program until that time.

(f) *State response to EPA review of program*—(1) *Disapproval.* The State shall submit to EPA program revisions or modifications required by the Administrator's action disapproving the program, or any part thereof, within 180 days of receiving notification of the disapproval.

(2) *Interim approval.* The State shall submit to EPA changes to the program addressing the deficiencies specified in the interim approval no later than 6 months prior to the expiration of the interim approval.

(g) *Effective date.* The effective date of a part 70 program, including any partial or interim program approved under this part, shall be the effective date of approval by the Administrator.

(h) *Individual permit transition.* Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program, except that the Administrator will continue to issue phase I acid rain permits. After program approval, EPA shall retain jurisdiction over any permit (including any general permit) that it has issued unless arrangements have been made with the State to assume responsibility for these permits. Where EPA retains jurisdiction, it will continue to process permit appeals and modification requests, to conduct inspections, and to receive and review monitoring reports. If any permit appeal or modification request is not finally resolved when the federally-issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved. Upon request by a State, the Administrator may delegate authority to implement all or part of a permit issued by EPA, if a part 70 program has been approved for the State. The delegation may include authorization for the State to collect appropriate fees, consistent with § 70.9 of this part.

(i) *Program revisions.* Either EPA or a State with an approved program may initiate a program revision. Program revision may be necessary when the relevant Federal or State statutes or regulations are modified or supplemented. The State shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures.

(1) If the Administrator determines pursuant to § 70.10 of this part that a State is not adequately administering the requirements of this part, or that the State's permit program is inadequate in any other way, the State shall revise the program or its means of implementation to correct the inadequacy. The program shall be revised within 180 days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years if the State demonstrates that additional legal authority is necessary to make the program revision.

(2) Revision of a State program shall be accomplished as follows:

(i) The State shall submit a modified program description, Attorney General's statement, or such other documents as EPA determines to be necessary.

(ii) After EPA receives a proposed program revision, it will publish in the FEDERAL REGISTER a public notice summarizing the proposed change and provide a public comment period of at least 30 days.

(iii) The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Act.

(iv) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of nonsubstantial program revisions may be given by a letter from the

Administrator to the Governor or a designee.

(v) The Governor of any State with an approved part 70 program shall notify EPA whenever the Governor proposes to transfer all or part of the program to any other agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until the revision has been approved by the Administrator under this paragraph.

(3) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as he determines are necessary.

(j) *Sharing of information.* (1) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction and in a form specified by the Administrator, including computer-readable files to the extent practicable. If the information has been submitted to the State under a claim of confidentiality, the State may require the source to submit this information to the Administrator directly. Where the State submits information to the Administrator under a claim of confidentiality, the State shall submit that claim to EPA when providing information to EPA under this section. Any information obtained from a State or part 70 source accompanied by a claim of confidentiality will be treated in accordance with the regulations in part 2 of this chapter.

(2) The EPA will furnish to States with approved programs the information in its files that the State needs to implement its approved program. Any such information submitted to EPA under a claim of confidentiality will be subject to the regulations in part 2 of this chapter.

(k) *Administration and enforcement.* Any State that fails to adopt a complete, approvable part 70 program, or that EPA determines is not adequately administering or enforcing such program shall be subject to certain Federal sanctions as set forth in §70.10 of this part.

[57 FR 32295, July 21, 1992, as amended at 61 FR 31448, June 20, 1996; 61 FR 56370, Oct. 31, 1996; 66 FR 27010, May 15, 2001]

§70.5 Permit applications.

(a) *Duty to apply.* For each part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.

(1) *Timely application.* (i) A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.

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

(iii) For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed. In no event shall this time be greater than 18 months.

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

(2) *Complete application.* The program shall provide criteria and procedures for determining in a timely fashion when applications are complete. To be deemed complete, an application must

to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

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

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

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

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

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

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

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

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

[57 FR 32295, July 21, 1992, as amended at 62 FR 54946, Oct. 22, 1997; 66 FR 12876, Mar. 1, 2001; 66 FR 55884, Nov. 5, 2001; 68 FR 38523, June 27, 2003]

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

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

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under § 70.6(d) of this part;

(ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (2) and (3) of this section, the permitting authority has complied with the requirements for public participation under paragraph (h) of this section;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 70.8(b) of this part;

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

(v) The Administrator has received a copy of the proposed permit and any notices required under §§ 70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under § 70.8(c) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under § 70.4(b)(11) of this part or under regulations promulgated under title IV of title V of the Act for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.

(3) The program shall also contain reasonable procedures to ensure priority is given to taking action on applications for construction or modification under title I, parts C and D of the Act.

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in

paragraphs (e) (2) and (3) of this section, the State program need not require a completeness determination.

(5) The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.

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

(b) *Requirement for a permit.* Except as provided in the following sentence, § 70.4(b)(12)(i), and paragraphs (e) (2)(v) and (3)(v) of this section, no part 70 source may operate after the time that it is required to submit a timely and complete application under an approved permit program, except in compliance with a permit issued under a part 70 program. The program shall provide that, if a part 70 source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a part 70 permit is not a violation of this part until the permitting authority takes final action on the permit application, except as noted in this section. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section, and as required by § 70.5(a)(2) of this part, the applicant fails to submit by the deadline specified in writing by the permitting authority any additional information identified as being needed to process the application.

(c) *Permit renewal and expiration.* (1) The program shall provide that:

(i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State and EPA review, that apply to initial permit issuance; and

(ii) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part.

(2) If the permitting authority fails to act in a timely way on a permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate or revoke and reissue the permit.

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

(i) Corrects typographical errors;

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

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

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

(v) Incorporates into the part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§ 70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in § 70.6 of this part; or

(vi) Incorporates any other type of change which the Administrator has determined as part of the approved part 70 program to be similar to those in paragraphs (d)(1) (i) through (iv) of this section.

(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

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

(i) The permitting authority shall take no more than 60 days from receipt

of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected States provided that it designates any such permit revisions as having been made pursuant to this paragraph.

