On August 4, 1993, John S. Seitz issued a memorandum titled “Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V.” The August 4, 1993, memorandum updated, clarified, revised, and replaced this memorandum.

December 18, 1992

MEMORANDUM

SUBJECT: Agency Review of State Fee Schedules for Operating Permits Programs Under Title V

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Air Division Director, Regions I-X

This memorandum outlines the Environmental Protection Agency's (EPA's) basic approach for reviewing State fee schedules for approval under Title V of the Clean Air Act (Act). [As used herein, the term "State" includes local agencies.] Section 502(b)(3) of the Act requires that each State collect fees sufficient to cover all reasonable direct and indirect costs required to develop and administer its Title V permits program. The final Part 70 regulation contains a list of activities discussed in the Preamble which must be funded by permit fees. This memorandum and its attachment provide further guidance on what types of activities must be funded through Title V permit fees, as well as the procedure for demonstrating that fee revenues are adequate to support the program. The policies set out in this memorandum and attachment are intended solely as guidance, do not represent final agency action, and cannot be relied upon to create any rights enforceable by any party.

The attachment to this memorandum outlines the general principles which, along with the Preamble and final rule, will guide our review of fee submittals. These principles reflect the intent of Congress that permit fees become the funding mechanism for Part 70 permits programs, and the fact that the activities mandated by the 1990 Amendments to the Act require these programs to be more comprehensive than most existing State permits programs. The attachment also discusses the nature of direct and indirect permitting costs, the flexibility available for fee schedule design, and future adjustments of approved fee schedules. In addition, it contains a partial list of the permitting-related activities required by the 1990 Amendments.

This document emphasizes that cost estimates for Title V permitting are required to take into account these permitting-related activities mandated by the 1990 Amendments and contained in this guidance. We understand that knowledgeable State permitting managers have found preliminary drafts of the attached list very useful in assessing the full scope of direct and indirect costs of Title V permitting. The list of activities should provide a basis for your offices (and for States) to assess the adequacy of fee schedules.

Given the scope of new permitting activities which are mandated by Title V, Congress set a presumptive minimum aggregate amount of fees which States must collect [equal to $25 per ton per year (tpy), with Consumer Price Index (CPI) adjustments, or $28.39/tpy as of August 31, 1992] in order to sufficiently fund a Title V program. States which nonetheless propose to collect less than that amount (in the aggregate) must provide a detailed demonstration that their program fees will be adequate to fund an effective program which complies with all relevant permit requirements of the Act. These demonstrations will be subject to close scrutiny by EPA. The EPA discourages States from expending resources on detailed demonstrations unless there are specific, compelling data which rebut the statutory presumption. On the other hand, except where challenged, States which take advantage of the statutory presumption can reexamine their program costs once they have more experience with Title V programs. States may adjust fees at a later date if the initial fee schedules produce revenue which is more or less than is needed. Reliance on the presumptive minimum also avoids a resource-intensive review process for the State and EPA which may jeopardize the smooth and timely approval and implementation of the Title V program. However, if credible evidence is presented to EPA indicating that the presumptive minimum amount ($25/tpy with CPI adjustments) will not be adequate, the State must develop a higher fee schedule which will generate the revenue necessary to adequately fund the direct and indirect costs of the permits program.

There have been a number of questions about the continued availability of section 105 grant monies in the future. Given that funds must be collected from Title V sources to pay the full direct and indirect costs of the permits program, the use of section 105 grants to fund permits program costs that should be covered by permit fees is inappropriate and is prohibited by the Act. While there are other program costs which permit fees do not address and for which continued section 105 grant funding is appropriate, the States making a showing that less than $25/tpy (with CPI adjustments) is adequate should not include any section 105 grant funds in this showing. The EPA would not not expect toextend transitional support under section 105 for permitting activities beyond the amount of time States haveunder the Act to become self supporting.

As a means of providing support for the Regional Offices and States on fee approval issues, we invite early submittal of fee analyses (separate from the entire program submittal) from States, particularly those which propose to charge less than the presumptive fee minimum. We will assist Regional Offices in reviewing these submittals with respect to the requirements of Title V. Case-by-case reviews of fee programs which you believe are ripe for review offer a timely opportunity to provide additional guidance on this issue.

If you would like us to assist with review of a State's fee program, please contact Kirt Cox. For further information, you may call Kirt at (919) 541-5399 or Candace Carraway at (919) 541-3189.

