Federal Register

Thursday,
January 22, 2004

Part II

Environmental Protection Agency

40 CFR Parts 70 and 71

Revisions To Clarify the Scope of Certain Monitoring Requirements for Federal and State Operating Permits Programs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[FRL–7612–5, E–Docket ID. No. OAR–2003–0179 (Legacy Docket ID No. A–90–50)]

RIN 2060–AK29

Revisions To Clarify the Scope of Certain Monitoring Requirements for Federal and State Operating Permits Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's action ratifies certain current language of the State and federal operating permits program rules under title V of the Clean Air Act (Act) concerning monitoring and declines to adopt the changes to the regulatory text of the monitoring rules that were proposed on September 17, 2002. Today EPA also announces a different interpretation of the ''umbrella monitoring'' rules (40 CFR 70.6(c)(1) and 71.6(c)(1)) from that set forth in the preamble to that proposal. Notwithstanding the recitation in the umbrella monitoring rules of monitoring as a permit element, EPA has determined that the correct interpretation of the umbrella monitoring rules is that they do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under separate provisions of the operating permits rules. As explained in this action, the umbrella monitoring rules do not provide a basis for adding monitoring to title V permits independent of monitoring required under existing federal air pollution control rules and State implementation plan (SIP) rules (*i.e.*, monitoring required under applicable requirements), including monitoring required under the compliance assurance monitoring (CAM) rule where it applies, and such monitoring as may be required under the periodic monitoring rules. Accordingly, EPA interprets the umbrella monitoring rules to require that title V permits contain monitoring required under applicable requirements, including monitoring required under the CAM rule where it applies, and such monitoring as may be required under the periodic monitoring rules. Together, such monitoring will constitute monitoring sufficient to assure compliance as required by the Act.

Today's action is the first step in a four-step strategy for considering programmatic improvements to existing monitoring where necessary through rulemaking while reducing resource-intensive, case-by-case monitoring reviews and so-called ''gap-filling'' in title V permits. In addition, EPA intends to encourage States to improve monitoring requirements in certain SIP rules through guidance to be developed in connection with a separate rulemaking concerning the implementation of the national ambient air quality standards (NAAQS) for fine particulate matter to be published in the near term. The EPA also intends to publish an advance notice of proposed rulemaking (ANPR) in the near term to ask for comments on inadequate monitoring in applicable requirements (in addition to any monitoring addressed in the fine particulate guidance and rulemaking) and on appropriate methods for upgrading such monitoring. Finally, EPA expects to conduct a separate notice and comment rulemaking to address what types of existing monitoring are ''periodic'' under the periodic monitoring rules, and when the periodic monitoring rules apply, what types of monitoring satisfy the monitoring criteria contained in the periodic monitoring rules.

Under the Act, EPA has discretion to implement the title V monitoring requirements through rulemakings or case-by-case permit reviews. Today, EPA is committing to exercise its discretion under the Act to require any necessary improvements to existing monitoring through rulemaking, except where the periodic monitoring rules authorize the case-by-case addition of monitoring to individual permits. The EPA's interpretation of the Act, its own regulations, recent Court decisions, and several policy considerations underlie this decision. EPA believes, as a matter of policy, that it will be less burdensome on State, local and tribal permitting authorities and on sources, and far more equitable and efficient, to require any necessary improvements in monitoring requirements through rulemakings to revise federal applicable requirements or SIP rules, rather than by requiring permitting authorities to conduct case-by-case sufficiency monitoring reviews of individual permits.

Furthermore, EPA has decided not to adopt the changes to the regulatory text of the umbrella monitoring rules that were proposed in September 2002. For various reasons, EPA also has determined that the correct interpretation of the umbrella monitoring rules is that they do not establish a separate regulatory standard or basis requiring or authorizing the review and enhancement of existing monitoring independent of such review and enhancement as may be required under different provisions of the operating permits program rules that specifically set forth permit content requirements for monitoring. Upon reflection, EPA now believes that the plain language of the umbrella monitoring rules indicates that they constitute ''umbrella provisions'' for monitoring that direct permitting authorities to include monitoring required under existing statutory and regulatory authorities in permits, and which include and gain meaning from the more specific requirements for monitoring set forth in different provisions of the rules. The policy considerations described in this preamble as relevant to EPA's exercise of its discretion under the Act also inform EPA's interpretation of the umbrella monitoring rules. Thus, the effect of today's action will be that the umbrella monitoring rules neither require nor authorize permitting authorities to create new monitoring in operating permits, apart from including in permits such monitoring as may be required under the periodic monitoring rules and under applicable requirements, including the CAM rule where it applies.

EFFECTIVE DATE: This final rule is effective on February 23, 2004.

ADDRESSES: *Docket.* Docket No. A–93–50 (Electronic Docket No. OAR–2003–0179), containing supporting information used to develop the proposed and final rules, is available for public inspection and copying between 8:00 a.m. and 4:30 p.m., Monday through Friday (except government holidays) at the Air and Radiation Docket (Air Docket) in the EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20004.

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, or electronic mail at *herring.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Are the Regulated Entities?

