necessary) is met. The plain meaning of this provision is that implementation of section 112(g) is a title V requirement of the Act and that the prohibition takes effect upon EPA's approval of the State's PROGRAM regardless of whether EPA or a state has promulgated implementing regulations.

The EPA has acknowledged that states may encounter difficulties implementing section 112(g) prior to the promulgation of final EPA regulations and has provided guidance on the 112(g) process (see April 13, 1993 memorandum entitled, "Title V Program Approval Criteria for Section 112 Activities" and June 28, 1994 memorandum entitled, "Guidance for Initial Implementation of Section 112(g)," signed by John Seitz, Director of the Office of Air Quality Planning and Standards). In addition, EPA has issued guidance, in the form of a proposed rule, which may be used to determine whether a physical or operational change at a source is not a modification either because it is below de minimis levels or because it has been offset by a decrease of more hazardous emissions. See 59 FR 15004 (April 1, 1994). EPA believes the proposed rule provides sufficient guidance to Colorado and their sources until such time as EPA's section 112(g) rulemaking is finalized and subsequently adopted by the State.

The EPA is aware that Colorado lacks a program designed specifically to implement section 112(g). However, Colorado does have a preconstruction review program that can serve as a procedural vehicle for establishing a case-by-case MACT or offset determination and making these requirements federally enforceable. The EPA wishes to clarify that Colorado's preconstruction review program may be used for this purpose during the transition period to meet the requirements of section 112(g).

Note that in the notice of proposed interim approval of Colorado's PROGRAM, EPA referred to part B of Colorado Regulation No. 3 as the location of Colorado's preconstruction permitting program. While this is the correct citation in Colorado's current version of Regulation No. 3 (which was recently revised and reorganized), EPA has not yet approved the recent revisions and reorganization as part of the State Implementation Plan (SIP). However, EPA has approved the State's preconstruction permitting program as part of the SIP under the previous organization of Regulation No. 3, and EPA believes Colorado's preconstruction permitting program is adequate to meet the requirements of

section 112(g). Specifically, section III.A.1. of the EPA-approved version of Regulation No. 3 requires that a preconstruction permit be obtained for construction or modification of a stationary source. "Stationary source" is defined in Colorado's Common Provisions Regulation as "any building, structure, facility, or installation...which emits any air pollutant regulated under the Federal Act." "Air pollutant" is defined very broadly by the State and would consequently include all HAPs. Thus, the State has adequate authority to issue preconstruction permits to new and modified sources of HAPs and, because the State's preconstruction permitting program has been approved as part of the SIP, these permits would be considered federally enforceable.

Another consequence of the fact that Colorado lacks a program designed specifically to implement 112(g) is that the applicability criteria found in its preconstruction review program may differ from the criteria in section 112(g). EPA will expect Colorado to utilize the statutory provisions of section 112(g) and the proposed rule as guidance in determining when case-by-case MACT or offsets are required. As noted in the June 28, 1994 guidance, EPA intends to defer wherever possible to a State's judgement regarding applicability determinations. This deference must be subject to obvious limitations. For instance, a physical or operational change resulting in a net increase in HAP emissions above 10 tons per year could not be viewed as a de minimis increase under any interpretation of the Act. In such a case, the EPA would expect Colorado to issue a preconstruction permit containing a case-by-case determination of MACT.

Comment #2: The commenter asserted that Colorado has authority to issue preconstruction permits only to sources of HAPs that are components of criteria pollutants, such as PM–10 and volatile organic compounds (VOCs).

EPA Response: EPA disagrees with this assertion. As described above, EPA believes the State's preconstruction permitting program requires permits for all new and modified sources of HAPs. The exemptions to the construction permitting requirements in section III.D. of the EPA-approved version of Regulation No. 3 support this claim, in that many of the exemptions specifically clarify that the construction permit exemptions do not apply to HAPs, and HAPs are defined in the Common Provisions Regulation as including all of those pollutants listed in section 112(b) of the Act. Therefore, EPA believes that, until the 112(g) rule has been promulgated and adopted by the State,

the State has the authority to issue preconstruction permits to all new and modified major sources of HAPs.

Comment #3: Two commenters expressed concern with the EPA proposal to consider Colorado's law (S.B. 94–139) preventing the admission of voluntary environmental audit reports as evidence in any civil, criminal or administrative proceeding as "wholly external" to Colorado's PROGRAM and asserted that these provisions are consistent with congressional intent and EPA policy, and the Federal Government should not interfere in the State's interpretation and exercise of its own prosecutorial discretion. In addition, one commenter also stated that, absent the audit privilege, it would be unlikely that voluntarily disclosed information would be identified and further indicated that, although title V may be delegated by EPA, such delegation does not preempt or require the State to defend its laws to

EPA Response: EPA did not identify this as an approval issue and stated that it is not clear at this time what effect this privilege might have on title V enforcement actions. A national position on approval of environmental programs in states which adopt statutes that confer an evidentiary privilege for environmental audit reports is being established by EPA. Further, EPA disagrees with the commenter's interpretation of congressional intent and EPA policy. Congressional intent was to encourage owners and operators to do self-auditing and correct any problems expeditiously, but this is not the same as providing an evidentiary privilege and enforcement shield. Congress could have provided such a privilege and shield in the Act, but did not. Section 113 of the Act and title V contain no exceptions for withholding self-auditing reports as evidence in any enforcement proceeding. Likewise, 40 CFR part 70 contains no such exceptions. Also, EPA disagrees with the commenter's assumption that, absent the audit privilege provided by Colorado law, it is unlikely that voluntarily disclosed information would otherwise be identified. For example, section 114 of the Act gives EPA the authority to issue information requests and requires disclosure of information regardless of whether it is generated through a self-audit. Colorado has similar authority. EPA agrees that Colorado has the authority to adopt its own laws regarding environmental matters as long as the area has not been preempted by Congress. However, title V of the Act and the part 70 regulations give EPA the responsibility to ensure