UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

August 3, 1994

Ms. Beverly Hartsock
Deputy Executive Director
Office of Air Quality
Texas Natural Resource
Conservation Commission
P. O. Box 13087
Austin, TX 78711-3087

Dear Ms. Hartsock:

I am pleased to take this opportunity to provide you with a copy of the Transition Guidance which we promised would be forthcoming during the State/U. S. Environmental Protection Agency (EPA) meeting in Tulsa on July 12-13, 1994.

The enclosure contains three parts: a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation; Grant-Fee Transition: Questions and Answers; and a copy of a memorandum from Susanne Lee, Office of General Counsel. As you familiarize yourself with the various sections, you will find many of the State's concerns to be addressed. We were most happy with the guidance, which was the outcome of the efforts of the Transition Workgroup. The workgroup was comprised of various representatives from EPA Headquarters program offices, the Office of General Counsel, the Inspector General's Office, the State and Territorial Air Pollution Program Administrators, the State and Local Air Pollution Control Officials, and the Regional Offices. We believe the workgroup charge from Mary Nichols to clearly outline transition guidelines while at the same time providing Regions and States flexibility was achieved.

If you will recall, one area where flexibility was stressed was in the delineation of Title V funded activities versus Section 105 funded activities. The transition guidance calls for Regions and States to use the grant/fee matrix as a general guide not a "prescriptive checklist". Since EPA is providing for flexibility in assessing the various activities as either fee funded or grant funded, we are dependent upon your defining the program activities. As we discussed in Tulsa, we are implementing a two-phased approach to developing grant workplans in FY 95. Your program delineations will be needed before Phase II workplan objectives can be developed and Implementation Agreements finalized. I am requesting that these assessments be provided to the Regional Office by October 1, 1994.

I realize the next two years will be challenging and, at times, trying. Since we are breaking new ground, there may be instances where we don't have all the answers. But, I feel confident that the sound working relationships we have established will serve us well in achieving our program goals in a time of change. If you have any questions, please do not hesitate to contact me at (214) 665-7200 or Terrie Mikus at (214) 665-7208.

Sincerely,

A. Stanley Meiburg
Director
Air, Pesticides and
Toxics Division (6T)

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 21 1994

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Transition to Funding Portions of State and Local Air Programs with Permit Fees Rather than Federal Grants

FROM: Mary D. Nichols
Assistant Administrator
for Air and Radiation

TO: Regional Administrators
Regions I - X

I expect that during FY 1995 we will give interim or final approval to many of the state and local operating permit programs required by Title V of the Clean Air Act. The fees that result from implementation of the permit programs will significantly alter how, and to what degree, state and local agencies use federal grant funds awarded under section 105 of the Act. The agencies will no longer be able to use federal grant funds for permit program activities. Also, the agencies cannot use Title V fees to provide the nonfederal matching funds required by section 105.

In many instances regional offices will need to negotiate state and local grant workplans and award grants for FY 1995 well in advance of the Title V program approvals. EPA and grant recipients will need to develop operating procedures that will facilitate a smooth transition from programs that now are funded largely by federal grants and state and local general revenue funds to programs with major components that are funded with Title V fees. I have summarized below general guidance to facilitate this program transition. I have also attached a series of questions and answers that provide additional clarification on certain aspects of the guidance including when grant funds can no longer be used for Title V-related purposes.

Relationship of Title V Fees and Section 105 Grants

After a thorough review, EPA's General Counsel concluded that Title V operating permit fees cannot be used to meet the cost-sharing requirements of the section 105 air grant program.

- Section 502 of the Clean Air Act requires that sources subject to Title V permit requirements pay an annual fee, or the equivalent over some other period, to the applicable permitting authority. The fees that the permitting authority collects must be sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the Title V operating permit program.

- Any fee required to be collected under Title V must be used solely to cover the reasonable (direct and indirect) costs of the Title V program.

- Because section 502 requires that Title V program costs be funded solely from the fees collected and that the fees collected be used only for that purpose, Title V permit program costs cannot be funded through a section 105 grant and these costs are not allowable section 105 grant costs.

- In order to qualify for cost-sharing, the costs incurred must be allowable costs under the EPA grant. Since Title V program costs are not allowable section 105 grant costs, the fees used to pay for them cannot be used to meet the cost-sharing requirements of section 105.

Differentiation of Program Activities

Although the Clean Air Act outlines expected Title V program activities, a state or local agency has some flexibility in how it designs its Title V program and fee schedule. As a result, the specific activities that are grant-eligible and those that are fee-eligible may vary among jurisdictions. EPA issued clarifying fee guidance on August 4, 1993 and a grant-fee matrix of activities on May 31, 1994. I have attached a copy of the matrix.

- Regional offices and grant recipients should use the matrix as an information document and general guide and not as a prescriptive checklist for differentiating between grant-eligible and fee-eligible activities. In some instances, the same activity could fall in either category, depending on the design of the state or local Title V program. Further, the nature and extent of Title V and section 105 program activities can be expected to change over time.

- Until a state or local agency's Title V program is approved by EPA, that agency has the option of using section 105 grant funds to assist in the development of its Title V program.

When Can Section 105 Grants No Longer be Used for Title V-Related Purposes?

Once EPA has given interim or final approval to the Title V operating permit program of a state or local agency:

- The agency may no longer use section 105 funds for direct or indirect Title V activities included in the EPA-approved Title V program.
- The agency must clearly identify in its grant workplan which air program activities will continue to be funded with section 105 funds.
- If a section 105 grant has been awarded that provides funding for activities that are part of the approved Title V program and no longer grant-eligible, the agency must revise its grant workplan to eliminate the Title V activities and, if appropriate, may reinvest the freed-up grant funds in other grant-eligible program areas.

Defining Acceptable Content and Procedures for the FY 1995 Grant Workplan

Many regional offices and section 105 grant applicants have expressed some uncertainty about the contents of grant workplans for FY 1995 where the state or local agency expects approval of a Title V program during the fiscal year. In these instances, regional offices may follow one of several acceptable approaches.

Approach A - Status Quo

- The grant applicant develops a grant workplan that shows the full range of air program activities planned during the course of the year. All sources and amounts of funding are identified including the agency's operating permit fees.
- Upon approval (or in anticipation of approval) of its Title V program, an agency differentiates its Title V-related activities from the balance of its air program and negotiates their removal from the grant. Regions and recipients also identify the revised level of nonfederal support remaining for matching the federal grant as a result of the removal of Title V-related resources.

Approach B - Expanded Program

- As in approach A, a full activity workplan is developed. This approach, however, expands the initial workplan submission to identify non-Title V program activities for reinvestment or increased investment once the Title V program is approved, the Title V activities removed, and grant funds are freed.

- Investments and reinvestments would be subject to negotiation with the regional office. If the workplan has identified the changes in activities and the retargeting of resources explicitly and accurately, a renegotiation of the grant may not be necessary.

Approach C - Incremental

- Where early Title V program approval is anticipated, the applicant submits a grant workplan that reflects only those air program activities that are clearly section 105 eligible. EPA would provide an incremental award reflecting support for only those activities.

- Upon approval (or in anticipation of approval) of its Title V program, the applicant renegotiates its award (or an additional award) with EPA to identify supplemental areas of new or increased investment.

In all of the above approaches, every grant awarded to agencies with existing or potential Title V responsibilities must be conditioned to provide that no activities that are part of an approved Title V program will be funded with section 105 funds.

Recomputing Maintenance of Effort Levels

The Clean Air Act requires that all section 105 grantees must provide at least the same level of nonfederal contribution as for the previous year. This "maintenance-of-effort" or MOE level may include funding for activities that will become part of the Title V program, upon EPA approval. Once an agency has accounted for the removal of its Title V activities and resources from its section 105 grant workplan and agreement:

- The agency may request the establishment of a new MOE level based upon all the remaining air program activities that are recurrent in nature. I have attached a June 27, 1994 opinion from the Office of General Counsel that provides the basis for allowing a revised MOE level.

- For requests that would lower the MOE, EPA will consider only those revisions that are directly attributable to the impact of Title V.

- However, an agency may still request an adjustment of its MOE because of a nonselective reduction in state or local funding (i.e., a reduction that applies to all state or local programs, not just to the air program).

