

AR-18J

April 22, 2004

Bruce E. Nilles
Sierra Club Midwest Office
214 N. Henry Street
Madison, Wisconsin 53704

RE: Petition Seeking the U.S. EPA to Protect Wisconsin Families From Air Pollution by Issuing the State a Notice of Deficiency for Failing to Adequately Administer its Title V Permit Program

Dear Mr. Nilles:

Enclosed please find a copy of the "Notice of Deficiency for Clean Air Act Operating Permit Program in Wisconsin" (NOD) that was issued by the United States Environmental Protection Agency (U.S. EPA) on March 4, 2004, 69 Fed. Reg. No. 43, 10167-10171. In the NOD, U.S. EPA determined, *inter alia*, that the State's title V program does not comply with the requirements of the Clean Air Act (Act) or with the implementing regulations at 40 CFR Part 70, in the following respects: (1) Wisconsin has failed to demonstrate that its title V program requires owners or operators of part 70 sources to pay fees that are sufficient to cover the costs of the State's title V program in contravention of the requirements of 40 CFR Part 70 and the Act; (2) Wisconsin is not adequately ensuring that its title V program funds are used solely for title V permit program costs and, thus, is not conducting its title V program in accordance with the requirements of 40 CFR 70.9 and the Act; (3) Wisconsin has not issued initial title V permits to all of its part 70 sources within the time allowed by the Act and 40 CFR 70.4; and (4) Wisconsin has failed to implement properly its title V program in several respects, including its issuance of title V permits that contain terms that do not have certain underlying applicable requirements, that do not contain all applicable requirements, and that do not make certain requirements federally enforceable.

The U.S. EPA concludes that the NOD, along with U.S. EPA's letter to the Midwest Environmental Advocates, Inc. (MEA), and the Sierra Club Midwest Office (Sierra Club), dated March 20, 2003, (copy attached) addresses the issues raised by MEA and Sierra Club in their "Petition Seeking the U.S. EPA to Protect Wisconsin Families From Air Pollution by Issuing the State a Notice of Deficiency for Failing to Adequately Administer its Title V Permit Program" (Petition). Accordingly, U.S. EPA is not preparing a separate response to the Petition.

The U.S. EPA is committed to ensuring that Wisconsin maintains a balanced title V Clean Air

Act Operating Permit Program. As explained in the NOD, 40 CFR 70.10(b)(3) provides that if Wisconsin has not corrected the deficiencies within 18 months after the date of the finding of deficiency and issuance of the NOD, then Wisconsin would be subject to the sanctions under section 179(b) of the Act, in accordance with section 179(a) of the Act. The U.S. EPA management and staff have met with Wisconsin Department of Natural Resources (WDNR) management and staff regarding the NOD and understand that WDNR is working to resolve the issues raised in the NOD.

Sincerely,

/ s /

Stephen Rothblatt, Director
Air and Radiation Division

Enclosures

cc: Ms. Melissa K. Scanlan
Midwest Environmental Advocates, Inc.
702 East Johnson Street
Madison, Wisconsin 53703

entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing section 111(d)/129 negative declarations, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a section 111(d)/129 negative declaration submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a section 111(d)/129 negative declaration, to use VCS in place of a section 111(d)/129 negative declaration submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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 rule 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

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 May 3, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 approving the Pennsylvania negative declaration for small MWC units may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Administration practice and procedure, Air pollution control, Aluminum, Fertilizers, Fluoride, Carbon monoxide, Intergovernmental relations, Paper and paper products industry, Phosphate, Reporting and recordkeeping requirements, Sulfur oxides, Sulfur acid plants, Waste Treatment and disposal.

Dated: February 25, 2004.

James W. Newsom,

Acting Regional Administrator, Region III.

■ 40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart NN—Pennsylvania

■ 2. Subpart NN is amended by adding § 62.9647 to read as follows:

Emissions from Existing Small Municipal Waste Combustion Units

§ 62.9647 Identification of plan—negative declaration.

October 30, 2003 letter from the Pennsylvania Department of Environmental Protection, Bureau of Air Quality, certifying that there are no existing small municipal waste combustion units within Pennsylvania, excluding Allegheny and Philadelphia counties, that are subject to 40 CFR part 60, subpart BBBBB.

