

The EPA Administrator, Gina McCarthy, signed the following notice on 08/15/2016, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2016-0194. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[EPA-HQ-OAR-2016-0194; FRL-xxxx-x]

RIN 2060-AS61

Revisions to the Petition Provisions of the Title V Permitting Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) proposes to revise its regulations to streamline and clarify processes related to submission and review of title V petitions. This notice covers five key areas, each of which should increase stakeholder access to and understanding of the petition process and aid the EPA's review of petitions. First, the EPA is proposing regulatory provisions that provide direction as to how petitions should be submitted to the agency. Second, the EPA is proposing regulatory provisions that describe the expected format and minimum required content for title V petitions. Third, the proposal clarifies that permitting authorities are required to respond to significant comments received during the public comment period for draft title V permits, and to provide that response with the proposed title V permit to the EPA for the agency's 45-day review period. Fourth, guidance is provided in the form of "recommended practices" for various stakeholders to help ensure title V permits have complete administrative records and comport with the requirements of the Clean Air Act (CAA or Act). Fifth, to increase familiarity with the post-petition process, this notice presents

information on the agency's interpretation of certain title V provisions of the CAA and its implementing regulations regarding the steps following an EPA objection in response to a title V petition, as previously discussed in specific title V orders.

DATES: Comments: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Public Hearing: If anyone contacts EPA requesting a public hearing on or before **[INSERT DATE 10 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a public hearing. Additional information about the hearing would be published in a subsequent *Federal Register* notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2016-0194, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Questions concerning these proposed rule revisions should be addressed to Ms. Carrie Wheeler, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division, (C504-05), Research Triangle Park, NC 27711, telephone number (919) 541- 9771, email at *wheeler.carrie@epa.gov*. To request a public hearing or information pertaining to a public hearing on the proposed regulatory revisions, contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, (C504-01), Research Triangle Park, NC 27711; telephone number (919) 541-0641; fax number (919) 541-5509; email address: *long.pam@epa.gov* (preferred method of contact).

SUPPLEMENTARY INFORMATION:

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I. General Information

A. Does this action apply to me?

Entities potentially affected directly by the proposed revisions to the EPA's regulations include anyone who intends to submit a title V petition on a proposed title V permit prepared by a state, local or tribal title V permitting authority pursuant to its EPA-approved title V permitting program. Entities also potentially affected by this rule include state, local and tribal permitting authorities responsible for implementing the title V permitting program. Entities not directly affected by this proposed rule include owners and operators of major stationary sources or other sources that are subject to title V permit requirements, as well as the general public who would have an interest in knowing about title V permitting actions and associated public hearings but do not intend to submit a petition.

B. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI. Do not submit this information to the EPA through <http://www.regulations.gov> or email. Clearly mark the specific information that you claim to be

CBI. For CBI in a disk or CD-ROM that you mail to the EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket.

2. *Tips for preparing comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

C. *How can I find information about a possible public hearing?*

To request a public hearing or information pertaining to a public hearing, contact Ms. Pamela Long, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, by phone at (919) 541-0641 or by email at long.pam@epa.gov.

D. *Where can I obtain a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this *Federal Register* document will be posted at the regulations section of our Title V Operating Permits Web site, under Regulatory Actions, at <http://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>. A “track changes” version of the full regulatory text that incorporates and shows the full context of the proposed changes to the existing regulations in this proposal is also available in the docket for this rulemaking.

II. Overview of Proposed Regulatory Revisions and Information in This Notice

Title V of the CAA establishes an operating permit program. Section 505 of the CAA requires permitting authorities to submit a proposed title V permit to the EPA Administrator for review for a 45-day review period before issuing the permit as final. The Administrator shall

object to issuance of the permit within that 45-day review period if the Administrator determines that the permit contains provisions that are not in compliance with the applicable requirements under the CAA. If the Administrator does not object to the permit during the 45-day EPA review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action (hereinafter “title V petition” or “petition”). The title V petition provisions of the current implementing regulations found at 40 CFR part 70 largely mirror the CAA, and have not been revised since original promulgation in 1992. With 20 years of experience with title V petitions as well as feedback from various stakeholders, the agency is now proposing changes to 40 CFR part 70 intended to provide clarity and transparency to the petition process, and to improve the efficiency of that process.¹

The changes proposed and the information provided in the preamble to the proposal are intended to benefit permitting authorities, permitted sources, and potential petitioners, as well as the EPA. Permitting authorities and permitted sources are expected to benefit by early consultation with the appropriate EPA Regional Office when the permitting authority is preparing a permit to ensure it includes conditions that assure compliance with applicable requirements under the CAA and part 70). These early actions should minimize potential permit deficiencies and reduce the associated likelihood that a petition will be submitted on that title V permit.

¹ The revisions proposed in this rule only impact 40 CFR part 70, which applies to federally-approved state, local, and tribal operating permit programs; 40 CFR part 71, which covers the title V operating permit program for permits issued under the EPA’s federal permitting authority, utilizes a different administrative review process, through the Environmental Appeals Board (EAB). The EAB has its own review process for title V permits issued under 40 CFR part 71 that is separate and distinct from the process of petitioning the Administrator for an objection to a 40 CFR part 70 permit; thus, these proposed changes are intended to streamline and clarify the EPA’s title V petition review process under 40 CFR part 70 only.

Potential petitioners are expected to benefit by having better notification of permits and review deadlines (e.g., the EPA is proposing to post on EPA Regional Web sites when a proposed permit is received and the corresponding 60-day deadline for submitting a petition) and by better access to permitting decision information (e.g., the permitting authority's written response to comments). These updates will clarify the expected minimum content of petitions and provide a standardized format, simplifying the process and enhancing the likelihood that petitions will be clear and complete. In addition, potential petitioners may also derive a benefit from more efficient responses to petitions and a better understanding of the process.

The EPA is expected to benefit by improving the agency's ability to meet its statutory obligations to review proposed permits, respond to title V petitions and provide more transparency in the title V petition process. These were concerns expressed by a Clean Air Act Advisory Committee task force in recommendations provided to the agency in 2006.² The EPA believes that the proposed regulatory revisions and shared information are responsive to these concerns and could, if finalized, improve the efficiency of the agency's response.

The proposed regulatory revisions described in Section IV of this notice would, among other things: (1) provide direction as to how title V petitions should be submitted to the agency, including encouraging the use of an electronic submittal system as the preferred (but not exclusive) method to submit title V petitions; (2) describe mandatory content and format for

² In 2004, the Clean Air Act Advisory Committee (CAAAC) established a Task Force to evaluate the title V program. The 18-member panel, comprised of industry, state, and environmental group representatives, identified what Committee members believed was and was not working well. After hosting public meetings and receiving written feedback, and compiling the information with the personal experience of panel members, the Title V Task Force issued a final report that highlighted concerns and recommendations for improvement. *See, Final Report to the Clean Air Act Advisory Committee on the Title V Implementation Experience: Title V Implementation Experience* (April 2006). The Title V Task Force Final Report is available at: <https://www.epa.gov/caaac/caaac-reports>.

title V petitions, which is intended to clarify the process for petitioners and improve the EPA's ability to review and act on petitions efficiently; and (3) require permitting authorities to respond in writing to significant comments received during the public comment period on a draft title V permit and to provide that written response to the EPA along with the proposed title V permit at the start of the EPA's 45-day review period. This proposal also requests comment on the proposed revisions to the regulations governing the CAA title V petition process, as well as comment on questions related to potentially establishing page limits on title V petitions. The proposed revisions to the 40 CFR part 70 regulations are described more fully in Section IV of this notice.

Separate from the regulatory revisions proposed in Section IV, Section V.A of this notice provides guidance on "recommended practices" for permit development for various stakeholders that, when followed, helps to ensure permits have complete administrative records and comport with the requirements of the CAA. Lastly, to increase stakeholder familiarity with the post-petition process, Section V.B. provides information concerning the agency's interpretation of certain provisions of title V of the CAA and the implementing regulations at part 70 regarding the steps following an EPA objection in response to a title V petition, as previously discussed in specific title V orders. The following paragraphs briefly provide additional information on each area.

First, in order to reduce confusion with and add clarity to the process of submitting title V petitions, the EPA has developed a centralized point of entry for all title V petitions using an electronic submittal system. As described in Section IV.A of this notice, the EPA encourages petitioners to use this electronic system when submitting title V petitions, which will improve customer service by allowing for better access to and tracking of petitions. This is the preferred

method identified in the proposed regulatory revisions that would be acceptable to use to submit a title V petition to the agency. Alternative methods for submittal are also identified in this notice.

Second, with regard to petition content, the EPA is proposing regulatory revisions that would specify requirements for mandatory petition content and standard formatting for all petitions. This is expected to benefit potential petitioners by ensuring completeness while promoting streamlining and improving the EPA's ability to review and act on petitions efficiently. In its orders responding to title V petitions, the EPA has already identified key elements that are critical for demonstrating that a title V permit does not assure compliance with applicable requirements under the CAA or under the part 70 regulations, and has explained their relevance to its determinations. In this proposal, the EPA is proposing new regulatory language to codify what has already been discussed in prior orders. If finalized, petitioners would be expected to follow these requirements and include this content following a standard format. As described later in this notice and in the proposed regulatory text, this content includes identifying where the issue being raised in the title V petition was raised during the public comment period on the draft title V permit and addressing the permitting authority's response to the comment in the petition in order to demonstrate that an objection is warranted.

Along with the proposed changes and requests for comment regarding petition content and format in Section IV.B of this notice, the EPA proposes to add new regulatory language to 40 CFR 70.8 that would require a petitioner to send a copy of the petition to both the permitting authority and the permit applicant. The current title V regulations do not have provisions implementing this requirement of section 505(b)(2) of the Act. Therefore, this rule proposes to

insert a requirement into the part 70 rules mirroring the Act's requirement in order to ensure consistency with this provision of the statute.

Third, Section IV.C of this notice contains requirements for certain procedures related to responding to significant public comments on the draft title V permit, as well as the administrative record for and submittal of proposed title V permits to the EPA by permitting authorities. The changes being proposed now would require that all permitting authorities respond to significant comments received on draft permits. The EPA is also proposing that the 45-day review period under section 505(b)(1) would not begin until the permitting authority forwards the proposed permit, the written response to comments (RTC) or statement that no public comments were received, and the statement of basis document, to the EPA for its review. These changes are expected to benefit permitting authorities and permitted sources by resulting in a more complete permit record and greater clarity for all stakeholders. If finalized, these changes may result in a need to revise at least some state, local and tribal part 70 programs.

In addition to these three areas, as part of the agency's effort to share information with stakeholders about the title V petition process, this notice includes guidance to help ensure permits have complete administrative records and comport with the requirements of the CAA. Presented in the form of "recommended practices" for stakeholders, this guidance is shared in the spirit of providing information and context to give a more comprehensive view of the title V petition process, including the time before a petition may be filed. Following the suggested recommended practices contained in Section V.A of this notice is expected to positively affect the permit issuance process resulting in better permits and may reduce the likelihood that a title V petition will be submitted on a title V permit.

All four of the previously mentioned areas should help to improve title V permits issued by permitting authorities, promote access to and provide better understanding of the title V petition process for potential petitioners, and reduce delays in decisions and support the agency's efforts to meet its obligations in responding to title V petitions. The proposed revisions to the part 70 regulations associated with the first three key areas are anticipated to increase transparency and add clarity to the title V petition submittal, review, and response processes. Codifying existing practices into title V regulations of the CAA is also expected to make the EPA petition review process more efficient. In addition, providing "recommended practices" for stakeholders, including some related to permit issuance, also increases transparency and clarity to further improve the stakeholder experience and understanding surrounding title V petitions.

Section V.B of this notice discusses steps following the EPA's issuance of an objection in response to a title V petition, particularly where the state, local, or tribal permitting authority subsequently amends the permit terms and conditions and/or the permit record in response to the EPA's objection. This process is often referred to as the post-petition process. The information provided in Section V.B reflects interpretations of certain statutory and regulatory provisions related to this aspect of the title V petition process that have previously been discussed by the EPA, including in title V petition orders. This information is repeated as a convenience to stakeholders and the general public: the agency is not proposing to alter its interpretation of that process in this notice and the regulatory revisions proposed in this notice do not relate to or modify this interpretation. The agency is not soliciting comment on this interpretation or otherwise reopening or revising the already-issued title V petition orders or

other EPA documents in which it has previously been discussed. Rather, this discussion is included to provide additional transparency and clarity.

Finally, as a convenience to stakeholders and the general public, and to provide context and background that informs how the EPA determines whether to grant an objection and to promote awareness of the EPA's existing interpretation of key provisions of section 505(b)(2) of the Act, Section III.D of this notice includes a summary of some past orders responding to title V petitions and court decisions addressing the burden on a title V petitioner to demonstrate that an objection is warranted.

III. Background

A. The Title V Operating Permits Program

Congress amended the CAA in 1990 to add title V, now found at 42 USC sections 7661-7661f, to assist in compliance and enforcement of air pollution controls. CAA Amendments of 1990, Pub. L. No. 101-549, sections 501-507, 104 Stat. 2399, 2635-48 (1990). Before this, the CAA pollution control requirements that might apply to a particular source could be found in many different provisions of the Act and its numerous regulations. As one court opinion has described it: "Before 1990, regulators and industry were left to wander through this regulatory maze in search of the emission limits and monitoring requirements that might apply to a particular source. Congress addressed this confusion in the 1990 Amendments by adding title V of the Act, which created a national permit program that requires many stationary sources of air pollution to obtain permits that include relevant emission limits and monitoring requirements." *Sierra Club v. EPA*, 536 F.3d 673, 674 (D.C. Cir. 2008).

Accordingly, title V of the Act establishes an operating permits program for major sources of air pollutants, as well as certain other sources. CAA section 502(a). Under title V of

the CAA, states were required to develop and submit to EPA for approval title V permitting programs consistent with program requirements promulgated by the EPA. Those requirements are now found in 40 CFR part 70. Most states, certain local agencies, and one tribe have approved part 70 programs.³ As part of an approved part 70 program, title V of the CAA requires every major source and certain other sources to apply for and operate pursuant to an operating permit. CAA sections 502(a) and 503; *see also* 40 CFR 70.5(a) and 70.1(b). It further requires that the permits contain conditions that assure compliance with all of the sources' applicable requirements under the Act, including the requirements of the applicable implementation plan. CAA section 504(a); *see also* 40 CFR 70.1(b) and 70.6(a)(1).