(ii) The permitting authority shall submit a copy of the revised permit to the Administrator.

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

(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in §70.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§70.6, 70.7, and 70.8 for significant permit modifications.

(e) *Permit modification.* A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(1) *Program description.* The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.

(2) *Minor permit modification procedures*—(i) *Criteria.* (A) Minor permit modification procedures may be used only for those permit modifications that:

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

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

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

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

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

(*B*) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

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

(*6*) Are not required by the State program to be processed as a significant modification.

(B) Notwithstanding paragraphs (e)(2)(i)(A) and (e)(3)(i) of this section, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.

(ii) *Application.* An application requesting the use of minor permit modification procedures shall meet the requirements of §70.5(c) of this part and shall include the following:

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

(B) The source's suggested draft permit;

(C) Certification by a responsible official, consistent with §70.5(d), that the

proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(D) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under §70.8.

(iii) *EPA and affected State notification.* Within 5 working days of receipt of a complete permit modification application, the permitting authority shall meet its obligation under §70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modification. The permitting authority promptly shall send any notice required under §70.8(b)(2) to the Administrator.

(iv) *Timetable for issuance.* The permitting authority may not issue a final permit modification until after EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, whichever is first, although the permitting authority can approve the permit modification prior to that time. Within 90 days of the permitting authority's receipt of an application under minor permit modification procedures or 15 days after the end of the Administrator's 45-day review period under §70.8(c), whichever is later, the permitting authority shall:

(A) Issue the permit modification as proposed;

(B) Deny the permit modification application;

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

(D) Revise the draft permit modification and transmit to the Administrator the new proposed permit modification as required by §70.8(a) of this part.

(v) *Source's ability to make change.* The State program may allow the source to make the change proposed in its minor permit modification application immediately after it files such application. After the source makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions specified in paragraphs (e)(2)(v) (A) through (C) of this section, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(vi) *Permit shield.* The permit shield under §70.6(f) of this part may not extend to minor permit modifications.

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

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

(A) That meet the criteria for minor permit modification procedures under paragraph (e)(2)(i)(A) of this section; and

(B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (e)(3)(i)(B) (*1*) and (*2*) of this section, this threshold shall be 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in §70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:

(*1*) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that would be imposed by immediate permit modification review, and

(*2*) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.

(ii) *Application.* An application requesting the use of group processing procedures shall meet the requirements

of § 70.5(c) of this part and shall include the following:

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

(B) The source's suggested draft permit.

(C) Certification by a responsible official, consistent with § 70.5(d) of this part, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(3)(i)(B) of this section.

(E) Certification, consistent with § 70.5(d) of this part, that the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.

(F) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8 of this part.

(iii) *EPA and affected State notification.* On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligations under §§ 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under § 70.8(b)(2) of this part to the Administrator.

(iv) *Timetable for issuance.* The provisions of paragraph (e)(2)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(2)(iv) (A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45-day review period under § 70.8(c) of this part, whichever is later.

(v) *Source's ability to make change.* The provisions of paragraph (e)(2)(v) of this section shall apply to modifications eligible for group processing.

(vi) *Permit shield.* The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.

(4) *Significant modification procedures*—(i) *Criteria.* Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. The State program shall contain criteria for determining whether a change is significant. At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

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

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

(i) Additional applicable requirements under the Act become applicable to a major part 70 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original

permit or any of its terms and conditions has been extended pursuant to § 70.4(b)(10) (i) or (ii) of this part.

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

(iii) The permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

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

(3) Reopenings under paragraph (f)(1) of this section shall not be initiated before a notice of such intent is provided to the part 70 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time period in the case of an emergency.

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

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

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

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

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

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

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

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

(1) Notice shall be given: by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice; to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address,

and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in §70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

(3) The permitting authority shall provide such notice and opportunity for participation by affected States as is provided for by §70.8 of this part;

(4) *Timing.* The permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.

(5) The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.

§70.8 Permit review by EPA and affected States.

(a) *Transmission of information to the Administrator.* (1) The permit program shall require that the permitting authority provide to the Administrator a copy of each permit application (including any application for permit modification), each proposed permit, and each final part 70 permit. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.

(2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:

(i) By regulation for a category of sources nationwide, or

(ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.

(3) Each State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.

(b) *Review by affected States.* (1) The permit program shall provide that the permitting authority give notice of each draft permit to any affected State on or before the time that the permitting authority provides this notice to the public under §70.7(h) of this part, except to the extent §70.7(e) (2) or (3) of this part requires the timing of the notice to be different.

(2) The permit program shall provide that the permitting authority, as part of the submittal of the proposed permit to the Administrator [or as soon as possible after the submittal for minor permit modification procedures allowed under §70.7(e) (2) or (3) of this part], shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) *EPA objection.* (1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit

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

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

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

(E) Noncommercial food preparation;

(F) Consumer use of office equipment and products;

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

(H) Internal combustion engines used for landscaping purposes.

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

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

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

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

§71.6 Permit content.

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

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

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

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

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

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

(3) *Monitoring and related recordkeeping and reporting requirements.* (i)

Each permit shall contain the following requirements with respect to monitoring:

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any situation in which an emissions unit fails to meet a permit term or condition. A deviation is not always a violation. A deviation can be determined by observation or through review of data obtained from any testing, monitoring, or recordkeeping established in accordance with paragraphs (a)(3)(i) and (a)(3)(ii) of this section. For a situation lasting more than 24 hours which constitutes a deviation, each 24 hour period is considered a separate deviation. Included in the meaning of deviation are any of the following:

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

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

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

(*4*) A situation in which an exceedance or an excursion, as defined in part 64 of this chapter, occurs.

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

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

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

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

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

(6) Provisions stating the following:

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

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

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

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

(v) The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee shall also

furnish to the permitting authority copies of records required to be kept by the permit or, in the case of a program delegated pursuant to §71.10, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) *Operational flexibility.* Provisions consistent with paragraphs (a)(3)(i) through (iii) of this section to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of

emissions or in terms of total emissions): Provided, that the facility provides the Administrator (in the case of a program delegated pursuant to §71.10) and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days.

