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March 21, 1997

Part III

Environmental Protection Agency

40 CFR Part 71

Federal Operating Permits Program; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 71

[FRL–5800–3]

RIN 2060–AG90

Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of opportunity for public hearing.

SUMMARY: The EPA is proposing a new 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 (Act). Consistent with EPA's Indian Policy, the Agency will protect air quality by administering a Federal operating permits program in areas lacking an EPA-approved or adequately administered Tribal operating permits program. Implementation of today's proposal would benefit the environment by assuring that the benefits of title V, such as increased compliance and resulting decreases in emissions, would extend to every part of Indian country.

DATES: *Comments.* Comments on the proposed regulations must be received by EPA's Air Docket on or before May 5, 1997.

Public Hearing. A public hearing is scheduled for 10:00 a.m., on April 21, 1997, at the address listed under **ADDRESSES**. Requests to present oral testimony must be received by April 7, 1997, and the hearing may be canceled if no speakers have requested time to present their comments by that date. Written comments in lieu of, or in addition to, testimony are encouraged.

ADDRESSES: *Comments.* Comments should be mailed (in duplicate if possible) to: EPA Air Docket (Mail Code 6102), Attention: Docket Number A–93–51, Room M–1500, Waterside Mall, 401 M Street, SW, Washington, DC 20460.

Public Hearing. The public hearing will be held in the Waterside Mall auditorium at the U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Persons interested in attending the hearing or wishing to present oral testimony should contact Ms. Pat Finch in writing at the 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.

Docket. Supporting information used in developing the proposed rule is contained in Docket Number A–93–51. The 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:

Comments. The EPA is unlikely to be able to extend the public comment period. Two paper copies of each set of comments are requested. If possible, comments should be sent in both paper and computerized form. Comments generated on computer should be sent on an IBM-compatible diskette and clearly labeled. Computer files created with the WordPerfect 5.1 software package should be sent as is. Files created on other software packages should be saved in an ''unformatted'' mode for easy retrieval into WordPerfect. Comments should refer to specific page numbers of today's proposal whenever possible.

Regulated entities. Entities potentially regulated by this proposed action are sources (1) That are located in Indian country; and (2) that are major sources, affected sources under title IV of the Act (acid rain sources), solid waste incineration units required to obtain a permit under section 129 of the Act, and those area sources subject to a standard under section 111 or 112 of the Act which have not been exempted or deferred from title V permitting requirements. Regulated categories and entities include:

Category	Examples of regulated entities
Industry located in Indian country	Major sources under title I or section 112 of the Act; affected sources under title IV of the Act (acid rain sources); solid waste incineration units required to obtain a permit under section 129 of the Act; area sources subject to standards under section 111 or 112 of the Act that are not 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 proposed 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 § 71.3(a) of the rule, the definition of ''Indian country'' in § 71.2 of the rule, and § 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 State or area in which the relevant source or facility is located.

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

I. Background and Purpose
II. Proposal Summary
III. Federal Authority to Implement Title V in Indian Country
IV. Proposed Changes to Regulatory Language
V. Administrative Requirements
A. Docket
B. Executive Order 12866
C. Regulatory Flexibility Act Compliance
D. Paperwork Reduction Act
E. Unfunded Mandates Reform Act

I. Background and Purpose

Title V of the Act 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 originally 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 has defaulted on its obligation to submit an approvable program within the timeframe set by title V or on its obligation to adequately administer and enforce an 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 will administer a Federal

operating permit program in a State or in areas over which States do not have jurisdiction. The final rule was published on July 1, 1996 (61 FR 34202) and will be codified at 40 CFR part 71. The regulations authorize EPA to issue permits when a State, local, or Tribal agency has not developed, administered, or enforced an acceptable 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. The EPA expects that most Tribes will not develop title V operating permit programs, in part due to the resources required to develop a program and in part because for some Tribes it will not be practicable to develop a permits program for relatively few sources. Within Indian country, EPA believes it is 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, pending resolution of jurisdictional issues involving Tribes and States that were raised in a proposed rule that specified provisions of the Act for which EPA believes it is appropriate to treat Indian Tribes in the same manner as States, pursuant to section 301(d)(2). See 59 FR 43956 (August 25, 1994) (''Indian Tribes: Air Quality Planning and Management,'' hereinafter ''proposed Tribal authority rule'').