Satisfying the Nonfederal Match Requirement

Some state and local agencies anticipated using Title V fees to provide the nonfederal matching funds for section 105 grants and have no alternative sources of funds to meet the required 40 percent nonfederal matching requirement. For those instances where an agency is no longer able to provide the nonfederal contribution level for a section 105 grant:

- The agency may request a temporary waiver of the match requirement under rules currently under development by EPA. I anticipate that these rules will be issued before EPA's approval of the Title V programs.

- EPA may reduce the level of the federal award accordingly.

Treatment of Ramp-Up Fees

Many jurisdictions have increased their existing fees in order to cover the costs of developing an approvable Title V program. (EPA has also been supporting and encouraging these efforts since FY 1991 through the award of section 105 grants.) Fees generated in advance of Title V program approval but used for development of the Title V program are generally termed "ramp-up" fees. Depending on the circumstances, in individual cases this revenue may be used towards grant match or to subsidize an agency's post-approval Title V fee schedule. Specifically --

- Ramp-up fees that are generated as part of a grant agreement should be counted towards an agency's grant matching and MOE requirements.

- Ramp-up fees that are generated apart from a grant agreement but in advance of Title V approval may, at the discretion of the jurisdiction, be used to subsidize an agency's approved Title V fee schedule if certain criteria are met. The permitting authority must assure that the fees were obtained from sources subject to Title V requirements; were collected or were to have been collected over for a period subsequent to enactment of the 1990 amendments to the Clean Air Act; are identifiable and available for unrestricted use; and are to be quantified and incorporated in the agency's four-year demonstration of Title V fee adequacy. This revenue cannot be used for grant cost-sharing purposes.

- At its discretion, a jurisdiction may also use ramp-up revenue that was generated apart from a grant agreement, and has been accumulated prior to Title V approval, for grant matching purposes. Such funds, if used for grant matching, can only be expended on activities allowable in the grant workplan. Further, these same funds cannot also be used to cover the costs of an approved Title V program.

Treatment of Additional Fee Revenue

The August 4, 1993 guidance on state fee schedules for operating permits programs under Title V notes that fee revenue needed to cover the reasonable direct and indirect costs of the Title V permits program may not be used for any purpose except to fund the Title V permits program. The guidance further notes, however, that Title V does not limit a jurisdiction's discretion to collect fees pursuant to independent state authority beyond the minimum amount required by Title V. Such funds may, at the discretion of the jurisdiction, be used for grant matching purposes. These funds, if used for grant matching, can be expended only on activities allowable in the grant workplan.

Ensuring the Fiscal Integrity of Grant Operations

Permitting authorities and grant recipients will need to ensure the fiscal integrity of their grant and fee operations in order to avoid an inappropriate commingling of funds. For grants, EPA will rely upon the provisions in 40 CFR 31 which covers standards for grantee financial management systems including:

- Procedures for expenditure and accounting of funds must be well documented and enable the clear tracing of funds. This includes adequate financial reporting, accounting records, internal controls, and budget controls.

- The recipient's workplan must comply with all applicable federal statutes and regulations.

EPA expects that each agency, if it has not already done so, will update and maintain a financial management system to accomplish the objectives noted above. This includes the necessary differentiation of air grant-eligible activities and expenditures from those related to Title V. This should occur no later than at the time of approval of the Title V program.

As noted above, I have attached a series of questions and answers to provide additional, more detailed guidance on some of the issues outlined above. I also will provide guidance on any additional transition issues that may arise. I am committed to ensuring a smooth transition as state and local agency Title V programs are approved and to providing, to the extent possible, the funding that these agencies need to implement the Clean Air Act. For further information on this guidance please contact either Bill Houck in the Office of Air and Radiation at 202-260-1754 or Susanne Lee in the Office of the General Counsel at 202-260-1484.

Attachments

GRANT-FEE TRANSITION:

QUESTIONS and ANSWERS

Office of Air and Radiation
July 21, 1994

GRANT-FEE TRANSITION:
QUESTIONS and ANSWERS

105/ Title V Programmatic Relationship

Q. What is the programmatic relationship between section 105 and Title V?

A. Section 105 air grants have been appropriated by Congress annually since 1963 to assist air pollution control agencies (as defined in section 302(b)) in implementing programs for the prevention and control of air pollution and in meeting national ambient air quality standards.

However, Title V of the 1990 Clean Air Act created an operating permit program applicable to stationary sources of regulated air pollutants. It requires the owners of affected sources to pay fees to the permitting agency to cover all reasonable direct and indirect costs of the operating permit program.

Title V operating permit program costs will likely constitute a major portion, though not necessarily all, of a jurisdiction's stationary source program expenses. The operating permit program will be an integral component of an overall air quality maintenance and attainment strategy. This strategy will also encompass activities related to non-Title V stationary sources, area sources and mobile sources.

Since an important distinction has been made in the Act that Title V activities can only be supported by Title V fees, significant changes will need to be made in how air pollution control agencies fund a large portion of their air programs.

Title V Fees (General)

Q. How are Title V operating permit program expenses to be covered?

A. Section 502(b)(3) directs that all affected sources pay an annual fee, or equivalent over some other period, to the appropriate permitting authority. In most cases this will be the traditional section 105 air pollution control agency. The permitting authority is to recover fees in an aggregate amount sufficient to recover all reasonable (direct and indirect) expenses related to developing and administering the permit program. While Congress set a presumptive minimum fee rate for permitting authorities to meet ($25 per ton adjusted annually per the CPI), a jurisdiction may collect less than this amount if it provides a detailed cost justification.

Section 105 (General)

Q. What are the nonfederal contribution requirements that a grantee must meet in order to obtain or retain a section 105 grant?

A. There are two major requirements that state and local agencies must meet in order to receive section 105 funds: (a) each agency must expend annually for recurrent program expenses at least the level of nonfederal funds that it expended in the previous year (i.e., its maintenance of effort), and (b) pursuant to 1990 CAA changes, each agency must cover at least 40% of the total recurring expenses of its section 105 air pollution control program (i.e., the 40% match).

105/ Title V Fiscal Relationship

Q. Can Title V operating permit fees be used towards the nonfederal matching requirements of the section 105 air grant program?

A. After a thorough review, EPA's General Counsel concluded that Title V operating permit fees cannot be used to meet the cost-sharing requirements of the section 105 air grant program.

Section 502 of the Clean Air Act requires that sources subject to Title V permit requirements pay an annual fee, or the equivalent over some other period, to the applicable permitting authority. The fees the permitting authority collects must be sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the Title V operating permit program. Since section 502 requires that Title V program costs be funded solely from required Title V fees and these fees be used only for that purpose, Title V permit program costs cannot be funded through a section 105 grant and these costs are not allowable section 105 grant costs.

In order to qualify for cost-sharing, the costs incurred must be allowable costs under the EPA grant. Since Title V program costs are not allowable section 105 grant costs, the fees used to pay for them cannot be used to meet the cost-sharing requirements of section 105.

Q. If an agency already had an operating permit program in place which charged affected sources a fee, is the Title V fee only that portion which represents the incremental change (i.e., the increase)? Can the original fee level be used as a basis for matching purposes?

A. Many of the activities and costs associated with a jurisdiction's existing stationary source control program effort will become a part of its Title V program once that program is approved by EPA. Title V requirements will, in and of themselves, likely generate new expenses. The Title V fee must be based upon the entire range of Title V-related expenses and not just the incremental change. No portion of the fees necessary to cover the full range of Title V-related program costs can be used for grant matching purposes.

Q. Does this mean that a jurisdiction cannot charge a Title V source a separate fee to cover other than Title V-related air program expenses?

A. No. A jurisdiction is free to charge a Title V source a separate fee to cover air program expenses other than those which are Title V-related (e.g., for state-only requirements). A jurisdiction may choose to collect this fee along with the Title V-related fee but the fees must be clearly be differentiated for administrative purposes.

Q. Can fee revenue in excess of that required to meet Title V needs be used towards the grant matching requirement?

A. The August 4, 1993 fee guidance for state Title V operating permit programs notes that Title V does not limit a jurisdiction's discretion to collect fees pursuant to independent state authority beyond the minimum amount required by Title V. Such funds may, at the discretion of the jurisdiction, be used for grant matching purposes. These funds, if used for grant matching, can only be expended on activities allowable in the approved grant workplan. These funds should also be clearly differentiated from fees required to cover Title V activities.

