7017.2025, 7017.2030, 7017.2035, 7017.2045, 7017.2050 and 2060, published in the *Minnesota State Register* April 20, 1998, and adopted by the state on July 13, 1998.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[CT–021–1224a; A–1–FRL–7210–9]

Clean Air Act Final Approval of Operating Permits Program; State of Connecticut

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is granting full approval to the Clean Air Act (Act), Operating Permits Program of the State of Connecticut (program). Connecticut submitted its program for the purpose of complying with the Act's directive under title V that states develop programs to issue operating permits to all major stationary sources and certain other stationary sources of air pollution. EPA granted interim approval to Connecticut's initial operating permit program on March 24, 1997. On August 13, 2001, EPA proposed full approval of Connecticut's pending revised program, provided the state finalized the sections of its proposed rules that address EPA's interim approval conditions. On January 11, 2002 EPA received Connecticut's adopted revisions to its program. On March 15, 2002, EPA proposed full approval to rule changes Connecticut made that were not related to EPA's interim approval issues. The Agency has determined that Connecticut's program fully meets the requirements of title V.

DATES: This rule is effective on May 31, 2002.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, Boston, MA.

FOR FURTHER INFORMATION CONTACT: Donald Dahl, (617) 918–1657.

SUPPLEMENTARY INFORMATION:

The following table of contents describes the format for this **SUPPLEMENTARY INFORMATION** section:

I. What Action Is EPA Taking Today?

EPA is taking final action to approve the changes Connecticut made to its regulations (R.C.S.A. Sections 22a–174–1, 22a–174–2a and 22a–174–33) regarding the state's title V permitting program. The Agency is granting full approval to Connecticut's title V permitting program because Connecticut has made all the necessary changes to its program required by EPA's interim approval and the additional program changes that the state made meet the requirements of title V and EPA's state operating permit program regulations at 40 CFR part 70 (part 70). Details of the state's regulatory changes can be found in EPA's two proposed rulemakings, 66 FR 42496 (August 13, 2001) and 67 FR 11636 (March 15, 2002).

EPA received comments from several groups on the proposed rulemakings. Responses to relevant comments are contained in the following section. In the final adoption, the state made several changes to its proposed rule in response to comments the state received. These changes do not effect the substance of the provisions EPA relied on when it proposed to grant full approval to Connecticut's program. The exact changes the state made can be found as part of EPA's public record. In addition, in EPA's proposal of March 15, 2002, the Agency explained several interpretations of the state's rules upon which we are relying to fully approve the program. The Connecticut Department of Environmental Protection (DEP) has submitted a letter confirming DEP's agreement with our interpretations. See letter from Carmine DiBattista to Donald Dahl, April 12, 2002.

Unlike the prior interim approval, this full approval has no expiration date. However, the state may revise its program as appropriate in the future by following the procedures of 40 CFR 70.4(i). EPA may also exercise its oversight authority under section 502(i) of the Act to require changes to a state's program consistent with the procedures of 40 CFR 70.10.

II. What Issues Were Raised During the Public Comment Periods and What Are EPA Responses?

EPA received several comments on its proposals during the public comment periods. The state's rule changes touch upon three separate, though related, programs—the title V operating permit program, the new source review (NSR) preconstruction permit program, and mechanisms that may be used to limit a source's potential emissions. EPA received comments that raise issues about all three programs. EPA is not taking action here on the portions of the state's rule changes that concern NSR and the mechanisms that may limit potential emissions. In the Agency's Technical Support Document, EPA has categorized the comments into three areas: comments relating to the title V program, comments relating to new source review, and all other comments including several comments on section 22a-174–3b which establishes operational requirements for facilities that assure their emissions will remain at insignificant levels. The requirements of section 3b may ultimately play a role in a facility's potential to emit. But this section is not part of the title V program, and relates more to the requirements for staying out of the title V program. Comments concerning new source review or other programs, including section 3b, are not related to EPA's proposal and are beyond the scope of today's actions. EPA is now responding only to the comments that are relevant to fully approving Connecticut's title V program. Those comments and our responses are as follows:

1. *Comment:* The commenter states that Connecticut did not fully meet a state legislative mandate that requires the DEP to identify and explain differences between federal and state requirements.

Response: Under section 506(a) of the Clean Air Act, a state is free to establish ''additional permitting requirements not inconsistent with [the] Act.'' Therefore, EPA will not look behind a state's decision to include permitting requirements beyond the minima of the Act and part 70, provided the program satisfies those requirements. While state agencies may have an independent obligation under state law to explain their reasons for including requirements beyond those specified in part 70, that obligation does not apply to EPA's assessment of the program's adequacy under the Act and part 70.

2. *Comment:* The commenter states that the DEP should continue its work in clarifying terminology. Examples were given where clarity could be

improved. Terms such as ''minor'' or ''modification'' will have different meanings depending on the context the term is used in.

Response: EPA agrees with the commenter that an unambiguous regulation is an important goal for Connecticut as well as the Agency. We also agree with the commenter that Connecticut has made major improvements in clarity to its title V regulations. As the program is implemented in the future, we will continue to work with Connecticut in addressing any areas of the state's rule that may be unclear to the public or the regulated community. EPA believes that the meaning of the terms ''minor'' and ''modification'' are reasonably clear when read in the context of each regulatory requirement.

3. *Comment:* The commenter requested the state to clarify the intent of the phrase ''any other state located within fifty (50) miles of a Connecticut Title V source'' contained within the definition of ''Affected State or States'' in Section 22a–174–1 of the state regulations. The current state rule is unclear as to whether ''the within 50 mile test'' applies from the Connecticut state border or from the location of the permitted source.