The EPA now believes that the 1995 proposal's definition of ''Tribal area,'' that is to say, the Indian lands where EPA would exercise authority to implement a Federal permit program, was inappropriate. The proposal was based on the interpretation of Tribal jurisdiction under the Act in the proposed Tribal authority rule. The approach of the 1995 proposal would have required Tribes to establish their jurisdiction over an area before EPA could implement a Federal program for the area. While in many cases this would not present a problem, EPA believes it is more consistent with the Act that EPA administer part 71 programs for all areas of Indian country without requiring any jurisdictional showing on the part of the Tribe. Furthermore, in proposing that EPA implement part 71 throughout Indian country, today's notice is consistent with the Agency's Indian Policy, which provides that EPA generally will administer environmental programs on reservation lands until a Tribe assumes regulatory responsibility. See, e.g., EPA's 1984 Policy for the Administration of Environmental Programs on Indian Reservations, reaffirmed by EPA Administrator Browner in 1994.

II. Proposal Summary

The EPA's approach for issuing operating permits in Tribal areas outlined in the April 1995 proposal was modeled on the jurisdictional provisions of the proposed Tribal authority rule. In the proposed Tribal authority rule, EPA proposed to interpret the Act as granting to Tribes, that are approved by EPA to administer programs under the Act in the same manner as States, authority over all air resources within the exterior boundaries of an Indian reservation. This would enable Tribal-approved programs under the Act to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation. The proposed Tribal authority rule would also authorize an eligible Tribe to develop and implement programs under the Act for off-reservation lands that are determined to be within a Tribe's own authority to regulate under relevant principles of Federal Indian law, generally up to the limits of Indian country, as defined at 18 U.S.C. 1151. The rationale for this proposed interpretation of Tribal jurisdiction to administer programs under the Act is set out in detail in the proposed Tribal authority rule. See 59 FR 43956, 43958–43961 (August 25, 1994).

In the 1995 proposal, EPA noted that when EPA is acting in the place of a Tribe under the Act, pursuant to Federal implementation authority, the responsibilities that would otherwise fall to the Tribe would accrue instead to EPA. Thus, under the 1995 proposal, EPA would have authority to implement a part 71 program for any lands within the exterior boundaries of a reservation and for any off-reservation land over which a Tribe has demonstrated its own authority under Federal Indian law. Today's notice makes it clear that EPA's implementation of part 71 programs in Indian country is based on EPA's overarching authority to protect air quality within Indian country, not solely on its authority to act in the stead of an Indian Tribe.

The 1995 proposal used the term ''Tribal area'' to refer to the areas over which Tribes and EPA had jurisdiction. One of the commenters on the 1995 proposal recommended that the definition of ''Tribal area'' encompass Indian country, as defined in 18 U.S.C. 1151, noting that this term is used in the context of several other EPA environmental programs. As provided in 18 U.S.C. 1151:

> [T]he term ''Indian country,'' as used in this chapter, means (a) 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, (b) 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 (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although a detailed analysis of the cases that have interpreted this definition is beyond the scope of this notice, it should be noted that the definition of Indian country would encompass the land referred to in the 1995 proposal as ''Tribal area,'' but would not require a jurisdictional showing on the part of the Tribe. Indian country includes all of the territory within an Indian reservation (even land owned by non-Indians) and incorporates ''dependent Indian communities'' and allotments held in trust regardless of whether they are located within a recognized reservation.

Based on recent Supreme Court case law, EPA has construed the term ''reservation'' to incorporate trust land that has been validly set apart for use by a Tribe, even though that land has not been formally designated as a ''reservation.'' See 56 FR at 64881 (December 12, 1991); see also *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 111 S.Ct. 905, 910 (1991). The EPA will be guided by relevant case law in interpreting the scope of ''reservation'' under the Act.