Categories and entities potentially affected by this action include facilities currently required to obtain title V permits under State, local, tribal, or

federal operating permits programs, and State, local, and tribal governments that issue such permits pursuant to approved part 70 programs.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* The EPA has established an official public docket for this action under Electronic Docket ID No. OAR–2003–0179 (Legacy Docket ID No. A–90–50). The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include confidential business information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of a portion of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. Interested persons may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Legacy Docket ID No. A–90–50 is the paper-based docket that is physically located in the EPA West Building in Washington D.C., while Electronic Docket (e-docket) ID No. OAR–2003–0179 is an electronic docket more recently created for internet access purposes during the course of this rulemaking (between the proposal and the final rule). In cases where the new e-dockets system was created during the course of a rulemaking, the EPA docket office has not routinely transferred all documents from the relevant conventional, paper dockets to the e-dockets, potentially creating disparities between the paper and e-dockets. The e-docket and the legacy dockets for this rulemaking contain the complete supporting materials for this rulemaking, however, each docket is not necessarily complete on its own. Due to this, interested persons should check both dockets for complete access to all supporting materials.

C. Where Can I Obtain Additional Information?

In addition to being available in the docket, an electronic copy of today's notice is also available on the World Wide Web through the Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of today's notice will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

D. How Is This Preamble Organized?

The information presented in this preamble is organized as follows:

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II. Background

Two provisions of EPA's State and federal operating permits program regulations require that title V permits contain monitoring requirements. The ''periodic monitoring'' rules, 40 CFR 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 title V 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) and § 71.6(a)(3)(i)(B)].

The ''umbrella monitoring'' rules, §§ 70.6(c)(1) and 71.6(c)(1), require that each title V 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.''

On September 17, 2002, EPA published a proposed rule (67 FR 58561) (the ''proposed rule'') to clarify the scope of the monitoring required in title V permits issued by State, local and

tribal permitting authorities or by EPA. Specifically, EPA proposed to remove the italicized 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,*'' monitoring ''sufficient to assure compliance with the terms and conditions of the permit.'' At that time, EPA proposed to clarify the interpretation that §§ 70.6(c)(1) and 71.6(c)(1) established a separate regulatory standard from that of the periodic monitoring rules. The EPA believed the proposed revisions were necessary to address claims of confusion on the part of some source owners and operators, permitting authorities and citizens as to the scope of the title V monitoring rules. However, as discussed below, EPA has decided not to adopt the proposed revisions based on EPA's reasonable interpretation of the Act, the plain language and structure of §§ 70.6(c)(1) and 71.6(c)(1), and the policy considerations discussed in this preamble.

III. What Does Today's Action Involve?

In today's final action, EPA declines to adopt the proposed revisions to the text of §§ 70.6(c)(1) and 71.6(c)(1) and instead ratifies the regulatory text as it is currently worded. The EPA also announces that the Agency has determined that notwithstanding the recitation in §§ 70.6(c)(1) and 71.6(c)(1) of monitoring as a permit element, the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that they do not provide a basis for requiring or authorizing review and enhancement of existing monitoring in title V permits independent of any review and enhancement as may be required under the periodic monitoring rules, the CAM rule (40 CFR part 64)(62 FR 54900, October 22, 1997) where it applies, and other applicable requirements under the Act, including, but not limited to, new source performance standards (NSPS), 40 CFR part 60, national emissions standards for hazardous air pollutants (NESHAP), 40 CFR part 61, acid rain program rules, 40 CFR parts 72 through 78, and SIP, tribal implementation plan (TIP) and federal implementation plan (FIP) rules approved by EPA under title I of the Act. Finally, EPA announces plans to address monitoring for purposes of title V in three separate actions.

A. Will the Regulatory Text of the Rules Change Under Today's Action?

The EPA has decided not to adopt the revisions to the regulatory text of §§ 70.6(c)(1) and 71.6(c)(1) which we proposed in September 2002. Instead, we are ratifying the regulatory text of those rules as it is currently worded. Under today's final action, the text of §§ 70.6(c)(1) and 71.6(c)(1) will continue to require, in relevant part, 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.'' Today's final action does not change any other regulatory text, as no other changes have been proposed.

B. What Is the Correct Interpretation of §§ 70.6(c)(1) and 71.6(c)(1)?

Notwithstanding the recitation in §§ 70.6(c)(1) and 71.6(c)(1) of monitoring as a permit element, EPA has determined that the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3). Thus, §§ 70.6(c)(1) and 71.6(c)(1) require that title V permits contain the following types of monitoring: (1) Monitoring required by ''applicable requirements'' under the Act as that term is defined in § 70.2, including, but not limited to, monitoring required under the CAM rule, where it applies, monitoring required under federal rules such as NSPS, NESHAP, maximum achievable control technology (MACT) standards, 40 CFR part 63, acid rain rules, and SIP, TIP and FIP rules; and (2) such monitoring as may be required under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). *See Appalachian Power Co.* v. *EPA,* 208 F.3d 1015 (D.C. Cir. 2000) (*Appalachian Power*). Thus, for monitoring, §§ 70.6(c)(1) and 71.6(c)(1) constitute ''umbrella provisions'' that direct permitting authorities to include monitoring required under existing statutory or regulatory authorities in title V permits. Based on EPA's interpretation of the Act, the plain language and structure of §§ 70.6(c)(1) and 71.6(c)(1) and the policy considerations described in section IV of this preamble, EPA has determined that where the periodic monitoring rules do not apply, §§ 70.6(c)(1) and 71.6(c)(1) do not require or authorize a new and independent type of monitoring in permits in order for the permits to contain monitoring to assure compliance as required by the Act.

C. What Related Rulemaking Actions Are Planned?

Today's action is the first in a four-step strategy for improving existing monitoring where necessary through rulemaking actions while reducing resource-intensive, case-by-case monitoring reviews and ''gap-filling'' in title V permits. The EPA plans to undertake three related actions in the near future.