[FR Doc. 04-4818 Filed 3-3-04; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[W118-1; FRL-7632-2]

Notice of Deficiency for Clean Air Act Operating Permit Program in Wisconsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of deficiency.

SUMMARY: Pursuant to its authority under section 502(i) of the Clean Air Act and 40 CFR 70.10(b), EPA is publishing this Notice of Deficiency (NOD) for the State of Wisconsin's Clean Air Act title V operating permit program. EPA has examined the facts and circumstances associated with the State's title V operating permit program and based on the totality of those facts and circumstances before the Agency, hereby issues this NOD. As explained more fully below, EPA has determined that the State's title V program does not comply with the requirements of the Clean Air Act (Act) or with the implementing regulations at 40 CFR part 70, in the following respects: (1) Wisconsin has failed to demonstrate that its title V program requires owners or operators of part 70 sources to pay fees that are sufficient to cover the costs of the State's title V program in contravention of the requirements of 40 CFR part 70 and the Act; (2) Wisconsin is not adequately ensuring that its title V program funds are used solely for title V permit program costs and, thus, is not conducting its title V program in accordance with the requirements of 40 CFR 70.9 and the Act; (3) Wisconsin has not issued initial title V permits to all of its part 70 sources within the time allowed by the Act and 40 CFR 70.4; and (4) Wisconsin has failed to implement properly its title V program in several respects, including its

issuance of title V permits that contain terms that do not have certain underlying applicable requirements, that do not contain all applicable requirements, and that do not make certain requirements Federally enforceable. Publication of this notice is a prerequisite for withdrawal of the State's title V program approval, but EPA is not withdrawing this program through this action.

EFFECTIVE DATE: February 22, 2004.

Because this NOD is an adjudication and not a final rule, the Administrative Procedure Act's 30-day deferral of the effective date of a rule does not apply.

FOR FURTHER INFORMATION CONTACT: Susan Siepkowski, EPA Region 5 (AR-18J), 77 W. Jackson Boulevard, Chicago, Illinois 60604, (312) 353-2654, siepkowski.susan@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. Background

On January 27, 1994, the Wisconsin Department of Natural Resources (WDNR) submitted to the Administrator for approval its proposed title V program. EPA granted interim approval of Wisconsin's program on April 5, 1995. WDNR submitted corrections on March 28, 2001, September 5, 2001, and September 17, 2001 to address the issues identified in the interim approval. EPA approved the corrections submitted by WDNR, finding that they adequately addressed the conditions of the April 1995 interim approval. EPA gave Wisconsin final full approval of its title V program effective on November 30, 2001.

In addition to submitting corrections to EPA in 2001 in accordance with EPA's interim approval, Wisconsin submitted certain other proposed revisions to its title V program. One of Wisconsin's proposed program revisions concerns its fee schedule. Although EPA has not taken action on this proposed program revision, Wisconsin has nonetheless implemented the change, which includes elimination of the inflation adjustment factor from its title V fee schedule. In a December 6, 2002 letter, EPA informed WDNR that EPA was reviewing the permit fee component of Wisconsin's title V permit program, and requested that Wisconsin provide information regarding its fees. Specifically, EPA requested that WDNR submit a description of the State's title V fee structure, a demonstration that

Wisconsin's fee schedule resulted in the collection of revenues sufficient to cover the title V permit program costs, a description of the title V permit program activities and costs, and a description of the activities funded by part 70 fees, including personnel. Wisconsin provided some, but not all, of the requested information in a series of three written submissions to EPA dated March 3, 2003, April 18, 2003, and June 5, 2003.

On or about December 16, 2002, Sierra Club and a coalition of Wisconsin environmental groups submitted to EPA their "Petition Seeking The U.S. EPA To Protect Wisconsin Families From Air Pollution By Issuing The State A Notice Of Deficiency For Failing To Adequately Administer Its Title V Permit Program" (Sierra Club Petition). The Sierra Club Petition raised fee issues similar to those identified by EPA in its December 6, 2002 letter to WDNR, including, for example, WDNR's failure to charge title V fees sufficient to cover permit program costs, and WDNR's illegal use of title V monies to fund portions of non-title V program and staff. The Sierra Club Petition also raised WDNR's failure to act timely on applications for title V permits.