The 1995 proposal was designed to authorize EPA to directly implement an operating permits program where there was a void in program coverage, thus assuring program coverage coast to coast. However, the proposal inadvertently created a potential void in coverage, in that it would authorize EPA to administer an operating permits program only where the Tribe had made a jurisdictional showing. This raised the possibility that neither EPA, the Tribe, nor the State would be implementing an

operating permits program in a given geographic area. The EPA believes that to avoid this result, EPA should exercise its authority throughout Indian country. Thus, consistent with the Agency's Indian Policy, EPA will administer title V programs within Indian country unless a part 70 program has been given full or interim approval. In addition, EPA believes there is no reason to impose on Tribes the burden of making a jurisdictional showing prior to EPA administering a Federal program. The EPA solicits comment on this approach to describing its exercise of authority to issue operating permits under the Federal operating permits program.

III. Federal Authority to Implement Title V in Indian Country

Today, EPA is proposing to implement the Federal title V operating permit program throughout Indian country. As discussed in the proposed Tribal authority rule, EPA is authorized to protect air quality by directly implementing provisions of the Act throughout Indian country (59 FR 43956, 43958–43960 (August 25, 1994)). The EPA's authority is based in part on the general purpose of the Act, which is national in scope. As stated in section 101(b)(1) of the Act, 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). It is clear that Congress intended for the Act to be a ''general statute applying to all persons to include Indians and their property interests.'' See *Phillips Petroleum Co.* v. *United States 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).

Section 301(a) of the Act delegates to EPA broad authority to issue such regulations as are necessary to carry out the functions of the Act. Further, several provisions of the Act call for Federal issuance of a 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., sections 110(c) and 502 (d), (e), (i) of the Act. It follows that Congress intended that EPA would similarly have broad legal authority in instances when Tribes choose not to develop a program, fail to adopt an adequate program, or fail to adequately implement an air program authorized under section 301(d). In addition, section 301(d)(4) of the Act empowers the Administrator to directly administer Act requirements so as to achieve the appropriate purpose, where Tribal implementation of those requirements is inappropriate or administratively infeasible. These provisions of the Act evince Congressional intent to authorize EPA to directly implement programs under the Act in Indian country until Tribes submit approvable programs. [1]

The EPA believes that under the Act, Congress intended to allow eligible Tribes to implement programs under the Act generally up to the limits of Indian country and to authorize EPA to implement the Act in Indian country where a Tribe does not have an approved program. The Act authorizes EPA to treat a Tribe in the same manner as a State for the regulation of ''air resources *within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction*'' (section 301(d)(2)(B) (emphasis added)). The EPA believes that this statutory provision, viewed within the overall framework of the Act, reflects a territorial view of Tribal jurisdiction and authorizes a Tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. In the proposed Tribal authority rule, EPA stated its proposed interpretation that the Act grants to Tribes approved by EPA to administer programs under the Act in the same manner as States authority over all air resources within the exterior boundaries of a reservation for such programs (59 FR at 43958). In addition, based on section 301(d)(2)(B) of the Act, EPA proposed that a Tribe may also be able to implement its air quality programs on off-reservation lands which are within its jurisdiction under Federal Indian law, generally up to the limits of ''Indian country,'' as defined in 18 U.S.C. 1151; id. at 43960.

The EPA is proposing to interpret the Act as generally authorizing EPA to implement the title V program even in areas of Indian country where a State previously may have been able to demonstrate jurisdiction. However, the EPA will not administer and enforce a part 71 program in Indian country when an operating permits program for the area which meets the requirements of part 70 of this chapter has been granted full or interim approval unless such approval is later withdrawn. The EPA believes that the provisions of the Act discussed above evince a Congressional preference that implementation of the Act in Indian country be carried out by either EPA or the Tribes. Even where a State has asserted jurisdiction over an area located in Indian country under color of a statement of general authorization in another Federal statute, the Act would nonetheless generally authorize EPA to implement a title V program in such areas. See *Adkins* v. *Arnold*, 235 U.S. 417, 420; 59 L. Ed. 294, 295; 35 S. Ct. 118 (1914) (noting that ''later in time'' statutes should take precedence).

Today's notice is consistent with long-standing EPA policy that the Agency will administer environmental programs in Indian country until a Tribe assumes regulatory responsibility. See, e.g., EPA's 1984 Policy for the Administration of Environmental Programs on Indian Reservations, reaffirmed by EPA Administrator Browner in 1994.