Prior to the title V program, CAA requirements for major sources of air pollutants were implemented in multiple and various ways. As a lawmaker involved in the 1990 CAA

Amendments explained:

Title V creates, for the first time, a unifying permit program for facilities subject to the [A]ct's various control requirements. In the past, some provisions of the Clean Air Act—for example, the nonattainment and PSD new source requirements—were, and will continue to be, implemented through preconstruction permits. Other control requirements were effected without Federal, or in some cases, State permits—for example, NESHAPS and NSPS—although States often incorporated these requirements into their own permit programs.⁴

More specifically, a title V permit must contain enforceable emission limits and standards, including operational requirements and limitations, and such other conditions as necessary to assure compliance with all applicable requirements that apply to the source at the time of permit

³ The Southern Ute Indian Tribe has an EPA-approved operating permit program under 40 CFR part 70.

⁴ 136 Cong. Rec. E3663, E3673 (1990) (Speech of Rep. Michael Bilirakis) , *reprinted in* Environment and Natural Resources Policy Division of the Congressional Research Service of the Library of Congress, 6 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 10768 (1993) [hereinafter CAAA Leg. Hist.].

issuance, as well as the monitoring, recordkeeping, and reporting requirements to assure compliance. In sum, the title V permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to a source's emission units and for assuring compliance with such requirements.

For the most part, title V of the CAA does not impose new pollution control requirements on sources. The definition of "applicable requirements" in the part 70 regulations includes many standards and requirements that are established through other CAA programs, such as standards and requirements under sections 111 and 112 of the Act, and terms and conditions of preconstruction permits issued under the New Source Review programs. 40 CFR 70.2. Once those air quality control requirements are established in those other programs, they are incorporated into a source's title V permits as appropriate. Hence, a title V permit is a comprehensive document that identifies all the specific CAA requirements that must be met by a source in order to operate. Developing such a comprehensive document can be a complex process that involves some harmonization of all the source's applicable requirements. As a lawmaker involved in the 1990 CAA Amendments explained:

The creation of the new permit program in title V provides an opportunity and an obligation for EPA to harmonize the substantive provisions of the other titles in this complex legislation. Many of the same sources and pollutants will be controlled under multiple titles—the same facilities and pollutants will often be controlled under the hazardous air pollutant, nonattainment, and acid rain programs. EPA must make every effort to harmonize and prevent unproductive duplication among those titles. The permit provisions of title V provide a focus for this harmonization, although title V does not change, and gives EPA no authority to modify, the substantive provisions of these other titles.⁵

⁵ 136 Cong. Rec. E3663, E3673 (1990) (Speech of Rep. Michael Bilirakis), *reprinted in* 6 CAAA Leg. Hist., at 10768 (1993).

As this language suggests, in providing an opportunity for harmonization through title V of the CAA, Congress did not replace or remove the procedures and requirements for establishing substantive requirements that exist in other provisions of the CAA. Nor did Congress alter or supplant the opportunities for public participation and administrative and judicial review that are found in other CAA programs, such as those for public participation and judicial review of certain final agency actions under section 307 of the Act. In addition, the Act requires that title V permitting programs provide opportunities for public participation in title V permitting processes and an opportunity for judicial review in state court. CAA section 502(b)(6); *see also* 40 CFR 70.4(b)(3)(x) (judicial review) and 70.7(h) (public participation). The petition process co-exists with those provisions, without superseding them.

Although title V of the CAA does not generally impose new pollution control requirements on sources, it does require that certain procedural measures be followed especially with respect to assuring compliance with underlying applicable requirements, and it also requires sources to pay certain fees. For example, title V of the CAA requires permits to contain adequate monitoring, recordkeeping, and reporting provisions to assure sources' compliance with permit terms and conditions. *See* CAA 504(c); *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). The part 70 regulations contain monitoring rules designed to satisfy this statutory requirement. Finally, as an additional measure to ensure permits are in compliance with the CAA, the title V program provides for public participation at various steps in the permitting process, including the opportunity to submit a title V petition.

B. Statutory and Regulatory Basis for this Proposal

In general terms, as noted above, the title V permit program was a significant development that established new procedural requirements for permitting authorities and

sources. In crafting the program, Congress balanced the benefit of a single document that contains all applicable requirements of the Act with the need to process these complex documents in an efficient manner. As part of the effort to promote efficient implementation of the operating permits program, the provisions relating to title V objections establish an orderly process with specific deadlines, which give the EPA an opportunity to raise objections to a title V permit before it is issued and which give any person the opportunity to timely raise specific issues to the EPA through a title V petition. In light of the complexities of implementing a program of title V's scope, a statement of one lawmaker in the legislative history indicates that the opportunity to "challenge EPA's failure to object" through the petition process was "designed to avoid delays" while preserving the discretion of both the EPA and the states.⁶

More specifically, under CAA section 505(a), and the current implementing regulations found at 40 CFR 70.8(a), permitting authorities are required to submit each proposed title V permit to the EPA for review.⁷ Upon receipt of a proposed permit and all necessary supporting information, the Administrator has 45 days in which to object to the final issuance of the permit if he/she determines that the proposed permit is not in compliance with applicable requirements of the Act, including the requirements of the applicable state implementation plan (SIP), or part 70 requirements. CAA section 505(b)(1) and 40 CFR 70.8(c)(1).

As the EPA explained when proposing the initial title V regulations in 1991, the Act limits the EPA's opportunity for its initial review and an objection based on that review to 45 days in order to minimize delays. 56 FR 21749 (May 10, 1991). If the Administrator objects

⁶ 136 Cong. Rec. E3663, E3675 (1990) (Speech of Rep. Michael Bilirakis), *reprinted in* 6 CAAA Leg. Hist. at 10774.

⁷ As the part 70 rules in 70.8(c) and (d) largely mirror the Act's provisions, the statutory and regulatory requirements are addressed together in this background discussion.

under CAA 505(b)(1), he/she must provide a statement of the reasons for the objection, providing a copy of both the objection and the statement to the permit applicant. CAA 505(b)(1); *see also* 40 CFR 70.8(c)(1).

If the Administrator does not object during the 45-day review period, consistent with section 505(b)(2) of the CAA and 40 CFR 70.8(d), any person may petition the Administrator within 60 days after the expiration of the EPA's 45-day review period to object to the permit. The Administrator shall grant or deny such a petition within 60 days after it is filed. CAA section 505(b)(2) establishes several requirements related to such petitions. Among other things, it provides that such a petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise objections during that period or the grounds for objection arose after completion of the public comment period. It also provides that the Administrator shall issue an objection if the petitioner demonstrates that the permit is not in compliance with the requirements of the CAA, including the requirements of the applicable implementation plan.

The implementing regulations are found in 40 CFR 70.8(d) and largely mirror this provision. As the EPA explained in proposing the initial title V regulations, the title V petition opportunity serves an important purpose because title V permits are frequently complex documents, and given the brevity of the agency review period there may be occasions when the EPA does not recognize that certain permit provisions are not in compliance with applicable requirements of the Act. 56 FR 21751 (May 10, 1991). CAA section 505(b)(2) states that the Administrator "shall" object if the petitioner makes the required demonstration. If the Administrator denies a petition for an objection, CAA 505(b)(2) provides that denial is subject to judicial review under CAA section 307; however, under CAA section 505(c), no objection is

subject to judicial review until the Administrator has taken final action to issue or deny the permit. Further, the requirements under CAA section 505(b)(2) may not be delegated by the Administrator.

In addition to the provisions of title V, the rulemaking of provisions under CAA section 307(d) are relevant to this notice. The Administrator is applying the rulemaking provisions of CAA section 307(d) to the rulemaking discussed in this notice, pursuant to CAA section 307(d)(1)(V), which provides that the provisions of 307(d) apply to “such other actions as the Administrator may determine.”

C. Title V Petition Process and Content

After 20 years of experience in implementing the title V petition process, the EPA has identified some general trends in petition content and aspects of the petition review process that pose challenges for potential petitioners in preparing petitions and for the EPA in providing an efficient response to petitions. These are described in this section of the notice to provide additional context for this proposal. This proposed rulemaking is aimed in part at increasing stakeholder access to and understanding of the petition process and increasing the efficiency of the agency’s response to petitions received and at mitigating some of the factors that contribute to poorly prepared or incomplete petitions, misunderstanding of applicable permit and CAA requirements, and longer response times. These factors include: (1) the lack of administrative requirements around petition submittals, which results in a variety of inconsistent methods used by petitioners; (2) the lack of specific rules regarding petition content, which results in considerable inconsistency in the format and content of petitions; and (3) the need to often deal with numerous and highly complex issues that arise in title V petitions given that title V permits must address many applicable requirements. These include issues relating to compliance with the

requirements of the prevention of significant deterioration (PSD) permitting program, the hazardous air pollutant program (i.e., requirements implementing the provisions of CAA 112), and other air quality issues. For example, petitioners often raise issues related to compliance with the requirements of the major and minor preconstruction permit programs, such as the PSD permitting requirements found in part C of Title I of the Act. This permitting program has a separate process under the CAA, its implementing regulations and SIPs, for evaluating applicability of the permitting requirements, determining the appropriate terms and conditions for permits, and for public participation and administrative and/or judicial review of those permits. At times, the PSD issues raised in the context of a title V petition relate to projects that occurred a considerable time in the past, and in some situations, the title V permit record may not contain all the relevant information for understanding the determinations that were made. For these reasons, consideration of these issues in the title V petition context can be time-consuming to research and complex to resolve, even to come to the seemingly simple determination that the permit record is inadequate. Further, title V petitions frequently include lengthy arguments that primarily concern CAA programmatic or policy issues, rather than the terms of a particular permit.

Over time, petitions have raised increasingly more complex policy, legal, and technical matters. Through the review of such extensive and complicated petitions, the petition review process has evolved into a resource-intensive effort by the EPA. To increase stakeholder understanding of the title V petition process, help ensure consistent presentation of critical information in such petitions, and facilitate more efficient review of them, the EPA is proposing to revise its regulations to establish procedural parameters which, if finalized, would govern the title V petition process moving forward. As described in more detail in Section IV of this notice,

this proposal includes proposed requirements for petition submittal, petition content and format, and certain administrative record requirements. As mentioned previously, one of the primary goals of the proposed changes is to improve stakeholder access to and understanding of the petition process and improve the agency's ability to meet its statutory obligations to review proposed permits and respond to title V petitions, in light of the overall structure of the CAA.

Yet another overarching factor that hampers the current petition review process is the confusion or lack of familiarity with the process itself. In the 2006 Title V Task Force Final Report noted earlier, for example, the CAAAC task force expressed a concern with the lack of transparency in the title V petition process. This concern has been echoed in the years since the 2006 report through feedback the agency has received from various stakeholders. In response, the EPA has tried to provide more explanation and insight into the title V petition process in the administrative orders it issues in responding to petitions. Some of these issues have also been discussed in the opinions courts have issued in reviewing such EPA orders. However, the EPA expects that not all stakeholders, including the public, may have read these response orders or related court decisions.

Therefore, the next section of this notice seeks to provide additional transparency concerning the petition process by repeating some of the relevant interpretations of statutory and regulatory provisions that the EPA has previously explained in title V petition orders, as well as interpretations of certain provisions related to the title V petition process provided in judicial opinions. Reiterating these prior statements concerning the EPA's application and interpretation of the statute to reviewing title V petitions may also provide useful context for the proposed changes to 40 CFR part 70, which are discussed in Section IV of this notice.

D. Prior Interpretations and Applications of the Title V Provisions

This section includes a discussion of certain aspects of the statutory elements of CAA section 505(b)(2) as well as the implementing regulations that have previously been interpreted by the EPA and/or courts. The discussion that follows serves to inform the public, stakeholders, permitting authorities, and other interested parties of these interpretations. Although the matters discussed in this section are available to the public,⁸ and in some cases have been available for years and/or already subject to judicial review, in the interest of transparency and clarity, the agency is collecting these interpretations and judicial decisions in this notice. That information is repeated here merely as a convenience for the public. The agency is not in this notice proposing to change these previously-presented interpretations, soliciting comments on these interpretations, or reopening the already-issued title V orders or other EPA documents in which these interpretations were discussed. None of the regulatory revisions proposed in this notice would alter these interpretations or the prior title V orders or other EPA documents in which these interpretations were discussed.

1. *“Threshold” Requirements*

Certain of the requirements under CAA section 505(b)(2) related to petitions are sometimes referred to as “threshold” requirements, which provide some procedural requirements and some limitations on the scope of title V petitions. These include, for example, that the petition be filed within 60 days following the agency’s 45-day review period. Another example is the requirement that the petition be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency.

⁸ The Title V Petitions Database contains petitions and EPA Orders responding to petitions and is available at: <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

The agency has previously addressed these “threshold” issues in prior title V orders, and some of those statements are reiterated in this section.

a. Timeliness

Generally speaking, the first step in the petition response process is for the agency to ascertain if the petition was timely filed pursuant to CAA section 505(b)(2). The Act and implementing regulations at 40 CFR 70.8(d) provide for a 60-day window in which to file a title V petition, which runs from the expiration of the EPA's 45-day review period. A petition received after the 60-day petition deadline is not timely. The agency is aware that because the petition period runs from the end of the EPA's 45-day review period, and the date a proposed permit is received by the EPA is not always apparent, the petition deadline is not always readily apparent. The agency currently encourages permitting authorities to provide notifications to the public or interested stakeholders regarding the timing of proposal of permits to the EPA, for example making that information available either online, such as Region 4 has done on the EPA Web site, “Region 4 Proposed Title V Permits and State Contacts,”⁹ or in the publication in which public notice of the draft permit was given.

b. Reasonable Specificity

The second “threshold” requirement described in the statute regards the content of a petition. CAA section 505(b)(2) requires that, unless one of the enumerated exceptions applies, the petition must be based only on objections to the permit that were raised with reasonable

⁹ EPA Region 4's Web site provides links with lists of permits that have been proposed and are still under the public petition deadline, organized by state: <https://www.epa.gov/caa-permitting/region-4-proposed-title-v-permits-and-state-contacts>.

specificity during the public comment period provided by the permitting agency. Subject to the exceptions contained in the provision, the EPA understands this statutory language to require that the issues presented in a petition be raised during the public comment process with reasonable specificity. Such issues could, however, be raised in comments filed by a commenter other than the petitioner.

The EPA continues to believe that, as stated in the preamble to the 1991 part 70 proposal, Congress did not intend for petitioners to create an entirely new record before the EPA that the permitting authority had no opportunity to address. The requirement to raise issues “with reasonable specificity” places the burden on the petitioner. Unless there are unusual circumstances, the Petitioner needs to provide evidence that would support a finding of noncompliance with the Act to the permitting authority before it is raised in a petition. *See*, 56 FR 21712, 21750 (1991).

Where an issue is raised to the EPA in a title V petition without first raising it with reasonable specificity to the permitting authority to give it the opportunity to address the issue, the Administrator has generally denied such claims consistent with the statutory requirements. The EPA has specifically addressed the reasonable specificity threshold requirement in a number of title V petition orders. Some key highlights are summarized next.