Q. How should permit fees which are collected in advance of Title V program approval be treated?

A. Permit fees generated in advance of Title V program approval but used for the development of the Title V program are generally termed "ramp-up" fees. Depending upon how the fee provisions were structured, this revenue may be used towards grant match or to subsidize an agency's post-approval Title V fee schedule. Specifically:

- Ramp-up fees that are generated as part of a grant agreement (i.e., used to support allowable grant activities) should be counted towards an agency's grant cost-sharing requirements (matching and maintenance of effort).

- Ramp-up fees that are generated apart from a grant agreement but in advance of Title V approval may, at the discretion of the jurisdiction, be used to subsidize an agency's approved Title V fee schedule if certain criteria are met. The permitting authority must assure that the fees: were obtained from sources subject to Title V requirements; were collected or were to have been collected over a period subsequent to enactment of the 1990 amendments to the Clean Air Act; are identifiable and available for unrestricted use; and are, or will be, quantified and incorporated in the agency's four-year demonstration of Title V fee adequacy. These fees may not be used for grant matching purposes.

Applicable Activities

Q. What air program activities are eligible for fee coverage and what activities are eligible for continued receipt of grants? Does there need to be a clear differentiation?

A. Activities eligible for Title V permit fees are delineated in section 502(b)(3)(A) of the Act and in 40 CFR 70.9, the final Title V operating permit program rule. Although the Clean Air Act outlines expected Title V program activities, a state or local agency has some flexibility in how it designs its Title V program and fee schedule. As a result, the specific activities that are grant-eligible and those that are fee-related may vary among jurisdictions. Generally, Title V program activities are those which are necessary for the issuance and implementation of the Title V permits. EPA issued clarifying fee guidance on August 4, 1993 and a grant-fee matrix of activities on May 31, 1994. Since air grants cannot be used to pay for Title V-related activities a clear differentiation will need to be made.

Q. How should the Grant-Fee Matrix be used?

A. Regional offices and grant recipients should use the matrix as an information document and general guide and not as a prescriptive checklist for differentiating between grant-eligible and fee eligible activities. In some instances, the same activity could fall in either category, depending on the design of the state or local Title V program. The matrix can be expected to change over time as the nature of sources subject to Title V changes and as new grant initiatives emerge.

Q. Can section 105 air grants be used to cover the development of a state's Title V operating permit program prior to its approval by EPA?

A. Yes. Section 105 grants can be used to assist in the 'ramp-up' or development of the permitting agency's prospective Title V program prior to its approval by EPA. To be an grants-eligible activity, of course, the Title V ramp-up activity must be included as part of the recipient's approved section 105 grant workplan. (Note: EPA has been awarding agencies air grants since FY 1991 to encourage the development of the Title V program and supporting fee provisions.) Until EPA takes action to either approve (including interim approval) or disapprove an agency's Title V program, that agency has the option of using its section 105 grant funds to develop its Title V program.

Section 105/ Title V Threshold

Q. When can air grants no longer be used to fund Title V-related program activities?

A. Once EPA has given interim or final approval to the Title V operating permit program of a state or local agency, the agency may no longer use section 105 grant funds to cover the reasonable direct and indirect costs of its Title V program activities except under specific circumstances as delineated in EPA guidance.

If a section 105 grant has been awarded that provides funding for activities that are part of the approved Title V program and no longer grant-eligible, the agency must amend or revise its grant workplan to eliminate the Title V activities and, if appropriate, reinvest the freed-up grant funds in other grant-eligible program areas.

Appropriate Procedures and Timing for Grant Workplan Submission and Adjustment

Q. What are acceptable grant workplan content and procedures for FY 1995 where a state or local agency expects Title V program approval subsequent to approval of its grant workplan (but during the FY 1995 grant budget period)?

A. In these circumstances, a regional office may use any one of the following approaches:

Approach A- Status Quo

- The grant applicant develops a grant workplan that shows the full range of air program activities planned during the course of the year. All sources and amounts of funding are identified including the agency's operating permit fees.

- Upon approval (or upon anticipation of approval) of its Title V program, an agency differentiates its Title V-related activities from the balance of its air program and negotiates their removal from the grant. Regions and recipients also identify the revised level of nonfederal support remaining for matching the federal grant as a result of the removal of Title V-related resources.

Approach B- Expanded Program

- As in approach A, a full activity workplan is developed. This approach, however, expands the initial workplan submission to identify non-Title V program activities for reinvestment or increased investment once the Title V program is approved, the Title V activity removed, and grant funds are freed.

- Investments and reinvestments would be subject to negotiation with the Region. Depending upon how explicitly and accurately the recipient has identified the changes in its activities and the retargeting of resources, a renegotiation of the grant may not be necessary.

Approach C- Incremental

- Where early Title V program approval is anticipated, the applicant submits a grant workplan which reflects only those air program activities which are clearly section 105 eligible. EPA would provide an incremental award reflecting support for only those activities.

- Upon approval (or upon anticipation of approval) of its Title V program, the applicant renegotiates its award (or an additional award) with EPA to identify supplemental areas of new or increased investment.

In all of the above approaches, every grant awarded to agencies with existing or potential Title V responsibilities must be conditioned to provide that no activities that are part of an approved Title V program will be funded with section 105 funds.

Impact on Nonfederal Contribution Requirements

Q. How is a recipient agency's cost-sharing (match) requirement affected by approval of its Title V program?

A. In those instances where an agency is no longer able to provide the necessary 40% nonfederal contribution level for a section 105 grant as a result of the transfer of air

program resources to the Title V program, the agency would be able to request a temporary waiver of the match requirement under rules currently under development by EPA.

Alternatively, if a recipient is not able to meet any of its match obligation because of the removal of all of its nonfederal resources to Title V-- but the recipient anticipated that it would be able to secure additional funding to return to at least the 40% level during the course of the grant budget period-- the recipient could request that EPA defer the recipient's nonfederal contribution until later in the grant budget period. The recipient would have to expend its nonfederal contribution within the approved budget period.

If the agency fails to meet the cost-sharing requirements because a waiver is not granted or the agency is unable to pay the amount of cost-sharing that has been deferred during the budget period, EPA may undertake the corrective actions set forth in 40 CFR 31.43. Included are actions such as terminating, or annuling the current award, or withholding future awards.

Q. **How is a recipient's maintenance of effort (MOE) obligation affected by approval of its Title V program?**

A. OGC has concluded that a grant recipient's MOE level may be adjusted to reflect the transfer of activities previously funded through section 105 grants to the Title V program. A state must maintain the level of effort associated with recurrent expenditures for activities that continue to be funded through section 105 grants. OGC has indicated that this principle applies to not only FY 1995 but future years as well.

Since the timing of Title V program approvals by EPA may vary and are uncertain, adjustment of the MOE level may need to occur in the midst of a fiscal year and not simply at its outset. Similarly, as Title V programs become fully implemented, further adjustments to the MOE level may be necessary in subsequent years.

Q. **Many section 105 recipients have been contributing nonfederal funds at a rate greater than the required 40% nonfederal minimum. When resources related to Title V have been removed from the section 105 equation, will these recipients be required to maintain their larger historical matching percentage or only a 40% contribution?**

A. This question confuses the matching and maintenance of effort requirements. If, even after adjustment for the removal of Title-V related resources, the grantee's contribution is at least 40% of the combined remaining nonfederal and federal grant funds, then the

grantee will have met the section 105 match requirement and remain eligible for at least the same level of federal funding that it had been receiving before. This is the only percentage requirement under the Act that a recipient must meet. Recipients are not obligated to increase their funding contribution to restore what might have been a historically-evolved nonfederal percentage above 40%. However, even though only 40% is required to meet the cost-sharing requirements, an amount above 40% may be required in order to meet the maintenance of effort requirement. Therefore, a recipient may not arbitrarily reduce its remaining nonfederal contribution simply because this funding level is greater than 40% relative to the total. This is because the amount of funds contributed constitutes the new maintenance of effort level and may not be reduced.