EPA has enforcement discretion under the Act to determine whether to issue a NOD under section 502(i) of the Act. See *Public Citizen, Inc. v. EPA*, 343 F.3d 449, 463-65 (5th Cir. 2003). In this case, EPA has fully examined the facts and circumstances associated with Wisconsin's title V operating permit program and based on the totality of those facts and circumstances determined that issuance of a NOD is appropriate. The deficiencies associated with Wisconsin's title V permit program are described below.

II. Description of Action

EPA is publishing this NOD to notify the State of Wisconsin and the public that, based on the totality of facts and circumstances, EPA has found deficiencies in the Wisconsin title V operating permit program. Publication of this document in the **Federal Register** satisfies 40 CFR 70.10(b)(1), which provides that EPA shall publish in the **Federal Register** a notice of any determination that a state's title V permitting program no longer complies with the requirements of 40 CFR part 70 and the Act. The deficiencies being noticed today are described more fully below, but include Wisconsin's failure to demonstrate that it requires owners or operators of part 70 sources to pay fees that are sufficient to cover the costs of the State's title V permit program; Wisconsin's failure to ensure that its

title V program funds are used solely for title V permit program costs; Wisconsin's failure to issue initial title V permits to all of its part 70 sources within the time allowed by the Act; and Wisconsin's failure to implement properly several aspects of its title V permit program, including its issuance of title V permits that contain terms that do not have certain underlying applicable requirements, that do not contain all applicable requirements, and that do not make certain requirements federally enforceable.

A. Title V Fee Schedule

1. Inadequate Fee Schedule Demonstration

Pursuant to 42 U.S.C. 7661a(b)(3) and 40 CFR 70.9(a), a state title V program must require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs, and the State must ensure that any fee collected be used solely for title V permit program costs. Although 42 U.S.C. 7661a(b)(3) and 40 CFR 70.9(b) require that a state's title V permit program include a fee schedule that results in the collection of sufficient fees to cover all title V permit program costs, states have flexibility in developing the components of that fee schedule. See 40 CFR 70.9(b)(3).

In one of its 2001 title V proposed program revisions, Wisconsin disclosed that it had removed the inflation adjustment factor from its title V fee schedule. Although EPA has not yet taken action on this proposed program revision, Wisconsin has implemented the change. Based on this information and consistent with 40 CFR 70.9(b)(5), EPA in December 2002 requested from Wisconsin a detailed fee demonstration, showing that the State's collection of fees is sufficient to cover the title V permit program costs. As discussed more fully below, the information subsequently provided by Wisconsin in response to EPA's request does not demonstrate that the revised fee schedule results in the collection of fees in an amount sufficient to cover its actual permit program costs, as required by 42 U.S.C. 7661a(b)(3) and 40 CFR 70.9(b)(1).

a. The Costs of Wisconsin's Title V Program Are Unknown

In response to EPA's December 2002 request, WDNR specifically declined to provide information regarding the actual costs of implementing its title V program and, thus, Wisconsin has not shown that the fees it is collecting are adequate to cover its actual title V

permit program costs. WDNR's response does assert, however, that the State is collecting the presumptive minimum fee amount as described at 40 CFR 70.9(b)(2). As explained further below, EPA disagrees with Wisconsin's characterization that it is meeting the presumptive minimum fee requirements of 40 CFR 70.9(b)(2), and finds that Wisconsin has failed to demonstrate that its title V fees are sufficient to cover actual permit program costs.

b. Wisconsin Has Not Demonstrated That It Collects Fees Sufficient To Fund Its Permit Program

1. Commingled Funds

EPA will presume that a state's fee schedule satisfies the requirements of 40 CFR 70.9(b)(1), if the fee schedule meets the requirements of 40 CFR 70.9(b)(2) (the presumptive minimum fee requirements). 40 CFR 70.9(b)(2) provides, in pertinent part, that a fee schedule is presumed to be sufficient to cover title V permit program costs if it would result in the collection and retention of an amount not less than \$25 per ton, adjusted for inflation, times the total tons of actual emissions of each regulated pollutant emitted from each part 70 source. The regulations allow the state to exclude from this calculation the amount per source that exceeds 4,000 tons per year. 40 CFR 70.9(b)(2)(ii). EPA finds that WDNR has not demonstrated that it is using a fee schedule that results in the collection of the presumptive minimum fee amount, as required by 40 CFR 70.9(b)(2).