Where there is a dispute as to whether a particular area is Indian country, EPA will run the title V program in that area until the dispute is satisfactorily resolved. A Tribal or State government that wishes to dispute whether an area is or is not within Indian country should submit to the appropriate Regional Administrator sufficient information that demonstrates to EPA's satisfaction that there is a dispute. The EPA solicits comment on this approach.

IV. Proposed Changes to Regulatory Language

The EPA today proposes to add a definition of the term ''Indian country'' based on the term as 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); 40 CFR 144.3).

In addition, EPA proposes to delete the definition of ''Tribal area'' because EPA believes it is more consistent with other environmental regulations to define EPA's jurisdiction in terms of ''Indian country.'' The use of both terms may create confusion as well. Accordingly, EPA proposes to revise several regulatory provisions that include the term ''Tribal area,'' including the definition of ''affected State'' in § 71.1, § 71.4(a), § 71.4(b), § 71.4(b)(2) through (b)(4), § 71.4(f), § 71.4(h)–(j), § 71.8(a), and § 71.8(d).

In addition, EPA proposes several regulatory changes that result from the new approach that are different than the 1995 proposal. Briefly summarized, these changes include the following. First, proposed § 71.4(b)(1) that referred to Tribal assertion of jurisdiction would

[1] The EPA's interpretation of section 301(d) is also supported by the legislative history—S. Rep.101–228 (December 20, 1989), page 80 (noting that section 301(d) of the Act authorizes EPA to implement Act provisions throughout ''Indian country'' where there is no tribal program).

not be finalized and would be deleted in its entirety since a Tribe's assertion of jurisdiction is not a relevant consideration under today's proposal. Instead, proposed § 71.4(b) would establish EPA's authority to administer the part 71 program within Indian country irrespective of whether the Tribe established its jurisdiction over the area. Second, consistent with the Agency's policy with respect to administering environmental programs in Indian country, EPA would not solicit comment on the boundaries of the program through a 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, disputes over whether a specific source was subject to the part 71 program would be resolved in the context of permitting the source. Therefore, provisions from the April 1995 proposal that would have required EPA to notify appropriate governmental entities of the proposed geographic boundaries of the program are inappropriate and will be withdrawn. The EPA solicits comments on this approach.

The EPA believes that most sources in Indian country are located within reservation boundaries and that these sources should not find it difficult to determine that they are subject to the part 71 program. The Agency will rely on boundaries as determined by the Bureau of Indian Affairs which will provide maps of reservations upon request. The EPA recognizes that some sources may be uncertain as to whether they are located within Indian country. Sources that are unsure of whether they are located in Indian country should consult the appropriate EPA Regional office. Prior to the effective date of the part 71 program in Indian country, the EPA will undertake outreach efforts to notify sources that they are subject to the program, in much the same way as States have notified sources that they believed were subject to the part 70 program. However, EPA may fail to identify some sources within Indian country. Even as to those sources, EPA reiterates that it is the source's responsibility to ascertain whether or not it is subject to the part 71 program.

The Agency will publish in the **Federal Register** a notice of the effective date of the part 71 program in Indian country as required by § 71.4(g), even where the default effective date of November 15, 1997 has not been changed for a given area within Indian country. The Agency solicits comments on what additional information this notice should contain that would be helpful to sources.

The EPA solicits comments on whether EPA should take additional steps to provide notice to sources that they are located in Indian country and, if so, what those steps would be. At this time, the Agency does not believe there is value in publishing maps and boundaries of reservations because the Agency will rely on the boundaries recognized by the Bureau of Indian Affairs which are available upon request from that Agency.

In addition, EPA is adding language to clarify § 71.4(b). The EPA intended that this section would not only authorize early implementation of the part 71 program (in advance of the November 15, 1997 default effective date for the program), but would also clarify that EPA will administer the program unless a part 70 program has been given full or interim approval. Given that the 1995 proposed language is less than clear on this point, the current proposal at section 71.4 explains that EPA will administer the program in Indian country.

V. Administrative Requirements

A. Docket

The docket for this regulatory action is A–93–51. All the documents referenced in this preamble fall into one of two categories. They are either reference materials that are considered to be generally available to the public, or they are memoranda and reports prepared specifically for this rulemaking. Both types of documents can be found in Docket Number A–93–51.