In 2013 in the *Luminant Order*, the EPA responded to a petition that raised a number of issues, including several that were raised only in general terms or not raised at all during the public comment period by any commenter. *See, In the Matter of Luminant Generating Station, Petition*, Order on Petition No. VI-2011-05 (January 15, 2013). For example, the petitioners claimed that the permit in question failed to identify emission units that were associated with permit by rules to which the facility was subject. The EPA noted that no mention was made in

the public comments concerning the lack of identification of emission units, and denied the claim. *Id.* at 12. The Administrator similarly denied other claims not raised with reasonable specificity during the public comment period: the comments did not present evidence or analysis to support these petition claims, and thus the state had no opportunity to consider and respond to those claims. *Id.* at 6, 11, 13, 15. The *Luminant Order* also included a discussion of the reasonable specificity standard, that absent unusual circumstances, the requirement to raise issues “with reasonable specificity” places the burden on the petitioner to bring forward evidence before the State that would support a finding of noncompliance with the CAA. *See id.* at 5.

As noted above, the Act contains two enumerated exceptions to the “reasonable specificity” requirement. Namely, issues that were not raised with reasonable specificity during the public comment period can be raised in a petition if the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period. CAA section 505(b)(2). For an issue to fit within one of these exceptions, the petitioner would have to demonstrate the impracticality, or show that the grounds arose after the comment period. The EPA has also addressed this issue in petition orders.

One example is in the 2012 *San Juan Generating Station Order*, where the EPA responded to a petition claim that the permit failed to assure compliance with PSD applicable requirements because it did not address significant increase of a specific pollutant after a change at the facility. *See In the Matter of Public Service Company Of New Mexico, San Juan Generating Station (SJGS)*, Order on Petition VI-2010 (February 15, 2012) at 10. According to the petitioners, these concerns were not raised during the comment period because the State did not make the information about the significant emission increase available until after the public comment period, when the permitting authority noted in its response to the EPA that the change

triggered PSD and expressed its intent to add a title V compliance schedule to the permit. The Administrator found that in this case, the petitioners demonstrated that the grounds arose after the comment period and therefore, the EPA would consider their claim on this matter. *See id.* at 10.

c. Scope of permit action

Petitions may be submitted on several types of proposed title V permits, such as proposed initial permits, permit renewals, or permit revisions, which may include minor or significant modifications to the title V permit. Some stakeholders have indicated there may be confusion on the matter of petition opportunities, particularly for minor modification actions. In cases where the permitting authority has not provided for a prior public comment period on a minor permit modification, petitioners can still submit a petition to the Administrator. 57 FR 32283; *see also* 40 CFR 70.7(e)(2)(iv) (for a minor modification, the permitting authority may not issue a final permit until after EPA's 45-day review period or until EPA has notified the permitting authority that it will not object, whichever is earlier) and 70.8(e) (a part 70 permit, including a modification, may not be issued until after EPA has had an opportunity to review the proposed permit as required under this section). As the EPA may receive a petition on different types of proposed title V permits, it is important for the agency to be able to identify the particular action of concern to the petitioner.

Under CAA section 505(b)(2), a petition pertains to a particular permit. Thus, the EPA must be able to discern from the petition what permit action the petition is based on in order to review and respond to it. The EPA has interpreted the potential scope of the petition as related to the scope of the permit action that is the basis of the petition. In the 1992 preamble to the final part 70 rule, the EPA explained that public objections to an initial permit, permit revision, or

permit renewal must be germane to the applicable requirements implicated by the permitting action in question. For example, objections raised on a portion of an existing permit that would not in any way be affected by a proposed permit revision would not be germane. 57 FR 32250, 32290/3 (July 21, 1992). Consistent with CAA section 505(b)(2), the EPA has considered the scope of the permit proceeding in reviewing petitions and denied petitions that concern issues that are outside the scope of the permit proceeding. *See, e.g., In the Matter of Wisconsin Public Service Corporation's JP Pulliam Power Plant* (Order in response to Petition Number V-2012-01)(January 7, 2013) at 8; *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2010-05, VI-2011-06 and VI-2012-07 (January 30, 2014) (*Nucor III Order*) at 12.

One such denial can be found in the 2007 *Weston Order*, in which the EPA received a petition that claimed that the proposed modification permit was deficient because it did not incorporate limits from PSD and preconstruction permit applications for a particular unit at the Weston facility. *See, In the Matter of Wisconsin Public Service Corporation – Weston Generating Station* (Order in response to Petition) (December 19, 2007). The EPA denied the claim because the unit in question had not been affected by or related to the significant modification on which the title V permitting action was based. The Order stated:

EPA interprets its title V regulations at 40 CFR part 70 to require different opportunities for citizens to petition on initial permit issuance, permit modifications, and renewals. The regulations state that a permit, permit modification, or renewal may be issued if specified conditions are met, 40 CFR 70.7(a)(1), including a requirement that '[t]he permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions.' 40 CFR 70(a)(1)(ii) and 70.7(a)(5) (emphasis added). Further, 40 CFR 70.7(h), in requiring the permitting authority to provide adequate procedures for public notice and comment for permit proceedings that qualify as significant modifications, provides that the notice shall identify 'the activity or activities involved in the permit action; the emissions change involved in any permit modification;...and all other materials available to the permitting authority that are relevant to the permit

decision...’ 40 CFR 70.7(h)(2) (emphasis added). We interpret these provisions to limit petitions on significant modifications to issues directly related to those modifications. *Id.* at 5.

The *Weston Order* further noted that this limitation on petitions for title V significant modifications did not affect the public’s ability to participate in the permit issuance or enforcement processes. When a title V permit is renewed, all aspects of the title V permit are subject to public comment and petition as part of the process to issue a renewal permit. Generally speaking, members of the public can also bring an enforcement action in situations of alleged noncompliance with any permit terms. Furthermore, if the public is concerned that the permit fails to incorporate all applicable requirements, a petition may be submitted to the Administrator to reopen the permit for cause under CAA section 505(e). *Id.* at 7.

2. *Demonstration Requirement*

In addition to the threshold requirements, the statute identifies another general guideline for the EPA’s consideration. Specifically, to compel an objection by the EPA, CAA section 505(b)(2) requires the petitioner to demonstrate that a permit is not in compliance with requirements of the Act, including the requirements of the applicable implementation plan. The EPA has interpreted the demonstration burden under CAA section 505(b)(2) in numerous title V petition orders and court opinions have also interpreted it. What follows is a brief restatement of interpretations previously articulated in some of those orders and opinions.

In the 2013 *Nucor II Order* the EPA stated:

The petitioner demonstration burden is a critical component of CAA section 505(b)(2). As courts have recognized, CAA section 505(b)(2) contains a “discretionary component” that requires the exercise of the EPA’s judgment to determine whether a petition demonstrates noncompliance with the Act, as well as a nondiscretionary duty to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265-66 (“it is undeniable [CAA section 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements”); *NYPIRG*, 321 F.3d at 333. Courts

have also made clear that the Administrator is only obligated to grant a petition to object under CAA section 505(b)(2) if the Administrator determines that the petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (section 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made”) (emphasis added); *NYPIRG*, 321 F.3d at 334 (“Section 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated.”) (emphasis added); *Sierra Club v. Johnson*, 541 F.3d at 1265 (“Congress’s use of the word ‘shall’ ... plainly mandates an objection *whenever* a petitioner demonstrates noncompliance”) (emphasis added). Courts reviewing the EPA's interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265-66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence [v. EPA]*, 596 F.3d [1123] at 1130-31 [9th Cir. 2010]).

See, In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013)(*Nucor II Order*) at 4-5.

The EPA highlighted in the *Nucor II Order* several reasons why the petitioner's demonstration is important in the context of a title V petition, including first, the relatively short time frames title V of the CAA provides for the EPA to review title V permits and petitions. As previously explained, under CAA section 505(b)(1), the Administrator has only 45 days after receiving a copy of the proposed permit to review that permit and object if she determines that the permit is not in compliance with the CAA. If the Administrator does not object, then any petition for an objection must be filed within 60 days after the expiration of the 45-day review period, and the agency is required to grant or deny that petition within 60 days. *See* CAA section 505(b)(2). Given these short time frames, the *Nucor II Order* explained that EPA does not believe it is reasonable to conclude that Congress would have intended for the EPA to engage in extensive fact-finding or investigation to analyze contested petition claims, and in support of this interpretation it cited *Citizens Against Ruining the Environment*, 535 F.3d at 678, which noted that because the limited time frame Congress gave the EPA for permit review “may not allow the

EPA to fully investigate and analyze contested allegations, it is reasonable in this context for the EPA to refrain from extensive fact-finding.” *Nucor II Order* at 5. Therefore, it is imperative that the petitioner make the demonstration.

After discussing the relatively short time frames for the EPA to review as the first point, the *Nucor II Order* continued:

Second, the Act is structured so that the EPA's evaluation of a petition under CAA section 505(b)(2) follows and is distinct from its review of a proposed permit under section 505(b)(1), which requires the Administrator to object on his own accord if he determines the permit is not in compliance with the Act. By contrast, under section 505(b)(2), the Administrator is compelled to object only if the necessary demonstration has been made.^[10]

Third, the EPA is also sensitive to the fact that its response to title V petitions often comes late in the title V permitting process and often after the title V permit has been issued. *See* CAA section 505(b)(3) (acknowledging that the EPA's response to a petition may occur after the permit has been issued). The EPA's evaluation of the petitioners' demonstration can have consequences, as a determination by the EPA that the petition demonstrates the permit is not in compliance with the Act requires the Administrator and the state permitting authority to take certain actions. *MacClarence*, 596 F.3d at 1131. The EPA also acknowledges Congress' direction that permitting authorities must provide “streamlined” procedures for issuing title V permits, indicating that the title V permitting process should proceed efficiently and expeditiously. CAA section 502(b)(6); 40 C.F.R. part 70.4(d)(3)(ix). These circumstances make it all the more important that the EPA carefully evaluate the petition's demonstration and not issue an objection under section 505(b)(2) unless the petition demonstrates that one is required.

Fourth, and consistent with its importance in CAA section 505(b)(2), the petitioner demonstration requirement helps to ensure the equity, procedural certainty, efficiency, and viability of the title V petition process for petitioners, state and local permitting authorities, the EPA and source owner/operators. This petitioner demonstration requirement helps to ensure that each and every petitioner is treated equitably in the petition process because the same standard for demonstration applies to each petitioner. Where petitioners meet their burden, the EPA will grant the petition. Where they do not, the EPA will not grant the petition. In this way, the EPA gives equal consideration to the petitioner's arguments, as appropriate.

¹⁰ Footnote 3 of the *Nucor II Order* explained: “Further, CAA section 505(b)(2) provides that ‘the Administrator may not delegate the requirements of this paragraph.’ This reflects the significance Congress attached to the decision on whether or not to object in response to a petition, and means the process requires additional time.”

In addition, the petitioner burden requirement also helps to ensure that the title V petition process is consistent with the division of responsibilities and co-regulator relationship between the EPA and state or local permitting authorities established in the CAA. When carrying out our title V review responsibilities under the CAA, it is our practice, consistent with that relationship, to defer to permitting decisions of state and local agencies with approved title V programs where such decisions are not inconsistent with the requirements under the CAA. The EPA does not seek to substitute its judgment for the state or local agency. As we discuss above in this section, sections 505(b)(1) and (2) of the Act, require the EPA to object to the issuance of a title V permit if it determines that the title V permit contains provisions that are not in compliance with applicable requirements of the Act, including the requirements of the applicable SIP. State and local agencies must ensure that the title V permit includes all applicable requirements under the CAA for that source, and provide an adequate rationale for the permit requirements in the public record, including the response to comment. When the EPA grants a particular title V petition under CAA section 505(b)(2), the EPA directs the state or local agency regarding actions necessary to ensure that the title V permit meets the applicable requirements with regard to the particular issue(s) that was raised, including appropriate and necessary changes to the permit.

The petitioner burden requirement assures that petitioners have clearly and sufficiently articulated the basis for an objection before a title V petition is granted. Thus, state and local agencies have certainty regarding the standard against which petitions on their title V permits and permit records will be assessed. The petitioner burden requirement also helps to ensure that the EPA does not have to spend significant time and resources responding to ungrounded claims regarding the title V permit or permit record. For example, petitioners might include claims in petitions unrelated to applicable requirements for the title V permit at issue or that do not provide sufficient information for the EPA to analyze the claim. Without the petitioner demonstration burden, the EPA could be required to investigate and respond to claims that ultimately prove to be ungrounded or frivolous. This would increase the complexity and uncertainty of the title V permit process, and would be burdensome and unproductive for the EPA, as well as for state and local agencies. The petitioner burden standard also helps to ensure certainty of the permitting process for source owner/operators, because it provides a consistent standard against which petitions on their title V permits will be assessed.

Nucor II Order at 5-7.

In light of the EPA's interpretation of the demonstration requirement and its importance to the implementation of the statutory structure that Congress created for addressing objections to title V permits, the EPA has discussed and applied its interpretation of the demonstration burden in numerous title V orders. Examples of the EPA's application of this standard can be

found in: *In the Matter of Scherer Steam-Electric Generating Plant Juliette, Georgia, et al.*, Order on Petition Nos. IV-2012-1, IV-2012-2, IV-2012-3, IV-2012-4, and IV-2012-5 (Apr. 14, 2014) at 12-13; *In the Matter of Hu Honua Bioenergy Facility*, Order on Petition No. IX-2001-1 (July 2, 2014) (*Hu Honua Order*) at 25-27; *In the Matter of EME Homer City Generation LP, et al.*, Order on Petition No. III-2012-06, III-2012-07, and III-2013-02 (July 30, 2014) at 24-25; *In the Matter of Public Service of New Hampshire Schiller Station*, Order on Petition No. VI-2014-04 (July 28, 2015) at 11-12.

The interpretation quoted from the *Nucor II Order* is based on the discussion of the demonstration burden in opinions from federal courts of appeal. These courts have recognized that the term “demonstrates” in CAA section 505(b)(2) is ambiguous and have accordingly deferred to the EPA’s interpretation. *See Wildearth Guardians v. EPA*, 728 F.3d 1075, 1081-1082 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130-1131 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1265-1267 (11th Cir. 2008); *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008). In so deferring, these courts have discussed the seminal Supreme Court decision, *Chevron USA, Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-843 (1984), which provides guiding principles for judicial review of agency interpretations and determinations under statutes that the agency administers.¹¹ *Chevron* establishes a well-known two-step test: First, if the Congress has “directly spoken to the precise question at issue” both the court and the agency must “give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-843. Second, if the statute is

¹¹ The principle of deference named after this decision -- *Chevron* deference -- is discussed in more detail in Section IV.A of this notice.

ambiguous, courts will generally defer to the agency's interpretation and uphold it so long as it "is based on a permissible construction of the statute." *Id.* at 843.

