6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[FRL-7374-6]

Revisions to Clarify the Scope of Sufficiency Monitoring Requirements for Federal and State Operating Permits Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: The EPA is promulgating this interim final rule to clarify the scope of the monitoring required in operating permits issued by State and local permitting authorities or by EPA under title V of the Clean Air Act (Act). Specifically, this interim final rule clarifies that under the sufficiency monitoring rules, all title V permits must contain monitoring sufficient to assure compliance as required under sections 504(a), 504(b), 504(c), and 114(a)(3) of the Act, in cases where the periodic monitoring rules are not applicable. The EPA believes this interim final rule is necessary to address claims of confusion on the part of some source owners and operators, permitting authorities and citizens as to the scope of EPA's title V monitoring regulations while EPA conducts a notice-and-comment rulemaking to consider adopting as a final rule the same changes made by this interim final rule.

EFFECTIVE DATE: This interim final rule is effective on [insert date of publication in the Federal Register] until [insert date 60 days following publication in the Federal Register].

ADDRESSES: Documents relevant to this action are available for inspection at the Docket Office, Attention: Docket No. A-93-50, U.S. EPA, 401 M Street SW, Room M-1500,

Washington, DC 20460, telephone (202) 260-7548, between 7:30 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. Documents relevant to the promulgation of the operating permit program regulations at parts 70 and 71 are available for inspection at the same location under Docket Nos. A-90-33 and A-93-50 for part 70, and A-93-51 for part 71.

FOR FURTHER INFORMATION CONTACT: For further information, contact Mr. Jeff Herring, U.S. EPA, Information Transfer and Program Implementation Division, C304-04, Research Triangle Park, North Carolina 27711, telephone number (919) 541-3195, facsimile number (919) 541-5509, electronic mail address: herring.jeff@epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated Entities. Categories and entities potentially affected by this action include facilities currently required to obtain title V permits by State, local, tribal, or Federal operating permits programs.

World Wide Web (WWW). After signature, the final rule will be posted on the policy and guidance page for newly proposed or final rules of EPA's Technology Transfer Network (TTN) at http://www.epa.gov/ttn/oarpg/t5.html. For more information, call the TTN Help line at (919) 541-5384.

Outline. The contents of the preamble are listed in the following outline:

I. Background

A. The Legal Basis for Requiring Title V Monitoring

By enacting title V as part of the 1990 Act Amendments, Congress sought to enhance sources' compliance with the Act in two important ways. First, Congress required that every major stationary source of air pollution and certain other sources obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive Act requirements that apply to the source. 42 U.S.C. 7661a(a), 7661c(a). Second, Congress required that all title V sources conduct monitoring of their emissions that is sufficient to assure compliance with applicable requirements under the Act and also certify compliance with such applicable requirements. 42 U.S.C. 7661c(a), 7661c(c). The Senate Report summarized: "EPA must require reasonable monitoring ... requirements that are adequate to assure compliance." S. Rep. No. 101-228, at 350 (1989) (reprinted in 1990 U.S.C.C.A.N. 3385, 3733).

Three provisions of title V set forth Congress's requirements for monitoring by title V sources. Section 504(c) of the Act requires that each permit "shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. 7661c(c). Section 504(a) requires that each permit "shall include enforceable emission limitations and standards . . . and such other conditions as

are necessary to assure compliance with applicable requirements." 42 U.S.C. 7661c(a). Section 504(b) contains discretionary authority for EPA to prescribe by rule "procedures and methods for determining compliance and for monitoring . . ." 42 U.S.C. 7661(b). In addition, section 114(a)(3) directs EPA to require "enhanced monitoring" at all major stationary sources. 42 U.S.C. 7414(a)(3).

The EPA's title V regulations at §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B) require that

> [w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), [each permit must contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to [§ 70.6(a)(3)(iii) or § 71.6(a)(3)(iii)]. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of [§ 70.6(a)(3)(i)(B) or § 71.6(a)(3)(i)(B)].

Furthermore, §§ 70.6(c)(1) and 71.6(c)(1) require that each part 70 and 71 permit contain, "[c]onsistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." 40 CFR part 64, the Compliance Assurance Monitoring (CAM) rule, as well as the title V regulations discussed above, implements the statutory "enhanced monitoring" requirement. See 62 FR 54900, October 22, 1997.

