6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA-HQ-OAR-2013-0162; FRL-9790-5]

RIN 2060-AQ71

Amendments to Compliance Certification Content Requirements for State and Federal Operating Permits Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to amend the compliance certification requirements for state and federal operating permits programs that were published in the *Federal Register* on June 27, 2003. In that action, one sentence was removed from the rules in error. This action proposes to restore the sentence to its original location in the rules.

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

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**], the EPA will hold a public hearing. Additional information about the hearing would be published in a subsequent *Federal Register* notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2013-0162, by one of the following methods:

- *Http://www.regulations.gov*: Follow the online instructions for submitting comments.
- *Email*: *a-and-r-docket@epa.gov*. Attention Docket ID No. EPA-HQ-OAR-

2013-0162.

- *Fax*: (202) 566-9744.
- *Mail*: Attention Docket ID No. EPA-HQ-OAR-2013-0162, Air and Radiation Docket, Mailcode: 28221T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460. Please include a total of two copies.
- *Hand Delivery*: Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, D.C. 20004, Attention Docket ID No. EPA-HQ-OAR-2013-0162. Such deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2013-0162. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an

electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Joanna Swanson, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-5282; fax number (919) 541-5509; email address: *swanson.joanna@epa.gov*.

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality

Planning and Standards (C504-01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-5509; email address: *long.pam@epa.gov*.

SUPPLEMENTARY INFORMATION:

The information in this Supplementary Information section of this preamble is organized as follows:

I. General Information
- A. Does this action apply to me?
- B. What should I consider as I prepare my comments for the EPA?
- 1. Submitting CBI
- 2. Tips for Preparing Your Comments
- C. Where can I get a copy of this document and other related information?
- D. How can I find information about a possible public hearing?

II. Overview of the Proposed Rule

III. Background
- A. The Title V Operating Permits Program
- B. History of Changes to the Title V Compliance Certification Requirements
- 1. The CAM Rulemaking and the Credible Evidence Rule
- 2. The 2001 and 2003 Rulemakings To Address a Court Remand

IV. Proposed Revisions to the Title V Program Rules
- A. The Proposed Change and Rationale
- B. Scope of Rulemaking and Request for Comment

V. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to me?

Entities potentially affected by this proposed action would include owners and operators of emission sources in all industry groups that hold or apply for a title V operating permit. Other entities potentially affected by this proposed action would include federal, state, local, and tribal air pollution control agencies that administer title V permit programs.

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

1. Submitting CBI

Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), Environmental Protection Agency, Research Triangle Park, NC 27711, Attention Docket ID No. EPA-HQ-OAR-2013-0162.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information

(subject heading, *Federal Register* date and page number).

- Follow directions – The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket found on www.regulations.gov, an electronic copy of this proposed rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this proposed rule will be posted on the EPA's title V web page at *http://www.epa.gov/ttn/oarpg/t5pfpr.html*.

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

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality

Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–0641; fax number (919) 541–5509; email address: *long.pam@epa.gov*.

II. Overview of the Proposed Rule

This proposed rule would restore a sentence that was inadvertently removed from the operating permits program rules found in 40 CFR parts 70 and 71 due to an editing error. This error occurred in a June 27, 2003, final rule (68 FR 38517) amending the compliance certification requirements in 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B). The final rule removed the following sentence from the end of paragraph (c)(5)(iii)(B) of both sections: "If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information." This proposed rule would restore this sentence to its former position in both paragraphs.

This sentence was originally added to the operating permits rules in the context of the 1997 Compliance Assurance Monitoring (CAM) rulemaking, which clarified the use of CAM monitoring data in compliance certifications. Specifically, this sentence was intended to clarify that material information (i.e., compliance information beyond required monitoring) known by the owner or operator must be identified and addressed in compliance certifications consistent with section 113(c)(2) of the Act and the 1997 Credible Evidence rule. The 2003 rulemaking that erroneously removed the subject sentence was intended to address a court remand concerning other aspects of the annual compliance certification requirements of title V.