First, EPA plans to encourage States to improve possibly inadequate monitoring in certain SIP rules. Specifically, EPA plans to address such monitoring in guidance to be developed in connection with an upcoming rulemaking concerning the implementation of the NAAQS for fine particulate matter (particulate matter with an aerodynamic diameter of less than 2.5 micrometers, or PM 2.5). The primary purpose of the proposed PM 2.5 implementation rule will be to describe the requirements that States and tribes have to meet in order to implement the PM 2.5 NAAQS. Because opacity and particulate monitoring are related to compliance with particulate matter standards, one part of this proposal will address EPA's plans to develop guidance on how States can reduce PM 2.5 emissions by improving source monitoring related to particulate matter emission limits. This may include increasing the frequency of existing opacity monitoring, adding monitoring for parameters of a control device, installing continuous particulate emissions monitoring, or a combination of the above.

Second, EPA plans to identify and consider improving possibly inadequate monitoring in certain federal rules or monitoring in SIP rules not addressed in connection with the PM 2.5 implementation guidance or rulemaking over a longer time frame. To initiate this process, we intend to publish an ANPR requesting comment on what inadequate monitoring may exist in federal applicable requirements and seeking suggestions as to the ways in which inadequate monitoring in such rules could be improved. We further intend to request comment on inadequate monitoring that may exist in other rules, such as SIP rules not addressed in the PM 2.5 implementation rule. Implementation of this second step should substantially strengthen our efforts to assure compliance with applicable standards. Comments received on the ANPR will inform EPA's decision as to what steps to take next. Next steps may include national rulemakings to revise federal rules such as NSPS or NESHAP, or issuance of

guidance or SIP calls directing States to correct deficient monitoring in certain SIP rules.

Third, EPA plans to publish a separate proposed rule to address what monitoring constitutes ''periodic'' monitoring under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). As part of this separate proposed rule, we also intend to address what types of monitoring should be created under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). Many commenters on the proposed rule raised concerns over a lack of definitive guidance on this question, primarily due to the fact that EPA has not issued any such guidance since the Appalachian Power court set aside the Agency's 1998 ''Periodic Monitoring Guidance.''[1]

IV. What Is the Policy Rationale for Today's Action?

Several considerations—many of which were raised in comments on the proposed rule—motivate our decision to pursue an approach to title V monitoring that will achieve necessary improvements in monitoring primarily through national rulemakings or guidance for States to revise their SIP rules. We believe this approach will achieve a better balance of responsibilities and resource burdens between the States and EPA, than by case-by-case monitoring reviews by the permitting authorities under §§ 70.6(c)(1) and 71.6(c)(1).

First, today's approach will better balance the responsibilities of States and other permitting authorities and EPA to improve monitoring where necessary to ensure that the Act's monitoring requirements are met. Under the interpretation in the proposed rule, permitting authorities would perform case-by-case monitoring reviews of individual title V permits under §§ 70.6(c)(1) and 71.6(c)(1), which in turn would place many significant burdens on State, local, and tribal permitting authorities charged with implementing §§ 70.6(c)(1) and 71.6(c)(1). EPA and permitting authorities have some experience with such an approach. For each draft title V permit, permitting authorities performed such monitoring reviews with respect to virtually every permit term or condition and determined, generally without any definitive, national EPA guidance, whether the existing monitoring was sufficient to assure compliance with such terms and conditions. The complex industrial sources and other sources subject to title V are subject to numerous applicable requirements and their draft permits contain numerous terms and conditions, which means that such reviews are time-consuming. In addition, the reviews demand permit writers with highly technical expertise. Where permit writers determined that §§ 70.6(c)(1) and 71.6(c)(1) applied because existing monitoring would not assure compliance, permit writers also determined what monitoring to include in permits to assure compliance with the permits' terms and conditions. Thus, these States and other permitting authorities found themselves in the awkward position of reviewing existing monitoring for sufficiency under §§ 70.6(c)(1) and 71.6(c)(1) before EPA clearly indicated what monitoring was insufficient and then creating new monitoring in permits under those provisions before EPA explained what types of monitoring would satisfy the statutory and regulatory requirements. Over the years, some permitting authorities have attributed delays in permit issuance to their efforts to develop monitoring for permits on a case-by-case basis.

These concerns are reflected in the comments received on the proposed rule from State and local permitting authorities. (See more detailed EPA responses to all significant comments raised on the proposal below, and in a separate document placed in the docket.) Two representatives of State and local permitting authorities commented on the proposal, they both disagreed with the proposed rule's overall approach for monitoring, and they both noted either significant concerns or burdens that they perceived in implementing it. One cited the burdens of conducting sufficiency reviews and adding new monitoring to permits in more cases than they thought were appropriate or were required by the Act. The commenter also indicated that such monitoring would likely result in more arbitrary and less consistent monitoring from permit to permit and make permit issuance more difficult. Another State commenter did not understand specifically what States would be required to do to implement the proposal, if it were to be adopted as a final rule. Neither of the State or local commenters filed comments that could be interpreted as adverse to the approach of today's final rule. In addition, other commenters indicated that the proposed rule's approach would lead to increased burdens on States.

Thus, we now are convinced that requiring States and other permitting authorities to assess the adequacy of all existing monitoring, and, as necessary, to upgrade monitoring through the title V permitting process would place a significant, unmanageable and unnecessary burden on those permitting authorities.