B. Court Rulings About Title V Monitoring

Two opinions issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) have addressed the monitoring required of title V sources. Specifically,

the court reviewed EPA's CAM rule in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999) (NRDC), and reviewed EPA's periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (Appalachian Power). In NRDC, the Natural Resources Defense Council argued that the CAM rule was inadequate to meet the statutory mandate that all major sources be subject to enhanced monitoring because it excluded units without control devices, units below a 100-ton cutoff, and certain other categories. 194 F.3d at 135.[1] The court disagreed, and upheld the CAM rule and EPA's general enhanced monitoring program. 194 F.3d at 135-37. The court pointed out that certain sources exempt from CAM were subject to "other specific rules." Id.[2] The court then reasoned that all other major sources were subject to one of two "residual rules" under part 70: either the periodic monitoring rule at § 70.6(a)(3)(i)(B), or the sufficiency rule at 70.6(c)(1). Id. at 135-36. The court recognized that "[w]hile the Part 70 rules are not as

[1] For example, CAM exempts acid rain program requirements under title IV of the Act. See § 64.2(b)(1)(iv).

[2] For example, sources exempt from acid rain requirements under CAM (see supra n. 1) are subject to state-of-the-art monitoring under Act section 412 and 40 CFR part 75.

specific as CAM, they have the same bottom line – a major source must undertake 'monitoring ... sufficient to assure compliance.'" Id. at 136.[3]

In Appalachian Power, a different panel of the D.C. Circuit set aside EPA's "Periodic Monitoring Guidance"[4] after finding that it had in effect amended part 70's periodic monitoring rule at § 70.6(a)(3)(i)(B) by interpreting that rule too broadly to cover situations where the underlying applicable requirement called for some kind of "periodic" testing or monitoring, but such monitoring was not sufficient to assure compliance. 208 F.3d at 1028. The Appalachian Power court held that in its current form, the periodic monitoring rule authorized sufficiency reviews of monitoring and testing in an existing emissions standard, and enhancement of that

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[3] The entire relevant passage reads as follows:

> Specifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules, and if they are not, they are subject to the following two residual rules: (1) "[The permit shall contain] periodic monitoring sufficient to yield reliable data ... that are representative of the source's compliance with the permit...."40 C.F.R. 70.6(a)(3)(i)(B); (2) "All part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." Id. § 70.6(c)(1).
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> While the part 70 rules are not as specific as CAM, they have the same bottom line – a major source must undertake "monitoring ... sufficient to assure compliance." Like CAM, the monitoring protocols will be developed on a unit-by-unit basis. Such monitoring is sufficiently "enhanced" over the pre-1990 situation to satisfy the statutory requirement. See Compliance Assurance Monitoring, 62 FR 54900, 54904, October 22, 1997. Id.

[4] "Periodic Monitoring Guidance," signed by Eric V. Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards, September 15, 1998.

monitoring or testing through the permit, only when that standard "requires no periodic testing, specifies no frequency, or requires only a one-time test." Id. The panel did not address the separate "sufficiency" requirement of § 70.6(c)(1) or the earlier decision in NRDC, except to note that it disagreed with EPA's argument that the court in the earlier decision read the periodic monitoring rule in the same way as the Agency. Id. at 1027 n. 26. The Appalachian Power court set aside the Periodic Monitoring Guidance, reasoning that the Guidance was "final agency action" that broadened the scope of the periodic monitoring rule without complying with the rulemaking procedures required by 42 U.S.C. 7607(d). Id. at 1023, 1028.

C. The EPA's Adjudicatory Orders in Pacificorp and Fort James

Following the NRDC and Appalachian Power decisions, EPA was called upon to clarify the scope of the title V monitoring requirements in two adjudicatory orders responding to petitions requesting that the Administrator object to title V permits under section 505(b)(2) of the Act.[5] In the Matter of Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1 (November 16, 2000) (Pacificorp) (available on the Internet at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/woc020.pdf); In the Matter of Fort James Camas Mill, Petition No. X-1999-1 (Dec. 22, 2000) (Fort James)

[5] Section 505(b)(2) authorizes any person to petition the Administrator to object to a title V permit within 60 days after the expiration of EPA's 45-day review period and directs the Administrator to grant or deny such petitions and to issue an objection if the petitioner demonstrates that the permit is not in compliance with the applicable requirements of the Act. 42 U.S.C. 7661d(b)(2).

