

MEMORANDUM

SUBJECT: Title IV-Title V Interface Guidance for States

FROM: Lydia Wegman, Deputy Director
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TO: Director, Air Division, Regions I-X

The purpose of this guidance is threefold. First, it is intended to clarify the primary criteria for approval of state submittals to carry out the acid rain portion of the operating permits program under 40 CFR Part 70. Second, it discusses key dates in the submittal/approval process and lays out a proposed schedule for certain subsequent deadlines. Last, it introduces the attached guidance package, which is designed to assist states as they focus on issues pertaining to EPA requirements for Titles IV and V.¹

BACKGROUND

Under Title V of the Clean Air Act Amendments and its implementing regulations published at 40 CFR part 70, states are required to submit acceptable operating permits programs to EPA by November 15, 1993. Permitting provisions of Title IV of the Act fall under the regulatory umbrella of Title V, requiring EPA to establish criteria for the approval of Title V programs that are compatible with the national Acid Rain Program.

The Acid Rain Program has a number of unique characteristics that make national

¹ The policies set out in this memorandum and its attachments are intended solely as guidance, do not represent final EPA action, and cannot be relied upon to create any rights enforceable by any party.

consistency particularly important and thus, a number of requirements that cannot be devolved to the states. First, the operation of the sulfur dioxide allowance system is managed at EPA headquarters where all trades of allowances are recorded and where, at the end of each calendar year, the determination of compliance or non-compliance is made (i.e., whether the unit does or does not hold enough allowances to cover all SO₂ emissions). Automatic fines for exceedences are due and payable to the Administrator without demand. Second, the mandatory hourly recordation of specified emissions on continuous emission monitor systems (CEMS) will be transmitted in electronic format directly from the utility to the headquarters database quarterly. Quality assurance systems to check the operation of CEMS are also expected to be operated either out of headquarters or the regional offices. Lastly, the only alternative compliance plan during Phase II of the program (excluding NO_x options) is the issuance of additional allowances for qualifying repowering technologies. The Act requires that the determination of whether utilities are using qualifying technologies must be made by EPA in consultation with the Department of Energy.

The permitting portion of the program is implemented in two phases. Phase I permitting, now underway, involves the federal issuance of acid rain permits to 110 affected sources that are required to fully comply with the requirements of the Acid Rain Program beginning January 1, 1995. (Concurrently, headquarters, regional staff, and some states using section 105 grant funds, have begun the process of certifying all affected utility CEMS.) Phase II permitting involves the issuance of permits to over 800 acid rain affected sources (including those affected sources permitted in Phase I) that are required to come into full compliance January 1 of the year 2000, when Phase II begins. Issuance of Phase II permits, however, will be the responsibility of states that have submitted a timely and satisfactory Title V Operating Permit Program, which will include a Title IV component.

States should note that in areas where Title IV and Title V regulations differ, Title IV rules supersede those of Title V. The fundamental differences between Titles IV and V are identified in attachment A, and include mandatory use of the permit shield, certain applications of expedited permit revision procedures, and permits five years in duration. In addition, EPA retains enforcement responsibility for Phase I affected sources.

CRITERIA FOR APPROVAL OF ACID RAIN PORTION OF TITLE V STATE SUBMITTALS

Title V and part 70 require an approvable operating permits program to assure compliance with all applicable requirements, including the requirements of the Acid Rain Program. To meet these requirements, the state permitting authority must, among other things, have the statutory and regulatory authority necessary to implement Phase II of the program. Although it is necessary for a state to submit documentation on a wide variety of items in order to receive approval under the Title V operating permits program for a Title IV program, the Agency is most interested in assuring that an approvable acid rain program meet five major criteria:

Legal Authority -- A state must demonstrate that it has the legal authority to create, administer and enforce an acid rain permitting program that is consistent with the provisions of Title IV of the Act and its implementing regulations contained in the Code of Federal Regulations. As with Title V, a letter from a state's Attorney General declaring that a state has the authority to do so will suffice in meeting this requirement. Language needed to enable state acid rain programs can be relatively simple. For example:

The state permitting authority shall develop, adopt, and implement standards, permitting procedures, and implementation plans necessary to control sulfur dioxide and nitrogen oxide emissions from affected sources in accordance with Title IV of the federal Clean Air Act, as amended, and all existing and future implementing regulations promulgated by the United States Environmental Protection Agency.

By passing or adopting broad language such as this, most states should have sufficient authority to carry out all requirements of the Acid Rain Program. To assist a state in evaluating whether its broad authority is adequate, Attachment A lists several specific authorities unique to the Acid Rain Program that must be covered by a state's broad legal authority or under some other authority.

