

December 4, 1997

MEMORANDUM

SUBJECT: Implementing the Part 71 Program in Indian Country

FROM: Steven J. Hitte, Group Leader \s\
Operating Permits Group (MD-12)

TO: Air Program Manager
Regions I-II, IV-X

The Federal operating permits program rule, promulgated in July 1996 (and codified at 40 CFR part 71), included a regulatory provision stating that November 15, 1997 would be the effective date of the program in "Tribal areas." The purpose of this memorandum is to highlight several implementation issues that Regional Offices must address as they implement the program and to reclarify that the effective date of the program in Tribal lands will be finally established when EPA completes its rulemaking on the jurisdictional scope of the program.

Status of Rulemaking

The final part 71 rule did not address how EPA would determine where the program would be effective (i.e., the rule did not adopt a definition of "Tribal area," and the final part 71 rule clearly stated that EPA would not be able to implement part 71 in Indian lands until the Agency completed a follow-up rulemaking) [61 FR 34202, 34214]. Subsequently, on March 21, 1997, EPA published a proposal that would authorize EPA to administer the program within "Indian Country." Representatives of the Regions and Headquarters (HQ) Offices are currently participating in work group discussions to resolve the issues on which comments were received on the proposal. Once EPA finalizes the rulemaking, the scope of EPA's implementation of part 71 within Indian Country will be established and the program will become effective.

Contemporaneous with the publication of the final rule, HQ will publish an informational notice in the Federal Register to

advise sources within Indian Country of the effective date of the program and to notify them of the scope of the geographic area subject to the program as per §71.4(g). The Regions will also undertake outreach efforts to notify sources that they are subject to the program, as discussed in the March 21, 1997 proposal. Headquarters will coordinate these efforts with your title V staffs.

Major Deadlines for Sources

For sources, the first significant deadline will be the deadline for submitting permit applications, which is 1 year from the effective date of the program, unless the Regional Office provides 6 months notice of an earlier submittal date [§71.5(a)(1)(i)]. Regional Offices should use EPA's standard part 71 permit application form in administering the part 71 program unless EPA determines use of another application form would substantially enhance implementation of the program. In that case, EPA must determine that the alternative form ensures consistency with part 71 prior to its distribution to sources. Permit fees are due at the time the application form is submitted [71.9(f)(3)].

The effective date of the part 71 program will also trigger the section 112(g) program under the Clean Air Act, covering construction and reconstruction of major sources of hazardous air pollutants. Although State and local agencies have until June 29, 1998 to certify that they have a program in place to implement section 112(g) [December 27, 1996, 61 FR 68384,68401], EPA will not delay its implementation of the section 112(g) program under part 71 since EPA can use part 71 procedures to issue preconstruction permits. Regions would use the permit issuance procedures of §71.7 for section 112(g) permits. As part of the informational Federal Register notice discussed in the previous section of this memorandum, EPA will provide notice of the effective date of the section 112(g) program.

Major Deadlines for Regional Offices

Regions will be required to do completeness reviews of the permit applications within 60 days of receipt or by default the applications will be considered complete [§71.5(a)(2)]. Due to the limited number of sources that are expected to become subject to part 71 in Indian Country, EPA has a 2-year transition period in which to take final action on the permit applications received within the first year of the program [§71.4(b)(4)]. Regions must take final action on one-third of the permit applications in the first year (the same year that all applications are due) [section 503(c) of the Clean Air Act], with the remainder of actions

completed in the next year. Although the Regional Office Division Directors agreed 3 years ago that they would try to issue one-half of the permits in each year following the effective date of part 71 in Indian Country, this memorandum notes that part 71 requires a minimum of one-third of the permits to be issued in the first year of the program, with the remaining two-thirds of the permits to be issued in the second year.

In order to comply with the 2-year deadline for issuing permits, Regions may want to impose a permit application due date between 6 and 12 months following the effective date of the program (by providing sources with a notice to that effect). Although Regions may notify sources that they will require applications before the 1 year statutory deadline, EPA does not have authority to require early applications to be submitted sooner than 6 months following the effective date of the program.

Sources Subject to the Program

There is one difference between the sources subject to part 70 permitting requirements and those sources in Indian Country that are expected to become subject to part 71. The rulemaking that deferred or exempted nonmajor sources subject to certain section 112 standards (i.e., standards for chromium electroplating and chromium anodizing tanks, ethylene oxide commercial sterilization and fumigation operations, perchloroethylene dry cleaning facilities, and secondary lead smelters) from part 70 permitting requirements inadvertently omitted a corresponding deferral or exemption for part 71 sources [June 3, 1996, 61 FR 27785]. The OAQPS is working on a technical amendment to this rulemaking so that there is consistency in how nonmajor sources are treated under parts 70 and 71. The correction should be made prior to the time that applications are required under the part 71 program.

In addition, there is an important distinction between part 70 and part 71 with respect to sources that seek to limit their potential to emit (PTE) in order to avoid being subject to permitting requirements. At present, there are no Federal or federally-approved Tribal mechanisms for establishing permanent enforceable PTE limits for sources located in Indian Country which would enable sources to avoid the requirement to obtain a title V permit. The EPA's transition policy on PTE limits (see John Seitz's memorandum entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," dated January 25, 1995) allows States the discretion to defer permitting requirements for sources with actual emissions of less than 50 percent of the relevant major source threshold, provided the sources keep

adequate records of actual emissions. This transition policy was originally scheduled to expire on January 25, 1997, but was extended to July 31, 1998 (see John Seitz's memorandum entitled "Extension of January 25, 1995 Potential to Emit Transition Policy," dated August 27, 1996). The EPA is considering a transition policy on PTE limits for sources within Indian Country that would otherwise become subject to part 71.

