Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[NY002; FRL–7090–4]

Clean Air Act Proposed Full Approval of Operating Permits Program: State of New York

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed full approval.

SUMMARY: The EPA proposes full approval of the operating permits program submitted by the State of New York for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources and to certain other sources.

DATES: Comments on this proposed action must be received in writing by November 26, 2001.

ADDRESSES: Written comments should be addressed to Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at the New York Region 2 Office listed below. Copies of the State's submittal and other supporting information used in developing the proposed full approval are available for inspection during normal business hours at the following location: EPA Region 2, 290 Broadway, 25th Floor, New York, New York 10007–1866, Attention: Steven C. Riva.

FOR FURTHER INFORMATION CONTACT: Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at the above EPA office in New York or at telephone number (212) 637–4074.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

As required under Title V of the Clean Air Act (''the Act''), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at Title 40 of the Code of Federal Regulations (40 CFR) part 70. Title V of the Act directs States to develop, and submit to EPA for approval, programs for issuing operating permits to all major stationary sources and to certain other sources. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval.

On November 7, 1996, EPA granted New York interim approval of its part 70 program. 61 FR 57589. At that time, EPA stated that there were eight interim approval issues that needed to be fixed in order for the EPA to grant New York full approval. However, with regard to five of the eight issues identified, EPA stated that if revisions to part 70 were finalized (proposed revisions were published in the **Federal Register** on August 29, 1994 and August 31, 1995) prior to expiration of New York's interim approval, New York might not need to address those five issues.

On June 8, 1998, New York submitted to EPA Region 2 revisions to 6 NYCRR part 201 which address three of the interim approval issues. EPA has reviewed the changes and finds that they provide approvable corrections for the three issues cited in the final interim approval notice.

On October 5, 2001, New York submitted additional revisions to 6 NYCRR Parts 200 and 201 which addressed three of the remaining five interim approval issues. These changes were accomplished through New York State's emergency rulemaking procedures and were filed with the New York State Department of State with an effective date of September 19, 2001. A separate rulemaking proposal with identical changes was also filed with the Department of State and will replace the ''emergency'' package once the rulemaking proposal is finalized.

On May 22, 2000, EPA promulgated a rulemaking that extended the interim approval period of 86 operating permits programs until December 1, 2001. (65 FR 32035) The action was subsequently challenged by the Sierra Club and the New York Public Interest Research Group (NYPIRG). In settling the litigation, EPA agreed to publish a notice in the **Federal Register** that would alert the public that they may identify and bring to EPA's attention alleged programmatic and/or implementation deficiencies in Title V programs and that EPA would respond to their allegations within specified time periods if the comments were made within 90 days of publication of the **Federal Register** notice.

Several citizens commented on what they believe to be deficiencies with respect to the New York State Title V program. EPA takes no action on those comments in today's action and will respond to them separately by December 1, 2001. As stated in the **Federal Register** notice published on December 11, 2000, (65 FR 77376) EPA will respond by December 1, 2001 to timely public comments on programs that have obtained interim approval; and EPA will respond by April 1, 2002 to timely comments on fully approved programs. We will publish a notice of deficiency (NOD) if we determine that a deficiency exists, or we will notify the commenter in writing to explain our reasons for not making a finding of deficiency. An NOD will not necessarily be limited to deficiencies identified by citizens and may include any deficiencies that EPA has identified through its program oversight.

Therefore, citizens should limit any comments on today's Notice to the specific issues delineated herein; that is, those eight specific issues that were addressed pursuant to EPA's November 7, 1996 interim approval of the New York State operating permits program.

II. Proposed Action and Implications

A. Analysis of State Submission

EPA is proposing full approval of New York's Title V program as submitted on November 12, 1993, June 17, 1996, and June 27, 1996, revised and resubmitted on June 8, 1998, and resubmitted under emergency rulemaking procedures on October 5, 2001. The following addresses the June 8, 1998, resubmission which fixes three of the program deficiencies EPA found on November 7, 1996, and the October 5, 2001, emergency rulemaking which addresses three additional program deficiencies that were also identified by EPA on November 7, 1996. EPA seeks comment on its proposal to fully approve New York's program.

