

II. Final Action and Implications

A. Analysis of State Submission

The Governor of North Dakota submitted an administratively complete title V Operating Permit Program (PROGRAM) for the State of North Dakota on April 28, 1994. The North Dakota PROGRAM, including the operating permit regulations (Article 33-15, Section 33-15-14-06, of the North Dakota Administrative Code—Air Pollution Control Rules (NDAC)), substantially meets the requirements of 40 CFR 70.2 and 70.3 with respect to applicability; §§ 70.4, 70.5, and 70.6 with respect to permit content including operational flexibility; § 70.5 with respect to complete application forms and criteria which define insignificant activities; § 70.7 with respect to public participation and minor permit modifications; and § 70.11 with respect to requirements for enforcement authority.

EPA's comments noting deficiencies in the North Dakota PROGRAM were sent to the State in a letter dated December 22, 1994. The deficiencies were segregated into those that require corrective action prior to interim PROGRAM approval, and those that require corrective action prior to full PROGRAM approval. The State committed to address the PROGRAM deficiencies that require corrective action prior to interim PROGRAM approval in a letter dated January 5, 1995. The State submitted these corrective actions in letters dated February 22, March 20, and June 13, 1995. EPA has reviewed these corrective actions and has determined them to be adequate to allow for interim PROGRAM approval.

B. Response to Comments

The comments received on the April 28, 1995 **Federal Register** notice proposing interim approval of the North Dakota PROGRAM, and EPA's response to those comments, are as follows:

Comment #1: One commenter stated that they supported granting interim approval of the State's PROGRAM. However, the commenter also indicated a concern regarding EPA's requirement that the State lower proposed insignificant emission levels, listed in subsection 33-15-14-06.4.c of the NDAC, to "more reasonable" levels prior to full PROGRAM approval. The commenter stated that, because the State's insignificant exemption is based on the emission rate, rather than size or production rate, and the regulation requires listing all emission units claiming the exemption in the permit application, subsection 33-15-14-06.4.c

of the NDAC merely grants the applicant relief from additional administrative burdens imposed on major sources. The commenter urges EPA to reconsider its position when evaluating the PROGRAM for full approval.

EPA Response: EPA does not consider this an adverse comment for granting interim approval of the State's PROGRAM. However, for full PROGRAM approval, EPA continues to believe that the insignificant emission levels that North Dakota set for the listed air contaminants (emission levels set at approximately 25% of the Prevention of Significant Deterioration (PSD) major modification significant levels) are too high to be considered reasonable levels for exempting those emission units from Title V operating permit requirements. A determination of what level of emissions is appropriate for these types of exemptions is best performed based on a consideration of the size of the emissions thresholds relative to the major source threshold applicable in various areas of North Dakota. Emissions of 25% of the PSD major modification significance levels are not clearly insignificant. Also, EPA is concerned that a source could have numerous emission units that emit less than the levels the State has set as insignificant and would subsequently be excluded from the majority of Title V permit requirements, even though the total emissions from all such insignificant emission units may be greater than the major modification significance levels or even greater than the major source threshold. Consequently, EPA continues to believe that the State must lower its insignificant emission levels for non-HAP units to a more reasonable level.

Comment #2: One commenter stated that the North Dakota PROGRAM jurisdiction should be consistent with existing treaties, court decisions, applicable statutes, and Indian and non-Indian historical activity which may have a bearing on jurisdiction. The commenter referenced specific U.S. Supreme Court cases and indicated belief that State-tribal jurisdictional questions should be decided in federal court and not by EPA "whose expertise is environmental and not jurisdictional."

EPA Response: Under Title V of the Act and the part 70 implementing regulations, it is incumbent upon EPA to determine whether a given State has the authority to implement a part 70 operating permits program for affected sources before granting approval of the State's PROGRAM. Specifically, the Act gives EPA regulatory authority "to establish the minimum elements of a

permit program to be administered by any air pollution control agency." See § 502(b) of the Act. The Act further provides that these minimum elements must include "[a] requirement that the permitting authority have adequate authority to * * * issue permits and assure compliance by all sources required to have a permit under [Title V] with each applicable standard, regulation or requirement under [the Act]." See section 502(b)(5) of the Act; 40 CFR 70.4(b)(3)(i).

Because EPA has the responsibility to ensure that a State has adequate authority over sources affected by its Title V program, EPA must make judgments about the scope of a State's legal authority, including its jurisdictional reach over affected sources. EPA also has the responsibility to address whether Tribes may administer Clean Air Act programs and, if not, to establish other means by which EPA will directly administer such programs. See sections 301(d) and 110(o) of the Act; 59 FR 43956 (August 25, 1994).

North Dakota has not specifically asserted jurisdiction over air pollution sources located within Indian Country in either its PROGRAM submittal or its comments on EPA's proposed interim approval. The Program Description that the State submitted to EPA as part of its PROGRAM specifically indicated that the State was not seeking approval to operate the PROGRAM on Indian Reservations. Thus, as EPA indicated in its notice of proposed interim approval, EPA is not presently deciding whether the State of North Dakota has jurisdiction over sources within Indian Country. Should North Dakota choose to seek PROGRAM approval over additional sources located in other areas, it may do so without prejudice. Any EPA decision regarding State or Tribal jurisdiction will necessarily be informed by relevant law, including the applicable provisions of the Act and implementing regulations, and other applicable Federal law.

C. Final Action

The EPA is promulgating interim approval of the Operating Permits Program submitted by the State of North Dakota on April 28, 1994. The State must complete the following corrective actions to receive full PROGRAM approval: (1) The State must revise subsection 33-15-14-06.4.c of the NDAC to lower the insignificant emissions unit threshold for criteria pollutants to more reasonable levels. (2) In order to implement sub-section 33-15-14-06.5.a.(1)(c) of the NDAC, the State must adopt specific provisions which detail