Response: Part 70 defines ''affected state'' as all states whose air quality may be affected and which are contiguous to the state in which the title V source exists in and any other state within 50 miles of the source. The state's definition in section 22a–174–1 differs from part 70 only in that Connecticut lists the contiguous states and removes the requirement that the source may affect the air quality in that contiguous state. Both Connecticut's rule and part 70 determine the 50 mile rule based on the distance between another state's border and the location of the title V facility. Connecticut's rule satisfies the part 70 requirements for identifying affected states.

4. *Comment:* The commenter asks the state whether the definition of ''Minor Permit Modification'' means either a permit modification under the new source review program or a permit modification under the title V permitting program.

Response: The term ''minor permit modification'' as it is used in Connecticut's air regulations can mean either a modification to a title V permit or a new source review permit. When the term is read in context, however, the state's regulations make a source's obligations reasonably clear when making a change that would require a minor permit modification to its title V permit. This is also true for a source that is required to obtain a minor permit modification under the new source review program.

5. *Comment:* The commenter asks the state whether the definition of ''non-minor permit modification'' means either a permit modification under the major new source review program or the title V permitting program.

Response: The term ''non-minor permit modification'' as it is used in Connecticut's air regulations can mean either a major modification to a title V permit or a major new source review permit. The state's permit process regulations consolidate provisions for title V and NSR permits where possible to avoid repetition of similar procedural requirements. When the term is read in context, however, the state's regulations make a source's obligations reasonably clear when making a change that would require a non-minor permit modification to its title V permit. This is also true for a source that is required to obtain a non-minor permit modification under the major new source review program.

6. *Comment:* The commenter asks the state why the phrase ''who are legally'' was removed from the definition of who is responsible as an ''operator.'' The commenter suggests that the state limit the definition by adding ''legally'' when describing who can be considered responsible as an operator. The commenter interprets the proposed definition of operator, without the term ''legally responsible,'' as possibly making all employees subject to permit requirements.

Response: The term ''operator'' in the state's regulations is used to define who is responsible for a source. For example, section 22a–174–33(c)(1) states that the title V provisions shall apply to the owner or operator of a title V source. Connecticut has agreed with the commenter and has added the phrase ''who are legally responsible for the operation of a source'' back into the definition of ''operator.'' This change does not affect EPA's ability to fully approve the state's program. It is the intent of part 70 to hold any operator or owner, including their agents, who are legally responsible for a source's operations liable for meeting the Act's requirements.

7. *Comment:* The commenter states that adding the phrase ''portable emissions units'' to the definition of ''stationary sources'' will lead to unnecessary permitting of de minimus sources. According to the comment, de minimus sources would include, among other things, snow making machines, rented engines, and spray painting equipment. The commenter suggests removing the reference to ''portable emissions units.''

Response: The term ''stationary source'' is used extensively in the state's title V regulations. In order to clarify what process units are considered emission units at a stationary source, the state proposed to add to the term ''stationary source'' portable emission units that remain stationary at a source. The state's clarification is consistent with EPA guidance when dealing with emission units that are portable. Therefore, EPA disagrees with the commenter that the state definition of ''stationary source'' should remove the term ''portable emission unit.'' For example, under the title V program in Vermont, the state correctly included snow making machines as emission units in the title V permit for Okemo Mountain, Incorporated.

8. *Comment:* The commenter requests that the state incorporate-by-reference the federal definition of ''volatile organic compound'' in Section 22a–174–1 of its regulations. The comment states that this will minimize the need for the DEP to revise the definition every time EPA changes the definition.

Response: The term ''VOC'' is used in the state's title V regulations in the definition of ''regulated air pollutant.'' EPA agrees with the commenter that incorporating the federal definition of VOC will make it easier for the state to recognize future changes EPA makes to the federal definition. The state also agrees with the commenter and has changed the definition of VOC to simply incorporate EPA's definition found in ''40 CFR 51.100(s), as amended from time to time.''

9. *Comment:* The commenter requests the state to clarify and modify the signatory responsibilities requirements found in section 22a–174–2a(a). This section of the state rule identifies who the responsible official is for purposes of certifying documents under the title V permit program. The state should clarify that people who sign documents in accordance with section 22a–174–2a(a)(1) be authorized in accordance with section 22a–174–2a(a)(2). The state should also use the existing language in section 22a–174–33(b) regarding responsible officials and authorization. The state should clarify that an authorization goes to a position rather than a specific person. Lastly, the requirement for state approval when signatory responsibility is delegated is overly burdensome.

Response: EPA identified as an interim approval issue the definition of a ''responsible official'' for documents submitted under the title V program. *See* 62 FR 13830–13833 (March 24,

1997). As discussed in EPA's August 13, 2001 proposal to fully approve Connecticut's program, the state's proposed rule fully addressed EPA's interim approval issue. To address comments the state received, Connecticut has made changes to its provisions for identifying a ''responsible official.'' The state changes clarify the procedures a company must follow when designating an individual as a responsible official. The state's final rule still satisfies the federal requirements for ''responsible official.''

As discussed in response to comment number 1, above, EPA does not have authority to look behind a state's decision to include permitting requirements in addition to those specified in part 70. Therefore, whatever burden might be created by Connecticut's requirement that DEP approve delegations of signatory responsibility is not relevant to EPA's review and approval of this program.

10. *Comment:* The commenter noted that DEP provides for adjudicative hearings, as well as less formal legislative hearings, as an option for satisfying the requirement that there be an opportunity for a hearing on permits. The commenter asserts that EPA has interpreted the Act to require only the less formal legislative hearings. Additionally, the commenter requests the DEP to consider limiting the requirement to hold a public adjudicative hearing by adding a threshold that one must make a ''material request'' before a hearing would be granted.

Response: The provisions of 22a–174–2a(c)(6) and 22a–174–2a(c)(7) governing non-adjudicative hearings and meetings satisfy the federal requirement to provide an opportunity for a hearing for Title V operating permits and new source review permits. In both programs, however, a state may include procedural requirements, including adjudicative hearing procedures, in addition to the federal minimum where the state agency deems it appropriate. EPA has found it appropriate for states to require that a request for a hearing must raise a material issue; it would be plainly unreasonable to require a state to hold hearings on immaterial issues.