Q. Can the MOE be adjusted for reasons other than the accommodation of the changes brought about by Title V?

A. Yes. An agency may request an adjustment of its MOE because of a nonselective reduction in the expenditures of all executive branch agencies (not just the air program) of the applicable unit of government (e.g., state or local government). As part of the revisions to Part 35, EPA is also considering other circumstances where MOE flexibility may be needed.

Grant Fiscal Integrity

Q. Must a recipient continue to report its overall air program expenditures as part of the section 105 grant?

A. To assure that federal funds do not supplant other available resources EPA can request, as a condition for receipt of a section 105 grant, that a grantee describe all sources of support for the entirety of its air program activities.

Q. What financial integrity requirements must each grant recipient satisfy?

A. Permitting authorities and grant recipients will need to ensure the fiscal integrity of their grant and fee operations in order to avoid the inappropriate commingling of funds. For grants, EPA will rely upon the provisions in 40 CFR 31 including requirements that procedures for the expenditure and accounting of funds must be well documented and enable the clear tracing of funds. This includes adequate financial reporting, accounting records, internal controls, and budget controls. The recipient's workplan must also comply with all applicable federal statutes and regulations.

EPA expects each agency, if it has not already done so, to update and maintain a financial management system to accomplish the above objectives. This includes the necessary differentiation of air grant-eligible activities and expenditures from those which are related to Title V. This should occur no later than upon approval of the Title V program.

Each regional office will be expected to coordinate its review and oversight of each of its recipients' grant workplan and permit program submissions.

MATRIX OF TITLE V-RELATED AND AIR GRANT-ELIGIBLE ACTIVITIES

INFORMATION DOCUMENT

OFFICE OF AIR & RADIATION

MAY 31, 1994

MATRIX OF TITLE V-RELATED AND AIR GRANT-ELIGIBLE ACTIVITIES

Use of the Matrix

The matrix should be read and used in concert with the August 4, 1993, operating permit fee guidance issued by the Office of Air Quality Planning and Standards, particularly the explanatory cover memorandum. That memorandum sets forth principles which will help guide the Agency's review of the Title V fee program submittals. The matrix does not reinterpret the Part 70 rule nor the Title V fee guidance. Rather the matrix reaffirms those program activities outlined by the guidance which are necessary for the development and implementation of a Title V operating permit program and which EPA expects to be covered by Title V fees. Title V operating permit program expenses cannot be eligible grant expenses.

Organization of the Matrix

The matrix consists of two columns of activities-- those which EPA considers necessary for the issuance and implementation of Title V permits (and which EPA expects to be covered by Title V permit fees)-- and those air program activities outside of Title V that would be eligible for federal air grant assistance.

Activities are organized by functional or substantive categories that are common to each of the columns in order to better illustrate the impact of Title V on the overall air program operations. The categories used, however, tend to reflect the functional aspects of Title V (i.e., program development, permit issuance, compliance, etc.). Because some portion of over-arching CAA activities like emissions inventory development, monitoring, etc., may be Title V-related, some repetition may occur in the matrix.

The left-hand column of the matrix lists those program activities outlined in the Title V fee guidance which are necessary for the development and implementation of a Title V operating permit program and which EPA expects to be covered by Title V fees. Categories of Title V-related activity include:

- Development of the Title V operating permit program
- Review and issuance of Title V permits
- Implemention of specific CAA requirements applicable to Title V
- Compliance/enforcement of Title V-related requirements
- Administration of Title V fee program
- Title V-related small business technical assistance
- Other activity necessary for Title V operations

By contrast, the right-hand column of the matrix lists air program activities which can reasonably be expected to remain eligible for federal air grant assistance. This list, while as comprehensive as possible, should not be viewed as absolute. The categories of activity used for grants-eligible activities include:

- Permit program development (including the Title V program prior to approval by EPA)
- Permit review and issuance for non-Title V sources
- Implementation of specific CAA regulatory requirements
- Compliance/enforcement of CAA requirements not related to Title V
- Administration of grant and other forms of assistance
- CAA technical assistance to small business (outside of Title V)
- General and emerging air program activity

For Further Information

Questions on the matrix should be directed to William Houck in the Office of Program Management Operations at 202-260-1754. Specific concerns related to the eligibility of program expenses for Title V fee coverage and to Title V fee demonstrations should be directed to Kirt Cox at 919-541-5399 or Candace Carraway at 919-541-3189 in the Office of Air Quality Planning and Standards.

MATRIX OF TITLE V-RELATED AND AIR GRANT-ELIGIBLE ACTIVITIES

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Title V Permit Program Development	Permit Program Development
Design/development of operating permit program for Part 70 sources including: preparation of initial program submittal; development of implementation agreement with EPA; documentation of resources and legal authority; training of staff for Title V program implementation; development of necessary regulations, policies, and procedures; development of modifications to program required by new Federal regulations or standards; integration with other Clean Air Act programs (including Title III/IV); development of data systems for tracking Part 70 sources; development and oversight of local Title V programs; development of model permits.	Design/development of operating permit program for Part 70 sources (prior to Title V program approval). Development/revision of operating permit programs for other than Part 70 sources.
Determinations of program coverage and source applicability including: inventory of Part 70 sources; establishment of criteria for deferrals of non-major sources, development of significance levels for exempting required permit information; development of capacity to emit restrictions for avoiding consideration as major source (e.g., creation of synthetic minors).	Identification of those sources subject to any state permitting requirements other than those in the state's Title V program.
Revisions to the SIP to the extent they are necessary for the issuance and implementation of Part 70 permits.	Preparation, adoption and revision of SIPs necessary to implement permitting programs for other than Part 70 sources.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Title V Permit Review/Issuance Activities	Other Permit Review/Issuance Activities
Review of permit application for permitting of Part 70 sources * including: completeness review, review of compliance plans, schedules and compliance certifications; development of permit terms and conditions (including operational flexibility); trading and compliance provisions; permit limitations; separation of state-only requirements; establishment of permit-equivalent SIP limitations; optional shield provisions; and actual issuance of the permit. * (For the purposes of this matrix, such sources include: Phase II, Title IV sources; as well as major and non-major sources deferred by EPA but which a state opts to include in Title V).	**Review of applications and issuance of permits:** * For non-Part 70 sources; * For deferred sources during the deferral period approved by EPA rulemaking; * Covering state/local-only requirements in Part 70 permits.
Activities in support of public, affected State, and EPA review of permits including: notices of issuance, renewal and significant modification and the opportunity to comment; holding of public hearings, as necessary; review of public comments and preparation of responses; documentation of hearing records; and preparation of responses to challenges on permit decisions.	Public participation activities associated with permit issuance, renewal and modification for other than Part 70 sources.
Post-permit issuance activity: following the issuance of Title V permits- any revisions, modifications, or reopenings necessary (including analysis and processing necessary for reissuance); and renewals of Title V permits.	Post-permit issuance activity for non-Part 70 sources.
Development of emission inventory compilation requirements necessary for Title V permit issuance, and any necessary equivalency and case-by-case RACT determinations under Section 110 of the Clean Air Act if conducted as part of the Part 70 permitting process.	Development of emission inventory compilation requirements, and any necessary equivalency and case-by-case RACT determinations under Section 110 of the Clean Air Act if conducted as part of a construction or non-Title V operating permit process.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Implementing Applicable Requirements	Implementing Other Permit or Regulatory Requirements
Title I	Title I
Implementation and enforcement of permits issued to Part 70 sources pursuant to Title I, Parts C/D, and PSD/NSR sources.	
Implementation and enforcement of state/local minor new source review (NSR) permit for a Part 70 source that is a minor source provided that such a state/local program is approved under section 110(a)(2)(C).	Development, implementation and enforcement of state/local minor NSR permit programs which are not approved under 110(a)(2)(C).
Implementation of section 111 NSPS through Part 70 permits.	Implementation of section 111 NSPS that are not part of Title V/Part 70 process including new residential wood heaters (if not incorporated as part of Part 70 at the option of the state).
Section 112	Section 112
Implementation of specific Title I, section 112 requirements through Part 70 permits: • NESHAPs [112(d), 112(f)] • 112(h) design and work practice standards	Asbestos NESHAP demolition and renovation activities (if not incorporated as part of the Part 70 program at the option of the state).
Development and implementation of specific section 112 requirements through Part 70 permits: • 112(g) modifications for constructed, reconstructed and modified major sources. • 112(i) early reductions occurring within Part 70 sources. • 112(j) equivalent MACT determinations. • 112(l) state/local air toxics activities that take place as part of Part 70 process. • 112(r)(7) risk management plans if plan is developed as part of Part 70 process.	Development and implementation of specific section 112 requirements affecting minor sources of hazardous air pollutants. 112(l) state/local air toxics activities not within the Part 70 process (i.e., urban area toxics programs). 112(r)(7) risk management plans or plan elements not developed as part of Part 70 process (i.e., plans are developed prior to permit issuance, plans cover sources deferred from Part 70, etc.).

