ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 71

[FRL -]

Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates regulations setting forth EPA's approach for issuing Federal operating permits to covered stationary sources in Indian country, pursuant to title V of the Clean Air Act as amended in 1990 (CAA). Consistent with EPA's Indian Policy, the CAA authorizes the Agency to protect air quality in Indian country by administering a Federal operating permits program in areas lacking an EPA-approved or adequately administered operating permits program. Implementation of today's rule will benefit the environment by assuring that the benefits of title V, such as increased compliance and resulting decreases in emissions, extend to every part of Indian country. This action potentially applies to all industry sectors.

EFFECTIVE DATE: [insert date that is 30 days from publication].

ADDRESSES: Supporting information used in developing the promulgated rules is contained in Docket No. A-93-51. This

docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Candace Carraway (telephone 919-541-3189), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Information Transfer and Program Integration Division, Mail Drop 12, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Background Information Document. A background information document (BID) for the promulgated rule may be obtained from the docket. Please refer to the "Federal Operating Permits Program - Response to Comments." The BID contains a summary of the public comments made on the proposed Federal Operating Permits Program rule published on March 21, 1997 and the public comments made on the proposed Federal Operating Permits Program rule published on April 27, 1995 that pertain to the subject matter of this rulemaking, and EPA responses to the comments. Comments addressed in the preamble to this rule are generally not duplicated in the BID.

Regulated entities. Entities potentially regulated by this action are stationary sources that (1) are located in Indian country or an area for which EPA believes the Indian country status is in question;[1] and (2) are major sources, affected sources under title IV of the CAA (acid rain sources), solid waste incineration units required to obtain a permit under section 129 of the CAA, or sources subject to a standard under section 111 or 112 of the CAA except those area sources that have been exempted or deferred from title V permitting requirements. Regulated categories and entities include:

[1] The EPA believes that a few sources that are subject to title V requirements may be located in areas where, in the Agency's judgment, there is a bona fide question whether the area is Indian country within the meaning of 18 U.S.C. §1151 and as defined in this rule. As described more fully elsewhere in this preamble, EPA believes the objectives of the Act and protection of air quality will be more effectively served if EPA administers a part 71 program in such areas. Unless it is otherwise apparent from the context, when this preamble uses the term "Indian country," it is intended that the term also refer to areas for which EPA believes there is a bona fide question about whether the area is Indian country.

Category	Examples of regulated entities
Air pollution sources in all industry sectors located in Indian country	Major sources under title I, section 112, or section 302 of the CAA; affected sources under title IV of the CAA (acid rain sources); solid waste incineration units required to obtain a permit under section 129 of the CAA; sources subject to standards under section 111 or 112 of the CAA that are not area sources exempted or deferred from permitting requirements under title V.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in section 71.3(a) of the rule, the definition of "Indian country" in section 71.2 of the rule, and the provisions of section 71.4 of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding "FOR FURTHER INFORMATION CONTACT" section or the EPA Regional Office that is administering the part 71 permit program for the area in which the relevant source or facility is located.

Outline. The contents of today's preamble are listed in the following outline:

H. Executive Order 12875

I. Executive Order 13084

J. National Technology Transfer Advancement Act

I. Background of the Final Rule

Title V of the CAA as amended in 1990 (42 U.S.C. 7661 et seq.) requires that EPA develop regulations that set minimum standards for State operating permits programs. Those regulations, codified in part 70 of chapter I of title 40 of the Code of Federal Regulations, were promulgated on July 21, 1992 (57 FR 32250). Title V also requires that EPA promulgate, administer, and enforce a Federal operating permits program when a State does not submit an approvable program within the time frame set by title V or does not adequately administer and enforce its EPA-approved program. On April 27, 1995, EPA proposed regulations (60 FR 20804) (hereinafter "1995 proposal") setting forth the procedures and terms under which the Agency would administer a Federal operating permits program. The final rule was published on July 1, 1996 (61 FR 34202) and is codified at 40 CFR part 71. The regulations authorize EPA to issue permits when a State, local, or Tribal agency has not developed an approved program, has not adequately administered or enforced its approved operating permits program, or has not issued permits that comply with the applicable requirements of the Act.

Indian Tribes are not required to develop operating permits programs, though EPA encourages Tribes to do so. See, e.g., Indian Tribes: Air Quality Planning and Management, 63 FR 7253 (February 12, 1998)(hereinafter “Tribal Authority Rule”). The EPA expects that most Tribes will not develop title V operating permit programs, in part due to the resources required to develop such a program. Within Indian country, EPA believes it is generally appropriate that EPA promulgate, administer, and enforce a part 71 Federal operating permits program for stationary sources until Tribes receive approval to administer their own operating permits programs.

In the 1995 proposal, EPA stated its intention to implement part 71 programs to ensure coverage of Tribal areas which EPA proposed to define as "those lands over which an Indian Tribe has authority under the Clean Air Act to regulate air quality." The final part 71 rule did not include provisions relating to the boundaries of part 71 programs in Tribal areas because EPA planned to address these issues in a rule that specified provisions of the CAA for which EPA believes it is appropriate to treat Indian Tribes in the same manner as States, pursuant to section 301(d)(2) of the CAA. See 59 FR 43956 (August 25, 1994) ("Indian Tribes: Air Quality Planning and Management," hereinafter "proposed Tribal Authority Rule").

Subsequently, on March 21, 1997, EPA proposed a different approach to administering the part 71 program for areas of Indian country that are not covered by an approved State or Tribal part 70 program (hereinafter "1997 proposal"). See 62 FR 13748. In the 1997 proposal, EPA explained that the 1995 proposal's definition of "Tribal area" (i.e., the Indian lands where EPA would exercise authority to implement a Federal permit program) was inappropriate. The 1995 proposal was generally based on two aspects of the proposed Tribal Authority Rule: EPA's interpretation of Tribal jurisdiction under the CAA and the procedures by which Tribes could demonstrate jurisdiction to implement their own programs under the CAA. The approach of the 1995 proposal would have required Tribes to establish their jurisdiction over certain areas of Indian country before EPA could implement a Federal program for those areas. The EPA noted in the 1997 proposal that the approach of the 1995 proposal could create gaps in program coverage. The EPA believes it is more consistent with the CAA that EPA administer part 71 programs in Indian country without requiring any jurisdictional showing on the part of the Tribe. The Agency's authority under the CAA is not premised on Tribal authority. Furthermore, in proposing that EPA implement part 71 throughout Indian country, the 1997 proposal was consistent with the Agency's general policy of

administering environmental programs in Indian country until a Tribe assumes regulatory responsibility. See, e.g., EPA's 1984 Indian Policy ("Policy for the Administration of Environmental Programs on Indian Reservations," signed by William D. Ruckelshaus, Administrator of EPA, dated November 8, 1984), reaffirmed by EPA Administrator Browner in 1994 (memorandum entitled "EPA Indian Policy," signed by Carol M. Browner, Administrator of EPA, dated March 14, 1994); Underground Injection Control Programs for Certain Indian Lands, Final Rule, 53 F.R. 43096, 43097 (Oct. 25, 1988). The docket for today's rulemaking contains copies of these documents.

In the 1997 proposal, EPA proposed to interpret the CAA as authorizing EPA to protect air quality by directly implementing provisions of the CAA throughout Indian country. Further, the 1997 proposal stated EPA's belief that under the CAA, Congress intended to allow eligible Tribes to implement programs for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. In light of this territorial view of Tribal jurisdiction, other provisions of the CAA, and the legislative history, the proposal asserted EPA's belief that Congress preferred that implementation of the CAA in Indian country be carried out by either EPA or the Tribes. The

bases for this interpretation are discussed in detail in the 1997 proposal at 62 FR 13748, 13750; in section III.A of this preamble; in sections II.A and II.B of the preamble to the proposed Tribal Authority Rule at 59 FR 43956, 43958-61; and in section II.A of the preamble to the final Tribal Authority Rule at 63 FR 7254-7260.

Consistent with the Agency's interpretation of the CAA as described above, in the 1997 proposal, EPA proposed to implement the title V program even in areas of Indian country where a State previously may have been able to demonstrate jurisdiction. The EPA would not implement a part 71 program when a part 70 program has been explicitly approved by EPA for the area, unless such approval was later withdrawn. Under the 1997 proposal, where there was a "dispute" as to whether a particular area is Indian country, EPA would run the title V program in that area until the dispute was satisfactorily resolved. The proposal suggested that State or Tribal governments could submit to EPA sufficient information to demonstrate to EPA's satisfaction that a question exists about whether an area is Indian country.

In the 1997 proposal, EPA proposed to add a definition of the term "Indian country" as defined in 18 U.S.C. §1151. In addition, EPA proposed to delete the term "Tribal area" from the rule.[2] Consistent with the proposal's approach to implementing the title V program in Indian country, EPA proposed not to adopt regulatory language (from the 1995 proposal) that would have referred to Tribal assertions of jurisdiction. Instead, proposed section 71.4(b) would establish EPA's authority to administer the part 71 program within Indian country even where the Tribe had not demonstrated its jurisdiction over the area. Also, unlike the 1995 proposal, the 1997 proposal did not provide that EPA would solicit comments on the boundaries of the program through area-specific rulemakings or that governmental entities would be notified of the proposed boundaries. Rather, the issue of whether a specific source was subject to the part 71 program would be resolved in the context of permitting the source.

In the 1997 proposal, EPA stated that sources that are uncertain as to whether they are located in Indian country should confer with the appropriate Regional office, and that EPA would undertake outreach efforts to notify sources that

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[2] Note that the final 1996 rule did not adopt a definition of "Tribal area." The 1995 proposal contained a proposed definition for the term which EPA deferred adopting pending today's follow-up rulemaking.

the Agency believes would be subject to the program. The proposal stated that even sources that do not receive notification would be responsible for ascertaining whether they are located in Indian country. In the proposal, EPA solicited comments on what steps EPA should take to provide notice to sources that they are located in Indian country.