1. Issues Raised in the Interim Approval Notice That Have Been Corrected

a. On June 8, 1998, New York submitted revisions to 6 NYCRR Part 201 which satisfy three deficiencies noted in the November 7, 1996, **Federal Register** notice granting New York interim approval.

i. Under the reporting requirements of 6 NYCRR 201–6.5(c)(3)(ii), New York provides that a permittee can seek to have a violation excused as provided in 201–1.4 if such violations are reported as required in 201–1.4(b). The DEC Commissioner is provided discretion under 201–1.4 to excuse violations of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions, malfunctions, and upsets if such violations are unavoidable and the permittee meets certain conditions and reporting requirements. EPA found that New York's rule was deficient since it was not clear that the DEC Commissioner's discretion could only apply to state implementation plan (SIP) requirements or State-only requirements. Such discretion could not extend to other Federal requirements such as NSPS, NESHAPs or PSD/NSR. In its notice proposing interim approval, EPA stated that in order to receive full approval, New York must add a sentence to 6 NYCRR 201–6.5(c)(3)(ii) which clarifies that the discretion to excuse a violation under 201–1.4 will not extend to Federal requirements unless the specific Federal requirement provides for the affirmative defense during start-ups, shutdowns, malfunctions, or upsets. New York amended 201–6.5(c)(3)(ii) to state that a federal regulation can only be excused if the specific federal regulation provides an affirmative defense during start-up, shutdowns, malfunctions or upsets. Therefore, the affirmative defense provisions at 201–1.4 cannot be used for federally promulgated regulations. EPA considers this issue resolved for purposes of granting the State of New York full program approval.

ii. 40 CFR 70.6 provides that permits can include alternative emission limits, equivalent to those contained in the SIP, as long as the SIP allows for alternative emission limits to be made through the permit issuance, renewal or significant modification process. EPA in its interim approval notice found that New York's language was overly broad in that it allowed New York to provide for alternative emission limits even if that was not provided in a particular regulation approved into the SIP or even if the limit was not determined to be ''equivalent'' to that in the SIP. New York amended 201–6.5(a)(1)(ii) to state that permits can only include alternative emission limits if provided for in a SIP and if the alternative emission limit is determined by NYSDEC to be equivalent to the limit in the SIP. Therefore, EPA considers this issue resolved for purposes of granting the State of New York full program approval.

iii. EPA in its interim approval notice had found that 6 NYCRR 201–6.5(f)(3) concerning operational flexibility related to emissions trading under the SIP did not include one of the ''gatekeepers'' of 40 CFR 70.4(b)(12)(i) which states that changes do not need to undergo a permit revision as long as the changes are not modifications under any provision of Title I of the Act. 6 NYCRR 201–6.5(f)(4) concerning operational flexibility related to emissions trading under a cap did not include the two gatekeepers of 40 CFR § 70.4(b)(12) which state that (1) changes do not need to undergo a permit revision as long as the changes are not modifications under any provision of Title I of the Act and (2) the changes do not exceed the emissions allowable under the permit. New York revised paragraphs 201–6.5(f)(3) and 201–6.5(f)(4) to include the needed gatekeepers from § 70.4(b)(12)(i). Therefore, EPA considers this issue resolved for purposes of granting the State of New York full program approval.

b. On October 5, 2001, New York submitted revisions to 6 NYCRR Parts 200 and 201 which satisfy three additional deficiencies noted in the November 7, 1996 **Federal Register** notice granting New York interim approval.

