

establish a partial part 71 program in limited geographical areas of a State if EPA has approved a part 70 program (or combination of part 70 programs) for the remaining areas of the State. This should avoid unnecessary disruption of partial programs that have been approved within a State and avoid intruding into the State's administration of its air program where only certain jurisdictions have failed to implement an approvable part 70 program.

The proposed rule also provides for EPA implementation of part 71 programs to ensure coverage of Tribal areas. The proposed Tribal rule generally describes EPA's authority for implementing programs under the Act to protect Tribal air quality. 59 FR 43960-43961. That discussion is incorporated here by reference.

In broad overview, the Act authorizes EPA to protect air quality on lands over which Indian Tribes have jurisdiction. The overarching purpose of the Act is "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." section 101(b)(1). The members of the public residing on lands over which Tribes have jurisdiction are equally entitled to air quality protection as those residing elsewhere.

Several provisions of the Act evince Congressional intent to authorize EPA to directly implement programs under the Act where there are voids in program coverage (e.g., sections 110(c)(1), 301(d)(4) and 502(d)(3), (i)(4)). Federal implementation of Clean Air Act programs on Indian lands is particularly appropriate where Federal action will prevent a "vacuum of authority" in air quality protection. See *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 555-56 (10 Cir. 1986) (affirming EPA's authority to directly implement Safe Drinking Water Act Underground Injection Control program on Indian lands where concluding otherwise would contradict the meaning and purpose of the Act by creating "a vacuum of authority over underground injections on Indian lands, leaving vast areas of the nation devoid of protection from groundwater contamination"). Based on the proposed interpretation of Tribal jurisdiction under the Act in EPA's Tribal rule, discussed previously, EPA would have authority under today's proposed rules to implement part 71 programs for all areas within the exterior boundaries of an Indian reservation and other areas over which an Indian Tribe has jurisdiction.

If finalized as proposed, the Tribal rule will authorize Tribes to develop and submit title V operating permit

programs to EPA for approval. The EPA's principal objective would be to assist Tribes in developing and administering their own title V operating permit programs, similar to the manner in which EPA has assisted States. The EPA recognizes that ultimately Tribes are best situated to provide primary protection of Tribal air resources. To these ends, EPA's proposed Tribal rule provides the following:

It is EPA's policy to assist Tribes in developing comprehensive and effective air quality management programs to insure that Tribal air quality management programs will be implemented to the extent necessary on Indian reservations. EPA will do this by, among other things, providing technical advice and assistance to Indian Tribes on air quality issues. EPA intends to consult with Tribes to identify their particular needs for air program development assistance and to provide on-going assistance as necessary.

59 FR 43961.

However, EPA also intends to be prepared to implement title V programs in the event Tribes do not. To avoid gaps in title V permits program coverage, the rules proposed today authorize EPA to implement a title V operating permits program for Tribes that do not develop their own programs.

The more difficult issue is when EPA should implement title V programs for Tribes. EPA believes it is reasonable to give Tribes some opportunity to develop their own title V programs, assuming EPA's final Tribal rule authorizes them to do so, before EPA directly implements title V programs.

The part 71 rules propose to authorize EPA to implement the title V permit program for Tribes if a Tribal program has not been fully approved by November 15, 1997. Within the first two years of the program, the permitting authority would be required to take action on all applications submitted in the first year of the program. Nothing in today's proposal would prevent EPA from implementing a part 71 program for a Tribal area subsequent to November 15, 1995 but prior to November 15, 1997. It may be appropriate, particularly where the absence of an operating permits program would create a gap in coverage, for EPA to implement part 71 programs in advance of the effective date set by the rule. The EPA would discuss early implementation with the affected Tribe before adopting an earlier effective date. In such a case, the program would become effective when the Administrator provides written notice to the Tribal chairperson or analogous Tribal leader.

The EPA considered several factors in addressing this issue including: The opportunity for the development of Tribal programs that would render Federal implementation unnecessary; the importance of title V coverage, whether Tribal or Federal, in protecting Tribal air quality; and, the need to treat the potentially affected regulated community fairly and to facilitate certainty in business planning. The EPA solicits comments on whether the EPA's proposed approach to the effective date of the program is appropriate and whether the two-year deadline for taking action on permit applications is appropriate and feasible.

The proposed Tribal rule describes an administrative procedure by which EPA would resolve jurisdictional issues affecting Tribes. See 59 FR 43962-43963 (Aug. 25, 1994). That discussion is incorporated here by reference. Generally, EPA expects these issues to involve the precise boundary of the reservation in question and, less frequently, competing claims of jurisdiction over land which is outside of the exterior boundaries of a reservation.

Briefly summarized, the proposed Tribal rule would require EPA to notify the appropriate governmental entities regarding the Tribe's assertion of jurisdiction.¹ Those entities would have fifteen days following receipt of EPA's notification to provide formal comments to EPA regarding any dispute they might have with the Tribe's assertion of jurisdiction. Where the dispute concerns jurisdiction over off-reservation lands, appropriate governmental entities may request a one-time fifteen-day extension to the comment period. In all cases, comments from appropriate governmental entities would have to be offered in a timely manner and be limited to the Tribe's jurisdictional assertion. Where no timely comments are presented, EPA would conclude there is no objection to the Tribe's assertion. To raise a competing or conflicting claim, a commenter would be required to clearly explain the substance, basis, and extent of its objections. Finally, where EPA receives timely notification of a dispute, it could obtain such additional information and documentation as it believes appropriate and, at its option, consult with the Department of the Interior.

For purposes of identifying the Tribal area for which a part 71 program is

¹ For purposes of this rule, EPA is proposing to adopt the same definition of "governmental entities" as the Agency did in its December 1991 Water Quality Standards regulation. See 56 FR 64876 at 64884 (Dec. 12, 1991).