Specifically, the fee revenue information Wisconsin provided on March 3, 2003, shows that the State is not distinguishing between fees collected from sources operating under different Clean Air Act programs. The information provided shows that Wisconsin does not account separately for or maintain separate accounts for fees collected under title V and other non-title V fee-based programs. Thus, the State cannot provide an accurate picture of its title V fee collections. By including non-title V fee revenues in its calculation of "Emission Fee Revenue 1992-2001," WDNR has overstated the amount of fees it is collecting as part of the title V permit program. The degree of the overstatement cannot be determined from the information provided by Wisconsin. Accordingly, Wisconsin has not demonstrated that it is collecting an amount equal to or in excess of the presumptive minimum fee, as required by 40 CFR 70.9(b)(2).

2. No Adjustment for Inflation

As explained above, 40 CFR 70.9(b)(2) sets forth specific requirements for calculating the presumptive minimum amount of fees that must be collected to cover title V permit program costs. One of those requirements is that states must adjust annually for inflation the \$25 figure used in the presumptive fee calculation. 40 CFR 70.9(b)(2)(i) and (b)(2)(iv).

Wisconsin's fee schedule, as currently being implemented by the state, does not allow for adjustments to reflect inflation; it relies instead on billing for emissions in excess of the 4,000 ton per year amount that states may exclude from the presumptive fee calculation. See 40 CFR 70.9(b)(2)(ii)(B). In particular, Wisconsin's fee schedule requires the state to bill sources for each 1,000 tons of emissions beyond the 4,000 ton per year amount provided by 40 CFR 70.9(b)(2)(ii)(B). Wisconsin claims, without appropriate record support, that, by billing for emissions in excess of the tons to be billed under the presumptive fee schedule, it is collecting more revenue than it would by merely adjusting for inflation.

Wisconsin's original fee structure approved in 1995 followed the presumptive minimum fee schedule formula described in 40 CFR 70.9(b)(2). However, the Wisconsin legislature removed the provision for annual adjustments for inflation for fees billed after 2002. The State bills for emission fees in arrears; its fee bills are for the prior year's emissions. The effect of freezing the fees in 2001 is that the amounts billed in 2001 for the year 2000 also are calculated at the rate established in 2001. Wisconsin has not adjusted its emission fee rates to reflect the effects of inflation since 2000. By effectively freezing its fees at the 2000 level, Wisconsin has departed from the presumptive fee formula set forth in 40 CFR 70.9(b)(2). EPA cannot evaluate Wisconsin's claim that it is still collecting an amount greater than the amount it would collect using the presumptive minimum rate formula based on the information provided by the State, because Wisconsin has provided no actual fee billing or collection information for years after 2001.

Because Wisconsin has not demonstrated that it collects fees that cover the actual permit program costs, the State's program does not comply with the requirements of the Act and 40 CFR 70.9.

B. Wisconsin Has Not Demonstrated That It Is Adequately Administering Its Fees and Resources

40 CFR 70.10(b) provides that states must conduct approved state title V programs in accordance with the requirements of 40 CFR part 70 and any agreement between the state and EPA concerning operation of the program. Information provided to EPA by Wisconsin in its 2001 title V proposed program revision submissions and its responses to EPA's December 6, 2002 fee demonstration request disclose significant internal fee management deficiencies that demonstrate that WDNR is not conducting its title V program in accordance with the requirements of Act and 40 CFR part 70 and, therefore, is not adequately administering its title V program.

