Continued Need for Rule

ATF continues to believe that these regulations help to avoid accidental explosions on the premises of special fireworks plants.

Nature of Complaints Received

ATF has received no complaints about the regulating from members of the fireworks industry, and believe the regulations should remain in place.

Complexity of the Rule

The requirements were determined to be the minimum necessary to improve the safe storage of special fireworks.

Conflicting, Duplicative or Overlapping Federal Rules

None of the requirements of the regulation conflict, duplicate, or overlap other Federal rules.

Changes in Area Affected by Rule

The Regulatory Flexibility Act requires an agency to review all affected rules within ten years of the publication of the final rule. This is the first such review of final rule, T.D. ATF–293, since the effective date of March 7, 1990. ATF is unaware of any changes in the fireworks industry having a significant impact on the effectiveness of these regulations.

Public Participation

One of ATF's primary missions is protection of the public. To successfully accomplish this goal, we are requesting comments on the following questions concerning the amended regulations stemming from T.D. ATF–293:

(1) Have any of the changes in the regulations issued in T.D. ATF–293 caused any unnecessary burdens on business activities or practices?

(2) How could the existing regulations be altered to assure the same security, protection, and traceability of explosive materials, while further reducing expenses to industry members?

(3) Are there any areas of the explosives regulations which need strengthening? Are there any areas of the amendments contained in T.D. ATF–293 that need more stringent regulation?

(4) Are there any areas contained in the regulations issued in T.D. ATF–293 that need to be relaxed, rethought, or rewritten?

(5) Have there been any changes in the industry which would necessitate changes in these regulations?

Written comments must be received within the 90-day comment period. ATF will not recognize any material as confidential. Any materials submitted may be disclosed to the public. Any material which the transmitter considers to be confidential or inappropriate for disclosure should not be included in the suggestion. The name of the person submitting the suggestion is not exempt from disclosure.

Drafting Information

The author of this document is Mark D. Waller, Firearms and Explosives Regulatory Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 55

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Signed: November 27, 1996.

John W. Magaw,

Director.

Approved: December 16, 1996.

John P. Simpson,

Deputy Assistant Secretary, Regulatory, Tariff and Trade Enforcement.

[FR Doc. 97–593 Filed 1–9–97; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[MI001; FRL–5674–1]

Clean Air Act Final Interim Approval of the Operating Permits Program; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating interim approval of the operating permits program submitted by the State of Michigan for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: February 10, 1997.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AR–18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AR–18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–2703. E-mail address: valenziano.beth@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Title V of the Clean Air Act Amendments of 1990 (title V), and the implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Clean Air Act (Act) and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the expiration of the interim approval period, it must establish and implement a Federal program.

On June 24, 1996, EPA proposed interim approval of the operating permits program for the State of Michigan. See 61 FR 32391. The EPA received public comment from five organizations on the proposal and compiled a Technical Support Document (TSD) responding to the comments and briefly describing and clarifying aspects of the operating permits program. In this document EPA is taking final action to promulgate interim approval of the operating permits program for the State of Michigan.

II. Final Action and Implications

A. Analysis of State Submission and Response to Public Comments

The EPA received comments on a total of 12 topics from five organizations. The EPA's response to these comments as developed for the response to comments TSD is included in this section.

1. Indian Country

The EPA proposed that the interim approval of Michigan's operating permits program shall not extend to any sources of air pollution on Indian lands, including lands within the exterior boundaries of any Indian reservation in the State of Michigan. MDEQ commented that Michigan's part 70 authority should extend to some lands within the exterior boundaries of Indian reservations, and identifies a specific

source on an Indian reservation that the State believes is within its jurisdiction. MDEQ states that it intends to develop legal arguments to support its determination that lands within the exterior boundaries of reservations that have been sold for non-tribal uses are within the State's jurisdiction. MDEQ also states that it expects such sources to submit operating permit applications in accordance with the State regulations.

Because Michigan has not demonstrated the legal authority to regulate sources in Indian country, including sources on non-Indian owned fee lands within the exterior boundaries of Indian reservations, the final interim approval of Michigan's part 70 program does not extend to such sources. However, EPA will carefully consider any evaluation Michigan submits in the future regarding State authority over such sources. The EPA retains the authority to issue part 71 permits to all sources in Indian country until such time as EPA approves a part 70 program. Part 71 application submittal deadlines for Indian country are established in 40 CFR 71.4(b) and 40 CFR 71.5(a)(1), and will be no later than November 15, 1998. Any sources located in Indian country required to submit applications earlier than this date will be notified in accordance with the requirements of part 71. The EPA takes no position on the State seeking voluntary compliance with State permitting requirements in Indian country.

2. Delegation of State Program to Local Governments

The proposed interim approval of Michigan's part 70 program confirmed the State's authority to delegate the program to certain county governments, such as Wayne County. MDEQ asked EPA to clarify whether a delegation would require a part 70 program revision, and what the timing and content of any required program revision would be.

Title V of the Act and the part 70 regulations specify the elements of a State operating permits program. In addition to the criteria for the permits themselves, these elements address various program infrastructure and administration issues. Examples include the adequacy of the agency's legal authorities and staffing. Thus, the delegation of the program authorities to another agency would by its nature entail revision of the State's part 70 program.

40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective. However, EPA is developing a program revision process that will meet the requirements of 40 CFR 70.4(i) while also providing continuity as States modify and update their programs. Although the details of this process have yet to be established, this process will focus on ongoing cooperation between the State and EPA, with real-time evaluation of program revision efforts. The EPA will work with Michigan as this process is developed so that any program revision, including any delegation of the State program to a local agency, can take advantage of this approach.

The content of a revised part 70 program submittal to EPA would depend on the nature and scope of the actual delegation. The information provided to EPA should address the changes and additions that the delegation makes to the program that has already been approved by EPA. The State should review the program submittal requirements in 40 CFR 70.4 and determine what elements are necessary to address the delegation. For example, the submittal of State regulations would not be necessary if they are not revised; however, the adoption of any local regulations necessary for the delegation should be included in the submittal. Similarly, a revised legal opinion from the Attorney General would likely be needed to verify that the local agency has the authority to carry out its part 70 program responsibilities established by the delegation. The EPA will provide Michigan additional guidance as necessary to address the program revision requirements for any particular State delegation to a local agency.

3. Definition of Potential to Emit

As a condition of full approval, EPA proposed that Michigan must revise its definition of ''potential to emit'' to require that limits on potential to emit be federally enforceable. Two commenters noted that a recent court case (*Clean Air Implementation Project* v. *EPA*, no. 96–1224 (D.C. Cir. June 28, 1996)) vacated the federally enforceable requirement from the 40 CFR 70.2 definition of potential to emit. Both commenters stated that this issue should be removed from Michigan's list of interim approval issues. The EPA agrees with the commenters, and has removed this issue as a condition of full approval. The EPA intends to develop a rulemaking to address the enforceability requirements on potential to emit limits for the title V program, the New Source Review program, and the section 112 toxics program.

4. Research and Development (R&D) Activities

In the proposed interim approval of Michigan's part 70 program, EPA acknowledged the State's regulatory provision that allows R&D activities on the same contiguous site as manufacturing activities to be treated as a separate source for purposes of determining operating permit program applicability. Although EPA believes that R&D should be treated as having its own industrial grouping for purposes of determining major source status, EPA stated in the Michigan proposal that separate treatment will not exempt R&D facilities in all cases. This is because some R&D activities may be individually major, or because they may be a support facility that makes significant contributions to the product of a collocated major facility. One commenter noted the R&D discussions in the part 70 supplemental proposal preamble (60 FR 45556–45558), and asked EPA to clarify whether EPA maintains its position in the supplemental proposal regarding the applicability of the support facility test in the R&D context.