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Implementing Applicable Requirements	Implementing Other Permit or Regulatory Requirements
Title IV	Title IV
Issue Phase II permits and implement CEM requirements after Title V approval including: • Observe on-site tests of Phase II CEMs including: pre-test meetings; review of protocol, records, and data integrity; and verification of monitor performance. • Conduct Phase II CEM certification reviews including monitoring plan and data acquisition system review, and review of certification application.	**Assist in implementing Phase I Acid Rain program activities including:** • Develop infrastructure for implementation (including- hiring, training and organizing staff; installation and operation of data management systems; and establishing links to national acid rain data base). • Observe on-site tests of Phase I CEMs including: pre-test meetings; review of protocol, records, and data integrity; and verification of monitor performance. • Conduct Phase I CEM certification reviews, including monitoring plan and data acquisition system review; and review of application certification prior to Title V approval. • Initiate Phase I CEM compliance activities for sources missing deadlines. • Participate in NO_x permitting process @ Phase I sources. • Review, evaluate and act on Phase I NO_x averaging compliance plans. • Assist in Phase I compliance activities through field presence, oversight and support to EPA enforcement actions including NO_x. **Implement Phase II CEM activities occurring prior to Title V approval including:** • Observe on-site tests of Phase II CEMs including: pre-test meetings; review of protocol, records, and data integrity; and verification of monitor performance. • Conduct Phase II CEM certification reviews including monitoring plan and data acquisition system review, and review of certification application.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Compliance/Enforcement of Title V Requirements	Compliance and Enforcement of Other Permit or Regulatory Requirements
Compliance and enforcement activities (prior to filing of an administrative or judicial complaint or order) to the extent the activities are related to the enforcement of a Part 70 permit, the obligation to obtain a Part 70 permit, or the Part 70 permitting regulations. This includes: • Development/administration of enforcement legislation, regulations, guidance, and policies. • Review and certification of compliance plans and schedules for Part 70 sources. • Conduct and document inspections for determining compliance with Part 70 permit requirements and provisions including the performance of necessary analyses and support activities to verify source compliance with Part 70 permit requirements and provisions (e.g., stack tests conducted/reviewed by permitting authority, review of monitoring reports). • Review and observation of CEM monitoring plan, certification tests, and certification application for Part 70 sources. • Review of monitoring data for determining compliance of Part 70 sources including CEM data and reports. • Making requests to Part 70 source for information before or after violation is identified. • Preparation and issuance of notices, findings, and letters of violation. • Development of cases and referrals up until the filing of an administrative or judicial complaint or order.	**Compliance and enforcement activities including:** • Determining compliance of non-Part 70 sources including sources *permitted* as synthetic minors if the state opts not to include these sources as part of the Part 70 program; • Part 70 sources following filing of administrative or judicial compliant or order; • State/local-only requirements on Part 70 sources.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Administration of Title V Permit Fee Program	Administration of Other Revenue Programs
Design and modification, as necessary, of fee structure for part 70 sources.	**Development, design, operation, demonstration, collection, administration, and accounting of permit and other fees for non-Part 70 sources.**
Demonstration of fee schedules and projection of revenues from fee collections from Part 70 sources.	**Development, design, operation, demonstration, collection, administration, and accounting of other fees, charges and financial mechanisms for overall air program support including meeting requirements for receipt and retention of federal air grant assistance.**
Collection, administration, and accounting of fees for Part 70 sources including costs of performing self-auditing or audit by independent auditor of fee collections and the adequacy of the fiscal management of the fee system.	
Technical Assistance to Small Business	Technical Assistance to Small Business
Costs of the Small Business Assistance Program attributable to Part 70 sources including that portion of costs related to: * Clearinghouse on compliance methods and technologies including pollution prevention approaches. * Establishment of CAA/small business ombudsman and the provision of information on source applicability, available assistance, and the rights and obligations of small business stationary sources under the CAA. * Small Business Compliance Advisory Panel.	**Costs of the Small Business Assistance Program attributable to non-Part 70 sources including that portion of costs related to:** * Clearinghouse on compliance methods and technologies including pollution prevention approaches. * Establishment of CAA/small business ombudsman and the provision of information on source applicability, available assistance, and the rights and obligations of small business stationary sources under the CAA. * Small Business Compliance Advisory Panel.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Other Title V-Related Program Costs	Non-Title V Permit Program Costs
General air program activities to the extent such activities are necessary for the issuance and implementation of Part 70 permits. These include:	**General and source-specific air program requirements necessary for the issuance and implementation of a state operating permit for other than a Part 70 source including:**
* Installation, operation, and maintenance of emissions and ambient monitoring instrumentation required in the Part 70 permit.	* Installation, operation, and maintenance of emissions and ambient monitoring instrumentation required for non-Part 70 source.
* Performance of ambient monitoring required in Part 70 permit.	* Performance of ambient monitoring required for non-Part 70 source.
* Emission testing on Part 70 sources required as part of the Part 70 permit.	* Emission testing on non-Part 70 sources.
* Modeling and other impact analyses required as part of Part 70 permit.	* Modeling and other impact analyses for a non-Part 70 source.
* Development of emissions inventories required as part of Part 70 permit (e.g., to verify compliance with Part 70 permit provisions, to develop and maintain permit fee schedule).	* Development of emissions inventory data for non-Part 70 sources or to verify compliance with other than Part 70 permit provisions.
* Overhead and administrative costs directly related to implementation of EPA approved state/local Title V operating permit program.	* Overhead and administrative costs directly related to the implementation of a non-Title V permitting program.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
General Air Program Activity	General Air Program Activity
Preparation, planning, development, and adoption of source-specific SIPs necessary for the issuance of a Title V permit and implementation of the permit provisions.	**Preparation, planning, development, and adoption of SIPs, including those for attainment and maintenance of NAAQS, enactment of state or local area-wide source regulations, and enactment of mobile or area source controls (excludes source-specific SIPs required as part of Title V program/Part 70 permit such as identification of synthetic minor sources). SIP development** includes: the conduct of analyses of control options and demonstration of alternative strategies and regulatory approaches; development and maintenance of emissions inventory for preparing attainment and maintenance strategies and for assessing progress in achieving necessary emissions reductions for attaining NAAQS; and conduct of area or regional modelling to assess and demonstrate options. Also, includes the designation/redesignation of nonattainment areas and other procedural changes related to the attainment and maintenance of NAAQS.
Establishment, operation, and maintenance of that portion of a multiple site ambient monitoring network which is necessary for the issuance of a Title V permit or permits (as documented in the permit issued to the source or group of sources) including any applicable source-specific NAMS, SLAMS or PAMS monitor. This includes the cost of purchasing the monitor; collection, processing, management and review of data collected by the monitor; and quality assurance of the instrumentation.	Establishment, operation, and maintenance of multiple site ambient monitoring networks designed to assess overall levels and trends within the ambient air including the EPA required or approved networks for NAMS, SLAMS, PAMS, urban air toxics, and acid rain assessment networks. This includes the cost of purchasing monitoring equipment; collection, processing, management and review of data collected by the networks; and the quality assurance of the networks and instrumentation (excludes ambient monitoring specifically required by a Title V permit).
Planning, establishment, and implementation of programs for the development and training of state/local staff to implement Title V and related Title III and IV requirements.	**Planning, establishment, and implementation of programs for the development and training of state/local staff** to carry out Clean Air Act requirements and Agency priorities not related to the implementation of the Title V program.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
General Air Program Activity	General Air Program Activity
	<u>Mobile Source Programs</u> **Planning, development, implementation, or oversight of mobile source control program required by Titles I & II of the Clean Air Act including:** * Development of emissions inventories for mobile sources. * Planning, development and oversight of basic and enhanced motor vehicle inspection/ maintenance (implementation should be paid by vehicle inspection fees). * Planning, development and oversight of oxygenated and alternative fuels programs for motor vehicles (implementation expected to be paid by non-grant/private sector resources). * Planning, development and oversight of clean vehicle programs (implementation expected to be paid by non-grant/private sector resources). * Development and enforcement of Stage I and Stage II vapor recovery/ refueling programs for motor vehicle fuels including tanker truck inspections (installation of controls expected to be paid by non-grant/private sector resources). * Integration of transportation and air-quality related planning activities including transportation-air quality analyses and determinations of transportation conformity. * Planning, development, and oversight of transportation control measures (implementation expected to be paid by non-grant/private or other public sector resources).