Finally, EPA proposed to clarify through a proposed revision to section 71.4(b) that EPA would administer the part 71 program throughout Indian country except where a part 70 program has been given full or interim approval.

II. Summary of Final Rule

The final rule establishes EPA's approach for issuing part 71 permits to sources in Indian country. The EPA will administer the part 71 program within Indian country unless a Tribal or State part 70 program has been explicitly approved for the area. The EPA will administer the program within Indian country even where a Tribe has not established its authority to regulate air resources within the same area. To assure that there are no gaps in title V coverage for sources in Indian country, EPA will also administer the part 71 program within areas for which EPA believes the Indian country status is in question, until EPA explicitly approves or extends approval of a State or Tribal program to cover the area.

The EPA will consult with Tribes, the Department of the Interior (DOI), States, and stakeholders as needed to assess whether sources are located in Indian country. The EPA will not conduct additional, separate notice and comment rulemakings, but will provide notice to State and local governments and Tribes each time it notifies sources that they are subject to the part 71 program.

Within a year of the effective date of the program (or some earlier deadline set by the EPA Regional Offices), sources that are subject to the program must submit a permit application. Sources that become subject to the program at a later date must submit permit applications within a year of becoming subject to the program.

Sources are responsible for ascertaining whether they are subject to the part 71 program. However, EPA will conduct outreach and provide notice to sources that it believes are subject to the part 71 program. Further, sources that are uncertain if they are located in an area covered by the program or that have other questions concerning whether they are subject to the program may informally consult with their EPA Regional Office or may formally request EPA to make an applicability determination. Submission of a formal request does not stay the permit application deadline. The EPA’s applicability determinations made pursuant to section 71.3(e) are final

Agency actions for judicial review purposes under CAA section 307(b). The EPA will publish notice of final permitting actions (including revision, issuance and denial of permits) in the Federal Register.

Sources that are subject to the program must pay permit fees, but EPA may reduce permit fees for sources that are located in areas for which EPA believes the Indian country status is in question and that have also paid permit fees to a State or local agency that has attempted to apply its EPA-approved part 70 program in the area. Sources that are explicitly determined to be located in Indian country are not eligible for a fee reduction.

Although EPA does not generally recognize State or local air regulations as being effective within Indian country for purposes of the CAA, today's rule does not address the validity of State and local law and regulations with respect to sources in Indian country or the authority of State and local agencies to regulate such sources for purposes other than the CAA. Rather, this rule describes the Agency's authority to administer the Federal Operating Permits Program and the Agency’s general position that State and local law do not affect the applicability of this program in Indian country.

The effective date of the part 71 program in Indian country is [insert date that is 30 days from publication.]

III. Major Issues Raised by Commenters

A. Scope of the Federal Program

Under today's rule, the part 71 program will be implemented throughout Indian country. The Federal program will apply except where a part 70 program has been explicitly approved by EPA to cover an area of Indian country. The EPA generally will implement the part 71 program even in areas of Indian country where a State may be able to demonstrate jurisdiction. As explained in detail in section III.A.2 below, EPA’s view of its authority is supported by CAA sections 301(d)(4) and 301(d)(2)(B) and several other provisions of the CAA as well as its legislative history.

1. Comments on the 1997 Proposal

The EPA received numerous comments regarding the scope of the Federal title V program for Indian lands. Several State and industry commenters assert that Indian country is not the appropriate scope for the part 71 rule and suggest alternatives to using Indian country. Several industry commenters believe that the Federal program should be limited to "Tribal areas" as proposed to be defined in the 1995 proposal. A State commenter believes "reservation lands" would be more consistent with the statute. Tribal commenters generally supported EPA’s approach of

implementing part 71 throughout Indian country in the absence of approved part 70 programs.

State and industry commenters assert that EPA does not have authority to implement the title V program throughout Indian country. Several State and industry commenters state that the 1997 proposal ignores State authority, particularly authority over non-Indian-owned fee lands (fee lands) within reservations. Citing several cases, including Montana v. United States, 450 U.S. 544 (1981), Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), and Strate v. A-1 Contractors, 117 S.Ct. 1404 (1997), these commenters assert that States may have authority over fee lands and that Tribes generally do not have authority over such lands. One State commenter believes that because States may have jurisdiction over fee lands, Federal jurisdiction must be determined on a case-by-case basis. Several State commenters believe that the language in CAA section 301(d)(2)(B) that Tribes may be treated in the same manner as States for reservations "or other areas within the Tribe's jurisdiction" means that Tribes must first make a jurisdictional showing before EPA may federally implement the CAA in Indian country. One State commenter asserts that the Indian country standard in the proposed rule is illogical in light of CAA section 301(d)(2)(B), coupled with the provision in CAA section 101

"that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."

Several State and industry commenters assert that EPA's authority to federally implement the title V program is limited to situations where a State fails to adopt or implement an adequate program. One industry commenter states that EPA's proposal to extend part 71 throughout Indian country conflicts with CAA sections 502(i) and 505, which specify those actions EPA may take to override a State's part 70 program and which limit EPA's authority to intervene in an approved State part 70 program. Several commenters assert that their States have not failed to adopt or adequately implement part 70 programs. Several State and industry commenters contend that State programs currently cover parts of Indian country, including non-Indian-owned lands within reservations. One State commenter believes that EPA's proposed interpretation of the CAA as generally authorizing EPA to implement the title V program even in areas of Indian country where a State may be able to demonstrate jurisdiction may conflict with CAA section 116, which the commenter believes establishes that the CAA is not to be implemented in derogation of State authority to regulate air quality.

Some State and industry commenters disagree with EPA's view, as described in the 1997 part 71 proposal and the then proposed Tribal Authority Rule, that Congress intended a territorial approach to Tribal jurisdiction for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. A Tribal commenter agrees with the view expressed by EPA in those proposals that Congress delegated authority to eligible Tribes to implement the CAA over all reservation sources. One industry commenter argues that EPA's interpretation that CAA section 301(d) expressed a Congressional preference for either Federal or Tribal implementation in Indian country is not correct and that EPA provided no reasonable basis in support of this interpretation of the CAA. One industry commenter states that there would not be a jurisdictional void if EPA administered the program for reservations and a State program is available for non-reservation areas of Indian country. Several industry commenters believe that there would be no gap in coverage if EPA allowed States to implement the title V program over non-Indian-owned lands within the reservation.

A number of State and industry commenters assert that EPA's approach of applying the Federal title V program throughout Indian country is not the most sensible way of

implementing the CAA. One industry commenter states that CAA section 301(d) gives EPA authority to allow States to provide title V permit coverage over fee lands within reservations and other non-Indian-owned lands in non-reservation areas of Indian country. This commenter states that nothing in the CAA prohibits States from implementing the CAA on non-Indian lands within reservations. One commenter believes EPA's approach creates a need to resolve jurisdictional questions even in cases where the Tribe may have no interest in pursuing jurisdiction. Several commenters state that EPA should allow facilities currently operating under a State part 70 program to continue unless the Tribe shows jurisdiction. Several industry commenters express concern that under the proposed approach they would have to comply with both State title V programs and EPA title V programs.

State and industry commenters believe there are policy reasons why EPA should allow States to implement the title V program in Indian country. Commenters assert that State, rather than EPA, implementation is more sensible because States have greater experience and resources and are physically closer to the regulated sources. These commenters also assert that State implementation of the title V program over non-Indian-owned lands within Indian country would make State-wide and interstate planning

easier, make State-wide regulation more uniform, and avoid piecemeal regulation over small tracts of land. One industry commenter asserts that EPA has not demonstrated that it has the resources to implement the title V program in Indian country. One industry commenter asserts that a cooperative approach involving State-Tribal cooperative agreements would be more effective than Federal implementation and EPA's approach seems to rule these out.

Some industry commenters believe there is too much uncertainty about the status of dependent Indian communities and other non-reservation categories of Indian country. Some commenters are concerned that under the Indian country standard, title V implementation might shift among regulators depending on land ownership.

Finally, several State and industry commenters believe that States should implement the title V program in areas where the Indian country status is in question. These commenters assert that State implementation would be more efficient and avoid confusion, delay, and unnecessary expense for permittees. One commenter asserts that no environmental benefit would be derived from requiring facilities operating under an approved State part 70 program to obtain a Federal part 71 permit while jurisdiction is being resolved.

2. Description of Final Rule and EPA's Response to Comments

Under today's final rule, the Federal title V permitting program will apply throughout Indian country except where a part 70 program has been explicitly approved by EPA to cover an area of Indian country. The EPA's implementation in these areas will continue until EPA explicitly approves or extends approval of a part 70 program covering an area of Indian country. The Federal program will also apply in areas for which EPA believes the Indian country status is in question.

The CAA provides EPA with the authority to run the title V program in Indian country. In light of the statutory language in CAA sections 101(b)(1), 301(a), 301(d)(2)(B), and 301(d)(4) as well as the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to directly implement title V programs throughout Indian country and in areas for which EPA believes the Indian country status is in question. See generally, Chevron U.S.A., Inc. V. NRDC, 467 U.S. 837, 842-45 (1984). This interpretation of EPA's authority under the CAA is based in part on the general purpose of the CAA, which is national in scope. As stated in CAA section 101(b)(1), Congress intended to "protect and enhance the quality of the Nation's air resources so as to promote the

public health and welfare and the productive capacity of its population" (emphasis added). Congress intended for the CAA to be a general statute applying to all persons, including those within Indian country. See Phillips Petroleum Co. v. EPA, 803 F.2d 545, 553-558 (10th Cir. 1986) (holding that the Safe Drinking Water Act applied to Indian Tribes and lands by virtue of being a nationally applicable statute).