Attachment

cc: Air Branch Chief, Regions I-X
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ATTACHMENT

GUIDANCE FOR STATE FEE PROGRAM DEVELOPMENT

I. GENERAL PRINCIPLES

- States must collect, from Part 70 sources, fees adequate to fund the direct and indirect costs of the permits program.
- Only funds collected from Part 70 sources may be used to fund a State's Title V permits program. Legislative appropriations and section 105 funds cannot be used.
- The 1990 Amendments to the Clean Air Act (Act) generally require a broader range of permitting activities than are currently addressed by most State and local permits programs.
- Title V fees present a new opportunity to improve aspects of current permits program implementation which may be inadequately funded.
- States have the discretion to collect fees beyond the minimum amounts specified by this guidance.
- Any fee program which collects aggregate revenues less than the $25 per ton per year (tpy) presumptive minimum will be subject to close Environmental Protection Agency (EPA) scrutiny.
- If credible evidence is presented to EPA which shows that the presumptive minimum amount of fee revenue is not sufficient to fund the permits program adequately, the State must collect fees which exceed the presumptive minimum amount.
- The EPA encourages State legislatures to include flexible fee authority in State statutes so as to allow flexibility to manage fee adjustments if needed in light of program experience, audits, and accounting reports. States should be able to adapt their fee schedules in a timely way in response to new information and new program requirements.

II. ACTIVITIES REQUIRED TO BE FUNDED BY PERMIT FEES

A. Overview.

- Permits program fees must cover all direct and indirect costs of the Title V permits program incurred by State and/or local agencies. For example, fees must cover the cost of permitting affected units under section 404 of the Act even though such sources may be subject to special treatment with respect to payment of permit fees.

- In addition to funding activities that have traditionally been associated with operating permits programs, Title V permit fees must be sufficient to fund the activities listed below. It is important to note, however, that these activities may <u>not</u> represent the full range of activities to be covered by permit fees. Implementation experience may demonstrate that additional activities are appropriately added to this list. Additionally, some States may have further program needs based on the particularities of their own air quality issues and program structure.

- States may use permit fees to hire contractors to support permitting activities.

B. Initial program submittal, including:

- Development of documentation required for program submittal, including program description, documentation of adequate resources to implement program, letter from Governor, Attorney General's opinion.

- Development of implementation agreement between State and Regional Office.

C. Part 70 program development, including:

- Staff training.

- Permits program infrastructure development, including:

  * Legislative authority.

  * Regulations.

  * Guidance.

        * Policy, procedures, and forms.

        * Integration of operating permits program with other programs [e.g., State implementation plan (SIP), new source review (NSR), section 112].

        * Data systems (including AIRS-compatible systems for submitting permitting information to EPA, permit tracking system).

        * Local program development, State oversight of local programs, modifications of grants of authority to local agencies, as needed.

        * Justification for program elements which are different from but equivalent to required program elements.

    - Permits program modifications which may be triggered by new Federal requirements/policies, new standards [e.g., maximum achievable control technology (MACT), SIP, Federal implementation plan], or audit results.

D. Permits program coverage/applicability determinations, including:

    - Creating an inventory of Part 70 sources.

    - Development of program criteria for deferral of nonmajor sources consistent with the discretion provided to States in Part 70.

    - Application of deferral criteria to individual sources.

    - Development of significance levels (for exempting certain information from inclusion on permits application).

    - Development and implementation of federally-enforceable restrictions on a source's capacity to emit in order to avoid it being considered a major source (i.e., the creation of synthetic minors).

E. Permits application review, including:

    - Completeness review of applications.

    - Technical analysis of application content.

    - Review of compliance plans, schedules, and compliance certifications.

F. General and model permits, including:

    - Development.

    - Implementation.

G. Development of permit terms and conditions, including:

- Operational flexibility provisions.

- Netting/trading conditions [e.g., prevention of significant deterioration (PSD)/NSR].

- Filling gaps within applicable requirements.

- Appropriate compliance conditions (e.g., inspection and entry, monitoring and reporting).

- Screen/separate "State-only" requirements from the federally-enforceable requirements. [Note, however, that the cost of implementing State-only conditions which are included in the Title V permits must be recovered by Title V permit fees.]

- Development of source-specific permit limitations [e.g., section 112(g) determinations].

- Optional shield provisions.

H. Public/EPA participation, including:

- Notices to public, affected States and EPA for issuance, renewal, significant modifications and (if required by State law) for minor modifications (including staff time and publication costs).

- Response to comments received.

- Hearings (as appropriate) for issuance, renewal, significant modifications, and (if required by State law) for minor modifications (including preparation, administration, response, and documentation).

- Transmittal to EPA of necessary documentation for review and response to EPA objection.

- 90-day challenges to permits terms in State court, petitions for EPA objection.

I. Permit revisions, including:

- Development of criteria and procedures for the following different types of permit revisions:
  * Administrative amendments.
  * Minor modifications (fast-track and group processing).
  * Significant modifications.
- Analysis and processing of proposed revisions.

