and 33-15-14-06.6.e.(1)(a)[2] of the NDAC to clarify that, in order to implement these provisions, the State must have an economic incentives, marketable permits or generic emissions trading program approved in its SIP. (6) Section IV of the PROGRAM submittal (Attorney General's Legal Opinion), part XX (Limitations on Judicial Review), does not cite to relevant State laws or regulations or to State case law, and, instead of discussing the provisions of North Dakota laws, largely discusses Federal regulations. The opinion should discuss and reference North Dakota law which ensures that the provisions for judicial review in North Dakota Century Code (N.D.C.C.) Chapter 28–23–14 and 15 and in NDAC Article 33-22 are the exclusive means for obtaining judicial review of the terms and conditions of permits and that petitions for judicial review must be filed within the 90-day periods discussed in 40 CFR 70.4(b)(3)(xii), Prior to full PROGRAM approval, the State must augment the Attorney General's opinion, providing discussion of and citation to case law, statutes, and regulations which address the requirements of 40 CFR 70.4(b)(3)(xii), or, if such an opinion cannot be rendered, the State must change its statutes and/or regulations to ensure that the requirements of 40 CFR 70.4(b)(3)(xii) are met. (7) Section IV of the PROGRAM submittal (Attorney General's Legal Opinion), part XVII (Final Agency Action on Permits), indicates that under State law, "final permit action" includes the failure of the State to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the regulations. It also indicates that the State's failure to take final action within 90 days of receipt of an application for a minor permit modification (or 180 days for minor modifications subject to group processing) is subject to judicial review. For support of these assertions, the opinion cites to N.D.C.C. 28-32 and NDAC Article 33-22. EPA could not determine whether these provisions support a right to judicial review in cases where the State fails to act in a timely way on a permit application. Prior to full PROGRAM approval, the State must augment the Attorney General's opinion, providing discussion of and citation to case law and/or specific statutory or regulatory provisions which provide for judicial review in cases of State inaction, consistent with the requirements of 40 CFR 70.4(b)(3)(xi), or if such an opinion cannot be rendered, the State must change its statutes and/or regulations to

ensure that the requirements of 40 CFR 70.4(b)(3)(xi) are met. (8) Section IV of the PROGRAM submittal (Attorney General's Legal Opinion), part XIV (Enforcement of Permits Program Requirements), states that State law provides civil and criminal enforcement authority consistent with 40 CFR 70.11. EPA was unable to determine from the opinion whether North Dakota's PROGRAM is consistent in all respects with 40 CFR 70.11, and in particular with the requirement for maximum fines of not less than \$10,000 per day per violation. Prior to full PROGRAM approval, the State must augment the Attorney General's opinion, providing citation to and discussion of case law indicating that the PROGRAM meets the penalty requirements contained in 40 CFR 70.11, or, if such an opinion cannot be rendered, the State must change its statutes and/or regulations to ensure that the requirements of 40 CFR 70.11 are met.

Refer to the technical support document accompanying this rulemaking for a detailed explanation of each comment and the corrective actions required of the State.

3. Fee Adequacy Demonstration

The North Dakota PROGRAM includes a fee structure that collects in the aggregate fees that are below the presumptive minimum set in part 70. Therefore, it was necessary for the State to include a fee adequacy demonstration in their PROGRAM submittal to demonstrate that the State's title V fee structure would collect sufficient fees to cover the reasonable direct and indirect costs of developing and administering the PROGRAM. The fee adequacy demonstration included a four year workload analysis and a cash flow analysis. The fee structure for fiscal year 1995 includes a fee of \$10 per ton with a cap of \$100,000 per source. These fees are projected to increase to \$14.42 per ton with a cap of \$109,000 per source by fiscal year 1998. After careful review, the State has determined that these fees would support the North Dakota PROGRAM costs as required by section 70.9(a) of the Federal operating permitting regulation.

- 4. Provisions Implementing the Requirements of Other Titles of the Act
- a. Authority and/or Commitments for Section 112 Implementation

North Dakota has demonstrated in its PROGRAM submittal adequate legal authority to implement and enforce all section 112 requirements through the title V permit. This legal authority is contained in North Dakota's enabling

legislation and in regulatory provisions defining "applicable requirements" and stating that the permit must incorporate all applicable requirements. EPA has determined that this legal authority is sufficient to allow North Dakota to issue permits that assure compliance with all section 112 requirements, and to carry out all section 112 activities, with the exception noted in section II.A.2 above. Therefore, contingent upon the State completing the above noted corrective action, EPA will consider that the State of North Dakota's legal authority is sufficient to allow the State to issue permits that assure compliance with all section 112 requirements, and to carry out all section 112 activities. For further rationale on this interpretation, please refer to the Technical Support Document accompanying this rulemaking and the April 13, 1993 guidance memorandum titled "Title V Program Approval Criteria for Section 112 Activities," signed by John Seitz, Director of the Office of Air Quality Planning and Standards.

b. Implementation of 112(g)

On February 14, 1995 EPA published an interpretive notice (see 60 FR 8333) that postpones the effective date of section 112(g) until after EPA has promulgated a rule addressing that provision. The section 112(g) interpretive notice explains that EPA is still considering whether the effective date of section 112(g) should be delayed beyond the date of promulgation of the Federal rule so as to allow states time to adopt rules implementing the Federal rule, and that EPA will provide for any such additional delay in the final section 112(g) rulemaking. Unless and until EPA provides for such an additional postponement of section 112(g), North Dakota must be able to implement section 112(g) during the period between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations. EPA believes that North Dakota can utilize its construction review program to serve as a procedural vehicle for implementing section 112(g) and making these requirements Federally enforceable between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations. For this reason, EPA is proposing to approve North Dakota's construction permitting program found in section 33-15-14-02 of the State's regulations under the authority of title V and part 70 solely for the purpose of implementing section 112(g) during the transition period to meet the requirements of section 112(g). Since the approval would be for the single purpose of providing a