Several federal courts of appeal have agreed with the EPA's position that the term "demonstrates" in CAA section 505(b)(2) is ambiguous. *MacClarence*, 596 F.3d at 1130 (collecting cases). As one opinion pointed out, "[n]either the Clean Air Act nor its regulations define the term 'demonstrates' or give context to how the Administrator should make this judgment." *Sierra Club v. Johnson*, 541 F.3d at 1266; *see also Citizens Against Ruining the Env't*, 535 F.3d at 677-678. After considering the plain meaning of the term "demonstrates" as shown by various dictionary definitions, courts have agreed that the plain meaning "does not resolve important questions that are part and parcel of the Administrator's duty to evaluate the sufficiency of a petition, for example, the type of evidence a petitioner may present and the burden of proof guiding the Administrator's evaluation of when a sufficient demonstration has occurred." *Sierra Club v. Johnson*, 541 F.3d at 1266; *MacClarence*, 596 F.3d at 1131 (same). Similarly, another court observed that the Act "does not set forth any factors the EPA must take into account in determining whether a petitioner has demonstrated noncompliance under [CAA 505(b)(2)]." *Wildearth Guardians*, 728 F.3d at 1082.

This recognition of the ambiguity in CAA section 505(b)(2) leads to the conclusion that "the statute's silence on these important issues means Congress has delegated to the EPA some discretion in determining whether, in its expert opinion, a petitioner has presented sufficient evidence to prove a permit violates clean air requirements." *Sierra Club v. Johnson*, 541 F.3d at 1266. Accordingly, as one opinion put it, "the EPA has discretion under the statute to determine what a petition must show in order to make an adequate 'demonstration.'" *Citizens Against Ruining the Env't*, 535 F.3d at 678. Similarly, another court explained, "because we conclude

[section 505(b)(2)] is ambiguous when it comes to defining the type of demonstration required to trigger the Administrator's duty to object, we are willing to defer to a reasonable interpretation by the agency as to when a petitioner has sufficiently demonstrated noncompliance with PSD requirements." *Sierra Club v. Johnson*, 541 F.3d at 1267. In so deferring to the EPA's interpretation of the demonstration standard under CAA section 505(b)(2) some courts have noted that they need not resolve the question of the exact degree of deference to be accorded to the EPA because its "interpretation is persuasive even under [the] less deferential standard of review" under *Skidmore v. Swift*, 323 U.S. 134 (1944) and "would thus prevail under either standard." *Wildearth Guardians*, 728 F.3d at 1082; *MacClarence*, 596 F.3d at 1131 (same).

In the context of reviewing particular applications of the demonstration burden in title V petition orders, courts have also deferred to the agency's interpretation as to whether or not a petition had adequately demonstrated that an objection was warranted. For example, in *MacClarence*, the petition was denied in part because it "failed to provide adequate information to support [a claim]" and made "only generalized statements ... and did not provide adequate references, legal analysis, or evidence in support of these general assertions." 596 F.3d at 1131 (internal marks omitted). The court found the EPA's construction of the burden under CAA section 505(b)(2) as encompassing an expectation that a petition provide "references, legal analysis, or evidence" a reasonable interpretation, which comported with both the plain meaning of the term "demonstrates" and with CAA section 505(b)(2). *Id.* In addition, in *MacClarence*, the petitioner argued that the EPA should not have denied his petition for failing to address the permitting authority's reasoning in the final permitting decision and documents, which differed from the draft documents and explained why the changes had been made. The court upheld the EPA's decision, determining that it was reasonable for the EPA to expect the petitioner to

address the permitting authority's final decision. *Id.* at 1132-33. As another example of the deference that courts have accorded the EPA's application of the demonstration standard, in the *Wildearth Guardians* case cited above, the court found reasonable the EPA's determination that the petitioner could not rely solely on the fact that a Notice of Violation (NOV) had been previously issued to demonstrate noncompliance. *Wildearth Guardians*, 728 F.3d at 1082. The court noted that the EPA had explained that an NOV may be a relevant factor in "determining whether the overall information presented by Petitioner—in light of all the factors that may be relevant—demonstrates the applicability of a requirement for the purposes of title V" but explained that other factors may also be relevant. *Id.* The EPA further explained that if the petitioner had not addressed other relevant factors, it could find that petitioner "failed to present sufficient information to demonstrate that the requirement is applicable." *Id.* Finding this interpretation of the demonstration requirement persuasive, the court deferred to it. *Id.*

3. *Raising PSD Issues in a Petition*

As noted earlier, many petitions raise numerous and highly complex issues around PSD permitting, a separate permitting program under the CAA. Because of the frequency with which title V petitions raise PSD claims, statements in prior petition orders regarding such claims is worth a separate mention here. In the *Meraux Refinery Order, In the Matter of Meraux Refinery*, Order on Petition Number VI-2012-04 (May 29, 2015), at 3-4, the EPA stated:

Where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of noncompliance with the Act), the burden is on the petitioner to demonstrate to the Administrator that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. CAA section 505(b)(2)... Such requirements, as the EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, include the permitting authority: (1) following the required procedures in the SIP; (2) making PSD determinations on reasonable grounds properly supported on the record; and (3)

describing the determinations in enforceable terms. *See, e.g., In the Matter of Wisconsin Power and Light, Columbia Generating Station*, Order on Petition No. V-2008-01 (October 8, 2009) at 8. The permitting authority for a State's SIP-approved PSD program has substantial discretion in issuing PSD permits. Given this discretion, in reviewing a PSD permitting decision, the EPA will not substitute its own judgment for that of the State. Rather, consistent with the decision in *Alaska Dep't of Env't'l Conservation v. EPA*, 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state's PSD permitting decision, the EPA generally will look to see whether the petitioner has shown that the state did not comply with its SIP-approved regulations governing PSD permitting or whether the state's exercise of discretion under such regulations was unreasonable or arbitrary. *See, e.g., In re Louisville Gas and Electric Company*, Order on Petition No. IV-2008-3 (Aug. 12, 2009); *In re East Kentucky Power Cooperative, Inc. Hugh L. Spurlock Generating Station*, Order on Petition No. IV-2006-4 (Aug. 30, 2007); *In re Pacific Coast Building Products, Inc.* (Order on Petition) (Dec. 10, 1999); *In re Roosevelt Regional Landfill Regional Disposal Company* (Order on Petition) (May 4, 1999).

As is indicated by the internal citations to a number of other title V orders in the *Meraux Refinery Order*, the agency has made similar statements in several previous orders over the years.

4. *Raising Emissions Monitoring Issues in a Petition*

Many petitions also raise issues surrounding emissions monitoring, recordkeeping and reporting in title V permits. Title V of the CAA requires permits to contain adequate emissions monitoring, recordkeeping, and reporting to assure sources' compliance with applicable requirements. 57 FR 32250, 32251 (July 1, 1992). Because of the frequency with which monitoring claims are raised, statements in prior petition orders regarding such claims are also worth a separate mention here. As an example, *In the Matter of the Premcor Refining Group, Inc.*, Order on Petition Number VI-2007-02 (May 28, 2009), at 7, the EPA stated:

As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in the EPA's part 70 regulations. First, a permitting authority must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. 40 CFR 70.6(a)(3)(i)(A). Second, if the applicable requirements contain no periodic monitoring, permitting authorities must add monitoring "sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 CFR 70.6(a)(3)(i)(B). Third, if the

applicable requirement has associated periodic monitoring but the monitoring is not sufficient to assure compliance with permit terms and conditions, a permitting authority must supplement monitoring to assure compliance. *See* 40 CFR 70.6(c)(1).

5. *Addressing Permitting Authority's Rationale*

The EPA has previously noted that as part of the CAA section 505(b)(2) demonstration requirement, the petitioner is expected to address the permitting authority's final decision, and the permitting authority's final reasoning (including the RTC), where these documents were available during the timeframe for filing the petition. Where a permitting authority has articulated its rationale for the permit terms and conditions concerning an applicable requirement in its record (RTC and statement of basis) and the petitioner did not adequately address that rationale in its petition, the EPA has often denied the petition, at least in part, on that basis. *See e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) at 20-21 (denying title V petition issue where petitioners did not respond to state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient). Caselaw supports this interpretation. *See MacClarence*, 596 F.3d at 1132-33 (the Administrator "reasonably expected" the petitioner to challenge the state permitting authority's explanation and reasoning for final permit).

IV. Proposed Revisions to Title V Regulations

This notice proposes several changes to part 70. Many of the proposed revisions fall within three key areas. First, regulatory language is proposed that encourages the use of the agency's electronic submittal system for title V petitions. Alternative methods for submittal are

also identified in this notice. Petitioners who experience technical difficulty when attempting to submit a petition through the electronic submittal system may send it to the designated email address, while those without access to the internet or unable to access email for other reasons may send a paper copy to the specific physical address identified in this proposal.

Second, this rule proposes mandatory petition content requirements and standard formatting for title V petitions. The EPA has identified key pieces of information that are critical when assessing claims and potential flaws in a title V permit or permit process, and these pieces are now proposed as required content for petitions and would be a new provision, 40 CFR 70.12. Under the proposed revisions, in order to demonstrate a flaw in the permit, permit record, or permit process that warrants an objection under CAA section 505(b)(2), the petition would present the required content in the same manner and order as contained in the new section of the title V regulations, 40 CFR 70.12.

A related change is proposed that would add new regulatory language to 40 CFR 70.8, which would require a petitioner to send a copy of the petition to both the permitting authority and the permit applicant. The current title V regulations do not have provisions effectuating this requirement of section 505(b)(2) of the Act. Therefore, this proposal would insert a requirement into the regulation identical to the one in the Act in order to ensure consistency with this provision of the statute.

Third, the agency proposes to require that permitting authorities respond in writing to significant comments received during the public comment period on a draft title V permit. Further, the EPA proposes regulatory language stating that this response to significant comments, often referred to as the RTC, must be sent with the proposed permit and statement of

basis for the 45-day EPA review period of the proposed permit.¹² Under the proposed revisions, the EPA 45-day review period would not commence until the proposed permit and all necessary supporting information, including the written RTC, are received. Finally, the EPA proposes to require that within 30 days of sending the proposed permit to the EPA, that permitting authorities must provide notification that the proposed permit and the response to significant public comments are available to the public. Such notice must explain how these materials may be accessed.

These proposed revisions to part 70 provide increased transparency and clarity to the title V petition preparation, submittal, review, and response processes. Improved interactions with stakeholders that participate in the title V process and more accurate tracking of petitions may also result from the establishment of the preferred petition submittal method. If finalized, the proposed rule revisions would help facilitate a more effective process for the development of title V petitions and a more efficient process for the review and response to title V petitions. Overall, the EPA is intending that these rule revisions along with other shared information will help to improve title V permits issued by permitting authorities, promote access to and provide better understanding of the title V petition process for potential petitioners, and reduce delays in decisions and support the agency's efforts to meet its obligations in responding to title V petitions.

For each of the three key areas, the agency describes the proposed regulatory changes, rationale for proposing the changes, and request for comment in the sections that follow. Before

¹² The statement of basis is a statement that “sets forth the legal and factual basis ... (including references to the applicable statutory or regulatory provisions)” for terms and/or conditions in a permit. 40 CFR 70.7(a)(5). Often a separate document, the statement of basis is intended to provide information to facilitate the EPA's review of permit terms and conditions and also to provide information that supports public participation in the permitting process.

discussing each of the three key areas of this proposal, however, this notice provides some additional legal background related to these proposals.

A. *Additional Legal Background for the Proposed Revisions to the Part 70 Rules*

To provide context for the statutory and regulatory interpretations discussed below, the EPA first discusses some additional legal background, including principles generally applied by courts in reviewing agency interpretations.

The Supreme Court decision, *Chevron USA, Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-843 (1984), establishes principles that guide judicial review of agency interpretations of statutes that the agency administers. Under *Chevron* courts apply a well-known two-step test: First, if the Congress has “directly spoken to the precise question at issue” both the court and the agency must “give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-843. Second, if the statute is ambiguous, courts will generally defer to the agency’s interpretation and uphold it so long as it “is based on a permissible construction of the statute.” *Id.* at 843. At the second step of this inquiry, also referred to as “*Chevron* Step 2,” courts such as the D.C. Circuit have frequently explained that “‘*Chevron* requires that we defer to the agency’s reasonable interpretation of the term.’” *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 151 (D.C. Cir. 2015) (quoting *Pennsylvania Dept. of Env’tl. Protection v. EPA*, 429 F.3d 1125, 1130 (D.C. Cir. 2005)). In other words, under *Chevron* the agency’s interpretation “‘governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts.’” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (quoted in *Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 413 (D.C. Cir. 2015)).

Similarly, courts accord deference to an administrative agency's interpretations of its own regulations under principles enunciated in *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997). This type of deference is frequently referred to as *Auer* deference. When an agency's interpretation of a regulation receives *Auer* deference, the court accepts the agency's interpretation "unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Rural Cellular Ass'n & Universal Serv. v. FCC*, 685 F.3d 1083, 1093-1094 (D.C. Cir. 2012) (internal marks and citations omitted).

Finally, the EPA notes that administrative agencies have broad discretion to adopt procedures to discharge their obligations under the statutes they implement. In the words of the U.S. Supreme Court: "[T]he formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978). Later in the same case, the Court observed that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 543-544. Relatedly, courts have emphasized the inherent authority that administrative agencies have "to control the disposition of their caseload" and manage their own dockets. *See, e.g., GTE Service Corp. v. FCC*, 782 F.2d 263, 273-274 (D.C. Cir. 1986).

B. Electronic Submittal System for Petitions

1. Proposed Revisions

a. Petition Submission to the EPA

In this notice, the EPA is proposing to revise part 70 to add a new provision that would require petitions to be submitted using one of three identified methods. Among those three methods, the agency encourages petitioners to submit title V petitions through the electronic submittal system, the agency's preferred method. The EPA has developed a title V petitions submittal system through the Central Data Exchange (CDX) and information on how to access and use the system is available at the title V petitions Web site: <http://www.epa.gov/title-v-operating-permits/title-v-petitions>. While the current submittal system was designed using CDX, the EPA recognizes that adjustments to the system or a different submittal system entirely may be needed in the future. Therefore, the title V petitions Web site will provide access to the designated electronic submittal system in use at any given time, which will remain the primary and preferred method for receiving title V petitions. The electronic submittal system allows for a direct route to the appropriate agency staff. It also provides immediate confirmation that the EPA has received the petition and any attachments.

If a petitioner experiences technical difficulties when trying to submit a petition through the electronic submittal system identified on the title V petitions Web site, the petition may also be submitted to the agency through the following email address: titleVpetitions@epa.gov. This address is being established as an alternative method for use in instances when the electronic submittal system is not available. For petitioners without access to the internet at the time of petition submittal, this notice also announces the establishment of one specific physical address to which all paper copies of petitions should be sent. Paper copies of all petitions unable to be

sent electronically may be sent by mail or by courier to the following address: US EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, Operating Permits Group Leader, 109 T.W. Alexander Dr. (C504-05), Research Triangle Park, NC 27711. Additional information on these alternative methods for submittal will also be available at the title V petitions Web site.

