

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA-HQ-OAR-2004-0087; FRL-8964-8]

RIN 2060-AM45

Operating Permit Programs; Flexible Air Permitting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: We are revising the regulations governing State and Federal operating permit programs required by title V of the Clean Air Act (CAA or the Act) to promote flexible air permitting (FAP) approaches that provide greater operational flexibility and, at the same time, ensure environmental protection and compliance with applicable laws.

The revisions to our title V regulations consist of adding definitions for alternative operating scenario (AOS) and approved replicable methodology (ARM) and codifying some clarifications to existing provisions. These revisions are intended to clarify and reaffirm opportunities for accessing operational flexibility under existing regulations. We are not finalizing any revisions to our existing minor or major New Source Review (NSR) regulations. In particular, we are withdrawing that portion of the proposal which relates to Green Groups and their potential inclusion in NSR programs required by parts C and D of title I of the Act. Instead, we are encouraging States and sources to investigate in more depth the flexibilities currently available under the major NSR regulations.

DATES: This final rule is effective on November 5, 2009.

ADDRESSES: The EPA established a docket for this action under Docket ID No. EPA-HQ-OAR-2004-0087. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301

Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: For general issues concerning this action, please contact Michael Trutna, Air Quality Policy Division (C504-01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone (919) 541-5345; fax number (919) 541-4028; or electronic mail at trutna.mike@epa.gov.

For specific issues concerning the pilot permits used to support this rulemaking, contact David Beck, Office of Policy, Economics, and Innovation, Innovative Pilots Division (C304-05), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone (919) 541-5421; fax number (919) 541-2664; or electronic mail at beck.david@epa.gov.

For issues relating to monitoring, recordkeeping, and reporting for FAPs, contact Barrett Parker, Sector Policies and Programs Division, Measurement Policy Group (D243-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone 919-541-5635; fax number (919) 541-1039; or electronic mail at parker.barrett@epa.gov.

For other part 70 issues, contact Juan Santiago, Operating Permits Group, Air Quality Policy Division (C504-05), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone (919) 541-1084; fax number (919) 541-5509; or electronic mail at santiago.juan@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this final action are facilities currently required to obtain title V permits under State, local, Tribal, or Federal operating permits programs, and State, local, and Tribal governments that are authorized by EPA to issue such operating permits. Potentially affected sources are found in a wide variety of industry groups. In particular, we believe based on the collective experience in implementing the pilot permit activity that these groups will include, but are not limited to, the following:

Industry group	SIC ^a	NAICS ^b
Aerospace Manufacturing	372	336411, 336412, 332912, 336411, 335413.
Automobile Manufacturing ...	371	336111, 336112, 336712, 336211, 336992, 336322, 336312, 33633, 33634, 33635, 336399, 336212, 336213.
Industrial Organic Chemicals	286	325191, 32511, 325132, 325192, 225188, 325193, 32512, 325199.
Chemical Processes	281	325181, 325182, 325188, 32512, 325131, 325998, 331311.
Converted Paper and Paper-board Products.	267	322221, 322222, 322223, 322224, 322226, 322231, 326111, 326112, 322299, 322291, 322232, 322233, 322211.
Magnetic Tape Manufacturing.	369	334613.
Petroleum Refining	291	32411.
Other Coating Operations ...	226, 229, 251, 252, 253, 254, 267, 358, 363	313311, 313312, 314992, 33132, 337122, 337121, 337124, 337215, 337129, 37125, 337211, 337214, 337127, 322221, 322222, 322226, 335221, 335222, 335224, 335228, 333312, 333415, 333319.
Paper Mills	262	322121, 322122.
Pharmaceutical Manufacturing.	283	325411, 325412, 325413, 325414.
Printing and Publishing	275	323114, 323110, 323111, 323113, 323112, 323115, 323119.
Pulp and Paper Mills	262	32211, 322121, 322122, 32213.
Semiconductors	367	334413.
Specialty Batch Chemical Processes.	282, 283, 284, 285, 286, 287, 289, 386	3251, 3252, 3253, 3254, 3255, 3256, 3259, except 325131 and 325181.

^a Standard Industrial Classification.

^b North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of this final rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this final rule will be posted in the regulations and standards section of our NSR home page located at <http://www.epa.gov/nsr>.

II. Purpose

The purpose of this rulemaking is to clarify and reaffirm opportunities within the existing regulatory framework to encourage the wider use of the FAP approaches. The Agency has learned a great deal over the past decade through the implementation and evaluation of pilot permits. In light of that experience and the comments we received on the proposed FAP rulemaking (72 FR 52206, September 12,

2007),¹ we are finalizing certain elements of that proposal.²

III. Background

A. What Is a Flexible Air Permit?

A FAP is a title V permit that by its design facilitates flexible operations at a source, allowing it to be market-responsive while ensuring equal or greater environmental protection than that achieved by conventional permits. In particular, a FAP contains one or more approaches that allow the source, under protection of the permit shield, to make certain types or categories of physical and/or operational changes without further review or approval of

¹ In addition to written comments submitted on the proposal, we have received input from stakeholders in outreach meetings held to discuss the proposal. These meetings, and the topics discussed, are documented in the docket for this rulemaking, Docket No. EPA-HQ-OAR-2004-0087. For purposes of this preamble, we refer to input from all these sources as "comments."

² On January 13, 2009, then Administrator Stephen L. Johnson signed a final Flexible Air Permitting Rule and the signed rule was made publicly available on EPA's Web site. The signed rule was submitted to the Office of Federal Register for publication. Rahm Emanuel, Assistant to the President and Chief of Staff, issues a memorandum on January 20, 2009, directing Agencies to withdraw from the Office of Federal Register "all proposed and final regulations that have not been published in the **Federal Register** so that they can be reviewed and approved by a department or agency head." Administrator Lisa P. Jackson reviewed and approved the final Flexible Permitting Rule, and this rule as published is identical in substance to the rule previously signed January 13, 2009.

the individual changes by the permitting authority as they subsequently occur. Flexible air permit approaches, as discussed in this notice, include advance approvals of minor NSR, AOSs, and ARMs. In pursuing a FAP, the source must propose one or more of these approaches to the permitting authority who then would accept those which are judged to be appropriate in a particular situation. In order to be effective, the combination of FAP approaches contained in the title V permit must address all applicable requirements and requirements of part 70 relevant to the anticipated changes being authorized.³ Flexible air permits cannot circumvent, modify, or contravene any applicable requirement and, instead, by their design must assure compliance with each one as it would become applicable to any of the authorized changes.

For more than a decade, we participated in a pilot permit activity with certain title V sources and permitting authorities through which were tested and evaluated various

³ "Applicable requirements" is a term that is used in title V. The EPA has defined the term to include, among other things, State implementation plan (SIP) rules, the terms and conditions of preconstruction permits issued under a SIP-approved NSR program, and requirements pursuant to the new source performance standards (NSPS), national emission standards for hazardous air pollutants (NESHAP), maximum achievable control technology (MACT), and Acid Rain Programs. See 40 CFR 70.2.

permitting approaches that afford operational flexibility. The lessons learned through the pilot permit experience served, in part, as the basis for our adoption of the plantwide applicability limitation (PAL) provisions of the 2002 NSR Improvement rule. They also serve as a basis for this rulemaking, in which we clarify and reaffirm existing regulatory provisions that currently afford reasonable opportunities for operational flexibility, while ensuring the required levels of environmental protection. We intend that this rulemaking provide a more positive foundation upon which FAPs can be considered by sources and permitting authorities and, as appropriate, be designed and implemented.

B. What Is the Title V Operating Permit Program?

When Congress amended the Act in 1990, it established an operating permit program in title V of the Act for major (and certain other) stationary sources of air pollution. Title V mandates that each State develop and implement an operating permit program, and requires EPA to establish minimum standards for these programs. The purpose of the program is to improve the enforceability, and thus the effectiveness, of the Act's requirements by issuing to every covered source a permit that lists all the requirements applicable to the source under the Act and contains other terms as necessary to assure compliance with those requirements. States may delegate program responsibility to local agencies, and eligible Tribes may develop and implement a program at their option. In 1992, EPA promulgated regulations setting forth minimum requirements for State, local, and Tribal operating permit programs in part 70 of title 40 of the Code of Federal Regulations (40 CFR part 70). Currently all States and many local agencies administer operating permit programs approved by EPA pursuant to the part 70 requirements. There are 112 such State, territorial, and local operating permit programs. These programs are typically referred to interchangeably as "title V programs" or "part 70 programs."

In addition, title V requires EPA to implement an operating permit program in areas lacking an approved or adequately administered State, local, or Tribal program. Accordingly, in 1996 EPA promulgated the Federal operating permit program at 40 CFR part 71. In 1999, EPA amended part 71 specifically to address Indian country. Currently, EPA administers the part 71 program in Indian country, for sources located on

the outer continental shelf, and for deep water ports.⁴ There are currently no Tribes with approved part 70 programs, although one Tribe has received delegation to administer the part 71 Federal program.

The concept of operational flexibility in title V permits is not a new one. Since they were initially promulgated in 1992, the part 70 State operating permit program regulations have included operational flexibility provisions. One of these is the AOS provision found at 40 CFR 70.6(a)(9), which is one subject of this rulemaking.^{5,6} Section 70.6(a)(9) generally provides that any permit issued under part 70 must include terms and conditions for reasonably anticipated operating scenarios identified in its application by the source and as approved by the permitting authority. Over the years, we have proposed rulemaking or guidance to address operational flexibility further, but none has been finalized.⁷

Shortly after we promulgated part 70, we initiated and/or supported pilot permit activities with interested States.⁸

⁴ The EPA may also issue a part 71 permit where a State permitting authority fails to respond to an objection by the Administrator to a part 70 permit. See CAA section 505(c), 40 CFR 71.4(e).

⁵ The Federal operating permit program at part 71 addresses reasonably anticipated operating scenarios in the same fashion as part 70. See 40 CFR 71.6(a)(9). This rulemaking affects both parts 70 and 71, and the revisions to each part are virtually identical. For ease of reference, this preamble discussion refers to the part 70 provisions, but the discussion applies equally to the part 71 program revisions. Section numbers given for the part 70 rules correspond directly to the analogous sections in part 71. The term "title V permit" refers to permits issued under either part 70 or part 71.

⁶ The EPA included other operational flexibility provisions in the final part 70 regulations, including 40 CFR 70.4(b)(12), (b)(14), and (b)(15), which implement section 502(b)(10) of the Act. This rule does not address those provisions.

⁷ In the 1990's, we proposed certain clarifications and modifications to the part 70 regulations. See generally 60 FR 45529 (August 31, 1995) and 59 FR 44460 (August 29, 1994). In those proposals, among other things, we discussed the concept of "advance NSR" in relation to AOSs, and proposed a definition for "alternative operating scenarios." In August 2000, based in large part on the experience gained through the pilot permit activity discussed below, we issued a draft guidance document called White Paper Number 3 (64 FR 49803, Aug. 15, 2000), on which we solicited comment. That draft guidance addressed various flexible permitting approaches, including the use of the AOS provisions, Clean Buildings, and PALs. In fashioning the proposal on which this final rule is based, we considered a summary of those comments received on the prior proposals that addressed advance approval and AOSs (which is available in the docket) and the relevant individual comments received on the draft guidance (which are also in the docket).

⁸ Sources at the following locations participated in the pilot permit activity: (1) 3M (St. Paul, MN); (2) Intel (Aloha, OR); (3) Lasco Bathware (Yelm, WA); (4) Imation (Weatherford, OK); (5) Cytec (Connecticut); (6) DaimlerChrysler (Newark, DE); (7) Merck (Elkton, VA); (8) Merck (Barceloneta, PR); (9)

Companies participating in this activity sought to reduce the cost, time, and delays associated with a permit revision for each operational change at a facility. We and the States sought to increase the sources' operational flexibility, while assuring compliance with applicable requirements, ensuring environmental protection, and facilitating pollution prevention (P2). These pilots typically allowed for both changes to operations of existing emissions units and the addition of new emissions units, provided that the changes were sufficiently well described in the permit application so that the permitting authority could confirm that all applicable requirements were identified and that the permit contained terms and conditions assuring compliance with all applicable requirements.

To evaluate the pilot permit activity, we conducted a thorough review of the six pilot permits for which at the time there was significant implementation experience.⁹ We reviewed on-site records to track utilization of the flexible permit provisions, assessed how well the permits worked, evaluated total emissions reductions achieved, and analyzed the economic benefits associated with the permits. Overall, we found that the flexibility approaches which States implemented under their current authorities had worked well for both the sources and the permitting authorities, with significant benefits accruing as follows:

- *Environmental*—The sources generally achieved 30 to 80 percent reductions in actual plantwide emissions or emissions per unit of production.
- *Informational*—Permitting authorities and the public received better information about the scope of planned changes at the sources and the maximum, cumulative environmental effects of those changes.
- *Economic*—Increased permitting certainty and reduced transaction costs improved the participating companies' ability to compete effectively in the market and enabled them to retain, and in some cases, create jobs.
- *Administrative*—Even with the higher front-end design costs associated with the pilot permits, permitting authorities reported a net reduction in administrative costs over the life of the

Saturn (Spring Hill, TN); (10) BMW (Spartanburg, SC); (11) Eli Lilly (West Lafayette, IN); (12) 3M (Nevada, MO); and (13) Imation (Camarillo, CA).

⁹ The six permits that we analyzed were: (1) Intel (Aloha, OR); (2) 3M (St. Paul, MN); (3) Lasco Bathware (Yelm, WA); (4) DaimlerChrysler (Newark, DE); (5) Saturn (Spring Hill, TN); and (6) Imation (Weatherford, OK).

permits as a result of a reduction in subsequent permit revisions.