The CAA section 301(a) provides EPA broad authority to issue regulations that are necessary to carry out the functions of the CAA. Moreover, several provisions of the CAA call for a Federal program where, for example, a State fails to adopt a program, adopts an inadequate program, or fails to adequately implement a required program. See, e.g., CAA sections 110(c)(1), 502(d)(3), and 502(i)(4). These provisions exist in part to ensure that whether or not local governments choose to participate in implementing the CAA, the purposes of the CAA will be furthered throughout the Nation. Especially in light of the problems associated with transport of air pollution across State and Tribal boundaries, it follows that Congress intended that EPA also would have the authority to operate a Federal program in instances when Tribes choose not to develop a program, do not adopt an approvable program, or fail to adequately implement an air program authorized under CAA section 301(d). Read in the context of the CAA as a whole, these

provisions authorize EPA to implement the CAA in Indian country, without limiting EPA's authority to areas for which Tribes have made a jurisdictional showing.

This interpretation is most evident from Congress' grant of authority to EPA under CAA section 301(d)(4). Section 301(d)(4) authorizes the Administrator to directly administer provisions of the CAA so as to achieve the appropriate purpose, where Tribal implementation of those provisions is inappropriate or administratively infeasible. EPA has determined that it is inappropriate to subject Tribes to the deadlines and sanctions provisions of title V. See 40 CFR §49.4(h) and (i). That determination triggers EPA's 301(d)(4) authority to administer the part 71 program for areas over which a Tribe may potentially receive CAA program approval. As noted in the final Tribal Authority Rule, EPA interprets the CAA as establishing a territorial approach to CAA implementation within Indian reservations by delegating to eligible Tribes CAA authority over all reservation sources without differentiating among the various categories of on-reservation lands. 63 FR 7253-7258. In addition, the CAA authorizes Tribes to implement CAA programs in non-reservation areas over which a Tribe has jurisdiction, generally including all areas of Indian country. Id. at 7258-7259.

Under CAA section 301(d)(4), Congress authorized EPA to maintain the territorial approach by implementing the CAA throughout Indian reservations in the absence of an EPA-approved Tribal program. The EPA believes that Congress authorized the Agency, consistent with EPA's Indian Policy, to avoid the checkerboarding of reservations based on land ownership by federally implementing the CAA over all reservation sources in the absence of an EPA-approved Tribal program. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989)(implementation of the CAA to be in a manner consistent with EPA's Indian Policy). In addition, section 301(d)(4) authorizes the Agency to implement the CAA in non-reservation areas of Indian country in order to fill any gap in program coverage and to ensure an efficient and effective transition to Tribal programs.

The EPA's interpretation of CAA section 301(d) as authorizing EPA implementation throughout Indian country is also supported by the legislative history. S. Rep. No. 228, 101st Cong., 1st Sess. 80 (1989) (noting that CAA section 301(d) authorizes EPA to implement CAA provisions throughout "Indian country" where there is no Tribal program); Id. at 80 (noting that criminal sanctions are to be levied by EPA, "consistent with the Federal government's general authority in Indian Country"); Id. at 79 (the purpose of section 301(d) is to "improve the environmental quality of the air

wit[h]in Indian country in a manner consistent with the EPA Indian Policy").

The EPA believes that it can implement the title V program in Indian country without first finding that a State has failed to submit a program or that a State's program is inadequate. As noted above, CAA section 301(d)(4) authorizes EPA to implement the CAA throughout Indian country and does not require a finding of failure to submit or inadequacy. No provision in the CAA prohibits EPA from implementing the CAA in Indian country absent a finding of failure to submit or inadequacy. In fact, CAA section 502(d)(3) requires EPA, by November 15, 1995, to promulgate, administer and enforce a title V program where "a program meeting the requirements of this subchapter has not been approved in whole for any State." This provision is not conditioned upon EPA making a failure to submit or inadequacy determination. While EPA’s final Tribal Authority Rule makes the November 15, 1995 deadline inapplicable in the context of Tribal implementation of the CAA, EPA remains under an obligation to implement title V in Indian country. See 63 FR at 7264-65.

Furthermore, Congress could not have intended that EPA must make an inadequacy or failure to submit determination before EPA could implement the CAA in Indian country because States generally lack authority over Indians in Indian

country. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In addition, such a determination by EPA may result in the application of sanctions against States; it would be nonsensical to punish States where they lack authority over Indian country since States are powerless to remedy such a "deficiency."

In response to comments that some States may have authority over non-Indian activities on reservation fee lands, EPA believes that in the context of regulating air pollution, States generally will not have jurisdiction over these lands. See 63 FR at 7256-7257; 53 FR 43080 (Oct. 25, 1988)(notice of denial of Washington department of Ecology UIC Program for Indian lands). Furthermore, as discussed above, EPA interprets the CAA as favoring unitary management of reservation air resources and delegating Federal authority to eligible Tribes to implement the CAA over all sources within reservations, including non-Indian sources on fee lands. Accordingly, even if a State could demonstrate authority over non-Indian sources on fee lands, EPA believes that the CAA generally provides the Agency the discretion to federally implement the CAA over all reservation sources in order to ensure an efficient and effective transition to Tribal CAA programs and to avoid the administratively undesirable checkerboarding of reservations based on land ownership.

Federal implementation of the title V program does not conflict with CAA sections 101 or 116. Neither of these provisions extends State jurisdiction into Indian country where it does not already exist. See Washington Department of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985). The provision of section 101(a) cited by the commenter only expresses the general view that air pollution regulation is the primary responsibility of the States and localities. Congress has made it clear that for reservations and for non-reservation areas over which Tribes can demonstrate jurisdiction (generally including all non-reservation areas of Indian country), Tribes are the entities with primary responsibility to regulate air quality. See CAA section 301(d); S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989). EPA's implementation of the CAA where Tribes have yet to develop approvable programs is consistent with section 101(a). Furthermore, the approach finalized today does not conflict with section 116. Section 116 provides that the CAA does not preclude or deny the right of any State to adopt or enforce any standard or limitation respecting emissions of air pollutants or any requirement respecting control or abatement of air pollution. Broadly speaking, section 116 reserves to the States the right to set State emission standards and limitations that are more stringent than and/or in addition to Federal requirements. Section

116 does not preclude EPA from implementing CAA programs. As discussed in detail in section III.B below, this rule only addresses Federal implementation of the CAA. For purposes of this rulemaking, EPA does not believe it is necessary to resolve whether States are precluded from regulating air resources in Indian country solely under color of State law or whether the reservation of rights embodied in section 116 extends to Indian country in some cases.

The EPA shares the concerns expressed by commenters about fair, efficient, and effective implementation of the CAA. In finalizing this rule, EPA sought to weigh and balance several objectives including: avoiding gaps in title V coverage; minimizing jurisdictional disputes; allowing for a smooth transition to Tribal programs; avoiding checker-boarding of reservations; protecting Tribal sovereignty; minimizing uncertainty, delay, and expense for the regulated community; and maximizing efficient use of government expertise and resources. The EPA believes the approach finalized today best ensures that the CAA is implemented fairly, efficiently, and effectively in Indian country. See Washington Department of Ecology, 752 F.2d 1465 (9th Cir. 1985).

The EPA disagrees with commenters who assert that there are policy reasons that should compel EPA to allow States to

implement the title V program over Indian country lands, including non-Indian-owned fee lands within Indian reservations. One of EPA's primary policy objectives is to avoid gaps in title V coverage. This objective is not served by allowing States that generally lack authority to regulate air sources in Indian country, including non-Indian lands, to issue permits that may not be enforceable under Federal law. In addition, EPA does not believe the Agency has the authority to approve a State program in Indian country unless the State can demonstrate that it has authority over Indian country sources.

The EPA's approach also advances the important policies of administrative clarity in the operation of the regulatory program, effective and efficient environmental management, and support of Tribal self-determination. Today's rule makes it clear that from the first day of the program in Indian country, EPA would be the relevant permitting authority for sources located in Indian country, until a part 70 program is explicitly approved for the area. Except in rare cases, sources would be spared the delay and confusion caused by States attempting to construct and support CAA jurisdictional demonstrations over Indian country. Further, EPA has sufficient resources to implement the program in Indian country. Today's rule also avoids checkerboarding of regulatory authority within reservations.

As stated above, EPA believes that Congress intended that EPA take a territorial view of implementing air programs within reservations. The EPA believes that air quality planning for a checkerboarded area would be more difficult and that it would be inefficient if a Tribe and a State were to exercise piecemeal regulation over tracts of land within a reservation, possibly with similar reservation sources being subject to different substantive requirements. EPA's policy provides for coherent and consistent environmental regulation within reservations.

Today's rule also supports and preserves Tribal sovereignty through Federal implementation of the program until Tribes are delegated authority pursuant to the Tribal Authority Rule to regulate all air sources within their reservations. Consistent with EPA's Indian Policy, EPA generally will implement the program in Indian country until Tribal governments are willing and able to assume full responsibility for CAA programs. See EPA Indian Policy, reaffirmed by Administrator Browner on March 14, 1994.

Today's rulemaking will allow for a smooth transition to Tribal implementation of title V programs. Apart from the question of whether States could even demonstrate CAA jurisdiction in Indian country, if EPA were to allow States to administer the program within reservations until Tribal programs were approved, EPA would need to complete two

rounds of notice and comment rulemaking before taking a third round of rulemaking to approve the Tribal program. The first would be to explicitly approve State programs as covering reservations, and the second would be to subsequently withdraw program approvals for the same areas. This approach would be unwieldy as well as inconsistent with the Agency's interpretation of the CAA. Further, EPA believes that there would be less conflict between States and Tribes that administer title V programs if there was not a period of State administration. The EPA, nevertheless, strongly encourages Tribal and State cooperation in the development of Tribal part 70 programs through sharing technical expertise as well as information about sources and air quality issues. With the Agency's increasing emphasis on regional solutions to air quality issues, EPA supports Tribal and State efforts to jointly plan air protection strategies. The EPA believes the most supportive environment for collaborative efforts is one in which Tribes and States are not adversaries on the issue of who has jurisdiction to administer the title V program.