As discussed in the supplemental proposal preamble, EPA believes that R&D activities should not generally be considered support facilities to collocated industrial facilities, since the support provided is directed towards development of new processes or products and not to current production. However, if an activity does contribute to the ongoing product produced or service rendered at a facility in more than a de minimis manner, those activities should be considered part of the source for applicability purposes.

5. Exemptions From Major Source Determinations

The EPA proposed as a condition of full approval that Michigan must remove its exemptions of certain small activities from determining major source status. Two commenters objected to this interim approval issue. One commenter stated that there is no express regulatory requirement mandating that insignificant activities be considered in major source determinations under title V. The commenter also believes the inclusion of such activities is inconsistent with EPA's July 10, 1995 guidance memorandum entitled ''White Paper for Streamlined Development of Part 70 Permit Applications''.

Neither the applicability requirements in 40 CFR 70.3 nor the ''major source'' definition in 40 CFR 70.2 provide any exemptions for insignificant activities in determining major source status. The

concept of insignificant activities originates under 40 CFR 70.5(c), and only establishes reduced title V permit application requirements for activities defined as insignificant. 40 CFR 70.5(c) does not modify the title V applicability provisions, and specifically states that ''an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement.'' In addition, the White Paper provides guidance on the permit application requirements for insignificant activities; it does not address major source applicability considerations.

One commenter expressed concern that counting insignificant activities in major source determinations would be very burdensome. The commenter was also concerned that the use of engineering judgement in determining emissions from insignificant activities does not provide sources sufficient certainty and protection from lawsuits. The EPA does not agree that the calculation of emissions from insignificant activities need be a burdensome and resource intensive task. As discussed in the proposed interim approval of Michigan's part 70 program, EPA expects that such emissions would only be examined in those cases where the insignificant activity emissions might impact whether the source is major. In addition, sources and permitting authorities have significant discretion in determining the rigor of analysis necessary for calculating insignificant activity emissions. Such analysis may not even need to be performed on a source by source basis, and could instead establish a general emission level for a particular insignificant activity that can be used for all sources. For example, a permitting authority could determine that sources may assume 1,000 pounds of emissions from a particular insignificant activity. With respect to the commenter's concerns about protection from lawsuits, EPA sees no distinction between the emissions calculations for significant activities and insignificant activities. For example, a source with a potential to emit that is just under a title V applicability threshold should do what is necessary to ensure that the source indeed is not subject to the operating permits program, as additional emissions from either significant or insignificant activities could make the source major.

Another commenter stated that Michigan's rule is consistent with the actual application of major source determinations made throughout the country, and commented that other States are not including insignificant activities in determining applicability. The commenter also stated that there is no EPA guidance for determining emissions from such activities. The EPA is unaware of any other approved part 70 program that has regulatory exclusions for insignificant activities in determining a source's potential to emit. If EPA determines that a State's part 70 program is not being administered in accordance with part 70, EPA has the authority under 40 CFR 70.10 to require the State to correct the deficiencies. In addition, EPA has the authority to pursue enforcement actions against sources for violations of the Act, including the requirement to obtain a title V permit. With respect to the lack of EPA guidance for determining insignificant activity emissions, EPA generally issues emissions factor guidance on a source category basis. The EPA will consider developing guidance for any particular insignificant activities of concern that are not addressed in current guidance.

6. Certification of Compliance

The EPA proposed a condition for full approval requiring Michigan to adopt statutory or regulatory authority that ensures permit applications include a certification of compliance and a statement of the methods used for determining compliance. MDEQ commented that it will work with EPA to resolve this issue during the interim approval period. The EPA also agrees to work with MDEQ to resolve this issue, and would like to clarify that this is a condition of full approval because it is not clear that the underlying State requirements legally obligate sources to include the compliance certification requirements in their permit applications.[1]

Another commenter commented that Michigan's program does require applications to include compliance certifications, and states that this issue should be deleted. The following analysis addresses the commenter's arguments.

40 CFR 70.5(c)(9)(i) and (iv) require permit applications to include a statement of compliance for all applicable requirements. This statement must be certified by a responsible official in accordance with 40 CFR 70.5(d). Although Michigan's statute and regulations require applications to include a certification by a responsible official, they do not require applications to include a certified statement of compliance for all applicable requirements.

40 CFR 70.5(c)(9)(ii) requires the compliance certification to include a statement of the methods used for determining compliance. Although section 324.5507(1)(f)(ix) of Michigan's Natural Resources and Environmental Protection Act (NREPA) requires applications to include proposed compliance method information, the State provision does not associate this compliance method information to compliance certification requirements. The compliance certification provisions must therefore include a statement of the methods used for determining compliance. Of course, this does not preclude Michigan from expanding the scope of its current application requirement to serve this purpose if the State provides a means by which a source can certify that it made its compliance determination using its proposed compliance determination method.

40 CFR 70.5(c)(9)(iii) requires applications to include a schedule for submission of compliance certifications at least annually or more frequently if specified by the underlying requirement or the permitting authority. The EPA agrees that section 324.5507(1)(d) of NREPA satisfies this requirement and is clarifying in the final condition of full approval that this provision is not an issue.

7. Definition of Emergency

The EPA proposed as a condition of full approval that Michigan revise its definition of emergency in section 324.5527(1) of NREPA to ensure that the State's definition is not broader than that provided by 40 CFR 70.6(g)(1). Two commenters disagreed with this condition of full approval. Both commenters stated that the Michigan definition is not broader, and only clarifies what could be considered ''sudden and reasonably unforeseeable events''. The EPA has reevaluated this issue and agrees with the commenters that the State definition of emergency meets the requirements of 40 CFR 70.6(g).

The additional language in the State definition of emergency includes the following as events that could be considered an emergency: ''war, strike, riot, catastrophe, or other condition as to which negligence on the part of the person was not the proximate cause''. These situations are eligible for the affirmative defense only if they meet all the provisions of 40 CFR 70.6(g). Specifically, such events must arise from sudden and reasonably unforeseeable events beyond the control

[1] Despite this regulatory deficiency, the State application forms do include the compliance certification requirements.

of the source; require immediate corrective action to restore normal operation; and not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error. Further, the emergency defense only applies to exceedances of technology based emission limitations that are due to unavoidable increases in emissions attributable to the emergency. These provisions are important qualifications, because the specific State examples would not qualify as emergencies in all situations. For example, exceedances at a source due to increased production would not qualify as an emergency even if the increase is due to additional demand caused by a strike at another source. Similarly, an exceedance at the source involved in a strike may not qualify as an emergency if the strike was not reasonably unforeseeable, or if the exceedance was not an unavoidable increase attributable to the strike. The EPA believes that the additional Michigan events are properly qualified because the State definition includes all of the requirements of 40 CFR 70.6(g). Therefore, EPA is removing this issue as a condition of full approval.

8. Source Category Limited Interim Approval

In its program submittal, the State of Michigan requested source category limited (SCL) interim approval of its 4 year permit issuance schedule. In the proposed interim approval notice for Michigan, EPA acknowledged Michigan's 4 year schedule as part of the State's permit fee sufficiency demonstration. However, EPA could only propose in the alternative the State's request for SCL interim approval because Michigan's regulations currently require a 3 year permit issuance schedule. MDEQ requested that EPA clarify the State's obligations for submitting a program revision once the 4 year schedule is incorporated into the State's regulations.

The EPA proposed SCL interim approval in the alternative so that a program revision would have been unnecessary if Michigan had been able to finalize and submit its rule revisions prior to this final action on Michigan's part 70 program. Because the State has not yet submitted the regulatory revision that would change the State permit issuance schedule from 3 to 4 years, this final action on Michigan's part 70 program fully approves the 3 year schedule contained in the current State regulations.