For a more extensive discussion of the findings of the pilot permit evaluation, see the evaluation report.¹⁰

C. What Is the New Source Review (NSR) Program?

The NSR program is a preconstruction permitting program that applies when a source is constructed or modified. The NSR program is composed of three different programs:

- Prevention of Significant Deterioration (PSD);
- Nonattainment major NSR (NA NSR); and
- Minor NSR.

1. Major NSR

We often refer to the PSD and NA NSR programs together as the major NSR program because these programs regulate only major sources.¹¹ These programs are mandated by parts C and D of title I of the Act.

Part C contains the PSD provisions. The PSD program applies when a major source that is located in an area that is designated as attainment or unclassifiable for any criteria pollutant is constructed or undergoes a major modification.^{12 13} Part D prescribes the NA NSR program, which applies when a major source that is located in an area that is designated as nonattainment for one or more criteria pollutants is newly constructed or undergoes a major modification for any of those pollutants. The implementing regulations for the PSD program are found at 40 CFR 52.21, 40 CFR 51.166, and 40 CFR 51.165(b). For NA NSR, the regulations are found at 40 CFR 52.24, 40 CFR 51.165, and 40 CFR part 51, appendix S.

As noted above, parts C and D set forth the statutory requirements for the PSD and NA NSR programs, and the implementing regulations include requirements for State major NSR programs. As a result, major NSR programs generally are similar across the States.

The PSD requirements include but are not limited to:

- Installation of Best Available Control Technology (BACT);
- Air quality monitoring and modeling analyses to ensure that a project's emissions will not cause or contribute to a violation of any national ambient air quality standards (NAAQS) or maximum allowable pollutant increase (PSD increment);
- Notification of Federal Land Manager of nearby Class I areas; and
- Thirty-day public comment period and opportunity for a public hearing on the permit.

Nonattainment NSR requirements include but are not limited to:

- Installation of Lowest Achievable Emission Rate (LAER) control technology;
- Offsetting new emissions with creditable emissions reductions;
- Certification that all major sources owned and operated in the State by the same owner are in compliance with all applicable requirements under the Act;
- An alternative siting analysis demonstrating that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification; and
- Thirty-day public comment on the permit.

Based on our pilot permit evaluation and our 1996 proposed modifications to the major NSR program, in December 2002 we finalized the NSR Improvement rule. In that rule, we promulgated regulations for PALs in the PSD and NA NSR programs. As explained in the preamble to the December 2002 final rule, a PAL is an alternative approach for determining NSR applicability on a plantwide basis. See 67 FR 80206. Sources with PALs can make changes without triggering the major NSR preconstruction permitting requirements, provided such changes remain below the limit established in their PAL and do not otherwise violate the requirements of the PAL. A PAL is an important technique which is often used in tandem with other FAP approaches such as advance approvals for minor NSR.

2. Minor NSR

Under section 110(a)(2)(C) of the Act, States are required to have "minor" NSR programs, which apply to new and modified sources that do not meet the emissions thresholds for the NSR programs that apply to major sources, as well as permit programs to meet parts C and D of the Act. In addition, section 110(j) requires all applicants for permits issued under title I of the Act to show that they will comply with standards of performance and all other requirements

of the Act. The minor NSR program is part of each State's "State implementation plan" (SIP) and is designed to ensure that the construction or modification of any stationary source does not interfere with the attainment of the NAAQS. Aside from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs. The implementing regulations, which are found at 40 CFR 51.160 through 51.164, also are stated in very general terms. As a result, SIP-approved minor NSR programs can vary quite widely from State to State.

IV. Overview of This Final Action

This final action is primarily a reaffirmation of currently available flexibility options and the process for accessing them. This action adds some new definitions and clarifications to existing parts 70 and 71 provisions in order to promote greater certainty and reasonable consideration of these options. This notice discusses each of the FAP approaches (*e.g.*, advance approvals of minor NSR, AOSs, and ARMs) and the common process for their consideration. In this process, the source first proposes use of one or more of the FAP approaches to the permitting authority who then evaluates the proposal on a case-by-case basis.

Commenters have generally found these options to be available to the extent needed and appropriate under existing authorities. Commenters have also found the common process to be sufficient and effective in the reasonable consideration of the particular options proposed for a FAP. These commenters have convinced the Agency that more prescriptive approaches proposed to assure greater consistency may well be counterproductive to our objective for greater consideration and appropriate use of FAP approaches. While deciding not to prescribe specific approaches to the design and implementation of FAPs, EPA does intend to monitor State activities in these areas, to evaluate the effectiveness of various FAP approaches periodically, and to assess, on the basis of new experiences and other information, whether any additional rulemaking would be appropriate in the future.

A. What Specific Changes to Parts 70 and 71 Is EPA Finalizing?

We are finalizing a proposed revision to the title V permit application requirements at 40 CFR 70.5(c)(3)(iii) to facilitate the use of emissions caps, including those for advance approvals of minor NSR and for PALs, although

¹⁰ "Evaluation of the Implementation Experience with Innovative Air Permits." A copy of this report is located in the docket for this rulemaking, or can be accessed at http://www.epa.gov/ttn/oarpg/t5/memoranda/iap_eier.pdf.

¹¹ The Act uses the terms "major emitting facility" to refer to sources subject to the PSD program, and "major stationary source" to refer to sources subject to NA NSR. See CAA sections 165, 169, 172(c)(5), and 302(j). For ease of reference, we use the term "major source" to refer to both terms.

¹² The term "criteria pollutant" means a pollutant for which we have set a NAAQS.

¹³ In addition, the PSD program applies to many noncriteria regulated pollutants.

the wording has been changed slightly in the final rule. The final revisions clarify that for emissions units subject to an annual emissions cap, the application may report the units' emissions as part of the aggregate emissions associated with the cap, except where more specific information is needed, including where necessary to determine or assure compliance with an applicable requirement.

With respect to AOSs, after considering the comments we received on the proposed rules, we are finalizing only those aspects of our proposal that would preserve the current levels of flexibility and add no new administrative burden. In particular, we are revising the rules to:

- Add a definition of AOS, but eliminating the reference to "physical and operational changes" from the proposed definition.
- Clarify that the permitting authority shall require the source to supplement its application with additional information when necessary to define permit terms and conditions to implement a proposed AOS as requested by the source.
- Clarify that the compliance plan requirements for applications must address proposed AOSs when an application includes them.
- Clarify that applications must contain documentation that the source has obtained all authorizations required under the applicable requirements relevant to a proposed AOS or a certification the source has submitted all relevant materials for obtaining such authorizations.
- Clarify that permits must contain all authorizations as required under the applicable requirements relevant to an AOS.
- Use consistent terminology wherever the rules refer to AOSs.

We are not finalizing other proposed requirements relating to the specific content of AOSs in logs and permits and to the need to report AOS implementation every 6 months. We have been persuaded by the commenters on the proposal that these potential new requirements would not be necessary and may, in fact, be counterproductive.

In the final rules with respect to ARMs, we are adding the proposed definition of ARM and supplementing it with two clarifications added in 40 CFR 70.6(a)(1): (1) As is currently the case for AOSs, the source must identify in its application a potential ARM and the permitting authority must then choose to approve it before the ARM can be effective; and (2) an ARM cannot be used to circumvent any other applicable requirement. Although ARMs can

reduce the number of potential permit revisions that a source must otherwise request, an ARM must be consistent with and implement an applicable requirement or requirement of part 70. We are not finalizing the proposed requirement for sources to identify in the 6-month monitoring report any ARMs implemented during the reporting period. Instead, we are clarifying that implementation records for all ARMs use must be kept on-site by the source.

Because the final rules represent clarifications to the existing part 70 regulations, we believe that many States will be able to implement the final rules without revising their regulations. This belief is further based on the pilot experience and on the comments received from States who affirmed that their current authority was sufficient to implement both AOSs and ARMs (*i.e.*, no State rulemaking was thought to be needed to incorporate the new definitions and clarified requirements).

However, since the AOS provisions are impacted by the rule and are one of the part 70 program minima, and State part 70 programs differ, some States may revise their current part 70 program to add sufficient authority to implement the final rule or opt to make current authority on flexible permits more explicit.

With respect to AOSs, for those States that believe they lack authority under their current part 70 programs to implement the final rule, or that chose to make current authority more explicit, such States should submit proposed revisions to their title V operating permits program to their EPA Regional Offices pursuant to 40 CFR 70.4(i). For other States if, based on their subsequent efforts to implement the final rule, we determine in writing that a particular part 70 program does not provide sufficient authority to implement the final rule or is inconsistent with the final rule, then the relevant State must revise the program pursuant to 40 CFR 70.4(i). Accordingly, the State will have, from the date of our written determination, 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 required program revisions, to submit a proposed operating permit program revision consistent with the final rule to us for review and approval.

With respect to ARMs, States may choose to send us specific revisions to their current programs at any time. There is no mandate for part 70 programs to contain provisions specific

to ARMs. Thus, States are not obligated to revise their part 70 programs in this regard as a result of this final rule. However, optional rule changes may be useful to some States in implementing the final rule more effectively and to achieve the anticipated administrative benefits attributed to ARM implementation.

Regardless of whether States revise their rules to incorporate the part 70 rule changes that are being finalized in this action, the Agency wishes to reiterate that inclusion of AOSs or ARMs in a title V permit remains an essentially voluntary activity. A source owner in deciding whether to propose one must first determine that an AOS and/or ARM would be useful in increasing certainty and flexibility and then the permitting authority must determine whether or not to grant the source's request for an AOS and/or ARM. The permitting authority, on a case-by-case basis, may reject source proposals as inadequate to assure compliance with the underlying applicable requirements or otherwise inappropriate, depending on the specific facts of the situation.

B. What Changes to Parts 51 and 52 Is EPA Finalizing?

We are not finalizing any changes to the NSR program in parts 51 and 52. We did not propose any changes to the regulations for minor NSR based on our experience with several pilot States. Comments received on the proposal affirmed that the relevant pilot experience was broadly applicable and that States, in general, have sufficient existing authority to advance approve minor NSR, where they determine it appropriate to do so, and to incorporate the permit terms accomplishing this approval into title V permits as applicable requirements. As a result, we continue to believe revisions to our part 51 minor NSR regulations are not necessary. Where States are considering revisions to their current minor NSR programs to provide more explicit authority for authorizing advance approvals, EPA is willing to discuss possible revisions and to review any rule changes proposed by the State, consistent with 40 CFR 51.160 through 51.164.

We have also decided to terminate our rulemaking proposal for Green Groups. As discussed more fully later in this preamble, we instead intend to support States and sources who wish to explore the flexibilities available under the existing major NSR regulations. Upon request to do so, EPA is willing to assist States in an evaluation of their current SIPs and to discuss possible

replacement provisions with them consistent with our 40 CFR 51.165 and 51.166 regulations governing NA NSR and PSD SIPs.

C. What Approach Is Being Used To Discuss the Final Actions?

The final actions relative to parts 70 and 71 and to parts 51 and 52 are subsequently discussed in four sections entitled: V. Advance Approval of Minor NSR; VI. Alternative Operating Scenarios (AOSs); VII. Approved Replicable Methodologies (ARMs); and VIII. Green Groups. Each of these sections first summarizes what we proposed and the significant reactions of commenters to our proposal, and then describes what EPA is finalizing as a result. A more comprehensive summary and analysis of the written comments received can be found in our Response to Comments document, which is available in the public docket for this rulemaking as described in the **ADDRESSES** section of this preamble.

D. What Are EPA's Recommendations for Public Participation in Flexible Permitting?

Based on our experience with pilot permits, we believe that FAPs provide at least as much environmental protection as conventional permits and often promote superior environmental performance. Nevertheless, we also recognize that FAPs will contain features, such as AOSs, ARMs, or advance approval of minor NSR, that may not be familiar to the reviewing public at least until these approaches are more widely used. For this reason, we encourage permitting authorities to consider using their discretion to enhance the relevant public participation process (as currently required in both title V and NSR regulations), as appropriate, for a particular FAP. Some recommendations which we found to work well in the context of the pilot permits are described below.

During the permitting process, permitting authorities could consider making the permit application available to the public soon after receipt. We found in pilot permits that early outreach to the community, rather than waiting until the draft permit was prepared, was an effective public participation strategy. Some permitting authorities have also found it useful to issue a local press release (in addition to a conventional notice in the newspaper) when a permit containing innovative approaches is released for comment. Press releases have potential to reach more people and raise local awareness of FAP approaches.

The minimum public comment period required for a title V permit renewal or significant permit modification is 30 days. Where a significant amount of a permit's content consists of terms to incorporate operational flexibility, we suggest that permitting authorities consider expanding the comment period to 45 days or more. Note, however, that for some pilot permits, an up-front outreach to the public was sufficient to resolve community questions and comments early in the process, so that by the time of the public hearing and comment period no adverse comments were received.

Finally, in order to ensure adequate technical support and accessibility for the public in their efforts to understand and comment upon FAPs, we suggest that permitting authorities provide a principal point of contact for responding to technical questions and ensure the availability of draft permits, applications, and technical support documents on an Internet Web site. We believe that any additional costs here will be offset by the subsequent administrative cost savings to the permitting authority resulting from the reduced need to process permit revisions for sources with FAPs.

E. What Types of Support Does EPA Intend To Offer?

The Agency anticipates that the effort by States and sources to investigate FAPs will involve a potentially wide spectrum of sources (*see* section I.A). As a result, EPA intends to provide general support to States, sources, and the public on this and other FAP topics, potentially in the form of a Web site, workshops, and an EPA network of contacts. In addition, we will consider other types of support to individual States where requested to do so.

