(I) TNRCC Order No. 94–17 for Merichem Company, as adopted by the TNRCC on June 29, 1994.

(J) TNRCC Order No. 94–18 for Mobil Mining and Minerals Company, as adopted by the TNRCC on June 29, 1994.

(K) TNRCC Order No. 94–19 for Phibro Energy USA, Inc., as adopted by the TNRCC on June 29, 1994.

(L) TNRCC Order No. 94–20 for Shell Chemical and Shell Oil, as adopted by the TNRCC on June 29, 1994.

(M) TNRCC Order No. 94–21 for Shell Oil Company, as adopted by the TNRCC on June 29, 1994.

(N) TNRCC Order No. 94–22 for Simpson Pasadena Paper Company, as adopted by the TNRCC on June 29, 1994.

(ii) Additional material.

(A) May 27, 1994, letter from Mr. Norman D. Radford, Jr. to the TNRCC and the EPA Region 6 requesting approval of an equivalent method of monitoring sulfur in fuel and an equivalent method of determining compliance.

(B) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Crown Central Petroleum Corporation, approving an alternate monitoring and compliance demonstration method.

(C) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Exxon Company USA, approving an alternate monitoring and compliance demonstration method.

(D) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Lyondell Citgo Refining Co., LTD., approving an alternate monitoring and compliance demonstration method.

(E) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Phibro Energy, USA, Inc., approving an alternate monitoring and compliance demonstration method.

(F) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Shell Oil Company, approving an alternate monitoring and compliance demonstration method.

(G) June 8, 1994, letter from Mr. S. E. Pierce, Mobil Mining and Minerals Company, to the TNRCC requesting approval of an alternative quality assurance program.

(H) June 28, 1994, letter from Anthony C. Grigsby, Executive Director, TNRCC, to Mobil Mining and Minerals Company, approving an alternative quality assurance program.

(I) August 3, 1994, narrative plan addressing the Harris County Agreed Orders for SO_2, including emission inventories and modeling analyses (i.e. the April 16, 1993, report entitled ''Evaluation of Potential 24-hour SO_2 Nonattainment Area in Harris County, Texas–Phase II'' and the June, 1994, addendum).

(J) TNRCC certification letter dated June 29, 1994, and signed by Gloria Vasquez, Chief Clerk, TNRCC.

[FR Doc. 95–5352 Filed 3–3–95; 8:45 am]

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40 CFR Part 70

[WI001; FRL–5164–9]

Clean Air Act Final Interim Approval of the Operating Permits Program; Wisconsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating interim approval of the Operating Permits Program submitted by the State of Wisconsin for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: April 5, 1995.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AT–18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AT–18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–2703.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the Clean Air Act (Act), and implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The 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.

On October 19, 1994, EPA proposed interim approval of the operating permits program for the State of Wisconsin. See 59 FR 52743. The EPA received public comment from 7 organizations on the proposal and compiled a Technical Support Document (TSD) responding to the comments and briefly describing and clarifying aspects of the operating permits program. In this notice EPA is taking final action to promulgate interim approval of the operating permits program for the State of Wisconsin.

II. Final Action and Implications

A. Analysis of State Submission and Response to Public Comments

The EPA received comments on a total of 14 topics from 7 organizations. The EPA's response to these comments is summarized in this section. Comments supporting EPA's proposal are not addressed in this notice; however, EPA's complete response to comments TSD is available in the official file at the Region 5 address noted in the **ADDRESSES** section above.

1. Indian Lands

The EPA proposed that interim approval of Wisconsin's operating permits program not extend to lands within the exterior boundaries of reservations of federally recognized Indian Tribes in the State of Wisconsin. The proposal indicated that the Wisconsin Department of Natural Resources (WDNR) had not demonstrated the legal authority to regulate sources on tribal lands. WDNR submitted several comments on this issue, which are summarized and addressed below.

Comment: ''[W]ho will be responsible for issuance of permits to sources on Indian reservations prior to promulgation of either a tribal operation permits program or the federal operation permits program under 40 CFR Part 71? We are not aware of any tribal programs being developed or implemented in Wisconsin, and the federal part 71 rules have not yet been formally proposed. We are concerned about the apparent lack of any regulatory authority over sources on Indian reservations until a federal or tribal program is promulgated.''

Response: At this time, EPA is not aware of any facility within the exterior boundaries of a reservation in the State of Wisconsin that requires a title V operating permit. Further, the Act

explicitly contemplates that Indian Tribes may develop and administer their own Clean Air Act programs in the same manner as States. Section 164(c) delegates to Indian governing bodies the authority to redesignate lands within the exterior boundaries of reservations of federally recognized Indian tribes for purposes of the Act's Prevention of Significant Deterioration of Air Quality (PSD) program. Section 301(d) of the Act delegates to EPA the authority to specify the provisions of the Act for which it is appropriate to treat Indian Tribes in the same manner as States. The EPA has issued proposed rules that would authorize Tribes to administer approved Act programs in the same manner as States for virtually all provisions of the Act, including title V operating permit programs. *See* 59 FR 43956 (Aug. 25, 1994).

The EPA has spelled out some of the steps it currently takes and plans to take to protect tribal air quality prior to issuance of final rules authorizing tribal Act programs and ensuing tribal program approvals. *See, e.g.*, 59 FR at 43960–43961. The EPA is also developing rules to be issued within the next few months that would provide for EPA implementation of title V permit programs on tribal lands in the interim period before tribal programs are approved.

Comment: ''[T]he State of Wisconsin believes that it has authority to permit sources within Indian reservations if the source may have a substantial off-reservation impact * * *. The State has jurisdiction to enforce its air permitting laws on the basis of common law principles laid down by the United States Supreme Court. Recent decisions of that Court have departed from the concept of inherent Indian sovereignty as a bar to State jurisdiction over Indians and leaned towards reliance on the principle of federal preemption. *Rice* v. *Rehner*, 463 U.S. 713 (1983); see also *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973) * * *. Although the concept of tribal sovereignty is given less emphasis today, it continues to be relevant to a form of preemption analysis applicable to Indian law, which can be summarized as follows: State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, [ ] 334 (1983). Thus, the inquiry must be whether federal or Indian interests are interfered with by enforcement of the state's air permitting laws, and, if so, whether the State interests at stake are sufficient to justify the assertion of State authority. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court discusses the issue of whether State laws apply to on-reservation conduct of Indians. The Court describes the appropriate analysis, that being the balancing of state, federal, and tribal interests and the related notion of tribal sovereignty * * *. Where a State's interest in applying its law outweighs any competing federal or Indian interests at stake, and where the State's exercise of its jurisdiction is not incompatible with congressional goals of promoting Indian self-government, self-sufficiency and economic development, states may apply their laws unless such application is preempted by the law. *Cabazon*, 480 U.S. at 214–216. In the case of the title V permitting program, no express federal law preempts State jurisdiction on Indian reservations. While this could occur with delegation of state status to the tribes, it has not happened yet. Furthermore, no Tribe in Wisconsin has a comprehensive air management program similar to that of the State. Given this backdrop, the State's interests in protecting the health and welfare of its citizens must prevail.''