Although regulatory changes are being proposed to integrate these methods of submission into the part 70 rules, all three of these methods are currently available for petition submission, and petitioners may elect to use any one of them now. Furthermore, although the proposed changes to the regulatory provisions identify three possible means to submit petitions, for any particular petition, once a petition and any attachments have been successfully submitted using one method, there is no need to submit a duplicate copy via another method. The EPA requests that petitioners only submit a petition using one method, which will expedite the administrative process and improve the EPA's efficiency in reviewing petitions. Finally, if these regulatory revisions are finalized, the agency would not be obligated to consider petitions submitted through any means other than the three identified in the rule.

b. Required Copy of the Petition to the Permitting Authority and Applicant

Section 505(b)(2) of the Act requires that the petitioner provide copies of its petition to the permitting authority and the permit applicant. This requirement does not currently appear in the part 70 rules. The EPA is proposing to revise the part 70 regulations in order to fill this gap in the regulations. Specifically, in this notice, the EPA proposes to add language to 40 CFR 70.8(d) that is identical to the statutory language.

2. *Why is the EPA Proposing this Change?*

In general, feedback from stakeholders, as well as the EPA's experience in receiving petitions, indicate there is confusion at present as to where a petition should be submitted. While section 505(b)(2) of the CAA and 40 CFR 70.8(d) provide that any person may petition the Administrator to object within 60 days after the expiration of the EPA's 45-day review period for the proposed permit, both the statute and the regulations are currently silent as to how a petition should be submitted to the EPA. Because the regulations do not dictate a specific address, title V petitions have been received in a number of different offices within the agency. Most of the recent petitions have been sent to the agency through email, in some cases with a duplicate paper copy sent to a physical address somewhere within the EPA. For example, the agency has received petitions that were sent directly to a staff person in a Regional office, as well as petitions sent directly to the Administrator, either by email or courier. One complication presented by this current practice is that by sending petitions via email, attachments supplied by petitioners as supporting materials may become separated from the petition or lost entirely. In addition, and potentially because of this fact, petition attachments are frequently submitted by mail or courier, while the petition itself is submitted by email. These various submission practices require additional administrative processing within the EPA and can delay the initiation of the substantive petition review process.

One goal of this proposal is to clarify where and how title V petitions should be submitted. Another goal of this proposal is to announce the establishment of an electronic submittal system and promote its use as the preferred method for the submittal of petitions to the EPA. These proposed changes are expected to allow for more accurate tracking of petitions and

to increase the agency's efficiency and effectiveness in responding to petitions by ensuring the timely receipt of petitions and any attachments in a central location.

The EPA has identified several benefits of establishing the electronic submittal system as the preferred submittal method for receiving title V petitions. For petitioners, the electronic submittal system will provide immediate confirmation to the petitioner that the petition was received by the agency. In contrast to the size limitations that can be experienced when sending title V petitions through email, petitioners will be able to see that all intended supporting materials are attached to the petition and are submitted in one entry. Thus, submitting a petition and attachments via the electronic submittal system would avoid the need to send multiple emails to transmit the entire petition package. Sending petitions through the electronic submittal system also eliminates timeliness issues from potential mishandling due to courier issues.

For the agency, there is a time savings as petitions and any attachments submitted through the electronic submittal system will be immediately and directly available to the agency. This saves administrative time otherwise spent processing the incoming petition and any attachments, especially those submitted separately from the petition. Thus, the EPA anticipates that using this system will facilitate more efficient processing for incoming petitions. Further, the electronic submittal system in its current form identifies the number of attachments a petitioner intends to submit, which can alert the EPA to any missing attachments.

More information about the electronic submittal system, including information about security concerns regarding providing personal information, uploading and/or downloading files, personally identifiable information (PII), and CBI is available at the CDX Web site:

<https://cdx.epa.gov/>. If this rule is finalized and there is interest from commenters, the EPA will consider developing training webinars on the use of the electronic submittal system.

These proposed rule revisions to identify specific methods for petition submittal fall within the EPA's inherent discretion to formulate procedures to meet its obligations under CAA section 505(b)(2), as discussed in Section IV.A of this notice. In addition, the Act is silent as to the methods that should be used for title V petition submittal but imposes a 60-day deadline for granting or denying such petitions. Accordingly, these proposed changes to improve the efficiency of the EPA's initial processing of petitions and to support the agency's efforts to satisfy that obligation are based on a reasonable interpretation of CAA section 505(b)(2), including the relatively short timeframe for the EPA to grant or deny a petition.

3. Request for Comment

Comments are requested on all aspects of these proposed revisions. The EPA is also specifically soliciting comment on our proposal to add language to part 70 that identifies the electronic submittal of petitions through the agency's identified electronic submittal system as the preferred primary method for submitting a title V petition, as well as identifying two alternative methods that could be used in case of technical difficulties or by a petitioner without internet access. Commenters are encouraged to address in their comments whether additional specification or direction is needed to ensure all stakeholders are aware and have a better understanding of the preferred electronic submittal process. The EPA is expressly requesting comment on whether the proposed regulatory revisions are necessary, or whether the same effect could be achieved through the direction provided in this preamble and through the title V petitions Web site. Further, the EPA is requesting comment on what, if any, outreach methods or training materials (e.g., written instructions) would assist users with submitting petitions through the CDX system.

C. Required Petition Content and Format

1. Proposed Revisions

The following proposed regulatory changes are designed to assist the public with preparing their petitions, as well as to assist the EPA in its review of petitions. In this notice, the agency proposes to establish in the part 70 regulations key mandatory content requirements for title V petitions. These proposed requirements are based on statutory requirements under CAA section 505(b)(2) and aspects of the demonstration standard interpreted by the EPA in numerous title V petition orders and restated in Section III.D of this notice. By proposing to codify what has already been discussed in prior orders, the EPA aims to help all stakeholders understand the criteria that the EPA applies in reviewing a title V petition. The EPA also proposes to establish requirements to encourage similar formats for all petitions to further assist the agency in its review process.

a. Required Petition Content

The EPA is proposing to revise part 70 to require standard content that must be included in a title V petition, laying out the agency's expectations with more specificity to assist petitioners in understanding how to make their petitions complete and to enhance the EPA's ability to review and respond to them promptly. Under this proposal, a new section of the title V regulations, 40 CFR 70.12, would add the following list of required elements:

- Identification of the proposed permit on which the petition is based. The proposed permit is the version of the permit the permitting authority forwards to the EPA for the agency's 45-day review under CAA section 505(b)(1).¹³ A petition would be required to provide

¹³ A proposed permit may be any of the following permit actions: initial permit, renewal permit, or permit modification/revision.

the permit number, version number, and/or any other information by which the permit can be readily identified. In addition, the petition must specify whether the relevant permit action is an initial issuance, renewal, or modification/revision, including minor modifications/revisions.

- Sufficient information to show that the petition was timely filed. A petition must be filed within 60 days after the expiration of the Administrator's 45-day review period, as required by section 505(b)(2) of the Act. Timeliness may be demonstrated by the electronic receipt date generated upon submittal of the petition through the agency's electronic submittal system, the date and time the emailed petition was received, or the postmark date generated for a paper copy mailed to the agency's designated physical address. It is helpful if the petition provides key dates, such as the end of the public comment period provided under 40 CFR 70.7(h), (or parallel regulations in an EPA-approved state, local or tribal title V permitting program), or the conclusion of the EPA 45-day review period for the proposed permit.
- Identification of Petition Claims. Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with the applicable requirements under the Act or requirements under part 70. All pertinent information in support of each issue raised as a petition claim must be included within the body of the petition. In determining whether to object, the Administrator would not consider information incorporated into the petition by reference (for example, comments offered during the public comment period on the draft permit that are incorporated by reference into the petition on the proposed permit, or, as another example, claims raised in one title V petition that are incorporated by reference into a

different title V petition). However, petitions may and should still provide citations to support each petition claim (e.g., citations to caselaw, statutory and regulatory provisions, or portions of the permit record). For each claim raised, the petition would need to identify the following:

- The specific grounds for an objection, citing to a specific permit term or condition where applicable.
- The applicable requirement under the CAA or requirement under part 70 that is not met. Note that the term “applicable requirement” refers to Clean Air Act requirements only, and does not include other requirements (e.g., Endangered Species Act, Clean Water Act) to which a source may be subject. The term “applicable requirement” of the CAA for title V purposes is defined in 40 CFR 70.2.
- An explanation of how the term or condition in the proposed permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement under the CAA or requirement under part 70.
- If the petition claims that the permitting authority did not provide for the public participation procedures required under 40 CFR 70.7(h), the petition must identify specifically the required public participation procedure that was not provided.
- Identification of where the issue in the claim was raised with reasonable specificity during the public comment period provided for in 40 CFR 70.7(h), citing to any relevant page numbers in the public comment as submitted and attaching the submitted public comment to the petition. If the grounds for the

objection were not raised during the public comment period, the petitioner must demonstrate that it was impracticable to raise such objections within the period or that they arose after such a period, as required by section 505(b)(2) of the Act and 40 CFR 70.8(d).

- o Unless the exception under CAA section 505(b)(2) and 40 CFR 70.8(d) discussed in the immediately preceding bullet applies, the petition must identify where the permitting authority responded to the public comment, including the specific page number(s) in the document where the response appears, and explain how the permitting authority's response to the comment is inadequate to address the claimed deficiency. If the written RTC does not address the public comment at all or if there is no RTC, the petition should state that.

In addition to including all specified content, it is important that the information provided or any analysis completed by the petitioner must also be accurate. However, including this content would not necessarily result in the Administrator granting an objection on any particular claim raised in a petition. For example, a petitioner could include all this information but not demonstrate noncompliance, or the petition might point to a specific permit term as not being adequate to comply with an air emission limit, but may not have identified the appropriate applicable requirement.

One impediment to the EPA's review process is the use of incorporation by reference of other documents, in whole or in part, into petitions. As noted earlier in this section, under "identification of petition issues" in the new proposed mandatory content requirements, the EPA would require all pertinent information in support of each issue raised as a petition claim to be included in the body of a petition. Incorporating information into a petition by reference is

inconsistent with the demonstration obligations in the statute and would extend the petition review time as the agency spends time searching for and then attempting to decipher the petitioner's intended claim. In practice, the EPA often finds that where claims have been incorporated by reference it is not clear that the specific grounds for objection have been raised by the petitioner, which could lead to the EPA denying for failure to meet the demonstration burden. Relatedly, petitioners have sometimes used incorporation by reference to include comments from a comment letter, but a comment letter alone would typically not address a state's response to the comment. *See, e.g. Nucor III Order* at 16 (noting that the "mere incorporation by reference... without any attempt to explain how these comments relate to an argument in the petition and without confronting [the State's] reasoning supporting the final permit is not sufficient to satisfy the petitioner's demonstration burden"). In practice, the EPA has found that the incorporation of comments by reference into a petition can lead to confusion concerning the rationale for the petitioner's arguments, as it is frequently unclear which part of the comment is incorporated, how it relates to the particular argument in the petition, and the precise intent of the incorporation. In addition, the incorporation of comments by reference increases the agency's review time, as the EPA must review more than one document to try to determine the complete argument that a petitioner is making. Therefore, the EPA is proposing to revise the regulations to state that the Administrator will not consider information incorporated by reference into a petition. However, a petition should still provide citations as needed to support its legal and factual assertions.

For further transparency and clarity, the EPA in this notice gives examples of types of information that are not necessary to include when preparing an effective petition. In doing so, the EPA hopes to ease the effort associated with preparing a petition while promoting

succinctness. For example, while a petitioner needs to cite to the legal authority supporting its specific claim, a petition does not need to include pages of background or history on aspects of the CAA. If a petitioner wishes to include additional information for an alternate purpose unrelated to the EPA's review of the specific petition claim, the EPA recommends appending this information to the petition as a separate document and identifying the purpose for which it is provided.

b. Required Petition Format

Even with all necessary information provided, a petition may still require substantial time to review because of how it is organized. Therefore, the EPA is also proposing and taking comment on format requirements. If information is presented in the same format, including the same order, in all petitions, the EPA anticipates this standard organization could reduce review time as the general location of specific details would be the same in every petition received. These proposed format requirements could also help petitioners better understand what is, and what isn't, necessary in an effective title V petition. To that end, the EPA proposes the use of a standard format following the same order as previously identified in the list of required petition content. Regulatory language to this effect is included in the proposed new provision, 40 CFR 70.12. If finalized, templates and/or guidance are planned for development for inclusion on the title V petitions Web site.

Further, the EPA is requesting input from the public on several specific questions related to potentially establishing page limits for title V petitions, as explained further in Section IV.C.4 of this notice. While the EPA has received petitions ranging from approximately 3 to 82 pages (excluding attachments), the length for most petitions is in the range of 20 to 30. The amount of detail required to successfully raise a claim and meet the demonstration standard may depend on

the complexity of the issue. However, we expect that most claims could be written effectively and succinctly, as demonstrated in the example claim that follows.

2. *Example Claim*

The following paragraphs contain an example of a concise and effective presentation of a hypothetical single claim that would be part of a larger petition – one that includes all pieces of required content for a claim proposed in this rule. Because this is only a sample claim, not a sample petition, it does not include some of the required content that relates to the petition as a whole (such as identifying information for the proposed permit). This example is organized following the order presented in the proposed required content changes identified previously, which is also the proposed standard format. The bullets highlight each element of the proposed content requirements.

Although EPA is providing this sample claim to illustrate how the material that would be required under the proposed regulatory revisions could be presented succinctly and effectively, the information that is needed to satisfy the demonstration burden for any given petition claim will vary depending on the specifics of the claim, the applicable requirements, and the underlying permit terms and record. The following hypothetical claim is provided solely for purposes of illustration:

- Specific Grounds for Objection, Including Citation to Permit Term

Facility X's title V permit lacks monitoring sufficient to assure compliance with the 4.5 pound per hour (lb/hr) nitrogen dioxide (NO_x) emission limitation of the approved State Implementation Plan (SIP) at 30 State Administrative Code 66.54.2. Specifically, Permit Condition I.D.26 requires that NO_x emissions from Facility X's combustion units (Units 1-6 and 11-14) cannot exceed 4.5 pounds of NO_x per hour. Permit Condition II.D.105 requires once-per-

year portable analyzer monitoring for Units 1-6 and 11-14. The permit contains no other testing, monitoring, recordkeeping, or reporting requirements on these units, and contains no other monitoring that could be used determine compliance with the 4.5 lb/hr NO_x emission limit for the units.

