

21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) part 70. Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that States develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

B. Previous Action on Washington's Program

Washington submitted its operating permits program to EPA in November 1993. In August 1994, EPA proposed to grant interim approval to Washington's program and proposed to condition full approval on, among other things, revisions to Washington's regulations pertaining to the treatment of insignificant emission units (IEUs). See 59 FR 42552, 42557-42558 (August 18, 1994). In proposing that Washington be required to revise its IEU regulations as a condition of full approval, EPA stated:

Under 40 CFR 70.5(c), EPA may approve as part of a State program a list of insignificant activities and emissions levels which need not be included in permit applications. However, no activity for which there is an applicable requirement may be defined as insignificant.

59 FR 42558. Several parties commented that Washington's IEU rules met the requirements of title V and part 70 and should therefore not be a basis for interim approval. These commenters disagreed with EPA's statement that no unit for which there is an applicable requirement could be defined as "insignificant." The commenters further stated that such an interpretation would prevent Washington and most other States from granting any relief for insignificant emission units, which they argued is inconsistent with the intent of part 70, because it would subject all emissions, regardless of size and environmental impact to all part 70 requirements, including periodic monitoring, reporting, recordkeeping and compliance certification.

After reviewing the comments, EPA determined that Washington's IEU rules did in fact exceed the exemption authorized under part 70 for IEUs and therefore conditioned full approval of Washington's program on certain specified changes to Washington's IEU rules and changes to four other aspects of Washington's operating permits program. In responding to these comments in the final interim approval action, EPA stated:

EPA maintains, however, that Title V and the Part 70 rules preclude the exemption of emission units as "insignificant" when such units are subject to an applicable requirement. Section 504(a) of the Act requires that "each permit issued under this title shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of the Act, including the requirements of the applicable implementation plan." (emphasis added). Section 70.6(a)(1) provides that each permit shall include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance". Furthermore, § 70.6(c)(1) requires that each permit shall contain "compliance, certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." The fact that an emission unit may emit only small quantities of pollutants does not provide a basis to exempt it from the fundamental statutory requirement that the permit specifically include, and ensure compliance with, all applicable requirements.

59 FR 55814. EPA therefore required Washington, as a condition of full approval, to:

(5) Revise WAC 173-401-530(2) to define an emission unit as insignificant only if it is subject to no federally enforceable applicable requirement and delete the last sentence in WAC 173-401-200(16) ("These units and activities are exempt from permit program requirements except as provided in WAC 173-401-530.").

59 FR 55818. On January 9, 1995, the Washington States Petroleum Association, Northwest Pulp & Paper Association, Aluminum Company of America, Columbia Aluminum Corporation, Intalco Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Vanalco Inc. (collectively, "Petitioners") filed a petition with the United States Court of Appeals for the Ninth Circuit seeking review of the conditions in EPA's final interim approval of Washington's operating permits program. *Western*

States Petroleum Association, et al v. EPA, et al, No. 95-70034 (9th Cir., Jan. 6, 1995). In their petition and subsequent brief, Petitioners claimed that EPA had exceeded its authority in requiring Washington to revise its IEU rules as a condition of full approval and that this condition was arbitrary, capricious, an abuse of discretion and not otherwise in accordance with the law. Petitioners' brief clarified that Petitioners were challenging only EPA's requirement that Washington revise its IEU rules to obtain full approval and did not challenge any of the four other conditions for full approval. The State of Washington filed a brief as intervenor in the matter.

In reviewing the issue, EPA determined Petitioners and the State of Washington had raised a substantial question concerning EPA's interpretation of the IEU provisions of part 70 and the specific regulatory revisions EPA had ordered the State to make to its IEU rules as a condition of full approval. EPA therefore moved the Court on May 23, 1995, to vacate and remand to EPA those portions of EPA's final interim approval of Washington's operating permits program concerning IEUs, specifically, Condition 5 of EPA's conditions for full approval of Washington's operating permits program as described in the November 9, 1994 Federal Register. 59 FR 55818. The Court granted EPA's motion on July 7, 1995, thereby vacating Condition 5 of EPA's conditions for full approval of the Washington program and remanding Condition 5 to EPA for reconsideration and amended decision.

Following the Court's order, EPA has again reviewed the part 70 regulations and Washington IEU provisions. EPA now believes that it was overly broad in stating that title V and part 70 preclude the designation of emission units as "insignificant" if such units are subject to a federally-enforceable applicable requirement and in requiring Washington to change its regulations to allow the designation of an emission unit as insignificant only if it is not subject to a federally-enforceable applicable requirement. As discussed below, EPA believes there are circumstances in which an emission unit or activity can be defined as "insignificant" under a State operating permits program, even if it is subject to an applicable requirement. However, a title V application must still contain information needed to determine the applicability of or to impose any applicable requirement or any required fee and a title V permit must still meet the requirements of § 70.6 for all emission units, including IEUs, subject