interfere with the criminal enforcement authorities required by part 70.

With respect to the bypass provisions of ORS 468.959, a "bypass" is defined as a temporary discharge under circumstances in which the defendant reasonably believed that the discharge was necessary to prevent the loss of life, personal injury or severe property damage. See 468.959(2)(a). The Attorney General's opinion states that the affirmative defense to criminal liability for violations due to a "bypass" is directly analogous to the criminal defense of necessity, which is available as a matter of Federal criminal common law. See U.S. v. Schoon, 971 F.2d 193, 195. The necessity defense "justifies criminal acts to be taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime." Id. at 196. By limiting the affirmative defense of "bypass" to "circumstances in which the defendant reasonably believed that the discharge was necessary to prevent the loss of life, personal injury, or severe property damage or to minimize environmental harm", a defendant may avoid criminal liability under the Oregon statute for what would otherwise clearly be a knowing violation only in those limited situations where the violation will avert a more serious harm to society as a whole. As such, EPA believes that the Oregon affirmative defense to criminal liability for a "bypass" is substantially equivalent to the affirmative defense of necessity which would be available as a matter of Federal common law for criminal violations under the Clean Air Act. EPA does not believe that part 70 was intended to preclude a State from providing sources with affirmative defenses that would be available as a matter of Federal law to Clean Air Act violations. See 40 CFR 70.11(b) (requiring that the degree of knowledge and burden of proof required under State law can be no greater than that required under the Clean Air Act).

The Attorney General's opinion also points to the procedural requirements a source must meet to establish the affirmative defense of bypass as additional checks on the scope of that affirmative defense. In the determing that ORS 468.959 precluded full approval, EPA expressed concern that the statute appeared to allow a source to routinely bypass improperly designed control equipment with impunity simply by indicating that the control equipment would be severely damaged if operated during the periods of bypass. The Attorney General explains that

because the affirmative defense of bypass is available only if the source took appropriate corrective action as soon as reasonably possibly, it should not be necessary to have a bypass day after day.

In summary, EPA believes that the Oregon statute providing an affirmative defense to criminal liability for violations due to an upset or bypass is sufficiently narrow so as not to interfere with the criminal enforcement requirements of 40 CFR 70.11. EPA notes that 40 CFR 70.4(b)(7) requires a permitting authority with an approved title V program to submit at least annually information regarding the State's enforcement activities and 40 CFR 70.10(c)(iii) allows EPA to withdraw program approval where a permitting authority fails to enforce its title V program consistent with the requirements of part 70. To ensure that ORS 468.959 does not impermissibly impinge on the State's enforcement authority, EPA intends to monitor the Oregon enforcement programs closely during implementation.

2. Small Business Assistance Program Provisions

The statute establishing the Oregon Small Business Program, ORS 468A.330, states that onsite technical assistance for the development and implementation of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program shall not result in inspections or enforcement actions except where there is reasonable cause to believe that a clear and immediate danger to the public health and safety or to the environment exists. See ORS 468A.330(4)(a). In the Federal Register notice granting Oregon interim approval of its operating permits programs, EPA stated that, as a condition of full approval, Oregon must demonstrate to EPA's satisfaction that ORS 468A.330(4)(a) is consistent with the enforcement responsibilities of 40 CFR 70.11(a). EPA explained that ORS 468A.330(4)(a) does not simply give a source an opportunity to correct a violation observed during onsite technical assistance before being subject to enforcement action, but rather protects the source from follow-up inspections or enforcement activities that "result from" observations made during onsite technical assistance." 59 FR 61827. EPA therefore concluded that the Oregon statute interfered with the State's enforcement requirements under 40 CFR 70.11.

In discussing ORS 468.330(4)(a), EPA noted that EPA had issued a guidance memorandum dated August 12, 1994, entitled "Enforcement Response Policy

for Treatment of Information Obtained Through Clean Air Act Section 507 Small Business Assistance Programs" signed by Steven A. Herman (herein referred to as the "SBA Enforcement Guidance''). This guidance document sets forth EPA's enforcement response policy on the treatment of violations detected during compliance assistance visits under State Small Business Assistance Programs. The SBA **Enforcement Guidance endorses State** Small Business Assistance Programs that either (1) allow sources that voluntarily seek compliance assistance a limited period to correct violations observed or revealed as a result of compliance assistance or (2) if the State Small Business Assistance program is independent of the delegated State air enforcement program, keep confidential information that identifies the names and locations of specific small businesses with violations revealed through compliance assistance. It therefore interprets section 507 of the Clean Air Act as creating a limited exception to the enforcement requirements of title V and part 70 for those sources that qualify for assistance under section 507 of the Act.

In granting the Oregon operating permits programs interim approval, EPA determined that ORS 468.330(4)(a) did not meet the requirements of the SBA Enforcement Guidance because the Oregon statute permanently shields a source from inspections or enforcement actions resulting from observations during onsite technical assistance, rather than granting a limited correction period. See 59 FR 61826. Since that time, Oregon has submitted a guidance document entitled "Air Quality Guidance: Restriction of Information Obtained by the AQ Small Business Assistance Program" (hereinafter, "Oregon's SBAP Confidentiality Guidance"). This document requires Oregon's Small Business Assistance Program to be operated independently from Oregon's air program enforcement efforts, and requires the Small Business Assistance Program to restrict access by Oregon air enforcement staff to information regarding violations detected through onsite technical assistance visits to small businesses. EPA has reviewed Oregon's SBAP Confidentiality Guidance and believes that it meets the conditions that apply to States choosing the confidentiality option under the SBA Enforcement Guidance. See 60 FR 46071 (September 5, 1995). EPA also believes that this document sufficiently minimizes the risk that ORS 468A.330(4)(a) will interfere with the State's enforcement