1. Use of Title V Funds for Non-Title V Purposes

Section 502(b) of the Act, 42 U.S.C. 7661a(b), and 40 CFR 70.9(a) provide that state title V programs must ensure that all title V fees are used solely for permit program costs. The information provided by WDNR in response to EPA's December 6, 2002 fee demonstration request discloses that Wisconsin is not using all title V fees for permit program costs.

a. Use of Title V Funds for Subsidization of Employees Performing Non-Title V Work

Wisconsin is diverting title V fees to complete non-title V work. According to information submitted to EPA by Wisconsin, only 66 of 99 title V funded employees attributed activities on their timesheets in fiscal year 2002 to title V. In addition, many of those 99 employees work in areas such as mobile sources, which typically are not associated with title V. Furthermore, title V funded 13 positions located outside of Wisconsin's Air Division. WDNR did not provide EPA with any information regarding the activities of these positions. Accordingly, WDNR is not ensuring that all title V fees that it collects are used solely for title V permit program costs, contrary to 42 U.S.C. 7661a(b) and 40 CFR 70.9(a).

b. Use of Title V Funds for Non-Title V Grant Matching

Information provided by Wisconsin establishes that when it applied for Federal non-title V grant monies, WDNR satisfied the "matching funds" requirement by using the total balance of funds in the account that holds fees collected under title V and fees collected from non-title V sources. Thus, Wisconsin is using title V money

for non-title V purposes. Accordingly, WDNR is not ensuring that all title V fees that it collects are used solely for title V permit program costs, contrary to 42 U.S.C. 7661a(b) and 40 CFR 70.9(a).

2. Insufficient Staffing

Section 502(b) of the Act, 42 U.S.C. 7661a(b), and 40 CFR 70.4 provide that a state must have adequate personnel to ensure that the permitting authority can carry out implementation of its title V program. EPA has determined that Wisconsin is not adequately staffing its title V program.

In Wisconsin's January 27, 1994, initial program submittal, Wisconsin estimated that it would need 300 agency staff to carry out its title V program. Wisconsin has never revised that estimate. As discussed above, Wisconsin currently has 99 title V funded positions in the Air Division. Further, of that number, only 66 of those employees reported working on title V activities on their time sheets in fiscal year 2002, and many of those 99 positions work in areas not typically associated with title V. Finally, Wisconsin's 2004–2005 budget includes a \$1.1 million reduction in fee spending authority (not a reduction in fees collected) and a reduction of 11.5 title V positions. Accordingly, because it is not employing staff sufficient, by its own estimate, to carry out its program, Wisconsin is not complying with the requirements of the Act and 40 CFR 70.4.

C. Failure To Timely Issue Title V Permits

Section 503(c) of the Act, 42 U.S.C. 7661b(c), and 40 CFR 70.4 require that a permitting authority must act on all initial title V permit applications within three years of the effective date of the program.

EPA granted interim approval to Wisconsin's title V program on April 5, 1995. Pursuant to section 503 of the Act, Wisconsin was to have completed issuance of initial title V operating permits to all of its part 70 sources by April 5, 1998. 42 U.S.C. 7661b(c). WDNR failed to meet this deadline and originally projected it would issue all operating permits by December 2005. In response to EPA's December 2002 fee demonstration request, WDNR stated that, due to the new budget reductions, it may not complete issuance of title V operating permits to all of its part 70 sources until 2009, eleven years after they were due. WDNR has operated its program for over eight years, but has issued only 73% of its permits. As of January 26, 2004, Wisconsin has issued 426 of 578 title V permits.

Recently, Wisconsin indicated that it is undertaking steps to complete issuance of title V operating permits to all of its part 70 sources by December 31, 2004. While EPA finds this intention encouraging, EPA is issuing this notice based on the totality of facts and circumstances currently associated with the State's title V program.

D. Additional Program Issues

1. Expiration of NSR Permits

Each source subject to title V must have a permit to operate that assures compliance with all applicable requirements. 42 U.S.C. 7661c(a), 40 CFR 70.1. The regulations define "applicable requirement" to include, among other things, any term or condition of any preconstruction permit issued pursuant to programs approved or promulgated under title I, including parts C or D of the Act. 40 CFR 70.2. Generally, title V does not impose new substantive air quality control requirements. 40 CFR 70.1(b). Therefore, to be included in a title V permit, applicable requirements, such as permit conditions in previously issued permits, must exist independent of the title V permit. In addition, a state, through its Attorney General or other applicable counsel, must provide a legal opinion demonstrating that the state has adequate authority to carry out all aspects of the title V program, including authority to incorporate all applicable requirements into title V permits. 40 CFR 70.4(b)(3)(v).