11. *Comment:* The commenter notes that ''issue of a subject permit * * *'' should be ''issuance of a subject permit * * *'' in section 22a–174–2a(c)(7).

Response: Connecticut has corrected this error. As stated in the response to the previous comment, section 22a–174–2a(c)(7), in conjunction with section 22a–174–2a(c)(6), satisfies the federal requirements when a public hearing is requested.

12. *Comment:* Section 22a–174–2a(e)(3)(B)(i) requires a source to include in its application for a minor permit modification any ''modification in potential emissions.'' Since the term ''modification'' is a defined term, the commenter requests the word ''modification'' be replaced by the word ''increase.''

Response: The state agreed with the commenter and changed the word ''modification'' to ''increase'' when describing a change in emissions due to a project that requires a minor modification to the part 70 permit. EPA agrees that this change clarifies the state's proposed rule. The state's rule still satisfies the federal requirements regarding the content of a title V application for a minor permit modification.

13. *Comment:* Connecticut requires a 21 day waiting period before a source can make the change it proposes in its application for a minor permit modification. The commenter requests that the state remove the waiting period and make the process consistent with part 70.

Response: The provision of section 22a–174–2a(e)(3)(c) meets the federal requirement for minor permit amendments that allow a source to make the proposed change prior to receiving a permit modification. As stated earlier, a state may include procedural requirements in its title V program, including a waiting period for minor permit modifications, in addition to the federal minimum requirements when the state agency deems it appropriate.

14. *Comment:* The commenter requested that Connecticut incorporate a safe harbor provision in the procedures for a minor permit modification in section 22a–174–2a(e)(4) of the state's regulations. A safe harbor provision would protect a source from enforcement if the source acted in good faith when it implemented its minor permit modification, even if it was determined later that the modification did not qualify as a minor permit modification.

Response: EPA disagrees with this comment. The part 70 program does not allow a state to create a safe harbor provision for a source that violates program regulations even though the source is complying with its application and applied for the minor modification in good faith. The minor permit modification procedures in 40 CFR 70.7(e)(2) allow a facility to implement a change prior to the permit authority revising the permit to address the change. But this provision imposes strict liability on a facility that submits a change that it purports to be a minor permit modification, but ultimately turns out to require a significant permit modification. This strict liability is an important element of the structure of 70.7(e)(2), because it provides a significant disincentive to permitees that might be tempted to rush a change through the system with an unfounded claim that it is a minor modification. Therefore, Connecticut cannot, consistent with part 70, create the ''safe harbor'' the commenter recommends, and the state's rule is consistent with part 70.

15. *Comment:* The commenter requests that Connecticut add language to section 22a–174–2a(d)(4)(D) that would explicitly state that modifications qualifying as operational flexibility and off-permit changes would not be subject to non-minor permit modification requirements.

Response: The state has made changes to its proposed rule to address this comment. It is consistent with part 70 to exclude changes at a facility that qualify as changes under the off-permit or operational flexibility requirements from the requirements for significant permit modifications. Therefore, the state's changes to its rule that address this comment do not impact EPA's ability to approve this program.

16. *Comment:* The commenter requests that the approval of ''equivalent monitoring, recordkeeping, or reporting'' be added to administrative amendments found at 22a–174–2a(f)(2) of the state regulations.

Response: In 40 CFR 70.7(d), EPA lists the types of changes a state may allow sources to make as administrative amendments. Section 70.7(d)(1)(iii) states a change is eligible as an administrative amendment if the permit change ''requires more frequent monitoring or reporting.'' Since the request is to add ''equivalent monitoring * * *,'' EPA disagrees with the comment and supports Connecticut's position not to add ''equivalent monitoring, recordkeeping, or reporting'' to its list of permit changes eligible for administrative amendments. Making a determination that a substitute monitoring regime is ''equivalent'' to that provided in the permit involves a level of regulatory judgment that is not appropriate for the administrative amendment procedure. These procedures are designed for amendments that are largely ministerial or that are indisputably more protective of the environment, such as increased monitoring frequency.

17. *Comment:* Section 22a–174–2a(i)(1) requires permit renewal applications to include ''any

modifications in potential emissions resulting from the proposed modifications.'' The commenter suggests clarifying language by replacing ''any modification'' with ''any increase'' since the term modification is a defined term.

Response: Connecticut essentially agreed to make this clarification in its regulations, and the final rule provides that a renewal application must describe any ''increases or decreases in potential emissions resulting from any proposed modifications.'' This revision is consistent with part 70.

18. *Comment:* The commenter states that section 22a–174–3a(m) of Connecticut regulations is not identical to part 63 with regard to case-by-case MACT determinations. For example, under Connecticut's definitions, an increase in HAP emissions at the entire source, not just process lines, is used to determine if the thresholds for a 112(g) modification are triggered.

Response: Case-by-case MACT determinations are commonly referred to as 112(g) modifications because they implement the requirements of section 112(g) of the CAA. Under part 63, the entire new or reconstructed process must be a major source by itself. A process is defined in 40 CFR part 63 as ''any collection of structures and/or equipment, that processes assembles, applies, or otherwise uses material inputs to produce or store an intermediate or final product.'' This means that a single facility may contain more than one process or production unit. Since the state's regulation determines applicability on a facility wide basis, the state's rule could potentially require more section 112(g) determinations than federal requirements. However a state may include requirements, including a more encompassing 112(g) program, in addition to the federal minimum for a part 70 program and other air pollution control programs where the state agency deems it appropriate. See sections 506(a) and 116 of the Act, 42 U.S.C. 7661e(a) and 7416.