V. Advance Approval of Minor NSR

A. Background

Pursuant to section 110(a)(2)(C) of the Act and its implementing part 51 regulations (*see* 40 CFR 51.160 through 51.164), States are required to adopt minor NSR programs that complement their major NSR programs required under parts C and D of title I the Act. Given the general nature of these requirements, the content of minor NSR programs varies widely among the States. Regardless of their specific provisions, through the pilot permit experience, we found that State minor NSR requirements, where applicable, are among the most important in designing a FAP for sources making frequent and/or rapid physical and operational changes. Absent an up-front

authorization for these changes under minor NSR (usually categories or types of changes), an individual review by the permitting authority typically is required at the time each change would be approved.

We refer to up-front, categorical authorizations as "advance approvals" under minor NSR.¹⁴

Upon examining the provisions of their minor NSR programs, most of the States in which pilot permits were conducted ("pilot States") found that they could issue advance approvals under existing minor NSR authority for a wide spectrum of changes, provided that certain boundary conditions were established in the minor NSR permit. The conditions established in the minor NSR permit to accomplish such approvals varied depending upon the requirements of the different State minor NSR programs and the specific facts of the particular situation.

The pilot permits employed several types of techniques to authorize, in a practically enforceable manner, a category of changes under minor NSR. These techniques, while not necessarily transferable in all aspects to other permitting situations, do represent field-tested reference points from which similar advance approval approaches can be considered by other permitting authorities. Ultimately, as with all FAP approaches, in order for a minor NSR project proposing use of an advance approval to be viable, the source must first propose it to the permitting authority, and the permitting authority must then agree to pursue it in the context of its own SIP-approved minor NSR rules and the case-specific facts.

Permitting authorities in pilot States employed the following approaches and safeguards when authorizing the advance approval of minor NSR:

- *Scope of minor NSR project*—Permitting authorities were able to rely

¹⁴ "Advance approval" generally refers to an authorization to make certain categories or types of changes which is issued to a source by its permitting authority pursuant to a specific applicable requirement that requires approval prior to making subject changes (*e.g.*, minor and major NSR, section 112(g), *etc.*). Changes within the types or categories of changes which are advance approved can subsequently be made over the duration of the permit without further review or approval by the permitting authority with respect to the particular applicable requirement for which the changes are advance approved. In order to explore use of a specific advance approval, a source would first propose its use which then could be accepted or rejected by the permitting authority, as appropriate. Advance approvals authorized under one particular applicable requirement (*e.g.*, advance approvals under minor NSR) may also address additional requirements which may or may not themselves require prior approval before the specified changes can be made (*e.g.*, MACT, NSPS, and State air toxics requirements).

upon available flexibility to interpret the relevant SIP-approved definitions (e.g., emissions unit, facility, source) in order to fashion a reasonable scope and duration of the minor NSR pilot project (i.e., ones that provide appropriate operational flexibility for the particular situation while ensuring environmental protection). In general, these advance approvals (i.e., the minor NSR projects) consist of several categories of potential changes anticipated to occur over an appropriately defined period of time (e.g., a range of possible types of changes, such as “any of various physical changes to the rollers, drive mechanism, and other components of the coating section within a coating line”). In their permit applications requesting advance approval of minor NSR, pilot sources described these changes in sufficient detail to allow the permitting authority to conduct the relevant ambient air impact and control technology reviews, to determine relevant applicable requirements, and to assess the compatibility of the changes with the approved emissions reduction and monitoring approaches. The SIP-approved requirements concerning the timeliness of the approved construction project vary among the pilots, depending upon the content of the approved SIP and the ability to characterize the project (as deemed appropriate by the permitting authority) as a series of related ongoing changes.

- *Non-applicability of major NSR*—In order to assure the types of changes authorized under the advance approvals for minor NSR could subsequently occur without further review and approval by the permitting authority, the pilot permits contain terms to prevent major NSR from also applying to the same changes. These terms typically involve either a PAL based on actual emissions or a potential to emit (PTE) cap to prevent an existing source from becoming major, depending on whether the source is already major or not for the pollutant(s) involved in the advance approval of minor NSR.

- *Control technology requirements*—Permitting authorities imposed terms in pilot permits as necessary to assure compliance with all applicable control requirements. In all pilot permits, these terms require compliance with Federal standards (e.g., MACT, NSPS, NESHAPs) that continue to apply regardless of the approach taken to advance approve minor NSR. In addition, the advance approved changes must meet any applicable SIP requirements, including those in some States to apply best available technology (BAT) to certain changes subject to their minor NSR programs. In those pilot

permits subject to a State BAT requirement, permitting authorities also determined whether the advance approval allowed discrete changes with later construction times and whether any initial BAT determination for them would require re-evaluation.

- *Protection of ambient standards*—Pilot permits contain terms judged appropriate by the permitting authority to assure that the minor NSR pilot project would not interfere with the attainment and maintenance of the NAAQS. Typically, since the advance approvals requested by the pilot sources involved VOC emissions, pilot projects primarily focused on protecting the ozone NAAQS. The plantwide VOC emissions caps used in the pilots were determined to be adequate for purposes of safeguarding the ozone NAAQS, but for other pollutants (e.g., air toxics) States sometimes required a replicable modeling procedure to screen the impacts of individual emissions increases relative to acceptable ambient levels. In the case of one pilot, an ambient dispersion model, complete with implementation assumptions, was included in the permit to evaluate any new air toxic pollutants of concern, or increases in existing toxic pollutants. Failure of a particular change to meet the screening levels triggered a case-by-case review of that change by the permitting authority. Additional safeguards were imposed to a varying extent, as applicable and as deemed appropriate, by the permitting authority to address averaging time concerns potentially applicable to NAAQSs other than ozone.

- *Public participation*—Each pilot permit project was subjected to an opportunity for public comment. Often this process was enhanced to facilitate better understanding and support for the project. (See section IV.D.)

To augment initial application information, pilot States, as part of authorizing advance approvals under their existing minor NSR programs, frequently decided to require sources to send a notice to the permitting authority contemporaneous with the operation of any entirely new emissions unit relying upon the advance approval. Pilot States were also able to add other permit terms, where necessary, to make enforceable any advance approvals of minor NSR that were authorized.

Often the permitting authorities were able in pilot permits to streamline various permit terms so as to accomplish multiple objectives and to simplify the overall permit. For example, the pilot source frequently requested its permitting authority to establish in the minor NSR permit a

plantwide VOC emissions cap at a particular level for two purposes. First, the level was requested to prevent the applicability of major NSR. In cases where the existing plantwide VOC emissions were below the major source threshold, the permitting authority approved an emissions cap to constrain the PTE of the source in a practically enforceable fashion so that it would not be a major source of VOC emissions for purposes of PSD. In other cases, where the source was an existing major stationary source for its VOC emissions, the source requested a plantwide cap level to function as a PAL. In response, the permitting authority approved the requested PAL consistent with the PAL provisions of the major NSR regulations (see, e.g., 40 CFR 52.21(aa)). Accordingly, compliance with the PAL ensures that major NSR would not apply to any future changes made at the source during the time period over which the PAL was effective. Second, the VOC emissions level established in the PTE cap or in the PAL, as applicable, was interpreted by the permitting authority as a sufficient safeguard to prevent future changes approved under minor NSR, in combination with existing source emissions, from interfering with the ozone NAAQS. As such, the VOC emissions cap would both prevent major NSR from applying to changes at the source and ensure that the advance approval of changes under minor NSR does not jeopardize the NAAQS. Given the strategic importance of such caps, pilot sources typically maintained a significant margin of safety between their actual plantwide emissions and the level required by their emissions cap(s).

Under the current part 70 regulations, any permit terms accomplishing an advance approval pursuant to a SIP-approved minor NSR program must be incorporated into the title V permit as applicable requirements, and combined with other permit terms established in the part 70 permit as necessary to assure compliance with all requirements that will apply when the approved changes are subsequently implemented. Thus, the part 70 permit would include the requirements directly addressed in the minor NSR permit, as well as other requirements that the minor NSR permit did not address, if any. Changes advance approved under minor NSR can then be implemented without any further review or approval by the permitting authority, provided that the terms of the authorizing minor NSR permit are effective upon its issuance and are incorporated into the title V

permit as applicable requirements consistent with 40 CFR 70.2.

In our evaluation of pilot permits,¹⁵ we found that the use of advance approvals under minor NSR improved operational efficiency at the plants because companies knew in advance what changes were authorized, making resource allocation more efficient and accommodating the typically incremental, iterative nature of industrial process improvements. We also found that P2 projects approved in advance became more attractive to the companies because such projects could be undertaken without the delay and uncertainty of future case-by-case approvals. In addition, P2-related projects reduced emissions and enabled sources to comply more easily with emissions limits such as the plantwide emissions caps that were often features of the pilot permits.

As mentioned above, pilot permit experience indicates that obtaining advance approval under minor NSR is often a critical element in the design of a FAP. This experience also suggests that many State minor NSR programs may already provide, in situations judged to be appropriate by the permitting authority, the legal authority necessary to issue minor NSR permits that accommodate various types of operational flexibility, which can be readily incorporated into title V permits. Although we did not propose any revisions to the minor NSR regulations at 40 CFR 51.160 through 51.164, we used the proposal preamble to encourage States to implement advance approvals in response to requests by sources under their existing minor NSR programs, as appropriate, and to seek additional authority to consider source proposals where they do not currently have such discretion. Based on pilot experience, we also expressed our belief that permitting authorities can often advance approve changes with respect to other applicable requirements that require a specific authorization without regulatory changes. *See* 72 FR 52215.

We proposed one revision to part 70 to facilitate the use of advance approvals under minor NSR, which, as mentioned, often rely upon one or more emissions caps to accomplish their authorizations.¹⁶ This revision to 40 CFR 70.5(c)(3)(iii) would clarify that for

emissions units subject to an annual emissions cap, the title V permit application may report the units' emissions (in tons per year) as part of the aggregate emissions associated with the cap, except where more specific information is needed to determine and/or assure compliance with an applicable requirement.

As explained in the proposal preamble (72 FR 52219), the introductory text in 40 CFR 70.5(c) states generally that the application must include information for each emissions unit. Existing 40 CFR 70.5(c)(3)(iii) further requires that the application provide the emissions rate in tons per year and in such terms as are necessary to establish compliance consistent with the applicable reference test method. We proposed to clarify this regulatory requirement as it applies to sources subject to title V permitting requirements that employ an annual emissions cap (*e.g.*, caps which are PALs, limit PTE, and/or enable advance approval for minor NSR). In particular, we proposed that for the operation of any emissions unit authorized under an annual emissions cap, a source can meet 40 CFR 70.5(c)(3)(iii) by reporting the aggregate emissions associated with the cap.

We noted in the proposal preamble that under the proposed approach, an emissions cap could be thought of as a constraint on annual emissions from each emissions unit under the cap as well as on the aggregated emissions from the group of units. That is, in the extreme, a unit could emit up to the full amount of the cap if all other units under the cap had zero emissions. Thus, for a group of emissions units under an annual emissions cap, the 40 CFR 70.5(c)(3)(iii) requirement for unit-by-unit emissions figures could be met by reporting in the permit application that the emissions cap represents the upper limit on emissions both from each unit in the group and from the entire group. The proposed revision to 40 CFR 70.5(c)(3)(iii) would simply clarify that in this particular situation, more specificity is not needed in the title V permit application (unless additional specificity is necessary to determine applicability or to assure compliance with one or more potentially applicable requirements). Reporting emissions data in this manner would be permissible except where the permitting authority determined that more specific emissions information was needed (*e.g.*, where an applicable requirement for a specific emissions unit depends on the emissions type or level, or where annual emissions figures are needed to assess compliance for the unit).

We did not propose any other revisions to part 70 related to advance approvals under minor NSR. Part 70 already requires incorporation into a title V permit of the terms of any State minor NSR permit, including those issued to advance approved changes. These permit terms are themselves applicable requirements as defined in 40 CFR 70.2. Sometimes, however, the permitting authority may need to include other terms in the title V permit, in addition to the terms of a minor NSR permit authorizing advance approved changes, so that the changes can be made without further review or approval. This would be the case if there were other applicable requirements also implicated by the advance approved changes that were not addressed in the minor NSR permit. In such cases, the part 70 permit must assure compliance with these applicable requirements as well.

We pointed out in the proposal preamble that an advance approval that is incorporated into a part 70 permit remains subject to all the conditions of the underlying authorization. For example, if an underlying minor NSR permit is contingent upon the source commencing construction of the authorized change(s) within a certain period, the part 70 permit must contain terms to ensure that the part 70 permit does not authorize operation if the source fails to meet the required deadline. The source is responsible for obtaining any extensions or additional authorizations as necessary to keep the advance approval in the part 70 permit in effect. *See* 72 FR 52217, footnote 23.

In the proposal preamble we also noted that an advance approval under minor NSR may be added to a title V permit through permit issuance or renewal or through the permit revision process. When an existing permit is to be revised to incorporate an advance approval of minor NSR, the appropriate revision track depends on the nature of the proposed advance approval and the process under which it was established (*e.g.*, whether the authorizing NSR process also addressed title V requirements). *See* 40 CFR 70.7(d) & (e). Note also that the permit shield (where available and granted by the permitting authority) can be extended to advance approvals added through permit issuance or permit renewal or to those added during a significant permit modification, but not to those added through other permit revision procedures.

Commenters generally agreed that no Federal rulemaking is needed on the advance approval of changes under minor NSR because States currently can,

¹⁵ *See* footnote 9 for information on where to obtain our report "Evaluation of the Implementation Experience with Innovative Air Permits."