Once Michigan finalizes its 4 year issuance schedule, the State will be obligated to submit a part 70 program revision to EPA for SCL interim approval. Although 40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective, EPA expects that it will be able to quickly process Michigan's request for SCL interim approval. If the final 4 year schedule is identical to the draft rule that EPA proposed for SCL interim approval, EPA will be able to finalize SCL interim approval without having to repropose the action. If there are changes to the schedule, EPA would still be able to expedite the SCL interim approval through a direct final action. As discussed above in section II.A.2., EPA is also developing a program revision process that may help expedite the program revision process for this situation.

9. Startup, Shutdown, and Malfunction (SSM) Provisions

The EPA proposed as a condition of full approval that Michigan revise its SSM provisions to be consistent with the emergency defense provisions in 40 CFR 70.6(g), or adopt an enforcement discretion approach consistent with the Act. Two commenters expressed concern with this interim approval issue. MDEQ disagreed that the SSM rules affect the State's ability to enforce the requirements of title V, but agreed to work with EPA to address the issue during the interim approval period. The EPA believes it is important that MDEQ and EPA work together during the interim approval period, and commits to working with MDEQ to address this and other interim approval issues.

Another commenter stated that EPA's consideration of Michigan's SSM rules is too inflexible, as the SSM rules provide an affirmative defense only in narrowly defined and highly prescriptive circumstances. The commenter also believes that EPA overlooked the potential for environmental benefits resulting from the SSM requirements to use good air pollution control practices and implement preventative maintenance and malfunction abatement plans. Irrespective of the control and work practice provisions that Michigan's SSM rules require for sources to be eligible for the affirmative defense, EPA has no authority under its part 70 rules to approve an affirmative defense that is less stringent than that contained in 40 CFR 70.6(g). The commenter extolled the benefits of the safeguards contained in Michigan's SSM rules, but did not offer anything to counter EPA's finding that these rules are broader than 40 CFR 70.6(g) and are therefore inconsistent with the federal rule. As discussed in the Michigan proposal, however, EPA could also consider an enforcement discretion approach as a means for resolving this interim approval issue. Such an approach would allow Michigan to retain the specific SSM provisions that may provide environmental benefit.

The EPA would also like to clarify that the Michigan SSM regulations do not affect EPA's enforcement capabilities under the Act during the two year interim approval period. The EPA reserves the right to pursue enforcement of applicable requirements, in accordance with EPA's enforcement discretion policy, notwithstanding the existence of the State's SSM regulations. Similarly, the Michigan rules do not affect citizen suit rights under section 304 of the Act. The interim approval of Michigan's part 70 program establishes the mechanism for the State to issue federally enforceable part 70 permits; EPA will continue to implement the operating permits program in accordance with Title V of the Act and the implementing Federal regulations.

10. Environmental Audit Privilege and Immunity Law

The EPA proposed several conditions for full approval based on the enforcement deficiencies created by Michigan's Environmental Audit Privilege and Immunity Law (audit law), part 148 of NREPA. Four commenters disagreed with EPA's position that Michigan's audit law adversely affects Michigan's ability to comply with the enforcement requirements of part 70.[2]

MDEQ generally commented that Michigan's law does not affect the State's ability to enforce the requirements of title V. The Michigan State Senator sponsoring the bill that became Michigan's audit law also commented that the law does not adversely affect Michigan's authority to assure compliance with and enforce permits. Both commenters stated that regulated entities remain fully liable for any damages they cause, and self reporting data, agency inspections, and other information required by law is not privileged and remains available to the State and the public. However, both commenters supported the interim approval of Michigan's part 70 program, as it will allow the program to be implemented while EPA and MDEQ resolve these issues during the interim approval period.

For the reasons outlined in the Michigan proposal and as further discussed below, EPA remains

[2] One commenter also submitted comments on a fifth commenter's behalf.

concerned that Michigan's audit law affects the State's ability to meet the enforcement requirements of part 70. The EPA recognizes that Michigan may have a different interpretation of the provisions in the audit law, and has provided as an alternative condition for full approval that the State need only submit a revised title V Attorney General's opinion that addresses EPA's concerns and certifies that Michigan's operating permits program meets the part 70 requirements in light of the audit law. The EPA believes that a new Attorney General's opinion would be appropriate, as the Attorney General's opinion in the original program submittal to EPA was developed prior to the passage of the State audit law. The EPA appreciates Michigan's willingness to work with EPA during the interim approval period to resolve these issues.

The EPA also received extensive adverse comments from two law firms that represent nationwide trade organizations and industries. The following subsections address the issues raised by these commenters.[3]

a. Effect of the Michigan audit law on Michigan's enforcement authority.

The commenters stated that nothing in the Act or part 70 prohibits a State from establishing a new protection for audits, expanding existing privileges, providing an additional affirmative defense, or determining that criminal or civil prosecution is inappropriate in certain defined situations, such as those specified in the Michigan audit law.

The EPA disagrees. Section 502(b)(5)(E) of the Act lays out the minimum enforcement authorities which Congress required a State to have in order to secure Federal approval to implement and enforce a title V operating permits program. That section requires, as a condition of Federal approval, that a State have adequate authority to issue permits and assure compliance; to terminate or revoke such permits for cause; and to enforce permits, permit fee requirements and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation and to provide appropriate criminal penalties. The part 70 implementing regulations, at 40 CFR 70.11, elaborate upon those authorities. Part 70 requires a State to have authority to issue emergency orders and seek injunctive relief (40 CFR 70.11(a) (1) and (2)), to assess civil and criminal penalties in a maximum amount of not less than $10,000 per day per violation (40 CFR 70.11(a)(3)), and to assess appropriate penalties (40 CFR 70.11(c)). Although neither title V nor part 70 expressly prohibits State audit privilege and/or immunity laws, the analysis in the proposed interim approval of Michigan's program shows how EPA believes the Michigan audit law interferes with Michigan's general enforcement authority and its civil penalty authority as required in title V and the part 70 implementing regulations so as to preclude full approval of Michigan's operating permits program.[4] For example, as EPA explained in the Michigan proposal, the immunity provisions of the Michigan audit law alter and in fact eliminate the State's authority to recover *any* civil penalties under the circumstances identified in the State law. *See* 61 FR 32394–32395. Moreover, the privilege provisions of the Michigan audit law prevent the State from obtaining potentially important information on whether a civil or criminal violation occurred or has been corrected. If the State, by virtue of such laws, surrenders its ability to thoroughly investigate potential violations or its discretion to assess appropriate penalties in the face of violations, then the State's fundamental enforcement authority is significantly compromised. The EPA believes that this is the case with the Michigan audit law.

In a similar vein, the commenters argue that the State of Michigan has the general authorities enumerated in section 502(b)(5)(E) and 40 CFR 70.11 to enforce permits, permit fee requirements and the requirement to obtain a permit and to recover civil and criminal penalties in a maximum amount of not less than $10,000 per day of violation, and that nothing in the text of section 502(b)(5)(E) of the Act or the part 70 regulations authorizes EPA to consider the effect of State laws of general applicability on a State's title V civil and criminal enforcement authorities. The commenters further argue that the logical corollary of EPA's proposed action with respect to the Michigan audit law is that *every* State procedural and evidentiary rule must be evaluated and amended whenever EPA believes that it could in some fashion, directly or indirectly, interfere with environmental enforcement.

Laws of general applicability are an appropriate subject for EPA review as is evident from the language of the part 70 regulations themselves. The regulations require that a State applying for a title V operating permits program include copies of ''all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program *or restrict its implementation*.'' 40 CFR 70.4(b)(2) (emphasis added). The regulations also require a legal opinion from the State Attorney General asserting that the laws of the State provide adequate authority to carry out ''all aspects of the program.'' 40 CFR 70.4(b)(3). It is certainly EPA's expectation that, in issuing such a legal opinion, the Attorney General is certifying that no State laws, even laws of general applicability or laws of evidence, interfere with the State's authority to administer and enforce the title V program. *See* 59 FR 47105, 47108 (September 14, 1994) (requiring Oregon to revise or clarify meaning of criminal statute appearing to limit criminal liability of corporations as a condition of full title V approval); 59 FR 61820, 61825 (December 2, 1994) (accepting Oregon Attorney General's opinion regarding effect of statute).[5]

Both commenters also argued that the Michigan audit law does not interfere with the enforcement requirements of title V because it is qualified in a number of important respects. The commenters note that the Michigan audit law does not offer protection from disclosure for information obtained by observation, sampling, or monitoring by any regulatory agency; machinery and equipment maintenance records; information legally obtained independent of the environmental audit; and information required by law to be collected, developed, reported or otherwise made available to a government agency. *See* section

[3] These commenters also commented on various EPA documents, including the memorandum entitled ''Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements'', April 5, 1996, and the policy entitled ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations'', December 22, 1995. These comments are addressed to the extent that they are relevant to EPA's action on Michigan's title V operating permits program.