19. *Comment:* The commenter states that Connecticut's rule does not exclude sources from the 112(g) program that use existing controls previously determined as BACT within 5 years of the modification (referred to as the ''good controls exclusion''). This omission could make the Connecticut 112(g) program more stringent than the federal program. The commenter requests that the state make section 22a–174–3a(m)(8) consistent with the federal requirements regarding situations when compliance with a MACT standard is not required for a source that is operating under a 112(g) determination.

Response: The comment is correct in that Connecticut's rule is more stringent than the federal rule regarding this issue. However, a state may include requirements, including a more encompassing 112(g) program, that go beyond the federal minimum for a part 70 program and other air pollution control programs.

20. *Comment:* The commenter requests that the state expand its list of exempted activities from 112(g) determinations in section 22a–174–3a(m)(2) to be consistent with federal requirements. The expanded list would include adding exemptions for electric utility steam generating units and research and development activities.

Response: The exemption for electric steam generating units is no longer applicable. *See* 65 FR 79825 (December 20, 2000). In its final rule, the state did add an exemption for research and development (R&D). To comply with the exemption, the state rule requires R&D activities to meet the federal requirements for R&D at 40 CFR 63.40(f). Exempting R&D activities from 112(g) requirements is consistent with federal requirements under part 63 and does not impact EPA's ability to approve the title V program.

21. *Comment:* The commenter suggests that the state incorporate-by-reference the federal application requirements for a case-by-case MACT determination. The commenter states that Connecticut's rule does not contain administrative procedures nor an opportunity for public comment. The current proposed state regulations are also confusing when determining the required information in an application for a 112(g) modification.

Response: Connecticut is not required to incorporate the federal requirements for 112(g) applications. Instead, the state has the option to develop its own regulations for applications, as long as the state regulations are consistent with federal requirements. EPA has determined that section 22a–174–3a, including subsections (c) and (m), meet the federal requirements for a complete application, including adequate public notice, under the 112(g) program.

22. *Comment:* The commenter requests the state to clarify section 22a–174–3a(m)(7). This section determines when a permittee that has received a 112(g) determination is required to comply with the emission limit for the applicable MACT standard. The state rule is unclear about what happens when a source that installs case-by-case MACT controls that are different than the MACT standard later adopted by EPA.

Response: The state regulation requires a facility, even one with a case-by-case MACT determination, to comply with a MACT standard within 8 years after a MACT is promulgated or within 8 years of the permittee's first compliance date for the emission limitation under the MACT determination, whichever is earlier. If the first compliance date precedes the MACT promulgation, then the permittee would have less than 8 years from the promulgation. Since the federal requirement is for all sources with case-by case determinations to meet the MACT standard within eight years of the standard's promulgation, the state rule meets federal requirements.

23. *Comment:* The commenter is concerned that the state rule regarding alternative operating scenarios could be interpreted too broadly, requiring separate permit conditions for each level of production.

Response: It is not the intent of a title V permit program to require a source to list every production level as an alternative operating scenario. EPA has determined that Connecticut's definition of an alternative operating scenario is consistent with the Agency's policy and guidance on the issue.

It is true that the definition of ''alternative operating scenario'' in definitions section of Connecticut's operating permit program regulations is quite broad. *See* R.C.S.A. sec. 22a–174–33(a)(1). Read out of context, it is possible to conclude this definition implies that any variation in a facility's operations is relevant under this program, regardless of the bearing that variation has on the permit and the applicable requirements.

But it is important to understand this definition in the context in which it is used in the program regulations. Permit applicants must provide information ''for each alternative operating scenario that the applicant has included in the title V permit application.'' R.C.S.A. sec. 22a–174–33(g)(1)(E). The permit content requirements mandate that each permit include a ''statement of all terms and conditions applicable to any allowable alternative operating scenario, including a requirement that each such alternative operating scenario shall meet all applicable requirements * * *.'' R.C.S.A. sec. 22a–174–33(j)(1)(J). These provisions make it reasonably clear that an applicant must provide information about those operating scenarios that must be addressed in the permit and which require separate attention because of the different compliance scenarios or different applicable

requirements that apply to those scenarios.

24. *Comment:* The commenter requests a determination as to how title V applicability in the state rules affects landfills and other sources subject to section 111(d) plans of the CAA.

Response: According to Section 22a–174–33(a)(10)(D) of the state's rule, any source subject to a 111(d) plan would be defined as a ''Title V source.'' However, not all ''Title V sources'' are required to obtain a title V permit. Section 22a–174–33(c)(2)(D) of the state's rule, exempts sources subject to a 111(d) plan, in addition to other types of sources, from obtaining a Title V permit if EPA exempts such a source. For example, if a closed landfill is not otherwise required to obtain a Title V permit, 40 CFR 62.14352(f) exempts the landfill from obtaining a Title V permit provided that the landfill meets certain criteria. Since EPA has exempted this limited class of landfills from having to obtain a Title V permit, Section 22a–174–33(c)(2)(D) is invoked and closed landfills in Connecticut meeting the requirements of 40 CFR 62.14352(f) are exempted from Title V permitting. Please note that if Connecticut submits a rule that would substitute for the federal rule for existing landfills, and EPA approves the state rule, the exemption from Title V permitting listed in 40 CFR 62.14532(f) would no longer apply. The exemption would have to exist in the EPA approved state rule.

25. *Comment:* The commenter believes that the references to a general permit in sections 22a–174–33(d)(9) and (10) are redundant and unnecessarily repeat the requirements of sections 22a–174–33(c)(4) and (5).

