

**COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD
REGULATIONS FOR THE CONTROL AND ABATEMENT OF AIR POLLUTION**

**PRELIMINARY DETERMINATION REVIEW DOCUMENT FOR
PROPOSED REGULATION REVISION K97
CONCERNING**

**FEDERAL OPERATING PERMITS FOR STATIONARY SOURCES,
PERMIT PROGRAM FEES FOR STATIONARY SOURCES,
AND
ACID RAIN OPERATING PERMITS
(9 VAC 5 CHAPTER 80)**

PROVISIONS AFFECTED (TENTATIVE DETERMINATION)

Federal Operating Permits for Stationary Sources [9 VAC 5-80-50 et seq.]

Permit Program Fees for Stationary Sources [9 VAC 5-80-310 et seq.]

Acid Rain Operating Permits [9 VAC 5-80-360 et seq.]

Insignificant Activities [9 VAC 5-80-710 et seq.]

REASON FOR PROPOSED REGULATION AMENDMENTS

The regulation amendments are being proposed to bring the regulations into compliance with federal guidance concerning the implementation of Title V of the federal Clean Air Act (42 U.S.C. §§ 7661-7661f) and of federal regulations concerning state operating permit programs (40 CFR Part 70).

STATEMENT OF LEGAL AUTHORITY

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare. Section 10.1-1322 of this same law authorizes the State Air Pollution Control Board to adopt requirements for permits and to collect fees from air pollution sources.

STATEMENT OF STATUTORY MANDATES

The regulation is mandated by federal law or regulation. A succinct statement of the source (including legal citation) and scope of the mandate may be found below. A copy of all cited legal provisions is attached.

Title V of the Clean Air Act requires the states to develop operating permit programs to cover all stationary sources defined as major by the Act. Permits issued under these programs must set out standards and conditions that cover all the applicable requirements of the Act for each emission unit at each individual stationary

source. The federal regulations required to be developed under Title V, 40 CFR Part 70 (57 FR 32250, July 21, 1992), specify the minimum elements that must be included in state operating permit programs.

CAA, Section 502(a) and 40 CFR 70.3(a) require that the following sources be covered under the provisions of any Title V program:

1. Affected sources as defined under the acid deposition provisions of Title IV of the Act.
2. Major sources, defined as follows:
 - a. any source of air pollutants with the potential to emit 100 tons per year (tpy) or more of any pollutant;
 - b. in ozone nonattainment areas designated as serious, any source emitting 50 tpy or more of VOCs or NO_x (in Virginia, the Northern Virginia area is designated serious); for severe or extreme nonattainment areas, sources emitting 25 and 10 tpy or more of VOCs or NO_x, respectively; and
 - c. any source with the potential to emit 10 tpy of any hazardous air pollutant or 25 tpy of any combination of hazardous air pollutants regulated under Section 112 of the Act.
3. Any other source, including an area source, subject to a hazardous air pollutant standard under Section 112 of the Act.
4. Any source subject to new source performance standards under Section 111 of the Act.
5. Any source required to have a preconstruction review permit pursuant to the requirements of the prevention of significant deterioration program under Title I, Part C of the Act or the nonattainment area new source review program under Title I, Part D of the Act.
6. Any other stationary source in a category that EPA designates in whole or in part by regulation, after notice and comment.

CAA, Section 502(b) and 40 CFR 70.4(b) and other provisions of 40 CFR Part 70, as noted, set out the minimum elements that must be included in each program, as follows:

1. Requirements for permit applications, including standard application forms, compliance plans and criteria for determining the completeness of applications. (40 CFR 70.5)
2. Monitoring and reporting requirements. (40 CFR 70.6(a)(3))
3. A permit fee system. (40 CFR 70.9)
4. Provisions for adequate personnel and funding to administer the program.
5. Authority to issue permits and assure that each permitted source complies with applicable

requirements under the Act. (40 CFR 70.7(a)(1))