[4] In addition, part 70 does not provide for any affirmative defenses beyond that provided by the emergency defense provisions in 40 CFR 70.6(g). See subpart II.A.9. of this notice regarding Michigan's affirmative defense for startups, shutdowns, and malfunctions.

[5] One commenter argues that section 116 of the Act bars EPA from seeking to preempt State audit privilege and/or immunity laws. Section 116 states that, subject to limited exceptions, nothing in the Act shall preclude or deny the right of any State to adopt or enforce emissions standards or limitations or requirements respecting the control or abatement of air pollution ''except where such emission standard or limitation is less stringent than required by the Clean Air Act.'' Such an interpretation would mean that EPA had no authority to disapprove any State enforcement provisions as a condition of title V approval. Section 502(b)(5)(E), which requires EPA to promulgate minimum enforcement authorities required for approval of a State title V program, clearly belies such an argument.

14802(3), part 148 of NREPA. The commenters state that the privilege is further limited because it only applies to an environmental audit report as defined in the Michigan audit law. In addition, the commenters state that the immunity provisions in the Michigan audit law are limited by the provisions in section 14809 of NREPA, which, among other things, require the source to promptly disclose violations, make a good faith effort to achieve compliance, pursue compliance with due diligence, and promptly correct the noncompliance.

The EPA noted in the proposed interim approval of Michigan's program that, although the Michigan audit law appears to contain several exemptions from the otherwise broad scope of the privilege protection, EPA is unable to determine the extent to which the exemptions limit the application of the privilege. In other words, the extent to which evidence of violations of title V permits and permit program requirements would be exempted from the privilege provisions of the Michigan audit law is not clear. For example, the Michigan audit law appears to provide privilege protection for a source that determines through an environmental audit that it is operating without a title V permit. This violation appears eligible for the privilege because part 70 does not have any source notification requirements prior to the submittal of the permit application that would exclude this violation from the privilege provisions. The EPA does not agree with the commenters' assertion that the privilege is further limited by the definition of an environmental audit report. The Michigan audit law broadly defines such a report to include any documents created as a result of an environmental audit, such as supporting information and implementation plans that address correcting violations and improving current compliance. In addition, the Michigan audit law's exemptions from privilege protection do not appear to apply to the penalty immunity in section 14809, part 148 of NREPA. Therefore, it appears that any violation discovered during an environmental audit, regardless of whether it is eligible for the privilege, is eligible for the immunity as provided in section 14809. Despite the limitations on the scope of the State's immunity provisions imposed by the requirement that disclosure be ''voluntary'', EPA believes that application of the immunity provisions is so broad that it potentially could apply to any title V violation. Because the privilege and immunity exemptions could apply to title V requirements, EPA must therefore infer that there could be violations at a title V source discovered through an environmental audit that would be entitled to the privilege or immunity provided by the Michigan audit law. The EPA again notes that Michigan may have a different interpretation of its audit law, in which case an Attorney General's opinion may help to resolve these interim approval issues.

The commenters also take issue with EPA's interpretation of the title V and part 70 requirements for enforcement authority, as evidenced in the April 5, 1996 memorandum entitled ''Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements'' (hereinafter, the ''April 5 Title V Memorandum'') and the proposed interim approval of Michigan's part 70 program. The commenters argue that EPA's interpretation and application of the title V enforcement requirements improperly interferes with the States' role as independent sovereigns, improperly divests States of their primary responsibility for implementing and enforcing the Act, and conflicts with the Clinton Administration's stated policy to allow States to experiment with alternative approaches to achieve environmental protection. The commenters further argue that the determination of the Michigan legislature that criminal or civil penalties are inappropriate under the circumstances set forth in the Michigan audit law is within the statutory boundaries and flexibility provided by the Act. The commenters continue that the immunity provisions of the Michigan audit law reflect the Michigan legislature's judgment as to the ''appropriate'' penalty for companies that voluntarily disclose and correct instances of environmental noncompliance and reflect a reasonable allocation of the State's enforcement resources.

The EPA agrees that, in enacting the Act, Congress believed that States and local governments should have the primary responsibility for controlling air pollution at its source. *See* Section 101(a)(3) of the Act. The EPA also agrees with the commenters that the States are to be given broad flexibility to select alternative means to achieve the minimum Federal requirements established in the Act by Congress and by EPA in the part 70 regulations, and fully supports State experimentation to achieve greater compliance with environmental laws. Such flexibility and experimentation, however, must be, as the commenters acknowledge, *within* the bounds of the statutes enacted by Congress and the implementing regulations promulgated by EPA. It cannot cancel out the requirement that States must meet some minimum Federal requirements as a condition of Federal approval of their programs.

In the case of the operating permits program, those minimum Federal requirements are set forth in title V and the part 70 regulations. It is these requirements that EPA is insisting that the State of Michigan meet as a condition of full approval of its title V program. In short, EPA does not believe that the Michigan title V program is within the statutory boundaries established by Congress or the flexibility provided by the Act because the Michigan audit law would limit the enforcement authority Congress and EPA required States to have as a condition of Federal approval.

Moreover, the commenters' argument that the Michigan audit law governs areas of law traditionally committed to States in their role as independent sovereigns—if taken to its logical conclusion—would mean that a State could not be required to have any civil or criminal penalty authority to get approval for a title V program. It is an argument that goes to the validity of section 502(b)(5)(E) and 40 CFR 70.11 themselves and therefore is untimely in this context. As stated above, Congress through title V, and EPA through the part 70 implementing regulations, required States to satisfy certain minimum requirements for enforcement authority as a condition of Federal approval of a Clean Air Act operating permits program. By conditioning full approval of the Michigan title V program on changes to the Michigan audit law or a demonstration by the State satisfactory to EPA that the Michigan audit law does not interfere with the enforcement requirements of title V, EPA is simply seeking to assure that Michigan has the required enforcement authorities before receiving Federal approval of its program. *Cf. Commonwealth of Virginia* v. *Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (in rejecting Virginia's argument that requiring the State to change its judicial standing rules as a condition of title V approval violated State's sovereignty, the Court stated: ''Even assuming *arguendo* the accuracy of Virginia's assertion that its standing rules are within the core of its sovereignty, we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that would otherwise be beyond Congress' regulatory authority.''' *citing FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

The commenters also assert that EPA's use of its title V program approval authority to ''force'' States to modify their audit privilege and/or immunity legislation is contrary to Congress' general expression of intent against the automatic use of audit reports for enforcement of the Act, as expressed in the Joint Explanatory Statement of the Conference Committee Report for the 1990 Amendments. S. Conf. Rep. 101–952, 101st Cong. 2d Sess. 335, 348 (Oct. 26, 1990), *reprinted in* Legislative History at 941–42, 955, 1798. The commenters further assert that Michigan's decision to provide qualified audit immunity is consistent with that Congressional intent.

As an initial matter, EPA disagrees that it is using the title V approval process to ''force'' States to modify their audit legislation. Instead, as stated above, EPA is simply analyzing to what extent the audit privilege and/or immunity laws of a particular State compromise the enforcement authorities required by Congress in title V and interpreted by EPA through the part 70 regulations, as a condition of Federal approval of the State's operating permits program.