¹⁶ In the proposal preamble, we discussed this proposed clarification as a revision for purposes of AOSs (72 FR 52219). We now believe that it is more appropriately portrayed as a revision in support of advance approvals under minor NSR.

at their discretion, employ a variety of advance approval techniques under their existing rules and authorities. Some commenters indicated that any new Federal rules might actually constrain innovation by the States in this area, rather than enable greater use of advance approvals. A commenter noted that some State minor NSR programs require contemporaneous minor source BACT determinations that are not consistent with the advance approval of a wide spectrum of changes, and some expressed concern about the burden and other costs that advance approval permits could impose upon State agencies for uncertain projects and uncertain environmental gain.

Several industry commenters urged EPA to further encourage States to issue advance approvals under minor NSR. On the other hand, an association of State and local air agencies indicated that States do not need our encouragement to use their minor NSR programs for advance approvals as appropriate, and objected that the discussion in the proposal preamble could be misinterpreted as having regulatory force. This commenter believed that advance approvals cannot be issued under some minor NSR programs.

We received few comments on our proposal to revise 40 CFR 70.5(c)(3)(iii). One State agency indicated that for a combined NSR/title V permit program unit-specific information is often needed for several purposes, including control technology assessment, modeling, compliance assessment, determining the appropriate level and frequency of monitoring, *etc.*, even if the unit is covered by an emissions cap. This commenter wanted to retain the ability to require such information as needed.

B. Final Action

Consistent with our proposal, we are not revising any part 51 requirement in order to require or facilitate advance approvals under minor NSR (or under any other applicable requirement). We continue to believe that many States are able to advance approve changes under their existing minor NSR programs, to the extent that they believe it is appropriate to do so. As mentioned by a commenter, EPA recognizes, however, that certain minor NSR rules are not as amenable to advance approval as are others. In particular, advance approvals under State rules that require sources to employ best available technology (where such rules are judged to be open to advance approval by the permitting authority and appropriate for use in a particular case) may require additional

permit terms as necessary to assure that best available technology will be used.

We would also like to emphasize that permitting authorities, operating under their existing minor NSR regulations and authorities, must include terms as necessary to ensure the practical enforceability of advance approvals. For example, for purposes of tracking compliance with an emissions cap established in minor NSR, the minor NSR permit should contain sufficient terms that collectively act to monitor and quantify the relevant emissions at the site over the applicable time period.

We are finalizing the proposed revision to the title V permit application requirements at 40 CFR 70.5(c)(3)(iii) with minor changes. As proposed, the final revisions clarify that for emissions units subject to an annual emissions cap, the application may report the units' emissions as part of the aggregate emissions associated with the cap, except where the permitting authority determines that more specific information is needed. The EPA agrees with the commenter who wanted to assure that permitting authorities retained the ability to require more unit-specific information as needed to develop permit terms needed to determine or to assure compliance with all applicable requirements relevant to emissions units included under the emissions cap. As a result, the final rule language now indicates that unit-specific information must be provided whenever it is needed, including where necessary to determine or assure compliance with an applicable requirement.

We believe that the revised 40 CFR 70.5(c)(3)(iii) will facilitate the use of advance approvals under emissions caps. This combination of FAP tools was repeatedly validated in our evaluation of pilot permits. In addition, emissions caps were clearly shown to promote emissions reductions as sources sought to create "head room" under their caps to allow for additional growth. No other changes to part 70 are being made for the purposes of accomplishing advance approvals under minor NSR or incorporating them into part 70 permits. However, we again stress that an advance approval which is incorporated into a part 70 permit must include all the conditions of the underlying authorization. The source is responsible for obtaining any extensions or additional authorizations as necessary to keep the advance approval in the part 70 permit in effect.

While we believe that appropriately crafted advance approvals of minor NSR can, in certain cases, facilitate operational flexibility while protecting

the environment (at least as effectively as would the individual review of each change as it occurs), we do not intend to imply that States should issue such advance approvals in any cases that would be inconsistent with their existing rules or, in their judgment, would be inappropriate. As a general matter, the permitting authorities have authority to decide, on a case-by-case basis, the merits of granting an advance approval of minor NSR to a particular requesting source. Additionally we do not intend to imply that States must revise their current rules to facilitate advance approvals in the future. Rather, where existing rules may limit advance approval opportunities, EPA simply encourages States to consider the adoption of more flexible minor NSR rules under the broad governing regulations in 40 CFR 51.160–51.164. It is EPA's policy to support State use of advance approvals under minor NSR, where they deem them appropriate, and particularly where States expect benefits similar to those found in our evaluation of pilot permits to occur.

We also acknowledge that States, in order to respond to requests by sources for advance approval of minor NSR, may incur additional up-front development costs for which they may have to charge additional service fees. However, based on the pilot permit experience, annual administrative costs associated with FAPs should decline over time and, over the life of the permit, be less than those for conventional permits.

VI. Alternative Operating Scenarios

A. Background

Since they were initially promulgated in 1992, the part 70 State operating permit program regulations have included the AOS provisions found at 40 CFR 70.6(a)(9).¹⁷ These provisions were promulgated consistent with section 502(b)(6) of the Act, which requires permit programs to include provisions for adequate, streamlined and reasonable procedures for expeditious processing of the application and expeditious review of permit actions. Accordingly, 40 CFR 70.6(a)(9) is a mandatory part 70 program element, but its use is discretionary on the part of both sources

¹⁷ As noted previously, our proposed and final actions related to AOSs apply equally to part 70 and part 71. For simplicity, we refer only to part 70 in this preamble discussion. The provisions of part 71 generally mirror those of part 70, so the part 71 paragraphs that correspond to the cited paragraphs in part 70 differ only by designating part 71 instead of part 70 (unless otherwise noted). For example, the AOS provisions of part 71 are found at 40 CFR 71.6(a)(9) rather than at 40 CFR 70.6(a)(9).

and permitting authorities. In particular, 40 CFR 70.6(a)(9) provides that any permit issued under part 70 must include terms and conditions for reasonably anticipated operating scenarios identified by the source in its application, as approved by the permitting authority.¹⁸

The Agency outlined broad policy on the design and implementation of AOSs in our final part 70 rule and then further explained our policy in the September 12, 2007 proposal. In the final part 70 rule, we emphasized the importance of 40 CFR 70.6(a)(9), noting that a permit that contains approved AOSs “will be a more complete representation of the operation at the permitted facility.” See 57 FR 32276. We also explained that once a permit with approved AOSs is issued, the need for additional permit modifications will be substantially reduced since the permit will already contain appropriate terms and conditions to accommodate the approved operating scenarios. In the final part 70 rule, we did not place any restrictions on the types of operations that could qualify as a reasonably anticipated operating scenario. Instead, the Agency deferred to the process under which a candidate AOS would be identified by the source and considered for approval by the permitting authority to establish those AOSs which would be appropriate for streamlining purposes.

In the September 12, 2007 proposal, the Agency explained that, when deciding to approve an AOS, the permitting authority must ensure that the proposed operating scenarios are adequately described for each relevant emissions unit such that all applicable requirements^{19 20} associated with each

scenario are identified and appropriate terms and conditions to assure compliance with these requirements (when they become applicable) are included in the permit. We also noted that the source must obtain all specific authorizations which are required under any applicable requirements (e.g., those under minor NSR) in order to implement any AOS approved by the permitting authority without any further review or approval on their part. In addition, EPA affirmed that, while States must have sufficient authority in their part 70 programs to grant an AOS, if proposed by a source, permitting authorities retain the discretion as to the appropriateness of doing so on a case-by-case basis, depending on the specific facts of each situation. The Agency further conveyed that changing to an AOS can not be used to circumvent applicable requirements or to avoid an enforcement action. A switch to an AOS does not affect the compliance obligations applicable to a source under its previous operation.

As with advance approvals, we noted in the proposal preamble that an AOS may be added to a title V permit through permit issuance or renewal or through the permit revision process. When an existing permit is to be modified, the appropriate modification track (significant or minor) depends on the nature of the proposed AOS (or the proposed revision to an AOS) and whether it would qualify for treatment as a minor permit modification under existing 40 CFR 70.7(e)(2)(i). We noted also that the permit shield (where available and granted by the permitting authority) can be extended to AOSs added during permit issuance or renewal or through a significant permit modification, but not to those added through minor permit modification procedures (per existing 40 CFR 70.7(e)(2)(vi)).

In addition, we pointed out in the proposal preamble that the contents of the AOS log, such as its description of requirements that apply to a particular AOS, are not permit provisions for purposes of the permit shield. Thus, a source would not be deemed to be in compliance with the applicable requirements of the Act simply because it was in compliance with the description of applicable requirements contained in the log, if that description were inaccurate.

On a few occasions prior to our September 2007 proposal, we proposed

implementing the change, without a permit revision, if it can satisfy the requirements of the off-permit provisions in an approved part 70 permit program. Cf. 40 CFR 70.4(b)(12) and (b)(14).

rulemaking and guidance on AOSs. These proposals focused primarily on how AOSs might relate to advance approvals. We did not finalize our proposals.²¹

In the preamble to our September 2007 proposed rulemaking we also proposed several specific revisions to the existing part 70 and part 71 regulations as they apply to AOSs. The Agency stated that the primary purpose of these revisions to parts 70 and 71 is to build upon the existing regulatory framework and to ensure that the flexible permitting approaches with which we have experience are more readily and widely used.

We specifically proposed to define the term “alternative operating scenario (AOS)” in 40 CFR 70.2 and to codify certain related requirements to promote consistency and a common understanding of AOSs. The proposed definition read as follows:

Alternative operating scenario (AOS) means a scenario authorized in a part 70 permit that involves a physical or operational change at the part 70 source for a particular emissions unit, and that subjects the unit to one or more applicable requirements that differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

The other proposed revisions included the following:

- Revisions to 40 CFR 70.5(c)(7) to clarify that the permitting authority may require the source to include in its application additional information as necessary to define permit terms and conditions implementing any AOS;
- Additional revisions to 40 CFR 70.5(c)(7) to clarify that the application must include a demonstration that the source has obtained all authorizations required under the applicable requirements that apply to any AOS, or a certification that the source has submitted a complete application for such authorizations;

²¹ In the 1990s, we proposed certain clarifications and modifications to the part 70 regulations. See generally 60 FR 45529 (August 31, 1995) and 59 FR 44460 (August 29, 1994). In those proposals, among other things, we discussed the concept of “advance NSR” in relation to AOSs, and proposed a definition for “alternative operating scenarios.” In August 2000, we issued a draft guidance document called White Paper Number 3 (64 FR 49803, Aug. 15, 2000), on which we solicited comment. That draft guidance addressed various flexible permitting approaches, including the use of the AOS provisions. In fashioning the proposal on which this final rule is based, we considered a summary of the comments received on the prior proposals that addressed AOSs (which is available in the docket) and the relevant individual comments received on the draft guidance (which are also in the docket).

¹⁸ Alternatively, if a title V permit is issued without an AOS, it must nonetheless, pursuant to 40 CFR 70.6(a)(1), contain terms sufficient to assure compliance with all applicable requirements at the time of permit issuance. While permissible to do so, failure to address anticipated changes in an AOS which are not otherwise sufficiently addressed by the included applicable requirements may result in the need for a permit revision or, if available under the State’s part 70 program, an off-permit action which would require an advance notice and would not be eligible for the permit shield. On the other hand, if an AOS were authorized in a title V permit, then the source could subsequently implement it without further review or approval, provided that such implementation was contemporaneously recorded in an on-site log upon making the relevant change(s).

¹⁹ “Applicable requirement” as defined in 40 CFR 70.2 includes all the separate emissions reduction, monitoring, recordkeeping, and reporting requirements of a particular standard or SIP regulation and all the terms and conditions of preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I of the Act.

²⁰ Failure to anticipate and include a particular change in a part 70 permit (including under an AOS) does not in and of itself bar the source from

- Revisions to the compliance plan requirements for applications under 40 CFR 70.5(c)(8) to clarify that such plans must address AOSs when an application includes them;

- Revisions to 40 CFR 70.6(a)(3)(iii)(A) to require the source to identify in the 6-month monitoring report any AOSs implemented during the reporting period;

- Revisions to 40 CFR 70.6(a)(9)(i) to clarify what specific information must be included in the AOS log (already required under the existing regulations) when an AOS is implemented;

- Revisions to 40 CFR 70.6(a)(9)(iii) to clarify what constitutes an acceptable description in a title V permit for an AOS;

- Additional revisions to 40 CFR 70.6(a)(9)(iii) to make clear that the permitting authority cannot grant final approval of an AOS until the source has obtained all the authorizations required under the applicable requirements relevant to that AOS; and

- Revisions to use consistent terminology wherever the rules refer to AOSs.

The commenters on our proposal generally indicated an overall consensus that the proposed additional requirements for AOSs are not necessary or useful. They pointed out that AOSs are already provided for in part 70, and that permitting authorities have been implementing these provisions without difficulty for years. On the other hand, some commenters believe that use of AOS provisions, in their experience, has not been necessary in some States. In these States, commenters assert that permitting authorities have been able to address prospective operating scenarios identified by the source by simply including in the title V permit the applicable requirements and corresponding compliance assurance terms (*i.e.*, monitoring, recordkeeping, and reporting requirements) related to these scenarios. Commenters further asserted that in many cases, such terms are adequate to assure compliances at all times without AOS-specific logs or reports. Therefore, they objected to the level of detail proposed for the content of AOS logs and permit terms, and to the requirement to document AOS implementation in the 6-month monitoring reports. These commenters also claim that the proposed requirements would be unnecessarily burdensome and would not improve compliance assurance. Moreover, some States indicated the rulemaking on AOSs, as proposed, might have the unintended consequence of stifling innovative approaches to operational flexibility by prescribing a rigid

approach to AOSs. These commenters collectively seek to preserve the current levels of available flexibility and the avenues for accessing it.

