August 4, 1993

MEMORANDUM

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

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

TO: Air Division Director, Regions I-X

On December 18, 1992, I issued a memorandum designed to provide initial guidance on the Environmental Protection Agency's (EPA's) approach to reviewing State fee schedules for operating permits programs under title V of the Clean Air Act (Act). Today's memorandum updates, clarifies, revises, and replaces the earlier memorandum.

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. [As used herein, the term "State" includes local agencies.] The final part 70 regulation contains a list of activities discussed in the July 21, 1992 preamble to the final rule (57 FR 32250) which must be funded by permit fees. This memorandum and its attachment provide further guidance on how EPA interprets that list of activities, as well as the procedure for demonstrating that fee revenues are adequate to support the program.

The memorandum and attachment set forth the principles which will generally guide our review of fee submittals. The EPA believes that these positions are consistent with the preamble and final rule and are useful in explaining the broad language in the promulgation, but in no way supplant the promulgation itself. In evaluating State program submittals, EPA will make judgments based on the particular design and attributes of the State program, as well as the requirements of section 70.9 of part 70.

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.

Several substantive revisions to the earlier guidance that are reflected in this document deserve special mention. First, with respect to activities which relate to provisions of the Act in addition to title V, the revisions clarify that the cost of those activities would be permit program costs only to the extent the activities are necessary for part 70 purposes. For example, this qualification would apply to activities undertaken pursuant to sections 110, 111, and 112 of the Act. In determining which of the activities normally associated with State Implementation Plan (SIP) development are to be funded by permit fees, for instance, States should include those activities to the extent they are necessary for the issuance and implementation of part 70 permits. Accordingly, if a SIP provision requires that a State perform or review a modeling demonstration of a source's impact on ambient air quality as part of the permit application process, the State's costs which arise from the modeling demonstration (which are ordinarily not permit program costs) must be covered by permit fees.

Second, the revisions provide that case-by-case maximum achievable control technology determinations for modified/ constructed and reconstructed major toxic sources under section 112(g) of the Act are considered permit program costs, even if the determination preceded the issuance of the part 70 permit. This position is consistent with the Agency's guidance on Title V Program Approval Criteria for Section 112 Activities (issued April 13, 1993). In that guidance, EPA explained that in order to obtain approval of their title V permit programs, States must take responsibility for implementing all applicable requirements of section 112, including section 112(g), to fulfill their broader obligation to issue title V permits which incorporate all applicable requirements of the Act. For this reason, these section 112 activities are appropriately viewed as permit program costs and thus funded with permit fees.

Third, the revisions clarify in section II.L that enforcement costs incurred prior to the filing of an administrative or judicial complaint are considered permit program costs, including the issuance of notices, findings, and letters of violation, as well as development and referral to prosecutorial agencies of enforcement cases. This approach is based on legislative history which indicates that Congress viewed the filing of complaints as the beginning of enforcement actions for purposes of the statutory provision that excludes "court costs or other costs associated with any enforcement action" from the costs to be recovered through permit fees.

Fourth, the revisions take a different approach to "State-only" requirements which are part of the title V permit by concluding that part 70 does not require that permit fees cover the costs of implementing and enforcing such conditions, since the rule requires that States designate these requirements as not federally enforceable.

Fifth, the attachment modifies the discussion of the extent to which title V fees must fund the costs of permit programs under provisions of the Act other than title V. After carefully considering section 110(a)(2)(L) (which requires that every major source covered by a permit program required under the Act pay a fee to fund the permit program), as it relates to section 502(b)(3) in general, and section 502(b)(3)(A)(ii) in particular, EPA has concluded that title V fees must cover the costs of implementing and enforcing not only title V permits but of any other permits required under the Act, regardless of when issued. This result makes sense, since the title V permit will incorporate the terms of other permits required under the Act so that enforcing title V permits will have the effect of implementing and enforcing those permit requirements as well. However, the costs of reviewing and acting on applications for permits required under Act provisions other than title V need not be recouped by title V fees. In conclusion, the costs of implementing and enforcing all permits required under the Act must be considered in determining whether a State's fee revenue is adequate to support its title V program. However, States may opt to retain separate mechanisms and procedures for collecting permit fees for other permitting programs under the Act, provided the fees covering the costs of implementing and enforcing permits are included in the determination of fee adequacy for purposes of title V.

Although most of the changes outlined today are not expected to affect significantly whether EPA will find fee programs based on the earlier guidance adequate, we will assist States in resolving any difficulties which may have resulted from reliance on the December 18 guidance.

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
Regional Counsel, 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 reasonable 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, other funding mechanisms such as vehicle license fees, and section 105 funds cannot be used to fund these permits program activities.

- 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 and part 70 contain a nonexclusive list of types of activities which must be funded by permit fees.

- Title V fees present a new opportunity to improve permits program implementation where funding has been inadequate in the past.