(available on the Internet at: http://www.epa.gov/region07/ programs/artd/air/title5/petitiondb/petitions/fortjamesdecision1999.pdf). Notice of these decisions was published in the Federal Register. See 66 FR 85, January 2, 2001 (Pacificorp); 66 FR 13529, March 6, 2001 (Fort James).

The first order, Pacificorp, responded to a petition in which Wyoming Outdoor Council requested that the Administrator object to two title V permits issued by the State of Wyoming. The petition alleged, in relevant part, that the permits, which required only a quarterly Method 9 visual observation, were deficient because they failed to assure compliance with the 20 percent opacity limit in the Wyoming State Implementation Plan (SIP). The Administrator's response summarized the monitoring requirements of the Act and part 70, quoting from sections 114(a)(3), 504(a) and 504(c), and from §§ 70.6(a)(3)(i)(B) and 70.6(c)(1). Id. The response then summarized the NRDC and Appalachian Power decisions. Pacificorp at 16-18. In particular, the Administrator observed that the NRDC panel had based its holding that EPA had satisfied the statutory mandates to require adequate monitoring for all permits at major sources on the two "residual rules" in part 70: §§ 70.6(a)(3)(i)(B) and 70.6(c)(1). Id. at 16-17 (citing NRDC, 194 F.3d at 135-37). She also observed that the Appalachian Power panel had held that §70.6(a)(3)(i)(B) must be read narrowly to apply only when the underlying emission standard "'requires no periodic testing, specifies no frequency, or requires only a one-time test.'" Pacificorp at 18 (quoting Appalachian Power, 208 F.3d at 1028). Finally, she observed that the Appalachian Power panel did not address 70.6(c)(1), or the earlier decision in NRDC (except to note that it disagreed with EPA's contention that the NRDC panel had

read § 70.6(a)(3)(i)(B) in the same broad fashion as had EPA). Pacificorp at 18 (citing Appalachian Power, 208 F.3d at 1028 n. 26).

The Administrator then set forth her understanding of the current monitoring requirements by harmonizing the NRDC and Appalachian Power decisions. Specifically, the Administrator stated that in light of those decisions, where an applicable requirement requires no "periodic" testing or monitoring at all, "section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied" by meeting the more substantive requirements of § 70.6(a)(3)(i)(B). Where, in accordance with Appalachian Power, the latter periodic monitoring provision does not apply because there is some "periodic" monitoring but it is not sufficient to assure compliance, the "separate regulatory standard" in § 70.6(c)(1) governs instead and requires enhancement of existing monitoring "as necessary to be sufficient to assure compliance." Pacificorp at 18-19.

Based on this understanding, the Administrator found that since the Wyoming SIP called for quarterly Method 9 visual readings, and this was "periodic," then in accordance with Appalachian Power "the provisions of § 70.6(a)(3)(i)(B) do not apply." She then found that such monitoring:

> is not sufficient to "assure compliance"with the 20 [percent] opacity limit in the Wyoming SIP within the meaning of § 70.6(c)(1) and sections 504(a) and 504(c) of the Clean Air Act, and does not constitute enhanced monitoring within the meaning of section 114(a)(3) of the Act.

Id. at 19. The Administrator granted the petition in part and denied it in part. See 66 FR 85,

January 2, 2001.

The Administrator subsequently responded to another citizen petition to object alleging numerous monitoring deficiencies in a permit issued by the State of Washington, the Fort James order. As in Pacificorp, the petition raised monitoring issues, and the Administrator ruled similarly. She explained that where it was clear that there was no underlying monitoring of a "periodic" nature, § 70.6(a)(3)(i)(B) applied and decided the claims accordingly. Where there was some underlying monitoring that could be considered periodic, she applied the general sufficiency standard in § 70.6(c)(1) and decided the claims on that basis. The petition was granted in part and denied in part. See Fort James at 5-9; 66 FR 13529, March 6, 2001.