The EPA understands the strong desire expressed by industry commenters to avoid having several regulating entities, e.g., EPA, a State, and a Tribe, seeking to assert regulatory authority over them. The EPA believes that Federal implementation of the title V program throughout

Indian country will help provide certainty and clarity to regulated entities. While in some cases application of the Indian country standard may involve a detailed, case-specific analysis, the standard provides certainty. For example, Indian country clearly includes all lands within Indian reservations, including fee lands. The EPA believes that the vast majority of Indian country sources that are subject to the part 71 program are located within reservations. Therefore, it will be clear to most Indian country sources that they are subject to the part 71 program. In addition, there is a well-developed body of Federal case law on the Indian country standard, including case law on the status of reservations, dependent Indian communities, and allotments.

To provide additional certainty to regulated entities, EPA believes it is helpful to clarify the extent to which State title V programs have force in Indian country. The EPA makes clear today that the Agency interprets past approvals of State title V programs as not extending to Indian country unless that State has made an explicit demonstration of jurisdiction over Indian country, and EPA has explicitly approved the State's title V program for such area. This is consistent with Congress' requirement that EPA approve State and Tribal programs only where there is a demonstration of adequate authority. See CAA sections

502(b)(5)(A) and (E) and 40 CFR 70.4(b)(3).[3] Since States generally lack the authority to regulate air resources in Indian country, EPA does not believe it would be appropriate for the Agency to approve State CAA programs as covering Indian country where there has not been an explicit demonstration of adequate jurisdiction and where EPA has not explicitly indicated its intent to approve the State program for an area of Indian country. Thus, to the extent States or others may have interpreted past EPA approvals that were not based on explicit demonstrations of adequate authority and did not explicitly grant approval in Indian country, as

[3] To obtain title V program approval, a State must demonstrate that it has adequate authority to issue and enforce permits that assure compliance by all sources required to have permits under title V with each applicable requirement under the CAA. See CAA sections 502(b)(5)(A) and (E); 40 CFR 70.4(b)(3). The program submission must include a legal opinion from the Attorney General from the State or the attorney for those State, local, or interstate air pollution control agencies that have independent counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific statutes, administrative regulations, and where appropriate, judicial decisions that demonstrate adequate authority (40 CFR 70.4(b)(3)).

approvals to operate part 70 programs in Indian country, EPA wishes to clarify any such misunderstanding.[4]

In State program approvals, EPA generally did not find that States had demonstrated authority to regulate sources in Indian country pursuant to part 70 programs. Although the language of program approvals on this issue varied, approvals of State programs typically excluded areas over which a Tribe has jurisdiction. Except where expressly noted, at the time EPA issued part 70 approvals, EPA did not find that the States whose programs were subject to the approvals had made an adequate showing of authority pursuant to CAA sections 502(b)(5)(A) and (E) to justify approval of their programs in Indian country.

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[4] On May 15, 1998, the State of Colorado Department of Law, Office of the Attorney General, submitted a document entitled "Supplemental Attorney General Opinion - Title V Program" to the Regional Administrator of EPA Region VIII. This document requests that EPA extend approval of Colorado's interim approved title V program (60 FR 4563, January 24, 1995) to cover non-member-owned sources located on fee lands within the exterior boundaries of the Southern Ute Reservation. Colorado asserts that its request is supported by Public Law 98-290. Colorado did not submit the request as a comment on the proposed revisions to part 71 that are the subject of today's rulemaking. The EPA will respond to Colorado's request in a separate proceeding in accordance with the part 70 provisions governing EPA review of submitted programs. Today's rulemaking does not constitute an EPA final action in response to Colorado's request and does not prejudge EPA's consideration of Colorado's request in any way.

In the 1997 proposal, EPA proposed to implement the program where there is a "dispute" as to whether a particular area is Indian country. However, EPA now believes the use of the term "dispute" may be misleading and inappropriate. For purposes of this rule, there may be, but need not be, a formal dispute, such as active litigation or other form of public disagreement, for EPA to consider the Indian country status of the area to be in question. Further, although it may be helpful for States and Tribes to submit information to EPA relative to their views, this information would not necessarily be dispositive as to EPA's judgment about whether the Indian country status of the area is in question. The EPA may be aware of questions regarding the area's status based on information from other sources such as the Department of the Interior (DOI) or other Federal agencies. Also, EPA emphasizes that EPA will not consider there to be a question about the status of areas that are clearly within the boundaries of an Indian reservation.

The EPA's decision to implement the program in areas for which EPA believes there is a question of whether the area is Indian country will help achieve a number of important objectives. Federal implementation in such areas will ensure no gap in title V coverage. If it is unclear whether a Tribe or a State has authority over an area, EPA

can ensure that the title V program has legal effect by implementing the program federally. See Underground Injection Control Programs for Certain Indian Lands, Final Rule, 53 F.R. 43096, 43097 (Oct. 25, 1988) (observing that where there is a dispute, both States and Tribes may disagree with each other's assertions of jurisdiction, thereby raising doubts as to whether either has enforcement authority over the area's sources).

The EPA notes that disputes and uncertainty could prevent both the State and Tribe from effectively implementing the CAA title V program. Where a State and Tribe assert jurisdiction over an area whose Indian country status EPA believes is in question (and EPA has not resolved the question and has not explicitly approved a part 70 program as applying in the area), EPA would not view either the State or the Tribe as having satisfied the CAA section 502(b)(5) requirements to have adequate authority to issue permits that assure compliance with all CAA applicable requirements, and enforce such permits, with respect to the area. See 42 U.S.C. 7661a(b)(5)(A)-(E). Only when the State or Tribe prevails on the Indian country question would EPA then be able to conclude that the section 502(b)(5) requirements have been met for the area. Until that time, the absence of an approved part 70 program in the area necessitates implementation of part 71. By federally

implementing the title V program in areas for which EPA believes the Indian country status is in question, EPA can help avoid jurisdictional disputes that might hinder effective implementation of the CAA. Furthermore, Federal implementation in such areas will help provide the regulated community with certainty as to which entity (EPA, the State or the Tribe) will implement the title V program.

In addition, as discussed in detail below, EPA is providing a mechanism under this rule that will allow regulated entities to formally seek a determination from EPA as to whether or not they are covered by the part 71 program. This mechanism will help provide certainty and minimize delay and expense for regulated entities.

Finally, EPA recognizes that, compared to States, the Agency has different expertise, and generally expends fewer resources for direct implementation of the CAA than for establishing national programs and conducting oversight. However, EPA notes that it has substantial experience with developing title V regulations and nationally-applicable standards, issuing Prevention of Significant Deterioration (PSD) and acid rain permits to sources in Indian country, providing oversight of State title V and other CAA programs, and reviewing State-issued title V permits. The EPA has the expertise and is committed to ensuring that the CAA is fully implemented in Indian country. In the preamble to the final

Tribal Authority Rule, EPA outlines its strategy for full implementation of the CAA in Indian country. A short summary of the strategy is included in section III.B below.

The EPA notes that the approach finalized today is not intended to preclude cooperative approaches between States and Tribes. To the contrary, Tribes and States are permitted and encouraged to cooperate in the implementation of the title V program, including by sharing financial and technical resources and expertise.

B. Effect of State Law

Several commenters request that EPA clarify the effect of the part 71 program on permits issued under State law. In general, State and industry commenters argue that the Federal operating permits program should not alter either the authority of States to regulate non-Indian sources operating on fee lands within reservations or the validity of permits issued to sources in Indian country under State law. Several commenters ask EPA to agree that a facility located in Indian country operating under a permit issued by a State agency which purports to limit the facility's potential to emit (PTE) to below the part 71 applicability emission thresholds is a "synthetic minor" source that does not need to obtain a Federal operating permit.

As EPA stated in the 1997 proposal, EPA believes that

CAA section 301(d)(2) clearly reflects Congress' decision to grant to eligible Tribes the authority to administer programs over all air resources within the exterior boundaries of a reservation and within areas outside of the reservation that are within a Tribe's jurisdiction. Until a Tribal program is approved, EPA believes that it should manage air quality in those areas for the reasons discussed in section III.A above. Consistent with this preference and the territorial approach favored by Congress, it follows that under EPA's approach to implementation of the CAA, State or local programs do not affect the applicability of Federal Clean Air Act requirements to sources in Indian country unless the programs are explicitly approved by EPA under the CAA as applying within Indian country. Where such approval is lacking, EPA will implement the CAA in Indian country except where a Tribal program is approved. It is EPA's position that unless EPA has explicitly approved the program as applying in Indian country, State or local permits for sources in Indian country (and limitations in such permits) are not effective for purposes of limiting PTE of sources such that they are not covered by the part 71 program, or for any other purpose under the CAA. The EPA is not taking a position in this rulemaking on whether State laws regulating air resources have effect in Indian country outside of the context of the CAA.

The EPA also notes that its decisions on whether States have demonstrated authority in Indian country have already been made in approvals of individual State part 70 programs. Where States have not demonstrated authority in Indian country, EPA has limited the scope of its approval of the State program accordingly. The fact that a source has applied for or obtained a permit from a State or local program that has not been explicitly recognized by EPA as extending into Indian country but which purports to limit the PTE of the source does not alter the requirement under part 71 that the source apply to EPA for a Federal operating permit. The EPA expects all sources that meet the applicability criteria of part 71 to apply to the appropriate EPA Regional Office for a Federal operating permit.

Sources located in Indian country are already subject to applicable Federal CAA programs, such as the PSD program, New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP) issued under sections 111, 112, and 129 of the CAA, the acid rain program under title IV of the CAA, and requirements of title VI of the CAA. Nonetheless, EPA is aware that in the short term, some of the estimated 100 part 71 sources in Indian country will not be subject to substantive requirements that control their emissions. The EPA has a

number of efforts underway on dual tracks to remedy this situation as part of the Agency's initiative to develop a comprehensive strategy for implementing the CAA in Indian country. This approach relies both on the development of Tribal air programs that will establish substantive control requirements and on EPA's direct implementation of new Federal requirements.