i. 40 CFR 70.7(e)(2)(i)(B) states that minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches ''to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.'' EPA in its interim approval notice found that 6 NYCRR 201–6.7(c)(2) provided for use of minor modification procedures for permit modifications involving the use of economic incentives and marketable permits, but did not include the language quoted above. New York has revised 201–6.7(c)(2) to include the language quoted above. Therefore, EPA considers this issue resolved for purposes of granting the State of New York full program approval.

ii. EPA had originally found as a deficiency New York's definition of ''Regulated Air Pollutant'' in 6 NYCRR 200.1(bq) because it failed to include pollutants regulated under section 112(r) of the Act. The definition of Regulated Air Pollutant at § 70.2 includes ''any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act. * * *'' New York's definition of regulated air pollutant includes ''any hazardous air pollutant,'' which New York defines by providing a list of the 112(b) pollutants. New York added a new requirement at 6 NYCRR 201.1(bm) to include in its definition of regulated air pollutants, pollutants regulated under section 112(r) of the Act. Therefore, EPA considers this issue resolved for purposes of granting the State of New York full program approval.

iii. 40 CFR 70.4(b)(12)(i) provides that states can allow sources to make 502(b)(10) changes without requiring a permit revision. 40 CFR § 70.2 defines ''section 502(b)(10) changes'' as changes that contravene an express permit term as long as such changes would not violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring, recordkeeping, reporting, or compliance certification requirements. New York's regulation did not provide for one of the three elements defined to provide operational flexibility under section 502(b)(10) of the Act. New York has revised its regulations at 6 NYCRR 201–6.5(f)(6) to provide the operational flexibility provisions as set forth in section 502(b)(10) of the Act. Therefore, EPA considers this issue resolved for purposes of granting the State of New York full program approval.

2. Other Issues Raised in Interim Approval Notice

i. Judicial Review: 40 CFR 70.4(b)(3)(xii) requires that petitions for judicial review be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Article 78 of the New York Civil Practice Law and Rules (CPLR) provides a four month statute of limitations for persons to seek judicial review of all New York State agencies' actions. When granting the interim approval, EPA stated that New York must adopt a 90 day statute of limitations through rulemaking in order to be consistent with part 70. However, in granting New York interim approval

EPA also mentioned that it had proposed on August 29, 1994 to extend the filing date of requesting judicial review from 90 days to 125 days, and that if part 70 were promulgated as proposed, New York would not need to change the statute of limitations.

EPA has revisited this issue and now proposes that New York need not change its filing date for seeking judicial review as its filing date is more stringent than the federal requirement. One goal of Title V is to provide more public participation in the air permitting process. The four month statute of limitations provided under the CPLR gives citizens an additional month to seek judicial review. EPA believes that imposing a unique, and shorter, statute of limitations than otherwise applies in New York State for Title V purposes would result in less public involvement in permitting actions. EPA also believes that the one additional month provided by New York's rule, beyond the 90 day period provided in part 70, is not so long as to deny facilities repose as to when their permits would no longer be subject to suit. Because EPA encourages involvement by citizens as well as permittees in the permitting process, it is prudent that EPA allow a state to continue to use the statute of limitations the public is familiar with when seeking judicial review. The statute of limitations has no impact on the implementation or enforcement of the Title V program. EPA also considers New York's statute of limitations to be more stringent than the one required under part 70 such that this should not have been raised as a program deficiency. Therefore, EPA proposes to remove the statute of limitations interim approval issue.

ii. Definition of Major Source: In its interim approval, EPA found New York's definition of ''major source'' at 6 NYCRR 201–2(b)(21) to be inconsistent with the definition in 40 CFR 70.2. In 40 CFR 70.2, the last category in the list of 27 categories of stationary sources in which fugitive emissions must be included to determine if a source is subject to Title V includes ''* * * all other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category.'' EPA determined this to be a deficiency based on a March 8, 1994 memorandum from Lydia Wegman entitled ''Consideration of Fugitive Emissions in Major Source Determinations.'' EPA stated it would grant interim approval for programs that do not require fugitives to be counted in determining the status of post 1980 NSPS source categories. That same memo also stated that EPA did not follow the procedural steps necessary for a proper rulemaking under Section 302(j) of the Act and would revise the definition in part 70.