Similarly, we are convinced that requiring sufficiency reviews under §§ 70.6(c)(1) and 71.6(c)(1) places undue burdens on title V sources. Many commenters disagreed with the proposed rule's approach to monitoring and cited numerous examples of how it would lead to increased burdens not only on States but also on sources. For instance, commenters claimed that it would delay permit issuance and renewals, represent an inefficient use of State resources, and promote ''forum shopping'' by sources, resulting in inequities among similarly-situated sources in different jurisdictions or even within the same jurisdiction.

Furthermore, under the proposal, the State permit writers were given no guidance as to how to set these monitoring requirements, as commenters pointed out. Using rulemaking to revise monitoring requirements will assure that the new monitoring requirements are adopted in the same manner as the originally promulgated standards. That original promulgation included a determination that the standards were achievable assuming the specified control technologies. Commenters expressed concern that the proposed rule would illegally increase the stringency of underlying emission standards and limitations because it would require new averaging periods or change other compliance methods when added to the permit. Similar issues were raised in *Appalachian Power.* Ratifying the current regulatory language eliminates any possible problem in this regard under §§ 70.6(c)(1) and 71.6(c)(1).

In addition to reducing burdens on title V permitting authorities and sources, today's action offers several other advantages over the proposed rule's approach. We believe it is a far better and more efficient approach from a resource standpoint to focus primarily on reviewing the adequacy of existing monitoring requirements on a programmatic basis and to accomplish needed upgrades through federal, State, or local rulemaking. Programmatic ''fixes'' to monitoring in applicable requirements made through national or State rulemakings will address potential inadequacies in existing monitoring requirements in the first instance. Thus, there will be no need to resort to more resource-intensive, case-by-case sufficiency reviews to supplement existing monitoring under §§ 70.6(c)(1)

[1] ''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.

and 71.6(c)(1) during permit proceedings.

The final rule also is likely to result in greater consistency in monitoring requirements included in permits, both within States and nationally. When inadequate monitoring is improved through rulemaking at the national or State level, the improved monitoring can be incorporated into title V permits with little, if any, source-specific tailoring, thereby eliminating some of the variations in monitoring determinations inherent in case-by-case reviews. Under the proposed rule's approach, such variations may have resulted from permitting authorities' different policies on what monitoring to add to permits, from variations in engineering judgment among permit writers, and from complex source-specific factors. More consistent monitoring requirements in permits nationally should help to eliminate some of the concern over forum shopping pointed out by the commenters, as well as concerns about potential inequities in monitoring amongst similarly-situated sources in different jurisdictions.

In addition, we expect that today's approach is likely to result in broader public input into monitoring decisions than is possible during individual permit proceedings. This is so because formal rulemaking procedures involve an opportunity for public comment and a hearing that may attract a larger national or State audience of individuals more interested in consistent outcomes and perhaps more knowledgeable about technical issues specific to the source categories or applicable requirements that are the subject of the rulemaking. Moreover, the final rules are more likely than individual permit proceedings to result in better consideration of potential economic impacts. Statutory or regulatory provisions or Executive Orders requiring detailed consideration of economic impacts or other burdens imposed by various types of monitoring may apply to federal or State rulemakings; such consideration is not required in individual permit proceedings. Thus, compared to the proposed rule's approach, this approach has the added benefit of providing a greater degree of clarity and the opportunity for a wider interested public to influence decisions concerning the adequacy of monitoring and efforts to accomplish upgrades.

Finally, commenters expressed concern about the statutory underpinnings of sufficiency monitoring under §§ 70.6(c)(1) and 71.6(c)(1) along the lines of the D.C. Circuit's observation in *Appalachian Power* that the approach to sufficiency monitoring described in the Periodic Monitoring Guidance ''raises serious issues, not the least of which is whether EPA possesses the authority it now purports to delegate.'' 208 F.3d at 1026. Adopting this final rule will eliminate possible concern in this regard.

For all of these reasons, we believe today's approach will better balance the roles and responsibilities of States and other permitting authorities, on the one hand, and EPA, on the other, to improve the monitoring required of title V sources where necessary to ensure that the Act's title V monitoring requirements are met.

V. What Is the Legal Basis for Today's Action?

The Act provides EPA with broad discretion to decide how to implement the title V monitoring requirements. In the past, EPA has exercised that discretion in part by requiring permitting authorities to conduct case-by-case monitoring reviews under §§ 70.6(c)(1) and 71.6(c)(1) and, where necessary to assure compliance, to add monitoring pursuant to those provisions prior to issuing, renewing, reopening, or revising title V operating permits. The EPA also has established monitoring requirements under national rules, such as the CAM rule and the continuous emission monitoring rule under the acid rain program (40 CFR part 75). Based on comments received on the proposed rule and as a matter of policy (see section IV of this preamble), EPA now believes that it is not appropriate to exercise our discretion under the statute to require case-by-case monitoring reviews under §§ 70.6(c)(1) and 71.6(c)(1). The EPA believes that improving the monitoring required of title V sources by conducting rulemakings to revise federal standards that contain inadequate monitoring and/or by encouraging States to revise SIP rules that contain inadequate monitoring will better balance the responsibilities of EPA and States and other permitting authorities and will result in more equitable and more efficient monitoring decisions.

Accordingly, EPA has decided not to adopt the proposed rule, which would have removed the prefatory phrase, ''[c]onsistent with paragraph (a)(3) of this section,'' from the regulatory text of §§ 70.6(c)(1) and 71.6(c)(1). See 67 FR 58561. Rather, EPA has decided to leave the regulatory text as it stands and to issue what EPA now believes to be the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1). Specifically, EPA has determined that notwithstanding the recitation in §§ 70.6(c)(1) and 71.6(c)(1) of monitoring as a permit element, the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3).