For the first track, EPA has been providing technical and financial assistance to Tribal governments to build Tribal capacity to run EPA-approved CAA permits programs and other CAA programs. For example, the Agency is working with both the Shoshone-Bannock and the Navajo Tribes to address pollution control of major sources on their reservations.

In terms of Federal implementation, EPA will establish priorities for its direct Federal implementation activities by addressing as its highest priority the most serious threats to public health and the environment in Indian country that are not otherwise being adequately addressed.

The EPA is in the process of developing a regulatory program for preconstruction review of minor sources that will establish, where appropriate, control requirements for sources that would be incorporated into part 71 permits. EPA anticipates that the program will offer sources located in Indian country the opportunity to accept enforceable limits on their PTE, and possibly thereby avoid the

requirement to obtain a part 71 operating permit or a pre-construction permit under the PSD program. The EPA is also working on nationally applicable regulations for major source preconstruction permitting in non-attainment areas that would apply to sources in Indian country.

To establish additional applicable, federally-enforceable emission limits, the EPA Regional Offices will promulgate Federal implementation plans that will establish Federal requirements for sources in specific areas, where appropriate. The Regional Offices will carry out this process in a prioritized manner without unreasonable delay, beginning with facilities that pose the greatest threat to public health or the environment and in instances where the Tribal government raises important considerations.

Further, EPA plans to extend its January 25, 1995 transition policy for PTE limits to sources located in Indian country where they maintain emissions of less than 50 percent of all applicable major source emissions thresholds. Under this policy, sources located in Indian country that meet the criteria and record keeping requirements outlined in the policy memorandum would not be considered major sources for purposes of the part 71 program for an interim period until EPA or a Tribe adopts and implements a mechanism that can be used to limit a source’s PTE. This policy will ensure that early implementation of

the part 71 program can focus attention on creating high-quality permits and Federal implementation plans for higher-emitting part 71 major sources.

C. Determining Whether Sources Are Subject to the Federal Program

The discussion below explains how EPA will decide in particular cases whether sources are located in Indian country and communicate to sources that they are expected to submit permit applications to their appropriate EPA Regional Office. The approach adopted in today's rule is essentially the one contained in the March 1997 proposal. In addition, today's rule establishes procedures for sources to obtain individual determinations from EPA as to whether they are subject to the program. Like the permitting procedures themselves, however, these procedures are not intended to provide a forum in which the Agency is required to resolve all questions about whether an area is Indian country. Moreover, a source owner or operator's decision to request that the Agency make an applicability determination will not stay the effectiveness of the part 71 program for the source.

1. The 1995 Proposal

Under the 1995 proposal, 90 days prior to the effective date of any Federal part 71 program in a "Tribal area," EPA would have notified interested governmental entities of the

proposed geographic scope of the Federal program. Where the program would solely address sources within a reservation, the notice would have specified the boundaries of the reservation. But where the program would cover off-reservation areas, the notice would have relied upon the Tribe's basis for asserting jurisdiction. Governmental entities would have had 15 days in which to submit written comments to EPA regarding any disagreement concerning the boundaries of the reservation, with up to an additional 15 days to comment regarding disagreements about off-reservation areas over which the Tribe had claimed jurisdiction. The EPA would then have decided the scope of the Tribe's jurisdiction. Where disputes were not resolved, EPA would have implemented part 71 in areas that were not subject to competing jurisdictional claims. Final determinations of the scope of Tribal jurisdiction would have been published in the Federal Register at least 30 days prior to the effective date of the part 71 program in the "Tribal area." See proposed section 71.4(b)(1)(I)-(vi), 60 FR 20804, 20831-32 (April 27, 1995). These provisions were not adopted in the July 1996 final rule which announced that EPA would revisit in a subsequent notice the issue of how EPA would make decisions regarding whether sources are located in Indian country and are subject to the program.

2. The 1997 Proposal

The 1997 proposal, in order to be more consistent with EPA's general policy on implementing environmental programs in Indian country, proposed that EPA would not conduct area-specific rulemaking procedures to assess the boundaries of programs in Indian country. (See, e.g., 40 CFR 144.3, 147.60(a) regarding EPA implementation of UIC programs on "Indian lands," defined equivalently to "Indian country.") Instead, EPA's action to establish part 71 in Indian country would occur through today's generally applicable national rulemaking. Specific "boundary" questions relating to applicability of the program to particular sources would be addressed through a less formal consultation process involving, as appropriate, DOI, Tribes, States and relevant stakeholders. Rather than requiring the Agency to notify interested governmental entities of the proposed geographic scope of programs, EPA would make case-specific determinations on whether particular sources are in Indian country. Prior to the effective date of the part 71 program, EPA would undertake similar kinds of outreach efforts as those taken by States and local governments under part 70 programs, notifying sources that the Agency believed were subject to the program. In addition, under section 71.4(g), EPA would publish an informational notice of the effective date of the part 71 program for sources in Indian

country. Finally, EPA proposed that in cases of disagreement about whether an area is Indian country, EPA would administer part 71 in the area pending resolution of the area's Indian country status, and would, to the extent possible, resolve such issues in the context of permitting sources. See 62 FR 13748, 13750-51 (March 21, 1997).

3. Comments on the 1997 Proposal

The EPA received numerous comments regarding the way the 1997 proposal addressed how EPA would determine whether sources are subject to the Federal program. In general, State and local government regulatory agencies and industry commenters favor requiring individual notice and comment rulemaking procedures to establish the geographic boundaries of each area where the Federal program applies, and prefer the approach discussed in the 1995 proposal or procedures similar to it. These commenters argue that the boundaries of Federal programs should be set through case-by-case notice and comment procedures and ascertained with geographical certainty before establishing programs, in order to avoid imposing inappropriate costs and undermining clarity and certainty for sources. Some argue that EPA's planned reliance on Bureau of Indian Affairs (BIA) maps is misplaced due to the alleged inaccuracy of this information. These commenters suggest that the determination of geographic boundaries is a contested, fact-specific inquiry

that requires notification of appropriate governmental entities, sources and the relevant public. They assert that the rule should provide for delay of implementation until such questions are resolved. Without this, the commenters argue, EPA would produce poor jurisdictional decisions and frustrate title V's goals of clarity and certainty for sources.

These commenters also believe that at the time EPA notifies sources that they are subject to part 71, EPA should also notify relevant States who may already be attempting to regulate these sources. They assert that because of the perceived ambiguity concerning the scope of Tribal or EPA authority under the CAA, many States may be implementing title V in areas where EPA would consider them not to have jurisdiction. This means that States need to be aware of jurisdictional issues so that they can work with EPA and Tribes to resolve jurisdictional questions without leaving the regulated sources caught in uncertainty and having unintended fiscal impacts on States to which sources have paid title V fees.

Several State and industry commenters believe that EPA should return to the 1995 proposed rule's approach of requiring Tribes to demonstrate jurisdiction before EPA would implement part 71 in off-reservation areas. These commenters argue that the only clear boundaries in Indian

country are recognized reservation boundaries. They also contend that if Tribes claim jurisdiction beyond the reservation, they must provide the factual and legal basis for their inherent authority over such resources with clarity and precision before the Tribe, and hence EPA, can regulate them. One such commenter argues that this approach is required by the language of CAA section 301(d)(2)(B). Another argues that the shift of jurisdictional proof to States regarding non-reservation trust lands results in EPA presuming jurisdiction where none may exist. Another commenter asserts that this result, as opposed to the approach of the 1995 proposal, is inappropriate in light of the long history of competing jurisdictional claims concerning current and former Indian lands.

Some commenters believe that placing the burden on the source to assess whether it is in Indian country is unfair, given the uncertainties and the costs of applying for permits, and that it will therefore be difficult for sources to determine whether they are subject to the part 71 program or the corresponding State part 70 program. Other commenters argue that sources who mistakenly apply for State part 70 permits, rather than Federal part 71 permits, should not be subject to liability; furthermore, their part 70 permits should be deemed valid part 71 permits until the time for permit renewal, at least where EPA’s initial

determinations of geographic borders are later found to be incorrect.

As discussed in Section III.A above, many State and industry commenters contend that EPA should run part 71 in areas where the Indian country status is in question only if the State has not attempted to apply its part 70 program there. These commenters argue that this would allow State part 70 programs to be used to resolve jurisdictional questions in the permitting process, would avoid situations where permitting responsibility shifts back to the State if the State prevails in its jurisdictional claim, and would leave the "status quo" in place until a Tribe successfully demonstrates jurisdiction in the area. Moreover, these commenters assert that the regulation should specify the guidelines EPA will use to review and settle questions regarding an area's Indian country status. Due to EPA's trust responsibility toward Indian Tribes, these commenters believe that EPA may not be able to act as an impartial judge in resolving jurisdictional questions. The commenters argue that since EPA has limited expertise in defining the scope of Indian country, the method EPA develops should afford ample time for States and sources to receive notice and present all necessary information before the Agency makes a jurisdictional decision.

Finally, Tribal commenters generally support the 1997 proposal and suggest that States and sources should not have difficulty in discerning the boundaries of Indian reservations, which are delineated on updated BIA maps. Tribes also suggest that EPA could use Tribes to give notice to sources on reservations, and that this, in combination with publication of a general notice of the effectiveness of part 71 in Indian country pursuant to section 71.4(g), would provide sufficient notice to sources that they need to submit Federal permit applications to EPA.