II. Revisions to the Title V Monitoring Requirements

A. Why Is EPA Revising §§ 70.6(c)(1) and 71.6(c)(1)?

This interim final rule responds to assertions by some industry representatives that the NRDC and Appalachian Power court decisions have created uncertainty and confusion on the part of some source owners and operators, permitting authorities and citizens as to the scope of the title V monitoring requirements. The EPA also is undertaking this interim final rule and the related actions described below consistent with the defense of pending litigation, Utility Air

Regulatory Group v. EPA, No. 01-1204 (D.C. Cir.) (UARG)[6] While EPA has harmonized the NRDC and Appalachian Power decisions to clarify the title V monitoring requirements in the Pacificorp and Fort James orders, some industry representatives and others have maintained that EPA's understanding as stated in the orders is based on an overbroad reading of §§ 70.6(c)(1) and 71.6(c)(1). Under EPA's current title V regulations, these parties have asserted, §§ 70.6(c)(1) and 71.6(c)(1) cannot be read to require "sufficient" monitoring where 70.6(a)(3)(i)(B) or § 71.6(a)(3)(i)(B) does not apply (e.g., where the permit already contains some monitoring that can be considered "periodic" but that is not sufficient to assure compliance with the permit's terms and conditions) because §§ 70.6(c)(1) and 71.6(c)(1) as currently written expressly provide that monitoring sufficient to assure compliance be "[c]onsistent with [70.6(a)(3) or § 71.6(a)(3)]." In short, these parties interpret this prefatory language to mean that §§ 70.6(c)(1) and 71.6(c)(1) must have the same limited meaning as §§ 70.6(a)(3) and 71.6(a)(3), respectively, because "consistent with [§ 70.6(a)(3) or § 71.6(a)(3)]" means "identical to the scope and content of [§ 70.6(a)(3) or § 71.6(a)(3)]." Under this view, §§ 70.6(a)(3) and 71.6(a)(3) require that inadequate but "periodic" monitoring

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[6] The EPA's interpretation of §§ 70.6(c)(1) and 71.6(c)(1) as they are currently written has been challenged in litigation pending before the D.C. Circuit. Specifically, the Utility Air Regulatory Group (UARG) has sought judicial review of the interpretation set out by EPA in the Fort James order and restated in an "Instruction Manual" dated January 2001 that was posted on EPA's web site to assist those completing permit application forms under the part 71 federal operating permit program. Pursuant to section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1), UARG also has sought review of the final part 70 and part 71 regulations by alleging "grounds arising after" the time allowed for seeking judicial review. In its brief defending its current interpretation, EPA informed the court of its intention to issue this interim final rule and the companion proposed rule described below. See UARG.

must be accepted without enhancement.

The EPA disagrees with these assertions that the prefatory "consistent with" language limits the scope of §§ 70.6(c)(1) and 71.6(c)(1). Indeed, interpreting "consistent with" to mean "identical to" as some parties have suggested would render the second clause of §§ 70.6(c)(1) and 71.6(c)(1), which requires monitoring "sufficient to assure compliance," superfluous, and would imply that the NRDC court's discussion of § 70.6(c)(1) was redundant. By contrast, EPA has reasonably interpreted "consistent with" to mean "compatible with [§ 70.6(a)(3) or § 71.6(a)(3)]." Under EPA's interpretation, §§ 70.6(c)(1) and 71.6(c)(1) are separate sources of regulatory authority from §§ 70.6(a)(3) and 71.6(a)(3), and §§ 70.6(c)(1) and 71.6(c)(1) independently require that all monitoring in title V permits be sufficient to assure compliance with the permits' terms and conditions. As EPA explained in the Pacificorp and Fort James orders, EPA believes that the "consistent with" language means that the broadly applicable, but bare sufficiency provisions at § 70.6(c)(1) [or § 71.6(c)(1)] will be satisfied by compliance with the substantive monitoring requirements of § 70.6(a)(3)(i)(B) [or § 71.6(a)(3)(i)(B)] where the latter periodic monitoring provision applies. In other words, where § 70.6(a)(3)(i)(B) [or § 71.6(a)(3)(i)(B)] applies, its more specific requirements (e.g., reliable data from the relevant time period that are representative of the source's compliance) are deemed sufficient to assure compliance, and where § 70.6(a)(3)(i)(B) [or § 71.6(a)(3)(i)(B)] does not apply, the general sufficiency requirement at § 70.6(c)(1) [or § 71.6(c)(1)] comes into play. See Pacificorp at 18-19; Fort James at 9.