Response: Section 22a–174–33(d) of Connecticut's rules deals with regulations that limit a source's potential emissions. Subsection (d) does not contain provisions for a general permit for the title V permit program. In fact, the main reason Connecticut developed section 22a–174–33(d) is to allow a source to limit its potential emissions to avoid the title V permit program. Sections 22a–174–33(c)(4) and (5), on the other hand, address how title V general permits operate under Connecticut's program. Specifically, they spell out the consequences for failing to comply with a general permit and for failing to qualify for a general permit under which the facility claims it is operating. These provisions are not redundant with the general permit provisions designed to limit a source's potential to emit under sections 22a–174–33(d)(9) and (10).

26. *Comment:* The commenter believes that the state has gone beyond the federal requirement when determining the consequences when a source is found to be violating a general title V permit or a general permit limiting potential to emit. Connecticut's rule states that if a source violates either type of a general permit, the source would be considered to be operating without a title V permit.

Response: EPA disagrees with the comment and has determined the state regulation (sections 22a–174–33(c)(4) and (d)(10)) is consistent with federal requirements. The commenter is correct that the minimum federal requirement in EPA's part 70 regulations for liability provisions in a title V general permit program includes a provision deeming the source to be operating without a title V permit if the source is found not to qualify for a general permit. Connecticut added section 33(c)(5) to address EPA interim approval issue number 23 to meet this requirement. In addition, Connecticut provided that sources which fail to comply with their general permits will be deemed to be operating without a title V permit under section 33(c)(4). While not required by the part 70 regulations, this provision is certainly allowed under title V pursuant to section 506(a) of the Act. That section allows a state to establish ''additional permitting requirements not inconsistent with [the] Act.'' Connecticut's decision to provide vigorous enforcement mechanisms to ensure compliance with its general permit programs is certainly not inconsistent with the Clean Air Act.

The requirement in section 33(d)(10), while similar in structure to 33(c)(4), is not strictly speaking part of EPA's review of the operating permit program. This provision addresses a source's liability when it fails to comply with a general permit to limit its potential to emit. As noted in response to the prior comment, the purpose of 33(d) is to keep sources out of the title V program, not to address the requirements of title V or part 70.

27. *Comment:* The commenter requests the state to be consistent with the federal requirements regarding the timing of a title V application for a new major stationary source. The federal rule requires an application within 12 months of commencing operation. The state's proposed rule required an application within 12 months of applying for an NSR permit.

Response: The state addressed this comment by changing its proposed rule to be consistent with federal regulations. Section 22a–174–33(f)(4) requires a title V application within 12 months of commencing operation for a new major stationary source or a major modification to an existing title V source or within 90 days if notified by the commissioner, whichever date is earlier. This state rule addresses the application deadline requirements of 40 CFR 70.5(a)(1)(ii).

Section 22a–174–33(f)(4) does not address the requirement in 40 CFR 70.5(a)(1)(ii) that the title V permit must be modified prior to operating the modification when its existing title V permit prohibits such construction or change in operation. However, nothing in section 22a–174–33(f)(4) of the state rules excuses a source applying for a major modification from complying with its existing title V permit. Section 22a–174–2a(d)(5)(B) of the state rules clearly prohibits a source deviating from its existing permit unless the state first modifies the permit.

28. *Comment:* The commenter states the vagueness of section 22a–174–33(h) of Connecticut's rules may not allow an applicant a reasonable opportunity to correct application deficiencies before being held liable for an insufficient permit application.

Response: Connecticut has revised section 22a–174–33(h) to clarify the consequences if a source fails to meet the requirements for submitting a timely application either for the first time or when the state determines additional information is required in order to process an application. The state's final rule is still consistent with federal requirements and fully addresses EPA's interim approval issue. See 62 FR 13831, section III, no. 6.

29. *Comment:* The commenter requests that the state make its permit shield provisions in the state rules consistent with permit shield language in part 70, and that the state grant permit shield when issuing permits.

Response: Connecticut's permit shield provisions in section 33(k) are substantially identical to the federal shield provisions in section 70.6(f) of EPA's part 70 regulations. Both regulations require that a permit shield will only cover those applicable requirements that are included and are specifically identified in the permit. Therefore, the commenter's concern that the state's shield provisions are more stringent that federal requirements appears to be misplaced.

The commenter's concern that the state does not always provide for a permit shield when issuing permits is not relevant to this program review. The permit shield language is an optional element for a state title V program. It is solely within Connecticut's discretion to grant a permit shield. As long as the

authority for granting a shield under section 22a–174–33(k) is consistent with federal requirements, it is up to the state to decide when to use that authority.

30. *Comment:* The commenter requests the state to relax the proposed rule regarding prompt reporting. The commenter is concerned that the state has eliminated the provision in section 33(p)(1) that commenced the period for measuring ''prompt'' reporting from the time at which the permit holder reasonably should have learned of the occurrence. The commenter is concerned that some deviations will be difficult to discover, and the deadline for reporting will have passed before the permit holder knows that the deviation must be reported.

Response: Part 70 is not specific about how a state should define ''prompt'' for reporting deviations, and leaves the state substantial latitude in structuring this requirement. As described in section IV., no. 8 of the proposal, EPA stated that sections 22a–174–33(o)(1) and (p)(1) of Connecticut's proposed rules are consistent with how EPA defines prompt reporting in the federal program. *See* 40 CFR 71.6(a)(iii)(B). Since Connecticut has not changed these proposed provisions, EPA has determined that the state's regulations governing prompt reporting meet the requirements of part 70. Any concern about the strict standard in section 33(p)(1) for reporting a deviation can be addressed as part of program implementation and with the reasonable application of enforcement discretion.

31. *Comment:* The commenter requests the state confirm that it has deferred title V permitting of chrome emitting sources for five years.