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

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

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

(ii) The permit may provide for the permitted source to trade increases and decreases in emissions in the permitted facility, where the applicable implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph (a)(13)(ii) of this section. This provision is available in those cases where the permit does not already provide for such emissions trading.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

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

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;

(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification; and

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

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

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

(d) *General permits.* (1) The permitting authority may, after notice and opportunity for public participation provided under §71.11, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other

part 71 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part 71 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in 40 CFR parts 72 through 78.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[61 FR 34228, July 1, 1996, as amended at 62 FR 54947, Oct. 22, 1997; 66 FR 12876, Mar. 1, 2001; 66 FR 55885, Nov. 5, 2001; 68 FR 38523, June 27, 2003]

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

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

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

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

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

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

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

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

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

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e) (1) and (2) of this section, the permitting authority need not make a completeness determination.

(5) The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e) (1) and (2) of this section, the permitting authority need not make a completeness determination.

(5) The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references

to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to any person who requests it, and to EPA, in the case of a program delegated pursuant to §71.10.

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

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

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

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

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

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

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

(i) Corrects typographical errors;

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Minor permit modification procedures.* (i) Criteria. (A) Minor permit modification procedures may be used only for those permit modifications that:

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

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

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

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

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

(*ii*) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

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

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

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

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

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

(B) The source's suggested draft permit;

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

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

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

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

(A) Issue the permit modification as proposed;

(B) Deny the permit modification application;

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

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

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

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

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

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

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

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

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

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

(B) The source's suggested draft permit.

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

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated

with these other applications, equals or exceeds the threshold set under paragraph (e)(2)(i)(B) of this section.

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

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

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

(iv) *Timetable for issuance.* The provisions of paragraph (e)(1)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(1)(iv) (A) through (D) of this section within 180 days of receipt of the application (or, in the case of a program delegated pursuant to §71.10, 15 days after the end of the Administrator's 45-day review period under §71.10(g), whichever is later).

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

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

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

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

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

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

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

(iii) The permitting authority (or EPA, in the case of a program delegated pursuant to §71.10) determines

that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

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

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

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

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

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

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

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

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

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

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

§71.8 Affected State review.

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

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

(ii) Notice of opportunity for the applicant to present, in writing, within 30 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator to enable further action on the application.

(4) A final determination to deny any application for approval will be in writing and will specify the grounds on which the denial is based. The final determination will be made within 60 calendar days of presentation of additional information or arguments (if the application is complete), or within 60 calendar days after the final date specified for presentation if no presentation is made.

(5) Neither the submission of an application for approval nor the Administrator's approval of construction or reconstruction shall—

(i) Relieve an owner or operator of legal responsibility for compliance with any applicable provisions of this part or with any other applicable Federal, State, or local requirement; or

(ii) Prevent the Administrator from implementing or enforcing this part or taking any other action under the Act.

(f) *Approval of construction or reconstruction based on prior State preconstruction review.* (1) The Administrator may approve an application for construction or reconstruction specified in paragraphs (b)(3) and (d) of this section if the owner or operator of a new or reconstructed source who is subject to such requirement demonstrates to the Administrator's satisfaction that the following conditions have been (or will be) met:

(i) The owner or operator of the new or reconstructed source has undergone a preconstruction review and approval process in the State in which the source is (or would be) located before the promulgation date of the relevant standard and has received a federally enforceable construction permit that contains a finding that the source will meet the relevant emission standard as proposed, if the source is properly built and operated;

(ii) In making its finding, the State has considered factors substantially equivalent to those specified in paragraph (e)(1) of this section; and either

(iii) The promulgated standard is no more stringent than the proposed standard in any relevant aspect that would affect the Administrator's decision to approve or disapprove an application for approval of construction or reconstruction under this section; or

(iv) The promulgated standard is more stringent than the proposed standard but the owner or operator will comply with the standard as proposed during the 3-year period immediately following the effective date of the standard as allowed for in §63.6(b)(3) of this subpart.

(2) The owner or operator shall submit to the Administrator the request for approval of construction or reconstruction under this paragraph no later than the application deadline specified in paragraph (d)(1) of this section (see also §63.9(b)(2) of this subpart). The owner or operator shall include in the request information sufficient for the Administrator's determination. The Administrator will evaluate the owner or operator's request in accordance with the procedures specified in paragraph (e) of this section. The Administrator may request additional relevant information after the submittal of a request for approval of construction or reconstruction under this paragraph.

§ 63.6 Compliance with standards and maintenance requirements.

(a) *Applicability.* (1) The requirements in this section apply to owners or operators of affected sources for which any relevant standard has been established pursuant to section 112 of the Act unless—

(i) The Administrator (or a State with an approved permit program) has granted an extension of compliance consistent with paragraph (i) of this section; or

(ii) The President has granted an exemption from compliance with any relevant standard in accordance with section 112(i)(4) of the Act.

(2) If an area source that otherwise would be subject to an emission standard or other requirement established under this part if it were a major source subsequently increases its emissions of hazardous air pollutants (or its potential to emit hazardous air pollutants) such that the source is a major

source, such source shall be subject to the relevant emission standard or other requirement.

(b) *Compliance dates for new and reconstructed sources.* (1) Except as specified in paragraphs (b)(3) and (b)(4) of this section, the owner or operator of a new or reconstructed source that has an initial startup before the effective date of a relevant standard established under this part pursuant to section 112(d), 112(f), or 112(h) of the Act shall comply with such standard not later than the standard's effective date.

(2) Except as specified in paragraphs (b)(3) and (b)(4) of this section, the owner or operator of a new or reconstructed source that has an initial startup after the effective date of a relevant standard established under this part pursuant to section 112(d), 112(f), or 112(h) of the Act shall comply with such standard upon startup of the source.

