September 30, 1999

MEMORANDUM

SUBJECT: Reduced Penalties for Disclosures of Certain Clean Air Act Violations

FROM: Eric Schaeffer
Director of the Office of Regulatory Enforcement

TO: Addressees

Introduction

This memorandum clarifies that certain Clean Air Act (CAA) violations discovered, disclosed and corrected by a company prior to issuance of a Title V permit are potentially eligible for penalty mitigation under the Audit Policy.[1] When applying for Title V permits under the CAA, companies are expected to thoroughly evaluate their compliance with the Act's requirements. To further this critical objective, EPA may reduce penalties pursuant to its Audit Policy where a company (a) reviews its prior decision regarding the application of New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements (e.g., a determination that NSR permit requirements did not apply) that was made in good faith and (b) discloses to EPA a violation discovered through such a review and agrees to correct it prior to Title V permit issuance, and (c) otherwise meets conditions 3 through 9 of the Audit Policy. EPA may exercise its enforcement discretion in such cases to promote the CAA goals of thorough evaluation and full disclosure and correction of violations at the permit application stage.

Background

Title V of the CAA requires that owners or operators of major sources apply for and obtain operating permits.[2] Upon issuance of a Title V operating permit, the owner or operator must annually submit a certification as to whether the source has maintained compliance with the

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[1] Policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995).

[2] 40 C.F.R. §70.5.

permit.[3] The Agency established regulations that require a source to conduct a reasonable inquiry as to its compliance status, consider all credible information relevant to compliance, and disclose all violations. Where a violation is discovered by an owner or operator after submission of the permit application but prior to permit issuance, an owner or operator is required to disclose the violation by amending its application.[4]

In response to concerns that these provisions might force companies to review large quantities of archived records to reconstruct its permitting decisions, in 1995 EPA established a "no look back" policy in the "White Paper for Streamlined Development of Part 70 Permit Applications" ("White Paper I"). White Paper I states that companies "are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing part 70 permit applications."[4] Thus, while an extensive review of prior determinations regarding NSR and PSD applicability is not required, when a company knows of a violation of the Act at one of its sources based on an improper or inconsistent determination, the violation must be disclosed and corrected.

Eligibility for Penalty Mitigation

Both the Audit Policy and the Title V application process encourage regulated facilities to identify, disclose and correct violations. Title V requires a company to conduct a reasonable inquiry as to its sources' compliance status when preparing a Title V application(s) and to supplement the application(s) as it becomes aware of new information. The Audit Policy eliminates "gravity-based" penalties for companies that voluntarily discover, disclose and promptly correct violations of federal environmental law.[5]

Compliance with CAA NSR and PSD requirements usually means installing state of the art pollution controls and is critical to achieving the nation's air quality goals. To encourage a more extensive evaluation and correction of past violations, EPA may mitigate penalties under its Audit Policy where NSR (major and minor)/PSD violations are discovered as the result of an audit or

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[3] 40 C.F.R. §70.5(c).

[4] 40 C.F.R. §70.5(b).

[4] White Paper I further states, "However, EPA expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the part 70 permit shield is not available for noncompliance with applicable requirements that occurred prior to or continues after submission of the application." White Paper I, part II, section H.

[5] To date, approximately 525 companies have disclosed potential violations at approximately 2100 facilities.

inquiry conducted by or on behalf of a company. Such violations are eligible for penalty mitigation if they were discovered, disclosed and corrected prior to issuance of a Title V permit for the source in violation.[6] In addition, a company's prior NSR/PSD determinations must have been made in good faith, i.e., not reflect an attempt to avoid the law. Companies must also meet the specific requirements of conditions 3-9 of the Audit Policy. For example, the policy does not apply where EPA, a state or local agency or a citizen group has already commenced an investigation or enforcement action for the same violation. Companies must also agree to pay penalties equivalent to any significant economic benefit that may have been gained from their failure to comply.

Companies may wish to take advantage of this unique opportunity to address past violations. Although White Paper I does not require an extensive review of prior applicability determinations of NSR/PSD applicability in the context of a Title V permit application, it also makes clear that companies always remain subject to enforcement actions for violations later uncovered by regulatory agencies. In creating an opportunity for sources to use the Audit Policy, EPA is not attempting to define "reasonable inquiry" or suggesting that sources are not under an obligation to disclose violations detected while a Title V permit is pending. Moreover, sources are never relieved of the obligation to comply with PSD/NSR requirements and EPA has made enforcement of NSR/PSD requirements a national priority in response to growing concern about widespread violations.

EPA is clarifying eligibility for penalty mitigation to encourage self-evaluation of compliance status, encourage the disclosure and correction of violations, and otherwise further the goals of the Title V application process. This policy of enforcement discretion will be reconsidered a year from its issuance date, at which time it may be revised or terminated based on the Agency's assessment of this policy's value in improving the quality of Title V applications and permits.

If you have any questions about this memorandum, contact Leslie Jones at (202) 564-5123.

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[6] EPA is limiting penalty mitigation to those violations discovered during the application process because it recognizes that companies are examining their compliance status and history more intensively at that time. As described in EPA's "Audit Policy Interpretive Guidance" (question 2), after a permit is issued, violations that exceed a reasonable inquiry may be eligible for penalty mitigation under the Audit Policy.

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