



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

May 25, 2023

**MEMORANDUM**

**SUBJECT:** Fee Evaluation and Oversight Guidance for 40 CFR Part 70

**FROM:** Scott Mathias, Director  
Air Quality Policy Division 

**TO:** Regional Air Division Directors, Regions 1 – 10

The attached guidance is being issued as a supplement to the Environmental Protection Agency's prior guidance titled *Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70*<sup>1</sup> in response to the EPA Office of Inspector General's (OIG) 2022 report regarding the need to address ongoing state, local, and tribal<sup>2</sup> program fee issues and improve oversight of fee practices and evaluations under title V of the Clean Air Act (CAA or Act).<sup>3</sup> Specifically, this guidance reflects EPA's commitment to the OIG in response to the OIG's Recommendations 3 and 4 to "update the EPA's guidance documents to require regions to establish time frames for permitting authorities to complete corrective actions in program and fee evaluation reports and clear, escalating consequences if timely corrective actions are not completed" and "update the Clean Air Act Title V guidance documents to establish criteria for when regions must conduct Title V fee evaluations and require a minimum standard of review for fee evaluations."<sup>4</sup> This document identifies best practices and guidance on EPA oversight of air agency fee programs, particularly expectations for title V program and fee evaluations and corrective actions resulting from those evaluations.

---

<sup>1</sup> *Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70*, Memorandum from Peter Tsigotis, Director Office of Air Quality Planning and Standards, to Regional Air Division Directors, March 27, 2018 ("2018 Part 70 Fee Evaluation Guidance"). [https://www.epa.gov/sites/default/files/2018-03/documents/fee\\_eval\\_2018.pdf](https://www.epa.gov/sites/default/files/2018-03/documents/fee_eval_2018.pdf).

<sup>2</sup> As used herein, the term "permitting authority" refers to state, local, and tribal agencies.

<sup>3</sup> *EPA's Title V Program Needs to Address Ongoing Fee Issues and Improve Oversight*, U.S. EPA Office of the Inspector General. Report No. 22-E-0017. January 12, 2022 ("OIG Report").

<sup>4</sup> *Id.* at 14, 19.

## Attachment

### Supplement to EPA's Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70 Guidance

#### I. Summary of Title V Requirements for Air Agencies

##### A. General Program Requirements

Title V of the CAA of 1990 establishes an operating permit program for major sources of air pollutants, as well as some other sources.<sup>5</sup> EPA promulgated regulations under 40 CFR part 70 (part 70), consistent with title V of the Act, to establish the minimum elements for operating permit programs to be administered by permitting authorities. Air agencies with approved permit programs under part 70 must comply with minimum permit program requirements, such as reviewing application forms, adhering to certain permit processing procedures (including timeframes), ensuring certain permit content, collecting fees sufficient to fund the program, providing for public participation and EPA review of individual permits, and supplementing permits with compliance provisions (when needed), among other requirements.<sup>6,7</sup>

##### B. Summary of Title V Fee Requirements

The following is a summary of the fee requirements that will guide EPA reviews of permitting authority programs:

- Permit fees must be paid by “part 70 sources,”<sup>8</sup> the permit fees must cover all “reasonable (direct and indirect) costs required to develop and administer” the permit program (e.g., the permit fees must be sufficient to at least cover the total permit program costs).<sup>9</sup>
- Any fee required by part 70 must “be used solely for permit program costs” – in other words, required permit fees may not be diverted for non-part 70 purposes.<sup>10</sup> Nothing in part 70 restricts air agencies from collecting additional fees beyond the minimum amount needed to cover part 70 program cost; however, all fees (including surplus fees collected) must be used for part 70 purposes.

---

<sup>5</sup> See CAA §§ 501-507; 42 U.S.C. §§ 7661-7661f.

<sup>6</sup> See 40 CFR §§ 70.1(a) and 70.4.

<sup>7</sup> EPA has issued guidance on Small Business Technical Assistance Program activities that should be covered by part 70 fees as well as potential activities that could be covered by part 70 fees. See EPA's 1995 memo *Use of Title V Emission Fees for Small Business Activities* (<https://www.epa.gov/title-v-operating-permits/use-title-v-emission-fees-small-business-activities>).

<sup>8</sup> The term “part 70 sources” is defined in 40 CFR §70.2 to mean “any source subject to the permitting requirements of this part, as provided in 40 CFR §§ 70.3(a) and 70.3(b) of this part.”

<sup>9</sup> CAA section 502(b)(3)(A); 40 CFR § 70.9(a).

<sup>10</sup> 40 CFR § 70.9(a).