(3) The owner or operator of an affected source for which construction or reconstruction is commenced after the proposal date of a relevant standard established under this part pursuant to section 112(d), 112(f), or 112(h) of the Act but before the effective date (that is, promulgation) of such standard shall comply with the relevant emission standard not later than the date 3 years after the effective date if:

(i) The promulgated standard (that is, the relevant standard) is more stringent than the proposed standard; and

(ii) The owner or operator complies with the standard as proposed during the 3-year period immediately after the effective date.

(4) The owner or operator of an affected source for which construction or reconstruction is commenced after the proposal date of a relevant standard established pursuant to section 112(d) of the Act but before the proposal date of a relevant standard established pursuant to section 112(f) shall comply with the emission standard under section 112(f) not later than the date 10 years after the date construction or reconstruction is commenced, except that, if the section 112(f) standard is promulgated more than 10 years after construction or reconstruction is commenced, the owner or operator shall comply with the standard as provided in paragraphs (b)(1) and (b)(2) of this section.

(5) The owner or operator of a new source that is subject to the compliance requirements of paragraph (b)(3) or paragraph (b)(4) of this section shall notify the Administrator in accordance with §63.9(d) of this subpart.

(6) [Reserved]

(7) After the effective date of an emission standard promulgated under this part, the owner or operator of an unaffected new area source (i.e., an area source for which construction or reconstruction was commenced after the proposal date of the standard) that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source that is subject to the emission standard, shall comply with the relevant emission standard immediately upon becoming a major source. This compliance date shall apply to new area sources that become affected major sources regardless of whether the new area source previously was affected by that standard. The new affected major source shall comply with all requirements of that standard that affect new sources.

(c) *Compliance dates for existing sources.* (1) After the effective date of a relevant standard established under this part pursuant to section 112(d) or 112(h) of the Act, the owner or operator of an existing source shall comply with such standard by the compliance date established by the Administrator in the applicable subpart(s) of this part. Except as otherwise provided for in section 112 of the Act, in no case will the compliance date established for an existing source in an applicable subpart of this part exceed 3 years after the effective date of such standard.

(2) After the effective date of a relevant standard established under this part pursuant to section 112(f) of the Act, the owner or operator of an existing source shall comply with such standard not later than 90 days after the standard's effective date unless the Administrator has granted an extension to the source under paragraph (i)(4)(ii) of this section.

(3)–(4) [Reserved]

(5) After the effective date of an emission standard promulgated under

this part, the owner or operator of an unaffected existing area source that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source that is subject to the emission standard shall comply by the date specified in the standard for existing area sources that become major sources. If no such compliance date is specified in the standard, the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in that standard for other existing sources. This compliance period shall apply to existing area sources that become affected major sources regardless of whether the existing area source previously was affected by that standard. Notwithstanding the previous two sentences, however, if the existing area source becomes a major source by the addition of a new affected source or by reconstructing, the portion of the existing facility that is a new affected source or a reconstructed source shall comply with all requirements of that standard that affect new sources, including the compliance date for new sources.

(d) [Reserved]

(e) *Operation and maintenance requirements.* (1)(i) At all times, including periods of startup, shutdown, and malfunction, owners or operators shall operate and maintain any affected source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards.

(ii) Malfunctions shall be corrected as soon as practicable after their occurrence in accordance with the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section.

(iii) Operation and maintenance requirements established pursuant to section 112 of the Act are enforceable independent of emissions limitations or other requirements in relevant standards.

(2) Determination of whether acceptable operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

(3) *Startup, shutdown, and malfunction plan.* (i) The owner or operator of an affected source shall develop and implement a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction and a program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant standard. As required under §63.8(c)(1)(i), the plan shall identify all routine or otherwise predictable CMS malfunctions. This plan shall be developed by the owner or operator by the source's compliance date for that relevant standard. The plan shall be incorporated by reference into the source's title V permit. The purpose of the startup, shutdown, and malfunction plan is to—

(A) Ensure that, at all times, owners or operators operate and maintain affected sources, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards;

(B) Ensure that owners or operators are prepared to correct malfunctions as soon as practicable after their occurrence in order to minimize excess emissions of hazardous air pollutants; and

(C) Reduce the reporting burden associated with periods of startup, shutdown, and malfunction (including corrective action taken to restore malfunctioning process and air pollution control equipment to its normal or usual manner of operation).

(ii) During periods of startup, shutdown, and malfunction, the owner or operator of an affected source shall operate and maintain such source (including associated air pollution control equipment) in accordance with the procedures specified in the startup, shutdown, and malfunction plan developed

under paragraph (e)(3)(i) of this section.

(iii) When actions taken by the owner or operator during a startup, shutdown, or malfunction (including actions taken to correct a malfunction) are consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, the owner or operator shall keep records for that event that demonstrate that the procedures specified in the plan were followed. These records may take the form of a ''checklist,'' or other effective form of recordkeeping, that confirms conformance with the startup, shutdown, and malfunction plan for that event. In addition, the owner or operator shall keep records of these events as specified in §63.10(b) (and elsewhere in this part), including records of the occurrence and duration of each startup, shutdown, or malfunction of operation and each malfunction of the air pollution control equipment. Furthermore, the owner or operator shall confirm that actions taken during the relevant reporting period during periods of startup, shutdown, and malfunction were consistent with the affected source's startup, shutdown and malfunction plan in the semiannual (or more frequent) startup, shutdown, and malfunction report required in §63.10(d)(5).

(iv) If an action taken by the owner or operator during a startup, shutdown, or malfunction (including an action taken to correct a malfunction) is not consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, the owner or operator shall record the actions taken for that event and shall report such actions within 2 working days after commencing actions inconsistent with the plan, followed by a letter within 7 working days after the end of the event, in accordance with §63.10(d)(5) (unless the owner or operator makes alternative reporting arrangements, in advance, with the Administrator (see §63.10(d)(5)(ii))).

(v) The owner or operator shall keep the written startup, shutdown, and malfunction plan on record after it is developed to be made available for inspection, upon request, by the Administrator for the life of the affected source or until the affected source is no longer subject to the provisions of this part. In addition, if the startup, shutdown, and malfunction plan is revised, the owner or operator shall keep previous (i.e., superseded) versions of the startup, shutdown, and malfunction plan on record, to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan.