We also received a number of comments specific to our proposed definition of AOS. Most of these commenters objected to the inclusion of the phrase “physical or operational change” in the definition, believing that this will cause confusion with the similar phrase “physical change or change in the method of operation” used in the NSR program.

B. Final Action

Based on the comments received, the States’ current approach to implementing existing AOS rules (described above) has proven to be fundamentally sound and effective. We are persuaded that the proposed specific revisions which would be new requirements would not promote more widespread use of AOSs and other effective strategies than does the current process-based approach and that these revisions might instead be counterproductive. The Agency has therefore decided to not impose any additional requirements onto an already working approach. Rather, we intend to preserve the flexibility available under existing rules by codifying a definition of “AOS” (as modified in response to comments received) and promulgating a few minor clarifications to the existing rules intended to improve certainty. The Agency believes that these actions, in light of the comments received, are appropriate and consistent with the basic streamlining tenets of section 502(b)(6) of the Act on which the provisions for AOSs are based.

Commenters have convinced us that permitting authorities are currently able, in response to a request by a source for more operational flexibility, to develop title V permits which allow the source to shift among identified operating scenarios. Commenters correctly point out that, under the current rule, in lieu of using an AOS, this result might be achieved by relying on the authority and provisions contained in the applicable requirements implicated by the anticipated scenario. This would be true where the applicable monitoring and/or reporting requirements assure compliance (including requirements for records that effectively identify when the scenario operates) or where the source and permitting authority have opted to streamline the relevant applicable requirements consistent with White Paper Number 2.²² Conversely,

²² In streamlining, the compliance terms are based on the most stringent requirement applicable to the

AOSs would be useful where additional records are needed to document when a new scenario occurs. We are therefore agreeing with commenters that, for flexibility purposes, the current process is effective in developing: (1)

Appropriate permit design options to access the inherent flexibility under relevant applicable requirements to provide for alternative modes of operation; and (2) AOSs which are determined to be adequate and otherwise appropriate by the permitting authority in reducing administrative costs while assuring compliance with all applicable requirements.

In finalizing these limited revisions, the Agency wishes to make some additional observations relative to AOSs. First, as in the past, an AOS is essentially defined through the process used to establish it. This allows AOSs to encompass situations in which the relevant applicable requirements might be sufficient with respect to monitoring and/or recordkeeping to determine the compliance status of the unit at a given time but the source and permitting authority have nonetheless opted to use an AOS for greater certainty. We continue to believe that this result is acceptable if the source and permitting authority choose to pursue it. Although a log is required to record

proposed changes and are effective upon permit issuance. In guidance generally referred to as “White Paper Number 2,” we interpreted our part 70 rules to allow sources to streamline multiple applicable requirements that apply to the same emissions unit(s) into a single set of requirements that assure compliance with all the subsumed applicable requirements. See “White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program,” March 5, 1996, (<http://www.epa.gov/ttn/oarpg/t5/memoranda/wtppr-2.pdf>). If all the applicable requirements that apply to a set of changes are streamlined in the permit and the permitting authority approves the proposed streamlining, the source need only comply with the streamlined requirement. This benefits all parties by simplifying and focusing the compliance requirements contained in the permit. As a result, a source relying upon emissions limit streamlining implicitly has chosen not to pursue the use of AOSs, since the source would always be required to meet the worst case scenario at all times regardless of which scenario was actually operated.

As explained in White Paper Number 2, sources that seek to streamline applicable requirements should submit their request as part of their title V permit application, identifying the proposed streamlined requirements and providing a demonstration that the streamlined requirements assure compliance with all the underlying, subsumed applicable requirements. Upon approval of the streamlined requirements, the permitting authority would place the requirements in the title V permit (*see* White Paper Number 2 for the complete guidance on the streamlining of applicable requirements). A source can request in its title V permit application that the permitting authority streamline an advance approval already authorized under minor NSR with all other relevant applicable requirements. For the complete text of the elements that must be included in a title V application, *see* 40 CFR 70.5(c).

implementation of an AOS, the primary objectives of section 502(b)(6) are still met, since the authorized changes can subsequently occur without further review or approval by the permitting authority. On the other hand, in the absence of an AOS, the title V permit authorizing multiple operating scenarios at a particular emissions unit which implicate different applicable requirements must require sufficient records to determine, at any point in time, which requirements apply to the unit and whether the unit is in compliance with each of them. If permit terms ensuring this result can be written by relying upon the authority contained in the relevant applicable requirements themselves and not that in 40 CFR 70.6(a)(9), then there would be no need for the permitting authority to approve an AOS. Conversely, if the permitting authority would need the authority contained in 40 CFR 70.6(a)(9), for example, to require the operational and/or material use records needed to determine which scenario is operating at any time, then the permitting authority, as appropriate, could either authorize these changes as AOSs (if first proposed by the source) or reject the operating scenario proposed without this recordkeeping and address future changes under the applicable off permit (as available from the permitting authority) or permit revision provisions.

We have decided to finalize a definition for “alternative operating scenario (AOS)” and to revise the various references to AOSs to use consistent terminology. We believe that the term “AOS” should be defined and used consistently in the regulations.

The final definition reads as follows:

Alternative operating scenario (AOS) means a scenario authorized in a part 70 permit that involves a change at the part 70 source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

The final definition is different from the proposed definition in that we no longer define an AOS as involving a “physical or operational change.” We agree with the commenters that inclusion of the phrase “physical or operational change” invites confusion with the major NSR provisions.

The deletion of this phrase also helps to clarify the interface between the concepts of advance approvals (e.g., advance approval of minor NSR) and AOSs. As mentioned in the previous

section, we recognized, based on our evaluation of pilot permits, that potentially many States could currently advance approve minor NSR and then incorporate the terms of the authorizing minor NSR permit into the title V permit as applicable requirements. While not proposing to do so, the Agency nonetheless took comment on whether some aspects of such advance approvals might also involve AOSs. Commenters strongly affirmed the current abilities of States to authorize advance approvals of minor NSR and that these authorizations should be kept generally separate and distinct from AOSs. The EPA agrees with these commenters and finds that the deletion of the phrase is useful in maintaining this separation.²³ Thus, in most cases, advance approval of minor NSR is simply another example of how the inherent flexibility in an applicable requirement can be accessed without the need for an AOS.

The deletion of the phrase “physical or operational” is also consistent with our previously stated decision to preserve the scope and operation of the current rule regarding AOSs. That is, the Agency believes, in light of comments received, it is not necessary to constrain the scope of AOSs by limiting them to those triggered by a “physical or operational” change when the current approach only restricts the establishment of AOSs to those which both the source and permitting authority must agree are appropriate and are consistent with all underlying applicable requirements, including those involving NSR. The existing

²³ Alternative operating scenarios, in contrast to advance approvals of minor NSR, more often involve the reversible shifts in operation of existing emissions units which implicate different applicable requirements and require additional monitoring and/or recordkeeping to determine what requirements apply at a particular time. On the other hand, advance approvals of minor NSR generally involve either: (1) The implementation of a modification to any existing unit which irreversibly triggers new applicable requirements such that the emission unit cannot return to its preconstruction status in the future; or (2) the construction and operation of a new unit which represents the beginning of the initial or baseline operation of the unit. In some cases, however, one or more AOSs may be used to complement an advance approval. For example, a complementary AOS might be useful where the source anticipates varying operation of the future or changed existing emissions unit in a manner that would implicate a set of applicable requirements different from those of the minor NSR advance approval.

While AOSs and advance approvals of minor NSR are typically used as separate FAP approaches, sources and permitting authorities are not precluded from relying upon AOS authority to establish an advance approval of minor NSR in a title V permit. For example, an AOS might be appropriate where a different control approach would not be effective until and unless a particular change were made to an existing emissions unit.

process to establish an AOS in a title V permit also addresses any potential concerns that too many AOSs might be proposed, including, for example, those involving a switch from one compliance option to another as provided for under a MACT (or other) standard. We do not believe that the population of AOSs actually approved will be impacted by the deletion. First, the deletion just preserves the status quo. Moreover, sources and permitting authorities are unlikely to establish alternative MACT compliance options as one or more AOSs, since the extensive monitoring and recordkeeping requirements typically found in MACT standards can themselves authorize shifts in compliance options after being incorporated into a title V permit.

In addition to adding a revised definition of AOS and standardizing the part 70 references to AOSs to use consistent terminology, we have decided to finalize three other aspects of our proposed rules which we believe will also preserve the basic operation of the current rule while improving certainty. First, we are essentially finalizing the proposed revisions to 40 CFR 70.5(c)(7) to clarify that the permitting authority shall require the source to include in its application additional information as necessary to define permit terms and conditions to implement any AOS. Note that the final version obligates the permitting authority to require, as contained in the proposal, additional information to develop and implement AOSs, but this requirement only extends to situations where the permitting authority believe such information is necessary. We believe that this obligation has always been implicit in the previously existing language of the section, but that an explicit clarification is appropriate. Second, we are finalizing our proposed revisions to the compliance plan requirements for applications under 40 CFR 70.5(c)(8) to clarify that such plans must address proposed AOSs when an application includes them. We believe that this clarification also merely codifies existing policy and is appropriate to ensure that all applicants understand what is required for AOSs when a source chooses to request one.

Finally, we are finalizing our proposed revisions to 40 CFR 70.5(c)(7) to specify that the application must include a demonstration that the source has obtained all authorizations required under the applicable requirements that apply to any AOS being requested for approval by the source, or a certification that the source has submitted a complete application for such authorizations, and additional revisions

to 40 CFR 70.6(a)(9)(iii) to make clear that the permitting authority cannot grant final approval of an AOS until the source has obtained all the authorizations required under the applicable requirements relevant to that AOS. These actions again just codify existing policy and should be manageable given the relatively few AOSs that may also involve an advance approval (e.g., the preconstruction approval of a new unit requiring AOSs for its multiple future operating modes or for its involvement as a replacement component unit in an AOS for an existing emissions unit at the same source). This clarification will also help to ensure that any additional resources required for AOS development are focused on sources which are likely to use them and to eliminate any confusion over a provision approved without such authorizations.

As noted above, we have been convinced by numerous commenters from both State and local permitting agencies and industry that the other more specific requirements proposed for AOSs are unnecessary and potentially could undermine the streamlining objectives of the AOS provisions. We have, therefore, elected to not finalize them. In particular, proposed revisions that we are not finalizing are the following:

- Revisions to 40 CFR 70.6(a)(3)(iii)(A) to require additionally that the source identify in the 6-month monitoring report any AOSs implemented during the reporting period;
- Revisions to 40 CFR 70.6(a)(9)(i) to clarify the type of information that must be included in the AOS log when an AOS is implemented; and
- Revisions to 40 CFR 70.6(a)(9)(iii) to clarify what constitutes an acceptable description in a title V permit for an AOS.

Based on comments received, the Agency is persuaded that the new reporting requirements, as proposed for inclusion in the 6-month monitoring report, would not be necessary or useful. We generally believe that sufficient information about AOSs and their use already exists from the combination of the AOS provisions contained in the permit and the required reports concerning annual compliance certification and the prompt reporting of deviations from achieving compliance with the AOS terms of the permit. In addition, pursuant to 40 CFR 70.6(a)(9)(i), permits must require the source to keep an on-site log that contemporaneously records the implementation of any AOS which occurred during the duration of the title

V permit. Pursuant to 40 CFR 70.6(a)(3)(ii)(B), the source owner must keep these records at their site for at least 5 years. Under 40 CFR 70.6(a)(6)(v) the source must submit to the permitting authority, upon their request, this and any other on-site information which is required to be kept by the permit or is needed by the permitting authority to determine compliance with the permit.

The Agency also agrees with commenters that there is no need to standardize the content of AOS logs and permit provisions. While not finalizing any specific content or format requirements for permits or logs involving AOSs, the Agency notes that there remains an overall obligation that the information which is required by the permitting authority for AOSs must be adequate to assure compliance with all applicable requirements. Thus, the structure of the AOS implementation log required by the permitting authority is relatively flexible, provided that the required records are, in total, sufficient to verify the requirements applicable to a particular operating scenario and whether the source was in compliance with them.

VII. Approved Replicable Methodologies

A. Background

Under the Act, title V permits are required to assure compliance with all applicable requirements. Sometimes, circumstances change for a source that bring about the need to recalculate or update a value used either in determining the compliance status of the source with an applicable requirement or in determining the applicability of a requirement. An advance approval under minor NSR or an AOS can incorporate flexibility into a permit, but the scope of changes that can be authorized in them can be severely limited with respect to a particular applicable requirement, if such recalculations or updates are involved and require case-by-case review/approval and a permit revision to ensure ongoing implementation. To facilitate such implementation, and to encourage additional permitting techniques that reduce the need for permit revisions (in a manner consistent with part 70), we proposed the use of ARMs.

In our September 12, 2007 proposal on flexible air permitting, EPA included provisions dealing with ARMs. Therein we stated our belief that ARMs are available now as one type of permit term described in 40 CFR 70.6(a)(1) that can assure compliance with all

applicable requirements at the time of permit issuance. In order to establish an ARM, a source would first propose one to the permitting authority who would then consider the appropriateness of authorizing it on a case-by-case basis, depending on the specific facts of the situation. In all cases, the implementation of the proposed ARM must be consistent with all underlying applicable requirements.

While we believed that ARMs as proposed are generally available without any rulemaking (depending on the structure and content of individual part 70 programs, as approved for States), we proposed to codify certain additions to 40 CFR parts 70 and 71 in order to promote greater certainty and use of ARMs, where the permitting authority decides it is appropriate to do so.