J. Reopenings, including those:

- For cause.
- Resulting from new emissions standards.

K. Sections 110, 111, and 112 implementation issues, including:

- Section 110 activities undertaken in support of the Part 70 permitting process, such as:
  * Emissions inventory compilation requirements.
  * Equivalency determinations and case-by-case reasonably available control technology determinations if done as part of the Part 70 permitting process.
- Pre-construction permits issued pursuant to section 110 to Part 70 sources.
  * State NSR pursuant to a program approved into the SIP.
  * PSD/NSR pursuant to Parts C and D of Title I of the Act.
- Section 111 activities undertaken in support of permitting Part 70 sources.
- Development and implementation of certain section 112 activities which are addressed by permits. These program areas include, where applicable:
  * National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under section 112(d) according to the timetable specified in section 112(e).
  * The NESHAP promulgated under section 112(f) subsequent to EPA's study of the residual risks to the public health.
  * Section 112(g) program requirements for new and

modified sources to the extent done as part of the Title V permit process.

* Section 112(h) design, equipment, work practice, or operational standards.

* Section 112(i) early reductions.

* Section 112(j) equivalent MACT determinations.

* Section 112(l) State air toxics program activities that take place as part of the Part 70 permitting process.

* Section 112(r)(7) risk management plans if the plan is developed as part of the permits process.

L. Enforcement of permits program requirements, including the following to the extent they are related to the enforcement of a permit, the obligation to obtain a permit, or the permitting regulations:

- Schedule of compliance, compliance certification.

- Monitoring data report review (including continuous emissions monitoring review, if applicable).

- Inspections for compliance with permit or permits program requirements.

- Compliance monitoring activities such as stack tests, State-conducted audits, requests for information.

- Civil and criminal enforcement.

  * Development of enforcement legislation, regulations, policy and guidance (such as penalty policies).

  * Administration.

- Excluding all enforcement/compliance monitoring costs which are incurred after a facility is identified as a violator and an enforcement action is initiated (such as the issuance of an administrative order or notice of violation or the filing of an administrative or judicial complaint).

M. The portion of the Small Business Assistance Program which provides:

- Counseling to help sources determine and meet their obligations under Part 70, including:

  * Applicability.

  * Options for sources to which Part 70 applies.

- Development of general information to support permits program implementation.

- Direct Part 70 permitting assistance.

N. Permit fee program administration, including:

- Fee structure development.

- Fee demonstration.

  * Projection of fee revenues.

  * Projection of program costs if detailed demonstration is required.

- Fee collection and administration.

- Periodic cost accounting.

O. Segregation of general air program costs.

- Permit program costs include the cost of the following activities to the extent they are attributable to Part 70 sources:

  * Ambient monitoring.

  * Modeling and analysis.

  * Demonstrations.

  * Emissions inventories, such as for SIP development.

  * Administration and technical support (e.g., managerial costs, secretarial/clerical costs, labor indirect costs, copying costs, contracted services, accounting and billing).

  * Overhead (e.g., heat, electricity, phone, rent, and janitorial services).

- States will need to develop a rational method based on sound accounting principles for segregating the above costs of the permits program from other costs of the air program. The cost figures and methodology will be reviewed by EPA on a case-by-case basis.

III. FLEXIBILITY IN FEE STRUCTURE DESIGN

A. A State may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all direct and indirect permits program costs.

B. Provided adequate aggregate revenue is raised, States may:

- Base fees on actual emissions or allowable emissions.
- Differentiate fees based on source categories or type of pollutant.
- Exempt some sources from fee requirements.
- Determine fees on some basis other than emissions.
- Charge annual fees or fees covering some other period of time.

IV. INITIAL PROGRAM APPROVABILITY CRITERIA

A. Elements of State program submittals which relate to permit fees.

- Demonstration that fee revenues in the aggregate will adequately fund the permits program.
- Initial accounting to demonstrate that permit fee revenues required to support the direct and indirect permits program costs are in fact used to fund permits program costs.
- Statement that the program is adequately funded by permit fees (which is supported by cost estimates for the first 4 years of the permits program).

B. Methods by which a State may demonstrate that its fee schedule is sufficient to fund its Title V permits program:

- Demonstration that its fee revenue in the aggregate will meet or exceed the $25/tpy (with CPI adjustment) presumptive minimum amount.

- Detailed fee demonstration.

  * Required if fees in the aggregate are less than the presumptive minimum or if serious questions are raised during public comment on whether fee schedule is sufficient or information casting doubt on fee adequacy otherwise comes to EPA's attention.