''* * * [T]he State of Wisconsin believes that EPA's assertion that the State has no permitting jurisdiction over non-Indians on Indian reservations is overly broad, especially where the lands are owned by non-Indians. It is the State of Wisconsin's position that activities by non-Indians on Indian reservations are subject to a case-by-case review to determine whether the tribe (the federal government) or the state has regulatory jurisdiction. In order to regulate non-Indians, the tribe must demonstrate its inherent authority on a case-by-case basis. *Montana* v. *US*, 450 US 544 [ ] (1981), *Brendale* v. *Confederated Tribes of Yakima Indian Nation*, 492 US 408 [ ] (1989) * * *. In addition, as noted above, there is no inherent bar to state jurisdiction over the on-reservation activities of non-Indians.''

Response: To obtain title V program approval a State must demonstrate that it has adequate authority to issue permits and assure compliance by all sources required to have permits under title V with each applicable requirement under the Act. See Act § 502(b)(5); 40 CFR 70.4(b)(3)(i). The authority must include:

> A legal opinion from the Attorney General from the State or the attorney for those State, local, or interstate air pollution control agencies that have independent counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific stat[ut]es, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority.

40 CFR 70.4(b)(3). Thus, the Act requires affected States to support their title V program submittals with a specific showing of adequate legal authority over all regulated sources, including sources located on lands within Indian reservations. For the reasons outlined below, EPA concludes that the information presented by WDNR has not adequately demonstrated authority to regulate title V sources located within the exterior boundaries of reservations of Federally recognized Tribes, including any non-Indian owned fee lands within reservation boundaries.

In *Washington Department of Ecology* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985), the court upheld EPA's decision declining to approve the application of a state program submitted under the Resource Conservation and Recovery Act (RCRA) to Indian activities within Indian country, notwithstanding that ''RCRA does not directly address the problem of how to implement a hazardous waste management program on Indian reservations.'' The court reasoned that EPA's decision was within its reasonable discretion and was buttressed by ''well-settled principles of federal Indian law'':

> States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it. [citations omitted]. This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs. [citations omitted]. Accompanying the broad congressional power is the concomitant federal trust responsibility toward Indian tribes. [citations omitted]. That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. [citation omitted]. We must presume that Congress intended to exercise its power in a manner consistent with the federal trust obligation. [citation omitted].

Washington Department of Ecology, 752 F.2d at 1469–1470; *see also United States* v. *Mazurie*, 419 U.S. 544, 556 (1975) (the inherent sovereign authority of Indian Tribes extends ''over both their members and their territory''); *Montana* v. *United States*, 450 U.S. 544, 556–557 (1981) (Tribes generally have extensive authority to regulate activities on lands that are held by the United States in trust for the Tribe).

The cases cited by WDNR do not demonstrate that Wisconsin has authority to administer its title V operating permits program within the

exterior boundaries of Indian reservations. In *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337–38, 340–41, 343–44 (1983), the Supreme Court held that the State of New Mexico's attempt to regulate the hunting activities of non-tribal members on a Tribe's reservation was preempted because federal law recognized the authority of the Tribe to regulate hunting and fishing and the State regulation of non-members would entangle and interfere with the federal promotion of tribal authority. In *California* v. *Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987), the Court held that California and Riverside County could not assert jurisdiction over bingo and gambling activities conducted by Indians on Indian land, even though the primary customers for the activities were non-Indians. The Court found that neither Pub. L. No. 83–280 nor the Organized Crime Control Act of 1970 authorized the State or County to impose gambling laws or ordinances on the reservation. In *McClanahan* v. *Arizona State Tax Comm.*, 411 U.S. 164 (1973), the Supreme Court held that it was unlawful for the State of Arizona to impose an income tax on a reservation Indian whose income was derived from reservation sources. In three of the four Supreme Court cases cited by WDNR to support its regulation of Indian country based on preemption analysis, the Court held that state regulation was preempted.

In *Rice* v. *Rehner,* 463 U.S. 713 (1983) the Supreme Court reversed a lower court's decision that State regulation of liquor on a reservation was preempted by Federal law. The Court's decision was based on its conclusion that ''[i]n the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development' '' (citation omitted) and that Congress authorized State regulation over Indian liquor transactions. *Rice,* 463 U.S. at 724, 726, 734–35. In notable contrast with liquor regulation and as elaborated below, the Act (and other environmental statutes) plainly provides for tribal and Federal programs to protect air quality within reservations. Further, as explained below, there is well-established Federal policy promoting collaborative tribal and Federal environmental management of reservations and treating Tribes, not States, as responsible for protection of the reservation environment.

WDNR cites two additional Supreme Court cases to support its comment that EPA has been overbroad in proposing to conclude that the State lacks authority over non-Indian owned lands within the exterior boundaries of an Indian reservation. WDNR comments that the determination of regulatory jurisdiction over such lands should be based on a specific case-by-case review.

The case law addressing a Tribe's authority over non-members on non-Indian owned fee lands within the exterior boundaries of a reservation must be viewed in light of the provisions of the Act providing for tribal and Federal protection of air quality within reservation boundaries and the reservationwide concerns presented by air pollution activities, discussed further below.

As noted, EPA's regulations implementing the title V program require specific evidence of legal authority. WDNR does not present Federal law, particularized facts, and a formal legal opinion that specifically and adequately support its broad claim of title V program jurisdiction over all reservations in Wisconsin. Adequate State authority is especially necessary in these circumstances where, as set out below, the Act and relevant Federal policies provide for Tribes and EPA to protect reservation air quality, Supreme Court case law recognizes inherent sovereign tribal authority to regulate activities on fee lands where the conduct may have a serious and substantial impact on tribal health or welfare, and EPA has proposed to interpret the Act tribal authority provisions as granting Tribes' authority over air pollution activities on fee lands within reservations.