In particular, we proposed to define ARMs at 40 CFR 70.2 as part 70 permit terms that: (1) Specify a protocol which is consistent with and implements an applicable requirement or requirement of part 70, such that the protocol is based on sound scientific/mathematical principles and provides reproducible results using the same inputs; and (2) require the results of that protocol to be used for assuring compliance with such applicable requirement or requirement of part 70, including where an ARM is used for determining applicability of a specific requirement to a particular change. In the proposal preamble we also noted that within the scope of this definition, an ARM may be used to assure that a given requirement does not apply in a particular situation.

As proposed, the terms of an ARM must specify when the ARM is to be used, the applicable methodology (e.g., equation or algorithm), and the purpose for which the output obtained upon the execution of the prescribed methodology will be used (e.g., to determine compliance with an applicable requirement or to modify the level of the parameters used to determine compliance in the future). All necessary terms and conditions must be included in the permit at the time the ARM is approved so that no permit revision will be required in the future to implement the ARM.

We emphasized that an ARM, like any provision of a part 70 permit, cannot modify, supersede, or replace an applicable requirement, including, but not limited to, any monitoring, recordkeeping, or reporting required under applicable requirements.²⁴

²⁴ Under the authority of 40 CFR 70.6(a)(3), however, the permit can also contain additional streamlined monitoring or gap-filling periodic

Instead, we proposed ARMs as a strategic approach for incorporating into a title V permit relevant applicable requirements and the requirements of part 70. The ARM provides a method for obtaining and updating information consistent with an underlying applicable requirement(s) or requirement(s) of part 70 in such a manner so as to avoid the need to reopen or revise the permit to incorporate the updated information. As such, an ARM must work within and be consistent with the applicable part 70 rules that govern permit revisions.

We further explained that the protocol to obtain information under an ARM must be objective and scientifically valid and reliable—such as an EPA test method or monitoring method (usually specified in the applicable requirement itself). We noted that an ARM also includes the instructions governing how the results of the protocol are to be used. For example, an ARM could specify that firebox temperature measurements taken during a performance test of a thermal oxidizer be used to: (1) Define a temperature level that assures compliance with a particular applicable requirement; and (2) revise and update the minimum firebox operating temperature of the oxidizer previously relied upon to assure compliance.

We found permit terms containing ARMs to be useful in maintaining the effect of the advance approvals found in the pilot permits. Pervasively, all the pilot permits contained ARMs as the quantification methodology by which the source would sum VOC emissions from individual emissions units on an ongoing basis. These ARMs also included requirements governing when the aggregation procedures for determining total actual VOC emissions for the site would be compared to the relevant plantwide emissions cap(s) in order to assess source compliance. In some cases, the aggregation ARM relied on other ARMs to assure that certain input values were replicably determined. For example, two of the pilot permits contained replicable testing procedures. These procedures, once implemented, determined the control device operating parameter values that the source must monitor to demonstrate compliance with capture and destruction efficiency requirements (*i.e.*, the applicable requirement).

Without the replicable testing procedures in the permit, those values would have been included on the face

monitoring as needed to assure compliance with applicable requirements. We pointed out that an ARM could operate on the information gathered under these obligations as well.

of the permit, and the source would have had to seek a permit revision each time it repeated the testing procedures and the operating parameter values changed.²⁵ Another pilot permit specified the process (*i.e.*, compliance method) by which a source-specific emissions factor could be updated and used to determine whether emissions remained under the source's PTE cap where both the emissions cap and the ARM were established in its minor NSR permit. By including these replicable processes (*e.g.*, replicable testing and/or emissions factor updating procedures) in the permit instead of specific operating values and emissions factors, sources could update those values and indicate compliance based on the latest results consistent with the replicable testing procedures in the title V permit, and forego a permit revision each time the values are changed.

In addition to proposing a definition of an ARM, we also proposed that the 6-month monitoring reports (required under existing 40 CFR 70.6(a)(3)(iii)) must identify any ARMs implemented during the reporting period, and that for ARMs generating values related to parametric monitoring (*e.g.*, an ARM used to determine the minimum operating temperature of a thermal oxidizer during a performance test), the source must also include the results of the ARM in the 6-month monitoring report. We also proposed to modify 40 CFR 70.6(a)(1) to include a reference to ARMs, because ARMs are an example of permit terms that assure compliance with applicable requirements. Although we believe that the proposed regulatory change to 40 CFR 70.6(a)(1) is a relatively simple clarification, given that all permits must include terms that assure compliance with applicable requirements and the requirements of part 70, we proposed the change to promote increased consideration of ARMs, where appropriate. We recognized that we could have proposed to modify other provisions of part 70, such as 40 CFR 70.6(a)(9), to include a reference to ARMs, but given the structure and content of the existing regulations, we did not believe that such additional changes were needed.

As with advance approvals and AOSs, we noted in the proposal preamble that an ARM may be added to a title V

²⁵ Although an ARM can reduce the number of permit revisions a source must make, it cannot modify an applicable requirement. For example, there are some instances where the applicable requirement requires a notice to the permitting authority, such as where the requirement calls for notice of a performance test or the submission of certain performance test results. An ARM can not abrogate these requirements.

permit through permit issuance or renewal or through the permit revision process. When an existing permit is to be modified, the appropriate modification track (significant or minor) depends on the nature of the proposed ARM (or a proposed change to an ARM which requires a permit revision) and whether it would qualify for treatment as a minor permit modification under existing 40 CFR 70.7(e)(2)(i). We also noted that the permit shield (where available and granted by the permitting authority) can be extended to ARMs added through a significant permit modification, but not to those added through minor permit modification procedures (per existing 40 CFR 70.7(e)(2)(vi)). In addition, we pointed out in the proposal preamble that a source that incorrectly applies the procedures and criteria for an ARM will be considered not to be in compliance with the terms of the permit (and therefore not in compliance with the Act).

In proposing ARMs, we stated our belief that ARMs are authorized under title V of the Act and its implementing regulations. Section 502 sets forth the minimum elements for a State operating permit program. Among other things, section 502 provides that for a State operating permit program to be approved, the permitting authority must have adequate authority to “issue permits and assure compliance by all sources required to have a permit * * * with each applicable standard, regulation or requirement” under the Act. *See* CAA section 502(b)(5)(A). Section 504(a) of the Act also requires that each title V permit contain “enforceable limitations and standards * * * and such other conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan.” The Act further provides that any State operating permit program must include “adequate, streamlined, and reasonable procedures * * * for expeditious review of permit actions.” *See* CAA section 502(b)(6).

Several State commenters indicated that the rulemaking on ARMs is unnecessary because States already issue permits with these sorts of terms under existing authority, as evidenced by EPA's discussion of ARM-like permit terms in some of the pilot permits. These commenters also expressed concern that this Federal rulemaking on ARMs might have the unintended consequence of stifling innovative approaches to operational flexibility by prescribing a rigid approach to ARMs. Some commenters expressed concern

that an ARM could be used to avoid the applicability of major NSR, which might otherwise apply when the operating conditions of a control device are altered and actual emissions are anticipated to increase as a result.

Several industry commenters indicated that the rulemaking and EPA's expression of support for ARMs would help to clarify for States that ARMs are supported by the Act and viewed favorably by EPA. However, none of these commenters expressed support for the proposed 6-month reporting requirements for ARMs, and one industry commenter objected to the proposed 6-month reporting requirement for ARMs on the basis that no additional reporting is warranted for what is simply a method for showing compliance.

B. Final Action

In response to these commenters, EPA has decided to finalize the proposed definition with minor changes and to add certain additional clarifications to § 70.6(a)(1). In doing so, we reaffirm the proposal as summarized in the preceding section, except as described below in this section. As previously mentioned, these final rules with respect to ARMs do not affect any specific minima for part 70 programs, and, due to their clarifying nature, we do not expect many States to opt to revise their operating permit programs (see footnote 13).

While we agree that States currently have authority to issue ARMs in title V permits, we do not agree that placing a definition for ARM in our part 70 rules will stifle innovation by the States. On the contrary, we believe that finalizing the ARM definition will clarify the availability of this aid to flexible permitting to those States and sources that are not aware of it or have had prior issues concerning its use.

The final definition is nearly identical to the one proposed (*i.e.* we added a minor clarification that the results of the ARM be recorded as well as used for assuring compliance with any applicable requirement or requirement of part 70). The final definition reads as follows:

Approved replicable methodology (ARM) means part 70 permit terms that:

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

(2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable

requirement implicated by implementation of the ARM, or requirement of this part, including where an ARM is used for determining applicability of a specific requirement to a particular change.

We wish to emphasize that, under the final definition, an ARM may be used as a means to determine the applicability of a requirement, not just as an aid for assuring compliance. The EPA has included other ARM-like mechanisms in several of our national standards for MACT and NSPS. If a source proposes an ARM to delineate which changes are subject to one requirement instead of another, examples should be provided to the permitting authority and to the record supporting proposed approval of the ARM illustrating the prospective use of the ARM (if approved). We believe that the permitting process is the best forum for clarifying how a proposed ARM would work in the relevant situations reasonably expected to occur over the duration of the permit. However, in the case where the permitting authority has significant concerns over how an applicability ARM would operate in certain situations, the permitting authority should not authorize the ARM for those situations.

We are also revising 40 CFR 70.6(a)(1) to acknowledge that ARMs may be considered as one type of part 70 permit term that assures compliance with applicable requirements. We are also adding two clarifications that appropriately focus ARM implementation. The Agency believes that these clarifications in combination with the mentioned final definition will promote increased consideration of ARMs, where appropriate.

This final version of 40 CFR 70.6(a)(1) incorporates existing policy that a source must first request an ARM in its part 70 permit application before it can be considered by the permitting authority. Note that this request could appear as part of the originally submitted application or in the later submittal of supplemental application material (*e.g.*, a letter requesting consideration of a replicable protocol as an ARM). As is the case for AOSs, the permitting authority must then decide whether to accept the proposed ARM and may reject it or modify it for several appropriate reasons, including concerns over its replicability and/or value in lowering administrative costs. This addition is consistent with the basic process required for the establishment of AOSs which, based on comments received, is effective in ensuring that FAP approaches are appropriately considered.

Relevant to the first element of the final "ARM" definition, sources will identify candidate protocols that if judged to be replicable could be considered further as a potential ARM by the permitting authority. Candidates for such protocols would frequently arise from already established applicable requirements, such as MACT standards, NSPS, or preconstruction permits (*e.g.*, minor or major NSR). If accepted by the permitting authority as an ARM, pursuant to the second element of the final definition, the part 70 permit would contain the ARM (*i.e.*, the combination of the replicable protocol and the instructions for its use, including the type of data to be inputted).

The second clarification to 40 CFR 70.6(a)(1) was added in response to those commenters who were concerned that ARM implementation of one applicable requirement might circumvent the applicability of another applicable requirement. We believe that this final clarification adequately conveys appropriately that an ARM created under part 70 to streamline the implementation of one applicable requirement cannot be used to contravene compliance with another requirement under the Act or to circumvent its applicability as a result of implementing an ARM. Accordingly, the terms of an NSR permit, which are applicable requirements that must be incorporated into a title V permit, cannot subsequently be changed using an ARM created under different authority. Approved replicable methodologies can be used to update values only when the applicable requirement allows for this to occur. For example, if an existing NSR permit includes specific parametric monitoring levels as compliance indicators, to automate the updating of such levels the NSR permit would need to be revised to establish an ARM. The title V process could not create an ARM to revise the NSR conditions directly. Similarly, the potential applicability of other requirements implicated by the implementation of an ARM (*e.g.*, NSR) must be independently evaluated and determined.

As noted above, no commenters specifically supported our proposed reporting requirements for ARMs, and one commenter specifically opposed the reporting requirement. In addition, numerous States opposed the ARM proposal in general as being unnecessary and likely to reduce, rather than expand, the flexibility available under the existing rules. Although these commenters did not specifically refer to the reporting portion of the ARM

proposal (or most other specifics of the proposal), we believe that this is one aspect of the proposal that was targeted as unnecessary and potentially restrictive. Finally, several commenters raised concerns regarding our similar proposal to require reporting the implementation of AOSs in the 6-month monitoring report which we believe are also appropriate to consider in deciding whether to require the 6-month reporting of ARMs. As a result, we have concluded that the information contained in the permit about the nature of any approved ARM and the instructions for its use along with the required reports concerning annual compliance certification and the prompt reporting of deviations from achieving compliance with the ARM should generally be sufficient. In addition, sources must keep on-site records of ARM implementation.²⁶ Moreover, any required on-site records must be submitted to the permitting authority upon their request pursuant to 40 CFR 70.6(a)(6)(v). Therefore, we have decided to drop the proposed requirement for the 6-month monitoring report to identify any ARMs implemented during the reporting period.

VIII. Green Groups

A. Background

We proposed to modify the major NSR regulations in order to create an alternative means to comply with major NSR. Specifically, we proposed to allow a new pathway that would treat a number of emissions activities as a single emissions unit (which we termed, a "Green Group") where the emissions from each of these activities would be routed to a common emissions control device meeting BACT/LAER, and future emissions increases and other changes within the Green Group would be approved for a 10-year period in a major NSR permit. The proposed approach was described as an extension of our December 2002 NSR reform regulations (67 FR 80186, December 31, 2002). In particular, Green Groups would complement the use of plantwide emissions caps (termed, plantwide applicability limitations, or PALs) by providing a flexible permitting option for a section of a plant. Like PALs, we proposed that Green Groups would be a mandatory minimum element of a State

NSR program, but the permitting authorities would retain discretion as to when to approve individual Green Groups requested by sources.²⁷ However, we also solicited comment on whether Green Groups should be a voluntary, rather than mandatory, program element for States.