- The fee revenue needed to cover the reasonable direct and indirect costs of the permits program may not be used for any purpose except to fund the permits program. However, title V does not limit State discretion to collect fees pursuant to independent State authority beyond the minimum amount required by title V. The evaluation of State fee program adequacy for part 70 approval purposes will be based solely on whether the fees will be sufficient to fund all permit program costs.

- 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 raises serious questions regarding whether the presumptive minimum amount of fee revenue is sufficient to fund the permits program adequately, the State must provide a detailed demonstration as to the adequacy of its fee schedule to fund the direct and indirect costs of the permits program.

- 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 EXPECTED TO BE FUNDED BY PERMIT FEES

A. Overview.

- Permits program fees must cover all reasonable 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 making the determination as to whether an activity is a title V permits program activity, EPA will consider the design of the individual State's title V program and its relationship to its comprehensive air quality program. State design of its air program, including its State Implementation Plan (SIP), will in some cases determine whether a particular activity is properly considered a permits program activity. For example, if a SIP provision requires that a State perform or review a modeling demonstration of a source's impact on ambient air quality as part of the permit application process, the State's costs which arise from the modeling demonstration (which are ordinarily not permit program costs) would be part of the State's title V program costs. Because the nature of permitting-related activities can vary from State to State, the EPA intends to evaluate each program individually using the definition of "permit program costs" in the final regulation.

- In general, EPA expects that title V permit fees will fund the activities listed below. However, in evaluating State program submittals, EPA will consider the particular design and attributes of the State program. It is important to note that the activities listed below may not 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., SIP, new source review (NSR), section 112].

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

  * 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 potential to emit in order to avoid it being considered a major source.

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.
- Filling gaps within applicable requirements (e.g., periodic monitoring and testing).
- Appropriate compliance conditions (e.g., inspection and entry, monitoring and reporting).
- Screen/separate "State-only" requirements from the federally-enforceable requirements.

- Development of source-specific permit limitations [e.g., section 112(g) determinations, equivalent SIP emissions limits pursuant to 70.6(a)(1)(iii)].

- 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:

- For cause.

- Resulting from new emissions standards.

K. Activities relating to other sections of the Act which are also needed in order to issue and implement part 70 permits, including:

- Certain section 110 activities, 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.

- Implementation and enforcement of preconstruction permits issued to part 70 sources pursuant to title I of the Act, including:

  * State minor NSR permits issued pursuant to a program approved into the SIP.

  * Prevention of significant deterioration/NSR permits issued pursuant to Parts C and D of title I of the Act.

- Implementation of Section 111 standards through part 70 permits.

- Implementation of the following section 112 requirements through part 70 permits:

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

- Development and implementation of certain section 112 requirements through part 70 permits, including:

  * Section 112(g) program requirements for constructed, reconstructed, and modified major sources.

    * 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. Compliance and enforcement-related activities to the extent that these activities occur prior to the filing of an administrative or judicial complaint or order. These activities include the following to the extent they are related to the enforcement of a permit, the obligation to obtain a permit, or the permitting regulations:

- Development and administration of enforcement legislation, regulations, and policy and guidance.

- Development of compliance plans and schedules of compliance.

- Compliance and monitoring activities.

    * Review of monitoring reports and compliance certifications.

    * Inspections.

    * Audits.

    * Stack tests conducted/reviewed by the permitting authority.

    * Requests for information either before or after a violation is identified (e.g., requests similar to EPA's section 114 letters).

- Enforcement-related activities.

    * Preparation and issuance of notices, findings, and letters of violation [NOV's, FOV's, LOV's].

    * Development of cases and referrals up until the filing of the complaint or order.

- Excluded are all enforcement/compliance monitoring costs which are incurred after 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.

- Outreach/publications on part 70 requirements.

- 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. General air program activities to the extent they are also necessary for the issuance and implementation of part 70 permits.

- Emissions and ambient monitoring.

- Modeling and analysis.

- Demonstrations.

- Emissions inventories.

- 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 reasonable 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 reasonable 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 credible evidence is presented raising serious questions 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 adjusted by CPI) 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 "Phase I" 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. However, 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.

  * All units initially classified as "Phase I" units are listed in Table I of 40 CFR part 73. In addition, units designated as active substitution units under section 404(b) are considered "Phase I" affected units under section 404.

- 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 reasonable direct and indirect costs of the program are utilized solely for permits program costs.

- Periodic accounting every 2-3 years to demonstrate that the reasonable 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 showing how 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 reasonable 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.

NOTICE

The policies set out in this guidance document are intended solely as guidance and do not represent final Agency action and are not ripe for judicial review. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. The EPA officials may decide to follow the guidance provided in this guidance document, or to act at variance with the guidance, based on an analysis of specific circumstances. The EPA also may change this guidance at any time without public notice.