- Applicable Requirement or Part 70 Requirement Not Met

CAA section 504(c), and the implementing regulations in 40 CFR 70.6(c)(1) and 70.6(a)(3)(i)(B), requires all title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. *See also* 30 State Administrative Code 66.55.5(b) and (c) (same requirements in state's approved title V program). The permit does not meet this requirement as explained in the following analysis.

- Inadequacy of the Permit Term

The SIP-approved NO_x limitation does not include any periodic monitoring requirements, so 40 CFR 70.6(a)(3)(i)(B) requires state agency to add periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit. The monitoring added by the state in Permit Condition II.D.105 fails to satisfy that requirement under part 70 because monitoring only once annually for the engines units is inadequate to assure compliance with an hourly emission limit.

- Public Participation Procedure Not Provided

This petition does not claim that any public participation procedures were not provided.

- Issue Raised in Public Comments

Public Group Y (Petitioners) raised this issue on page 5 of the July 31, 2015 comment letter it submitted on Facility X's July 1, 2015 draft title V permit. (*See* Public Group Y Comments at 5; Petition Exhibit A at 5.)

- Analysis of State's Response

In responding to Petitioners' comment stating that the frequency of the permit's compliance monitoring for the compressor engines' 4.5 lb/hour NO_x limit was inadequate to assure compliance with the permit term, state agency asserted that "all that the title V provisions in 30 State Administrative Code 66.55.5(b) and the parallel requirements in 40 CFR 70.6(a)(3)(i)(B) require is periodic monitoring sufficient to yield reliable data that are representative of the source's compliance with the permit. Continuous monitoring is not required." [RTC) at 8; Petition Exhibit B at 8]. The RTC states that state agency's monitoring protocol for this unit type requires "quarterly portable analyzer testing on units with catalytic converters and annual testing on units without controls." *Id.* The RTC then concludes that "[b]ecause the portable analyzer test is a short term test, it demonstrates compliance with the emission limits for that time period. Due to the steady state operation of these units, state agency believes that the portable analyzer testing along with proper operation and maintenance of the units provides reasonable demonstration of compliance with hourly NO_x and CO emission limits." *Id.* Although state agency asserts that it included NO_x monitoring in accordance with its monitoring protocols for engines, state agency's RTC does not adequately explain how the monitoring in Facility X's permit is sufficient to assure compliance with the hourly NO_x limit in Permit Condition I.D.26.

As explained, state agency is relying on the portable analyzer test results as a snapshot sampling of emissions to confirm annually whether the units continue to meet their 4.5 lb/hour NO_x limits. Between annual portable analyzer tests, state agency relies on assumptions of steady state operation and "proper operation and maintenance of the units "to provide a "reasonable" demonstration of compliance with hourly NO_x emission limits. The RTC, however, does not

identify any permit terms or conditions that require proper operation and maintenance of the units; nor does it provide an explanation (or appropriate citation to the technical discussion) of why it believes its assumptions about steady-state operations are reasonable for this equipment, or explain how such assumptions, in conjunction with an annual emissions test, constitute monitoring that demonstrates compliance with a short term limit. Accordingly, the EPA must grants the petition on this claim.

3. *Why is the EPA Proposing this Change?*

The CAA and part 70 regulations currently provide little information on what a title V petition must or should contain. In fact, the primary requirement in CAA section 505(b)(2) is that a petition (with a few identified exceptions) must be based on objections that were raised with reasonable specificity during the public comment period for the permit, and that is the only specific requirement for petition content in the relevant regulation. *See* CAA section 505(b)(2) and 40 CFR 70.8(d). As a result, the content and format of petitions have varied widely. In the agency's experience, many petitions fail to include key pieces of information, making it more time-consuming and resource-intensive for the EPA to assess the claim. Many petitions are also convoluted, include extraneous or irrelevant information, or fail to present the key information in a logical progression, making it difficult for the agency to ascertain the specific issue being raised. Contributing to the confusion, petitions frequently include large sections of text that appear to have been developed for other reasons and are not relevant to raising or evaluating a claim about a specific flaw in the title V permit or permitting process.

One of the EPA's desired outcomes for this proposed rule is to provide direction to petitioners that will assist them with preparing petitions. The agency anticipates receiving petitions that are both more concise and clear and that contain all the key relevant material, so

that the EPA does not have to search for fundamental information or attempt to decipher the petitioner's intent. These proposed revisions are intended to facilitate a more effective petition development process and a more efficient petition review and response process, which are critical in this context because CAA section 505(b)(2) requires the agency to grant or deny a petition within 60 days. Similarly, this tight timeframe makes it imperative that a petitioner make a clear and concise demonstration that can be efficiently evaluated. By proposing to create obligations related to the content and structure of a petition, the EPA anticipates receiving petitions that more clearly articulate the petition claim and the basis for it, focusing on key information, including the alleged deficiency in the permit or permit process; the applicable requirements under the CAA or requirements under part 70 that are in question; and where the issue was raised during the public comment period (or a demonstration as to why it was impracticable to do so or that the grounds for the objection arose after the public comment period closed), how the state responded, and why that response did not adequately address the issue.

These proposed rules are consistent with statements and conclusions that the EPA has made in previous orders responding to title V petitions. The EPA has identified and emphasized the importance of such key pieces of information in assessing petitioners' claims that a title V permit or permit process does not assure compliance with applicable requirements under the CAA or under part 70. For context, examples of some of these orders were discussed in Section III.D of this notice. The EPA is proposing to add petition content requirements that would make certain information mandatory in petitions. These requirements would help clarify for petitioners specific information that is useful or necessary to evaluate a petition claim. The EPA anticipates that these mandatory petition content requirements and standard formatting would help petitioners to succinctly focus their claims and present them

effectively. The EPA anticipates that these proposed changes could also decrease the instances in which the Administrator denies a petition because the petitioner did not provide an adequate demonstration. The agency believes these changes would help petitioners to hone their claims to include the appropriate information and to realize when a claim does not meet the mandatory requirements and should not be included in the petition (e.g., the state adequately addressed the issue in its RTC).

The EPA expects the proposed revisions to require mandatory content to improve the efficiency of the agency's review process for title V petitions, as the key information would be presented in a clear and succinct fashion. Similarly, the agency expects that the proposed revisions to require similar organization for all petitions could reduce agency review time as a result of having the specific information in the same format in every petition received. Increasing the efficiency of the review process, and more specifically reducing the time it takes to review petitions, are consistent with Congress's intent that the petition process proceed in a timely and expeditious fashion, as indicated by the 60-day time frame for the Administrator to grant or deny petitions provided in CAA section 505(b)(2). *See Citizens Against Ruining the Environment*, 535 F.3d at 678 (noting that because the limited time frame Congress gave the EPA for permit review "may not allow the EPA to fully investigate and analyze contested allegations, it is reasonable in this context for the EPA to refrain from extensive fact-finding").

Moreover, as discussed in more detail in Section III.D of this notice, the EPA has explained in previous title V orders the importance of the demonstration burden in determining whether or not to grant an objection in response to a petition. *See, e.g., Nucor II Order* at 4-7. The Act does not dictate all the information that must be included or the format in which that

information should be presented; nor does it address what kind of showing must be made in order to demonstrate that an objection is warranted. Courts have determined that the term “demonstrates” in CAA section 505(b)(2) is ambiguous and have accordingly deferred to the EPA’s reasonable interpretation of that term. *See, e.g., MacClarence*, 596 F.3d at 1131 (finding the EPA’s expectation that a petition provide “references, legal analysis, or evidence” a reasonable interpretation of the term “demonstrates” under CAA section 505(b)(2)). The proposed changes are aimed in part at helping petitioners ensure that they are including information in their petitions that is necessary to satisfy the demonstration burden, under the EPA’s interpretation.

Furthermore, these proposed revisions to the part 70 rules related to mandatory petition content and format fall within the EPA’s inherent discretion to formulate procedures to discharge its obligations under CAA section 505(b)(2), as discussed in Section IV.A of this notice. Similar procedural requirements have been established for other EPA programs and processes, including the procedures for appeals filed with the Environmental Appeals Board (EAB). *See* 78 FR 5281 (2013) (adopting revisions to “codify current procedural practices, clarify existing review procedures, and simplify the permit review process”).

4. *Request for Comment*

Comments are requested on all aspects of these proposed revisions. The EPA is proposing changes to part 70 to include mandatory petition content and format to facilitate the efficient review of issues raised in petitions. The EPA requests comment on all aspects of the required petition content in the proposed 40 CFR 70.12, including the requirement to provide all key information, arguments, or analysis in the petition, rather than incorporating it by reference. The agency also requests comments on the proposed requirement that the petition format follow

the same order as the proposed list of required content, as well as the proposed revision to the regulatory language in 40 CFR 70.8(d) that requires that copies of the petition be provided to the permitting authority and the applicant.

The EPA is also requesting comment on whether or not page limits should be established for title V petitions, as a means of promoting concise petitions and to further facilitate efficient and expeditious review of petitions by the EPA. Procedural requirements specifying the maximum length of submissions have been instituted for processes such as the EAB appeal process, where petitions and response briefs may not exceed an identified word or page limit. *See* 40 CFR 12419(d)(3) (limiting petitions and response briefs to either 14,000 words or alternatively, a 30-page limit). Based on the EPA's assessment of petitions received to date, most claims could be written effectively and succinctly in one or two pages. However, we recognize that some claims are more complex and could benefit from more space for an effective demonstration. If page limits were established in the final rules, petitioners would need to include the mandatory required content (if finalized) while adhering to a specified page limit. We also request comments on the following questions: if a page limit is established, what would be an adequate number of pages, excluding attachments, for a complete but concise petition? Would a page limit in the range of 15-20 or 20-30 pages be reasonable excluding attachments? What would be an adequate number of pages for a complete but concise claim? When responding to these questions, the EPA requests that commenters provide a rationale or basis for their responses.

D. Proposed Administrative Record Requirements

1. Proposed Revisions

The EPA proposes to revise 40 CFR 70.7 to require a permitting authority to respond in writing to significant comments received during the public participation process for a draft permit. The agency is proposing a regulatory revision to 40 CFR 70.8 that would require a written response to all significant comments (RTC) and the statement of basis document to be included as part of the proposed permit record that is sent to the EPA for its review under CAA section 505(b)(1).¹⁴ Finally, the EPA proposes to revise 40 CFR 70.4(b), 70.7(h), and 70.8(a) to specifically identify the statement of basis document as a necessary part of the permit record throughout the permitting process. If no significant comments are received during the public comment period, the permitting authority should prepare and submit to EPA for its 45-day review a statement to that effect.

a. Response to Comments

Under the existing 40 CFR 70.7(h)(5), a permitting authority is required to keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill the obligation under CAA section 505(b)(2) of the Act to determine whether a title V petition may be granted. This provision also requires that such records shall be available to the public. The EPA is proposing regulatory language to revise 40 CFR 70.7 to add a new requirement that a permitting authority respond in writing to significant comments from the

¹⁴ While most permitting authorities prepare a separate RTC document, the response to significant comments may also be included within a statement of basis. Likewise, the statement of basis may be part of the title V permit, rather than a separate document. As long as there is clear indication that the RTC and statement of basis are provided along with the proposed permit, and where they can be found in the submission, the EPA will commence its 45-day review period.

public participation process for a draft title V permit.¹⁵ Significant comments in this context include, but are not limited to, comments that concern whether the title V permit includes terms and conditions addressing federal applicable requirements, including monitoring and related recordkeeping and reporting requirements. If no significant comments are received during the public comment period the permitting authority should prepare a statement to that effect.

b. Statement of Basis

The statement of basis document, which provides the legal and factual basis for the permit terms or conditions, is a necessary component for an effective permit review. Under the current regulations, permitting authorities are required to send this “statement of basis” to the EPA and “to any other person who requests it.” 40 CFR 70.7(a)(5). The EPA recently compiled best practices for developing and preparing statement of basis documents in the April 2014 guidance document, *Implementation Guidance on Statement of Basis Requirements Under the Clean Air Act Title V Operating Permits Program*.¹⁶ In most situations, the permitting authority makes the statement of basis document available for the public comment period on the draft permit (at least 30 days long), for the EPA’s 45-day review, and during the 60-day petition period.

To address any occasions where it may be absent during the permit issuance process, the EPA now proposes to add language to the part 70 regulations that would reaffirm its importance and require its inclusion at all points in the permit review process for every permit. To that end,

¹⁵ The EPA is aware that many permitting authorities elect to respond to all comments. While the EPA is proposing to require that permitting authorities must respond to all significant comments, the Agency’s proposal is not intended to discourage permitting authorities from that practice.

¹⁶ Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, U.S. EPA, to Regional Air Division Directors, April 30, 2014. Available at: <https://www.epa.gov/sites/production/files/2015-08/documents/20140430.pdf>.

we are proposing that 40 CFR 70.4(b), 70.7(h) and 70.8(a) would be revised to specifically identify the statement of basis document as a required document.

c. Incorrect Reference

The EPA proposes one additional change to 40 CFR 70.4(b) to amend an incorrect reference. Specifically, the language in 40 CFR 70.4(b)(3)(viii) currently reads: “[t]he contents of a part 70 permit shall not be entitled to protection under section 115(c) of the Act.” However, section 115(c) of the Act pertains to reciprocity related to statutory provisions addressing endangerment of public health or welfare in foreign countries from air pollution emitted in the United States.

Therefore, the EPA proposes to revise the citation in 40 CFR 70.4(b)(3)(viii) to section 114(c) of the Act, which pertains to the availability of records, reports, and information to the public. This change ensures the regulations comport with the parallel provision in the section 503(e) of the CAA, which states that: “The contents of a permit shall not be entitled to protection under section 7414(c) of this title.”

d. Commencement of EPA 45-Day Review Period

The agency considers both the statement of basis and the written RTC to be integral components of the permit record. Having access to these documents during the agency’s 45-day review period could improve the efficiency of the review, and also ensures that the agency has these critical parts of the record before it in reviewing a proposed permit under CAA section 505(b)(1). Further, it ensures that these documents are completed and available during the petition period under CAA section 505(b)(2). The EPA is proposing revisions to part 70 to require that any proposed permit that is transmitted to the agency must include both the statement of basis and written RTC among the necessary information as described in 40 CFR

70.8. The agency is proposing that the 45-day review period would not begin until all the supporting information listed in the proposed revisions to 40 CFR 70.8(a)(1)(i) has been received by the EPA. This includes the proposed permit, statement of basis, and the written RTC (or when no significant comments are received during the public comment period a statement to that effect). Finally, the EPA proposes to revise 40 CFR 70.7(h)(7) to require that within 30 days of sending the proposed permit to the EPA, that permitting authorities must provide notification that the proposed permit and the response to significant public comments are available to the public. Such notice must explain how these materials may be accessed.