Response: Section 22a–174–33(c)(2)(D) essentially incorporates any decisions EPA has made under the NSPS and NESHAP programs, including the MACT standards program, to defer facilities from the requirement to have a title V permit. This section allows for such deferrals where the sole reason for bringing a source into the title V program is the applicability of a MACT standard and where EPA has promulgated a deferral of the title V permitting requirement for that MACT standard or certain sources under it. At the discretion of the permitting authority, EPA has deferred chrome sources from becoming subject to the title V permit program until December 9, 2004. A title V application will be due one year after becoming subject to the program, on December 9, 2005 unless EPA exempts or continues to defer title V applicability for chrome emitting sources.

32. *Comment:* The commenter asks why did the DEP define the term ''principal executive officer'' in the last sentence of section 22a–174–2a(a)(1)(E) of the state's rule because the term appears nowhere else in the section. This section of the state rule lists the positions of people who can sign as the responsible official for federal entities.

Response: DEP clarified this provision by including ''principal executive officer'' in the list of federal officials who can sign title V permitting documents as responsible officials. Thus, the definition for this term now makes sense in the context of the final regulation, and the provision is consistent with part 70, section 70.2.

33. *Comment:* The commenter believes that section 22a–174–33(f)(3) includes a typographical error and the phrase ''may issue'' does not belong in the last phrase of the section. This section of the state regulation contains the deadlines for applying for a title V permit when a source's potential emissions are minor, but when the source is subject to either 40 CFR parts 60 or 61.

Response: Connecticut agreed with the comment and deleted the phrase ''may issue.'' The deletion of the phrase ''may issue'' does not impact EPA's proposal that states section 22a–174–33(f)(3) has been adequately revised to address the interim approval issue. See section IV, no. 20 of EPA's proposal.

34. *Comment:* The commenter requests that the state identify the forms that a facility must use to comply with the ''non-minor permit modification'' application process in section 22a–174–2a(e)(5)(B) of the state rules.

Response: On page 199 of its November 14, 2001 Hearing Report, Connecticut stated that it is developing forms for sources to use. However, the state made it clear, and EPA concurs, that a source is still required to submit all information required by the regulations if it desires a non-minor permit modification, even if the state has not yet developed a form.

35. *Comment:* A commenter expressed concern that the permit modification process for ''non-minor permit modifications'' is open-ended. Connecticut's regulation section 22a–174–2a(d)(8) requires the Commissioner to take final action on a non-minor modification within 12 months, but also provides that the modification will not be ''automatically be deemed sufficient or approved'' if the Commissioner takes longer than 12 months. The commenter asks what the consequence is if DEP misses its deadline for modifying a permit.

Response: EPA agrees with DEP that default issuance of ''non-minor'' permit modifications, which basically correspond to significant modifications under part 70, cannot be allowed consistent with sections 70.7(e)(4)(ii), 70.7(a), and 70.7(h). Therefore, it would not be appropriate to allow a facility to make a ''non-minor modification'' in its permit based solely on the fact that DEP has failed to act on its application within 12 months. EPA's significant permit modification regulations do provide that the ''permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.'' 40 CFR 70.7(e)(4)(ii). This provision does not mandate that the state bind itself to acting on all applications within 9 months. Rather it requires that the state use its authority to act on most significant modifications within 9 months. Connecticut's rule for processing ''non-minor modifications'' is consistent with this provision. Connecticut's procedures for taking public comment, offering an opportunity for a hearing, addressing affected state comments, and allowing for EPA review give DEP ample opportunity to implement its program so that it acts on a majority of ''non-minor modifications'' within 9 months. *See* R.C.S.A. 22a–174–2a(b), (c), and (d).

36. *Comment:* A commenter agreed with Connecticut's incorporation of the federal definition for ''emission unit'' in section 22a–174–1

Response: EPA also agrees with the state's change in its definition for ''emission unit.''

37. *Comment:* The definition of ''federally enforceable'' elicited several comments. First, commenters asked whether ''permits to operate'' issued under section 22a–174–3 of the state's regulations are considered federally enforceable. Second, the commenters supported the state's decision to provide that practically enforceable limits should also be considered sufficient to limit a source's potential to emit. Commenters also submitted concerns that relate to the new source review program and are not relevant to this action.

Response: In a July 25, 1997 letter to Christopher James at DEP, EPA confirmed that state operating permits issued pursuant to section 22a–174–3(f) and (g) may be federally enforceable if they are issued consistent with the requirements of those regulations approved into the state implementation plan. As discussed below, EPA agrees that emission limits to reduce a facility's

potential to emit must be practically enforceable.

38. *Comment:* A commenter requested an explanation from Connecticut whether the change to the state's definition for ''fugitive emissions'' was intended to change the meaning of ''fugitive emissions'' as defined by EPA.

Response: Connecticut's hearing report makes it clear that it did ''not intend to alter or expand the meaning of ''fugitive emissions'' by the proposed change.'' DEP Hearing Report at 154 (November 14, 2001). Rather the state's change was made to shift the tense of the verb ''which could not reasonably pass through a stack * * *'' from past tense to the present tense ''that cannot pass through a stack .* * *'' Therefore, if emissions would reasonably be passed through a stack, this definition would exclude them from being treated as fugitive emissions. Connecticut's revised definition for ''fugitive emissions'' is consistent with 40 CFR 70.2.

39. *Comment:* The commenter requested an explanation of the state's intent concerning new language the state added to the definition of ''maximum capacity.'' The new language allows the state to accept a time frame different from 8760 hours per year when determining the maximum capacity of a piece of equipment.

Response: Connecticut responded that it intends to issue future guidance on determining ''maximum capacity.'' On January 25, 1995, EPA issued guidance titled ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under section 112 and Title V of the Clean Air Act (Act)'' that recognized inherent physical limits in a source's operations that would restrict a source's capacity. These restrictions would prevent a source from operating the pollution emitting devices 8760 hours per year. In this guidance EPA indicated that states have the authority to make judgements on inherent physical operational restrictions. The language Connecticut added to the definition of ''maximum capacity'' gives the state the authority EPA recognized in the Agency's guidance. EPA is committed in working with Connecticut in developing state guidance on when the use of 8760 hours of operation is inappropriate when calculating a source's potential emissions.