4. EPA's Responses and Description of Final Rule

In most cases, determining whether sources are located within Indian country will be straightforward and non-controversial. That is, in the majority of cases EPA and sources will be able to easily determine whether a source is located within the exterior boundaries of a reservation or on land that a court or DOI has said is Indian country (which could include dependent Indian communities). These assessments can be verified through consultation with DOI and will be informed by data and materials received from States, surveys, DOI and Tribes. In the rarer, more complex factual cases such as those involving pending diminishment issues and dependent Indian community issues, EPA in appropriate cases will work with DOI, Tribes and

stakeholders (e.g., States, local governments, sources, and environmental organizations) to assess whether sources are located in Indian country or areas for which EPA believes the Indian country status is in question. After EPA has reviewed the relevant materials, the Agency will send letters to sources that EPA believes are located in such areas or in Indian country, indicating that they are expected to submit a Federal title V permit application within one year of the program's effective date (or some earlier time as established by the EPA Regional Office). Copies of these notices will be sent to interested State, local and Tribal governments. However, if EPA fails to notify some sources that are subject to the program, note that it is the source's responsibility to ascertain whether it is subject to part 71 and submit any required permit application. The addition in today's rule of provisions allowing sources to request that EPA answer applicability questions is designed to make it easier for sources to meet this responsibility and essentially can be used to partly shift the burden of accurately determining program applicability from the source to EPA.

As a result of today's national rulemaking establishing the part 71 program throughout Indian country, and in light of the process discussed above, EPA has decided that it would be administratively unnecessary and infeasible to

conduct additional iterative notice and comment rulemakings for each case in which EPA is discerning whether particular sources or areas fall within the geographic boundaries of Indian country. Under other Federal environmental programs, the Agency has taken the same basic approach as is being adopted today and has not made individual determinations of the boundaries of Indian country through case-specific rulemaking actions, beyond generally identifying the area of Indian country in which the Federal program was being established. See, e.g., Underground Injection Programs for Certain Indian Lands, Final Rule, 53 FR 43096 (Oct. 25, 1988).

Since EPA takes the position that State and local part 70 programs do not, for CAA purposes, extend into Indian country unless the Agency has explicitly approved the programs as extending into Indian country, EPA does not generally expect that sources located in Indian country will be confused about whether they are covered by a State part 70 or EPA part 71 Clean Air Act program. This is especially true for sources located in Indian country that are already covered by EPA-administered PSD plans under title I or acid rain programs under title IV of the CAA. States should be fully aware of whether EPA has explicitly approved their part 70 programs as applying in Indian country.

In addition, EPA is adding certain provisions to today's final rule that will make it easier for sources to learn whether they are subject to the Federal program, and that may reduce the expense of the program for some sources that have paid permit fees to a State agency. Finally, in response to the comments, EPA will notify relevant State, local, and Tribal governments at the same time the Agency notifies individual sources that they are subject to the Federal program.

The EPA does not agree with State and industry commenters that the 1995 proposal took the correct approach of requiring Tribes to demonstrate jurisdiction in off-reservation areas before EPA's Federal jurisdiction would attach. First, as discussed in section III.A above, EPA's authority to administer the part 71 program is based on EPA's broad authority to protect air quality within Indian country, and does not depend on a jurisdictional showing by a Tribe. In addition, if EPA were to administer a part 71 program only where Tribes come to EPA to demonstrate jurisdiction, there would be some non-reservation areas of Indian country that lack a permitting authority with jurisdiction to implement a title V program. The EPA's view is that no State CAA programs apply in Indian country unless explicitly approved as such, and that a State attempt to regulate under color of the CAA in non-reservation Indian

country during this temporal “gap” would result in State-issued permits that could not be enforced under the CAA. Only by EPA assuming responsibility to issue permits in these situations can the gap be filled and national title V coverage be achieved. Finally, EPA believes it would be an unnecessary burden on Tribes to require that they submit jurisdictional demonstrations over off-reservation areas in order to establish EPA’s Federal jurisdiction, which can be more easily established through today’s rule.

The EPA appreciates that some sources, especially those located in areas over which States have attempted to exert regulatory authority, may feel burdened by the duty to correctly identify whether they are subject to the Federal program. However, as discussed in section III.A above, EPA believes that the most appropriate approach to take in order to ensure nationwide coverage of title V is to apply the part 71 program in all areas except where a State or Tribal program has been explicitly approved.

In response to industry comments and in order to minimize uncertainty and burden for sources, EPA is adding in today’s final rule regulatory provisions that will allow sources that are uncertain regarding program applicability to submit requests to the Agency for applicability determinations. This process would be similar to those that exist under other CAA programs, such as NSPS and NESHAP

programs under sections 111 and 112, and the acid rain program under title IV. See, e.g., 40 CFR 60.5, 61.06, 72.6(c). Under today's rule, any source operator or owner who is uncertain regarding coverage of part 71 for any reason (including, for example, uncertainty regarding whether the source is a major source) could request in writing prior to the issuance of a part 71 permit that EPA make an applicability determination. The request must include an identification of the source and relevant and appropriate facts about the source and must be certified in accordance with section 71.5(d). Sources should include all information that they wish to be part of the record for EPA's applicability determination. This could include information provided by State, local, and Tribal governments.

With respect to issues concerning whether a source is in Indian country or an area for which EPA believes the Indian country status is in question, EPA would evaluate the source's request, along with other relevant information that EPA has assembled for the applicability determination record. For example, EPA may consider treaties, maps, and information submitted by State, local, and Tribal governments. Upon request, EPA would make the record available to Tribes, States, and relevant stakeholders prior to making the applicability determination. The EPA would

issue a written determination stating either that the source is subject to the part 71 program as of the program's effective date because it is located in Indian country or an area for which EPA believes the Indian country status is in question, or that the source is not located in an area covered by the part 71 program, and thus may be subject to the State or local program. The EPA believes that this process is consistent with the title V goals of providing clarity and certainty for sources and represents a practical method for addressing uncertainties regarding boundaries of Indian country. It also affords opportunities for sources and other stakeholders to get their views and information before the Agency.

The EPA stresses that any sources that are uncertain regarding part 71 program applicability should submit timely permit applications since submission of a request for an applicability determination will not stay the effectiveness of part 71 with respect to the source. In order to obtain the "application shield" under CAA section 503(d) that allows a source to continue to operate after the effective date of the Federal title V program, timely submission of a Federal permit application is required.

Moreover, as discussed in detail elsewhere in today's notice, EPA is taking another measure in response to industry comments to minimize the burden on sources located

in areas for which EPA believes the Indian country status is in question. For those sources, EPA may reduce the Federal title V permitting fee where the sources have paid fees to State permitting authorities that have asserted CAA regulatory authority over them. This approach will ensure that sources in such areas will be issued federally enforceable title V permits, without financially overburdening sources that have yielded to State attempts to assert jurisdiction under color of a part 70 program.

IV. Changes from the Proposed Rules and the 1996 Final Rule

Today's final rule is similar to the 1997 proposal in most respects. Instances in which the final rule departs from the 1995 and the 1997 proposals and the 1996 final rule are noted below.

A. Geographic Area Subject to the Part 71 Program

The EPA today adds a definition of the term "Indian country" as it is defined in 18 U.S.C. §1151. The EPA notes that although the definition of Indian country appears in a criminal code, it has been extended to civil judicial and regulatory jurisdiction (DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975). See also 40 CFR 144.3).

In addition, EPA is not adopting the proposed definition of the term "Tribal area" (from the 1995 proposal) because the term is not relevant to the approach

taken in today’s rulemaking for defining the geographical area for which EPA will administer a part 71 program. Accordingly, EPA revised several regulatory provisions that included the undefined term "Tribal area," including the definition of "Affected State" in section 71.2, section 71.4(a), section 71.4(b), sections 71.4(b)(2)-(3), section 71.4(f), section 71.4(h)-(j), section 71.8(a), and section 71.8(d), and replaced that term with language to reflect the program’s applicability in Indian country.

Also, with respect to section 71.8(d) and the definition of “Affected State,” EPA is adopting language consistent with CAA section 505(a)(2) and the 1996 final rule in lieu of the language in the 1997 proposal that misstated the criteria for States and Tribes to receive notices. The permitting authority will be required to provide notices of draft permits to Tribes pursuant to section 71.8(d) and to affected States if (1) their air quality may be affected by the permitting action and they are contiguous to the jurisdiction in which the part 71 permit is proposed or (2) they are located within 50 miles of the permitted source.

In addition, EPA has added language to section 71.4(b) that clarifies that for purposes of administering the part 71 program, EPA will treat areas for which EPA believes the Indian country status is in question as Indian country.

Proposed section 71.4(b)(1) from the 1995 proposal that referred to Tribal assertion of jurisdiction is not adopted since a Tribe's assertion of jurisdiction is not a relevant consideration under today's rulemaking. Instead, pursuant to section 71.4(b), EPA will administer the part 71 program within Indian country even where the Tribe has not demonstrated to EPA its jurisdiction over the area.

Also, as discussed in section III.C of today’s notice, provisions from the 1995 proposal that would have required EPA to notify State, local, and Tribal governmental entities of the proposed geographic boundaries of the program are inappropriate and have not been adopted. Consistent with the Agency's policy with respect to administering environmental programs in Indian country, EPA will not solicit comment on the boundaries of the program through subsequent rounds of rulemaking. See, e.g., 40 CFR 144.3, 147.60(a) (EPA administers Underground Injection Control program on "Indian lands," defined equivalent to "Indian country"). Rather, EPA will determine whether specific sources are within Indian country or areas for which EPA believes the Indian country status is in question and are therefore subject to the part 71 program. The EPA will provide notices to sources informing them of the deadline to submit part 71 permit applications and will send copies of the notices to State, local and Tribal governments.

B. Applicability Determinations

As discussed in section III.C of today's notice, in response to industry concerns that it may be difficult to determine whether a source is located in Indian country, the final rule adopts a provision, section 71.3(e), that provides that a source may formally request that EPA determine whether or not the source is subject to the part 71 program.