(vi) To satisfy the requirements of this section to develop a startup, shutdown, and malfunction plan, the owner or operator may use the affected source's standard operating procedures (SOP) manual, or an Occupational Safety and Health Administration (OSHA) or other plan, provided the alternative plans meet all the requirements of this section and are made available for inspection when requested by the Administrator.

(vii) Based on the results of a determination made under paragraph (e)(2) of this section, the Administrator may require that an owner or operator of an affected source make changes to the startup, shutdown, and malfunction plan for that source. The Administrator may require reasonable revisions to a startup, shutdown, and malfunction plan, if the Administrator finds that the plan:

(A) Does not address a startup, shutdown, or malfunction event that has occurred;

(B) Fails to provide for the operation of the source (including associated air pollution control equipment) during a startup, shutdown, or malfunction event in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards; or

(C) Does not provide adequate procedures for correcting malfunctioning process and/or air pollution control equipment as quickly as practicable.

(viii) If the startup, shutdown, and malfunction plan fails to address or inadequately addresses an event that meets the characteristics of a malfunction but was not included in the startup, shutdown, and malfunction plan at the time the owner or operator developed the plan, the owner or operator shall revise the startup, shutdown, and

malfunction plan within 45 days after the event to include detailed procedures for operating and maintaining the source during similar malfunction events and a program of corrective action for similar malfunctions of process or air pollution control equipment.

(f) *Compliance with nonopacity emission standards*—(1) *Applicability.* The nonopacity emission standards set forth in this part shall apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart.

(2) *Methods for determining compliance.* (i) The Administrator will determine compliance with nonopacity emission standards in this part based on the results of performance tests conducted according to the procedures in § 63.7, unless otherwise specified in an applicable subpart of this part.

(ii) The Administrator will determine compliance with nonopacity emission standards in this part by evaluation of an owner or operator's conformance with operation and maintenance requirements, including the evaluation of monitoring data, as specified in § 63.6(e) and applicable subparts of this part.

(iii) If an affected source conducts performance testing at startup to obtain an operating permit in the State in which the source is located, the results of such testing may be used to demonstrate compliance with a relevant standard if—

(A) The performance test was conducted within a reasonable amount of time before an initial performance test is required to be conducted under the relevant standard;

(B) The performance test was conducted under representative operating conditions for the source;

(C) The performance test was conducted and the resulting data were reduced using EPA-approved test methods and procedures, as specified in § 63.7(e) of this subpart; and

(D) The performance test was appropriately quality-assured, as specified in § 63.7(c) of this subpart.

(iv) The Administrator will determine compliance with design, equipment, work practice, or operational emission standards in this part by review of records, inspection of the source, and other procedures specified in applicable subparts of this part.

(v) The Administrator will determine compliance with design, equipment, work practice, or operational emission standards in this part by evaluation of an owner or operator's conformance with operation and maintenance requirements, as specified in paragraph (e) of this section and applicable subparts of this part.

(3) *Finding of compliance.* The Administrator will make a finding concerning an affected source's compliance with a nonopacity emission standard, as specified in paragraphs (f)(1) and (f)(2) of this section, upon obtaining all the compliance information required by the relevant standard (including the written reports of performance test results, monitoring results, and other information, if applicable) and any information available to the Administrator needed to determine whether proper operation and maintenance practices are being used.

(g) *Use of an alternative nonopacity emission standard.* (1) If, in the Administrator's judgment, an owner or operator of an affected source has established that an alternative means of emission limitation will achieve a reduction in emissions of a hazardous air pollutant from an affected source at least equivalent to the reduction in emissions of that pollutant from that source achieved under any design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act, the Administrator will publish in the FEDERAL REGISTER a notice permitting the use of the alternative emission standard for purposes of compliance with the promulgated standard. Any FEDERAL REGISTER notice under this paragraph shall be published only after the public is notified and given the opportunity to comment. Such notice will restrict the permission to the stationary source(s) or category(ies) of sources from which the alternative emission standard will achieve equivalent emission reductions. The Administrator will condition permission in such notice on requirements to assure the proper operation and maintenance of equipment and practices required for

compliance with the alternative emission standard and other requirements, including appropriate quality assurance and quality control requirements, that are deemed necessary.

(2) An owner or operator requesting permission under this paragraph shall, unless otherwise specified in an applicable subpart, submit a proposed test plan or the results of testing and monitoring in accordance with §63.7 and §63.8, a description of the procedures followed in testing or monitoring, and a description of pertinent conditions during testing or monitoring. Any testing or monitoring conducted to request permission to use an alternative nonopacity emission standard shall be appropriately quality assured and quality controlled, as specified in §63.7 and §63.8.

(3) The Administrator may establish general procedures in an applicable subpart that accomplish the requirements of paragraphs (g)(1) and (g)(2) of this section.

(h) *Compliance with opacity and visible emission standards*—(1) *Applicability.* The opacity and visible emission standards set forth in this part shall apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart.

(2) *Methods for determining compliance.* (i) The Administrator will determine compliance with opacity and visible emission standards in this part based on the results of the test method specified in an applicable subpart. Whenever a continuous opacity monitoring system (COMS) is required to be installed to determine compliance with numerical opacity emission standards in this part, compliance with opacity emission standards in this part shall be determined by using the results from the COMS. Whenever an opacity emission test method is not specified, compliance with opacity emission standards in this part shall be determined by conducting observations in accordance with Test Method 9 in appendix A of part 60 of this chapter or the method specified in paragraph (h)(7)(ii) of this section. Whenever a visible emission test method is not specified, compliance with visible emission standards in this part shall be determined by conducting observations in accordance with Test Method 22 in appendix A of part 60 of this chapter.