40. *Comment:* The commenter requests the state to limit the counting of fugitive emissions ''to the extent quantifiable'' within the definition of ''potential emissions.'' In addition, the commenter states the definition of ''potential emissions'' arbitrarily prevents pollution control equipment from being considered as a physical limitation on potential emissions where that equipment is integral to the source's operation.

Response: The term ''potential emissions'' is used in section 22a–174–33(a)(10) for determining whether a source is required to obtain a title V permit. The state disagreed with the commenter and did not add the language ''to the extent quantifiable'' when determining if fugitive emissions are counted towards a source's title V applicability. The state rule is consistent with part 70, where the language ''to the extent quantifiable'' is absent when describing fugitive emissions within the definition of ''major source.'' The state also disagreed with the commenter that pollution control equipment is treated arbitrarily under its definition of potential emissions, and EPA sees no reason to disagree with that conclusion. DEP clarified that it will consider ''inherent engineering, operational or technical capacity on an emissions unit that restricts the potential emission of such unit'' when determining the maximum capacity of a unit. Nothing in this standard arbitrarily excludes consideration of pollution control equipment that is integral to the design of an emissions unit, although the applicant may have a high burden to demonstrate that the operation and performance of the control equipment is an inherent aspect of the source's operation.

41 *Comment:* Several industry commenters objected to aspects of the new definition of ''practically enforceable'' in section 1(87) of the state's rule. Following some slight adjustments DEP made to the proposed definition in its final rule, the remaining relevant comments all expressed concern about the requirement that a facility must have ''CEM or equivalent'' monitoring if it wishes to limit its emissions using an emission limit or operating restriction with a 12-month rolling average averaging period.

Response: Strictly viewed, this comment is probably not directly relevant to the action EPA is taking today to approve Connecticut's title V program. The term ''practically enforceable,'' as well as the corresponding term ''federally enforceable,'' are used in DEP's regulations primarily to define how a facility may take limits on its potential to emit to avoid the title V operating permit program or other applicable requirements that are triggered based on a facility's potential emissions. So these terms do not relate so much to the implementation of the operating permit program EPA is approving as they bear on how to stay out of that program.

Nevertheless, EPA is responding to comments about the definition of ''practically enforceable'' because the meaning of this term might be relevant to how permit terms in a title V permit are crafted. For example, a title V permit holder may wish to take a limit in its permit reducing its potential to emit so as to avoid an otherwise applicable requirement. In this context, title V sources and the state may want to assess the practical enforceability of that limit. Therefore, EPA is responding to the comments on this definition.

Connecticut's definition of practically enforceable is built on the same principles as EPA's guidance on the enforceability of limits on potential to emit (PTE). *See e.g.* Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits, from Kathie A. Stein, Jan. 25, 1995, and the materials summarized at p. 5 of this guidance. Both DEP and EPA are concerned that if a facility is relying on a PTE limit to avoid important applicable requirements or title V permitting, the agencies must be able to enforce those PTE limits readily on a short term basis. If we must wait for year before enforcing a PTE limit, the limit will have far less practical deterrent effect than a short term limit.

A limit based on a 12-month rolling averaging period strains at the boundary of this principle. It is not optimal for an agency to have to wait for a month to document compliance with a PTE limit. To be sure that we can determine compliance readily when the monthly compliance period is completed, the monitoring of such limits must be both accurate and timely.

A CEM meets this standard and provides a useful benchmark for the sort of monitoring that is necessary to make such limits practically enforceable. As DEP explained in its own response to comments, their rule does not mandate CEMs, but does require monitoring with similar characteristics—''qualitatively equal to that of CEM.'' DEP Hearing Report at 182 (Nov. 14, 2001). DEP and EPA understand that two critical qualities of CEMs are that they are accurate in their measurement of emissions and they produce data virtually contemporaneously. In addition to making timely compliance determinations possible at the end of each month, such monitoring would allow an agency inspector to arrive mid-month and look at the monitoring records of a facility to determine if it is on track to meet its PTE limit at the end of a month. EPA believes Connecticut's

requirement for ''CEM or equivalent'' monitoring for 12-month rolling average compliance periods is a reasonable step to making such longer term rolling PTE limits practically enforceable. During review of title V permits, EPA will monitor Connecticut's implementation of the ''CEM or equivalent'' requirement when a 12-month rolling average is used for the compliance period.

42. *Comment:* The commenter requested that Connecticut establish in the definition of ''Research and Development Operation'' a *de minimis* amount of commercial product activity in a laboratory. The commenter states that by adding a *de minimis* level to the definition, the definition would be consistent with EPA's proposed changes to part 70.

Response: Connecticut did revise the proposed amendments to section 33 with regards to how Research and Development Activities are treated. However, the state changes did not create a *de minimis* amount of product that could be sold commercially. Rather, the state's final rule essentially maintained the definition of ''Research and Development'' as the term was defined in the state's interim title V program which EPA had approved in 1997. If part 70 is amended as EPA proposed in 1996, EPA will work with Connecticut in making any state program changes that the revised federal rule would require or allow.

43. *Comment:* The commenter noted language appeared missing from the end of section 22a–174–33(j)(1)(F)(ii). ''For all other regulated air pollutants such limits are no [???].''

Response: Connecticut noted in its hearing report that a software error had led to the deletion of phrase ''less than one (1) ton per pollutant per year for each emission unit'' from the commenter's copy. The official version of the regulation contained the missing language so there was no typographical error.

44. *Comment:* The commenter requested that in order to take advantage of fuel cells, hydrogen, argon, and helium should be exempted in the states definition of ''air pollutant.''

Response: Connecticut did not add the requested exemptions to the definition of ''air pollutant.'' The state's definition of ''air pollutant'' is consistent with how that term is used in part 70.