The EPA recognizes that some permitting authorities run the 30-day public comment period and 45-day EPA review period concurrently, as long as no significant comments are received. Under this proposal such a practice could continue, but if a significant public comment is received, the Administrator would no longer consider the submitted permit as a proposed permit. In such instances, the permitting authority must make any necessary revisions to the permit or permit record, and per the regulations proposed in this notice, resubmit the proposed permit to EPA with the RTC and statement of basis, and any other required supporting information, with any revisions that were made to address the public comments, to re-start the EPA's 45-day review period. This reflects the EPA's understanding of how such concurrent permitting programs currently operate.

e. Notification to the Public

Because the petition period runs from the end of the EPA's 45-day review period, and the date a proposed permit is received by the EPA is not always apparent, the petition deadline is not always readily apparent. To date, the agency has encouraged permitting authorities to provide notifications to the public or interested stakeholders regarding the timing of proposal of permits

to the EPA, for example by making that information available either online or in the publication in which public notice of the draft permit was given. At this time, the agency is considering and requests comment on the best method for the public to be made aware of the date that a proposed permit is received by the EPA, as well as the deadline to submit a petition on a particular proposed permit. The EPA proposes to post when a proposed permit is received and the corresponding 60-day deadline for submitting a petition on the EPA Regional Office Web sites.

2. *Why is the EPA Proposing this Change?*

Section 505(a)(1)(B) of the CAA requires in relevant part that permitting authorities transmit to the Administrator each proposed permit. The current regulations contain the same requirement in 40 CFR 70.8(a)(1). Failure to submit any information necessary for the adequate review of the proposed permit is grounds for an objection. *See* 40 CFR 70.8(c)(3)(ii). Part 70 also currently requires that the permitting authority provide a statement of basis that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). *See* 40 CFR 70.7(a)(5).

As a general matter, initial and renewed title V permits are developed by a permitting authority and then go through a public notice and comment period. The draft permit may undergo some revisions based on the public comment period and this updated version of the permit, referred to as the proposed permit, is sent to the EPA for a 45-day review period per CAA section 505(b)(1). Many permitting authorities already send a written RTC and a statement of basis along with the proposed permit for the EPA 45-day review. However, there are other permitting authorities that do not; instead this information may be provided by these permitting authorities at some point later in the permitting process. When these documents, and the RTC document in particular, are unavailable for the EPA review period, the EPA cannot provide a

fully effective review. Moreover, when these documents are unavailable to the public following the EPA's review, potential petitioners may be missing necessary information to determine whether to submit a petition or to provide a full argument in support of any issues they may raise in a petition.

Notably, the EPA's 45-day review period under the current rules begins when the EPA has received the proposed permit and "all necessary information" from the permitting authority. 40 CFR 70.8(c). With regard to the availability of necessary information for the agency's 45-day review of a proposed permit, the EPA stated in the proposal to the original title V regulations that the agency believes it can object to the issuance of permit where the materials submitted by the permitting authority do not provide enough information to allow a meaningful EPA review of whether the proposed permit is in compliance with requirements of the Act (including the SIP). If the agency was not able to object under these circumstances, the EPA's oversight rule could be severely hampered. 56 FR 21750 (1991). The EPA continues to interpret the Act in this way and provides part of the rationale for these proposed revisions to the regulations.

In reviewing title V petitions, the EPA generally pays careful attention to the permitting authority's RTC. The EPA also explained the benefits of making the written RTC available during its 45-day review period in 2014 in the *Hu Honua Order*:

[P]roviding the entire record for a Proposed Permit at the beginning of the EPA's 45-day review period serves to enhance the EPA's review of the Proposed Permit by providing a fuller understanding of the permitting history and the state's rationale for its permitting decisions. Where the entire record is available at the beginning of the 45-day review period, the EPA has the benefit of understanding the permitting history and the state's rationale for its permitting decisions. Likewise, where the entire record is available at the beginning of the public's 60-day window to submit petitions to the Administrator, the public has the benefit of understanding the permitting history and the state's rationale for its permitting decisions. Providing the entire record before the start of the public's 60-day petition period would allow the public to better assess any issues with the permit that they may have identified.

See, In the Matter of Hu Honua Bioenergy Facility, Order on Petition No. IX-2001-1 (July 2, 2014) at 30.

As noted in Section III.D.5 of this notice under general principles of administrative law, it is incumbent upon an administrative agency to respond to significant comments raised during the public comment period. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”) It is to the benefit of the permitting authority to respond to significant comments, as it is an opportunity to further refine the permit record and/or articulate the authority’s rationale. As the issues raised in a title V petition must generally be raised with reasonable specificity during the comment period, responding to comments gives the permitting authority a chance to address any issues that may become the basis for a petition. Generally speaking, in order to make the demonstration required under CAA 505(b)(2), a petitioner is expected to address the permitting authority’s final decision and reasoning, including any response in the RTC. *See MacClarence*, 596 F.3d at 1132-33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) at 20-21 (denying title V petition issue where petitioners did not respond to state’s explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state’s response to comments or provide a particularized rationale for why the state erred or the permit was deficient). However, if the state has not responded to the comment, there is nothing for the petitioner to address. If the written RTC is not available during the petition period, it may not be clear how the petitioner would be able to address the permitting authority’s response in its petition.

Similarly, if a permitting authority has not adequately articulated its rationale for a particular permitting action that rationale may not be evident to the EPA from the permit record and a petitioner may be able to easily demonstrate that the articulated rationale is inadequate to support the action. For these reasons, without the availability of the written RTC during the petition period, there may be an increased likelihood of granting a particular claim on the basis that the state provided an inadequate rationale or permit record.

While many permitting authorities submit the RTC and statement of basis with a title V proposed permit, these proposed revisions, if finalized, would promote national consistency and the availability of the RTC document during the EPA 45-day review and the 60-day window in which a petition may be submitted on the proposed permit. This proposed requirement would allow a petitioner to better determine whether flaws in the permit, permit record, or public participation procedures raised during the public comment period had been adequately addressed. In turn, this would enhance a petitioner's confidence in its judgment whether a title V petition is warranted, because it would have the benefit of the permitting authority's rationale for permit terms and permit actions. Thus, it could facilitate resolution of issues earlier in the permitting process and may reduce the number of petitions or petition claims filed. Further, when properly implemented by permitting authorities, the agency anticipates that this proposed requirement would likely reduce the number of EPA determinations to grant a petition because a permitting authority's rationale is inadequate. The EPA is proposing this regulatory change to ensure that petitioners have the opportunity to address the permitting authority's response to comment in order to meet their demonstration burden. As such, these proposed revisions are supported by and would help implement the EPA's interpretation in this context of the ambiguous term "demonstrate" under CAA section

505(b)(2). *See MacClarence*, 596 F.3d at 1132-33 (finding the EPA's expectation that a petitioner challenge a permitting authority's final reasoning as reflected in the statement of basis of the permit a reasonable interpretation of the demonstration requirement).

These proposed changes are responsive to recommendations from the CAAAC Title V Task Force Final Report. The 2006 report included a number of recommendations for implementation improvements, including specific recommendations regarding public notification and public participation in the title V process. The majority of Task Force members agreed that if a permitting authority receives comments on a draft permit, it is essential that the permitting authority prepare a written response to comments. *See Title V Task Force Final Report Recommendation 1* at page 238. The majority of Task Force members also recommended that if a permitting authority received public comments (from anyone other than the permittee) during the public comment period, the RTC described in Recommendation 1 should be provided to the EPA for consideration during its 45-day review period. *See Title V Task Force Final Report Recommendation 2* at 239.

While the Act does not expressly require the submission of the RTC and statement of basis together with the proposed permit, it also does not preclude such a requirement or prescribe the specific materials that are needed to review a proposed permit. In light of the focus of CAA section 505(b)(2) on issues raised with reasonable specificity during the comment period, it is reasonable to interpret the Act to include a requirement that would allow the EPA and the public access to materials such as the RTC and statement of basis that would allow them to evaluate the issues raised with reasonable specificity during the comment period and the permitting authority's response.

The agency believes these proposed revisions to the part 70 rules are within the EPA's inherent discretion to formulate procedures to discharge its obligations under CAA sections 505(b)(1) and 505(b)(2), as discussed in Section IV.A of this notice. If finalized, it would help the EPA more efficiently review both proposed permits and title V petitions.

3. Request for Comment

Comments are requested on all aspects of these proposed revisions. Comments are specifically requested on the proposed regulatory language requiring the preparation of a written RTC. Additionally, the EPA requests comment on all aspects of the proposal to require both the written RTC and statement of basis be included in the record that is sent with the proposed title V permit for the EPA's 45-day review. The EPA is expressly taking comment on the best method(s) for proposed permits to be made available so that the public is aware when a proposed permit is received by the EPA for its 45-day review. States are also encouraged to provide information on whether any changes to state rules and programs would be necessary if this proposed revision to part 70 were finalized. The EPA is also expressly taking comment on the practices of permitting authorities that conduct concurrent review and is particularly interested in what processes or steps should be followed to allow for concurrent review, even if the permitting authority is not aware of whether or not it will receive comment on the title V permit when that permit is initially submitted to EPA. Finally, the EPA solicits comments on the proposed regulatory language in 40 CFR 70.4, 70.7, and 70.8 requiring the statement of basis is necessary or appropriate to ensure the document is available at all stages of the permit issuance process, or whether including it in fewer provisions would be adequate (and if so, which ones).

V. Pre- and Post- Petition Process Information/Guidance

In this section of the notice, the EPA is providing information on certain steps in the title V petition process, namely the permit issuance process that occurs before a petition is submitted, and the post-petition process, which occurs after the EPA grants an objection on at least one issue in a petition. The EPA anticipates this information will help stakeholders gain a better understanding of the role a petition might play in the development of a permit that assures compliance with applicable requirements under the CAA and part 70. Most of what follows has been addressed publicly in various formats, but the EPA believes that repeating this information here for the public's convenience will provide stakeholders with a comprehensive look at the petition opportunity in CAA section 505(b)(2) and 40 CFR 70.

A. Recommended Practices for Complete Permit Records

1. Recommended Practices for Permitting Authorities

The proposed changes in Section IV.D of this notice are intended to increase the effectiveness of the EPA 45-day review as well as ensure that the full permit record is before petitioners during the 60-day petition period. Making these documents available also provides an opportunity for a permitting authority to ensure that they have fully responded to comments when preparing the proposed permit. Permitting authorities have at least three opportunities to provide the permit record and ensure that it comports with the CAA: the draft, proposed, and final permit.

While the EPA is not requiring the following actions, the agency is recommending practices for permitting authorities when preparing title V permits. In the agency's experience, these practices can minimize the likelihood that a petition will be submitted on a title V permit. Many involve taking action at an appropriate time to ensure that the permit includes the

conditions to assure compliance with applicable requirements under the CAA and part 70. In addition, many focus on consulting with the appropriate EPA Regional Office early when preparing and issuing permits. These “recommended practices” include:

- Consulting with the appropriate EPA Regional Office as needed on key aspects of the permit before the draft permit stage, especially if the permit is expected to be highly visible or contested.
- On a case-by-case basis, considering whether a particular draft permit warrants outreach to the community.
- On a case-by-case basis, considering whether it is appropriate to provide for a public participation opportunity on a revised draft permit.
- Fully addressing significant comments on draft permits and ensuring the permit or permit record includes adequate rationale for the decisions made. For example, permitting authorities should provide sufficient rationale for selected monitoring to assure compliance. The EPA’s objections based on an inadequate record most often occur when the EPA finds that a permitting authority did not sufficiently explain why the monitoring was sufficient to assure compliance with a particular limit.
- Consulting with the appropriate EPA Regional Office as needed to resolve issues related to comments on draft permits and incorporating those resolutions into the proposed permits.
- Consulting with the appropriate EPA Regional Offices as needed to resolve issues related to the EPA objections or comments on proposed permits and incorporating those resolutions into the final permits.

- For petitions on which the EPA grants an objection on a claim because the record is inadequate, revising the record and permit as necessary and in a timely manner to resolve the objection.
- Reviewing permits that are the subject of a petition and revising or reopening for cause to address any issues raised by the petition that have not been resolved.
- Posting the proposed permit and RTC online where possible.

2. *Recommended Practices for Permit Applicants*

The EPA is providing the following recommended practices for a source to consider to help ensure that its permit includes the conditions to assure compliance with applicable requirements under the CAA and part 70. In some cases, this may minimize the likelihood that a petition will be submitted on its title V permit. These “recommended practices” include:

- Submitting permit applications that include all information required under the approved title V permit program.
- Consulting with the permitting authority when any discrepancy or inaccuracy is identified in the permit, at any stage of the permitting process.
- Promptly providing any updates to the permit application to the permitting authority.
- If public comments identify an issue in the draft permit, contacting the permitting authority to make revisions to address the concern before the permit is proposed to the EPA.
- Timely responding to inquiries from the permitting authority at each stage in the permitting process, including the draft, proposed, and final stages.

B. Post-Petition Process

The following discussion provides information about the activities that occur, or may occur, after the EPA responds to a title V petition. Various stakeholders have indicated there can be confusion around the appropriate steps following an EPA petition order, particularly when the Administrator granted the petition in whole or in part. The summary below describes EPA's interpretation of key provisions of the CAA and implementing regulations. This interpretation has already been shared publicly in title V orders responding to petitions. *See, e.g., In the Matter of Public Service of New Hampshire Schiller Station*, Order on Petition Number VI-2014-04 (July 28, 2015) at 4; *In the Matter of Meraux Refinery*, Order on Petition Number VI-2012-04 (May 29, 2015) at 7-10. In the interest of providing additional transparency and clarity for the title V petition process, and for the public's convenience, the EPA repeats that interpretation in the following paragraphs.

When the EPA objects to a proposed permit under CAA section 505(b), section 505(b)(3) instructs that a permitting authority "may not issue the permit unless it is revised and issued" in accordance with section 505(c) of the Act. If the permit has already been issued by the permitting authority before it receives the objection, then the EPA "shall modify, terminate, or revoke" the permit, and the permitting authority may then only issue a revised permit in accordance with section 505(c) of the Act.

Under CAA section 505(c), if the permitting authority fails to submit a permit revised to meet the Administrator's objection within 90 days after the objection, the Administrator must issue or deny the permit in accordance with the requirements under title V. Section 505(c) further provides that no objection is subject to judicial review until the Administrator takes final action to issue or deny the permit.