With respect to the issue of Congress' intent, the language from the Conference Report cited by the commenters does not clearly express a desire that audit reports not be used for enforcement of the Act requirements. Rather, the text expresses some general support for the concept of auditing and a desire that the *criminal penalties* of section 113(c) ''should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct deficiencies identified in an audit or the audit report should not *ordinarily* form the basis for intent which results in criminal penalties.'' (emphasis added). The legislative history merely indicates that the circumstances involving violations discovered through an audit report and voluntarily disclosed by the company will generally not meet the requirements for criminal liability. Importantly, Congress did not in any way suggest that a company which self-disclosed violations discovered through an environmental audit should be immune from civil penalties. In any case, when Congress amended the Act in 1990, there were no audit privilege and/or immunity laws on the books in any State. Any legislative history on auditing and enforcement from that period must be read in light of that reality. EPA does not believe Congress intended that the growth of environmental auditing—in itself a laudable goal fully supported by EPA—comes at the expense of the enforcement of environmental laws.[6] If Congress had wished to give special status to self-disclosed violations detected during an environmental compliance audit or to prohibit the use for general enforcement purposes of audits conducted under the Act and EPA approved programs, Congress could have done so in the language of the 1990 amendments. If anything, the legislative history of the Act is evidence of Congress' intent that such incentives for audits should be a basis for the exercise of prosecutorial discretion, and not a legislative grant of immunity or protection from disclosure.

The commenters also argue that Congress intended to vest the States with discretion in enforcing title V permit requirements and that the part 70 regulations merely provide that penalties assessed under a title V program must be ''appropriate'' to the violation. Nothing requires a State to obtain a penalty for every violation or prohibits a State from rewarding good actors who identify, disclose and correct violations, the commenters continue.

The EPA agrees that a State is not required to collect a penalty for every violation or is precluded from using its discretion to reward companies that conduct environmental audits and disclose and correct any violations discovered through such an audit. The EPA disagrees, however, that the only inquiry for title V approval is whether a State has authority to assess ''appropriate'' penalties. The part 70 regulations first state that civil and criminal fines must be recoverable ''in a maximum amount of *not less than $10,000 per day per violation*.'' 40 CFR 70.11(a)(3)(i)–(iii) (emphasis added).[7] Section 70.11(c) then provides that ''[a] civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate *to the violation*.'' (emphasis added). By interpreting title V and part 70 to require only that States have authority to assess ''appropriate'' penalties, the commenters are reading out of the regulations the independent requirement that States have the authority to assess civil and criminal penalties of an amount not less than $10,000 per day per violation. Read together, 40 CFR 70.11(a)(3) and 70.11(c) require that a State have authority to assess a civil or criminal penalty of up to $10,000 per day per violation and that, in addition, the penalty assessed in any particular case be ''appropriate'' to the violation at issue. Thus, EPA agrees with the commenters that it is within Michigan's discretion not to impose the statutory maximum penalty for violations as to which a lesser penalty is appropriate or to determine that criminal or civil prosecution is inappropriate under the facts and circumstances of a particular case so long as the State has the *authority* to assess penalties for each day of violation. The legislative history cited by the commenters in support of their position is, in fact, consistent with EPA's position on this issue. *See* Legislative History at 5815 (''states are not going to be required to impose these minimum fines of $10,000 for permit violations. Instead, the bill is revised to make clear that states shall ensure that they have the *authority* to impose this. It is not mandated, it is authority.'') (emphasis added).

Several commenters stated that section 113(e) of the Act only sets forth penalty factors that EPA or a Federal court must consider in imposing civil penalties for noncompliance with the Act, that section 113(e) has no bearing on EPA's authority to approve or disapprove State title V programs, and that nothing in section 113, title V or part 70 authorizes EPA to condition approval of a State's title V permit program on the State's ability to consider penalty factors comparable to those set out in section 113(e). The commenters further assert that, although section 113(e) is inapplicable, section 113(a) authorizes EPA in certain defined circumstances to take appropriate action, namely, filing an action against a facility where EPA believes the State's response was inadequate. This back-up

[6] That distinction is also reflected in EPA's Self-Disclosure policy, which offers significant incentives for businesses to audit and self-disclose violations, while at the same time retaining safeguards to ensure the protection of public health and the environment.

[7] One commenter appears to assert that a State need only have the authority to assess ''appropriate'' criminal penalties. In doing so, the commenter ignores the clear language of the part 70 regulations. Section 502(b)(5)(E) requires States to have authority to ''recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties.'' In promulgating part 70, EPA determined that to provide ''appropriate criminal penalties'' for purposes of title V approval, a State must have authority to issue criminal penalties in a maximum amount of not less than $10,000 per day per violation. *See* 40 CFR 70.11(a)(3)(ii) and (iii). If the commenter believes that the enforcement authorities enumerated in the part 70 regulations, including the requirement for criminal penalty authority of up to $10,000 per day per violation, are excessive or in any way inconsistent with the statutory authorities, the commenter should have challenged the part 70 regulations at the time of promulgation in 1992.

authority, and not wholesale invalidation of a State's title V permits program, the commenters continue, is EPA's tool for ensuring to its own satisfaction that State audit legislation does not allow egregious Act violations to go unsanctioned. In any event, one commenter asserts that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions.

The EPA agrees that the purpose of section 113(e) is, as the commenters assert, to set forth factors which EPA and the Federal courts must consider in assessing civil penalties under the Act. The EPA believes, however, that the section 113(e) factors can also serve as guidance in determining what civil penalty authority is minimally necessary in a State title V program.

In order for a State to have the authority to assess penalties that are ''appropriate'' to the violation in any particular case as required by 40 CFR 70.11(c), a State must have, in addition to the authority to assess a penalty of at least $10,000 per day per violation, the authority to consider mitigating or aggravating factors. In enacting section 113(e), Congress set forth factors it believed EPA and Federal judicial and administrative courts should consider in determining an appropriate penalty under the specific facts and circumstances before it. Although EPA believes that the factors enumerated by Congress in section 113(e) are the most fundamental, EPA believes that States may consider other factors as well. To the extent that a State has surrendered its ability to consider factors such as those set forth in section 113(e), EPA believes that a State does not have adequate authority, on a case-by-case basis, to collect penalties that are ''appropriate'' to the violation, as required by 40 CFR 70.11(c).

Industry commenters argue that since the section 113(e) factors do not apply to State programs, it must follow that Congress did not prescribe factors a State must apply in assessing ''appropriate'' penalties under title V, and that a State must therefore be given full approval as long as it possesses ''appropriate'' enforcement authority. As explained above, the question for EPA at the program approval stage is not how the State will exercise its enforcement discretion to assess penalties in any particular case. Rather, it is whether the State has sufficient authority to assess appropriate penalties in every case. Before granting full approval to a title V program, EPA must ensure, first, that the State has the general authority to assess penalties up to the amounts specified in section 70.11. The EPA must also ensure that the State has authority to consider factors, similar to those in section 113(e), such that the penalty actually assessed in any case may be appropriate to the violation. Because the immunity provisions of the Michigan audit law preclude the State from considering the factors set forth in section 113(e) or any other factors in determining an ''appropriate'' penalty in cases in which the source has disclosed and corrected violations discovered in an environmental audit, EPA believes that Michigan lacks this authority. The EPA also disagrees with the commenters' assertion that EPA's sole remedy where EPA believes a State does not have adequate enforcement authority is to take its own enforcement actions to address violations in that State. Although EPA does file Federal actions where the State fails to take enforcement action or where State action is inadequate to address a particular violation, before approving a State title V program EPA must also ensure that the State has demonstrated the capacity to administer and fully enforce the program as required by law and regulation. If Federal action were the only remedy for situations in which a State does not possess adequate enforcement authority, there would have been no need for Congress to direct EPA to promulgate rules setting forth minimum enforcement requirements for Federal approval of a State operating permits program. *See* 59 FR 61825 (rejecting similar comment in acting on Oregon's title V program).