6. Authority to issue permits for a fixed term, not to exceed five years. (40 CFR 70.6(a)(2))
7. Authority to assure that permits incorporate emission limitations in an applicable implementation plan. (40 CFR 70.6(a)(1))
8. Authority to terminate, modify, or revoke and reissue permits for cause and a requirement to reopen permits in certain circumstances. (40 CFR 70.7)
9. Authority to enforce permits, permit fees, and the requirement to obtain a permit, including civil penalty authority in a maximum amount of not less than \$10,000 per day, and appropriate criminal penalties. (40 CFR 70.11)
10. Authority to assure that no permit will be issued if EPA objects to its issuance in a timely fashion. (40 CFR 70.8(c) and (e))
11. Procedures for (i) expeditiously determining when applications are complete, (ii) processing applications, (iii) public notice, including offering an opportunity for public comment, and a hearing on applications, (iv) expeditious review of permit actions, and (v) state court review of the final permit action. (40 CFR 70.5 (a)(2) and 70.7 (h))
12. Authority and procedures to provide that the permitting authority's failure to act on a permit or renewal application within the deadlines specified in the Act shall be treated as a final permit action solely to allow judicial review by the applicant or anyone also who participated in the public comment process to compel action on the application.
13. Authority and procedures to make available to the public any permit application, compliance plan, permit emissions or monitoring report, and compliance report or certification, subject to the confidentiality provisions of section 114(c) of the Act; the contents of the permit itself are not entitled to confidentiality protection.
14. Provisions to allow operational flexibility at the permitted facility.

CAA, Section 503(b) and 40 CFR 70.5(c)(8) and (9) require that applicants shall submit with the permit application a compliance plan describing how the source will comply with all applicable requirements of the Act. The compliance plan must include a schedule of compliance and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every six months. The permittee must also certify that the facility is in compliance with any applicable requirements of the permit no less frequently than annually. The permittee must also promptly report any deviations from permit requirements to the permitting authority.

CAA, Section 503(d) and 40 CFR 70.7(b) specify that a source's failure to have an operating permit shall not be a violation of the Act if the source owner submitted a timely and complete application for a permit and if he submitted other information required or requested to process the application in a timely fashion.

CAA, Section 503(e) and 40 CFR 70.4(b)(3)(viii) require that a copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this title, shall be available to the public. Any information that is required of an applicant to submit and which is entitled to protection from disclosure under section 114 (c) of the Act can be submitted separately.

CAA, Section 504 and 40 CFR 70.6(a)-(c) specify what is to be included in each operating permit issued under this program. These provisions require each permit to include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every six months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements, including the requirements of any state implementation plan.

CAA, Section 504(b) indicates that the EPA administrator may prescribe, by rule, procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated by the Act. Continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance.

CAA, Section 504(c) and 40 CFR 70.6(a)(3) require that each permit issued under the program shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to applicable regulations issued under 504(b) and to any other requirements specified in federal regulation. Any report required to be submitted by a permit issued to a corporation shall be signed by a responsible corporate official, who shall certify its accuracy.

CAA, Section 504(d) and 40 CFR 70.6(d) allow the state permitting authority to issue a general permit covering numerous similar sources after notice and opportunity for public hearing. Any general permit shall comply with all program requirements. Any source governed by a general permit regulation must still file an application under this program.

CAA, Section 504(e) and 40 CFR 70.6(e) allow the state permitting authority to issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of the Act at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under the Act. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location.

CAA, Section 504(f) and 40 CFR 70.6(f) provide a permit shield for permittees. This section specifies that compliance with a permit issued in accordance with Title V shall be deemed in compliance with CAA, Section 502, or with the program. And unless otherwise provided by the EPA administrator and by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of the Act that relate to the permittee, if:

1. the permit includes the applicable requirements of those provisions, or
2. the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

CAA, Section 503(c) and 40 CFR 70.5(a)(1) specify that all sources required to be permitted under a Title V program are required to submit an application within twelve months after the date EPA approves the State's program. The State permitting authority may specify an earlier date for submitting applications. The State permitting authority must establish a phased schedule for acting on permit applications submitted within the first full year after program approval, and must act on at least one-third of the permits each year over a period not to exceed three years after approval of the program. After acting on the initial application, the permitting authority must issue or deny a complete application within 18 months after receiving that application.

CAA, Section 505(a) and 40 CFR 70.8(a) require the state permitting authority to send EPA a copy of each permit application and each permit proposed to be issued. For each permit application or proposed permit sent to EPA, CAA, Section 505(a) and 40 CFR 70.8(b) also require the permitting authority to notify all states whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of the source. This notice must provide an opportunity for these affected states to submit written recommendations respecting the issuance of the permit and its terms and conditions. CAA, Section 505(b) and 40 CFR 70.8(c) provide for EPA objections to any permit which contains provisions that are not in compliance with the requirements of the Act or with the applicable State Implementation Plan. This section also provides that any person may petition the EPA administrator within 60 days after the expiration of the 45-day review period, if no objections were submitted by the EPA administrator. Furthermore the state permitting authority may not issue the permit if the EPA administrator objects to its issuance unless the permit is revised to meet the objection. If the state permitting authority fails to revise and resubmit the permit, EPA must issue or deny the permit in accordance with the requirements of Title V. Under section 505(d) and 40 CFR 70.8(a)(2), the permit program submitted by the state may not have to meet these requirements for sources other than major sources covered by the program. CAA, Section 505(e) and 40 CFR 70.7(g) allow the EPA administrator to terminate, modify, or revoke and reissue an operating permit issued under a state's program, if he finds that cause exists for such action.