For many years Congress has delegated to Indian governing bodies the authority to redesignate ''[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes'' for the PSD program under the Act. *See* section 164(c) of the Act. In 1990, Congress broadly addressed tribal authority under the Act, adding sections 110(o) and 301(d) to the Act. Section 301(d)(2) of the Act authorizes EPA to issue regulations specifying those provisions of the Act for which it is appropriate ''to treat Indian Tribes as States.'' Further, it addresses the potential jurisdictional scope of tribal Act programs, authorizing EPA to treat Tribes in the same manner as States for ''the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.'' Act § 301(d)(2)(B). In addition, section 110(o) provides that tribal implementation plans under the Act ''shall become applicable to all areas * * * located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.'' Section 302(r) of the Act defines ''Indian tribe'' to mean ''any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'' Section 302(b) of the Act includes ''[a]n agency of an Indian tribe'' in the definition of ''air pollution control agency.'' *See also* sections 103 and 105 of the Act (authorizing Federal financial assistance to air pollution control agencies).

The EPA has proposed to interpret these and other provisions of the Act as granting Tribes—approved by EPA to administer Act programs in the same manner as States—authority over all air resources within the exterior boundaries of a reservation for such programs. The EPA has explained that ''[t]his grant of authority by Congress would enable such Tribes to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation.'' 59 FR 43956, 43958–43960 (Aug. 25, 1994) (legal rationale).[1]

The Supreme Court has indicated that a Tribe ''may * * * retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the * * * health or welfare of the tribe.'' *Montana,* 450 U.S. at 566. A Tribe's inherent authority must be determined on a case-by-case basis, considering whether the conduct being regulated has a direct effect on the health or welfare of the Tribe substantial enough to support the Tribe's jurisdiction over non-Indians. *See Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989).

Thus, EPA observed that even without the proposed grant of authority, Indian Tribes would very likely have inherent authority over all activities within reservation boundaries, including non-Indian owned activities on fee lands, that are subject to Act regulation. The high mobility of air pollutants, resulting area-wide effects and the seriousness of such impacts would all tend to support

[1] EPA's proposed interpretation was informed in part by the significant regulatory entanglements and inefficiencies that could result if tribes have reservationwide jurisdiction over Act Tribal implementation plans (TIPs), as plainly provided in section 110(o) of the Act, but States are conferred jurisdiction within reservation boundaries over non-TIP programs, such as title V. *See* 59 FR 43959; *see also New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 340–41.

such inherent tribal authority. *See* 59 FR 43958, n. 5; *see also* 56 FR 64876 at 64877–64879 (Dec. 12, 1991).

On January 24, 1983, the President issued a Federal Indian Policy stressing two related themes: (1) That the Federal government will pursue the principle of Indian ''self-government'' and (2) that it will work directly with tribal governments on a ''government-to-government'' basis. An April 29, 1994 Presidential Memorandum reiterated that the rights of sovereign tribal governments must be fully respected. 59 FR 22,951 (May 4, 1994).

The EPA's tribal policies commit to certain principles, including the following:

> EPA recognizes tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with tribal Governments as the independent authority for reservation affairs, and not as the political subdivisions of States or other governmental units.
>
> * * * * *
>
> In keeping with the principal of Indian self-government, the Agency will view tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved interests and/or participation of State Governments, EPA will look directly to tribal Governments to play this lead role for matters affecting reservation environments.

November 8, 1984 ''EPA Policy for the Administration of Environmental Programs on Indian Reservations''; Policy Reaffirmed by Administrator Carol M. Browner in a Memorandum issued on March 14, 1994; *see also Washington Department of Ecology,* 752 F.2d at 1471–72 & n. 5.

The United States also has a unique fiduciary relationship with Tribes, and EPA must consider tribal interests in its actions. *Nance* v. *EPA,* 645 F.2d 701, 710 (9th Cir.), *cert. denied, Crow Tribe of Indians* v. *EPA,* 454 U.S. 1081 (1981).

The EPA provides federal financial assistance and technical assistance to Tribes to support assessment and protection of reservation environments including air quality. Section 301(d)(4) of the Act expressly provides for EPA administration of Act programs where it is inappropriate or infeasible for Tribes. EPA has described its efforts and plans to protect reservation air quality. The EPA will fill gaps in air quality protection in the interim period before tribal Act programs are approved, as necessary to ensure that reservation air quality is adequately protected. *See* 59 FR 43960–61. The EPA will issue proposed rules within the next few months that will provide for EPA implementation of title V permit programs where Tribes lack approved programs.

Even where an environmental statute did not directly address management on reservations and Tribes themselves had not assumed authority for program management, the reviewing court upheld EPA's decision declining to approve a State program's application to Indian country and concluded:

> [T]he tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling.
>
> * * * * *
>
> It is enough that EPA remains free to carry out its policy of encouraging tribal self-government by consulting with the tribes over matters of hazardous waste management policy, such as the siting of waste disposal. * * * The 'backdrop' of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of RCRA.

Washington Dept. of Ecology, 752 F.2d at 1427 (citation omitted).

Further, the State has failed to identify any compelling State interest that would justify broad assertion of State authority throughout Indian country. At this time, EPA is not aware of any facility within the exterior boundaries of an American Indian reservation in the State of Wisconsin that requires a title V operating permit. It is possible but entirely speculative that some future title V reservation sources may be located near State boundaries. As indicated, EPA has issued proposed rules that would authorize Tribes to administer EPA-approved title V programs and, in the interim, EPA is developing regulations that would authorize EPA to issue title V permits for affected sources where Tribes lack approved programs. In addition, the Act provides several mechanisms to address the potential transport of pollution off-reservation. *See, e.g.,* 59 FR 43964; sections 110(a)(2)(D) and 126 of the Act; section 164(e) of the Act; section 505 of the Act.

Based on the Clean Air Act and Federal Indian law and policies, EPA concludes that WDNR has not adequately supported the application of its title V program to reservations generally or to fee lands within reservation boundaries. *See also* 53 FR 43080 (Oct. 25, 1988) (EPA's decision declining to approve Washington's request to administer the Safe Drinking Water Act's Underground Injection Control Program to Indian lands).