45. *Comment:* One commenter inquired about EPA's assessment of section 22a–174–2a(f)(2)(F) in which EPA clarified that Connecticut's new source review program (NSR) does not include all the necessary elements of the title V program to allow NSR permits to be included in a title V permit using an administrative amendment. The commenter asked EPA to explain what provisions of Connecticut's new source review program do not meet all the requirements of sections 40 CFR 70.6, 70.7, and 70.8 and to specify the changes Connecticut would have to make in its NSR program to meet these requirements.

Response: EPA is not prepared here to catalogue exactly how Connecticut might enhance its NSR program to allow for administrative title V permit amendments. That question is not ripe as a formal matter, and it would not be prudent for EPA to spell out how DEP might revise its NSR program without first working with DEP to sort through the many choices DEP would have to make about the design of such NSR enhancements. It is sufficient for the purposes of the decision currently before EPA to say that the state's NSR program does not contain all the substantive and procedural elements of sections 70.6, 70.7, and 70.8—the most obvious example being that the state does not provide EPA an opportunity to object to NSR permits to block their issuance.

III. What Is the Effective Date of EPA's Full Approval of the Connecticut Title V Program?

EPA is using the good cause exception under the Administrative Procedure Act (APA) to make the full approval of the state's program effective on May 31, 2002. In relevant part, the APA provides that publication of ''a substantive rule shall be made not less than 30 days before its effective date, except— * * * (3) as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). Section 553(b)(3)(B) of the APA provides that good cause may be supported by an agency determination that a delay in the effective date is impracticable, unnecessary, or contrary to the public interest. EPA finds that it is necessary and in the public interest to make this action effective sooner than 30 days following publication. In this case, EPA believes that it is in the public interest for the program to take effect before June 1, 2002. In the absence of this full approval of Connecticut's amended program taking effect on May 31, 2002, the federal program under 40 CFR part 71 would automatically require some sources to pay operating permit fees to the federal government in addition to fees the sources already pay to Connecticut under state law. EPA believes it is in the public interest for sources to avoid having to pay federal fees for permits the sources would not receive, since a federal program would only continue for a short time after June 1, 2002. Furthermore, a delay in the effective date is unnecessary because Connecticut has been administering the title V permit program for more than five years. Through this action, EPA is approving a few revisions to the existing and currently operational program. The change from the interim approved program which substantially met the part 70 requirements, to the fully approved program is relatively minor, in particular if compared to the changes between a state-established and administered program and the federal program. Finally, the state regulations EPA is approving have been effective under state law since March 15, 2002. Therefore, the regulated community has had more than 30 days to anticipate compliance with the requirements EPA is approving today.

IV. How Does Today's Action Affect the Part 71 Program in Connecticut?

Today, EPA is fully approving Connecticut's title V program. Upon the effective date of this notice, the part 71 program will no longer be effective in Connecticut. However, a part 71 program could become effective at a future date if EPA makes a finding that Connecticut's title V program fails to meet the requirements of part 70. If such a finding is made, the Agency will use its authority and follow the procedures under section 502(i) of the CAA and 40 CFR 70.10.

V. How Does EPA's Action Affect Indian Country?

In its program submission, Connecticut did not assert jurisdiction over Indian country. To date, no tribal government in Connecticut has applied to EPA for approval to administer a title V program in Indian country within the state. EPA regulations at 40 CFR part 49 govern how eligible Indian tribes may be approved by EPA to implement a title V program on Indian reservations and in non-reservation areas over which the tribe has jurisdiction. EPA's part 71 regulations govern the issuance of federal operating permits in Indian country. EPA's authority to issue permits in Indian country was challenged in *Michigan* v. *EPA,* (D.C. Cir. No. 99–1151). On October 30, 2001, the court issued its decision in the case, vacating a provision that would have allowed EPA to treat areas over which EPA determines there is a question regarding the area's status as if it is Indian country, and remanding to EPA for further proceedings. EPA will respond to the court's remand and explain EPA's approach for further

implementation of part 71 in Indian country in a future action.

VI. What Are the Administrative Requirements Associated With This Action?

Under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this final approval is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Administrator certifies that this final approval will not have a significant economic impact on a substantial number of small entities because it merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. This rule does not contain any unfunded mandates and does not significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) because it approves pre-existing requirements under state law and does not impose any additional enforceable duties beyond that required by state law. This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified by Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, ''Federalism'' (64 FR 43255, August 10, 1999). This rule merely approves existing requirements under state law, and does not alter the relationship or the distribution of power and responsibilities between the state and the federal government established in the Clean Air Act. This final approval also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) or Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action will not impose any collection of information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060–0243. For additional information concerning these requirements, see 40 CFR part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In reviewing state operating permit programs submitted pursuant to title V of the Clean Air Act, EPA will approve state programs provided that they meet the requirements of the Clean Air Act and EPA's regulations codified at 40 CFR part 70. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state operating permit program for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews an operating permit program, to use VCS in place of a state program that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on May 31, 2002.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 12, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(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: May 6, 2002.

Robert W. Varney,

Regional Administrator, EPA New England.

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 revising the entry for Connecticut to read as follows:

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

* * * * *

Connecticut

(a) Department of Environmental Protection: submitted on September 28, 1995; interim approval effective on April 23, 1997; revised program submitted on January 11, 2002; full approval effective May 31, 2002.

(b) [Reserved]

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Chapter I

[Notice No. 02–05]

Hazardous Materials; Advisory Guidance on Packaging and Shipper Responsibilities

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Advisory guidance.

SUMMARY: This advisory document is to remind shippers of hazardous materials in commerce, particularly by aircraft, of their responsibilities to properly identify, package, and communicate the hazards of those materials in conformance with the Hazardous Materials Regulations. The intent of this