Various factors have prompted EPA's decision regarding §§ 70.6(c)(1) and 71.6(c)(1). Significantly, upon reflection, EPA believes that the plain language of §§ 70.6(c)(1) and 71.6(c)(1), which begins with the phrase ''[c]onsistent with'' §§ 70.6(a)(3) and 71.6(a)(3), indicates that §§ 70.6(c)(1) and 71.6(c)(1) serve as ''umbrella provisions'' for monitoring which include and gain meaning from the more specific monitoring requirements in §§ 70.6(a)(3) and 71.6(a)(3). Both §§ 70.6(c)(1) and 71.6(c)(1) provide only that permits contain ''monitoring * * * requirements sufficient to assure compliance with the terms and conditions of the permit.'' Read in isolation, this general language does not provide any indication of what type or frequency of monitoring is required. Yet, for monitoring, §§ 70.6(c)(1) and 71.6(c)(1) take on practical meaning when they are read together with the more detailed periodic monitoring rules, which specify that periodic monitoring must be ''sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit,'' or with other provisions of §§ 70.6(a)(3) and 71.6(a)(3).[2] Thus, the plain language and structure of §§ 70.6(c)(1) and 71.6(c)(1) and the periodic monitoring rules show that §§ 70.6(c)(1) and 71.6(c)(1) are correctly interpreted on their face as umbrella provisions.

In addition, the policy considerations discussed in section IV of this preamble support EPA's determination that today's interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is the correct one. In sum, today's approach will better balance the responsibilities of States and other permitting authorities and EPA to improve monitoring where necessary to ensure that the Act's monitoring

[2] For instance, each permit must contain, with respect to monitoring: (1) ''[a]ll monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including [the CAM rule] and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) and 504(b) of the Act,'' *see* §§ 70.6(a)(3)(i)(A) and 71.6(a)(3)(i)(A); and (2) ''[a]s necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.'' §§ 70.6(a)(3)(i)(C) and 71.6(a)(3)(i)(C).

requirements are met. Compared to the proposed rule's approach, today's approach also will reduce burdens on title V sources, be more efficient from a resource standpoint, result in more equitable monitoring decisions, and allow for wider, more expert public input into monitoring decisions.

Today's interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is consistent with EPA's authority under the Act. In title V, Congress granted EPA broad discretion to decide how to implement the title V monitoring requirements, as well as the ''enhanced monitoring'' requirement of section 114(a)(3) of the Act.[3] Two provisions of title V specifically address rulemaking concerning monitoring. First, section 502(b)(2) of the Act requires EPA to promulgate regulations establishing minimum requirements for operating permit programs, including ''[m]onitoring and reporting requirements.'' 42 U.S.C. 7661a(b)(2). Second, section 504(b) authorizes EPA to prescribe ''procedures and methods'' for monitoring ''by rule.'' 42 U.S.C. 7661c(b). Section 504(b) provides: ''The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. * * *'' (Emphasis added.) Id.

Other provisions of title V refer to the monitoring required in individual operating permits. Section 504(c) of the Act, which contains the most detailed statutory language concerning monitoring, requires that ''[e]ach [title V 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(c) further specifies that ''[s]uch monitoring and reporting requirements shall conform to any applicable regulation under [section 504(b)]. * * *'' Id. Section 504(a) more generally requires that ''[e]ach [title V permit] shall include enforceable emission 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.'' 42 U.S.C. 7661c(a).

Thus, title V clearly authorizes the Agency to require improvements to the existing monitoring required by applicable requirements in at least two ways. Under the statute, the Agency may require case-by-case monitoring reviews as described in the proposed rule. Alternatively, the Agency may achieve any improvements to monitoring through Federal or State rulemakings to amend the monitoring provisions of applicable requirements themselves; then permitting authorities can simply incorporate the amended monitoring requirements into title V permits without engaging in case-by-case monitoring reviews under §§ 70.6(c)(1) and 71.6(c)(1) on a permit-specific basis. The EPA believes that the latter approach correctly reflects the plain language of §§ 70.6(c)(1) and 71.6(c)(1), is responsive to the majority of public comments received on the proposed rule, and gives effect to the policy considerations discussed in this preamble. Thus, we are exercising our discretion under the Act to no longer require case-by-case monitoring reviews under §§ 70.6(c)(1) and 71.6(c)(1) and instead to proceed with related rulemaking actions to address monitoring in applicable requirements.

The four-step approach outlined today will ensure that the Act's monitoring requirements will be met. First, our new emphasis on establishing monitoring requirements through rulemaking gives full effect to section 504(b) of the Act, which provides that ''[t]he Administrator may *by rule* prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants * * *'' 42 U.S.C. 7661c(b) (emphasis added). Today's approach also ensures that section 504(c)'s command that each title V permit ''set forth * * * monitoring * * * to assure compliance with the permit terms and conditions'' will be satisfied through the combination of EPA and, as necessary, State rulemakings to address monitoring, and the addition to permits of such monitoring as may be required under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). See 42 U.S.C. 7661c(c). Satisfying the specific monitoring requirements of section 504(c) will assure that the more general requirements of section 504(a) are satisfied as to monitoring.

The EPA anticipates that some existing monitoring required under applicable requirements could be improved and will be addressed in connection with both the upcoming PM 2.5 implementation rulemaking and the ANPR process described above. The EPA also plans to address the periodic monitoring rules in a separate rulemaking. Nevertheless, EPA believes the four-step strategy outlined today is well designed to assure that for purposes of title V, permits will contain monitoring to assure compliance.

