



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[EPA-R08-OAR-2020-0722; FRL-10019-27-Region 8]

Full Approval of Revised Clean Air Act Operating Permit Program; North Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: With this direct final rule, the Environmental Protection Agency (EPA or the “Agency”) is promulgating full approval of the revised and recodified North Dakota operating permit program for stationary sources subject to title V of the Clean Air Act (CAA or the “Act”). On August 6, 2018, North Dakota submitted a request for approval of its revisions to the North Dakota operating permit program (the “title V program”) for stationary sources subject to title V of the CAA and recodification of the State’s title V program under a new title of the North Dakota Administrative Code (NDAC). The EPA determined that the revised and recodified program substantially met the requirements of title V of the Act and Code of Federal Regulations (CFR) but was not fully approvable because the State law provisions for judicial review were not consistent with program requirements found in the CFR. Thus, EPA issued an interim approval of North Dakota’s title V program. North Dakota has made the changes required for full program approval. Accordingly, the EPA is taking this action in accordance with the CAA and CFR title V program approval requirements. This is a direct final action because the action is deemed noncontroversial and we do not expect adverse comments.

DATES: This direct final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further notice, unless the EPA receives adverse written comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If adverse comments are received, the EPA will publish a timely

withdrawal of the direct final rule in the *Federal Register* informing the public that the rule will not take effect.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2020-0722. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *www.regulations.gov*. To reduce the risk of COVID-19 transmission, for this action we do not plan to offer hard copy review of the docket. Please email or call the person listed in the **FOR FURTHER INFORMATION CONTACT** section if you need to make alternative arrangements for access to the docket.

FOR FURTHER INFORMATION CONTACT: Gregory Lohrke, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, (303) 312-6396, lohrke.gregory@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Why is EPA Using a Direct Final Rule?

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the Proposed Rules section of today’s *Federal Register* publication, the EPA is publishing a separate document that will serve as the proposal to fully approve North Dakota’s title V program revisions if relevant adverse comments are filed.

If the EPA receives adverse comments, the EPA will publish a timely withdrawal in the *Federal Register* informing the public that this direct final rule will not take effect. The EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will

not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

II. Background

Title V of the CAA as amended (42 U.S.C. 7401 *et seq.*) directs states to develop, and submit to the EPA, programs for issuing operating permits to all major stationary sources and to certain other sources.¹ As required under title V, the EPA has promulgated regulations establishing the minimum elements of an approvable state title V program and defined the corresponding procedures by which the EPA will approve, oversee and, when necessary, withdraw approval of a state title V program.² After review of the state's initial program submittal, the EPA may alternatively grant interim approval of a program which substantially meets the requirements of title V and part 70 but which is not fully approvable. In the case of such an interim approval, the EPA will specify the changes that must be made before the program can receive full approval and the state shall resubmit the modified program before expiration of the interim approval.³

North Dakota first received interim approval of its title V program effective August 7, 1995 (60 FR 35335). North Dakota's program later received final, full approval effective on August 16, 1999 (64 FR 32433). On August 6, 2018, the State of North Dakota submitted to the EPA a formal request for approval of title V program recodifications and revisions made to facilitate the transfer of permitting authority from the North Dakota Department of Health (NDDH) to a newly established North Dakota Department of Environmental Quality (NDDEQ).⁴ During North Dakota's review of the NDAC for recodification and submittal to the EPA for approval, North Dakota found limitations in state law provisions for judicial review in state courts. Accordingly, the Attorney General's Opinion that accompanied North Dakota's

¹ 42 U.S.C. 7661a.

² 40 CFR part 70.

³ 42 U.S.C. 7661a(g); 40 CFR 70.4(e), (f), (i).

⁴ 83 FR 53532 (Oct. 30, 2018).

submission explained those limitations and committed to submit an addendum to the Opinion when the State adopted rules consistent with the full judicial review requirements in 40 CFR 70.4(b)(3)(x)-(xii).⁵ After review, the EPA found that the recodified and revised program substantially met the minimum requirements of the CAA and part 70, but that the EPA could not fully approve the program transfer until the State revised its rules to provide the full legal authority necessary for judicial review.⁶ Accordingly, the EPA promulgated an interim approval of North Dakota's title V program transfer effective March 15, 2019. EPA stated that interim approval would expire on March 19, 2020, and required the State to submit changes to the program addressing the judicial review deficiencies no later than six months prior to the expiration of the interim approval.⁷ A subsequent action delayed the interim approval's effective date to April 30, 2019, which then delayed the expiration date to May 1, 2020.⁸ Accordingly, North Dakota's program revisions addressing the judicial review deficiencies were due no later than November 1, 2019.