C. Permit Fee Relief

Today's rule adds a section that authorizes EPA to reduce part 71 fees for sources that are located in areas for which EPA believes the Indian country status is in question and that have paid part 70 fees to a State or local permitting authority that has attempted to apply its part 70 program in the area. A commenter expressed concern about the fiscal impact on State part 70 programs that may result when sources that have paid fees to the State become subject to the part 71 program. In cases where it is not certain that a source is located in Indian country, the State may be reluctant to discontinue regulating and charging fees to the source. Industry commenters also generally stated that where there is disagreement regarding whether a source is subject to Federal jurisdiction, it would be burdensome for the source to comply with the requirements of two permit programs.

The EPA's primary goal in regulating sources in areas for which EPA believes the Indian country status is in question is to make sure that all title V sources are covered by permits enforceable under the CAA. The EPA believes that issuing part 71 permits to sources in such areas is the only way to assure that all title V sources are subject to enforceable permit terms, given that State permit regulations are generally unenforceable in Indian country under the CAA. However, EPA agrees with the commenters that sources should be afforded some relief from the financial hardship that may result while the Indian country status of the area is unclear, particularly since relieving sources of some of this burden would have no adverse environmental impact provided the source is paying an adequate aggregate title V fee. Where the Indian country status, in EPA's judgement, is in question, EPA may reduce the part 71 permit fee under section 71.9(p), upon application of the source. In implementing this section, EPA may reduce the fee the source would have owed under section 71.9(c) by the amount of permit fees paid to a State or local agency. The fee reduction will cease if the area is later determined to be Indian country.

D. Duty to Administer the Part 71 Program

Today EPA is adopting language in section 71.4(b) to clarify that EPA will (instead of "may") administer the part

71 program in Indian country unless a part 70 program has been given full or interim approval. The 1995 proposal and the final rule had used the phrase “may administer.” As explained in the 1997 proposal, EPA had intended this language to authorize early implementation of the part 71 program (in advance of the November 15, 1997 default effective date for the program) and did not mean to imply that the regulation would allow EPA to choose to not administer the program in Indian country.

E. Publication of Notice of Final Permitting Actions

Today’s rulemaking includes a technical amendment to section 71.11 that adds a provision (section 71.11(l)(7)) requiring EPA to publish notice of any final permitting action regarding a part 71 permit in the Federal Register. This amendment is to make the rule more consistent with the 40 CFR part 124 requirements that apply to EPA issuance of PSD permits and to implement the provisions of CAA section 307(b)(1). The time period in which petitioners can file petitions for review of final permits in the Court of Appeals will run for 60 days from the date of publication of the notice of final permit action.

This amendment is being made without first being proposed because it is technical in nature and imposes no new requirements on sources and because it is in the public interest to adopt this correction to part 71 more quickly

than could be achieved by using notice and comment procedures, which in this case are impracticable, unnecessary, and contrary to the public interest.

F. Technical Amendment to Section 71.4(f)

The EPA intended that this provision would allow EPA the flexibility to meld portions of a State or Tribal permit program with provisions of part 71 to create a part 71 program that fits the needs of the area for which it is being administered, regardless of whether the State or Tribal program had gained EPA approval. However, the provision as finalized in the 1996 final rule could be read to not allow this result. Strictly read, it allows EPA to use portions of a "State or Tribal program" (defined in section 71.2 to mean EPA-approved programs) in combination with provisions of part 71 to administer a Federal program. To achieve its intended result, EPA is revising the regulatory language to refer to a "State or Tribal permit program." By avoiding the defined term "State or Tribal program," the provision as amended by today's rulemaking authorizes EPA to develop a part 71 program by combining either an approved or unapproved permit program with provisions of part 71.

This amendment is being made without first being proposed because it is technical in nature and imposes no new requirements on sources and because it is in the public

interest to adopt this correction to part 71 more quickly than could be achieved by using notice and comment procedures, which in this case are impracticable, unnecessary, and contrary to the public interest.

G. Effective Date of Program

Because today's rulemaking was not finalized prior to November 15, 1997 as EPA had intended, section 71.4(b)(2) is amended to provide that the effective date of a part 71 program in Indian country is 30 days following the publication of today's rulemaking. For similar reasons, language in section 71.4(b)(3) which allowed EPA to adopt an earlier effective date for the program than November 15, 1997 has been deleted. Section 71.4(b)(4) has been renumbered as section 71.4(b)(3).

This amendment is being made without first being proposed because it is technical in nature and imposes no new requirements on sources and because it is in the public interest to adopt this correction to part 71 more quickly than could be achieved by using notice and comment procedures, which in this case are impracticable, unnecessary, and contrary to the public interest.

V. Administrative Requirements

A. Docket

The docket for this regulatory action is A-93-51. The docket is an organized and complete file of all the

information submitted to or otherwise considered by EPA in the development of this rulemaking.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan program or the rights and obligation of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is not a "significant" regulatory action because it does not raise any of the

issues associated with "significant" regulatory actions. The rule will have a negligible effect on the economy and will not create any inconsistencies with other actions by other agencies, alter any budgetary impacts, or raise any novel legal or policy issues. For these reasons, this action was not submitted to OMB for review.

C. Regulatory Flexibility

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities. In developing the original part 70 regulations and the proposed revisions to part 70, the Agency determined that they would not have a significant economic impact on a substantial number of small entities. See 57 FR 32250, 32294 (July 21, 1992), and 60 FR 45530, 45563 (August 31, 1995). Similarly, the same conclusion was reached in an initial regulatory flexibility analysis performed in support of the 1996 part 71 rulemaking. See 61 FR 34202, 34227 (July 1, 1996). A

small subset of sources subject to the part 71 rule are affected by today's rulemaking.

The prior screening analyses for the part 70 and part 71 rules were done on a nationwide basis without regard to whether sources were located within Indian country and are, therefore, applicable to sources in Indian country. Accordingly, EPA believes that the screening analyses are valid for purposes of today’s final rule. And since the screening analyses for the prior rules found that the part 70 and 71 rules as a whole would not have a significant impact on a substantial number of small entities, today’s rule, which will affect a much smaller number of entities than affected by the earlier rules, also will not have a significant impact on a substantial number of small entities. The reasons for this conclusion are discussed in more detail below.

At this time, there are very few nonmajor sources that are required by part 71 to obtain an operating permit. The Agency has also issued several policy memoranda explaining or providing mechanisms for sources to become “synthetic minors” whereby the source is recognized for not emitting pollutants in major quantities. The EPA plans to extend its January 25, 1995 transition policy for PTE limits to sources located in Indian country where they maintain emissions of less than 50 percent of all applicable major source

emissions thresholds. The sources covered by the policy thereby avoid the requirement to obtain a part 71 permit.

Because of the deferral of permitting requirements for nearly all nonmajor sources, today's rulemaking would affect only a small number of sources. Although firm figures on the number of title V sources in Indian country are not available, preliminary estimates suggest that there may be only approximately 100 major sources and 450 nonmajor sources (with permitting requirements deferred for nearly all nonmajor sources).

The EPA believes that four Tribal governments may own sources that could be subject to today’s rule and that consequently the rule would at most affect four of the more than 500 Federally recognized Tribal governments or fewer than 1 percent of those governments. The EPA estimates that the compliance cost for sources subject to this rule is $18,425 per source or $73,700 for the four sources owned by Tribal governments.

Consequently, I hereby certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44

U.S.C. 3501 et seq. and has assigned OMB control number 2060-0336. A copy of the Information Collection Request Document may be obtained from Sandy Farmer, OPPE Regulatory Information Division (2137), U.S. Environmental Protection Agency, 401 M Street, S.W., DC 20460 or by calling (202) 260-2740. The information requirements are not effective until OMB approves them.

The information is planned to be collected to enable EPA to carry out its obligations under the Act to determine which sources in Indian country are subject to the Federal Operating Permits Program and what requirements should be included in permits for sources subject to the program. Responses to the collection of information will be mandatory under section 71.5(a) which requires owners or operators of sources subject to the program to submit a timely and complete permit application, and under sections 71.6(a) and (c) which require that permits include requirements related to record keeping and reporting. As provided in 42 U.S.C. 7661(e), sources may assert a business confidentiality claim for the information collected under CAA section 114(c).

Today's rulemaking will impose information collection request requirements on approximately 100 sources in Indian country. The EPA believes that four of these sources may be owned or operated by Tribal governments. On a per source basis, the burden will be identical to the burden for

sources currently subject to part 71 requirements. In the Information Collection Request (ICR) document for the July 1996 final part 71 rule (ICR Number 1713.02), EPA estimates that the annual burden per source is 329 hours, and the annual burden to the Federal government is 243 hours per source. Therefore, the impact of today's rulemaking will be that sources will incur an additional 32,900 burden hours per year, and EPA will incur an additional 24,300 burden hours per year. The total annualized cost will be $18,425 per source or $1,842,500. Of this amount, the total annualized cost for Tribal governments would be $73,700.

Today's rule imposes no burden on State or local governments and no burden on Tribal agencies, except those that happen to own or operate sources subject to this rule as noted above. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information; processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of

information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

E. Unfunded Mandates Reform Act

Today's action imposes no costs on State or local governments and no costs on Tribal governments, except those that happen to own or operate sources that are subject to this rule, as noted below. This rule establishes the Agency's approach to issuing permits to sources in Indian country and eliminates the proposed requirement that Indian Tribes establish their jurisdiction prior to EPA administering the Federal operating permits program in Indian country.

The EPA has estimated in the ICR document that the Federal operating permits program rule promulgated in July 1996 would cost the private sector $37.9 million per year. See 61 FR 34202, 34228 (July 1, 1996). In the ICR, EPA estimates costs based on sources that would be subject to part 71 permitting requirements in eight States but overestimates the number of these sources for purposes of

simplifying the analysis. See 61 FR 34202, 34227 (July 1, 1996). The overestimate of the number of sources is nearly as large as the number of new sources covered by today's rule. Consequently, EPA believes today's rule would increase the direct cost of the part 71 rule for industry to $38.3 million. This estimate is based on the average cost of compliance per source and the number of sources in Indian country that were not accounted for in the original estimate.