Neither CAA section 505(b)(3) nor section 505(c) provide express direction as to the specific procedures and steps the EPA must use to “modify, terminate, or revoke” or “issue or deny” the permit, though section 505(c) points generally to the requirements under title V. Although the Act is ambiguous, the implementing regulations shed some light on the process. Those regulations provide a state with 90 days to resolve the EPA’s objection and terminate, modify, or revoke and reissue the permit, before the EPA would need to begin to act on the permit. 40 CFR 70.8(d), 70.7(g)(4)-(5); *see also* 40 CFR 71.4(e) (the EPA will take permitting action under part 71, when, among other things, a state fails to respond to the EPA’s objection). A permitting authority may address an EPA objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 CFR 70.7(g)(4). In some cases, the permitting authority’s response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. As an example, a permitting authority might opt to include additional rationale and detail to support its decision in response to the EPA’s objection if such objection was based on the grounds that the permit record does not adequately support the permitting authority’s decision. Whether the permitting authority submits

revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority's response is generally treated as a new proposed permit.¹⁷

As described in previous title V orders, such as the 2013 *Nucor II Order*, the EPA has generally treated the permitting authority response as a new proposed permit which is subject to the agency's opportunity to conduct a 45-day review per CAA 505(b)(1) and 40 CFR 70.8(c), and an opportunity for a petition if the EPA does not object. As stated in the *Nucor II Order*:

[T]he EPA viewed the revised permit as providing the EPA an opportunity to object to the permit under CAA section 505(b)(1) and 40 CFR 70.8(c), and, when the EPA did not object, an opportunity for a citizen to petition the EPA to object under CAA section 505(b)(2) and 40 CFR 70.8(d). The EPA has also treated state responses to EPA objections that revised the permit record to provide further support for its decision as constituting new proposed permits subject to review by the EPA under CAA section 505(b)(1) and 40 CFR 70.8(c), and, absent an EPA objection, citizen petition under CAA section 505(b)(2) and 40 CFR 70.8(d). *See, e.g., In the Matter of KerrMcGee/Anadarko Petroleum Corp., Frederick Compressor Station*, Order on Petition VIII-2008- 02, at 2-3 (Oct. 8, 2009); *In the Matter of Anadarko Petroleum Corp., Frederick Compressor Station*, Order on Petition VIII-2010-4, at 4-5 (Feb. 2, 2011). A permitting authority's rationale for its permit terms is a fundamental component of its permit decision. Accordingly, the EPA has viewed a state response to an EPA objection that buttresses its basis for its permit decision as a new proposed permit for purposes of CAA section 505(b) and 40 CFR 70.8(c) and (d).

Nucor II Order at 14.

The EPA's interpretation that a state's response to an EPA objection generally triggers a new EPA review and petition opportunity is consistent with, and a reasonable interpretation of,

¹⁷ When the permitting authority decides to modify a permit in order to resolve an EPA objection, it must go through the appropriate procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 CFR 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 CFR 70.7(h). In other words, EPA's view that the state's response to an EPA objection is generally treated as a new proposed permit does not alter the procedures for making the changes to the permit terms or condition or permit record that are intended to resolve EPA's objection.

the statutory and regulatory process for addressing objections by the EPA, as explained previously. Accordingly, at the end of the 45-day review period, if the EPA does not object, there is a 60-day window in which there is an opportunity for a second petition. If a second petition is received, the EPA must respond to the petition within 60 days under CAA section 505(b)(2).

VI. Implementation

Costs associated with this proposed rule are expected to be minimal. Much of the focus in this proposal is to codify the established practice that has been publicly discussed and evolved over time. If finalized, the revisions should impose no costs on petitioners, and may reduce confusion over and the time necessary for preparing a title V petition. The agency anticipates that a small number of permitting authorities may need to amend their rules regarding permit issuance to require responses to significant comments and the submittal of those responses with the proposed permit that is sent to the EPA for review.

The existing part 70 regulations provide for state program revisions if part 70 is revised and the EPA determines such conforming changes are necessary. 40 CFR 70.4(a) and 70.4(i). The EPA is soliciting comment as to whether revisions to any approved state programs would be necessary if the revisions to part 70 regulations proposed in this notice are finalized. States are expressly encouraged to provide information on any changes to state rules and programs that may be necessary if the proposed revisions to 40 CFR 70.7(h) and 70.8 are finalized to require permitting authorities to respond in writing to all significant comments raised during the public participation process and to provide that response to the EPA for the agency's 45-day review period.

VII. Proposed Determination of Nationwide Scope and Effect

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of nationally applicable regulations promulgated, or final actions taken, by the Administrator; or (ii) when such action is locally or regionally applicable, if the action is determined to be of nationwide scope or effect and the Administrator publishes such a determination. The EPA proposes to find and publish that this rule is based on a determination of nationwide scope and effect. This proposed rule concerns revisions to the EPA's regulations in part 70 for operating permit programs, and these regulations apply to permitting programs across the country. Accordingly, we propose to determine that this is a rulemaking of nationwide scope or effect such that any petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit.

VIII. Environmental Justice Considerations

This action proposes certain revisions to part 70 regulations to improve the title V petition submittal, review and response processes. The proposed revisions and guidance provided in this rule should increase the transparency and clarity of the petition process for all stakeholders. First, the establishment of centralized petition submittal is expected to reduce or eliminate confusion over where to submit a petition. When using the preferred method of an electronic petition submittal through the agency's electronic submittal system, a petitioner will also have immediate assurance that the petition and any attachments were received. However, alternative submittal methods are still available options for members of the public that experience technical difficulties when trying to submit a petition or for those that do not have

access to electronic submittal mechanisms. Second, the proposed required content and format provides instruction and clarity on what must be included in a petition. This change is anticipated to assist petitioners in providing all the critical information in their petitions in an effective manner, which may increase the agency's efficiency in responding to petitions. Third, the proposed regulatory changes would require permitting authorities to respond to public comments in a written document that is provided to the EPA for the agency's 45-day review and is available during the 60-day opportunity to file a title V petition, which will provide increased availability of information regarding permits for the public in general and petitioners specifically. Further, this change may provide more timely notification of pertinent steps and documents in the permit issuance process. Fourth, the recommended practices for permitting authorities and sources, if followed, may improve the quality of public participation and the operating permits being issued. Finally, the description of the post-petition process is anticipated to reduce confusion regarding the appropriate steps when the EPA grants a petition for an objection on a particular issue. This proposed action does not compel any specific changes to the requirements to provide opportunities for public participation in permitting nor does it finalize any particular permit action that may affect the fair treatment and meaningful involvement of all people. Further, this proposed action is responsive to some of the feedback received during the Environmental Justice in Permitting workshops the agency provided in the North Birmingham area on September 15 and 16, 2014 and other such meetings held in EPA's Region 4.

In preparation for this proposal, the agency participated in community calls where the EPA presented a brief overview and announcement of the rulemaking effort. The EPA provided additional details about a planned webinar that will describe the title V petition process, the content of this proposal, and when and how to submit comments.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action would not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060-0243 for the title V part 70 program. To the extent that a SIP revision or a title V program revision is necessary to effect the changes being proposed, we believe that the burden is already accounted for under the approved information collection requests noted earlier.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This proposed action would not impose any requirements directly on small entities. Entities potentially affected directly by this proposal include anyone that chooses to submit a title V petition on a proposed title V permit prepared by an EPA-approved state, local or tribal title V permitting authority. Other entities directly affected may include state, local, and tribal governments and none of these governments are small governments. Other types of small entities are not directly subject to the requirements of this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded federal mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and would not significantly or uniquely affect small

governments. This proposed action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effect 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.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. The Southern Ute Indian Tribe has an EPA-approved operating permit program under 40 CFR part 70 and could be impacted. The EPA conducted outreach to the tribes through a call with the National Tribal Air Association. Further, the agency plans to offer consultation to all tribal governments, and will specifically offer to consult with the Southern Ute Indian tribe. The EPA solicits comment from affected tribal governments on the implications of this proposed rulemaking.

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

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This proposed action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

The EPA believes the human health and environmental risk addressed by this proposed action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The results of this evaluation are contained in Section VIII of this notice titled, “Environmental Justice Considerations.”

K. Determination Under Section 307(d)

Section 307(d)(1)(V) of the CAA provides that the provisions of CAA section 307(d) apply to “such other actions as the administrator may determine.” Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this proposed action is subject to the provisions of CAA section 307(d).

VIII. Statutory Authority

The statutory authority for this proposed action is provided by 42 U.S.C. 7401 et. seq.

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List of Subjects

40 CFR Part 70

Environmental protection, administrative practice and procedure, air pollution control, intergovernmental relations, reporting and recordkeeping requirements.

Dated: _____

Gina McCarthy,
Administrator

For the reasons stated in the preamble, title 40, Chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 70 – [AMENDED]

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

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

2. Section 70.4 is amended by:
 - a. Revising paragraph (b)(3)(viii).

The revision reads as follows:

§70.4 State program submittals and transition.

* * * * *

(b) * * *

(3) * * *

(viii) Make available to the public any permit application, statement of basis, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit itself shall not be entitled to protection under section 114(c) of the Act.

* * * * *

3. Section 70.7 is amended by:
 - a. Revising paragraphs 70.7(h)(2) and (5); and
 - b. Adding paragraphs 70.7(h)(6) and (7).

The revisions and additions read as follows:

§70.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(h) * * *

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the draft permit, statement of basis for the draft permit, the application, all relevant supporting materials, including those set forth in 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

* * * * *

(5) The permitting authority shall keep a record of the commenters and of the issues raised during the public participation process, as well as records of the written comments submitted during that process, so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.

(6) The permitting authority shall respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and any such comments raised during any public hearing on the permit. If no significant comments are raised during the public participation process, the permitting authority shall prepare a written statement to that effect.

(7) The permitting authority shall give notice within 30 days of transmitting the proposed permit to the Administrator, consistent with the procedures under 70.7(h)(1), that the proposed permit in accordance with 70.8(a)(1) and responses to public comments in accordance with 70.7(h)(6) have been transmitted to the EPA, the date of the transmission, and that these documents are available to the public. Such notice shall explain how the public may access the proposed permit and responses to comments. When possible, such notice shall include notification in the same manner used to announce the availability of the draft permit for public comment.

4. Section 70.8 is amended by:

- a. Revising and adding paragraphs 70.8(a)(1)(i) and (ii); and
- b. Revising paragraphs 70.8(c)(1) and 70.8(d).

The revisions and additions read as follows:

§70.8 Permit review by EPA and affected States.

(a) *Transmission of information to the Administrator.* (1) (i) The permit program shall require that the permitting authority provide to the Administrator a copy of each permit application (including any application for significant or minor permit modification), the statement of basis for each proposed permit and for each final permit, each proposed permit, each final permit, the written response to comments (which shall include a written response to all significant comments raised during the public participation process on the draft permit and recorded under 70.7(h)(5) of this part, or if no significant comments are received, a statement to that effect), and an explanation of how those public comments and the permitting authority's responses are available to the public. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon

agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system. The Administrator's 45-day review period for this proposed permit will not begin until the proposed permit and all necessary supporting material required under this paragraph have been received by the EPA.

(ii) In instances where the Administrator has received a proposed permit from a permitting authority before the public participation process on the draft permit has been completed, and the permitting authority receives a significant comment on the draft permit after the submission of the proposed permit to the Administrator, the Administrator will no longer consider the submitted proposed permit as a permit proposed to be issued under section 505 of the Act. In such instances, the permitting authority must make any revisions to the permit or permit record necessary to address the public comments, including preparation or revision of the response to comment document, and must re-submit the proposed permit and all necessary supporting material required in 70.8(a)(1)(i) of this part to the Administrator after the public comment period has closed. The Administrator's 45-day review period for this proposed permit will not begin until the proposed permit and all necessary supporting material required under 70.8(a)(1)(i) of this part have been received by the EPA.

* * * * *

(c) * * *

(1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under

this part. No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information required under 70.8(a)(1).

* * * * *

(d) *Public petitions to the Administrator.* The program shall provide that, if the Administrator does not object in writing under paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection. The petitioner shall provide a copy of such petition to the permitting authority and the applicant. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in 70.7(h) of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the permitting authority has issued a permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in 70.7(g) (4) or (5) (i) and (ii) of this part except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

* * * * *

5. Add section 70.12 to read as follows:

§70. 12 Public Petition Requirements.

Standard petition requirements. Each public petition sent to the Administrator under 70.8(d) of this part shall include the following elements in the following order:

(a) Identification of the proposed permit on which the petition is based. The petition shall provide the permit number, version number, or any other information by which the permit can be readily identified. The petition shall specify whether the permit action is an initial permit, a permit renewal, or a permit modification/revision, including minor modifications/revisions.

(b) Sufficient information to show that the petition was timely filed.

(c) Identification of Petition Claims. Any issue raised in the petition as grounds for an objection shall be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under this part. All pertinent information in support of each issue raised as a petition claim shall be contained within the body of the petition. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. For each claim raised, the petition shall identify the following:

(1) The specific grounds for an objection, citing to a specific permit term or condition where applicable.

(2) The applicable requirement as defined in 70.2, or requirement under part 70, that is not met.

(3) An explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70.

(4) If the petition claims that the permitting authority did not provide for a public participation procedure required under 70.7(h), the petition must identify specifically the required public participation procedure that was not provided.

(5) Identification of where the issue was raised with reasonable specificity during the public comment period provided for in 70.7(h), citing to any relevant page numbers in the public comment submitted to the permitting authority and attaching this public comment to the petition. If the grounds for the objection were not raised with reasonable specificity during the public comment period, the petitioner must demonstrate that such grounds arose after that period, or that it was impracticable to raise such objections within that period, as required under 70.8(d) of this part.

(6) Unless the grounds for the objection arose after the public comment period or it was impracticable to raise the objection within that period such that the exception under 70.8(d) applies, the petition must identify where the permitting authority responded to the public comment, including page number(s) in the publicly available written response to comment, and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment. If the response to comment document does not address the public comment at all, the petition shall state that.

6. Add section 70.13 to read as follows:

§70.13 Documents that May be Considered in Reviewing Petitions

The information that the Administrator considers in making a determination whether to grant or deny a petition submitted under 70.8(d) of this part on a proposed permit generally includes, but is not limited to, the Administrative Record for the proposed permit and the petition, including attachments to the Petition. For purposes of this paragraph, the Administrative Record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of bases for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 70.7(h)(2) of this part; and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to 70.7(h)(2) of this part. If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

7. Add section 70.14 to read as follows:

§70.14 Submission of Petitions.

Any petition to the Administrator shall be submitted through the Operating Permits Group in the Air Quality Policy Division in the Office of Air Quality Planning and Standards, using one of the three following methods identified at the Title V Petitions Web site: an electronic submission through the EPA's designated submission system (the agency's preferred method); an electronic submission through the EPA's designated email address listed on that Web site; or a paper submission to the EPA's designated physical address listed on that Web site. Any necessary attachments shall be submitted together with the petition, using the same method

as for the petition. Once a petition has been successfully submitted using one of these three methods, the petitioner should not submit additional copies of the petition using another method. The Administrator is not obligated to consider petitions submitted to the agency using any method other than the three identified in this paragraph.