Finally, EPA's decision to decline to approve application of the State's program to lands within the exterior boundaries of reservations of federally recognized Indian Tribes based on the limited information submitted by the State and the special issues and considerations associated with tribal lands is within the Agency's discretion. *See* Act section 502(d)(1) (EPA ''may'' approve a [state title V] program) & Act section 502(g) (EPA ''may'' by rule grant the [state title V] program interim approval); *compare Alabama Power Co.* v. *EPA,* No. 94–1170, slip op. at 11 (D.C. Cir. Nov. 29, 1994) (''the AEL provision's mandatory language * * * '[t]he permitting authority *shall* * * * authorize an emission limitation less stringent than the applicable limitation * * *.' (emphasis added) * * *''); *see also* 59 FR 43982 (''[a] State Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian Tribe'') (proposed 40 CFR 49.10).

Comment: ''[T]he proposed interim approval discusses both Indian reservations and tribal lands, with no clear distinction between the two. On page 4 of its proposed interim approval, EPA states: '* * * the proposed interim approval of Wisconsin's operating permits program will not extend to lands within the exterior boundaries of any Indian reservation in the State of Wisconsin.' However, it is our understanding that Indians may own lands outside of a reservation which may still be considered 'tribal lands'. Certain lands may be simply owned by tribal members, while other lands may be considered 'trust lands' (i.e. after approval by the U.S. Department of the Interior). We are uncertain what EPA's position is as to whether State jurisdiction extends to various lands owned by Indians, but located outside of reservation boundaries. Again, this determination should likely be made on a case-by-case basis, as the State of Wisconsin may have regulatory jurisdiction on these lands. We are concerned that if the state does not have jurisdiction over these lands, a 'checkerboard' pattern of regulation will develop, with no clear delineation of who has jurisdiction over air pollution sources. This can result in a non-uniform, confusing and ineffective air pollution regulatory system. We believe that this issue should be clarified in EPA's final interim approval. Our position is that the State of Wisconsin should be allowed to exercise its jurisdiction on these lands, which are

located outside of reservation boundaries.''

Response: As indicated, EPA is currently not aware of any title V source located on lands over which an Indian tribe has jurisdiction. Further, the State's comment does not identify any specific affected off-reservation sources. Without more information about specific circumstances, EPA cannot address the State's specific concern. In general, based on the information currently submitted to EPA by the State and largely for the reasons outlined in the preceding response, EPA's approval of Wisconsin's program would not extend to any sources located within Indian country, as defined at 18 U.S.C. 1151. The EPA will work with both the State and an affected tribal governments to evaluate any specific questions that are in fact presented.

2. Fee Adequacy

WDNR commented that the State's title V fees were developed to provide for adequate implementation of the minimum program requirements as they existed when the fees were developed. However, WDNR is concerned that these fees may not be sufficient to cover any extra requirements that may be added to the program, especially the section 114 enhanced compliance monitoring requirements and the section 112(r) emergency release requirements. WDNR stated that EPA must take into account the limited resources that States will have under the presumptive minimum fees established for the title V program in promulgating these regulations.

Although title V establishes a presumptive minimum cost model, it also requires that a State's fee schedule result in the collection and retention of revenues sufficient to cover permit program costs. See 40 CFR 70.9 as well as the guidance memorandum issued on August 4, 1993 entitled, ''Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V,'' signed by John Seitz, Director of the Office of Air Quality Planning and Standards. This adequacy requirement ensures that title V programs are not and will not be underfunded, and obligates the States to update and adjust their fee schedules if they are not sufficient to fund the program costs. It may therefore be appropriate to adjust fees for program expenditure increases, such as the implementation of new applicable requirements for enhanced monitoring and emergency releases.

3. Acid Rain Fees

The EPA proposed that the approval of Wisconsin's fee schedule does not extend to Wisconsin's fee provisions for the collection of emissions fees from utilities with affected units under section 404 of the Act (s.144.399(2)(am), Wis. Stats., and s.NR 410.04(4), Wis. Adm. Code). 40 CFR 70.9(b)(4) provides that, for 1995 through 1999, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act. One commenter argued that the State fees are not directly charged on emissions from Phase I affected units, and therefore EPA should not be concerned about these fees, which would place Wisconsin's fee revenue collection slightly above the presumptive minimum cost established in part 70. Although the fees in question are not directly charged on emissions from Phase I affected units, they are charged to other units operated by a utility that owns or operates a Phase I affected source. In addition, the fee amount is equivalent to what would have been charged to the Phase I affected unit. In other words, the State program charges emissions fees to utilities with Phase I units in an amount equivalent to what would have been charged directly to the Phase I units. Because of this equivalency, EPA has determined that these fees cannot be considered title V fees.

4. Section 112(g) Implementation

The EPA received several comments regarding the proposed approval of Wisconsin's preconstruction permitting program for the purpose of implementing section 112(g) during the transition period between title V approval and adoption of a State rule implementing EPA's section 112(g) regulations. Two commenters argued that Wisconsin should not, and cannot, implement section 112(g) until: (1) EPA has promulgated a section 112(g) regulation, and (2) the State has a section 112(g) program in place. The commenters also argued that Wisconsin's preconstruction review program cannot serve as a means to implement section 112(g) because it was not designed for that purpose. One commenter also asserted that such a regulatory program is unconstitutional because the section 112(g) requirements are vague. In addition to the above comments, WDNR also commented that EPA should delay the implementation of section 112(g) until the Federal regulations are promulgated. WDNR anticipates that the implementation of section 112(g) without Federal regulations will be difficult and time consuming. However, WDNR also commented that it will implement the requirements of section 112(g) if a such a delay is not possible.

In its proposed interim approval of Wisconsin's part 70 program, EPA proposed to approve Wisconsin's preconstruction review program for the purpose of implementing section 112(g) during the transition period before promulgation of a Federal rule implementing section 112(g). This proposal was based in part on an interpretation of the Act that would require sources to comply with section 112(g) beginning on the date of approval of the title V program, regardless of whether EPA had completed its section 112(g) rulemaking. The EPA has since revised this interpretation of the Act in a **Federal Register** notice published on February 14, 1995. 60 FR 8333. The revised interpretation postpones the effective date of section 112(g) until after EPA has promulgated a rule addressing that provision. The revised notice sets forth in detail the rationale for the revised interpretation.

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), Wisconsin must be able to implement section 112(g) during the transition period between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations.

For this reason, EPA is finalizing its approval of Wisconsin's preconstruction review program. This approval clarifies that the preconstruction review program is available as a mechanism to implement section 112(g) during the transition period between promulgation of the section 112(g) rule and adoption by Wisconsin of rules established to implement section 112(g). However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. Further, EPA is limiting the duration of this approval to 18 months following promulgation by EPA of the section 112(g) rule.