Regulatory Authority -- A state must demonstrate that it has the regulatory authority to administer an acid rain program. The best confirmation of this authority would be the inclusion of the state acid rain regulations themselves along with the rest of the Title V submittal. Model state regulations are included in Attachment 5 to this memo. While the actual language of this model regulation is not intended to be mandatory, it does represent the "heart" of the Acid Rain Program, and all provisions enumerated in the model regulations should be included in a state's regulations.

EPA has explored the possibility of states incorporating Acid Rain Program regulations found in 40 CFR part 72 by reference, and found that doing so "across the board" could generate confusion in many instances. It is recommended, therefore, that states do not incorporate by reference unless a specific portion of the rules is found to be appropriate; adoption of the model rule (or a reasonable approximation of it) will suffice in meeting EPA requirements for acceptable state acid rain regulations.

Forms -- A state is required to use certain forms or formats consistent with the information requirements of EPA in regulating Phase II affected units (see attachments and 40 CFR 72.72(b)(4)). EPA is encouraging states to pattern their forms after EPA's. NO_x forms will be available when the final NO_x rule is promulgated.

Regulatory Revisions -- A state must demonstrate the commitment and ability to revise its regulations as necessary to accommodate federal revisions and additions to the Acid Rain regulations and to Title IV. A state's enabling authority must not bar such revisions to its regulations. It is particularly important that states be prepared to incorporate part 76

(NO_x) of the Acid Rain Program into their Title IV-Title V program once final part 76 is promulgated. State permitting authorities are required to reopen acid rain permits to add Acid Rain Program NO_x requirements no later than January 1, 1999, provided that the designated representatives for affected sources have submitted timely and complete acid rain permit applications for NO_x. (See 40 CFR 72.73(b)(2), 72.85, and 72.21) Similarly, states must also have the capacity to integrate the opt-in portion of the Acid Rain Program (part 74) once this rule is promulgated. In addition, existing part 72 may be amended or corrected from time to time, and such changes must be incorporated in the state program.

EPA will develop guidance to assist states in incorporating both NO_x and opt-in requirements into their acid rain programs once these rules are finalized. EPA will also develop a schedule and process to evaluate and approve/disapprove a state's incorporation of these requirements.

Commitment to Acid Rain Deadlines -- States must include a schedule in their Title V submittals for both the submission of permit applications from affected sources, as well as issuance of permits to the same, in accordance with the statutory deadlines and regulations for Phase II. A schedule for the reopening of the acid rain portion of permits to add Acid Rain Program NO_x requirements in accordance with the final part 76 regulations must also be included in the submittal.

APPROVAL SCHEDULE FOR ACID RAIN PORTION OF TITLE V STATE SUBMITTALS

All states must submit their Title V programs (including provisions for implementing Title IV requirements) for EPA approval by November 15, 1993. EPA recognizes, however, that some states may require additional time to complete development of their full acid rain program. Therefore, if a state is unable to submit a complete acid rain program (i.e., one that has all the required components enumerated in the "Criteria for Approval" portion of this memo, including regulations) by this deadline, it may choose to make a commitment in the November 15, 1993 submittal (e.g., in the Governor's letter of submittal to EPA) to submit all missing portions of its acid rain program no later than January 1, 1995. An agreement delineating a schedule of deadlines for submission of the rest of its acid rain program should accompany the package. EPA encourages states to submit missing portions before the January 1, 1995 deadline, in order to allow enough time to review them for completeness and consistency with the requirements of Title IV-Title V.

States that comply with the requirements set forth by part 70 and that include either full acid rain program elements or the above commitment to supply missing elements, will be eligible to receive "full approval" from EPA by November 15, 1994. EPA will review missing Title IV elements as they are received and, unless these submittals are unacceptable, will continue to hold the state in full approval status. EPA intends to inform states of when their submittals are

judged to be acceptable but will generally do so through means such as letters, and not Federal Register notices. If, however, EPA finds that a Title V program is not being properly administered or enforced for Title IV purposes (e.g., a state has not fulfilled commitments made in its November 15, 1993 submittal concerning the Acid Rain Program), the Administrator will publish a notice in the Federal Register making this announcement and noting where permit applications are to be delivered. With the publication of the Federal Register notice, the Administrator will elect to exercise one or more actions as appropriate. These include:

- 1) EPA withdrawal of approval for an entire part 70 program submittal or the acid rain portion of it; and
- 2) Application of appropriate sanctions under section 179(b) of the Act.

