

implement and enforce section 111/129 requirements. This situation would arise any time a title V permit was not in effect for a source subject to the section 111/129 Federal plan or where the permit did not contain the applicable section 111/129 requirements. For example, a title V source may be allowed to operate without a title V permit for a number of years in some cases between the time the source first triggers the requirement to apply for a permit and the issuance of the permit. The preamble to the final HMIWI Federal plan also noted that a source with a title V permit with a permit term less than 3 years is not required by part 70 to have its permit reopened by a State or tribe to include new applicable requirements such as the HMIWI standard.⁶ See 40 CFR 70.7(f)(1)(i).

In addition to the explanation provided in the preamble to the final HMIWI Federal plan, there are additional State implementation and enforcement gaps which would not be addressed by implementing and enforcing the section 111/129 standard through a title V permit. The following is an example of such a gap: title V permits are not permanent. With two exceptions, all permits must be renewed at least every 5 years.⁷ Although 40 CFR 70.4(b)(10) requires States to provide that a permit or the terms and conditions of a permit may not expire until the permit is renewed, this requirement only applies if a timely and complete application for a renewal permit has been submitted by the source, creating a potential gap. In contrast to this example, the two mechanisms that EPA has identified for transferring authority ensure that a State or tribe can implement and enforce the section 111/129 standards at all times.

Legally, delegation of a standard or requirement results in a delegated State or tribe standing in for EPA as a matter of Federal law. This means that obligations a source may have to the EPA under a federally promulgated standard become obligations to a State (except for functions that the EPA

retains for itself) upon delegation.⁸ Although a State or tribe may have the authority to incorporate section 111/129 requirements into its title V permits, and implement and enforce these requirements in these permits without first taking delegation of the section 111/129 Federal plan, the State or tribe is not standing in for EPA as a matter of Federal law in this situation. Where a State or tribe does not take delegation of a section 111/129 Federal plan, obligations that a source has to EPA under the Federal plan continue after a title V permit is issued to the source. As a result, the EPA continues to maintain that an approved part 70 operating permits program cannot be used as a mechanism to transfer the authority to implement and enforce the Federal plan from the EPA to a State or tribe.

As mentioned above, a State or tribe may have the authority under State or tribal law to incorporate section 111/129 requirements into its title V permits, and implement and enforce these requirements in that context without first taking delegation of the section 111/129 Federal plan.⁹ Some States or tribes, however, may not be able to implement and enforce a section 111/129 standard in a title V permit until the section 111/129 standard has been delegated. In these situations, a State or tribe should not issue a part 70 permit to a source subject to a Federal plan before taking delegation of the section 111/129 Federal plan.

If a State or tribe can provide an Attorney General's (AG's) opinion delineating its authority to incorporate section 111/129 requirements into its title V permits, and then implement and enforce these requirements through its title V permits without first taking delegation of the requirements, then a State or Tribe does not need to take delegation of the section 111/129 requirements for purposes of title V permitting.¹⁰ In practical terms, without approval of a State or tribal plan,

delegation of a Federal plan, or an adequate AG's opinion, States and tribes with approved part 70 permitting programs open themselves up to potential questions regarding their authority to issue permits containing section 111/129 requirements and to assure compliance with these requirements. Such questions could lead to the issuance of a notice of deficiency for a State's or tribe's part 70 program. As a result, prior to a State or tribal permitting authority drafting a part 70 permit for a source subject to a section 111/129 Federal plan, the State or tribe, EPA Regional Office, and source in question are advised to ensure that delegation of the relevant Federal plan has taken place or that the permitting authority has provided to the EPA Regional Office an adequate AG's opinion.

In addition, if a permitting authority chooses to rely on an AG's opinion and not take delegation of a Federal plan, a section 111/129 source subject to the Federal plan in that State must simultaneously submit to both EPA and the State or tribe all reports required by the standard to be submitted to the EPA. Given that these reports are necessary to implement and enforce the section 111/129 requirements when they have been included in title V permits, the permitting authority needs to receive these reports at the same time as the EPA.

In the situation where a permitting authority chooses to rely on an AG's opinion and not take delegation of a Federal plan, EPA Regional Offices will be responsible for implementing and enforcing section 111/129 requirements outside of any title V permits. Moreover, in this situation, EPA Regional Offices will continue to be responsible for developing progress reports, entering emissions data into the Aerometric Information Retrieval System (AIRS)/AIRS Facility Subsystem (AFS), and conducting any other administrative functions required under this Federal plan or any other section 111/129 Federal plan. See section II.J. of the proposed Federal plan for HMIWI, July 6, 1999 (64 FR 36426, 36431); 40 CFR 60.25(e); and Appendix D of 40 CFR part 60.

It is important to note that the EPA is not using its authority under 40 CFR 70.4(i)(3) to request that all States and tribes which do not take delegation of this Federal plan submit supplemental AG's opinions at this time. However, the EPA Regional Offices shall request, and permitting authorities shall provide, such opinions when the EPA questions a State's or tribe's authority to incorporate section 111/129

⁶ An owner or operator of a source subject to a section 111/129 Federal plan remains subject to, and must act in compliance with, 111/129 requirements and all other applicable requirements to which the source is subject regardless of whether these requirements are included in a title V permit. See 40 CFR 70.6(a)(1), 70.2, 71.6(a)(1) and 71.2.

⁷ Under 40 CFR 70.4(b)(3)(iv), permitting authorities are allowed to issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years, provided that the permits are reviewed at least every 5 years. Permits with acid rain provisions must be issued for a fixed term of 5 years; shorter terms for such permits are not allowed.

⁸ If the Administrator chooses to retain certain authorities under a standard, those authorities cannot be delegated, e.g., approval of major alternatives to test methods.

⁹ The EPA interprets the phrase "assure compliance" in section 502(b)(5)(A) to mean that permitting authorities will implement and enforce each applicable standard, regulation, or requirement which must be included in the title V permits the permitting authorities issue. See definition of "applicable requirement" in 40 CFR 70.2. See also 40 CFR 70.4(b)(3)(i) and 70.6(a)(1).

¹⁰ It is important to note that an AG's opinion submitted at the time of initial title V program approval is sufficient if it demonstrates that a State or tribe has adequate authority to incorporate section 111/129 requirements into its title V permits, and to implement and enforce these requirements through its title V permits without delegation.