The EPA believes that, although Wisconsin currently lacks a program designed specifically to implement section 112(g), Wisconsin's

preconstruction review program will serve as an adequate implementation vehicle during a transition period because it will allow Wisconsin to select control measures that would meet MACT, as defined in section 112, and incorporate these measures into a federally enforceable preconstruction permit.

Another consequence of the fact that Wisconsin lacks a program designed specifically to implement section 112(g) is that the applicability criteria found in its preconstruction review program may differ from those in the section 112(g) rule. However, whether a particular source change qualifies as a modification, construction, or reconstruction for section 112(g) purposes during any transition period will be determined according to the final section 112(g) rule. The EPA would expect Wisconsin to be able to issue a preconstruction permit containing a case-by-case determination of MACT where necessary for purposes of section 112(g) even if review under its own preconstruction review program would not be triggered.

WDNR also commented that it will implement section 112(g) using its preconstruction review program, as EPA proposed on October 19, 1994. In addition, WDNR agreed that allowing Wisconsin 18 months from promulgation of Federal section 112(g) regulations to adopt its own regulations is sufficient.

One commenter incorporated by reference its comments on the proposed section 112(g) rule, and stated that the proposed rule has technical, legal, and constitutional defects that disqualify it as a valid or workable approach to section 112(g) implementation. The EPA believes the appropriate forum for pursuing objections to the legal validity of Federal regulations is by: (1) Submitting comments on a proposed rulemaking during the public comment period for that particular rulemaking, or (2) petitioning for review of the promulgated rule in the D.C. Circuit Court of Appeals. If the commenter has concerns with the final section 112(g) rule, the commenter will have the opportunity to pursue such action once the section 112(g) rule is promulgated.

Two commenters assumed that EPA would delegate the section 112(g) requirements to the State. The EPA wishes to clarify that the implementation of section 112(g) by the State, including case-by-case MACT determinations, is a requirement for approval of a State title V program. In other words, approval of the title V operating permits program confers on the State responsibility to implement section 112(g). Since the requirement to implement section 112(g) lies with the State in the first instance, there is no need for a delegation action apart from the title V program approval mechanism, except where the State seeks approval of a ''no less stringent'' program under 40 CFR part 63 subpart E. The EPA's approval of Wisconsin's program for delegation of section 112 standards as promulgated does not affect this responsibility to implement section 112(g).

5. Acid Rain Commitment

WDNR commented that there has been a delay in finalizing the State's acid rain regulations, and stated that Wisconsin will be requesting a short extension of its January 1, 1995 commitment date for submitting the acid rain program requirements. On December 19, 1994, EPA received WDNR's request to extend the acid rain submittal requirement to May 1, 1995. Because EPA does not expect this extension to affect WDNR's ability to timely implement the Phase II acid rain requirements, EPA approves WDNR's request.

6. Operational Flexibility Provisions

One commenter questioned EPA's authority to grant interim approval to a State that did not include operational flexibility provisions for ''new'' and ''modified'' sources (as defined by Wisconsin's program). The Act provides that EPA may grant interim approval to a program that substantially meets the requirements of title V, but is not fully approvable. The key term, ''substantially meets'', was not expressly defined in the statute. The part 70 regulations further address this issue, but in fairly broad terms, specifying eleven core program elements, including operational flexibility. Further guidance was issued in a memorandum on August 2, 1993 entitled, ''Interim Title V Program Approvals,'' signed by John Seitz, Director of the Office of Air Quality Planning and Standards.

40 CFR 70.4(d)(3)(viii) provides that the State program must allow certain changes to be made without requiring a permit revision if the changes are not title I modifications and do not exceed the emissions allowable under the permit, as provided in 40 CFR 70.4(b)(12). The preamble to the part 70 rulemaking further indicates that interim programs need to include only the ability to generally implement this section. See 57 FR 32271.

Each of the three approaches to operational flexibility set forth in 40 CFR 70.4(b)(12) describes an approach to implementing the language of the statutory mandate for operational flexibility. As explained in the August 2, 1993 memorandum, EPA interprets the regulation and preamble to mean that a State program would be eligible for interim approval if it provides for the implementation of any one of these three approaches for providing operational flexibility.

40 CFR 70.4(b)(12)(i) provides for section 502(b)(10) changes. Wisconsin's program includes this provision for ''existing'' sources, but not for ''new'' or ''modified'' sources. 40 CFR 70.4(b)(12)(ii) provides for an optional SIP trading program. Wisconsin's program does not currently include this provision, as no SIP trading program exists. 40 CFR 70.4(b)(12)(iii) provides for trading in the permitted facility for the purpose of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. Wisconsin's program includes this provision in s.NR 407.025(2)(a), Wis Adm. Code.

Wisconsin's program partially includes the first operational flexibility provision, and fully includes the third provision. Therefore, Wisconsin's operational flexibility provisions substantially meet the requirements of part 70, and the program is eligible for interim approval. However, EPA is clarifying in the final interim approval of Wisconsin's program that the operational flexibility deficiency is specific to the requirements of 40 CFR 70.4(b)(12)(i).

7. Denial of Permit Renewal Applications

Two commenters disagreed with EPA's proposal that, as a condition for full approval, Wisconsin's program must provide the authority to deny a renewal application for a source that is not in compliance. The commenters stated that part 70 does not mandate denial in such a circumstance, and Wisconsin should be able to retain its discretion to either approve or deny a permit renewal application for a source that is not in compliance.

The EPA agrees with the commenters that the denial of a permit renewal application for a source that is not in compliance is a discretionary action. As explained in the proposal, however, Wisconsin's program is lacking the underlying authority to deny a renewal application for a source that is not in compliance. As a condition for full approval, Wisconsin's program must include the provision that any permit noncompliance is grounds for denial of a permit renewal application. This

should not be interpreted to mean that Wisconsin has no discretion in determining its action on individual permit renewal applications for noncomplying sources.

8. Reopenings for Cause

Three commenters disagreed with EPA's proposal that, as a condition for full approval, Wisconsin's program must be revised to require permits to be reopened for cause under certain circumstances. Some commenters noted that the State reopening provisions are structured differently than the part 70 reopening provisions. The EPA proposed that reopening permits for cause must be mandatory for the following State provisions: ss.NR 407.14(1) (b), (c), (d), and (h), Wis. Adm. Code.