The EPA believes that four Tribal governments may own or operate sources that could be subject to today’s rule. The EPA estimates the compliance cost for these governments would be $18,425 per source or $73,700 for the four sources owned by Tribal governments.

The EPA has determined that today's action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector, in any 1 year. Therefore, the Agency concludes that it is not required by section 202 of the Unfunded Mandates Reform Act of 1995 to provide a written statement to accompany this regulatory action.

F. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. §801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1966, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. §804(2).

G. Executive Order 13045

Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1977) applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is

preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866 and because it does not involve decisions based on environmental health risks or safety risks.

H. Executive Order 12875: Enhancing Intergovernmental Partnership

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or Tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and Tribal governments, the nature of their concerns, any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and Tribal governments "to provide meaningful and timely

input in the development of regulatory proposals containing significant unfunded mandates."

The EPA has concluded that this rule will create a mandate on tribal governments that happen to own or operate sources that are covered by the rule and that the Federal government will not provide the funds necessary to pay the direct costs incurred by such Tribal governments in complying with the mandate. The EPA believes that there are just four sources owned by Tribal governments that will be subject to this rule and that must submit permit applications and obtain part 71 permits. In developing this rule, EPA consulted with Tribal governments to enable them to provide meaningful and timely input in the development of this rule. Prior to the publication of the 1995 proposal, EPA shared a summary of the draft proposal and solicited input from attendees at a national Tribal environmental conference, as well as from approximately 300 Tribal leaders. The EPA mailed the 1995 and 1997 proposals and fact sheets to Tribal leaders, encouraging Tribal comment on the proposals. In addition, EPA discussed the proposed rulemaking and sought input from EPA's Tribal Operations Committee, composed of Tribal leaders as well as EPA managers.

Tribes were generally very supportive of the rule and EPA's interpretation of the CAA on the issues of Federal

authority and Tribal authority to regulate air quality in Indian country. The issues raised by Tribal commenters did not relate to the mandate imposed by this rule on Tribal governments that own or operate sources subject to the rule. The major concerns expressed by Tribes related to the need for technical assistance to develop their own permit programs and the need to receive notice of permitting actions that affect Tribal air quality. Tribes requested that EPA work directly with Indian tribal governments in a government-to-government relationship in establishing the scope of and administering the program. Other concerns were related to the effect of the rule on Tribal sovereignty and economic development.

The EPA continues to provide technical assistance and training for Tribes to develop their own programs and is committed to involving Tribes in the administration of the Federal program on a government-to-government basis until Tribes have developed their own operating permit programs. The EPA believes that the rule’s approach to jurisdictional issues is supportive of Tribal sovereignty and that the rule is necessary in order to protect air quality in Indian country, absent Tribal permits programs.

I. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

The EPA believes that four Tribal governments may own sources that could be subject to today's rule and that consequently the rule would at most affect four of the more

than 500 federally recognized Tribal governments or fewer than 1 percent of those governments. The EPA estimates that the compliance cost for sources subject to this rule is $18,425 per source or $73,700 for the four sources owned by Tribal governments. The EPA therefore concludes that this rule does not impose substantial direct compliance costs on communities of Tribal governments. Notwithstanding, EPA has taken numerous steps to involve representatives of Tribal governments in the development of this rule. The EPA's consultation, the nature of the governments' concerns, and EPA's position supporting the need for this rule are discussed above in the preamble section that addresses compliance with Executive Order 12875.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., material specifications, test methods, sampling and analytical procedures, business practices, etc.) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies

include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA requires Federal agencies like EPA to provide Congress, through OMB, with explanations when an agency decides not to use available and applicable voluntary consensus standards.

This action does not involve any new technical standards or the incorporation by reference of existing technical standards. Therefore, consideration of voluntary consensus standards is not relevant to this action.

List of Subjects 40 CFR Part 71

Operating permits, Indian Tribes, air pollution control, environmental protection.

Date

Carol M. Browner
Administrator

Billing Code: 6560-50-P

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

Part 71--[Amended]

1. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart A--[Amended]

2. Section 71.2 is amended by revising paragraphs (1) and (2) of the definition of “affected State” and by adding the definition of "Indian country" as follows:

§ 71.2 Definitions

* * * * *

Affected States are:

(1) All States and areas within Indian country subject to a part 70 or part 71 program whose air quality may be affected and that are contiguous to the State or the area within Indian country in which the permit, permit modification, or permit renewal is being proposed; or that are within 50 miles of the permitted source. A Tribe shall be treated in the same manner as a State under this paragraph (1) only if EPA has determined that the Tribe is an eligible Tribe.

(2) The State or area within Indian country subject to a part 70 or part 71 program in which a part 71 permit,

permit modification, or permit renewal is being proposed. A Tribe shall be treated in the same manner as a State under this paragraph (2) only if EPA has determined that the Tribe is an eligible Tribe.

* * * * *

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

* * * * *

3. Section 71.3 is amended by adding paragraph (e) as follows:

(e) An owner or operator of a source may submit to the Administrator a written request for a determination of applicability under this section.

(1) Request content. The request shall be in writing and include identification of the source and relevant and

appropriate facts about the source. The request shall meet the requirements of section 71.5(d).

(2) Timing. The request shall be submitted to the Administrator prior to the issuance (including renewal) of a permit under this part as a final agency action.

(3) Submission. All submittals under this section shall be made by the responsible official to the Regional Administrator for the Region in which the source is located.

(4) Response. The Administrator will issue a written response based upon the factual submittal meeting the requirements of paragraph (e)(1) of this section.

4. Section 71.4 is amended by revising paragraph (a) introductory text, revising paragraph (b), revising paragraph (f), revising paragraph (h), revising paragraph (i) introductory text, and revising paragraph (j), to read as follows:

§ 71.4 Program implementation

(a) Part 71 programs for States. The Administrator will administer and enforce a full or partial operating permits program for a State (excluding Indian country) in the following situations:

* * * * *

(b) Part 71 programs for Indian country. The Administrator will administer and enforce an operating permits program in Indian country, as defined in § 71.2,

when an operating permits program which meets the requirements of part 70 of this chapter has not been explicitly granted full or interim approval by the Administrator for Indian country. For purposes of administering the part 71 program, EPA will treat areas for which EPA believes the Indian country status is in question as Indian country.

(1) [Reserved]

(2) The effective date of a part 71 program in Indian country shall be [insert date 30 days following publication of this rulemaking].

(3) Notwithstanding paragraph (i)(2) of this section, within 2 years of the effective date of the part 71 program in Indian country, the Administrator shall take final action on permit applications from part 71 sources that are submitted within the first full year after the effective date of the part 71 program.

* * * * *

(f) Use of selected provisions of this part. The Administrator may utilize any or all of the provisions of this part to administer the permitting process for individual sources or take action on individual permits, or may adopt, through rulemaking, portions of a State or Tribal permit program in combination with provisions of this part to administer a Federal program for the State or in Indian

country in substitution of or addition to the Federal program otherwise required by this part.

* * * * *

(h) Effect of limited deficiency in the State or Tribal program. The Administrator may administer and enforce a part 71 program in a State or within Indian country even if only limited deficiencies exist either in the initial program submittal for a State or eligible Tribe under part 70 of this chapter or in an existing State or Tribal program that has been approved under part 70 of this chapter.

(i) Transition plan for initial permits issuance. If a full or partial part 71 program becomes effective in a State or within Indian country prior to the issuance of part 70 permits to all part 70 sources under an existing program that has been approved under part 70 of this chapter, the Administrator shall take final action on initial permit applications for all part 71 sources in accordance with the following transition plan.

* * * * *

(j) Delegation of part 71 program. The Administrator may promulgate a part 71 program in a State or Indian country and delegate part of the responsibility for administering the part 71 program to the State or eligible Tribe in accordance with the provisions of § 71.10; however,

delegation of a part of a part 71 program will not constitute any type of approval of a State or Tribal operating permits program under part 70 of this chapter.

* * *

* * * * *

5. Section 71.8 is amended by revising the first sentence of paragraph (a) and revising paragraph (d) as follows:

§ 71.8 Affected State review

(a) Notice of draft permits. When a part 71 operating permits program becomes effective in a State or within Indian country, the permitting authority shall provide notice of each draft permit to any affected State, as defined in § 71.2 on or before the time that the permitting authority provides this notice to the public pursuant to § 71.7 or 71.11(d) except to the extent § 71.7(e)(1) or (2) requires the timing of the notice to be different.

* * *

* * * * *

(d) Notice provided to Indian Tribes. The permitting authority shall provide notice of each draft permit to any federally recognized Indian Tribe (1) whose air quality may be affected by the permitting action and is in an area contiguous to the jurisdiction in which the part 71 permit

is proposed, or (2) is within 50 miles of the permitted source.

* * * * *

6. Section 71.9 is amended by adding paragraph (p) as follows:

§ 71.9 Permit fees

* * * * *

(p) The permitting authority may reduce any fee required under paragraph (c) for sources that are located in areas for which EPA believes the Indian country status is in question and that have paid permit fees to a State or local permitting authority that has asserted CAA regulatory authority over such areas under color of an EPA-approved part 70 program. Upon application by the source, the part 71 fee may be reduced up to an amount that equals the difference between the fee required under paragraph (c) and the fee paid to a State or local permitting authority. The fee reduction will cease if the area in which the source is located is later determined to be Indian country.

7. Section 71.11 is amended by adding paragraph (l)(7) as follows:

§ 71.11 Administrative record, public participation, and administrative review

* * * * *

(l) * * *

(7) Notice of any final agency action regarding a Federal operating permit shall promptly be published in the Federal Register.

* * * * *