

a new defect with Ann. Code Md. 2-611, namely that "it exempts a person from enforcement action for a violation of an air pollution limitation 'so long as the person acts in accordance with a plan for compliance.'" Such an exemption, the commenter asserts "explicitly violates Part 70's prohibition against a compliance schedule that 'sanction[s] noncompliance with, the applicable requirements on which it is based.'" 40 CFR 70.5(c)(8)(iii)(C).

However, the commenter has alleged a conflict between 40 CFR 70.5(c)(8)(iii)(C) and Ann. Code. Md. 2-611 that does not exist either explicitly or implicitly. The language of 40 CFR 70.5(c)(8) speaks to the contents of the compliance schedule. Under 70.5(c)(8) any compliance schedule must meet certain criteria. For example, 40 CFR 70.5(c)(8)(iii)(C) requires that the schedule "include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements * * *" (Emphasis added.) Further, the schedule must be "at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." The last requirement is that "the schedule shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based."

The federal regulations at 40 CFR 70.5(c)(8)(iii)(C) contemplate that a compliance schedule may be little more than the recitation of requirements set forth in a judicial consent decree or an administrative order that has been agreed to between the source and a state or federal enforcement agency to fully and finally settle a dispute with the source. Any such compliance schedule necessarily would be supplemental to the existing applicable requirements on which it is based. The title V permits, judicial consent decree or administrative order that defines the schedule may not, in of themselves, amend the underlying legal instruments such as state regulations or permits that establish the subject applicable requirements. Indeed, the regulatory language makes clear that a compliance plan must lead to compliance with all applicable requirements. The commenter seems to suggest that the requirement that the compliance schedule "shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based," essentially means that is mandatory that such schedules reopen concluded matters. The Agency does not believe that ever was the intent of this provision.

Instead, when all provisions of 40 CFR 70.5(c)(8)(iii)(C) are read in *pari materia* the prohibition of sanctioning noncompliance with underlying applicable requirements necessarily must refer to *all* applicable requirements, including judicial consent decrees and administrative orders (a term broad enough to easily encompass the type of plan for compliance contemplated by Ann. Code. Md. 2-611) with which a source is legally obligated to comply.

Comment: The commenter believes that Maryland has failed to adequately implement its operating permit program because the State did not issue all of its initial permits in accordance with the statutory three-year schedule.

Response: On December 1, 2001, EPA's interim approval of Maryland's title V operating permit program lapsed because the State was unable to submit all of the program revisions necessary to satisfactorily address the deficiencies identified by EPA when it granted the State final interim approval. At the time of program lapse, Maryland had not taken final action on all of its initial operating permit program applications. Also on December 1, 2001, EPA granted to Maryland the full delegation of authority to implement and enforce the federal operating permit program requirements established at 40 CFR part 71. Once the requirements of 40 CFR part 71 took effect, the State of Maryland could no longer issue federally enforceable permits pursuant to its own program regulations. The part 71 permit program established a new schedule for the submittal of permit applications and issuance of permits by Maryland. That schedule required Maryland to issue part 71 permits to the remaining initial permit applicants by December 1, 2004. As of December 1, 2001, 47 sources had not received initial title V permits in Maryland.

As discussed in the September 23, 2002 letter, the State of Maryland has committed to EPA that it will issue the remaining 47 permits within two years of receiving final full approval of its operating permit program. The two year time frame is consistent with the time provided other states that had failed to issue all of their initial operating permits within the statutory time-frame. As noted by the commenter, a number of states provided letters to EPA in December 2001 committing to issue their remaining permits within two years. The EPA believes Maryland is capable of achieving or surpassing its commitment and will closely monitor the State's permit issuance rates once the final full approval of its program is effective. Should Maryland fail to make

adequate progress toward meeting its commitment, the Agency will pursue options to address the situation, including the issuance of a notice of deficiency.

Comment: The commenter believes that Maryland has inadequately implemented is operating permit program with respect to the operating permit program reporting requirements for required monitoring.

Response: As discussed in our September 23, 2002 response, EPA disagrees with Earthjustice's assertion that Maryland is not implementing its monitoring report requirements in a manner consistent with the minimum requirements of part 70. Maryland's regulations with respect to requiring permittees to submit reports of any required monitoring at least every six months (hereafter, "six-month monitoring reports") are consistent with the requirements of 40 CFR 70.6(a)(3)(iii)(A). The provisions of 40 CFR 70.6(a)(iii)(A) do not specify the form or content of acceptable six-month monitoring reports other than the requirement that all deviations from permits requirements must be clearly identified in the reports. Therefore, considerable latitude has been provided to permitting authorities to develop specific reporting requirements in individual permits in order to satisfy the six-month monitoring report requirements. The EPA believes that Maryland has issued permits that reasonably provide adequate monitoring information to assess compliance in a timely fashion and that the permit requirements meet the minimum requirements of 40 CFR 70.6(a)(3)(iii)(A).

As noted in EPA's September 23, 2002 letter, Maryland has committed to modifying the manner in which it implements the six-month monitoring report requirements in individual permits. Upon the effective date of the final full approval, Maryland has committed to issue permits that clarify that six-month monitoring reports are required over all periods, including those when no deviations or excess emissions occurred. This change will affirm that the permits meet the requirement to submit monitoring reports every six months. The EPA believes Maryland is capable of meeting this commitment and will monitor the permits issued by Maryland once final full approval of its program becomes effective. The Agency feels it is prudent to allow Maryland an opportunity to demonstrate its ability to meet its commitment prior to determining whether a notice of deficiency is warranted.