Title I of the Act authorizes permitting authorities to establish in preconstruction permits source specific terms and conditions necessary for sources to comply with the requirements of the Prevention of Significant Deterioration and New Source Review programs. Wisconsin interprets its statutes, Wis. Stat 285.66(1), and regulations Wis. Admin code NR 405.12, to provide that its preconstruction permits expire after 18 months. Because Wisconsin's rules do not ensure these source specific permit terms remain in effect and exist independently of a title V permit, it allows the basis for these conditions to expire and could cause Wisconsin to lose the authority to include such conditions in a renewed title V permit.

Title V does not provide the authority for the establishment and maintenance of State Implementation Plan (SIP) approved permit requirements. Therefore, Wisconsin's interpretation that its title V program, Wis. Stat. 285.63, provides authority to create source-specific limitations, such as Best Available Control Technology

requirements, in title V permits, is inconsistent with EPA's regulations. Because Wisconsin's rules do not assure that construction permit conditions exist independently of title V permits and because its interpretation that its title V program provides the authority to create source specific limitations, the State's program does not meet the program approval requirements of title V and part 70. See 66 FR 64039, 64040 (12/11/01).

2. Combined NSR and Title V Permits

States have the option of integrating their pre-construction and title V programs. See 57 FR 32250, 32259 (July 21, 1992). 40 CFR part 70 requires that to implement an integrated permit program, the state permitting authority must: (1) Have in place procedures that substantially comply with all procedural requirements of part 70, 40 CFR 70.7(d)(1)(v); (2) comply with the permit content requirements in 40 CFR 70.6, including the requirement to specify the origin of and authority for each term or condition in a title V permit, 40 CFR 70.7(d)(1)(v); and (3) ensure that the NSR conditions do not expire to assure compliance with applicable requirements, 42 U.S.C. 7661c(a) and 40 CFR 70.1(b).

Wisconsin has been issuing combined pre-construction and title V permits for several years. Wisconsin does not identify NSR conditions or specify the origin and authority of the NSR conditions in combined permits. Furthermore, Wisconsin does not have any provisions to ensure that the NSR conditions are permanent. Wisconsin's integrated title V/pre-construction program does not meet the requirements of 40 CFR part 70.

3. Federal Enforceability

40 CFR 70.6(b) provides that all terms and conditions in a title V permit are federally enforceable, that is, enforceable by EPA or citizens. However, the permitting authority can designate as not federally enforceable any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. 40 CFR 70.6(b)(2) and 40 CFR 70.2 (definition of applicable requirement).

All terms and conditions of a permit issued pursuant to a program approved into a state's SIP are federally enforceable. 40 CFR 52.23. Wisconsin, however, does not identify all terms and conditions of its construction permit as federally enforceable. Instead, Wisconsin currently identifies permit requirements in title V permits originating from Wisconsin's non-SIP

toxics program (Wis. Admin. Code NR 445) as enforceable by the state only, even when the requirements were established in a permit issued pursuant to a SIP-approved program. Wisconsin's failure to include the terms established in a permit issued pursuant to a SIP-approved program into the federally enforceable side of its title V permits is contrary to 40 CFR 70.6.

4. Insignificant Emission Unit Requirements

40 CFR 70.5(c) authorizes EPA to approve as part of a state program a list of insignificant activities and emission levels which need not be included in the permit application. An application may not omit, however, information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the EPA approved schedule. Moreover, nothing in part 70 authorizes a state to exempt insignificant emission units (IEUs) from the permit content requirements of 40 CFR 70.6. Furthermore, the July 21, 1992 preamble to the part 70 regulations provides that the IEU exemption does not apply to permit content. 57 FR 32273 (July 21, 1992).

