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Part II

Environmental Protection Agency

40 CFR Part 71

Revision to Regulations Implementing the Federal Permits Program in Areas for Which the Indian Country Status is in Question; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 71

[FRL–7221–6]

Revision to Regulations Implementing the Federal Permits Program in Areas for Which the Indian Country Status is in Question

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; implementation of court order.

SUMMARY: This action promulgates an amendment to EPA's Federal operating permits program rule in order to comply with a court order. In February 1999, EPA promulgated final regulations setting forth EPA's program for issuing Federal operating permits to stationary sources of air pollution in Indian country, pursuant to title V of the Clean Air Act (Act). On October 30, 2001, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded a portion of the regulation that stated EPA will treat areas for which EPA believes the Indian country status is in question as Indian country. To conform with the Court's order, EPA is taking the ministerial step of removing the regulatory language that treats ''in question'' areas as Indian country as well as related regulatory language regarding the possible reduction of fees for sources located in ''in question'' areas.

DATES: This rule is effective on June 3, 2002.

ADDRESSES: The EPA does not seek comment on this final rule. Supporting information used in developing the promulgated rule is contained in Docket 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, e-mail *carraway.candace@epa.gov*), Operating Permits Group, Information Transfer and Program Integration Division, Office of Air Quality Planning and Standards, U.S. EPA, Mail Code C304–04, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The court order in *State of Michigan* v. *EPA,* 268 F.3d 1075 (D.C. Cir. 2001) vacating the treatment of ''in question'' areas as Indian country has been added to Docket A–93–51.

After signature, the final rule will be posted on the policy and guidance page for newly proposed or final rules of EPA's Technology Transfer Network (TTN) at *http://www.epa.gov/ttn/oarpg/t5.html.* For more information, call the TTN HELP line at (919) 541–5384.

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I. Background

On February 19, 1999, pursuant to title V of the Act, EPA promulgated final regulations amending 40 CFR part 71 to establish how EPA would issue Federal operating permits to sources in Indian country. See 64 FR 8247. The final rule amended certain definitions in § 71.2, applicability provisions in § 71.3, program implementation provisions in § 71.4, affected State review requirements in § 71.8, permit fee requirements in § 71.9, and administrative process provisions in § 71.11. See 64 FR 8262–8263. In addition, to help avoid gaps in title V coverage for sources in Indian country, EPA included regulatory language at 40 CFR 71.4(b) that stated as follows: ''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.'' See 64 FR 8249–8250, 8262. Subsequently, the State of Michigan Department of Environmental Quality, the American Forest and Paper Association, the New Mexico Oil & Gas Association, the New Mexico Environment Department, the Public Service Company of New Mexico and Salt River Project Agricultural Improvement and Power District challenged EPA's final rule in the U.S. Court of Appeals for the District of Columbia Circuit. The State and industry petitioners challenged EPA's decision to treat areas that EPA believes are ''in question'' as Indian country, and the process by which EPA intended to determine Federal jurisdiction in such cases.

In its October 30, 2001 decision, the Court agreed with the Agency that EPA has the authority to administer operating permit programs in Indian country. However, the Court found that EPA had exceeded its authority in deciding to treat ''in question areas'' as Indian country as provided by the Federal operating permits rule. Therefore, the Court ordered that portion of the EPA rule authorizing EPA to treat lands for which EPA has deemed Indian country status to be in question as Indian country to be vacated and remanded to the EPA for further proceedings. The EPA notes that the Agency had not issued any permits to sources based on the ''in question'' area approach under the rule.

To conform with the Court's order, EPA is taking the ministerial step of removing the language in § 71.4(b) that provided that for purposes of administering part 71, EPA will treat areas for which EPA believes the Indian country status is in question as Indian country. In addition, to make the rest of part 71 conform with the Court's order regarding the language in § 71.4(b), EPA is removing § 71.9(p) which provided that the permitting authority may reduce fees for sources that are located in ''in question'' areas that have paid fees to a State or local permitting authority asserting the Act's authority under a part 70 program. In light of the removal of the ''in question'' language of § 71.4(b), § 71.9(p) has no utility.

The EPA has determined that it has ''good cause'' under section 553(b)(B) of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), to promulgate this final rule without prior notice and opportunity for comment. The EPA finds it ''unnecessary'' to provide an opportunity to comment on the strictly legal issue of the impact of the Court's decision on the February 19, 1999, Federal operating permits program provisions addressing EPA's authority in ''in question'' areas. Today's rule is in direct response to the Court's order and implements that order. It amends only those regulatory provisions directly affected by the Court's order to vacate the portion of the rule authorizing EPA to treat areas for which EPA has deemed Indian country status to be in question as Indian country.

For the same reason, EPA has determined that good cause exists under section 553(d)(3) of the APA, 5 U.S.C. 553(d)(3) to waive the requirement for a 30-day period before the amendment becomes effective, and therefore the

amendment will be immediately effective.

Finally, the Administrator hereby designates subsection 307(d) of the Act as applying to this rulemaking.

II. Administrative Requirements

A. Executive Order 12866: ''Significant Regulatory Action Determination''

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

(1) Have an annual effect on the economy of $100 million or more, adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety in 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 entitlement, grants, user fees, or loan programs of the rights and obligations of recipients thereof; or

(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.

Because this action involves a ministerial removal of regulatory text in direct response to a court order, it has been determined that this action is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is not subject to OMB review.

B. Regulatory Flexibility Act Compliance as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

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. Because the agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Paperwork Reduction Act

The 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.

The Administrator has determined today's action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), since it directly imposes no burden at all. Burden means the total time, effort, or financial resources expended to generate and maintain, retain, or provide information as required by a rule. This includes the time needed to review instructions; develop, acquire, install, and use technology and systems for collecting, validating, and verifying information or processing and maintaining information; adjust the existing ways to comply with previous instructions and requirements; train personnel to respond to the collection of information; search data sources; complete and review the information; and transmit the information. Today's rule imposes no such burden on any entity.

D. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to public interest. This determination must be supported by a brief statement (5 U.S.C. 808(2)). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of June 3, 2002, for this rule. 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 the publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Because the agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute, it is not subject to sections 202 and 205 of the UMRA. In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of the UMRA.

F. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State

and local officials in the development of regulatory policies that have Federalism implications.'' ''Policies that have Federalism implications'' is defined in the Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has Federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a Federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with Federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's Federalism official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132. This action would not alter the overall relationship or distribution of powers between governments for the title V program. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

G. Executive Order 13175: Consultation With Tribes

This action does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes as specified by Executive Order 13175 (65 FR 67249, November 9, 2000) because it does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Accordingly, this rule is not subject to Executive Order 13175.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has 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 action is not subject to Executive Order 13045, because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

I. Executive Order 13211 (Energy Effects)

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Dated: May 23, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble title 40, chapter I of the Code of Federal Regulations is to be 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]

§ 71.4 [Amended]

2. Section 71.4 is amended by removing the last sentence from paragraph (b) introductory text.

§ 71.9 [Amended]

3. Section 71.9 is amended by removing paragraph (p).

[FR Doc. 02–13806 Filed 5–31–02; 8:45 am]

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