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
General Air Program Activity	General Air Program Activity
	Environmental Compatibility • State/local review of assurances by federal entities as to the general conformity of their activities with an approved state implementation plan (40 CFR 93 Subpart A); state/local determination of conformity of their federally-assisted actions (40 CFR 51). • Environmental impact review. • Land use and air quality analyses.
Emerging Activities and Programs	Emerging Activities and Programs
• Public education and outreach concerning implementation of the Title V program.	Planning, development, implementation of emerging programs and initiatives required by the Clean Air Act or agency priorities including: • Public education and outreach concerning the overall provisions of the Clean Air Act and the specific provisions required for implementation of non-Title V provisions. • Planning and implementation of specific geographic or ecosystem approaches (including multi-media support) and studies for addressing specific air pollution problems within defined geographic areas. • Planning and implementation of pollution prevention initiatives and strategies, market-based approaches, risk analysis, not directly related to implementation of a Title V permit to a specific Part 70 source. • Promotion of public/private partnerships for addressing specific air pollution problems.

TITLE V PERMIT FEE ACTIVITIES	AIR GRANT ELIGIBLE ACTIVITIES
Emerging Activities and Programs	Emerging Activities and Programs
• Future determinations will need to be made about the applicability of this matrix to those Indian Tribes which administer EPA-approved operating permit programs.	• Development and implementation of voluntary programs for reducing air pollution and/or addressing specific risks including indoor air, green programs, and other voluntary energy conservation programs. • Programs for assessing air quality maintenance/ air pollution control needs and for the development and implementation of air quality programs on Indian lands. • Programs for improving the transfer and exchange of programmatic and technical information among state and local programs including information on emerging and innovative technologies. • Innovative personnel programs to promote sharing of expertise and knowledge among state, local, and federal agencies. • Development of state programs for control of ozone depleting substances; and for control of carbon dioxide emissions. • Support for regional associations of states and interstate pollution control compacts. • Participation in international studies, programs, and agreements.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 27 1994

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Reduction in the Level of a State's Maintenance of Effort As a Result of the Implementation of the Title V Permit Program

FROM: Susanne M. Lee
Attorney Advisor
Grants and Intergovernmental Division (2378)

TO: Jerry A. Kurtzweg, Director
Office of Program Management Operations
Office of Air and Radiation (6102)

This is in response to your request for our opinion regarding whether, in order to meet the maintenance of effort (MOE) requirements of Section 105(c) of the Clean Air Act (CAA), States will be required to expend the same amount of non-Federal funds for air pollution control programs during Fiscal Year 1995 as they expend in Fiscal Year 1994, notwithstanding the implementation of the Title V permit fee program during Fiscal Year 1995.

It is our opinion that a State's MOE level may be reduced to reflect the transfer of activities previously funded through Section 105 grants to the Title V program. A State must maintain the level of effort associated with recurrent expenditures for activities that continue to be funded through Section 105 program grants. This principle applies not only to FY 1995 but to future years as well.

Section 105(c)(1) of the Clean Air Act (CAA) provides that "No agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds for recurrent expenditures for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year." (Emphasis added.) Regulations implementing this provision provide that: "To receive funds under section 105, an agency must expend annually for recurrent section 105 program expenditures an amount of non-Federal funds at least equal to such expenditures during the preceding fiscal year." (Emphasis added.) 40 CFR 35.120. Because the phrase

"expenditures... for such programs" in Section 105(c)(1) refers to "recurrent expenditures for air pollution control programs," which are further described in the regulatory text as "recurrent section 105 program expenditures," we believe a reasonable interpretation of the MOE provisions is that they require States to maintain their effort associated with activities that are included within the Section 105 grant program.

As a result of the enactment of Section 502 of the CAA, many, but not all, activities previously funded through Section 105 program grants are now included within the Title V permit fee program. Because the CAA requires that the permit program be funded solely from the fees collected, and the fees collected are to be used only for that purpose, permit program activity costs are no longer allowable costs under the Section 105 program. Thus, expenditures for permit activities are no longer "recurrent section 105 program expenditures" for which the MOE level must be maintained.

This interpretation is confirmed in the preamble to both the proposed and final air grant regulations. The proposed rule described the MOE provisions as follows:

> "...the proposed regulation clearly limits the definition of 'maintenance of effort' to the applicant's expenditures in an approved program, such as activities funded under section 105 of the Clean Air Act. This will allow the applicant to submit its entire work program in a particular medium without fear of being held to a more broadly defined maintenance of effort requirement. For example, an agency will be able to submit its entire air pollution control work program, and in future years EPA will require the agency to maintain only the level of expenditures associated with its approved section 105 air program." Emphasis added. 47 FR 25912, 25914 (June 15, 1982).

A similar discussion is included in the preamble to the final regulation, 47 FR 44946, 44949 (Oct. 12, 1982), as well as the following discussion regarding air pollution control grants in particular:

> "Our new definition...allows an agency to submit its entire air pollution control work program and (based on its planning target, its previous year's maintenance of effort level, and program guidance) select those activities in its total program which will constitute its 105 program for the year. The next year the agency may increase its expenditures for air pollution control programs outside its approved 105 program, but EPA will not require it to maintain such increases." Emphasis added. Id. at 44952.

Although this discussion of the regulation focuses primarily upon future increases in the air programs, we believe it indicates that the MOE provisions are to be applied only to the Section 105 program expenditures. Once activities are required to be included within the Title V program, and therefore are no longer allowable in the 105 grant program, the MOE may be recalculated to reflect only the expenditures associated with the remaining Section 105 activities.

While this interpretation is fully supported by the statutory and regulatory provision cited above, we recommend that a discussion of the issue be included in the preamble, and perhaps in the text of the regulation itself, when the regulations are promulgated providing a temporary waiver for states from the cost-sharing requirements of Section 105(a).

If you have any questions, please feel free to call me at 260-1484.

2. Permit Continuance

The proposal required permitting authorities to suspend a permit if the Administrator objected to the permit as a result of a public petition under section 70.8(d). Upon further review, EPA now believes that this provision would not meet the requirements section 505(b)(3) of the Act. The final rule states that upon EPA objection as a result of a petition and after the permit is issued, EPA shall modify, terminate, or revoke the permit. The permitting authority can thereafter issue a revised permit meeting EPA's objections. These provisions are as section 505(b)(3) of the Act stipulates and EPA has no discretion to do otherwise.

3. Grounds for an EPA Objection

The proposal allowed EPA to object to a permit if the permitting authority failed to submit necessary information, forms or notices to EPA. The final regulation expands this provision by allowing EPA to object to a permit if the public notice and comment and affected State review requirements (under section 502(b)(6) and 505(a)(2) of the Act), where applicable, were not met. This is necessary to ensure that permitting authorities meet their obligation under the Act to provide adequate opportunity for public participation and affected State review. The regulations also specify that the Administrator may only object if a proposed permit is not in compliance with the applicable requirements or the requirements of part 70.

I. Section 70.9 - Fee Determination and Certification

The requirement that State operating permit programs establish an adequate permit fee schedule is a key provision of title V. The statute provides that an approvable permit program require sources subject to part 70 to pay an annual fee (or the equivalent over some other period) sufficient to cover all "reasonable (direct and indirect) costs" required to develop and administer the permit program [502(b)(3)(A)]. The statute also mandates that all fees required to be collected by a permitting authority under title V must be used solely to support the permit program [502(b)(3)(C)(iii)]. Following is a description of the basis and purpose of the changes in section 70.9.