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 proposed rule is not a ''significant'' regulatory action because it does not raise any of the issues associated with ''significant'' regulatory actions. The proposal would have a negligible effect on the economy and would not create any inconsistencies with other actions by other agencies, alter any budgetary impacts, or raise any novel legal or policy issues. This proposal would affect EPA's approach to permitting sources in Indian country, assuring that all title V sources located in Indian country will be subject to title V permitting requirements. For these reasons, this action was not submitted to OMB for review.

C. Regulatory Flexibility Act Compliance

The Regulatory Flexibility Act (5 U.S.C. 601) requires EPA to consider potential impacts of proposed regulations on small entities. If a preliminary analysis indicates that a proposed regulation would have a significant adverse economic impact on a substantial number of small entities, then a regulatory flexibility analysis must be prepared.

The original part 70 rule and the recently proposed revisions to part 70 were determined to not have a significant adverse 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, a regulatory flexibility screening analysis of the part 71 rule revealed that the rule would not have a significant adverse impact on a substantial number of small entities, since few small entities would be subject to part 71 permitting requirements as a result of the rule's deferral of the requirement to obtain a permit for nonmajor sources. See 61 FR 34202, 34227 (July 1, 1996).

The prior screening analyses for the part 70 and part 71 rule was 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 proposal. 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 may 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, no nonmajor sources 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 sources thereby avoid the requirement to obtain a part 71 permit.

Because of the deferral of permitting requirements for nonmajor sources, today's proposal 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 (for which permitting requirements would be deferred).

Consequently, I hereby certify that today's proposed rule would not have a significant 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 currently contained in the part 71 requirements published July 1, 1996 (61 FR 34202) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0336. The additional information collection requirements in this proposed rule have been submitted for approval to the OMB. An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1713.03) and a copy may be obtained from Sandy Farmer, Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW., Washington, DC 20460 or by calling (202) 260–2740.

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 § 71.5(a) which requires owners or operators of sources subject to the program to submit a timely and complete permit application and under §§ 71.6 (a) and (c) which require that permits include requirements related to recordkeeping and reporting. As provided in 42 U.S.C. 7661(e), sources may assert a business confidentiality claim for the information collected under section 114(c) of the Act.

Today's proposal would impose information collection request requirements on approximately 100 sources in Indian country. On a per source basis, the burden would be identical to the burden for sources currently subject to part 71 requirements. In the current Information Collection Request (ICR) document for the part 71 rule, 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 proposal would 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 would be $18,425 per source or $1,842,500.

Today's rule imposes no burden on State and local agencies. 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, local, and Tribal governments. It changes the Agency's approach to issuing permits to sources in Indian country and eliminates the 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 in today's proposal. Consequently, EPA believes today's proposal 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 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.

List of Subjects 40 CFR Part 71

Environmental protection, Operating permits, Indian Tribes.

Dated: March 17, 1997.

Carol M. Browner,

Administrator.

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

2. Section 71.2 is proposed to be 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 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.

* * * * *

2. Section 71.4 is proposed to be amended by revising paragraph (a) introductory text, revising paragraph (b), revising paragraph (f), revising paragraph (h), revising paragraph (i) introductory text, and revising the first sentence of 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.* By November 15, 1997, the Administrator will administer and enforce an operating permits program in Indian country, as defined in § 71.2, when an operating permits program for the area which meets the requirements of part 70 of this chapter has not been granted full or interim approval by the Administrator. The Administrator may administer an operating permits program in Indian country in advance of that date.

(1) [Reserved].

(2) The effective date of a part 71 program in Indian country shall be November 15, 1997.

(3) Notwithstanding paragraph (b)(2) of this section, the Administrator, in consultation with the governing body of the affected Indian Tribe, may adopt an earlier effective date.

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

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3. Section 71.8 is proposed to be 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. * * *

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(d) *Notice provided to Indian Tribes.* The permitting authority shall provide notice of each draft permit to any federally recognized Indian Tribe in an area contiguous to the jurisdiction in which the part 71 permit is proposed or is within 50 miles of the permitted source and whose air quality may be affected by the permitting action.

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