The EPA is requesting comments only on whether, on the sole basis that the removal of the language in question was inadvertent, the language in question should or should not be restored. However, the EPA is not requesting comments on any other aspects of these provisions or on any other provisions of the part 70 and 71 rules.

III. Background

This section traces the origin of the sentence that is addressed in this proposal and its accidental removal from the regulations. Section III.A gives background information on the operating permits program under the Clean Air Act (CAA or "the Act"), followed in section III.B by background on the rulemaking that created the sentence in question and the rulemaking in which the sentence was accidentally removed.

A. The Title V Operating Permits Program

Title V of the Act establishes an operating permits program for major sources of air pollutants, as well as certain other sources (CAA section 502(a)). Under title V, states were required to develop and implement title V permitting programs in conformance with program requirements promulgated by the EPA, which the EPA placed in 40 CFR part 70. Under title V, the EPA also developed a federal operating permits program to apply where states do not have approved programs, where the EPA determines that a state is not adequately implementing a program, in cases where a state has not satisfied an EPA objection, in Indian country (absent an explicitly approved part 70 program), and in certain areas of the Outer Continental Shelf. The federal program was promulgated in 40 CFR part 71. Most states, certain local agencies and one tribe have approved part 70 programs. The EPA administers the part 71 federal program in most areas of Indian Country (one tribe has been delegated implementation authority) and in certain areas of

the Outer Continental Shelf (where there is no state permitting authority).

Once the operating permits programs are in place, title V requires every major source to apply for and operate pursuant to an operating permit (CAA sections 502(a) and 503), and requires that the permits contain conditions that assure compliance with all of the sources' applicable requirements under the Act (CAA section 504(a)). Among other things, title V also requires that sources certify compliance with the applicable requirements of their permits no less frequently than annually (CAA section 503(b)(2)), provides authority to the EPA to prescribe procedures for determining compliance and for monitoring and analysis of pollutants regulated under the Act (CAA section 504(b)) and requires each permit to "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions" (CAA section 504(c)).

B. History of Changes to the Title V Compliance Certification Requirements

1. The CAM Rulemaking and the Credible Evidence Rule

The part 70 rule was originally promulgated on July 21, 1992 (57 FR 32250), and the part 71 rule on July 1, 1996 (61 FR 34202). Among other requirements, these rules required operating permits to include requirements for sources to submit annual compliance certifications,[1] consistent with CAA sections 503(b)(2), 504(c) and 114(a)(3).

The requirement to identify "any other material information…," which is the sentence the EPA is proposing to restore in this action, was originally added to the title V compliance certification requirements of parts 70 and 71 in the context of a CAM

[1] The compliance certification requirement are found in 40 CFR 70.6(c)(5) and 71.6(c)(5).

rulemaking on October 22, 1997 (62 FR 54899). The CAM rule (located at 40 CFR part 64) is authorized by CAA section 114(a), which requires the EPA to promulgate regulations concerning enhanced monitoring and compliance certification. The CAM rule is an applicable requirement of the Act that imposes a methodology to create monitoring and/or recordkeeping to provide a reasonable assurance of compliance with applicable requirements. Section 114(a)(3) of the Act specifies certain requirements for compliance certifications that are relevant to the CAM rule and to title V. A goal of the CAM rule is to establish additional monitoring requirements so that units subject to part 64 can use the CAM monitoring data to address title V compliance certification requirements. At the time that the CAM rule was promulgated, in order to clarify that the EPA always intended for the CAM provisions to operate within the title V compliance certification process, the compliance certification provisions in 40 CFR 70.6(c)(5)(iii) and 71.6(c)(5)(iii) were also amended to reflect the requirements of compliance certification for those units subject to part 64 (62 FR 54937). In the CAM rulemaking, the EPA explained the revisions of the part 70 and 71 compliance certification requirements as follows:

> To tailor compliance certification to the monitoring imposed by part 64, EPA has revised § 70.6(c)(5)(iii) (and § 71.6(c)(5)(iii)) so that a compliance certification includes the following elements.
>
> First, the permit conditions being certified must be identified. Second, the method(s) and other information used to determine compliance status of each term and condition must be identified. These method(s) will have to include at a minimum any testing and monitoring methods identified in § 70.6(a)(3) that were conducted during the relevant time period. In addition, if the owner or operator knows of other material information (i.e., information beyond required monitoring that has been specifically assessed in relation to how the information potentially affects compliance status), that information must be identified and addressed in the compliance certification. This requirement merely emphasizes the

> general prohibition in section 113(c)(2) of the Act on knowingly making a false certification or omitting material information and the general criminal section on submitting false information to the government codified at 18 USC 1001. The revised part 70 provision does not impose a duty on the owner or operator to assess every possible piece of information that may have some undetermined bearing on compliance...

62 FR 54936.

Thus, after the 1997 CAM rulemaking, the compliance certification provisions that are pertinent to this proposal, 40 CFR 70.6(c)(5)(iii)(B) and (C) and 71.6(c)(5)(iii)(B) and (C), stated that a part 70 or 71 source's compliance certifications must include, among other items, the following information:

> (B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period, and whether such methods or other means provide continuous or intermittent data. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. *If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information*;
>
> (C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and

62 FR 54947 (emphasis added to denote the sentence that is at issue in this action).[2] [3]

Another rule, the Credible Evidence rule, was promulgated earlier in 1997 (62 FR 8314, February 24, 1997). The Credible Evidence rulemaking clarified that non-reference test data can be used in enforcement actions, and removed any potential ambiguity regarding use of such data for compliance certifications under section 114 and title V of the Act. That rulemaking was based on the EPA's understanding that Congress gave the EPA clear statutory authority to use any available information – not just data from reference tests or other federally promulgated or approved compliance methods – to prove CAA violations (62 FR 8314). The Credible Evidence rule revised 40 CFR parts 51, 52, 60 and 61 to make clear that "any credible evidence" can be used for this purpose by the EPA, states and citizens, but made no such revisions to part 70 or 71, in part because the CAM rule that was under development was expected to concurrently modify the existing part 70 requirements to provide additional detail as to what information sources must consider when certifying compliance (62 FR 8319).[4]

Although the scope of and authority for the Credible Evidence and CAM rules differ, there are complementary aspects to these rules (62 FR 54906). The 1997 CAM rulemaking discussed the relationship between the CAM rule and the Credible Evidence

---

[2] The language in 40 CFR 70.6 and 71.6 was identical except that the final sentence that appears above in the text of paragraph (c)(5)(iii)(C) was not included in 40 CFR 71.6. This difference in language was maintained throughout the revisions discussed in this preamble, and remains the same in the current regulations.

[3] The compliance certification requirements apply to all part 70 and 71 sources, not just part 64 (CAM) sources.

[4] In explaining why the Credible Evidence rulemaking made no changes to 40 CFR part 70 or 71, the EPA also stated that the final Credible Evidence rule "merely eliminates any potential ambiguity or conflict between Parts 51, 52, 60, and 61 and Part 70 regarding the ability of sources to use non-reference test data in compliance certifications. Consistent with the congressional intent reflected in Title V and section 114(a)(3), Part 70 already contemplates use of non-reference test data in compliance certifications" (62 FR 8319).

rule. In addressing comments on this relationship, the EPA stated the following in the 1997 CAM rulemaking:

> First, these commenters suggested that compliance with indicator ranges under part 64 should act as a shield to enforcement actions. The Agency disagrees. Complete compliance with an approved part 64 monitoring plan does not shield a source from enforcement actions for violations of applicable requirements of the Act if other credible evidence proves violations of applicable emission limitations or standards. The Agency expects that a unit that is operating within appropriately established indicator ranges as part of approved monitoring will, in fact, be in compliance with its applicable limits. Part 64 does not prohibit the Agency, however, from undertaking enforcement where appropriate (such as cases where the part 64 indicator ranges may have been set improperly and other data such as information collected during an inspection provides clear evidence that enforcement is warranted).
> * * * * *
>
> Finally, it has been suggested during the part 64 and credible evidence rulemakings that a Title V permit may be written to limit the types of evidence used to prove violations of emissions standards. As mentioned in the [Credible Evidence rulemaking], even if a Title V permit specifies that certain monitoring, CAM or other monitoring, be performed and that this monitoring is the sole or exclusive means of establishing compliance or non-compliance, EPA views such provisions as null and void. Such an attempt to eliminate the possible use of credible evidence other than the monitoring specified in a Title V permit is antithetical to the credible evidence rule and to section 113(e)(1). If such a provision is nonetheless included in a permit, the permit should be vetoed to avoid any ambiguity. If the provision is not vetoed, the provision is without meaning, as it is *ultra vires,* that is, beyond the authority of the permit writer to limit what evidence may be used to prove violations, just as if a permit writer were to attempt to write in a provision that a source may not be assessed a penalty of $25,000 per day of violation for each violation. Evidence that is permitted by statute to be used for enforcement purposes, fines that may be levied, and any other statutory provisions, may not be altered by a permit.

62 FR 54907.

This discussion provides a clear statement by the EPA regarding its position on credible evidence and title V permits. The EPA has not reversed or weakened this position in subsequent actions.

2. The 2001 and 2003 Rulemakings To Address a Court Remand

On March 1, 2001, to respond to an October 29, 1999, remand from the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council* v. *EPA*, 194 F.3d 130 (D.C. Cir. 1999), the EPA published a direct final rule (66 FR 12872) and a parallel proposal (66 FR 12916) requiring title V compliance certifications to identify whether compliance during the period was continuous or intermittent as specified in CAA section 114(a)(3) per the 1990 CAA Amendments. Accordingly, this language was to be added to paragraph (c)(5)(iii)(C) of both 40 CFR 70.6 and 71.6. The preamble discussion of this change stated the following:

> In response to the court's remand, we have added text to sections, §§ 70.6(c)(5)(iii)([C]) and 71.6(c)(5)(iii)([C]), to require that the responsible official for the affected facility include in the annual (or more frequent) compliance certification whether compliance during the period was continuous or intermittent. Specifically, the revised text, including the introductory language for both sections reads: "Permits shall include each of the following * * *: A requirement that the compliance certification include all of the following * * *: The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section." The italicized text indicates the revisions made in response to the Court decision. Other text within both of these sections remains as promulgated in 1997. Under this revised language, the responsible official must include in the compliance certification a statement as to whether compliance during the period was continuous or intermittent. We believe these revisions respond directly and adequately to the Court's decision to remand the compliance certification requirements to us and are consistent with the requirements of the Act.

66 FR 12874 (direct final rule); 66 FR 12918 (parallel proposed rule). [5]

The revised regulatory language in the 2001 direct final rulemaking for the part 70 program reads as follows:

> **§ 70.6 Permit content.**
> * * * * *
> (c) * * *
> (5) * * *
> (iii) * * *
> (C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and
> * * * * *

66 FR 12876.

The revised regulatory language in the 2001 direct final rulemaking for the part 71 program reads as follows:

> **§ 71.6 Permit content.**
> * * * * *
> (c) * * *
> (5) * * *
> (iii) * * *
> (C) The status of compliance with the terms and conditions of the

---

[5] There are a number of errors in this paragraph of the *Federal Register* as it appeared in the preamble text in both the direct final and parallel proposed rules. The first sentence of the preamble text in both the direct final and parallel proposed rules misidentified 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B) as the paragraphs in which text was being added. However, the revised regulatory text actually addressed paragraph (c)(5)(iii)(C) of the two rules, and the revised regulatory text was clearly placed in the paragraph (C) in the rule language section of the notices. In addition, the clause "including whether compliance during the period was continuous or intermittent" that is located midway through the paragraph should have been italicized to denote the text that was proposed to be added in response to the court decision, but no text was italicized.

> permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification; and
> * * * * *

66 FR 12876.

During the period provided for public comment on the 2001 direct final rule and parallel proposal, the EPA received significant comments.[6] Accordingly, the EPA withdrew the direct final rule, considered the comments that were received and, based on consideration of those comments, published a final rule on June 27, 2003 (68 FR 38518). In the final rule, the EPA finalized paragraph (c)(5)(iii)(C) of both 40 CFR 70.6 and 71.6 as proposed. In addition, in response to comments, the EPA revised paragraph (c)(5)(iii)(B) in both rules to remove from the first sentence the reference to whether the methods or other means used by the source to determine compliance "provide continuous or intermittent data." The preamble stated the following:

> In response to the comments, we have deleted the second clause after the comma in the first sentence from §§ 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B). This removes the requirement that the responsible official for the affected facility identify in the annual (or more frequent) compliance certification whether the methods provide continuous or intermittent data. … Other text within §§ 70.6(c)(5)(iii)(B), 71.6(c)(5)(iii)(B), 70.6(c)(5)(iii)(C), and 71.6(c)(5)(iii)(C) remains as proposed in March 2001. The language in this final rule requires responsible officials to identify in the compliance certification whether compliance during the covered period was continuous or intermittent, but responsible officials do not need to state whether the methods used for determining compliance provide continuous or intermittent data. We believe these revisions respond directly and adequately to the Court's decision to remand the compliance certification requirements to us and are consistent with the requirements of the Act.

---

[6] These comments are available in Docket No. EPA-HQ-OAR-2002-0062, items EPA-HQ-OAR-2002-0062-0002 through -0006.

68 FR 38521.

However, in addition to the change described above, the actual revisions as set out in the regulatory language section in the 2003 final rule also deleted the last sentence of paragraph (c)(5)(iii)(B) in both the part 70 and 71 rules, despite the fact that the preamble stated that no other changes were being made. *Id.* The final regulatory language for 40 CFR 70.6 and 71.6 is shown below:

§ 70.6 Permit content
* * * * *
(c) * * *
(5) * * *
(iii) * * *
(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;
(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and
* * * * *

§ 71.6 Permit content
* * * * *
(c) * * *
(5) * * *
(iii) * * *
(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;
(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether

> compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification; and
> * * * * *

68 FR 38523.

A comparison of the version of paragraphs 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B) promulgated in 2003 with the version promulgated in the 1997 CAM rule, as described in section III.B.1 above, shows that the last sentence of those paragraphs – which stated "If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information." – was deleted, despite the fact that no mention of this change was made in either the 2001 direct final and parallel proposed rulemaking or the 2003 final rulemaking. The accidental deletion of that last sentence in 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B) is the error that the EPA seeks to correct with this proposed action.

IV. Proposed Revisions to the Title V Program Rules

A. The Proposed Change and Rationale

This proposed rule would reinstate the inadvertently removed sentence, which, consistent with the Credible Evidence rule, directs owners and operators of sources to "identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information," in its original place before the semicolon at the end of 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B). No other changes are

proposed, and the other regulatory text within these paragraphs would remain as finalized on June 27, 2003. Thus, this proposed rule only seeks to correct what the EPA believes was demonstrably an error in the 2003 final rulemaking discussed in the previous section.