Finally, regardless of one commenter's assertion that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions, it is EPA's position that the Michigan audit law nonetheless prevents consideration of other critical factors in determining appropriate civil penalties, including but not limited to serious harm or risk of harm to the public or the environment, and substantial economic benefit to the violator. To the extent the Michigan audit law prevents consideration of mitigating or aggravating factors, EPA believes that Michigan has surrendered its authority to assess appropriate penalties as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

The commenters stated that EPA's approach on State audit privilege and/or immunity laws is bad policy and not supported by empirical evidence. The commenters expressed strong support for environmental auditing as a means of obtaining compliance with increasingly complex environmental requirements. These commenters argue that EPA's reaction against such audit statutes is a ''knee-jerk'' reaction that ignores the potentially huge benefits that these laws offer. EPA has wrongly concluded, the commenters continue, that the existence of a limited and qualified affirmative defense to penalties for violations discovered through environmental audits and protection for information in audit reports weakens Michigan's authority to enforce the law or to ensure compliance, and that the evidence to date in other States with such laws shows in fact that audit privilege and/or immunity legislation encourages self-correction and increased compliance. At the same time, the commenters argue, EPA has not cited to any specific instance in which the Michigan audit law or some other State audit privilege and/or immunity law has compromised or inhibited enforcement of the Act or a title V permit program.

The EPA has expressed strong support for incentives which encourage responsible companies to audit to prevent noncompliance and to disclose and correct any violations that do occur. *See, e.g.,* EPA's Self-Disclosure Policy. The issue involved in this Federal Register action, however, is not whether environmental auditing is good or bad policy. Rather, the issue is whether the Michigan audit law, in offering privilege and immunity to companies conducting environmental audits, so deprives the State of its authority to take enforcement action for violations of title V requirements such that the State does not have the necessary authority required for full title V approval.

Moreover, EPA believes that it is premature at this point to expect significant empirical evidence to document whether environmental audit privilege and/or immunity laws enhance or impede environmental compliance. Most of the State audit statutes are little more than one year old and only a few States have issued permits under approved title V programs. In any event, EPA is aware of several on-going environmental enforcement actions in certain States with audit privilege and/or immunity laws in which the audit privilege appears to be interfering with prosecutors' efforts to obtain and utilize certain evidence.[8]

[8] The confidentiality prerequisites that attach to all on-going enforcement actions, however, prevent the Agency from revealing additional details at this time.

The commenters go on to argue that the reasoning set forth in the April 5 Title V Memorandum and the proposed interim approval of Michigan's program could have far-reaching and unintended effects on the relationship between EPA and States in the implementation of the Act and other environmental laws such as approvals of State Implementation Plans and State programs under the Clean Water Act and Resource Conservation and Recovery Act.

The EPA agrees that the rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program has implications for other Federal programs delegated to the States. Because of that, the Agency has for some months been analyzing the effects of State audit privilege and/or immunity laws on enforcement authorities under the Clean Water Act, the Resource Conservation and Recovery Act, and other statutes. The rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program as it relates to the Michigan audit law, however, is dictated not by political or policy considerations, but rather by statutes and regulations that were finalized after public notice and comment.

The commenters also stated that EPA's proposed interim approval of Michigan's program based on the Michigan audit law is inconsistent with existing EPA and Department of Justice (DOJ) enforcement policies, which reflect the appropriateness of limiting enforcement discretion. The commenters point to ''Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator,'' DOJ, July 1, 1991; ''The Exercise of Investigative Discretion'', EPA, January 12, 1994; ''Policy on Flexible State Enforcement Responses to Small Community Violations'' EPA, November 1995 (''EPA Policy on Small Communities''); ''Policy on Compliance Incentives for Small Businesses,'' EPA, May 1996; and EPA's Self-Disclosure Policy.

There is an important distinction between the policies cited by the commenters, which adopt an ''enforcement discretion'' approach, and the Michigan audit law.[9] The EPA and DOJ have announced policies guiding the exercise of their enforcement discretion under certain narrowly defined circumstances, while preserving the underlying statutory and regulatory authority.[10] State audit privilege and/or immunity laws, such as the Michigan audit law, by contrast, constrain enforcement discretion as a matter of law, impermissibly surrendering the underlying statutory and regulatory enforcement authorities required for Federal approval of the State programs.

Both commenters stated that EPA's proposed action on the Michigan program is inconsistent with several previous title V approvals where audit privilege and/or immunity legislation has not posed a bar to full approval. As examples of previous title V approvals which the commenters believe are inconsistent with EPA's proposed action on the Michigan program, as it relates to the Michigan audit law, the commenters cite to EPA's action on the Oregon, Kansas and Colorado title V programs. Relying on the recent Ninth Circuit decision in *Western States Petroleum Association* v. *EPA*, 87 F.3d 280 (9th Cir 1996) (''WSPA''), the commenters state that, where EPA is departing from a prior course of action, more is required of the Agency than conclusory statements concerning the potential impact of the Michigan audit law on the State's title V enforcement authority. Instead, the commenters argue that EPA must provide a basis for deviating from its earlier approaches in Oregon, Kansas and Colorado.

As an initial matter, EPA notes its action on Michigan's title V program is consistent with its action on the Texas title V program, 61 FR 32693, 32696–32699 (June 25, 1996) (final interim approval), and the Idaho title V program, 61 FR 64622–64635 (December 6, 1996) (final interim approval). Moreover, EPA has notified the States of Ohio, Arizona, and Florida that audit privilege and/or immunity laws that these States have enacted or are contemplating enacting could interfere with the enforcement requirements of title V and part 70.

With respect to the three programs cited by the commenters as inconsistent with EPA's proposed action on the Michigan program, EPA is still in the process of reviewing the audit privilege and/or immunity statutes in Oregon, Kansas and Colorado and their effects on the title V enforcement requirements in those States in order to determine whether EPA acted inconsistently in approving those programs. If EPA determines that it acted inconsistently, EPA intends to take appropriate action to follow the *WSPA* Court's mandate that EPA act consistently or explain any departures.

Finally, one commenter challenges the April 5 Title V Memorandum itself arguing that the guidance document imposes requirements on EPA approval of a State operating permits program in addition to those required by section 502(b)(5)(E) of the Act and the part 70 rules. Because the April 5 Title V Memorandum sets additional substantive and binding standards for approval of State title V operating permits programs not included in the part 70 regulations, the commenter continues, the guidance is a rule disguised as guidance and must be promulgated in accordance with the Administrative Procedures Act. This requires, among other things, public notice and comment.

The EPA disagrees. The April 5 Title V Memorandum does not, as the commenters assert, ''purport to change fundamentally the requirements in section 70.11 by adding provisions that (1) effectively prohibit a state from adopting an audit protection or immunity law and (2) impose at least four new penalty criteria.'' Rather, the guidance simply recounts and reiterates existing statutory and regulatory requirements for enforcement authority under the title V program and shows how audit privilege and/or immunity laws may prevent a State from meeting those requirements. It creates no new ''substantive and binding standards'' for approval of title V programs, and therefore is not subject to notice and comment rulemaking of the Administrative Procedures Act.[11]

[9] In addition, the criminal enforcement policies noted by the commenters are irrelevant, as Michigan's audit law does not create deficiencies in the State's part 70 criminal enforcement penalty authority.

[10] Although the EPA Policy on Small Communities does encourage States to provide small communities an incentive to request compliance assistance by waiving all or part of a penalty under certain circumstances, it does not provide an unqualified waiver of civil penalties. The policy directs States to assess a small community's good faith and compliance status before granting any relief from penalties and identifies a number of factors that a State should consider in determining whether relief from civil penalties is appropriate in the particular circumstances. In addition, EPA's Policy on Small Communities directs a State to consider the seriousness of the violation. *See* EPA's Policy on Small Community Violations, page 4. Although the policy does not direct the State to consider economic benefit in determining the appropriate enforcement response, the policy is available only to those small communities that are financially unable to satisfy all applicable environmental mandates without the State's compliance assistance.