(ii) [Reserved]

(iii) If an affected source undergoes opacity or visible emission testing at startup to obtain an operating permit in the State in which the source is located, the results of such testing may be used to demonstrate compliance with a relevant standard if—

(A) The opacity or visible emission test was conducted within a reasonable amount of time before a performance test is required to be conducted under the relevant standard;

(B) The opacity or visible emission test was conducted under representative operating conditions for the source;

(C) The opacity or visible emission test was conducted and the resulting data were reduced using EPA-approved test methods and procedures, as specified in §63.7(e) of this subpart; and

(D) The opacity or visible emission test was appropriately quality-assured, as specified in §63.7(c) of this section.

(3) [Reserved]

(4) *Notification of opacity or visible emission observations.* The owner or operator of an affected source shall notify the Administrator in writing of the anticipated date for conducting opacity or visible emission observations in accordance with §63.9(f), if such observations are required for the source by a relevant standard.

(5) *Conduct of opacity or visible emission observations.* When a relevant standard under this part includes an opacity or visible emission standard, the owner or operator of an affected source shall comply with the following:

(i) For the purpose of demonstrating initial compliance, opacity or visible emission observations shall be conducted concurrently with the initial performance test required in §63.7 unless one of the following conditions applies:

(A) If no performance test under §63.7 is required, opacity or visible emission observations shall be conducted within 60 days after achieving the maximum production rate at which a new or reconstructed source will be operated, but not later than 120 days after initial startup of the source, or within 120

days after the effective date of the relevant standard in the case of new sources that start up before the standard's effective date. If no performance test under §63.7 is required, opacity or visible emission observations shall be conducted within 120 days after the compliance date for an existing or modified source; or

(B) If visibility or other conditions prevent the opacity or visible emission observations from being conducted concurrently with the initial performance test required under §63.7, or within the time period specified in paragraph (h)(5)(i)(A) of this section, the source's owner or operator shall reschedule the opacity or visible emission observations as soon after the initial performance test, or time period, as possible, but not later than 30 days thereafter, and shall advise the Administrator of the rescheduled date. The rescheduled opacity or visible emission observations shall be conducted (to the extent possible) under the same operating conditions that existed during the initial performance test conducted under §63.7. The visible emissions observer shall determine whether visibility or other conditions prevent the opacity or visible emission observations from being made concurrently with the initial performance test in accordance with procedures contained in Test Method 9 or Test Method 22 in appendix A of part 60 of this chapter.

(ii) For the purpose of demonstrating initial compliance, the minimum total time of opacity observations shall be 3 hours (30 6-minute averages) for the performance test or other required set of observations (e.g., for fugitive-type emission sources subject only to an opacity emission standard).

(iii) The owner or operator of an affected source to which an opacity or visible emission standard in this part applies shall conduct opacity or visible emission observations in accordance with the provisions of this section, record the results of the evaluation of emissions, and report to the Administrator the opacity or visible emission results in accordance with the provisions of §63.10(d).

(iv) [Reserved]

(v) Opacity readings of portions of plumes that contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity emission standards.

(6) *Availability of records.* The owner or operator of an affected source shall make available, upon request by the Administrator, such records that the Administrator deems necessary to determine the conditions under which the visual observations were made and shall provide evidence indicating proof of current visible observer emission certification.

(7) *Use of a continuous opacity monitoring system.* (i) The owner or operator of an affected source required to use a continuous opacity monitoring system (COMS) shall record the monitoring data produced during a performance test required under §63.7 and shall furnish the Administrator a written report of the monitoring results in accordance with the provisions of §63.10(e)(4).

(ii) Whenever an opacity emission test method has not been specified in an applicable subpart, or an owner or operator of an affected source is required to conduct Test Method 9 observations (see appendix A of part 60 of this chapter), the owner or operator may submit, for compliance purposes, COMS data results produced during any performance test required under §63.7 in lieu of Method 9 data. If the owner or operator elects to submit COMS data for compliance with the opacity emission standard, he or she shall notify the Administrator of that decision, in writing, simultaneously with the notification under §63.7(b) of the date the performance test is scheduled to begin. Once the owner or operator of an affected source has notified the Administrator to that effect, the COMS data results will be used to determine opacity compliance during subsequent performance tests required under §63.7, unless the owner or operator notifies the Administrator in writing to the contrary not later than with the notification under §63.7(b) of the date the subsequent performance test is scheduled to begin.

(iii) For the purposes of determining compliance with the opacity emission standard during a performance test required under §63.7 using COMS data,

the COMS data shall be reduced to 6-minute averages over the duration of the mass emission performance test.

(iv) The owner or operator of an affected source using a COMS for compliance purposes is responsible for demonstrating that he/she has complied with the performance evaluation requirements of §63.8(e), that the COMS has been properly maintained, operated, and data quality-assured, as specified in §63.8(c) and §63.8(d), and that the resulting data have not been altered in any way.

(v) Except as provided in paragraph (h)(7)(ii) of this section, the results of continuous monitoring by a COMS that indicate that the opacity at the time visual observations were made was not in excess of the emission standard are probative but not conclusive evidence of the actual opacity of an emission, provided that the affected source proves that, at the time of the alleged violation, the instrument used was properly maintained, as specified in §63.8(c), and met Performance Specification 1 in appendix B of part 60 of this chapter, and that the resulting data have not been altered in any way.

(8) *Finding of compliance.* The Administrator will make a finding concerning an affected source's compliance with an opacity or visible emission standard upon obtaining all the compliance information required by the relevant standard (including the written reports of the results of the performance tests required by §63.7, the results of Test Method 9 or another required opacity or visible emission test method, the observer certification required by paragraph (h)(6) of this section, and the continuous opacity monitoring system results, whichever is/are applicable) and any information available to the Administrator needed to determine whether proper operation and maintenance practices are being used.

(9) *Adjustment to an opacity emission standard.* (i) If the Administrator finds under paragraph (h)(8) of this section that an affected source is in compliance with all relevant standards for which initial performance tests were conducted under §63.7, but during the time such performance tests were conducted fails to meet any relevant opacity emission standard, the owner or operator of such source may petition the Administrator to make appropriate adjustment to the opacity emission standard for the affected source. Until the Administrator notifies the owner or operator of the appropriate adjustment, the relevant opacity emission standard remains applicable.