1. Permit Program Costs

The proposal required States to collect permit fees sufficient to cover most, if not all, of a State's costs of its air pollution control program for stationary sources. After review of public comment and further evaluation of section 502(b)(3) and its legislative history, the Administrator concludes that all air pollution control program costs related to stationary sources need not be recouped through operating permit

fees. The rejection of the interpretation in the proposal is based primarily on the fact that the Senate bill would have required recovery of all stationary source air pollution control program costs [S. Rep. No. 228, 101st Cong., 1st Sess. 351 (1989)], but the Senate bill was rejected by the Conference Agreement in favor of the House bill. Although the Act requires recovery of fewer costs than the Senate bill, it leaves the Agency some discretion in deciding which costs must be recouped.

The proposal was accurate in its conclusion that the fee provisions of title V mandate that the permit fees be collected in sufficient amount to support several air pollution control program activities that are relevant to title V sources and implemented through the operating permit program. This is clear from the list of such activities in section 502(b)(3)(A) of the Act, which includes some activities that are not strictly part of the permitting program, but for which costs related to stationary sources must be recovered. The final rule focuses more upon permit program activities, rather than air program activities more generally, in determining the minimum mandated amount for fee collections. Because the nature of permitting related activities can vary greatly from State to State, the EPA intends to evaluate each demonstration individually using the definition of "permit program costs" in the final regulation.

Finally, it should be noted that title V does not prevent a State from developing a fee schedule that will result in the collection of revenues in excess of those required to support the permit program. The Administrator will consider the use of such funds in reviewing the fee schedules proposed by States.

2. Role of the $25/tpy Presumptive Fee Amount

The proposal highlighted two "tests" for determining fee schedule adequacy: the "program support test" (the fee schedule would result in the collection of adequate revenues to support all of the specified air program functions) and the "cost-per-ton test" (the $25/tpy presumptive fee minimum). An environmental group objected to this approach, claiming that it might give the incorrect impression that a State program meeting the "cost-per-ton test" would be approvable regardless of whether this amount adequately funded its program.

Although EPA has consistently viewed program support as the true measure of a fee schedule's approvability, the Agency acknowledges that the format of the proposal could have created some uncertainty. For this reason, section 70.9(b) is restructured to indicate that the program support test is the basic measure of fee schedule approvability. Section 502(b)(3)(A) clearly requires that all State programs collect enough in fees to cover their permit program costs.

Section 70.9(b) clarifies that there is a rebuttable presumption that a State fee schedule is adequate if it collects in the aggregate an amount equal to or greater than the presumptive minimum program cost, which is $25/tpy of actual emissions of regulated pollutants (for presumptive fee calculation). Evidence may be presented to rebut this presumption and trigger the need for a more detailed fee adequacy demonstration. The EPA believes that the use of a presumptive minimum amount as a rebuttable presumption that the State is covering its permit program costs is the best way to give meaning to section 502(b)(3)(B) of the Act. A requirement that all State programs prove that their fee schedules recoup their permit program costs without regard for the presumptive minimum amount is an impermissible reading of the Act because it makes section 502(b)(3)(B) meaningless. The Administrator anticipates that this presumption will be most useful during the initial round of program approvals, until permitting programs develop and States and EPA gain greater expertise in estimating program financial needs and fee revenues.

3. "Regulated Pollutants"

The proposal set the presumptive minimum amount that a State must collect to cover its permit program costs as $25/tpy of regulated pollutants actually emitted by part 70 sources the preceding year. The proposal was somewhat confusing as to what pollutants would be considered "regulated pollutants" for this purpose, in part because the proposal used the statutory term "regulated pollutant" for purposes other than calculating the presumptive minimum. To clarify the matter, "regulated air pollutant" was added as a defined term for other than fee purposes, and "regulated pollutant (for presumptive fee calculation)" was redefined consistent with the Act's definition.

The proposal requested comment on when a pollutant listed in section 112(b) becomes a regulated pollutant for fee purposes. The following three alternatives were set forth: (1) at the time of enactment of the 1990 Act Amendments, (2) when EPA first promulgates a MACT standard for that pollutant, or (3) when a MACT standard for that pollutant first becomes applicable to the permitted source. The proposal adopted the second alternative.

The final rule adopts a slightly modified version of the second alternative, i.e., a pollutant becomes a regulated pollutant (for fee purposes) when EPA first promulgates a MACT standard for that pollutant. In addition, if a pollutant is regulated at a particular source, its emissions will be considered for fee purposes even if a general standard has not been issued. The EPA continues to rely on the rationale in the preamble supporting the second alternative. This alternative is the most reasonable interpretation of the Act and makes the most sense from a policy perspective.

concepts include implementation principles utilized in regulatory development.

Few comments were received on this proposed section; however, several commenters supported EPA's recognition of the implementation principles contained in the proposal and urged that the final regulation be as consistent as possible with them. One commenter suggested that environmental protection occur in conjunction with enhancing the productive capacity of the nation.

The Administrator agrees that enhancement of the nation's productive capacity is an important concept that should be incorporated into the first implementation principle. This is consistent with section 101(b)(1) of the Act which states that among its goals is one to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. The Administrator expects these principles to guide subsequent implementation of these final regulations as they have governed regulation development.

B. Section 70.2 - Definitions

Many definitions of terms in other parts of the Act or EPA regulations are utilized in part 70. In addition, a number of new terms created in conjunction with developing the part 70 regulations are defined by this section. These new definitions include terms necessary to communicate effectively the new regulatory requirements.

Several significant comments were received on how the definitions would be applied in various sections of the regulation. In responding to these commenters, some important changes to key definitions have occurred. Important changes were made to definitions of "applicable requirement" and "regulated pollutant." Several new terms, "section 502(b)(10) changes," "emissions allowable under the permit," "permit program costs," "part 70 program," and "regulated pollutant (for presumptive fee calculation)," were added to the definitions. Separate discussions of those changes are contained in the sections describing the program areas where these definitions are primarily used. In addition, some terms have either been moved from the proposed definitions or added in response to comment for exclusive use in a particular section. These include administrative amendment (section 70.7), actual emissions (section 70.9), and complete application (section 70.5).

C. Section 70.3 - Applicability

1. Five-Year Exemption for Nonmajor Sources

Section 502(a) of the Act provides the Administrator the

discretion to exempt one or more source categories (in whole or in part) from the requirement to obtain a permit "if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories." The Act specifies that major sources may not be exempted from these requirements.

The EPA initially proposed, consistent with the authority given in section 502(a), to allow States to exempt all nonmajor sources (other than acid rain affected sources) from the requirement to obtain a permit for 5 years from the date of State program approval. The proposal made the exemption for nonmajor sources in nonattainment areas contingent upon a showing by the permitting authority that title V operating permits were not necessary for the State to assure compliance with the implementation plan obligations applicable to defined sources. The EPA also reserved the ability to determine in future rulemakings whether permitting obligations should be deferred for nonmajor sources which become subject to new section 112 standards.

Section 70.3(b)(1) of the final part 70 regulations retains most of the provisions of the proposal and provides States the option of exempting all nonmajor sources (except for affected sources and solid waste incineration sources) from the requirement to obtain a permit until EPA completes the rulemaking described below on applying the permitting program to non-major sources. As discussed below, EPA will complete this rulemaking within five years of the date it first approves a State program that defers such sources. A State may choose to provide the 5-year temporary deferral to all "nonmajors" or to nonmajors only in selected source categories. The deferral may not be extended to any major source, as this is explicitly prohibited by section 502(a) of the Act. As proposed, the final rule also specifies that no affected source under the acid rain program can be exempted from the requirement to obtain a title V permit, since section 408(a) provides that permits shall be the vehicle for implementation of the acid rain requirements of the Act.

One change in the proposal is that solid waste incineration units that are nonmajor sources can be deferred only until the time they are required to obtain permits under section 129(e) of the Act. States should not be allowed to override the Act's specific schedule for permitting this specific source category.