The EPA's interpretation of the prefatory "consistent with" language in §§ 70.6(c)(1)

and 71.6(c)(1) is a reasonable one and is indeed the better interpretation, because it gives meaning to the second clause of §§ 70.6(c)(1) and 71.6(c)(1), advances the statutory monitoring requirements, and harmonizes the NRDC and Appalachian Power decisions with each other. Nonetheless, EPA recognizes that further clarification through rulemaking would be useful. In addition, EPA has received numerous requests from permitting authorities and citizens requesting clarification of the title V monitoring requirements, including a letter from eighty-one environmental and public health organizations asking EPA to revise the part 70 regulations to address monitoring in light of the court's decision in Appalachian Power.

B. What Interim Final Revisions Are Being Made?

By promulgating this interim final rule, EPA is suspending, for sixty days, the underscored prefatory language to §§ 70.6(c)(1) and 71.6(c)(1) providing that all title V permits contain, "[c]onsistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." The suspension of the prefatory language will expressly uncouple the sufficiency monitoring provisions, §§ 70.6(c)(1) and 71.6(c)(1), from the periodic monitoring provisions, §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B), and make more clear the regulatory distinction between the two sets of provisions. Specifically, the suspension will clarify the respective scopes of the periodic monitoring and sufficiency monitoring provisions, eliminating any possible confusion under the current regulations as to when a title V permit must contain monitoring sufficient to assure compliance. The EPA notes that despite this suspension, EPA is retaining its interpretation, set forth in the Pacificorp and Fort James orders,

that where § 70.6(a)(3)(i)(B) or § 71.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of § 70.6(c)(1) or § 71.6(c)(1).

The suspension of the prefatory language codifies the understanding set forth in the Pacificorp and Fort James orders, where the Administrator characterized § 70.6(c)(1) as a "separate regulatory standard" from § 70.6(a)(3)(i)(B). The suspension is also consistent with the court's holding in NRDC that §§ 70.6(a)(3)(i)(B) and 70.6(c)(1) together ensure that a major source must undertake "monitoring ... sufficient to assure compliance" where the CAM rule or other more specific rules governing major sources do not require such monitoring. 194 F.3d at 136. Finally, the suspension is consistent with the court's decision in Appalachian Power, which, as noted above, did not construe § 70.6(c)(1). See 208 F.3d at 1027 n.26.

Under this interim final rule, the periodic monitoring and sufficiency monitoring provisions will work together as follows. Where an applicable requirement does not require any periodic testing or monitoring, permit conditions are required to establish "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Sections 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). In contrast, where the applicable requirement already requires "periodic" testing or monitoring but that monitoring is not sufficient to assure compliance, the separate regulatory standard at § 70.6(c)(1) or § 71.6(c)(1) applies instead to require monitoring "sufficient to assure compliance with the terms and conditions of the permit." Furthermore, where § 70.6(a)(3)(i)(B) or § 71.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of § 70.6(c)(1) or § 71.6(c)(1).

C. How Does This Interim Final Rule Affect the Scope of the Current Title V Monitoring Requirements?

This interim final rule does not affect the scope of the title V monitoring requirements as previously construed by the D.C. Circuit in NRDC and Appalachian Power, or as set forth in EPA's Pacificorp and Fort James orders. Rather, the purpose of this interim final rule is simply to clarify that under §§ 70.6(c)(1) and 71.6(c)(1), all title V permits must include monitoring sufficient to assure compliance with the permits' terms and conditions, as required by Act sections 504(a), 504(b), 504(c), and 114(a)(3). As stated above, the purpose is to eliminate any possible confusion about the scope of the sufficiency monitoring provisions at §§ 70.6(c)(1) and 71.6(c)(1) that may arise due to their prefatory references to the periodic monitoring provisions at §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B).

III. Related Actions

The EPA intends to conduct two additional rulemakings related to this interim final rule. First, elsewhere in today's Federal Register, EPA is proposing to revise §§ 70.6(c)(1) and 71.6(c)(1) to make the same changes as this interim final rule through an expedited notice-and-comment rulemaking process. The EPA is soliciting comments on that proposal. The EPA intends that the proposed changes would be promulgated as a final rule and would become effective when this interim final rule sunsets. In addition, EPA intends to initiate a second notice-and-comment rulemaking process to consider more comprehensively means of meeting the statutory monitoring requirements.