(ii) The Administrator may grant such a petition upon a demonstration by the owner or operator that—

(A) The affected source and its associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance tests;

(B) The performance tests were performed under the conditions established by the Administrator; and

(C) The affected source and its associated air pollution control equipment were incapable of being adjusted or operated to meet the relevant opacity emission standard.

(iii) The Administrator will establish an adjusted opacity emission standard for the affected source meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity emission standard at all times during which the source is meeting the mass or concentration emission standard. The Administrator will promulgate the new opacity emission standard in the FEDERAL REGISTER.

(iv) After the Administrator promulgates an adjusted opacity emission standard for an affected source, the owner or operator of such source shall be subject to the new opacity emission standard, and the new opacity emission standard shall apply to such source during any subsequent performance tests.

(i) *Extension of compliance with emission standards.* (1) Until an extension of compliance has been granted by the Administrator (or a State with an approved permit program) under this paragraph, the owner or operator of an affected source subject to the requirements of this section shall comply with all applicable requirements of this part.

(2) *Extension of compliance for early reductions and other reductions*—(i) *Early*

reductions. Pursuant to section 112(i)(5) of the Act, if the owner or operator of an existing source demonstrates that the source has achieved a reduction in emissions of hazardous air pollutants in accordance with the provisions of subpart D of this part, the Administrator (or the State with an approved permit program) will grant the owner or operator an extension of compliance with specific requirements of this part, as specified in subpart D.

(ii) *Other reductions.* Pursuant to section 112(i)(6) of the Act, if the owner or operator of an existing source has installed best available control technology (BACT) (as defined in section 169(3) of the Act) or technology required to meet a lowest achievable emission rate (LAER) (as defined in section 171 of the Act) prior to the promulgation of an emission standard in this part applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to the BACT or LAER installation, the Administrator will grant the owner or operator an extension of compliance with such emission standard that will apply until the date 5 years after the date on which such installation was achieved, as determined by the Administrator.

(3) *Request for extension of compliance.* Paragraphs (i)(4) through (i)(7) of this section concern requests for an extension of compliance with a relevant standard under this part (except requests for an extension of compliance under paragraph (i)(2)(i) of this section will be handled through procedures specified in subpart D of this part).

(4)(i)(A) The owner or operator of an existing source who is unable to comply with a relevant standard established under this part pursuant to section 112(d) of the Act may request that the Administrator (or a State, when the State has an approved part 70 permit program and the source is required to obtain a part 70 permit under that program, or a State, when the State has been delegated the authority to implement and enforce the emission standard for that source) grant an extension allowing the source up to 1 additional year to comply with the standard, if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 1-year extension of compliance is insufficient to dry and cover mining waste in order to reduce emissions of any hazardous air pollutant. The owner or operator of an affected source who has requested an extension of compliance under this paragraph and who is otherwise required to obtain a title V permit shall apply for such permit or apply to have the source's title V permit revised to incorporate the conditions of the extension of compliance. The conditions of an extension of compliance granted under this paragraph will be incorporated into the affected source's title V permit according to the provisions of part 70 or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever are applicable.

(B) Any request under this paragraph for an extension of compliance with a relevant standard shall be submitted in writing to the appropriate authority not later than 12 months before the affected source's compliance date (as specified in paragraphs (b) and (c) of this section) for sources that are not including emission points in an emissions average, or not later than 18 months before the affected source's compliance date (as specified in paragraphs (b) and (c) of this section) for sources that are including emission points in an emissions average. Emission standards established under this part may specify alternative dates for the submittal of requests for an extension of compliance if alternatives are appropriate for the source categories affected by those standards, e.g., a compliance date specified by the standard is less than 12 (or 18) months after the standard's effective date.

(ii) The owner or operator of an existing source unable to comply with a relevant standard established under this part pursuant to section 112(f) of the Act may request that the Administrator grant an extension allowing the source up to 2 years after the standard's effective date to comply with the standard. The Administrator may grant such an extension if he/she finds that such additional period is necessary for the installation of controls and that steps will be taken during the period of the extension to assure that

the health of persons will be protected from imminent endangerment. Any request for an extension of compliance with a relevant standard under this paragraph shall be submitted in writing to the Administrator not later than 15 calendar days after the effective date of the relevant standard.

(5) The owner or operator of an existing source that has installed BACT or technology required to meet LAER [as specified in paragraph (i)(2)(ii) of this section] prior to the promulgation of a relevant emission standard in this part may request that the Administrator grant an extension allowing the source 5 years from the date on which such installation was achieved, as determined by the Administrator, to comply with the standard. Any request for an extension of compliance with a relevant standard under this paragraph shall be submitted in writing to the Administrator not later than 120 days after the promulgation date of the standard. The Administrator may grant such an extension if he or she finds that the installation of BACT or technology to meet LAER controls the same pollutant (or stream of pollutants) that would be controlled at that source by the relevant emission standard.

(6)(i) The request for a compliance extension under paragraph (i)(4) of this section shall include the following information:

(A) A description of the controls to be installed to comply with the standard;

(B) A compliance schedule, including the date by which each step toward compliance will be reached. At a minimum, the list of dates shall include:

(*1*) The date by which contracts for emission control systems or process changes for emission control will be awarded, or the date by which orders will be issued for the purchase of component parts to accomplish emission control or process changes;

(*2*) The date by which on-site construction, installation of emission control equipment, or a process change is to be initiated;

(*3*) The date by which on-site construction, installation of emission control equipment, or a process change is to be completed; and

(*4*) The date by which final compliance is to be achieved;

(C) A description of interim emission control steps that will be taken during the extension period, including milestones to assure proper operation and maintenance of emission control and process equipment; and

(D) Whether the owner or operator is also requesting an extension of other applicable requirements (e.g., performance testing requirements).

(ii) The request for a compliance extension under paragraph (i)(5) of this section shall include all information needed to demonstrate to the Administrator's satisfaction that the installation of BACT or technology to meet LAER controls the same pollutant (or stream of pollutants) that would be controlled at that source by the relevant emission standard.