The EPA finds that without this deferral, compliance with the permitting requirements would be "impracticable, infeasible" and "unnecessarily burdensome on these source categories" within the meaning of section 502(a). Two independent and sufficient reasons support EPA's determination. The first was presented in the preamble to the proposal, i.e., the burden on the permitting authorities and EPA will make permitting all nonmajor sources in

the early stages of the program impracticable and infeasible. The second reason, which by itself justifies deferral, is that the requirement for nonmajor sources to obtain a title V permit during the early stages of the program would be "unnecessarily burdensome" for these sources. This is because the anticipated burden on permitting authorities and EPA, as described in the preamble to the proposal, would translate into a significant, additional, and unnecessary burden on nonmajor sources if they were required to be permitted.

Nonmajor sources will be disproportionately affected by the administrative difficulties faced by the permitting authorities. The great majority of nonmajor sources are small businesses, and many are not currently subject to State air permit programs. Nonmajor sources will require more assistance from permitting authorities and EPA because of the relative lack of technical and legal expertise, resources, as well as inexperience in dealing with environmental regulation that characterizes most small businesses. If permitting authorities become overburdened due to a backlog of thousands of permits to be processed, nonmajor sources will be unable to obtain additional technical and procedural assistance from permitting authorities. Although the small business technical assistance program should help these sources, the small business program staff will also be assisting small businesses that are major sources and will face the same problems as permitting staff.

Difficulty in obtaining assistance will unnecessarily burden nonmajor sources in various ways. For example, difficulty in obtaining assistance from permitting authorities could make it problematic, if not impossible, for some nonmajor sources to submit a timely and complete application. If they fail to submit a timely and complete application, they would lose the "application shield," thereby forcing them to close or run the risk of operating without a permit in violation of the Act. Nonmajor sources' inexperience with permitting and their relative lack of technical and legal resources also make it more likely that such sources will require more permit revisions soon after permit issuance. If permitting authorities are overburdened, it will be difficult for nonmajors to obtain permit revisions early in the process. This will prevent them from promptly making what they believe are necessary changes.

The EPA notes that some nonmajor sources would already be permitted at the State level, and therefore would have some experience with the permitting process and completing permit applications. A State need not extend the deferral to these sources. However, even these sources will have to deal with the increased burdens flowing from the requirements of other titles of the Act. The EPA also notes that an alternative to deferral under section 502(a) exists in the form of general permits. However, even for source categories well-suited to general

permits, there will likely be some burden in complying with these requirements.

As stated above, EPA expects that the great majority of nonmajor sources will be small businesses. Some nonmajor sources will in fact be either adjuncts to large corporations possessing significant technical and legal expertise, or will have independently acquired such resources and expertise. It is therefore likely that there will be certain nonmajor sources for which the requirements of the part 70 program may not be unnecessarily burdensome.

While the permitting requirements will be significantly less burdensome for these sources, EPA has determined that it is not feasible to subject these sources to different treatment for purposes of this deferral. This is primarily because the class of sophisticated nonmajor sources described above bears little or no relation to the delineation of source "categories" as that term is used in section 502(a). Rather, EPA believes that these sources typically represent a small percentage of each of the various categories of nonmajor sources. Given the anticipated lack of resources discussed above, it is not reasonable to expect permitting authorities to sift through the large number of nonmajor sources and select those for which the permit program requirements will not be unnecessarily burdensome. Indeed, the requirement to conduct such a survey would to a great extent undercut the benefits intended by this deferral, and would not be justified by the minor gains in emission controls resulting from the permitting of these few nonmajor sources.

As already mentioned, States are free to apply the deferral only to certain categories of nonmajor sources. The part 70 regulations therefore do not prevent a State from drawing distinctions based upon which nonmajor sources have the resources and expertise necessary to comply with the permit program.

Compelling States to permit nonmajor sources during the early stages of the title V permitting program is not only extremely burdensome for these sources, it is unnecessarily so. Requiring nonmajor sources to be permitted at the beginning of the program would not provide major benefits to air quality and might actually hinder implementation of the Act. The temporary exemption for nonmajor sources poses few risks to progress in improving air quality. By definition, these sources emit less than major sources and are less significant contributors to air quality problems. Furthermore, deferring permitting requirements does not defer a source's obligation to comply with the underlying substantive air pollution control requirements. Nonmajor sources may be subject to NSPS or existing NESHAP regulations that in general already contain many of the same monitoring, recordkeeping, and reporting requirements that would apply to major sources.

Requiring nonmajors to obtain permits at the start of a permitting program could hinder implementation of the Act. It would stress the system by greatly increasing the number of permits required to be processed. This additional stress would make it more likely that errors would occur in permitting major sources, which could adversely affect air quality. Concentrating State permitting resources on major sources during the first phase of the program will make more efficient use of those resources.

Furthermore, deferring permitting requirements for nonmajor sources temporarily does not just delay the permitting burden on these sources, it will significantly decrease the burden. Once the programs have been operating for several years and the initial wave of permitting is completed, permitting staff will have the time and experience necessary to assist nonmajor sources which become subject to the permitting process.

Thus, the temporary exemption of minor sources furthers important policy goals. The failure to defer nonmajors would greatly increase the burden on those sources, would probably not provide significant environmental benefits, would stress the permitting system at its most vulnerable time, and might actually hinder achievement of air quality gains. Deferring the applicability of title V requirements to nonmajor sources temporarily might even have a net air quality benefit to the extent it facilitates bringing more major sources into compliance earlier.

The EPA believes that the preceding analysis of the burden on nonmajor sources is ample justification for the exemption under section 502(a) being implemented here. This is particularly so in light of the principle expressed in the Alabama Power decision that a deferral of the applicability of Act provisions requires far less justification than an outright exemption [636 F.2d at 360, n. 86].

The burdens of the permitting program identified above, including the lack of adequate resources and technical and legal expertise on the part of sources, as well as the potential difficulty in obtaining technical and legal assistance from permitting authorities, are likely to continue for some significant number of nonmajor sources beyond the early stages of the program. Accordingly, EPA believes it would be unduly burdensome, and in some cases onerous, to subject all such sources to the full panoply of procedural and substantive requirements embodied in the permit rules being promulgated today. Although the Agency anticipates that many nonmajor sources will qualify for general permits and thereby avoid the greater burdens associated with obtaining specific permits, EPA also believes it likely that a certain number of categories of nonmajor sources should be permanently exempted from the permit

program. For others, a continuation of the deferral of program applicability may well be appropriate. This is so despite the support that will be offered through the Small Business Technical Assistance Program established under section 507. While that program will be beneficial to nonmajor sources, the extraordinary number of nonmajor sources that could conceivably enter the permit system at the expiration of the 5-year period, as many as 350,000 sources, could overwhelm the capacities of the State technical assistance programs.

To address these serious concerns, EPA will, within 3 years of the first approval of a full or partial State permit program that defers nonmajor sources, initiate rulemaking to determine whether to grant a further deferral from the permit program to all or some specific categories of nonmajor sources. In addition, the rulemaking will consider whether to grant permanent exemptions to any source categories for which there is a sufficient record to support such an exemption. As part of this rulemaking, EPA, in conjunction with affected sources, will gather information which will enable the Agency to make exemption or deferral determinations as appropriate. Moreover, the rulemaking will consider whether the permitting program should be structured more effectively for nonmajor sources that may be brought into the program at that time. The Agency believes that after several years of experience with the title V program, both EPA and the States will be in a better position to determine whether the program may be structured more effectively for the large number of small sources that may be covered by the program. The EPA will propose such a rule no later than 4 years following approval of the first full or partial State permit program with a deferral, and promulgate the rule prior to EPA's first approval of a State program that defers such sources.

2. Nonattainment Area Demonstration Requirement for 5-Year Exemption

As mentioned above, the proposal made the 5-year deferral for nonmajor sources in nonattainment areas contingent upon a showing by the permitting authority that the State could effectively enforce its SIP obligations on such sources without using federally-enforceable operating permits. State representatives opposed having to make a demonstration for deferring nonmajor sources in nonattainment areas.

The final rules do not include this requirement because such a showing is not required by the Act. Section 502(a) of the Act makes no distinction regarding treatment of exemptions in attainment areas versus nonattainment areas. The EPA also determined that the proposed provision was impractical and unnecessary. It would have demanded a significant amount of resources from State agencies at a critical period in program development. States said that it would have taken almost as much