- Part 70 purposes are all activities in a permit program that must be funded by part 70 fees.<sup>11</sup> As EPA has previously explained in EPA's November 1993 memo, *Title V Fee Demonstration and Additional Fee Demonstration Guidance* ("Fee Demonstration Guidance"),<sup>12</sup> the types of activities included in a permit program to be funded by permit fees and the costs of those activities will differ depending on many factors associated with the particular permitting authority. These include, but are not limited to:
  - The number and complexity of sources within the area covered by the program;
  - How often the permitting authority reviews or modifies permits;
  - The universe of sources covered (i.e., some permitting authorities may not opt to defer permitting for non-major sources);
  - The experience of the permitting authority with permitting (e.g., agencies with experienced permitting staff may not need as much extensive training programs as those with less staff operating permit experience).
- Each permitting authority will have to determine its own permitting effort and what activities are directly or indirectly concerned with operating permits.
- As part of its ongoing oversight of part 70 programs, EPA may require "periodic updates" of the "initial accounting" portion of the "fee demonstration" to show whether fee revenue required by part 70 is used solely to cover the costs of the permit program.<sup>13</sup>
- EPA may also require a "detailed accounting"<sup>14</sup> to ensure that the fee schedule is adequate to cover costs when a permitting authority changes its fee schedule to collect less than the "presumptive minimum"<sup>15</sup> or if EPA determines, based on comments rebutting a presumption of fee sufficiency or on EPA's own initiative, that there are questions regarding whether the fee schedule is sufficient to cover the permit program costs.<sup>16</sup>
- EPA will presume that a fee schedule meets the requirements of part 70<sup>17</sup> if that schedule would result in fees above the "presumptive minimum." The "presumptive minimum" is generally defined to be "an amount not less than \$25 per year [adjusted for increases in

---

<sup>11</sup> 40 CFR § 70.9(b)(1).

<sup>12</sup> *Title V Fee Demonstration and Additional Fee Demonstration Guidance*, Memorandum from John S. Seitz, Director Office of Air Quality Planning and Standards, to Regional Directors, November 1993. [https://www.epa.gov/sites/default/files/2018-03/documents/fee\\_eval\\_2018.pdf](https://www.epa.gov/sites/default/files/2018-03/documents/fee_eval_2018.pdf).

<sup>13</sup> 40 CFR § 70.9(c), (d)..

<sup>14</sup> 40 CFR § 70.9(b)(5).

<sup>15</sup> 40 CFR § 70.9(b)(2)(i) through (v).

<sup>16</sup> 40 CFR § 70.9(b)(5); *See* Section 2.0 of the Fee Demonstration Guidance for an example "detailed accounting." The scope and content of a "detailed accounting" may vary but will generally involve information on program fees and costs and accounting procedures and practices that will show how the permitting authority's fee schedule will be sufficient to cover all program costs.

<sup>17</sup> 40 CFR § 70.9(b)(1).

the Consumer Price Index] times the total tons of the actual emissions of each "regulated air pollutant (for presumptive fee calculation)" emitted from part 70 sources." Note that the calculation of the "presumptive minimum" also excludes certain emissions and adds a "GHG cost adjustment."<sup>18</sup>

### *C. Overview of Part 70 Program and Fee Evaluations*

In its oversight capacity, EPA periodically evaluates part 70 programs to ensure that they are being implemented and enforced in accordance with the requirements of title V and part 70. EPA's operating permit program evaluations are intended to help pinpoint areas for improving program implementation, determine if previously suggested areas of improvement have been addressed by the permitting authority, and identify best practices that can be shared with other air agencies and the EPA Regions to enhance the implementation and integrity of all operating permit programs. As noted in EPA's 2018 Part 70 Fee Evaluation Guidance, program evaluations can be conducted on any particular element or elements of the part 70 program, including the complete program, or the air agency's implementation (including fee reviews), enforcement, and legal authority for the program.

## **II. Criteria for Title V Fee Evaluations**

### *A. Timing of Title V Fee Evaluations*

In EPA's 2018 Part 70 Fee Evaluation Guidance, EPA cited to the Office of Air and Radiation's 2017 National Program Manager Guidance ("NPM Guidance") as the mechanism for establishing annual requirements regarding the frequency and timing of EPA Regions' part 70 program evaluations.<sup>19</sup> The NPM Guidance established the expectation that each EPA Region complete at least one title V program evaluation and report each year but did not specify an expectation of whether each instance of a program evaluation was to include a fee evaluation. The 2018 Part 70 Fee Evaluation Guidance noted that a best practice is to conduct a fee evaluation as part of the overall program evaluation.

It is impractical to prescribe a timeframe applicable to all EPA Regions for conducting part 70 fee evaluations, for example, due to the differences across EPA Regions in the number of programs they oversee.<sup>20</sup> Nonetheless, this guidance now establishes a required best practice for each Region to conduct a fee evaluation as a part of their expected yearly title V program evaluation for one permitting authority, as prescribed in the NPM Guidance. The fee evaluation should follow the minimum standard of review outlined in the following section and should generally focus on fee revenue and program costs to determine if deficiencies are present and to

---

<sup>18</sup> 40 CFR § 70.9(b)(2).