VI. What Comments Were Received on the Proposed Rule and What Are EPA's Responses?

This section of the preamble provides EPA's responses to significant issues raised by commenters on the proposed rule. A more comprehensive document addressing these and other issues raised by commenters will be placed in the docket prior to promulgation of today's final rule.

A. Does the Rulemaking Record Support Separate Authority for Monitoring Review and Enhancement Under §§ 70.6(c)(1) and 71.6(c)(1)?

Many commenters were concerned that there was nothing in the part 70, part 71, or CAM rulemaking records to indicate that § 70.6(c)(1) was originally intended to provide a separate and independent regulatory standard, in addition to the periodic monitoring requirements under § 70.6(a)(3)(i)(B), to enhance existing monitoring in applicable requirements, or enhance periodic monitoring already created in part 70 permits. Instead, the commenters stated, the preamble to the original part 70 final rule (57 FR 32250, July 21, 1992) said monitoring enhancement was being implemented solely through § 70.6(a)(3), and that permitting authorities may enhance existing monitoring only where an applicable requirement failed to require monitoring that was periodic.

For the reasons set forth in sections IV and V of this preamble, today's action makes clear that §§ 70.6(c)(1) and 71.6(c)(1) do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring, independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3). Rather, for monitoring, §§ 70.6(c)(1) and 71.6(c)(1) act as ''umbrella provisions'' that direct permitting authorities to include in title V permits monitoring required under existing statutory and regulatory authorities. Thus, we are not adopting the proposed revision to the text of §§ 70.6(c)(1) and 71.6(c)(1). In light of today's action, we do not believe it is necessary to address the referenced rulemaking records as they may relate to the proposed rule.

[3] Section 114(a)(3) of the Act provides that ''[t]he Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, require enhanced monitoring and submission of compliance certifications.'' 42 U.S.C. 7414(a)(3).

B. May New Monitoring Be Established in Permits Without Further Rulemaking?

Many commenters opined that EPA must conduct notice-and-comment rulemaking, consistent with section 504(b) of the Act, to upgrade monitoring in applicable requirements, using the same procedures and criteria that were used to set the original standards. They reasoned that upgrading monitoring on a permit-by-permit basis is illegal because it is arbitrary and capricious and an unlawful delegation of regulatory authority not explicitly allowed by section 504(b) of the Act, which requires new monitoring to be imposed only by rule. In addition, they believe adding new monitoring under § 70.6(c)(1) would revise the emission standards in violation of section 307(d)(1)(C) of the Act, which requires separate rulemaking to revise emission standards.

In response to these comments, it appears that this issue need not be addressed in this action because EPA has committed to exercise its discretion under the Act to pursue rulemaking to improve existing monitoring requirements, as opposed to case-by-case monitoring reviews under §§ 70.6(c)(1) and 71.6(c)(1). Nonetheless, as explained elsewhere in this preamble, EPA believes that the Act authorizes it to meet the title V monitoring requirements by requiring permitting authorities to add monitoring to permits on a case-by-case basis or by pursuing rulemaking to improve monitoring requirements in Federal or State applicable requirements.

As for the comments that the proposal to upgrade monitoring on a permit-by-permit basis was arbitrary and capricious, was an unlawful delegation of regulatory authority not explicitly allowed by section 504(b) of the Act, and would revise emission standards in violation of section 307(d)(1)(C) of the Act, EPA believes it is not necessary to respond to these comments because we have decided not to adopt the proposed changes to the regulatory text of §§ 70.6(c)(1) and 71.6(c)(1) and we have determined that the correct interpretation of those provisions is that they do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3). To the extent the comments could be read to raise the concerns listed above with respect to the upgrading of monitoring under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B), EPA notes that these issues were beyond the scope of this rulemaking and were not opened for comment.

C. Was the Proposal Inconsistent With the Appalachian Power and NRDC Decisions?

Many commenters believed that the proposed rule was inconsistent with the *Appalachian Power* decision because they believed the court found that part 70 does not authorize sufficiency reviews or upgrading of existing periodic monitoring and that rulemaking is required to amend inadequate monitoring in applicable requirements. Likewise, many commenters maintained that the proposal was inconsistent with the D.C. Circuit's decision in *Natural Resources Defense Council* v. *EPA,* 194 F.3d 130 (D.C. Cir. 1999) (*NRDC*), because they said that the court did not opine as to the meaning of ''sufficient monitoring,'' refer to two separate regulatory standards for monitoring (periodic monitoring and monitoring under §§ 70.6(c)(1) and 71.6(c)(1)), or suggest that part 70 requires monitoring beyond CAM.

We believe it is not necessary to respond to these comments because EPA is not adopting the proposed revisions to the text of §§ 70.6(c)(1) and 71.6(c)(1), and because EPA has determined that the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3).

D. Does § 70.1(b) Prohibit Monitoring Enhancement in Permits?

Several commenters stated that they believed that § 70.1(b) and the Act do not allow substantive new requirements, such as monitoring, to be added to permits. Section 70.1(b) provides: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require * * * that certain procedural measures be adopted especially with respect to compliance.''