III. State Submittal

In our action granting interim approval of North Dakota's title V program transfer, the EPA concluded that North Dakota's title V program transfer was not fully approvable due to a lack of full authority required for judicial review.⁹ The EPA explained that interim approval would allow North Dakota to make minor revisions to NDAC section 33.1-15-14-06.8 and update the State Attorney General's Opinion to reflect revised legal authorities.¹⁰ The EPA received an Addendum, dated December 12, 2018, to the August 16, 2018 State Attorney General's Opinion Operating Permits Program (August 16, 2018 Opinion), which states that the regulations regarding petitions for judicial review identified in the August 16, 2018 Opinion

⁵ Id. at 54535.

⁶ 84 FR 3108, 3109 (Feb. 11, 2019).

⁷ Id.

⁸ 84 FR 8260; see also 40 CFR part 70, appendix A.

⁹ 83 FR 54536.

¹⁰ Id.

“have been lawfully adopted and shall be fully effective by the time the program is approved.”¹¹

The State of North Dakota also submitted clean and redlined copies of the revised NDAC section 33.1-15-14-06.8 with the December 12, 2018 Addendum to the Opinion, which are available in the docket for this action. The revisions to NDAC section 33.1-15-14-06.8 became effective on January 1, 2019.¹²

IV. Final Action

The December 12, 2018 Addendum to North Dakota’s Attorney General’s Opinion, together with the August 16, 2018 Opinion, affirm that the State revised the title V program provisions for judicial review as codified in NDAC section 33.1-15-14-6.8, effective as amended January 1, 2019. Therefore, North Dakota timely submitted revisions to address the deficiencies identified in our interim approval action within six months prior to the interim approval’s expiration. Accordingly, the EPA finds that the North Dakota title V program fulfills all criteria for full final approval of the transfer. The EPA is now acting to fully approve the North Dakota title V program under 40 CFR part 70 and CAA section 502.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a state title V program submittal that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7661a(d); 40 CFR 70.1(c), 70.4(i). Thus, in reviewing title V program submittals, the EPA’s role is to approve state choices, provided they meet the criteria of the CAA and the criteria, standards and procedures defined in 40 CFR part 70. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

¹¹ Margaret I. Olson, Assistant Attorney General, Addendum to August 16, 2018 Attorney General’s Opinion Operating Permits Program, December 12, 2018.

¹² North Dakota Administrative Code, Supplement 371, January 2019, <https://www.legis.nd.gov/agency-rules/administrative-rules-supplement> (last visited November 30, 2020).

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because Operating Permits Program approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial

direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 70

Environmental protection, Air pollution control, Intergovernmental relations, Title V.

Dated: February 11, 2021.

Debra Thomas,
Acting Regional Administrator,
Region 8.

40 CFR part 70 is amended as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

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

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

2. In appendix A to part 70 the entry for “North Dakota” is amended by revising paragraph (d) to read as follows:

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

* * * * *

North Dakota

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(d) The State of North Dakota submitted on August 6, 2018, operating permit program revisions and a request to transfer authority to implement and enforce the operating permit program from the North Dakota Department of Health to the North Dakota Department of Environmental Quality. The recodified North Dakota title V operating permits program is codified in N.D. Admin. Code sections 33.1-15-14-06, 33.1-15-23-04, and 33.1-15-21. North Dakota also submitted on August 16, 2018 the, “Attorney General’s Opinion Operating Permits Program,” which was supplemented on December 12, 2018, with an “Addendum to August 16, 2018 Attorney General’s Opinion Operating Permits Program,” stating that the laws of the State

provide adequate legal authority to carry out all aspects of the program. North Dakota also submitted revisions to state law effective January 1, 2019; full approval effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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[FR Doc. 2021-03267 Filed: 2/23/2021 8:45 am; Publication Date: 2/24/2021]