<sup>19</sup> *Final FY 2017 OAR National Program Manager Guidance Addendum*. U.S. EPA, Publication Number 440B16001 (May 6, 2016) located at <https://www.epa.gov/sites/default/files/2016-05/documents/fy17-oar-npm-guidance-addendum.pdf>.

<sup>20</sup> Currently, the number of title V programs in each Region varies significantly (between 4 and 43 individual programs). In addition, the scope of each title V program varies greatly, with some relatively small programs issuing a small number of permits to a small variety of sources each year and other larger programs issuing numerous permits to a wide variety of source types.

identify any concerns such as staff shortages or permitting backlogs. If that evaluation presents concerns about deficiencies or sustainability of fees, the Region should complete a more in-depth evaluation (detailed accounting) within 1 year.

#### *B. Minimum Standard of Review for Title V Fee Evaluations*

EPA has developed tools and resources for conducting fee evaluations and a minimum level of review to ensure consistency in information and data collection and evaluation reporting. A title V fee evaluation will be conducted differently for every permitting authority depending on the size and scope of permitting in that jurisdiction; however, EPA has developed an Example Annual Financial Data Form for 40 CFR Part 70 that regions should use as a minimum for fee evaluations conducted as a part of an annual program evaluation. This and additional tools can be found as attachments in EPA's [2018 Part 70 Fee Evaluation Guidance](#). EPA regions may revise the tools to meet their needs, but, in general, the Example Annual Financial Data Form should result in collection of similar information at a comparable level of detail.

### **III. Corrective Actions in Program and Fee Evaluation Reports**

#### *A. Timeliness of Corrective Actions*

EPA Regions should work collaboratively with permitting authorities to determine the most appropriate timeframes for addressing corrective actions identified in EPA program and fee evaluation reports. Permitting authorities should be afforded flexibility in setting timeframes for completing corrective actions, but also be expected to complete the corrective actions as expeditiously as possible. The time afforded may depend on the level of effort and resources necessary to meaningfully address the issues. For example, states may require more than a year to adopt new fee schedules, but they should be expected to respond to requests for additional information in a matter of weeks. EPA regions should document these timeframes as a schedule of corrective actions with clear milestones. These milestones can be revised as necessary, but failure to meet the milestones should result in the consequences outlined in the following section.

#### *B. Consequences of Failure to Complete Corrective Actions*

Failure by a permitting authority to complete corrective actions in EPA evaluation reports in a timely manner may result in pervasive and increasing fee deficits, which can lead to negative impacts on permit processing time, implementation and enforcement of title V permit terms, staffing, and ultimately, in unsustainable title V programs. While consistent communication between EPA regions and permitting authorities regarding the completion of corrective actions and potential need for extensions is preferred, in situations where the permitting authority fails to complete corrective actions in a timely manner, EPA regions should pursue specific and escalating consequences.

In general, EPA regions should keep the Office of Air Quality Planning and Standards (OAQPS) apprised of correspondence with permitting authorities and consult with OAQPS as necessary while pursuing the escalating consequences.

EPA regions should take the following steps after determining that a permitting authority failed to meet its corrective action obligations:

1. Initiate communication between the EPA Regional Section Chief or Manager and equivalent manager/director within the permitting authority informing it of its failure to complete corrective actions in a timely manner.
  - Discuss reasoning for the failure to complete the corrective actions
  - Discuss revising or revisiting the corrective actions and propose new timeframe
2. If the revised corrective actions are still not completed within the adjusted timeframe or the permitting authority has indicated it will not complete the corrective actions, initiate communication between the EPA Regional Air Program Branch Manager and equivalent manager/director within the permitting authority to discuss resolution.
3. If needed, continue to escalate conversations to EPA Regional Air Division Director, then subsequently to the Regional Administrator and equivalent managers/directors within the permitting authority to discuss EPA's next course of action.
4. If these steps do not result in any corrective actions being completed, appropriate EPA officials should discuss taking action consistent with CAA section 502(i) and 40 CFR § 70.10(b) and after consultation with the national title V program managers at OAQPS:
  - Whenever the EPA determines that a permitting authority is not adequately administering or enforcing a part 70 program, or any portion thereof, the Administrator will notify the permitting authority of the determination and the reasons and publish the notice in the **Federal Register**.
  - If, 90 days after issuing such a notice, the permitting authority fails to take significant action to assure adequate administration and enforcement of the program, EPA may take one or more of the following actions:
    - Withdraw approval of the program or portion thereof;
    - Apply any of the sanctions specified in section 179(b) of the Act;
    - Promulgate, administer, or enforce a federal program under title V of the Act.
      - In this instance, pursuant to CAA section 502(b)(C)(i), EPA may collect reasonable fees from sources and those fees shall be designed solely to cover EPA's cost of administering the provisions of the permit program promulgated by EPA.