The Green Group provisions were proposed to encourage a wide spectrum of sources to construct specified types of changes for a 10-year period with greater certainty and flexibility in exchange for implementing BACT/LAER, regardless of whether or to what extent the source may have been subject to the current major NSR regulations. That is, the Green Group provisions, as an alternative means to comply with major NSR, did not require an evaluation of whether conventional major NSR would otherwise apply.

In its permit application, the source would be required to describe the new and existing emissions activities to be included in a Green Group in sufficient detail to allow the permitting authority to determine BACT or LAER (as applicable) for the Green Group taken as a whole and to conduct an ambient air impact analysis to safeguard relevant ambient increments and standards (including the determination of any offsets necessary in nonattainment areas) or to safeguard air quality values in any relevant Class I areas. We further proposed that the type of detail required in a permit to describe the authorized changes in the Green Group must be sufficient to allow the permitting authority to determine, when a change subsequently was implemented, whether the permitting authority contemplated that change in the scope of the advance approval contained in the major NSR permit.

We proposed that, in general, two types of emissions limits must be set in the major NSR permit for Green Groups: (1) An emissions limit to constrain the overall emissions of the Green Group; and (2) a limit to ensure that BACT/LAER technology is being employed and is effective across the Green Group (e.g., lbs/gal, percent reduction). These two limits would complement each other and collectively implement the core requirements for the Green Group. The amount of any actual emissions increase from authorized changes above previous actual emissions would be limited by the annual emissions cap and by the

BACT/LAER emissions limitation, both of which would apply to the applicable emissions unit, in this case designated as the Green Group, and would be placed in the major NSR permit.

The major NSR review process must determine the level of monitoring, recordkeeping, reporting, and testing (MRRT) to assure compliance with the control technology requirement and any other emissions limit(s) imposed by the permitting authority on emissions unit(s) as necessary to meet major NSR. We proposed specifically for Green Groups that a source would be required to monitor all emissions activities that comprise the Green Group to ensure compliance with the Green Group limit using essentially the same approaches that would meet our requirements for tracking emissions associated with a PAL. These monitoring, recordkeeping, and reporting requirements would be incorporated into the NSR permit that established the Green Group.

We proposed that all NSR projects using a Green Group be of a 10-year duration, for two reasons. First, we stated that this time frame represents a balance between the useful life of the emissions control system and the time frame in which additional major NSR review is likely to result in little, if any, added environmental benefit. Second, we stated that a 10-year duration for a Green Group is supported by the same rationale we used in choosing a 10-year period for the duration of PALs. For PALs we concluded that a 10-year period was necessary to ensure that the normal business cycle would be captured generally for any industry; to balance the need for regulatory certainty with the administrative burden; and to align the PAL renewal with the title V permit renewal. *See* 67 FR 80216, 80219. In proposing a 10 year duration for the Green Group, the Agency also solicited comment on the appropriateness of a 15-year period.

The Agency further proposed to exclude from application to a Green Group the existing PSD part 52 requirements in 40 CFR 52.21(r)(2) for timely construction and in paragraph (j)(4) of both parts 51 and 52 PSD requirements for the BACT reevaluation of later independent phases of phased construction projects. We also clarified, albeit without proposing specific rule language, that the provisions of 40 CFR 52.21(r)(4), 51.166(r)(2), and 51.165(a)(5)(ii), which subject a source to major NSR upon the relaxation of certain permit terms that had previously allowed the source to avoid major NSR, are met during any major NSR process like one that would establish a Green Group. Finally, we noted that, under the

²⁶ The authority to impose this requirement typically arises from the ARMs themselves being applicable requirements (e.g., provisions within NSPS or MACT standards or terms of preconstruction permits) but also can occur under other authorities such as 40 CFR 70.6(a)(9) authority where the ARM would be part of an AOS.

²⁷ The major NSR rules refer to the "reviewing authority," while part 70 refers to the "permitting authority." For purposes of consistency with the other sections of this preamble, we use the term "permitting authority" in this section. In these discussions, this term is intended to have the same meaning as "reviewing authority."

current NSR regulations, an emissions change is only creditable for netting purposes to the extent that the permitting authority has not previously relied on it in issuing a major NSR permit. *See* 40 CFR 52.21(b)(3)(iii). Accordingly, emissions increases and decreases that occur at the emission activities of a source subject to a current major NSR permit, like those in a Green Group during its effective period, are not to be included in future netting calculations at the same source.

In our proposal, we based the legal rationale for Green Groups on the premise that the changes and emissions activities within a Green Group are specifically authorized to occur as a result of undergoing, not avoiding, major NSR. Conversely, other changes that a source seeks to implement, but that are not authorized in the Green Group, cannot occur without first obtaining all necessary preconstruction approvals that would apply to such changes. The determination of whether the newly proposed, but unauthorized changes trigger NSR would be made using the “actual-to-projected-actual test” under, for example, 40 CFR 52.21(a)(2)(iv). The Agency noted that this legal rationale for Green Groups differs from the legal rationale for Clean Units, a provision in the 2002 NSR reform rules that employed an allowable emissions test for netting purposes which the U.S. Court of Appeals for the DC Circuit vacated. *New York v. EPA*, 413 F.3d at 40 (DC Cir. 2005).

Finally, as discussed in the proposal preamble, we believe that the environment and the public would potentially benefit from Green Groups for several reasons. First, we believe that substantial environmental benefits could occur because a Green Group would require all included emissions activities to be controlled to the level of BACT or LAER. The BACT or LAER limits would apply to existing emissions activities (which otherwise would remain uncontrolled or be subject to less stringent control requirements), as well as to emissions activities that are modified or added pursuant to the Green Group authorization. In addition, absent a Green Group, some modifications and new emissions activities might not be subject to major NSR because their emissions would be below applicability thresholds or because they would “net out” of review. Even when individual changes would prove to be subject to major NSR, the resulting BACT might in some cases be less stringent than that required for a Green Group, given the economies of scale in evaluating BACT at the same time for all the activities and authorized

changes making up a Green Group. Moreover, we expect that environmental benefits would accrue from the better and more frequent type and amount of monitoring proposed to be required for Green Groups. Finally, we believe that Green Groups would also promote greater administrative efficiency for permitting authorities and sources, because a Green Group would eliminate iterations of permitting processes that produce little or no environmental benefit.

The commenters, while mixed in their overall reaction to the Green Group concept, generally did not support the specifics of the Green Group proposal. State commenters indicated that the proposed 10-to-15-year term of the Green Group is inappropriate because the Act and good environmental stewardship require BACT/LAER reviews and air quality analyses to be conducted contemporaneously with the time of each change at a facility. These commenters disagreed with our assertion that BACT and LAER typically do not advance significantly over the proposed 10- or 15-year period. They added that such permits would unfairly reserve PSD increments for projects that might never be built and that the air quality status in the area of a Green Group could also change due to, for example, transported pollution, revisions to the NAAQS, and natural events. State commenters also questioned the environmental benefits of Green Groups and did not believe that the pilot permits contained in the docket supported the Green Group approach. They also asserted that Green Groups share the legal flaws of Clean Units. State commenters further conveyed that many permitting authorities already offer considerable flexibility and that it is the permitting authorities who can best decide the structure of their own programs in this regard. The State commenters generally believe that the Green Group proposal should be abandoned, but if it is finalized it should be a voluntary element of the major NSR program, rather than mandatory as proposed.

The environmental group that commented on the proposal asserted that the proposed 10-to-15-year term of the Green Group is inconsistent with the Act’s requirements for contemporaneous BACT/LAER and air quality reviews. The environmental group also indicated that Green Groups suffer from the same legal flaws as Clean Units. Like most State commenters, the environmental group believes that the Green Group proposal should be abandoned, but if it is finalized it should be voluntary for the States.

Industry commenters, on the other hand, typically favored some aspects of the proposal and believe the Green Group to be a real incentive for sources to control beyond their legal requirements in exchange for greater regulatory certainty and operational flexibility. These commenters often argued that a term of 10 to 15 years would be necessary to justify the expenditure for state-of-the-art controls for a Green Group. They agreed with the proposal that Green Groups should be a mandatory element of the major NSR program and attributed real benefits such as those associated with lower administrative costs. They believe that Green Groups are legally defensible and clearly different from Clean Units. However, industry commenters asserted that the proposal did not reflect how manufacturing facilities are constructed and operated. In particular, they stated Green Groups should not be limited to a single control device and that pollution prevention should be allowed as the primary Green Group control approach. In addition, they indicated that the proposed monitoring, recordkeeping, and reporting requirements are unnecessarily detailed and prescriptive.

B. Final Action

Primarily for certain policy reasons raised by commenters and on our belief that the current major NSR regulations already provide considerable flexibility to States, EPA has decided to withdraw our proposal on Green Groups. As described below, the Agency will consider initiating another rulemaking related to flexibility under the major NSR regulations if new data becomes available after additional field experience that supports such an approach. Any such rulemaking would be an entirely new rulemaking separate and distinct from the Green Group proposal being withdrawn in this action.

Notwithstanding our withdrawal of the Green Group proposal, we wish to note that certain statements we made in support of the proposal are not affected by the Green Group withdrawal. First, the requirements of 40 CFR 51.165(a)(5)(ii), 51.166(r)(2), and 52.21(r)(4) are met when an emissions unit with emissions limits previously taken to avoid major NSR subsequently undergoes major NSR review.²⁸ Next, we continue to believe that a longer-

²⁸ Sections 51.165(a)(5)(ii), 51.166(r)(2), and 52.21(r)(4) provide that when a source or modification that took an emissions limit to avoid major NSR review wishes to relax that limitation, it must undergo major NSR as if construction had not yet commenced.

term major NSR project is clearly different from a Clean Unit and may be defended on that basis. Construction of the later portions of an approved major NSR project is simply “building out” the permit as authorized and does not rely on an allowables emissions test. Finally, pursuant to 40 CFR 52.21(b)(3)(iii), and to analogous provisions in 40 CFR 51.166(b)(3)(iii) and 51.165(a)(1)(vi)(C)(2), emissions increases and decreases that occur as authorized in a major NSR permit qualify as having been “relied upon by the permitting authority” in issuing a major NSR permit. As such, these emissions changes are not to be included in the future netting calculations at the same source during the time that the NSR permit would be effective.

Our decision to withdraw the Green Group proposal is in large part based on the significant new information and policy perspectives conveyed in certain comments received on this proposal. Based on the varying types of concerns raised by commenters, EPA no longer believes that promulgation of the Green Group approach—which was EPA’s effort to develop a single, nationally uniform approach for Green Groups to achieving advance approval under major NSR—is appropriate. While an approach like that proposed for Green Groups might be effective in certain situations, several commenters pointed out serious reservations about initial air quality and technology reviews becoming stale over the 10-year life of a Green Group. Others were concerned that the proposed Green Group approach was not flexible enough to encompass already tested approaches involving emissions units serviced by multiple control approaches. These commenters also persuaded the Agency that a mandatory, one-size-fits-all approach under the major NSR rules could be counterproductive as well as too inflexible. Many of the same commenters believed that national rules requiring a specific template for Green Groups across all States could instead stifle future innovation and flexibility while adding complexity and unnecessary administrative burden.

The Agency is also not finalizing our proposal on Green Groups because we believe that the current major NSR regulations already provide States considerable ability to design and implement their SIPs in ways that provide operational flexibility while addressing the types of concerns raised by commenters. The major NSR regulations, in general, are quite detailed and prescriptive as to what changes are subject to review, but afford

considerable flexibility to determine specifically how subject NSR projects must be permitted. The inherent flexibility for States to design and implement their SIP provisions with respect to NSR projects arises from the structure and content of the part 51 PSD and the nonattainment (“NA”) NSR regulations.

First, the definition of “project” can accommodate a wide spectrum of physical and operational changes, provided such changes are authorized by the permitting authority.²⁹ Similarly, the definition of “emissions unit” is elastic in its ability to include several types of situations, ranging from a simple piece of equipment to a collection of them at the same site.³⁰ A “project” involves changes to or addition of one or more emissions units. Thus, the permitting authority may define these terms in its SIP broadly or narrowly, for a particular case, provided that the physical and operational changes included in the project are covered by the major NSR requirements, as appropriate.

Moreover, the other provisions of the part 51 PSD and NA NSR regulations do not impose limitations on the scope or implementation of NSR projects once they are defined by the permitting authority. The NA NSR regulations do not contain any specific provisions that restrict how the permitting authority might define the scope, duration, and timeliness of an NSR project. The part 51 PSD regulations only indirectly affect the acceptable scope of an NSR project in their requirements and the BACT reevaluations of certain phases of phased construction projects.³¹

As a result, under the current major NSR regulations, with the exception of the relatively narrow class of construction projects with independent phases for PSD purposes,³² States are free to design and implement their major NSR SIPs to address

²⁹ “Project” is defined in the major NSR regulations as “a physical change in, or change in the method of operation of, an existing major stationary source.” See, for example, 40 CFR 52.21(b)(52).

³⁰ “Emissions unit” is defined in the major NSR regulations as “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant. * * *” See, for example, 40 CFR 52.21(b)(7).

³¹ The part 51 PSD requirement related to the permitting of subject projects only mandates that States in their SIPs require reevaluations of certain BACT determinations for the later independent phases of an approved phased construction project at the latest reasonable time prior to their commencement of construction (see 40 CFR 51.166(j)(4)). This longstanding safeguard was established in order to prevent inappropriate reserving of the available PSD increment by an individual source (see 43 FR 26396).

³² See footnote 30.

contemporaneity of construction, project scope and duration, number and types of emissions units comprising the project which are subject to emissions tracking, timely construction of authorized changes, and reevaluation of initial control technology and/or air quality impact reviews as they judge to be reasonable. For example, a SIP may be structured to allow the permitting authority to determine these aspects of a major NSR permit on a case-by-case basis after balancing appropriately the benefits of operational flexibility with the types of concerns raised by commenters on the Green Group proposal.