C. Computation of $25/tpy presumptive minimum.

- The emissions inventory against which the $25/tpy is applied is calculated as follows:

  * Calculate emissions inventory using actual emissions (and estimates of actual emissions).

  * From the total emissions of Part 70 sources, exclude emissions of carbon monoxide (CO) and other pollutants consistent with the definition of "regulated pollutant (for presumptive fee purposes)."

  * States may:

    - Exclude emissions which exceed 4,000 tpy per pollutant per source.

    - Exclude emissions which are already included in the calculation (i.e., double-counting is not required).

    - Exclude insignificant quantities of emissions not required in a permit application.

  * States have two options with respect to emissions from affected units under section 404 of the Act during 1995 through 1999.

    - If a State <u>excludes</u> emissions from affected units under section 404 from its inventory, fees from those units may <u>not</u> be used to show that the State's fee revenue meets or exceeds the $25/tpy presumptive minimum amount (see paragraph IV.E below).

    - If a State <u>includes</u> emissions from affected units under section 404 in its inventory, it <u>may</u> include non-emissions-based fees from those units in showing that its fee revenue meets or exceeds the

$25/tpy presumptive minimum amount (see paragraph IV.E below.)

- Computation of the presumptive minimum amount is a surrogate for predicting aggregate actual program costs. Once this aggregate cost has been determined, the method used for computing it does not restrict a State's discretion in designing its particular fee structure. States may impose fees in a manner different from the criteria for calculating the presumptive amount (e.g., charging fees for CO emissions and for emissions which exceed 4,000 tpy per pollutant per source).

D. Establishing that fee revenue meets or exceeds the presumptive minimum.

- Fee revenue in the aggregate must be equivalent to $25/tpy as applied to the qualifying emissions inventory.

- States have flexibility in fee schedule design as outlined in paragraph III above and are not required to adopt any particular fee schedule.

E. Fees collected from affected units under section 404.

- States may not use emissions-based fees from affected units under section 404 for any purpose related to the approval of their operating permits programs for the period from 1995 through 1999. The EPA interprets the prohibition contained in section 408(c)(4) of the Act as preventing EPA from recognizing the collection of such fees in determining whether a State has met its obligation for adequate program funding. Furthermore, such fees cannot be used to support the direct or indirect costs of the permits program. States may, on their own initiative, impose Title V emissions-based fees on affected units under section 404 and use such revenues to fund activities beyond those required pursuant to Title V.

- States may collect fees which are not emissions based (e.g., application or processing fees) from such units.
- Role of nonemissions-based fees in determining adequacy of aggregate fee revenue.

* Such fees may be used as part of a detailed fee demonstration (which does not rely on the $25/tpy presumption).

* Such fees may not be used to establish that aggregate fees meet or exceed the presumptive minimum amount unless the State exercises its discretion to include emissions from affected units under section 404 in the emissions inventory against which the $25/tpy is applied.

F. Fee program accountability.

- Initial accounting (required as part of program submittal) comprised of a description of the mechanisms and procedures for ensuring that fees needed to support the direct and indirect costs of the program are utilized solely for permits program costs.

- Periodic accounting every 2-3 years to demonstrate that the direct and indirect costs of the program were covered by fee revenues.

- Earlier accounting or more frequent accountings if EPA determines through its oversight activities that a program's inadequate implementation may be the result of inadequate funding.

G. Governor's statement assuring adequate personnel and funding for permits program.

- Submitted as part of program submittal.

- A statement supported by annual estimates of permits program costs for the first 4 years after program approval and a description of how the State plans to cover those costs.

  * Detailed description of estimated annual costs is not required if the State has relied on the presumptive minimum amount in demonstrating the adequacy of its fee program.

  * Detailed description of estimated costs for a 4-year period sufficient to show how the program activities and resource needs will change during the transition period is required if State proposes to collect fee revenue which is less than the presumptive minimum amount.

- Projection of annual fee revenue for a 4-year period with explanation of how State will handle any temporary shortfall (if projected revenue for any of the 4 years is less than estimated costs).

V. FUTURE ADJUSTMENTS TO FEE SCHEDULE

A. Continuing requirement of fee revenue adequacy.

- Obligates the States to update and adjust their fee schedules periodically if they are not sufficient to fund the direct and indirect costs of the permits program.

B. Changes in fee structure over time are inevitable and may be required by the following events:

- Results of periodic audits/accountings.

- Revised number of Part 70 sources (discovery of new sources, new EPA standards, expiration of the deferral of nonmajor sources).

- Changes in the number of permit revisions.

- Changes in the number of affected units under section 404 (e.g., substitution units).

- CPI-type adjustments.

- Different activities during post-transition period.