IV. Interim Final Rule

A. Need for an Interim Final Rule

The EPA is using the good cause exception under the Administrative Procedure Act (APA) to take the actions set forth in this interim final rule without prior notice and comment. See 5 U.S.C. 553(b)(3)(B). Section 553(b) of the APA generally requires that any rule to which it applies be issued only after the public has received notice of, and had an opportunity to comment on, the proposed rule. However, section 553(b)(3)(B) exempts from those requirements any rule for which the issuing agency for good cause finds that providing prior notice-and-comment would be impracticable, unnecessary, or contrary to the public interest. Thus, any rule for which EPA makes such a finding is exempt from the notice-and-comment requirements of section 553(b).

The EPA believes that the circumstances here provide good cause to take the actions set forth in this interim final rule without prior notice and comment, because providing prior notice and comment would be unnecessary and contrary to the public interest. In light of the short time period that this interim final rule will be in effect and the parallel, expedited notice-and-comment rulemaking to consider promulgating the same changes to §§ 70.6(c)(1) and 71.6(c)(1) as a final rule to provide clarification beyond the near term, EPA believes that soliciting public comment on this interim final rule is unnecessary. The public will have an opportunity to comment on the proposal for the parallel rulemaking, published elsewhere in today's issue of the Federal Register. Furthermore, EPA believes that soliciting public comment on this interim final rule would be contrary to the public interest because it is in the public interest to eliminate any possible confusion surrounding the scope of the sufficiency

monitoring provisions, §§ 70.6(c)(1) and 71.6(c)(1), as soon as possible given the importance of monitoring to carrying out title V's mandates that all title V permits assure compliance with all applicable requirements under the Act.

The EPA is also using the APA's good cause exception to make this interim final rule immediately effective. See 5 U.S.C. 553(d)(3). Section 553(d) of the APA generally provides that rules may not take effect earlier than 30 days after they are published in the Federal Register. However, section 553(d)(3) provides that if the issuing agency has made a finding of good cause and published its reasoning with the rule, the rule may take effect earlier. The EPA has determined that good cause exists to revise §§ 70.6(c)(1) and 71.6(c)(1) in this interim final rule without prior notice-and-comment, because prior notice-and-comment would be unnecessary and contrary to the public interest for the reasons stated above. Based on this determination, EPA is making this interim final rule immediately effective.

B. Scope of This Interim Final Rule

This interim final rule is limited to the removal of the prefatory phrase "[c]onsistent with paragraph (a)(3) of this section" from §§ 70.6(c)(1) and 71.6(c)(1) in order to clarify the scope of these provisions. This interim final rule does not address any other issues related to title V monitoring, such as the type of monitoring required under the periodic monitoring provisions, §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B), or under the sufficiency monitoring provisions, §§ 70.6(c)(1) and 71.6(c)(1). As indicated above, EPA is proposing elsewhere in today's Federal Register to revise §§ 70.6(c)(1) and 71.6(c)(1) to make the same changes as this interim final rule through an expedited notice-and-comment rulemaking process [insert citation

of related proposal published in the Federal Register]. The EPA is soliciting public comment on that proposal. The EPA expects to consider comments on other issues relating to title V monitoring during the comprehensive rulemaking that is also planned and described above.

V. Administrative Requirements

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more, adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety in State, local, or tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs of the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Under Executive Order 12866, it has been determined that this proposed rule is a "significant regulatory action" and is therefore subject to OMB review. Today's proposed rule raises important legal and policy issues associated with the court's decisions in Appalachian

Power and NRDC and EPA's adjudicatory orders in Pacificorp and Fort James. Therefore, this action is a "significant regulatory action."

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule that "includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more ... in any one year." A "Federal mandate" is defined to include a "Federal intergovernmental mandate" and a "Federal private sector mandate." [2 U.S.C. 658(6)]. A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or tribal governments," [2 U.S.C. 658(5)(A)(i)], except for, among other things, a duty that is "a condition of Federal assistance." [2 U.S.C. 658(5)(A)(i)(I)]. A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector," with certain exceptions [2 U.S.C. 658(7)(A)].

Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least-costly, most cost-effective, or least-burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply where they are

inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least-costly, most cost-effective, or least-burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, EPA must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined under the regulatory provisions of title II of the UMRA that this interim final rule does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Today's interim final rule imposes no new requirements but rather clarifies existing requirements. Because we have made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act (APA) or any other statute [see section IV.A. ("Need for an Interim Final Rule") of this preamble], and because it is merely intended to clarify existing requirements, it is not subject to sections 202 and 205 of the UMRA.

In addition, EPA has determined that this interim final contains no regulatory requirements that might significantly or uniquely affect small governments because it imposes no

new requirements and imposes no additional obligations beyond those of existing regulations. Therefore, today's interim final rule is not subject to the requirements of section 203 of the UMRA.

C. 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, or on the distribution of power and responsibilities among the various levels of government."

This interim 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. Today's rule will not impose any new requirements but rather will clarify existing requirements. Accordingly, it will not alter the overall relationship or distribution of powers between governments for the part 70 and part 71 operating permits programs. Thus, Executive Order 13132 does not apply to this interim final rule.

D. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of

regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This interim final rule does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's action does not significantly or uniquely affect the communities of Indian tribal governments. As discussed above, today's action imposes no new requirements that would impose compliance burdens beyond those that would already apply. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

E. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

Today's interim final rule is not subject to the RFA, which generally requires an agency to prepare a regulatory flexibility analysis of any rule that will have "a significant economic impact on a substantial number of small entities." The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because EPA is using the good cause exception under section 553(b)(3)(B) of the APA to take the

actions set forth in this interim final rule without prior notice and comment. See section IV.A., ("Need for an Interim Final Rule") of this preamble for more information on the good cause exemption cited for this interim final rule.

Although this interim final rule is not subject to the RFA, EPA has nonetheless has assessed the potential of this rule to adversely impact small entities subject to the rule and concluded that it will have no adverse impact on small entities because it adds no new requirements, and merely clarifies existing requirements.

F. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines is (1) "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risk, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This interim final rule is not subject to Executive Order 13045 because it is not "economically significant" under Executive Order

12866 and it does not establish an environmental standard intended to mitigate health and safety risks.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 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 bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The NTTAA does not apply to this interim final rule because it does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

H. Paperwork Reduction Act

This interim final rule does not impose any new information collection requirements beyond those already required under existing part 70 and part 71 rules. Therefore, revision to the existing information collection request documents for these rules is not required. The information collection requirements for parts 70 and 71 were previously approved by OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The existing ICR for part 70 is assigned ICR number 1587.05 and OMB number 2060-0243; for part 71,

the ICR number is 1713.04 and the OMB number is 2060-0336. A copy of these ICRs may be obtained by mail to: Director, Collection Strategies Division (2822), Office of Environmental Information, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. A copy may also be downloaded off the internet at http://www.epa.gov/icr.

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

This proposed rule is not a "significant energy action," as defined in to 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. As noted earlier, this action would simply clarify existing requirements and would not impose any new requirements, and thus would not affect the supply distribution, or use of energy.

J. Judicial Review

Section 307(b)(1) of the Act indicates which Federal Courts of Appeals have venue for petitions for review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the D. C. Circuit: (i) When the agency action consists of "national applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This interim final rule is of nationwide scope and effect for purposes of section

307(b)(1) because it revises EPA's part 70 and 71 operating permits programs. Thus, any petitions for review of this interim final rule must be filed in the D. C. Circuit within 60 days from [insert date of publication in the Federal Register].

K. Congressional Review Act

The Congressional Review Act (CRA), 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. Section 808 of the CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of [insert date of publication in the Federal Register]. See section IV.A. ("Need for an Interim Final Rule") of this preamble. The EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This interim final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 70

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

List of Subjects

40 CFR Part 71

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

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Dated: September 4, 2002

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Christine Todd Whitman, Administrator.

For the reasons set out in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 70 -- [Amended]

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

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

2. In § 70.6(c)(1) the phrase "[c]onsistent with paragraph (a)(3) of this section," is suspended.

* * * * *

PART 71 -- [Amended]

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

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

2. In § 71.6(c)(1) the phrase "[c]onsistent with paragraph (a)(3) of this section," is suspended.