(7) Advice on requesting an extension of compliance may be obtained from the Administrator (or the State with an approved permit program).

(8) *Approval of request for extension of compliance.* Paragraphs (i)(9) through (i)(14) of this section concern approval of an extension of compliance requested under paragraphs (i)(4) through (i)(6) of this section.

(9) Based on the information provided in any request made under paragraphs (i)(4) through (i)(6) of this section, or other information, the Administrator (or the State with an approved permit program) may grant an extension of compliance with an emission standard, as specified in paragraphs (i)(4) and (i)(5) of this section.

(10) The extension will be in writing and will—

(i) Identify each affected source covered by the extension;

(ii) Specify the termination date of the extension;

(iii) Specify the dates by which steps toward compliance are to be taken, if appropriate;

(iv) Specify other applicable requirements to which the compliance extension applies (e.g., performance tests); and

(v)(A) Under paragraph (i)(4), specify any additional conditions that the Administrator (or the State) deems necessary to assure installation of the necessary controls and protection of the

health of persons during the extension period; or

(B) Under paragraph (i)(5), specify any additional conditions that the Administrator deems necessary to assure the proper operation and maintenance of the installed controls during the extension period.

(11) The owner or operator of an existing source that has been granted an extension of compliance under paragraph (i)(10) of this section may be required to submit to the Administrator (or the State with an approved permit program) progress reports indicating whether the steps toward compliance outlined in the compliance schedule have been reached. The contents of the progress reports and the dates by which they shall be submitted will be specified in the written extension of compliance granted under paragraph (i)(10) of this section.

(12)(i) The Administrator (or the State with an approved permit program) will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 30 calendar days after receipt of sufficient information to evaluate a request submitted under paragraph (i)(4)(i) or (i)(5) of this section. The 30-day approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The Administrator (or the State) will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted.

(ii) When notifying the owner or operator that his/her application is not complete, the Administrator will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 30 calendar days after he/she is notified of the incomplete application, additional information or arguments to the Administrator to enable further action on the application.

(iii) Before denying any request for an extension of compliance, the Administrator (or the State with an approved permit program) will notify the owner or operator in writing of the Administrator's (or the State's) intention to issue the denial, together with—

(A) Notice of the information and findings on which the intended denial is based; and

(B) Notice of opportunity for the owner or operator to present in writing, within 15 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator (or the State) before further action on the request.

(iv) The Administrator's final determination to deny any request for an extension will be in writing and will set forth the specific grounds on which the denial is based. The final determination will be made within 30 calendar days after presentation of additional information or argument (if the application is complete), or within 30 calendar days after the final date specified for the presentation if no presentation is made.

(13)(i) The Administrator will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 30 calendar days after receipt of sufficient information to evaluate a request submitted under paragraph (i)(4)(ii) of this section. The 30-day approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The Administrator (or the State) will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 15 calendar days after receipt of the original application and within 15 calendar days after receipt of any supplementary information that is submitted.

(ii) When notifying the owner or operator that his/her application is not complete, the Administrator will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 15 calendar

days after he/she is notified of the incomplete application, additional information or arguments to the Administrator to enable further action on the application.

(iii) Before denying any request for an extension of compliance, the Administrator will notify the owner or operator in writing of the Administrator's intention to issue the denial, together with—

(A) Notice of the information and findings on which the intended denial is based; and

(B) Notice of opportunity for the owner or operator to present in writing, within 15 calendar days after he/she is notified of the intended denial, additional information or arguments to the Administrator before further action on the request.

(iv) A final determination to deny any request for an extension will be in writing and will set forth the specific grounds on which the denial is based. The final determination will be made within 30 calendar days after presentation of additional information or argument (if the application is complete), or within 30 calendar days after the final date specified for the presentation if no presentation is made.

(14) The Administrator (or the State with an approved permit program) may terminate an extension of compliance at an earlier date than specified if any specification under paragraphs (i)(10)(iii) or (i)(10)(iv) of this section is not met.

(15) [Reserved]

(16) The granting of an extension under this section shall not abrogate the Administrator's authority under section 114 of the Act.

(j) *Exemption from compliance with emission standards.* The President may exempt any stationary source from compliance with any relevant standard established pursuant to section 112 of the Act for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years.

§ 63.7 Performance testing requirements.

(a) *Applicability and performance test dates.* (1) Unless otherwise specified, this section applies to the owner or operator of an affected source required to do performance testing, or another form of compliance demonstration, under a relevant standard.

(2) If required to do performance testing by a relevant standard, and unless a waiver of performance testing is obtained under this section or the conditions of paragraph (c)(3)(ii)(B) of this section apply, the owner or operator of the affected source shall perform such tests as follows—

(i) Within 180 days after the effective date of a relevant standard for a new source that has an initial startup date before the effective date; or

(ii) Within 180 days after initial startup for a new source that has an initial startup date after the effective date of a relevant standard; or

(iii) Within 180 days after the compliance date specified in an applicable subpart of this part for an existing source subject to an emission standard established pursuant to section 112(d) of the Act, or within 180 days after startup of an existing source if the source begins operation after the effective date of the relevant emission standard; or

(iv) Within 180 days after the compliance date for an existing source subject to an emission standard established pursuant to section 112(f) of the Act; or

(v) Within 180 days after the termination date of the source's extension of compliance for an existing source that obtains an extension of compliance under § 63.6(i); or

(vi) Within 180 days after the compliance date for a new source, subject to an emission standard established pursuant to section 112(f) of the Act, for which construction or reconstruction is commenced after the proposal date of a relevant standard established pursuant to section 112(d) of the Act but before the proposal date of the relevant standard established pursuant to section 112(f) [see § 63.6(b)(4)]; or

(vii) [Reserved]; or

(viii) [Reserved]; or

CERTIFICATE OF SERVICE

I hereby certify that Sierra Club, Coalition for a Safe Environment, Environmental Integrity Project, Friends of Hudson and Louisiana Environmental Action Network's foregoing **Proof Opening Brief and Addendum** has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 26th day of October, 2007, upon the following:

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