Wisconsin's regulations contain criteria for sources to identify IEUs in their applications, (Wis. Admin. Code NR 407), and require that permit applications contain information necessary to determine the applicability of, or to impose, any applicable requirement. Although Wisconsin's regulations are consistent with EPA's regulations at 40 CFR part 70, the State is not properly implementing its regulations because it is not including these applicable requirements in its title V permits. Therefore, Wisconsin's implementation of its regulations is inconsistent with part 70.

III. Federal Oversight and Sanctions

40 CFR 70.10(b) and (c) provide that EPA may withdraw a part 70 program approval, in whole or in part, whenever the approved program no longer complies with the requirements of part 70, EPA has notified the state of the noncompliance, and the permitting authority fails to take corrective action. 40 CFR 70.10(c)(1) lists a number of potential bases for program withdrawal, including inadequate fee collection, failure to comply with the requirements of part 70 in administering the program, and failure to timely issue permits.

40 CFR 70.10(b), which sets forth the procedures for program withdrawal, requires as a prerequisite to withdrawal that the EPA Administrator notify the permitting authority of any finding of

deficiency by publishing a notice in the **Federal Register**. Today's notice satisfies this requirement and constitutes a finding of program deficiency. If Wisconsin has not taken "significant action to assure adequate administration and enforcement of the program" within 90 days after issuance of this notice of deficiency, EPA may, among other things, withdraw approval of the program using procedures consistent with 40 CFR 70.4(e) and/or promulgate, administer, and enforce a Federal title V program. See 40 CFR 70.10(b)(2). Additionally, 40 CFR 70.10(b)(3) provides that if the state has not corrected the deficiency within 18 months after the date of the finding of deficiency and issuance of the NOD, then the state would be subject to the sanctions under section 179(b) of the Act, in accordance with section 179(a) of the Act, 18 months after that notice. Upon EPA action, the sanctions will go into effect unless the State has corrected the deficiencies identified in this notice within 18 months after signature of this notice.¹ These sanctions would be applied in the same manner, and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.

In addition, 40 CFR 70.10(b)(4) provides that, if the state has not corrected the deficiency within 18 months after the date of the finding of deficiency, EPA will promulgate, administer, and enforce a whole or partial program within 2 years of the date of the finding.

This document is not a proposal to withdraw Wisconsin's title V program. Consistent with 40 CFR 70.10(b)(2), EPA will wait at least 90 days, at which point it will assess whether the state has taken significant action to correct the deficiencies outlined in this notice. See 40 CFR 70.10(b)(2) (providing that 90 days after issuance of NOD, EPA may take certain actions).

IV. Administrative Requirements

Under section 307(b)(1) of the Act, petitions for judicial review of today's action may be filed with the United States Court of Appeals for the appropriate circuit within 60 days of March 4, 2004.

¹ Section 179(a) provides that unless such deficiency has been corrected within 18 months after the finding, one of the sanctions in section 179(b) of the Act shall apply as selected by the Administrator. If the Administrator has selected one of the sanctions and the deficiency has not been corrected within 6 months thereafter, then sanctions under both sections 179(b)(1) and 179(b)(2) shall apply until the Administrator determines that the state has come into compliance.

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

Dated: February 22, 2004.

Thomas V. Skinner,

Regional Administrator, Region 5.

[FR Doc. 04-4822 Filed 3-3-04; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-7631-4]

Delaware: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Delaware has applied to EPA for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these revisions satisfy all requirements needed to qualify for final authorization and is authorizing Delaware's changes through this immediate final action. EPA is publishing this rule to authorize the revisions without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize Delaware's revisions to its hazardous waste program will take effect. If we receive comments that oppose this action, or portions thereof, we will publish a document in the **Federal Register** withdrawing the relevant portions of this rule, before they take effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the revisions to Delaware's program that were the subject of adverse comment.

DATES: This final authorization will become effective on May 3, 2004, unless EPA receives adverse written comments by April 5, 2004. If EPA receives any such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization, or portions thereof, will not take effect as scheduled.

ADDRESSES: Send written comments to Lillie Ellerbe, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, Phone number: (215) 814-5454. Comments may also be submitted