EPA has proposed a revision to the major source definition that will incorporate the 1980 cutoff date which will resolve this issue in the New York State program. We are therefore proposing to approve New York's definition of major source.

III. Administrative Requirements

A. Request for Public Comments

The EPA is requesting comments on all aspects of this proposed full approval. Copies of the State's submittal and other information relied upon for the proposed approval are contained in a docket maintained at the EPA Regional Office located in New York. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed rulemaking. The principal purposes of the docket are:

(1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process; and

(2) to serve as the record in case of judicial review. The EPA will consider any comments received by November 26, 2001.

B. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

C. Paperwork Reduction Act

This action will not impose any collection information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060–0243. For additional information concerning these requirements, *see* 40 CFR part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

D. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

E. Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) revokes and replaces Executive Order 12612 (Federalism) and Executive Order 12875 (Enhancing the Intergovernmental Partnership). Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts state law unless the agency consults with state and local officials early in the process of developing the proposed regulation.

EPA has concluded that this proposed rule may have federal implications. For example, under the authority of section 505 of the Act, 42 U.S.C. 7661(d), EPA may object to a permit issued under the New York's Title V Operating Permit Program. Should New York fail to revise the permit based upon EPA's objection, EPA has the authority under this section of the Act to issue a federal permit for the facility under 40 CFR Part 71. However, it will not impose direct compliance costs on State or local governments, nor will it preempt State law. Thus, the requirements of sections 6(b) and Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) require EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.''

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds. Therefore, section 6(c) of the Executive Order does not apply to this rule.

Consistent with EPA policy, EPA nonetheless consulted closely with the Governor of New York and his staff early and throughout the process of developing New York's regulations to allow them to have meaningful and timely input in the development of its Title V Operating Permit Program. EPA worked closely with the Governor's legal staff in drafting the legislation and regulations for this program.

F. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, 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 in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

G. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because Part 70 approvals under Section 502 of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

H. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This federal action approves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permit, Reporting and recordkeeping requirements.

Dated: October 19, 2001.

William J. Muszynski,

Acting Regional Administrator, Region 2

[FR Doc. 01–26927 Filed 10–24–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[NJ001; FRL–7090–5]

Clean Air Act Proposed Full Approval of Operating Permit Program; New Jersey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is taking proposed action to fully approve the operating permit program of the State of New Jersey. New Jersey's operating permit program was submitted in response to the directive in the 1990 Clean Air Act (CAA) Amendments that States develop and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources within the States' jurisdiction. EPA granted interim approval to New Jersey's operating permit program on May 16, 1996. New Jersey revised its program to satisfy the conditions of the interim approval and submitted the corrected program on May 31, 2001. This action approves those revisions. In addition, EPA is also taking proposed action to approve the following changes to New Jersey's Operating Permit Rule: (1) N.J.A.C.7:27–22.29(a) and 22.29(e) were changed to incorporate the final nitrogen oxide regulations under 40 CFR Part 76 as required by EPA; and N.J.A.C. 7:27–22.1 was changed to add the definition of a fuel cell system and to add fuel cell systems with a power output of less than 500 kilowatts to the list of exempt activity.

DATES: Comments on this proposed action must be received in writing by November 26, 2001.

ADDRESSES: Written comments on this action should be addressed to Steven C. Riva, Chief, Permitting Section, Air Programs Branch, EPA–Region 2, 290 Broadway, New York, New York 10007–1866. Copies of the State's submittal and other supporting information used in developing the proposed full approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 2, 290 Broadway, 25th Floor, New York, New York 10007–1866.

FOR FURTHER INFORMATION CONTACT: Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at the above EPA office in New York or at telephone number (212) 637–4074.