One commenter specifically opposed the mandatory reopening requirement for s.NR 407.14(1)(b), which provides for reopening to assure compliance with applicable requirements. This provision is equivalent to 40 CFR 70.7(f)(1)(iv), which requires reopening if the permitting authority determines that the permit must be revised to assure compliance with applicable requirements. Therefore, s.NR 407.14(1)(b) must be revised to require reopenings to assure compliance with applicable requirements. In addition, the same commenter referenced 40 CFR 70.7(f)(1)(i) requirements in the discussion of the State's s.NR 407.14(1)(b) requirements. The Federal provisions in (i) do not preclude the requirements in (iv).

The second provision, s.NR 407.14(1)(c), provides for reopening when there is a change in any applicable requirement, a new applicable requirement, or an additional applicable requirement. This State provision includes the provisions of 40 CFR 70.7(f)(1)(i), which requires reopening of a permit with a remaining term of 3 or more years when additional applicable requirements become applicable. This State provision also includes the provisions of 40 CFR 70.7(f)(1)(ii), which requires reopening when additional requirements become applicable to an affected source under the acid rain program. Therefore, s.NR 407.14(1)(c) must be revised to require reopenings, in accordance with the 3 year requirement under 40 CFR 70.7(f)(1)(i), or the acid rain requirements under 40 CFR 70.7(f)(1)(ii), as applicable. The EPA is clarifying in the final interim approval of Wisconsin's program that s.NR 407.14(1)(c) must be mandatory only to the extent required by 40 CFR 70.7(f)(1).

The third provision, s.NR 407.14(1)(d), provides for reopening when there is a change in any applicable emission limitation, ambient air quality standard, or ambient air quality increment that requires either a temporary or permanent reduction or elimination of the permitted emission. One commenter specifically opposed the mandatory reopening requirement for this State provision, stating that 40 CFR 70.7(f)(1) does not establish any requirement that a permit be reopened in response to a change in an applicable emission limitation or an air quality increment. The EPA disagrees with this comment, as the provisions outlined in s.NR 407.14(1)(d) include additional applicable requirements that a source may be subject to. Therefore, s.NR 407.14(1)(d) must be revised to require reopenings, in accordance with the 3 year requirement under 40 CFR 70.7(f)(1)(i), or the acid rain requirements under 40 CFR 70.7(f)(1)(ii), as applicable. However, EPA is clarifying in the final interim approval of Wisconsin's program that s.NR 407.14(1)(d) must be mandatory only to the extent required by 40 CFR 70.7(f)(1).

The fourth provision, s.NR 407.14(1)(h), provides for reopening when a permit contains a material mistake or inaccurate or unclear statements. Two commenters specifically opposed the mandatory reopening requirement for this State provision, stating that the Wisconsin provision is broader than the requirements of 40 CFR 70.7(f)(1)(iii). The EPA partially agrees with the commenters. 40 CFR 70.7(f)(1)(iii) requires permit reopening when the permitting authority determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit. The Wisconsin provision is broader because it includes ''unclear statements'' in a permit, in addition to material mistakes and inaccurate statements. The Wisconsin provision also does not limit the ''inaccurate statements'' provision to emissions standards or other terms or conditions of the permit. Therefore, EPA is clarifying in the final interim approval of Wisconsin's program that s.NR 407.14(1)(h) must be mandatory only to the extent required by 40 CFR 70.7(f)(1).

One commenter also objected to any revision that would require WDNR to mandatorily reopen any operating permit issued to a non-part 70 source. The EPA's interim approval of Wisconsin's title V operating permits program only applies to the State's title V program, and does not require the State to revise its operating permits program for non-part 70 sources.

9. Wisconsin Permitting Exemptions

Four commenters expressed concerns with EPA's proposal that, as a condition for full approval, some of Wisconsin's permitting exemptions must be revised to ensure that no part 70 sources are exempted from the requirement to obtain an operating permit.

All four commenters stated that the exemptions and associated recordkeeping and reporting requirements adequately limit potential to emit for the exempted sources. The EPA disagrees that the exemptions in question adequately limit potential to emit. As explained in the proposal, these Wisconsin permitting exemptions determine applicability based in part or totally on these sources' actual emissions or throughput, and the State's recordkeeping requirements do not provide a federally enforceable mechanism for limiting these sources' potential emissions to the actual emissions levels or throughput established in the exemptions. The recordkeeping provisions do not include specific emissions accounting requirements, and therefore do not ensure that the recordkeeping will be adequate to determine sources' actual emissions. In addition, the exemptions do not provide for any reporting requirements. Finally, mechanisms to limit potential to emit must be based on production or operation limits; emission rates do not adequately limit a source's potential to emit.

WDNR commented that, while it disagrees with EPA's concerns, WDNR commits to working with EPA to develop acceptable and practical mechanisms to deal with these source categories. The EPA agrees to work with WDNR to resolve this interim approval issue, and believes that it is important to develop mechanisms to avoid flooding the title V program with thousands of small sources that will never emit at part 70 applicability levels.

One commenter specifically objected to EPA's concern with ss.NR 407.03(1) (g) and (h). The commenter appears to be of the opinion that these exemptions are based on potential to emit because both exemptions include sources that ''*will emit* not more than 1,666 pounds of organic compounds per month''. The EPA disagrees with this interpretation. The Wisconsin provision provides an exemption for ''* * * operations which *emit or will emit* not more than 1,666 pounds of organic chemicals per month''. While this provision exempts

sources that ''will emit'' at this level, it also exempts sources that ''emit'' at this level. A source that has actual emissions of 1,666 pounds of organic chemicals per month may have the potential to emit at greater amounts, and therefore may be a part 70 source. In addition, the commenter noted that these Wisconsin exemptions are based on emissions measured prior to entering any emission control devices, while the determination of a source's potential to emit may be calculated by including air pollution control devices (if enforceable by the Administrator). Regardless of this distinction, EPA does not believe that the exemptions are based on potential to emit.

One commenter requested that the exemption in ss.NR 407.03(1)(t) be maintained to the extent possible. This provision provides an exemption for a combination of specified activities. The exemption is structured differently than the other exemptions for which EPA is granting interim approval, as it does not attempt to limit sources' potential to emit. Instead, this exemption allows combinations of activities to be grouped together, and certain combinations could result in emissions that would exempt part 70 sources from the permit program. Therefore, Wisconsin must revise this exemption to ensure that no part 70 sources are exempted. The State will need to determine to what extent this exemption can be retained and still ensure that no part 70 sources are eligible for the exemption.