The Act expressly requires that permits contain ''conditions as are necessary to assure compliance with applicable requirements'' and in particular ''monitoring * * * to assure compliance with the permit terms and conditions.'' 42 U.S.C. 7661c(a), 7661c(c); *see* 42 U.S.C. 7661a(b)(5)(A) (requiring that title V permitting authorities have adequate authority to ''issue permits and assure compliance by all [title V sources] with each applicable standard, regulation or requirement under this chapter''). The court in *Appalachian Power* recognized that certain monitoring requirements may be added to title V permits in some circumstances, *see* 208 F.3d at 1028, and the plain language of § 70.1(b) is not a bar to the addition of monitoring to permits under §§ 70.6(a)(3) and 71.6(a)(3). At the same time, EPA has determined that the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3). To the extent the comments could be read to refer to the addition of monitoring to permits under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B), we believe it is not necessary to respond, because that issue is beyond the scope of this rulemaking and was not opened for comment.

E. How Stringent Was Monitoring Under §§ 70.6(c)(1) and 71.6(c)(1) in the Proposal?

Several commenters were concerned that the proposed revisions to the text of §§ 70.6(c)(1) and 71.6(c)(1) would result in the elimination of the Act's requirement for ''reasonable monitoring.'' The commenters asserted that the current standard for monitoring and certifying compliance in title V permits is ''a reasonable assurance of compliance, quantified by the exercise of good and accepted science, which is the same standard used by CAM.'' The commenters further asserted that the proposed rule would change the monitoring standard to an ''absolute assurance of compliance,'' which could only be achieved by stringent and expensive direct monitoring techniques, such as continuous emissions monitoring systems (CEMS).

EPA responds by noting that the proposed rule made no statements regarding either an ''absolute assurance of compliance'' or a ''reasonable assurance of compliance'' as the standard for monitoring and/or for certifying compliance in title V permits. Nor does today's final rule. The proposed rule made clear that its scope was narrow. The EPA stated in the preamble: ''This proposed 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

proposed 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 * * * §§ 70.6(c)(1) and 71.6(c)(1).'' (67 FR 58561, 58565, September 17, 2002). Consistent with this statement, EPA does not address the issues raised by the commenters here. As noted in sections III.C. and VII. of this preamble, however, EPA plans to address criteria for use in determining how to fill a ''gap'' in a separate proposed rule.

F. Does New Monitoring in Permits Increase the Stringency of Existing Standards?

Many commenters opined that the proposed rule would illegally increase the stringency of underlying emission standards and limitations because it would require new averaging periods or change other compliance methods when added to the permit.

Today's action will not require or authorize the addition of monitoring to permits under §§ 70.6(c)(1) and 71.6(c)(1). To the extent the comments concern the addition of monitoring to permits under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B), we believe it is not necessary to respond because that issue is beyond the scope of this rulemaking and was not reopened for comment. The proposed rule was 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). (67 FR 58561, 58565, September 17, 2002).

G. Did the Proposed Rule Require Direct Proof of Violations?

Several commenters stated that the proposal required monitoring data derived from monitoring conducted pursuant to §§ 70.6(c)(1) and 71.6(c)(1) to be used as direct proof of violations in enforcement actions, without consideration of other credible evidence or the totality of circumstances.

The proposed rule was 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) and did not address any other issues related to title V monitoring (67 FR 58561, 58565, September 17, 2002). The EPA did not explicitly or implicitly seek comment on the use of monitoring data in enforcement actions or the consideration of other credible evidence. Those issues were resolved in the credible evidence rule (62 FR 8313, February 24, 1997), and they were not reopened in this rulemaking. The credible evidence rule ''[did] not designate any particular data as probative of a violation of an emission standard'' but rather eliminated language in 40 CFR parts 51, 52, 60 and 61 that ''some [had] construed to be a regulatory bar to the admission of non-reference test data [such as other monitoring data] to prove a violation of an emission standard* * *.'' 62 FR at 8314. Thus, the credible evidence rule clarified that non-reference test data can be used in enforcement actions and that in addition to reference test data, ''other material information that indicates that an emission unit has experienced deviations * * * or may otherwise be out of compliance with an applicable requirement even though the unit's permit-identified data indicates compliance'' must be considered in compliance certifications under title V of the Act. 62 FR at 8320. The credible evidence rule thereby ''eliminate[d] any potential ambiguity regarding the use of non-reference test data as a basis for [t]itle V compliance certifications.'' 62 FR at 8314; *see* 42 U.S.C. 7413(c)(2). The September 17, 2002 proposed rule made no statements inconsistent with the credible evidence rule, such as to require title V monitoring data to be considered direct proof of a violation. Similarly, today's final rule makes no statements inconsistent with the credible evidence rule, nor does it revise part 70 or part 71 to that effect. Thus, the proposed rule did not reopen these issues for comment, and today's action does not change the credible evidence rule. Finally, to the extent that an applicable requirement provides that certain monitoring methods constitute direct evidence of violations, title V rules would not affect that requirement.

H. Did the Proposed Rule Meet All Administrative Rulemaking Requirements?

Many commenters alleged that the proposed rule was not a proper rulemaking under the Act or the Administrative Procedure Act (APA) because it would have made substantive changes to §§ 70.6(c)(1) and 71.6(c)(1) without adequate notice, explanation, or justification. In addition, many of these same commenters thought the requirements of the Unfunded Mandates Reform Act (UMRA), the Regulatory Flexibility Act (RFA), and the Paperwork Reduction Act (PRA) were not met, and that the Regulatory Impact Analysis (RIA) and the Information Collection Request (ICR) did not adequately reflect the true costs of the proposal.