Affected sources as defined under the acid rain provisions of Title IV of the Act are one of the primary source categories required to be covered under the provisions of any Title V program.

CAA, Section 408 of Title IV covers the permit and compliance plan requirements for affected sources, those stationary sources that have at least one emission unit emitting air pollutants which cause acid rain. CAA, Section 408(a) states that the requirements of Title IV are to be implemented by permits issued to affected sources in accordance with Title V, as modified by the requirements of Title IV. Any permit issued to an affected source must prohibit all of the following:

1. Annual emissions of sulfur dioxide in excess of the number of allowances to emit sulfur dioxide that is held for the source. An allowance is the authorization to emit one ton of sulfur dioxide during or after a specified calendar year.
2. Exceedances of applicable emissions rates.
3. The use of any allowance prior to the year for which it was allocated.
4. Contravention of any other provision of the permit.

Permits must be issued for a period of five years. No permit can be issued that is inconsistent with the applicable

requirements of Titles IV and V.

CAA, Section 408(b) requires that compliance plans be submitted with each permit application. Alternative methods of compliance may be authorized by permitting authorities; however, a comprehensive description of the schedule and means by which the unit will rely on one or more of these alternative methods must be provided by the applicant. Any transfers of allowances recorded by EPA will automatically amend all applicable proposed or approved permit applications, compliance plans and permits. EPA may also require a demonstration of attainment of national ambient air quality standards for a source or, from the owner of two or more affected sources, an integrated compliance plan providing an overall plan for achieving compliance.

CAA, Section 408(d) describes the requirements for Phase II permits, those to be issued by states with EPA-approved Title V programs. The owners of sources subject to Phase II of Title IV must submit their permit applications and compliance plans by January 1, 1996 to the state permitting authority. The states with approved programs must issue the permits no later than December 31, 1997. Permit applications and compliance plans that have been received by January 1, 1996 are binding and are enforceable as a permit for purposes of Titles IV and V until a permit is issued by the permitting authority.

CAA, Section 408(e) covers new sources or emissions units, those that commence commercial operation on or after November 15, 1990. New sources must submit a permit application and compliance plan to the permitting authority no later than 24 months before the later of (i) January 1, 2000, or (ii) the date on which the source commences operation. The permitting authority must issue a permit to a new source if the requirements of Titles IV and V are satisfied.

CAA, Section 408(f) covers stationary sources or emissions units subject to nitrogen oxides requirements. Applications and compliance plans must be submitted to permitting authorities no later than January 1, 1998. The permitting authority must issue a permit to these sources or emissions units if the requirements of Titles IV and V are satisfied.

CAA, Section 408(g) allows the applicant to submit a revised application and compliance plan at any time after the initial submission. CAA, Section 408(h) states that it is unlawful for an owner or designated representative of the owner to fail to submit applications and compliance plans in the time period required by Title IV or to operate any affected source except in compliance with the terms and conditions of a permit and compliance plan issued by EPA or an approved permitting authority. CAA, Section 408(h)(3) prohibits shutdown of an electric utility steam generating unit for failure to have an approved permit or compliance plan. However, the unit may be subject to applicable enforcement provisions under section 113 of the Act.

CAA, Section 408(i) requires that no permit can be issued to an affected source until the designated representative has filed a certificate of representation with regard to the requirements of Title IV, including the holding and distribution of allowances. This section also describes the requirements for certification of representation when there are multiple holders of a legal or equitable title to, or leasehold interest in, an affected unit or when a utility or industrial customer purchases power from an affected unit under life-of-the-unit, firm power contractual arrangements.

The federal regulations required to be developed under Section 408 of Title IV, 40 CFR Part 72 (58 FR 3591, January 11, 1993) and EPA guidance on Part 72, stipulate specific requirements for affected sources that are different from the requirements of 40 CFR Part 70. The differences include, but are not limited to, the following:

1. Only a designated representative or alternative designated representative of the source owner is authorized to make permit applications and other submissions under the Title IV requirements and must file a certificate of representation with EPA before they can assume these responsibilities. 40 CFR 72, Subpart B.
2. The state permitting authority must allow EPA to intervene in any appeal of an acid rain permit. 40 CFR Part 72, § 72.72(5)(iv).
3. The period by which the acid rain portion of an operating permit can be appealed administratively is 90 days. Judicial appeal of an acid rain portion of a permit cannot occur after 90 days. 40 CFR Part 72, § 72.72(5)(ii).
4. An application is binding and enforceable as a permit until the permit is issued. 40 CFR Part 72, § 72.72(b)(1)(i)(B).
5. The acid rain portion of an operating permit must be covered by a permit shield. 40 CFR Part 72, § 72.51.
6. The acid rain rules allow for four different types of permit revisions. Two of these are the same as those provided for in 40 CFR Part 70: permit modifications and administrative amendments. The other two are unique to the acid rain program: fast-track modifications and automatic amendments. 40 CFR Part 72, Subpart H.
7. In general, permits are issued using Part 70 procedures. However, there are some exceptions. For instance, within 10 days of determining whether an acid rain application is complete, the permitting authority must notify EPA of that determination. The permitting authority must also notify EPA of any state or judicial appeal within 30 days of the filing of the appeal. 40 CFR Part 72, §§ 72.72(b)(1)(i)(C) and 72.72(b)(5)(iii).

STATEMENT OF CONCLUSIONS

The regulation amendments are essential for the efficient and economical performance of an important governmental function. The reasoning for this conclusion is set forth below.

On July 10, 1995, and March 5, 1996, the U.S. Environmental Protection Agency (EPA) issued "White Papers" designed to simplify and reduce the costs of preparing Title V permit applications. The guidance was developed to respond to the concerns of industry and permitting authorities that preparation of initial permit applications was proving more costly and burdensome than necessary to achieve the goals of the Title V permit program. The streamlining improvements set forth in the White Papers include allowing industry to substitute emissions descriptions for emissions estimates for emissions not regulated at the source, to substitute checklists rather than emissions descriptions for insignificant activities, to exclude certain trivial and short-term activities from permit applications, to provide group treatment for activities subject to certain generally applicable requirements, to certify compliance status without requiring reconsideration of previous applicability decisions, to use the Part 70 permit process to identify environmentally significant terms of new source review permits, and to submit tons per

year estimates only where meaningful to do so, among other items. Because most sources are now in the process of preparing their initial applications, and many concerns have been raised by those sources about permit content, the intended scope of the program, the respective responsibilities of sources, and other issues, an immediate need exists for all states to implement the guidance outlined in the White Papers.

STATEMENT OF PROCESS FOR CONSIDERING ALTERNATIVES

Alternatives to the proposed regulation amendments are being considered by the department. The department has tentatively determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulatory action. The alternatives being considered by the department are discussed below.

1. Amend the regulations to satisfy the provisions of the law and associated regulations and policies. This option is being selected because it meets the stated purpose of the regulatory action: to bring the regulations into compliance with federal guidance concerning the implementation of Title V of the federal Clean Air Act (42 U.S.C. §§ 7661-7661f) and of federal regulations concerning state operating permit programs (40 CFR Part 70).
2. Make alternative regulatory changes to those required by the provisions of the law and associated regulations and policies. This option is not being selected because it will not bring the regulations into compliance with federal guidance concerning the implementation of Title V of the federal Clean Air Act (42 U.S.C. §§ 7661-7661f) and of federal regulations concerning state operating permit programs (40 CFR Part 70). Furthermore, alternative regulatory changes might impose requirements that could exceed or be inconsistent with federal statutory and regulatory mandates.
3. Take no action to amend the regulations. This option is not being selected because it will not bring the regulations into compliance with federal guidance concerning the implementation of Title V of the federal Clean Air Act (42 U.S.C. §§ 7661-7661f) and of federal regulations concerning state operating permit programs (40 CFR Part 70). Furthermore, not taking any action might lead to federal sanctions.

As provided in the public participation procedures of the State Air Pollution Control Board, the department will include, in the subsequent Notice of Intended Regulatory Action, a description of the above alternatives and a request for comments on other alternatives and the costs and benefits of the above alternatives or the other alternatives that the commenters may provide.

STATEMENT OF IMPACT ON FAMILY FORMATION, STABILITY AND AUTONOMY

In the formulation of these regulation amendments, the department will consider the impact of the regulation amendments on family formation, stability and autonomy. It is not anticipated that these regulation amendments will have a direct impact on families. However, there may be positive indirect impacts in that the regulation amendments will contribute to the prevention of air pollution, thus also contributing to reductions in associated fertility disorders, fetal mutation and deformity, disease, and premature death.

CONTACT PERSON

Questions on the proposal should be referred to:

Dr. Kathleen Sands
Policy Analyst
Office of Air Program Development
Department of Environmental Quality
P.O. Box 10009
Richmond, Virginia 23240
Phone: (804) 698-4413

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