It is also important to note that many of the section 111 standards promulgated since July 21, 1992 have not addressed permitting requirements under title V and consequently have not deferred or exempted nonmajor sources subject to the standards from title V permitting requirements.

Outreach

A few Regions have already begun the process of identifying and making initial contact with sources in Indian Country that are expected to become subject to part 71, and have similarly contacted States to advise them of the part 71 program's impact. It is ultimately the responsibility of the source to submit an application to the proper permitting authority (regardless of whether contact is initiated by EPA). Once EPA's follow-up rulemaking is finalized, Regions should consider, to the extent practicable, publishing announcements in newspapers of general circulation within the geographic areas of the program, conferring with Tribal governments about the program prior to implementation, and sending letters to Tribal governments to provide notice of the effective date of the program [§71.4(g)].

The EPA has made contact with the Bureau of Indian Affairs (BIA) and the Solicitor's Office of the Department of Interior (DOI) to discuss the expected implementation of part 71 in Indian Country and to solicit their help in verifying descriptions of and identifying Tribal lands. The DOI's input will be useful to EPA's determinations about which sources are to be subject to the program. Your title V staffs have received memoranda that provide updates on the discussions with DOI, and they will be updated again when plans for cooperation and information sharing with the BIA and Solicitor's Office are complete.

Permit Fees

Like part 70, part 71 requires that fees from permitted sources be sufficient to cover program administration costs. As provided in §71.9(n), the original fee amount of \$32.00 per ton (of "regulated pollutants for fee calculation") was effective until December 31, 1996. Adjusted using the CPI index, the applicable fee will be \$33.78 per ton effective January 1, 1998.

After the second year of the program, EPA is required to review program costs to determine if fees need to be revised [§71.9(n)(2)].

Because of the need to keep fees in line with program costs, Regions should keep records of their costs of administering the program. The Operating Permits Group expects to issue guidance on which activities must be considered part 71 program costs, and has asked the Regions to identify other fee issues that should be clarified through guidance.

This fee amount does not cover the cost of permit revisions because when part 71 was finalized it was expected that the permit revision procedures in part 70 (and corresponding procedures for part 71) would be streamlined and altered dramatically in the future. Once this issue is resolved for part 70 and part 71, the cost of permit revisions under part 71 will be determined, and fee amounts will be adjusted accordingly.

While details regarding fee administration for the part 71 program have yet to be worked out, it is expected that part 71 sources will send fees to a "lock box" for processing and that the Region will be notified of receipt, so that permit applications can be processed. Guidance explaining this concept is forthcoming and has been discussed with your title V staffs. HQ will work with the Regional Offices to develop appropriate procedures.

Delegation of Part 71 Program to Tribes

Once the Tribal authority rule (TAR) is promulgated and effective, Regions may substantially lessen the burden of administering a part 71 program in Indian Country if the program is delegated to an eligible Tribe. A Tribe that seeks delegation would submit a formal request along with such other documentation as is necessary for EPA to determine that the Tribe has adequate legal authority and procedures to administer and enforce the portions of the part 71 program that are delegated [§71.10(a)]. Through publication of a notice in the Federal Register, EPA would notify the public that a delegation agreement has been signed [§71.10(b)]. The delegation procedures are discussed at 61 FR 34202, 34245 (July 1, 1996).

Only Tribes that are eligible for treatment in the same manner as States are eligible for delegation [§71.10(a)]. The delegation request can be processed contemporaneously with the request to be treated in the same manner as a State, under the procedures to be established in the TAR, pursuant to section 301(d) of the Act.

Funding for Delegated Programs

Funding of delegated programs is problematic because part 71 fees are not directly available for expenditure by EPA. As required by title V, part 71 fees will be sent to the U.S. Treasury. However, the part 71 rule creates an opportunity for delegate agencies to use their own fees to fund their part 71 efforts. When a Tribal agency takes delegation of the whole part 71 program and collects sufficient fees from title V sources (pursuant to Tribal law) to fund the delegated program activities, EPA does not need to collect part 71 fees [§71.9(c)(2)(ii)]. However, this option is not available when a Tribe receives a partial delegation.

For partially delegated programs, a Region may want to complete a notice and comment rulemaking for a Tribe that sets a unique part 71 fee, taking into account the Tribe's existing fee structure and the remaining implementation costs to EPA in running a partially delegated program. Regions may also want to explore the use of contracts as a means of funding delegated (full or partial) program activities. If you would like to explore these or other delegation issues, please contact Candace Carraway of my staff at (919) 541-3189.

Due to the breadth of topics affected by a part 71 program, I have established a team to deal with questions and issues. For further information on PTE limits for sources in Indian Country, please contact Scott Voorhees at (919) 541-5348. For further information on sources subject to part 71, contact Joanna Swanson at (919) 541-5282. For questions relating to other sections of this memorandum, contact Candace Carraway at (919) 541-3189. I am also available for consultation at (919) 541-0886, and I look forward to implementing this program with you.

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