As illustrated in the previous section, the substance of the preambles and rule text from the 2001 and 2003 rulemakings make it clear that the EPA did not intend to remove the missing sentence from 40 CFR 70.6(c)(5)(iii)(B) or 71.6(c)(5)(iii)(B). The EPA did not discuss or propose any revisions to these paragraphs in the 2001 direct final rulemaking or parallel proposal.[7] Similarly, while the EPA revised the text of 40 CFR 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B) as part of the 2003 final amendments, it did not discuss any intent to remove this sentence. To the contrary, the EPA stated clearly that "[o]ther text within §§ 70.6(c)(5)(iii)(B), 71.6(c)(5)(iii)(B), 70.6(c)(5)(iii)(C), and 71.6(c)(5)(iii)(C) remains as proposed in March 2001" (68 FR 38521). The EPA did not propose to remove the deleted sentence from paragraph (c)(5)(iii)(B) of 40 CFR 70.6 and 71.6 or to make any other changes to those paragraphs in that March 2001 rulemaking. Moreover, the EPA's response to comments on the 2001 proposed amendments reiterated the sentence's requirement that "responsible officials must identify in [their title V compliance certifications] other material information where failure to do so would constitute a false certification of compliance."[8]

Despite the accidental removal of the sentence in question on June 27, 2003, the

---

[7]As discussed previously, while the 2001 preamble discussion of the proposed revisions at 66 FR 12918 mistakenly referred to changes to paragraph (c)(5)(iii)(B) of 40 CFR 70.6 and 71.6, the proposed amendments in that action addressed only 40 CFR 70.6(c)(5)(iii)(C) and 71.6(c)(5)(iii)(C). The proposed revisions to the regulatory language correctly addressed 40 CFR 70.6(c)(5)(iii)(C) and 71.6(c)(5)(iii)(C).

[8] Responses to public comments prepared for the June 27, 2003 Final Rule, section 2.3, page 11, EPA Docket No. EPA-HQ-OAR-2002-0062-0008, June 2003.

EPA's actions since that time have remained consistent with the direction provided in the accidentally removed sentence, and with the Credible Evidence rule in general. For example, the part 71 federal operating permits program administered by the EPA includes a form for sources to use for their annual compliance certifications, and the instructions for completing the form state the following:

> Compliance Status: For each permit requirement and its associated compliance methods, indicate whether there was intermittent or continuous compliance (check one) during the reporting period. *You should consider all available information or knowledge that you have when evaluating this, including compliance methods required by the permit and "credible evidence" (e.g., non-reference test methods and information "readily available" to you).* You are always free to include written explanations and other information to clarify your conclusion regarding compliance status.[9]

Language similar to this was originally included in the instructions for the compliance certification form that the EPA issued shortly after the credible evidence sentence (the sentence we are restoring) was added to parts 70 and 71 as part of the promulgation of the CAM rule in 1997. After the credible evidence language was inadvertently deleted from the part 71 rule in 2003, the EPA revised the compliance certification form and associated instructions in 2004 to reflect the requirement for sources to certify whether compliance was continuous or intermittent, but the EPA did not revise the instruction for sources to consider credible evidence when determining compliance status. In addition, the EPA website where the part 71 forms and instructions are located states that "[o]n February 22, 2004, we revised the Annual Compliance Certification form and the Instruction Manual to reflect policy decisions concerning

---

[9] Annual Compliance Certification (A-COMP), EPA Form 5900-04, at page 4 (emphasis added), accessed from *http://www.epa.gov/airquality/permits/p71forms.html* on September 25, 2012.

monitoring and the data used for compliance certifications."[10] The retention of the instruction to consider credible evidence in the Annual Compliance Certification form clearly indicates that the EPA continues to believe that the title V rules should be implemented as if the removed sentence is still applicable. Note also that the EPA has made revisions to the part 71 forms a number of times since 2003, so it has had ample opportunity to change this language if its policy had changed; however, the EPA has made no such changes.[11]

Title V permits issued by EPA Regional Offices since 2003 also provide evidence of the EPA's ongoing practice of requiring sources to use credible evidence in compliance certifications. A review of a sample of recent part 71 permits revealed that they include language similar to the language in the removed sentence, which requires the annual compliance certification to include "any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information." These permits include a permit issued by Region II in 2011, two permits issued by Region VIII in 2010

[10] *http://www.epa.gov/airquality/permits/p71forms.html* accessed on September 25, 2012.