10. Source Category Limited Interim Approval

Two commenters were supportive of EPA's proposed source category limited (SCL) interim approval; however, they were concerned that the State's current determination that it will not need additional time to issue initial permits would require those source categories to submit permit applications before the State has fully developed the program requirements for these sources. The EPA proposed SCL interim approval for Wisconsin for two separate circumstances: for new and modified sources that are not in compliance, and for sources belonging to the source categories covered by the permitting exemptions in ss.NR 407.03(1) (d), (g), (h), (o), (s), (sm), and (t).

The deficiency in Wisconsin's program with respect to new and modified sources that are not in compliance relates to the lack of State authority to issue permits to such sources. However, the State program does require these sources to submit permit applications in accordance with the State application schedule. Therefore, these sources are already covered by the State program, and are currently required to submit applications.

The deficiency in Wisconsin's program with respect to the permitting exemptions relates to the lack of State authority to require permits for certain part 70 sources. Therefore, the State may currently exempt some part 70 sources. Interim approval requires the State to correct this deficiency and submit a corrected program to EPA within 18 months after the effective date of the interim approval. Once the State corrects the deficiency, any part 70 sources which had been exempt will be required to obtain an operating permit in accordance with the requirements of the State program.

As stated in the proposal, Wisconsin has not requested additional time for issuing initial operating permits because the State intends to fix the SCL interim approval deficiencies in time to permit all sources within the 3 year phase-in period. In addition, previously exempted part 70 sources (if any exist) will be required to submit applications within one year of the interim approval effective date. If Wisconsin determines that it cannot meet these implementation requirements, SCL interim approval does provide that the completion of the initial permitting of the SCL sources could occur as late as 5 years after the granting of SCL interim approval (the 3 year phase in period plus the 2 year interim approval). To obtain this extension, Wisconsin would have to submit a request to EPA that includes compelling reasons why the additional time is needed. For additional discussion of this issue, including the specific requirements for a state's extension request, refer to the August 2, 1993 memorandum entitled, ''Interim Title V Program Approvals,'' signed by John Seitz, Director of the Office of Air Quality Planning and Standards.

11. Proposed Part 70 Rules

One commenter submitted comments it had previously filed on the proposed part 70 rule, and stated that it objected to interim approval of Wisconsin's operating permits program for the same reasons it had objected to the part 70 rule itself. The EPA believes the appropriate forum for pursuing objections to the legal validity of the part 70 rule is through a petition for review of the rule brought in the D.C. Circuit Court of Appeals. The EPA notes that this commenter has filed such a petition. However, unless and until the part 70 rule is revised, EPA must evaluate programs according to the rule that is in effect.

12. Particulate Matter (PM) Issues

One commenter raised several issues regarding PM that were not relevant to EPA's proposed interim approval of Wisconsin's operating permits program. Therefore, EPA is not addressing these comments in the final action on Wisconsin's program.

B. Final Action

The EPA is promulgating interim approval of the operating permits program submitted by the State of Wisconsin on January 27, 1994. The scope of Wisconsin's part 70 program approved in this notice applies to all part 70 sources within Wisconsin, except for tribal lands in the manner described previously in this notice. The State must make the following changes to receive full approval:

1. Revise Wisconsin's operating permit program regulations to provide for criminal fines against any person who knowingly makes any false material statement, representation, or certification in a permit application. This provision is required by 40 CFR 70.11(a)(3)(iii).

2. Revise the following legislation and regulations to provide an application shield for ''new'' and ''modified sources'' (as defined by ss.144.30(20s) and (20e), Wis. Stats.): s.144.391(1)(b), Wis. Stats.; s.144.3925(7), Wis. Stats.; s.NR 407.06(2), Wis. Adm. Code; and s.NR 407.08, Wis. Adm. Code. Wisconsin's program does provide an application shield for ''existing sources'' (as defined by s.144.30(13). 40 CFR 70.7(b) requires that the application shield must apply to all part 70 sources which meet the application shield requirements.

3. Revise the following legislation and regulation to provide for operational flexibility, as required by 40 CFR 70.4(b)(12)(i), for ''new'' and ''modified sources'' (as defined by ss.144.30(20s) and (20e), Wis. Stats.): s.144.391(4m), Wis. Stats.; and s.NR 407.025, Wis. Adm. Code. Wisconsin's program does include this requirement for ''existing sources'' (as defined by s.144.30(13)). 40 CFR 70.4(b)(12)(i) is required to apply to all part 70 sources.

4. Revise the appropriate legislation and regulations to provide the authority to deny a renewal application for a source that is not in compliance. 40 CFR 70.6(a)(6)(i) requires that any permit noncompliance is grounds for denial of a permit renewal application. Section NR 407.09(1)(f)1., Wis. Adm. Code, states that the authority to deny a permit renewal application for noncompliance

is contingent upon the requirements in s.144.3925(6), Wis. Stats., which do not currently provide for a denial in such a circumstance. Appendix P of Wisconsin's operating permits program submittal includes draft statutory revisions that are intended to fix this deficiency. The draft revisions propose to add this authority to s.144.396(3)(c), Wis. Stats. Regardless of the statutory placement of this authority, s.NR 407.09(1)(f)1., Wis. Adm. Code, must be revised if necessary to reference the correct statutory authority.

5. Revise ss.NR 407.14(1)(b), (c), (d), and (h), Wis. Adm. Code, to provide that if the conditions specified in these provisions are met, and the conditions meet the requirements of 40 CFR 70.7(f)(1), WDNR is required to reopen a permit for cause. Under the State's current provisions, reopening a permit under these circumstances is discretionary. 40 CFR 70.7(f)(1) establishes the conditions under which reopening a permit for cause is mandatory.

6. Revise s.NR 407.05, Wis. Adm. Code, to include the duty to supplement or correct application provisions, as required under 40 CFR 70.5(b).

7. Revise s.144.3935(1)(a), Wis. Stats., to provide WDNR the authority to issue operating permits to ''new'' and ''modified'' part 70 sources (as defined by ss.144.30(20s) and (20e), Wis. Stats.) that are not in compliance. 40 CFR 70.3(a) requires that the permitting agency must have authority to issue permits to all part 70 sources.

Revise s.NR 407.05(4)(h)2.c., Wis. Adm. Code, to provide that compliance plan application requirements for noncomplying new and modified sources include a narrative description of how the sources will achieve compliance. 40 CFR 70.5(c)(8)(ii)(C) requires this compliance plan application requirement for all part 70 sources that are not in compliance.