The same part 51 flexibility has allowed states to adopt voluntarily some additional PSD regulatory constraints into their SIPs similar to those contained in paragraphs (r)(2) and (n)(1) of the 40 CFR part 52 regulations, which regulate the timeliness of construction and the required level of information for reviewing proposed NSR projects.³³ The part 52 regulations, which apply to interim EPA implementation of the PSD program in the absence of an approved SIP, contain these additional requirements in paragraphs (r)(2) and (n)(1) to help preserve the available PSD air quality increments until the State can assume full responsibility for the program under an approved SIP.

The EPA believes that States which have opted to include these additional regulatory constraints in their SIPs retain considerable discretion to interpret and implement them within the meaning of their SIP approved language. Affected States may choose to implement their programs consistent with policies that EPA has developed in our implementation of these provisions or to explore the adoption of different policies through their own administrative procedures. In addition, in accordance with their plans for preserving PSD increments and for protecting the NAAQS, States may maintain their current SIPs or opt to revise them as appropriate consistent with the applicable part 51 and/or part D requirements in order to allow greater flexibility to the permitting authority in reasonably determining how NSR projects can be approved on a case-by-case basis. The Agency is willing to work with States to evaluate their

³³ Section 52.21(n)(1) requires more specific detailed information about construction schedules and plans to be submitted by sources than do the analogous requirements of part 51 (see 40 CFR 51.166(n)(1)). Section 52.21(r)(2), which has no counterpart in 40 CFR 51.166, ensures the timely construction of non-phased projects and provides, without specification, the opportunity for the permitting authority to extend these deadlines.

current SIPs and to assist them in discussing possible revisions where requested to do so.

The EPA is interested in learning more as to whether the flexibility under existing major NSR regulations to sources and permitting authorities is sufficient and appropriate. In order to gain additional perspectives about the currently available level of flexibility—including the need for it; the benefits, costs, and/or impediments associated with its use; and any lack of safeguards to assure its effectiveness—the Agency is encouraging States and sources to explore how projects subject to major NSR might be more flexibly permitted and administratively managed. Where a State would agree to investigate such possibilities with a requesting source, we ask that the State give us an advance notice of the project before any permit is released for comment. In addition, EPA requests that the State make available relevant information about both the development of the permit and its subsequent implementation so as to facilitate any future analysis on our part. We also intend to collect other information that would be useful to informing us as to whether a new rulemaking should be initiated in the future.

In summary, the concerns of commenters on the potential inflexibility of the proposed Green Group affirms the need, at least for now, to maintain the relative openness of the current major NSR rules. These rules essentially defer to the States as to whether to adopt more specific requirements or to resolve flexibility needs on a case-by-case basis. This outcome is entirely consistent with the stated preference contained in State comments received on the proposal that States be allowed to structure their own SIP programs with respect to NSR flexibility.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

This action is not a “significant regulatory action” under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The information collection

requirements are not enforceable until OMB approves them.

The information collection requirements resulting from this final rule are associated with obtaining FAPs under minor or major NSR (pursuant to the requirements of title I of the Act and the implementing regulations at 40 CFR 51.160 through 51.166, appendix S to 40 CFR part 51, and 40 CFR 52.21) and/or under the title V operating permit program (pursuant to the requirements of title V of the Act and the implementing regulations at 40 CFR parts 70 and 71). The NSR and title V programs are established programs with approved information collection requests (ICRs). This final rule will encourage permitting authorities and sources to work together to create FAPs, which will eliminate the need for some subsequent permits and permit revisions and thereby reduce the burden on both the permitting authorities and sources.

The NSR program requires a permit to be obtained by the owner or operator prior to constructing a new stationary source of air pollutants or modifying an existing source in such a way that air pollution emissions increase or a new air pollutant is emitted. The minor NSR program applies to minor sources and minor modifications, while the major NSR program applies to major sources and major modifications. The information collection for sources under NSR results from the requirement for owners or operators to submit applications for NSR permits. In some cases, sources must conduct preconstruction monitoring to determine the existing ambient air quality. For permitting authorities, the information collection results from the requirement to process permit applications and issue permits, and to transmit associated information to EPA. The EPA oversees the NSR program, and the information collected by sources and permitting authorities is used to ensure that the program is properly implemented.

The title V program requires major sources and certain other sources of air pollutants to obtain an operating permit that contains all the requirements that apply to the source under the Act. The information collection for sources under the title V program results from the requirement for owners or operators to submit applications for title V permits and to submit deviation reports, semi-annual monitoring reports, and annual compliance certifications. For permitting authorities, the information collection results from the requirement to process permit applications and issue permits, to review the reports submitted

by sources, and to transmit associated information to EPA. The EPA oversees the title V program, and the information collected by sources and permitting authorities is used to ensure that the program is properly implemented.

Flexible air permits are innovative permits that authorize sources to make certain anticipated changes to their operations without being required to obtain new or revised permits at the times these changes are implemented, while assuring that all applicable requirements of the Act are met and that the environment is protected at least as well as it would have been under conventional permitting procedures. The initial burden to apply for and issue a FAP is greater than for a conventional permit, but this increase in burden is more than compensated for by the subsequent burden reduction for foregone new permits and permit revisions. Thus, the net effect of this final FAP rule is a reduction in the burden the approved ICRs for the NSR and title V programs.

As a result of this final rule, we estimate that 845 sources will obtain FAPs each year over the 3-year period of this ICR, with a total annual burden reduction averaging approximately 251,000 hours, or almost 300 hours per source. We do not expect a burden increase or reduction in capital costs, operation and maintenance costs, or purchase-of-services costs. For the 112 permitting authorities over the 3-year period of this ICR, we estimate a total annual burden reduction averaging about 197,000 hours, or nearly 1,800 hours per permitting authority and 234 hours per permit. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial

number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, "small entity" is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This final rule merely clarifies existing requirements and allows regulated entities to seek additional flexibility for their Clean Air Act permits. It does not create a new burden for regulated entities. Because FAPs are voluntary on the part of all permittees, including any small entities that are subject to permitting requirements, only those permittees who expect to reduce their permitting burden will seek FAPs. We have determined there will be cost savings for small entities associated with this final rule. We have therefore concluded that this final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C., 1531–1538 State, local, and Tribal governments, in the aggregate, or the private sector. This action imposes no enforceable duty on any State, local or Tribal governments or the private sector. As discussed

previously, we estimate that this rule will save State, local, and Tribal permitting authorities an average of \$11.5 million per year over the first 3 years of implementation and result in an administrative burden reduction averaging 197,000 hours per year over that period. Similarly, we estimate that this rule will save permittees an average of \$20.6 million per year and reduce their administrative burden by an average of 251,000 hours per year over the first 3 years. Therefore, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed earlier, this rule is expected to result in cost savings and an administrative burden reduction for all permitting authorities and permittees, including small governments to the extent that they fall in either category.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule is projected to result in cost savings and administrative burden reductions for States and will not alter the overall relationship or distribution of powers between governments for the part 70 and part 71 operating permits programs or for the part 51 and part 52 NSR programs. Thus, Executive Order 13132 does not apply to this rule.

In spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA solicited comment on the proposed rule from State and local officials. We believe that this final rule is generally responsive to

the comments received from these and other groups.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action merely clarifies existing requirements and allows regulated entities to seek additional flexibility for their CAA permits. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risks

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211—Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely clarifies existing requirements and allows regulated entities to seek additional flexibility for their CAA permits.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final rule merely clarifies existing requirements and allows regulated entities to seek additional flexibility for their CAA permits. Such FAPs achieve equal or better environmental protection than that achieved using more conventional permits.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective November 5, 2009.

X. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by December 7, 2009.

Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

Pursuant to section 307(d)(1)(V) of the Act, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to “such other actions as the Administrator may determine.” This action finalizes some, but not all, elements of a previous proposed action—the Flexible Air Permitting Rule proposed on September 12, 2007 (72 FR 52206). That action included proposed revisions to the PSD regulations under part C of title I of the Act and was, therefore, subject to section 307(d) pursuant to section 307(d)(f). Consequently, although the proposed PSD revisions are not being finalized in this action, the procedural requirements of section 307(d) have been complied with for purposes of this action.

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 25, 2009.

Lisa P. Jackson,
Administrator.

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

PART 70—[AMENDED]

■ 1. The authority citation for part 70 continues to read as follows:

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

■ 2. Section 70.2 is amended by adding definitions of “Alternative operating

scenario (AOS)” and “Approved replicable methodology (ARM)” in alphabetical order, to read as follows:

§ 70.2 Definitions.

* * * * *

Alternative operating scenario (AOS) means a scenario authorized in a part 70 permit that involves a change at the part 70 source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

* * * * *

Approved replicable methodology (ARM) means part 70 permit terms that:

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

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

* * * * *

■ 3. Section 70.4 is amended by revising paragraph (d)(3)(xi) to read as follows:

§ 70.4 State program submittals and transition.

* * * * *

(d) * * *

(3) * * *

(xi) *Approval of AOSs.* The program submittal must include provisions to insure that AOSs requested by the source as approved by the permitting authority are included in the part 70 permit pursuant to § 70.6(a)(9).

* * * * *

■ 4. Section 70.5 is amended as follows:

■ a. By revising paragraph (c)(2);

■ b. By revising paragraph (c)(3)(iii);

■ c. By revising paragraph (c)(7);

■ d. By adding paragraph (c)(8)(ii)(D);

and

■ e. By adding paragraph (c)(8)(iii)(D).

The additions and revisions read as follows:

§ 70.5 Permit applications.

* * * * *

(c) * * *

(2) A description of the source's processes and products (by Standard Industrial Classification (SIC) Code) including those associated with any proposed AOS identified by the source.

(3) * * *

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

* * * * *

(7) Additional information as determined to be necessary by the permitting authority to define proposed AOSs identified by the source pursuant to § 70.6(a)(9) of this part or to define permit terms and conditions implementing any AOS under § 70.6(a)(9) or implementing § 70.4(b)(12) or § 70.6(a)(10) of this part. The permit application shall include documentation demonstrating that the source has obtained all authorization(s) required under the applicable requirements relevant to any proposed AOSs, or a certification that the source has submitted all relevant materials to the appropriate permitting authority for obtaining such authorization(s).

(8) * * *

(ii) * * *

(D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(iii) * * *

(D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term will satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

* * * * *

■ 5. Section 70.6 is amended by revising paragraphs (a)(1) introductory text and (a)(9) to read as follows:

§ 70.6 Permit content.

(a) * * *

(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include ARMs identified by the source in its part 70 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would apply as a result of implementing the ARM.

* * * * *

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

- (i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the AOS under which it is operating;
- (ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such AOS; and
- (iii) Must ensure that the terms and conditions of each AOS meet all applicable requirements and the requirements of this part. The permitting authority shall not approve a proposed AOS into the part 70 permit until the source has obtained all authorizations required under any applicable requirement relevant to that AOS.

* * * * *

PART 71—[AMENDED]

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

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

■ 7. Section 71.2 is amended by adding definitions of "Alternative operating scenario (AOS)" and "Approved replicable methodology (ARM)" in alphabetical order, to read as follows:

§ 71.2 Definitions.

* * * * *

Alternative operating scenario (AOS) means a scenario authorized in a part 71 permit that involves a change at the part 71 source for a particular emissions

unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

* * * * *

Approved replicable methodology (ARM) means part 71 permit terms that:

- (1) Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this part, such that the protocol is based on sound scientific and/or mathematical principles and provides reproducible results using the same inputs; and
- (2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the ARM, or requirement of this part, including where an ARM is used for determining applicability of a specific requirement to a particular change.

* * * * *

■ 8. Section 71.5 is amended as follows:

- a. By revising paragraph (c)(2);
- b. By revising paragraph (c)(3)(iii);
- c. By revising paragraph (c)(7);
- d. By adding paragraph (c)(8)(ii)(D); and
- e. By adding paragraph (c)(8)(iii)(D).

The additions and revisions read as follows:

§ 71.5 Permit applications.

* * * * *

(c) * * *

(2) A description of the source's processes and products (by SIC Code) including those associated with any proposed AOS identified by the source.

(3) * * *

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

* * * * *

(7) Additional information as determined to be necessary by the permitting authority to define proposed AOSs identified by the source pursuant to § 71.6(a)(9) or to define permit terms and conditions implementing any AOS

under § 71.6(a)(9) or implementing § 71.6(a)(10) or § 71.6(a)(13). The permit application shall include documentation demonstrating that the source has obtained all authorization(s) required under the applicable requirements relevant to any proposed AOSs, or a certification that the source has submitted all relevant materials to the appropriate permitting authority for obtaining such authorization(s).

- (8) * * *
- (ii) * * *

(D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

- (iii) * * *

(D) For applicable requirements associated with a proposed AOS, a statement that the source will meet such requirements upon implementation of the AOS. If a proposed AOS would implicate an applicable requirement that will become effective during the permit term, a statement that the source

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

* * * * *

■ 9. Section 71.6 is amended by revising paragraphs (a)(1) introductory text and (a)(9) to read as follows:

§ 71.6 Permit content.

- (a) * * *

(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include ARMs identified by the source in its part 71 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would

apply as a result of implementing the ARM.

* * * * *

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

- (i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the AOS under which it is operating;
- (ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such AOS; and
- (iii) Must ensure that the terms and conditions of each AOS meet all applicable requirements and the requirements of this part. The permitting authority shall not approve a proposed AOS into the part 71 permit until the source has obtained all authorizations required under any applicable requirement relevant to that AOS.

* * * * *