[11] *http://www.epa.gov/airquality/permits/p71forms.html* accessed on September 25, 2012.

and 2011, and a permit issued by Region V in 2012.[12]

Similarly, EPA guidance to title V rule writers on an EPA Region III website concerning compliance and enforcement illustrates the EPA's commitment to the use of credible evidence. That website includes the following guidance:

> Title V permit conditions cannot limit the types of data or information (i.e., credible evidence) that may be used to prove a violation of any applicable requirement. Title V permits should contain language clarifying that any credible evidence may be used in determining a source's compliance status (or alternatively, that nothing in the permit precludes the use of credible evidence in determining compliance or noncompliance with the terms of the permit). Such language gives fair notice to the source and the public, and prevents the source from claiming that they weren't on notice that other credible evidence could be used to demonstrate a violation or compliance. Such language can most easily be added to Title V permits by modifying the "boilerplate" provisions (i.e., general permit conditions) as in the following example.…[13]

As illustrated by these examples, following the mistaken removal of the sentence on June 27, 2003, the EPA has clearly articulated a position consistent with the Credible Evidence rule under all circumstances, including the annual compliance certification. In light of the EPA's continued, consistent commitment to the use of credible evidence in compliance certifications and other title V contexts, the EPA has not previously devoted

---

[12] Region II part 71 permit issued to Turning Stone Casino Resort in Verona, New York, *http://www.epa.gov/region02/air/permit/trsc07052011.pdf*. Region VIII part 71 permits issued to (1) Samson Resources Company, *http://www.epa.gov/region8/air/permitting/Samson-HowardSWD_Initial_V-SU-0051-10.00.pdf*; and (2) Public Service Company of Colorado, *http://www.epa.gov/region8/air/permitting/PSCo-TiffanyCS-FinalRenewal-2-Permit-V-SU-00023-2010.00.pdf*. Region V part 71 permit issued for operations at the Treasure Island Resort & Casino in Red Wing, Minnesota. *http://yosemite.epa.gov/r5/r5ard.nsf/f5dbe2e3ef9dc9c1862570430068f396/10cd79ad1a4c177386257ad0004d7bc3/$FILE/V-PI-2704900084-2012-10%20-%20Final.pdf*. These websites were accessed on December 19, 2012.

[13] *http://www.epa.gov/reg3artd/permitting/t5_compl_enf.htm*. The website states that this page was last updated on February 11, 2011.

its limited resources to correcting the inadvertent deletion in the regulatory text through a formal rulemaking. Nonetheless, the EPA's Office of Inspector General (OIG) has indicated that the title V rules should be amended to restore the credible evidence language to the regulatory requirements in order to improve the content of annual compliance certifications.[14] In concurrence with the OIG recommendation, the EPA is now taking this action to restore the language currently missing in the part 70 and 71 rules.

In any case, the restored language reflects the Act's general prohibition on knowingly making a false certification or omitting material information, independent of any EPA policy or previous rulemaking actions. As modified in the 1990 CAA Amendments, section 113(c)(2) of the Act states that any person who knowingly "makes any false material statement, representation, or certification in, *or omits material information from*, … any notice, application, record, report, plan, or other document required pursuant to this Act" (emphasis added) is subject to fine or imprisonment, upon conviction. The EPA believes that it is important for sources to be on notice and to understand the requirement to consider as part of their compliance status any compliance information determined by methods other than those identified in the permit. Moreover, for the sake of clarity, the EPA believes that this general duty should be explicit in the part 70 and 71 compliance certification requirements.