[11] One commenter also stated that EPA expressly recognized in its earlier approval of the Oregon title V program that EPA would have to use rulemaking to modify its part 70 rules before EPA could prohibit States from adopting audit privilege and/or immunity laws. The commenter misstates the Agency's position. As an initial matter, the Oregon audit statute, Oregon Revised Statute 468.963, contains only an audit privilege and does not contain an immunity provision. In proposing interim approval of the Oregon title V program, EPA

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Moreover, in explaining why the Michigan audit law precludes full approval, EPA is relying on the requirements of title V and part 70 themselves, and not the April 5 Title V Memorandum. Finally, EPA's application of the title V and part 70 enforcement requirements to the specific circumstances before EPA in the case of the Michigan audit law is subject to notice and comment rulemaking.[12]

b. Additional concerns regarding the effect of the privilege provisions of the Michigan audit law on the State's enforcement authority. Both commenters disagreed with EPA's position that the Michigan audit law contains a privilege for environmental audit reports which impermissibly interferes with the enforcement requirements of title V and part 70. The commenters note that the Michigan audit law does not prohibit the State from gaining access to underlying data not prepared for or during the audit. One commenter states that EPA is directly linking title V enforcement authority to State evidentiary rules, and that every State procedural and evidentiary rule must therefore be evaluated and amended whenever it interferes with environmental enforcement. The commenters continue that EPA has singled out audit privilege laws while not taking issue with State attorney-client privilege provisions.

As discussed in the proposed interim approval of Michigan's part 70 program, EPA believes that the Michigan audit law prevents the State from requiring an owner or operator to produce an environmental audit report under the State's general information gathering authority. Although a source must voluntarily disclose the relevant portions of the audit report in order to obtain immunity from civil penalties, an owner or operator can hold as privileged audit reports containing information on violations in the hopes that the violations will not otherwise come to the attention of the State agency. Further, a source can rely on the privilege provisions to avoid disclosing criminal violations, as the Michigan audit law does not provide immunity for disclosed criminal violations (other than for negligent acts or omissions). Similarly, a facility could elect to disclose the fact of a violation under the immunity provisions, but not the related evidence of whether the violation was knowing or intentional. Although EPA agrees that the Michigan audit law does not preclude access to information that is not part of an environmental audit report, EPA remains concerned that the data that led the source to conduct the environmental audit may by itself be insufficient to demonstrate either compliance or noncompliance with an applicable requirement. Furthermore, there may not be any documented information or event which caused a source to conduct an environmental audit. In such a situation, all information regarding a potential violation would exist only in the environmental audit report. The EPA therefore believes that the Michigan audit law so interferes with the State's information gathering authority as to prevent the State from obtaining appropriate civil and criminal penalties and assuring compliance with the Act, as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

As discussed previously in this notice, EPA agrees with the commenters that State procedural and evidentiary rules are an appropriate subject for EPA review, as provided by 40 CFR 70.4(b)(2) and 40 CFR 70.4(b)(3). However, EPA does not agree with the commenters that the attorney-client privilege and the privilege provisions in the Michigan audit law are analogous. The attorney-client privilege merely prevents an attorney from revealing information disclosed by a client in a confidential communication made for the purpose of obtaining legal advice. It does not preclude the enforcement authority from obtaining the information from the source by any legal means. On the other hand, the privilege created by the Michigan audit law completely prevents an enforcement authority from obtaining any information labeled as an environmental audit report.

One commenter also stated that adequate title V enforcement authority cannot depend on access to voluntarily prepared audit reports. If such were the case, the commenter reasoned, State regulators would necessarily lack adequate enforcement authority over those entities that do not conduct audits voluntarily.

The EPA agrees that access to voluntarily prepared audit reports is not *per se* a prerequisite for adequate enforcement authority for title V approval. However, such access is important if the report exists and it contains information on violations or whether violations have been promptly corrected. The lack of such access can adversely affect the adequacy of enforcement authority.

One commenter also stated that State audit protection legislation does not inhibit whistle blowers but instead merely prohibits unauthorized disclosure of an audit report because whistle blowers are free to disclose any ''non audit'' information to support their allegations without fear of violating the laws.

As an initial matter, EPA notes that this concern is irrelevant in EPA's action on Michigan's title V program. To EPA's knowledge, neither the Michigan audit law nor any other provision of Michigan law specifically restricts the information that a whistle blower may disclose to a State agency, and EPA therefore did not raise this as a concern in proposing action on Michigan's title V program.

The commenter appears to be responding to an issue discussed in the April 5 Title V Memorandum. In that memorandum, EPA expressed concern with State audit privilege and/or immunity statutes that impose special sanctions upon persons who disclose privileged information. *See* April 5 Title V Memorandum, pp. 5–6. Although irrelevant to action on Michigan's title V program, EPA believes, as stated in the guidance, that the Act provision

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stated it was in the process of developing a national position regarding EPA approval of environmental programs in States which have environmental audit privileges, and that therefore, it proposed to take no action on the Oregon audit provision in the context of the Oregon title V approval. EPA noted, moreover, that it might consider such a privilege grounds for withdrawing program approval under 40 CFR 70.10(c) in the future if EPA later determined that the Oregon audit provision interfered with Oregon's enforcement responsibilities under title V and part 70. 59 FR 47105, 47106 (September 14, 1994). During the public comment period on EPA's proposal, one commenter stated that EPA's suggestion that a State audit privilege could be grounds for interim approval or withdrawal was bad policy and that Oregon's audit privilege statute was consistent with the Act. In addition to responding to the merits of the comment, EPA stated that the commenter's concerns were premature because, as the commenter acknowledged, EPA had not proposed to take any action on Oregon's environmental audit privilege statute in the context of final interim approval of the Oregon program. EPA further stated that any such concerns about EPA's position on the Oregon audit privilege statute would be properly made if EPA later proposed to withdraw Oregon's title V approval based on Oregon's audit privilege or if EPA ''revised part 70 to prohibit environmental audit provisions such as Oregon's.'' 59 61820, 61824 (December 2, 1994). EPA did *not* say in that Federal Register notice that a rulemaking would be required in order for the Agency to disapprove a title V program in a State with an environmental audit privilege and/or immunity statute.

[12] EPA also disagrees with one commenter's assertion that the Congressional review provisions of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104–121 (SBREFA), requires EPA to submit the April 5 Title V Guidance Memorandum to Congress. EPA does not believe that April 5 Title V Memorandum is subject to Congressional review under SBREFA because it is not a rule and it does not substantially affect the rights or obligations of a nonagency party. Even if the Memorandum were subject to review, EPA has not relied on that Memorandum as a basis for this action. Therefore, any procedural defect with respect to the April 5 Title V Memorandum would be irrelevant to the legal sufficiency of this action.

which gives explicit protection to whistle blowers makes no distinctions with respect to the source of the information relied upon by the whistle blower. The EPA believes that it is inconsistent with section 322 of the Act for States to remove audit reports from the universe of information which employees may rely upon in reporting violations to local or State authorities.

c. Summary. The EPA continues to believe that the privilege and immunity provisions of the Michigan audit law impermissibly interfere with the enforcement authorities required for full title V approval. Accordingly, Michigan must narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11(a) and (c), as addressed above. In addition, the State must submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], in which the Attorney General certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

Alternatively, the State may submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). Such an opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid. Finally, Michigan must also submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3)(ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's audit law. Although EPA does not believe that the Michigan audit law affects any title V requirements other than the ones specifically identified in this action, a supplemental Attorney General's opinion is appropriate because Michigan's current part 70 Attorney General's opinion was written before the existence of the Michigan audit law.

