

continuous or intermittent. On October 29, 1999, the Court issued a decision (see docket A-91-52, item VIII-A-1) *Natural Resources Defense Council v. EPA*, 194 F.3d 130 (D.C. Cir. 1999), on these challenges. The Court agreed with NRDC that EPA's removal from parts 70 and 71 of the explicit requirement that compliance certifications address whether compliance is continuous or intermittent revisions was contrary to the Statute. See section 114(a)(3)(D), 42 U.S.C. 7414(a)(3)(D). The Court wrote: "While [section] 114(a)(3) clearly states that a major source's 'compliance certification shall include * * * whether compliance is continuous or intermittent[.],' EPA only requires that a major source's compliance certification include '[t]he identification of the method(s) * * * used by the owner for determining the compliance status * * * and whether such methods * * * provide continuous or intermittent data' (40 CFR 70.6(c)(5)(iii)(B), 71.6(c)(5)(iii)(B)). The statute requires that certification include whether 'compliance'—not just 'data'—is continuous or intermittent" (194 F.3d at 137). The Court thus remanded the regulations to EPA for the Agency to revise them in accordance with the Court's opinion (Id. at 138). In response to the Court's remand, we issued a direct final rule for "Amendments to Part 70 and Part 71 Compliance Certification Requirements." These revisions to parts 70 and 71 inserted language into sections 70.6(c)(5)(iii)(C) and 71.6(c)(5)(iii)(C) to require that the responsible official for each subject facility include in the annual (or more frequent) compliance certification whether compliance during the period was continuous or intermittent. The original direct final rule notice, published March 1, 2001 (66 FR 12872), was accompanied by a proposal with the same revisions. In the March 1 notice, we indicated that we would withdraw the direct final rule if we received adverse comments and would respond to any adverse comments on the direct final rule as comments on the proposal. We subsequently received adverse comments on the direct final rule; however, through an inadvertent administrative error, we did not publish the withdrawal prior to the rule's April 30 effective date. To correct this oversight, we issued an amendment notice withdrawing the direct final rule, effective on November 5, 2001 (66 FR 55883).

B. Summary of Issues Raised by the Proposal

We received five letters from commenters, three of which were from

industry groups, one from an environmental interest group and one from a local permitting agency. All comments are discussed in detail in the response to comments document that is part of the docket documents; those that are pertinent to the March 1, 2001, proposal are summarized below.

On the whole, the primary issue raised by the commenters on the March 1, 2001, proposal for this final rule is that neither the proposed rule nor the preamble provides clear guidance for responsible officials to know how to comply with the requirement to certify whether compliance with the permit terms and conditions was continuous or intermittent. Neither does the proposed rule or the preamble enable regulatory authorities and the public to understand the meaning of such statement in a certification, commenters asserted. Commenters urged us to clarify in the final rule when responsible officials must certify continuous compliance and when responsible officials must certify intermittent compliance.

Commenters stated that the explanation of our interpretation of continuous versus intermittent compliance certification, contained in the preamble for the March 1, 2001, proposal, was unclear. In general, commenters stated that our explanation of the meaning of continuous or intermittent compliance certification in the March 1, 2001, proposal is indirect, ambiguous, and would lead to inconsistent implementation rendering the compliance certifications meaningless. Commenters also pointed out that, according to our explanation, responsible officials under the same compliance conditions could arrive at different conclusions regarding their compliance status. Additionally, commenters noted that the March 1, 2001, proposal equates the compliance status of responsible officials collecting periodic data with that of responsible officials experiencing periods of noncompliance. Commenters also argued that substantive portions of the discussion referenced in the preamble of the March 1, 2001, proposal as guidance are no longer valid because this guidance was developed for the rules that the court in *NRDC* held were inconsistent with the Act.

Additionally, commenters expressed concern with our approach for revising the rule in the March 1, 2001, proposal and disagreed that it fully addressed the Court's direction expressed in the remand. One commenter representing environmental interests and two industry commenters noted that the proposal retained the requirement for responsible officials to identify in the

compliance certification whether their monitoring methods provide continuous or intermittent data. Industry commenters urged us to remove this requirement in the final rule arguing that this requirement was originally in the rule due to the approach invalidated by the Court in *NRDC*. These commenters further argued that the Statute does not provide for this requirement and it only adds an unnecessary burden. One industry commenter suggested that if we would find that such requirement is necessary for implementing the amendments, we should impose it on permitting authorities to avoid mistakes in the classification of methods.

One industry commenter disagreed with our explanation, in section III.B. of the March 1, 2001, proposal's preamble, that permit terms and conditions that are the basis of the certification include applicable recordkeeping, monitoring and reporting provisions. The commenter also objected to the procedure for completing the compliance certification, suggested by this explanation, finding it confusing and impractical. The commenter argued that according to this procedure monitoring, recordkeeping and reporting requirements would need to be identified first as "methods" and then again as "permit terms and conditions." Although, the commenter added, it would be unclear what "methods" to use to verify compliance with monitoring, recordkeeping and reporting requirements. This commenter further argued that a better reading of the regulations is that "permit terms and conditions" include only substantive terms such as emission limits, standards and work practice requirements and exclude monitoring, recordkeeping and reporting. The compliance certification would then address only "permit terms and conditions," and that monitoring, recordkeeping, and reporting requirements would be handled in semiannual monitoring reports. This commenter asked that the discussion of the compliance certification obligations in the final rule should be revised accordingly.

III. Description of the Final Rule

A. How Is EPA Responding to Comments on the Proposal?

Consistent with the March 1, 2001, proposal, today's final rule requires responsible officials to identify in the certification whether compliance with each permit term and condition that is the basis of the certification was continuous or intermittent, during the period covered by the ongoing