B. Scope of Rulemaking and Request for Comment

---

[14] EPA Office of Inspector General, *Substantial Changes Needed in Implementation and Oversight of Title V Permits If Program Goals Are To Be Fully Realized*, Report No. 2005-P-00010, pp 31-32 and p 37, Recommendation 2-2, March 9, 2005. *http://www.epa.gov/oig/reports/2005/20050309-2005-P-00010.pdf*

The purpose of this rulemaking is to restore language inadvertently deleted from the title V regulations, 40 CFR parts 70 and 71.[15] Given the passage of time, the EPA is proposing to make this change through a proposed rule and providing an opportunity for public input. Accordingly, the EPA is requesting comments only on whether, on the sole basis that the removal of the language in question was inadvertent, the language in question should or should not be restored. However, the EPA is not requesting comments on any other aspects of these provisions or on any other provisions of the part 70 and 71 rules. If comments are submitted outside of this scope, the EPA will not take them into consideration when finalizing this rule.

V. Statutory and Executive Order Reviews

This proposed rule would implement a technical correction to the CFR, adding a sentence that was inadvertently removed in a prior rulemaking; it would not otherwise impose or amend any requirements. The analysis below is consistent with the limited nature of this rulemaking.

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

---

[15] Section 70.4(i) provides that states with an approved part 70 program may need to revise their programs when the relevant federal statutes or regulations are modified or supplemented. Given that the relevant federal statute concerning representations or statements made in compliance certifications (CAA section 113(c)(2)) applies regardless of the specific language in 40 CFR 70.6(c)(5)(iii)(B), the EPA is proposing that states will not need to submit part 70 program revisions in response to this rulemaking, except where a state program interferes with the implementation of the sentence the EPA proposes to restore. The EPA is also proposing that permit reopenings will not be needed under 40 CFR 70.7(f)(1) or 71.7(f)(1) in response to this rulemaking, except where a permit contains language that interferes with the implementation of the sentence the EPA proposes to restore. Notwithstanding the previous statements in this footnote, the EPA may require individual states to revise their programs or reopen permits where the EPA believes such actions would be necessary to ensure the appropriate implementation of the program or its permits.

Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The EPA is simply correcting the CFR to reinstate a sentence that was inadvertently removed. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR parts 70 and 71 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq*., and has assigned OMB control numbers 2060-0243 and 2060-0336, respectively. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) a small business as defined in the U.S. Small Business Administration size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a

population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. As explained above, this proposed rule would merely restore a sentence removed from the rules in error and, therefore, does not impose any new requirements on any entities, either large or small. The EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts

D. Unfunded Mandates Reform Act

This proposed rule contains no federal mandates under the provisions of title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector; it simply restores a sentence removed from the rules because of erroneous amendatory language contained in the June 27, 2003, amendments. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The sentence restored in this action was removed in error and, therefore, it does not impose new regulatory requirements.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As explained previously, this proposed rule would merely restore a sentence removed from the rules in error. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). As explained previously, this proposed rule would merely restore a sentence removed from the rules in error. Thus, Executive Order 13175 does not apply to this action.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it

does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through the OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high

and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As explained previously, this proposed rule would merely restore a sentence removed from the rules in error.

List of Subjects

40 CFR Part 70

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

40 CFR Part 71

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

Dated: March 22, 2013.

Bob Perciasepe,
Acting Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 70 – State Operating Permit Programs

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

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

2. Revise §70.6 paragraph (c)(5)(iii)(B) to read as follows:

§ 70.6 Permit Content.

* * * * *

(c) * * *

(5) * * *

(iii) * * *

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;

* * * * *

PART 71 – Federal Operating Permit Programs

1. The authority citation for part 71 continues to read as follows:

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

2. Revise §71.6 paragraph (c)(5)(iii)(B) to read as follows:

§ 71.6 Permit Content.

* * * * *

(c) * * *

(5) * * *

(iii) * * *

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;

* * * * *

[FR Doc. 2013-07266 Filed 03/28/2013 at 8:45 am; Publication Date: 03/29/2013]