If a state fails to submit, administer, or enforce an acceptable Title V operating permit program for Title IV purposes, EPA retains, under 40 CFR 72.74, the option of withdrawing only the acid rain portion of the program and issuing a Phase II Acid Rain permit, rather than withdrawing the entire program and issuing a comprehensive operating permit. If a state operating program with an acceptable acid rain component is given full, interim, or partial approval by the Administrator no later than July 1, 1996, that state is responsible for issuing comprehensive part 70 permits, including the acid rain portion, to all of its Phase II sources in the approved program by December 31, 1997.

FUTURE GUIDANCE

EPA is currently drafting guidance for states in two areas: fees under Phase I and coordination of Title IV-Title V permitting schedules. These memos will be distributed by EPA as soon as they are finalized. With the exception of the EPA forms, model permit application, and fact sheets (which are otherwise generally available), this package will be available on the TTN bulletin board for states to download if needed.

If there are any questions regarding this package, or suggestions for additional future guidance, please contact Donna Deneen at (202) 233-9089, Robert Miller at (202) 233-9077 (Title IV-Title V contacts at EPA's Acid Rain Division), or Mike Trutna at (919) 541-5345, contact for national interface of Title IV-Title V at OAQPS.

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Attachment A

Special Title IV Authorities

To receive a fully approved operating permit program, states are required to have the authority to administer a state acid rain program. For most states, broad legislative authority to carry out Title IV of the Clean Air Act will be sufficient to cover this requirement. However, because states differ, some states may need to pass additional authority to enable them to carry out certain requirements unique to the Acid Rain Program. The following authorities may fall into this category for some states.

- (a) The authority to allow the Administrator to intervene as a matter of right in any administrative appeal involving an Acid Rain permit or denial of an Acid Rain permit. [§72.72(b)(5)(iv)]

A general authority that allows any interested party to intervene is sufficient.

- (b) The authority to limit the administrative appeal period to no more than 90 days following the issuance of the Acid Rain permit and the judicial appeal period to no more than 90 days following a final agency action. [§72.72(b)(5)(ii)]

40 CFR part 72, independent of 40 CFR part 70, limits the period by which the acid rain portion of an operating permit can be appealed administratively. Both 40 CFR parts 70 and the acid rain rules limit the judicial appeal period to 90 days. However, unlike 40 CFR part 70.4(b)(3)(xii), the acid rain rules do not allow a judicial appeal beyond 90 days under any circumstance.

- (c) The authority to recognize a complete acid rain permit application as binding and enforceable as an acid rain permit until an acid rain permit is issued or denied. [§72.72(b)(1)(i)(B)]

The federal acid rain rules state that a source's complete acid rain permit application is binding and enforceable. The purpose of this provision is to ensure that a source has the equivalent of an acid rain permit in the unlikely case that a permit is not issued before the beginning of Phase II (January 1, 2000) or by the expiration date of a previously issued permit.

- (d) The authority to exempt a new unit or retired unit from certain requirements of the acid rain program. [§72.72(b)(7) and §72.70(b)]

Sources with small units that burn low sulfur fuel or sources that retire a unit can petition

to have such units exempted from certain permitting and monitoring requirements under the acid rain regulations. The permitting authority must have the authority to grant this exemption.

- (e) The authority to allow a permit shield to apply to the acid rain portion of an operating permit. [§72.51]

The acid rain portion of every operating permit is covered by a permit shield. This shield assures that a source, operating in accordance with a permit issued in accordance with Title IV of the Act, will generally be deemed to be operating in compliance with the Acid Rain Program.

- (f) The authority to process fast-track modifications, where the source, not the state, provides public notice. [§72.72(a)(2) and (b)(2)]

For certain kinds of permit revisions, a source may choose to have the revision undergo the fast-track modification process instead of the permit modification process. (The "permit modification" process under the acid rain rules is the "significant modification" process under 40 CFR Part 70.7(e)(4)). Under the fast-track modification process, the source is required to give public notice at the same time that it submits its revision request to the permitting authority. After the public comment period, the permitting authority follows the same procedures used for a permit modification beginning after the public comment period.

- (g) The authority to issue an Acid Rain permit that has a term of 5 years commencing on its effective date. [§72.73(b)(1)(ii)]

The permitting authority must have the authority to issue Acid Rain permits that have a term of 5 years commencing on the permit's effective date. In addition, the permitting authority should have the authority to issue a permit that has a future effective date. By having this authority, the permitting authority would be able to issue a renewed permit (with a 5 year term) on a date prior to the exact date the previous permit is scheduled to expire.

Note: There are also authorities that a permitting authority must not include in its operating permits program. For instance, the permitting authority cannot have the authority to interfere with allowance trading or to require that excess emissions penalties be submitted to the permitting authority instead of EPA. A program that contains authorities that are inconsistent with the federal acid rain rules, such as those in the above example, is not approvable.