Revise s.NR 407.05(4)(h)3.c., Wis. Adm. Code, to provide for schedule of compliance application requirements for noncomplying new and modified sources. 40 CFR 70.5(c)(8)(iii)(C) requires schedules of compliance in all noncomplying part 70 source applications.

Revise s.NR 407.05(4)(h)4., Wis. Adm. Code, to provide for progress report application requirements for noncomplying new and modified sources. 40 CFR 70.5(c)(8)(iv) requires progress report schedules in all noncomplying part 70 source applications.

Revise s.NR 407.09(4)(b), Wis. Adm. Code, to provide for schedule of compliance and progress report requirements in permits issued to noncomplying new and modified sources. 40 CFR 70.6(c) (3) and (4) require schedule of compliance and progress report requirements in all part 70 permits that are issued to noncomplying sources.

8. Revise ss.NR 407.03(1) (d), (g), (h), (o), (s), (sm), and (t), Wis. Adm. Code, to ensure that no part 70 sources are exempted from the requirement to obtain an operating permit, as provided under 40 CFR 70.3. Section NR 407.03(1)(t) potentially exempts certain part 70 sources, and ss.NR 407.03(1) (d), (g), (h), (o), (s), and (sm) do not provide for adequate procedures to limit these sources' potential to emit. The 40 CFR 70.2 definition of ''major source'' considers the potential to emit of a source in determining major source status. The Wisconsin permitting exemptions listed above determine applicability based in part or totally on these sources' actual emissions or throughput, and the provisions in s.NR 407.03(4) do not provide a federally enforceable mechanism for limiting these sources' potential emissions to the actual emissions levels or throughput established in the exemptions.

To be eligible for interim approval, 40 CFR 70.4(d)(3)(ii) requires that a program provide for adequate authority to issue permits containing all applicable requirements to all title V sources. Due to the deficiencies outlined in 7. and 8. above, EPA is granting source category limited interim approval to Wisconsin's operating permit program. See 57 FR 32270 (July 21, 1992). Therefore, EPA is not including ''new'' and ''modified'' part 70 sources that are not in compliance (as defined by Wisconsin's operating permits program), and part 70 sources covered by Chapter NR 407.03(1) (d), (g), (h), (o), (s), (sm), and (t) as part of the interim approval of Wisconsin's program. The exclusion of these source categories from approval, however, does not affect Wisconsin's obligation to fix these deficiencies in order to be eligible for full approval.

This interim approval, which may not be renewed, extends until April 7, 1997. During this interim approval period, Wisconsin is protected from sanctions, and EPA is not obligated to promulgate, administer and enforce a Federal operating permits program for the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications.

If the State of Wisconsin fails to submit a complete corrective program for full approval by October 7, 1996, EPA will start an 18-month clock for mandatory sanctions. If the State of Wisconsin then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that Wisconsin has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State of Wisconsin, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that Wisconsin has come into compliance. In any case, if, 6 months after application of the first sanction, Wisconsin still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves the State of Wisconsin's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Wisconsin has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Wisconsin, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that the State has come into compliance. In all cases, if, 6 months after EPA applies the first sanction, Wisconsin has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if the State has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to Wisconsin's program by the expiration of this interim approval and that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for the State of Wisconsin upon expiration of interim approval.

Requirements for approval, specified in 40 CFR 70.4(b), encompass section

112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is also promulgating approval under section 112(l)(5) and 40 CFR 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

The EPA is also promulgating approval of Wisconsin's preconstruction permitting program found in Chapters 406 and 408, Wis. Adm. Code, under the authority of title V and part 70 solely for the purpose of implementing section 112(g) to the extent necessary during the transition period between promulgation of the Federal section 112(g) rule and adoption of any necessary State rules to implement EPA's section 112(g) regulations. However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. Although section 112(l) generally provides authority for approval of State air programs to implement section 112(g), title V and section 112(g) provide authority for this limited approval because of the direct linkage between the implementation of section 112(g) and title V. The scope of this approval is narrowly limited to section 112(g) and does not confer or imply approval for purposes of any other provision under the Act, for example, section 110. The duration of this approval is limited to 18 months following promulgation by EPA of section 112(g) regulations, to provide Wisconsin adequate time for the State to adopt regulations consistent with the Federal requirements.

III. Administrative Requirements

A. Official File

Copies of the State's submittal and other information relied upon for the final interim approval, including public comments on the proposal received and reviewed by EPA, are maintained in the official file at the EPA Regional Office. The file is an organized and complete record of all the information submitted to, or otherwise considered by, EPA in the development of this final interim approval. The official file is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: February 23, 1995.

Robert Springer,

Acting Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Appendix A to part 70 is amended by adding the entry for Wisconsin in alphabetical order to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Wisconsin

(a) Department of Natural Resources: submitted on January 27, 1994; interim approval effective on April 5, 1995; interim approval expires April 7, 1997.

(b) Reserved

* * * * *

[FR Doc. 95–5403 Filed 3–3–95; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 32, 36 and 65

[CC Docket No. 93–50; FCC 95–56]

Accounting and Rate Treatment of Allowance for Funds Used During Construction (''AFUDC'') and Telephone Plant Under Construction (''TPUC'')

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission has adopted a report and order to amend its rules regarding the accounting and ratemaking treatment for TPUC and interest costs incurred to finance construction projects. This action is to make FCC rules consistent with generally accepted accounting principles and as fair and reasonable as possible for ratemaking purposes.

EFFECTIVE DATE: September 6, 1995.

FOR FURTHER INFORMATION CONTACT: Kim Yee, Common Carrier Bureau, Accounting and Audits Division, (202) 418–0810.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order in CC Docket No. 93–50, adopted February 13, 1995 and released February 28, 1995. The complete text of this Report and Order is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC, and may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., at 2100 M Street, NW., Suite 140, Washington, DC 20037, or call (202) 857–3800.

Synopsis of Report and Order

1. This Report and Order amends Part 32, Uniform Systems of Accounts, and 65, Interstate Rate of Return Prescription Procedures and Methodologies, with respect to the proper accounting and ratemaking treatment for telephone plant under construction and allowance for funds used during construction.

2. Specifically, this Report and Order amended Part 32 to require carriers to capitalize AFUDC for both short-term and long-term TPUC using a capitalization rate based on the carrier's average cost of debt. It amended Part 65 to include the interstate portion of the TPUC balances in the interstate rate base and to require carriers to reduce their interstate revenue requirement by the amount of AFUDC capitalized in the current year.