11. Additional State Comments

MDEQ noted that it is pursuing changes to Michigan's operating permit regulations to address the interim approval issues pertaining to the definition of ''schedule of compliance'', the definition of ''stationary source'', and the applicability requirements for nonmajor solid waste incineration units. The EPA has reviewed Michigan's proposed rules revision package, and submitted comments to MDEQ during the package's public comment period.

MDEQ also acknowledged the condition for full approval that requires removal of section 5534 of NREPA. MDEQ agrees to pursue an amendment to NREPA to remove section 5534.

B. Final Action

1. Interim Approval

The EPA is promulgating interim approval of the Michigan operating permits program received by EPA on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996. The scope of Michigan's part 70 program approved in this notice applies to all part 70 sources within Michigan, except for any sources of air pollution in Indian country. The State must make the following changes to receive full approval:

a. Revise the definition of ''schedule of compliance'' in R 336.1119(a) to provide that the schedule of compliance for sources that are not in compliance shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. This provision is required by 40 CFR 70.5(c)(8)(iii)(C).

b. Revise the definition of ''stationary source'' in R 336.1119(q) to provide that the definition includes all of the process and process equipment which are located at one or more *contiguous or* adjacent properties. The emphasized phrase is not currently included in the State regulation. This provision is required in the definition of ''major source'' in 40 CFR 70.2.

c. Revise R 336.1211(1) to provide that nonmajor solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are subject to the title V permits program. The permitting deferral for nonmajor section 111 sources in 40 CFR 70.3(b) does not apply to solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act.

d. Revise R 336.1212(1) to delete the exemption of certain activities from determining major source status. Part 70 and other relevant Act programs do not provide for such exemptions from major source determinations. This interim approval issue does not apply to the State's use of R 336.1212(1) as an insignificant activities list pursuant to 40 CFR 70.5(c).

e. Revise the State statutes or regulations, as appropriate, to require that permit applications include a certification of compliance with all applicable requirements and a statement of the methods used for determining compliance, as specified in 40 CFR 70.5(c)(9) (i), (ii), and (iv).

f. Remove the provisions of section 324.5534 of NREPA, which provide for exemptions from penalties or fines for violations caused by an act of God, war, strike, riot, catastrophe, or other condition as to which negligence or willful misconduct was not the proximate cause. Title V does not provide for such broad penalty and fine exemptions.

g. Revise R 336.1913 and R 336.1914 to be consistent with the affirmative defense provisions in 40 CFR 70.6(g). Alternatively, adopt an enforcement discretion approach consistent with the Act. These State regulations provide an affirmative defense that is broader than that provided by 40 CFR 70.6(g). They are also inconsistent with agency enforcement discretion permissible under the Act. These regulations, therefore, affect the State's ability to enforce permits and assure compliance with all applicable requirements and the requirements of part 70 [40 CFR 70.4(b)(3)(i) and 70.4(b)(3)(vii)]. For the same reasons, they also affect the State's general enforcement authority under 40 CFR 70.11.

h. Address all of the following issues relating to the State's audit privilege and immunity law, part 148 of NREPA. These conditions are proposed interim approval issues to the extent that they affect the State's title V operating

permits program and the requirements of part 70.

i. Narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11 (a) and (c) as addressed in subpart II.A.10. of this notice.

ii. Submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], and certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

iii. In lieu of subparts i. and ii. above, submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). The Attorney General's opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

iv. Submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3) (ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's privilege and immunity law.

This interim approval extends until February 10, 1999. During this interim approval period, Michigan is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate, administer, and enforce a Federal operating permits program for the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications.

If the State of Michigan fails to submit a complete corrective program for full approval by August 10, 1998, EPA will start an 18-month clock for mandatory sanctions. If the State of Michigan then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that Michigan has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State of Michigan, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that Michigan has come into compliance. In any case, if, 6 months after application of the first sanction, Michigan still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves the State of Michigan's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Michigan has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Michigan, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that the State has come into compliance. In all cases, if, 6 months after EPA applies the first sanction, Michigan has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if the State has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to Michigan's program by the expiration of this interim approval because that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for the State of Michigan upon expiration of interim approval.

2. Other Actions

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is promulgating approval under section 112(l)(5) and 40 CFR part 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

The EPA is also promulgating approval of Michigan's preconstruction permitting program found in Part 2 of Michigan's Air Pollution Control Rules (R 336.1201–336.1299) under the authority of title V and part 70 solely for the purpose of implementing section 112(g) to the extent necessary during the transition period between promulgation of the Federal section 112(g) rule and adoption of any necessary State rules to implement EPA's section 112(g) regulations. However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. Although section 112(l) generally provides authority for approval of State air programs to implement section 112(g), title V and section 112(g) provide authority for this limited approval because of the direct linkage between the implementation of section 112(g) and title V. The scope of this approval is narrowly limited to section 112(g) and does not confer or imply approval for purposes of any other provision under the Act, for example, section 110. The duration of this approval is limited to 18 months following promulgation by EPA of section 112(g) regulations, to provide Michigan adequate time for the State to

adopt regulations consistent with the Federal requirements.

III. Administrative Requirements

A. Official File

Copies of the State's submittal and other information relied upon for the final interim approval, including public comments on the proposal received and reviewed by EPA, are maintained in the official file at the EPA Regional Office. The file is an organized and complete record of all the information submitted to, or otherwise considered by, EPA in the development of this final interim approval. The official file is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the final interim approval action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 70

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

Dated: December 27, 1996.

Valdas V. Adamkus,

Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

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

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

2. Appendix A to part 70 is amended by adding the entry for Michigan in alphabetical order to read as follows:

Appendix A to Part—70–Approval Status of State and Local Operating Permits Programs

* * * * *

Michigan

(a) Department of Environmental Quality: received on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996; interim approval effective on February 10, 1997; interim approval expires February 10, 1999.

(b) (Reserved)

* * * * *

[FR Doc. 97–643 Filed 1–9–97; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1311

RIN 0970–AB56

Head Start Program

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Administration on Children, Youth and Families is issuing this final rule to implement a new statutory provision authorizing the Secretary to create a Head Start Fellows Program for staff in local Head Start programs or other individuals working in the field of child development, child care, early childhood education, health, and family services.

EFFECTIVE DATE: February 10, 1997.

FOR FURTHER INFORMATION CONTACT: Dennis Gray, Head Start Bureau, Administration on Children, Youth and Families, P.O. Box 1182, Washington, D.C. 20013; (202) 205–8404.

SUPPLEMENTARY INFORMATION:

I. Program Purpose

Public Law 103–252, the Human Services Amendments of 1994, amended the Head Start Act to authorize the creation of a Head Start Fellows Program (HSFP), which will support professional development of individuals working in Head Start or related programs.

The Head Start Bureau is pleased with the opportunity to develop the HSFP. The Bureau anticipates that the HSFP will provide Head Start Fellows with a unique opportunity to be exposed to activities, issues, resources, and new approaches through placements that will include national and regional Head Start offices, academia, and other public or private nonprofit entities and organizations concerned with services to children and families. The Head Start Bureau will benefit from the valuable perspectives brought by the Fellows currently working in Head Start and other programs across America to the national policy making process.

II. Summary of the Final Rule

The authority for this final rule is section 1150 of Public Law 103–252, the Human Services Amendments of 1994 (the Act) which added section 648A(d) to the Head Start Act (42 U.S.C. 9843). Section 648A(d) authorizes the Secretary to establish a program of Head Start Fellowships. Section 648A(d)(6) authorizes the Secretary to make expenditures not to exceed $1,000,000 for any fiscal year for stipends and other reasonable expenses for the Fellows Program. Additional authority is found in section 648A(d)(8), which mandates that the Secretary promulgate regulations to carry out section 648A(d).

The Act specifies:

- To whom Fellowships may be competitively awarded;