The EPA disagrees that the proposed rule was not a proper rulemaking. The proposed rule, which was published in the **Federal Register** for a 30-day public comment period, satisfied the rulemaking requirements of the APA and the Act. In accordance with those requirements, the reasons for the proposed revision to the text of §§ 70.6(c)(1) and 71.6(c)(1) were set forth in the preamble. However, in that EPA has decided not to adopt the proposed revision and has determined that the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1) is different from that set forth in the proposed rule, EPA believes it is not necessary to respond to the commenters' specific assertions. Section VIII of this preamble, ''Statutory and Executive Order Reviews,'' describes how today's final rule meets the administrative requirements that the commenters identified.

VII. What Other Related Actions Are Planned Under Today's Approach?

As stated above, today's action is the first step in a four-step strategy we expect will result in a better approach for meeting the Act's monitoring requirements than that reflected in the proposed rule. In the near future, EPA intends to address additional issues related to title V monitoring in two separate proposed rules and in an ANPR. First, EPA plans to encourage States to improve inadequate monitoring in certain SIP rules in guidance to be developed in connection with an upcoming rule, the PM 2.5 implementation rule, which primarily will address the implementation of the NAAQS for PM 2.5. We intend to use the PM 2.5 implementation rulemaking as a vehicle for addressing monitoring in certain SIP rules, because particulate and opacity monitoring are related to compliance with particulate matter emission limits. Second, over a longer time frame, EPA plans to identify and consider improving possibly inadequate monitoring in certain federal rules or in SIP rules not addressed in the proposed PM 2.5 implementation rule. In the near term, EPA expects to initiate this process by publishing an ANPR requesting comments to identify inadequate monitoring requirements in federal applicable requirements and State SIP rules (in addition to those requirements addressed in the proposed PM 2.5 implementation rule) and seeking suggestions as to the ways in which inadequate monitoring in such rules could be improved. Third, in a separate proposed rule, EPA plans to address two issues related to title V monitoring. First, EPA plans to address what monitoring constitutes ''periodic'' monitoring under §§ 70.6(a)(3)(i)(B) and

71.6(a)(3)(i)(B). The EPA also plans to address what types of monitoring should be created under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B).

VIII. Statutory and Executive Order Reviews

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 rule is a ''significant regulatory action'' because it raises important legal and policy issues. As such, this rule was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. In section V.A. of the proposal (*see* 67 FR 58565) we stated that we would perform a regulatory impact analysis prior to promulgation of the final rule. While the proposal arguably may have led to increased economic burdens, the final rule clearly does not because it does not adopt the proposed revisions to the regulatory text and it announces a different interpretation of §§ 70.6(c)(1) and 71.6(c)(1). In the event EPA proposes to revise monitoring requirements in other federal rules in future rulemaking actions, those actions will consider economic impacts as necessary. Thus, the final rule does not impose any burdens and therefore a detailed economic analysis is unnecessary.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. It does not adopt the proposed revision to the text of §§ 70.6(c)(1) and 71.6(c)(1). It merely states that notwithstanding the recitation in §§ 70.6(c)(1) and 71.6(c)(1) of monitoring as a permit element, these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under §§ 70.6(a)(3) and 71.6(a)(3). However, the information collection requirements in the existing regulations (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 EPA ICR number 1587.05 and OMB control number 2060–0243; for part 71, the EPA ICR number is 1713.04 and the OMB control number is 2060–0336. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20004 or by calling (202) 566–1672. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. 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.

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

The RFA generally requires an Agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment requirements 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 not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found in 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, country, 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. We determined and hereby certify this final rule will not have a significant economic impact on a substantial number of small entities. The originally promulgated part 70 and part 71 rules included the text of §§ 70.6(c)(1) and 71.6(c)(1), and this final rule does not revise that text. Moreover, any burdens associated with the interpretation of §§ 70.6(c)(1) and 71.6(c)(1) announced today are less than those associated with the interpretation under the proposed rule and previously enunciated by the Agency. Thus, today's final rule adds no burdens for any small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (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, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. 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.

Today's rule contains no federal mandates under the regulatory provisions of title II of the UMRA for State, local, or tribal governments or the private sector. Today's final rule imposes no enforceable duty on any State, local or tribal governments or the private sector. Rather, EPA merely states that §§ 70.6(c)(1) and 71.6(c)(1) do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement as may be required under the periodic monitoring rules, §§ 70.6(a)(3) and 71.6(a)(3). Therefore, today's action is not subject to the requirements of sections 202 and 205 of the UMRA.

In addition, EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. Today EPA sets out the correct interpretation of §§ 70.6(c)(1) and 71.6(c)(1), which is that they do not require or authorize title V permitting authorities—including any small governments that may be such permitting authorities—to conduct reviews and provide enhancement of existing monitoring through case-by-case monitoring reviews of individual permits under §§ 70.6(c)(1) and 71.6(c)(1). Therefore, today's final rule is not subject to the requirements of section 203 of the UMRA.

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, 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. Today's rule will not impose any new 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 final rule.

F. 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 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.

G. 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: (1) Is determined to be ''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 risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule 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 Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This final rule 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 declines to adopt the proposed revisions to the text of §§ 70.6(c)(1) and 71.6(c)(1) and states that these provisions do not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement of monitoring as may be required under §§ 70.6(a)(3) and 71.6(a)(3). Further, we have concluded that this rule is not likely to have any adverse energy effects.

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, section 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.

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

J. 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. We 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 February 23, 2004.

Dated: January 15, 2004.

Michael O. Leavitt,

Administrator.

[FR Doc. 04–1362 Filed 1–21–04; 8:45 am]

BILLING CODE 6560–50–P