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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[MS01; FRL-5082-8]

Clean Air Act Final Full Approval Of 40 CFR Part 70 Operating Permits Program; State of Mississippi

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final Full Approval.

SUMMARY: The EPA is promulgating full approval of the Operating Permits Program submitted by the State of Mississippi 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.

EFFECTIVE DATE: January 27, 1995.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final full approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, NE, Atlanta, GA 30365, 3rd floor, Tower Building. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the 1990 Clean Air Act Amendments (sections 501-507 of the Clean Air Act ('`the Act'')), and implementing regulations at 40 Code of Federal Regulations (CFR) Part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. 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. Where a program

substantially, but not fully, meets the requirements of Part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

On October 3, 1994, EPA proposed full approval of the operating permits program for the State of Mississippi. See 59 FR 50214. The EPA received public comment on the proposal, and compiled a Technical Support Document (TSD) which describes the operating permits program in greater detail. EPA received seven comments on the proposed full approval of the Mississippi program. Generally, these comments addressed the issues of what changes at a source constitute a "title I modification" under the State's regulations and the requirement that Mississippi make 112(g) determinations prior to EPA promulgating final rules implementing section 112(g) of the Act. In this notice EPA is taking final action to promulgate full approval of the operating permits program for the State of Mississippi.

II. Final Action and Implications

A. Analysis of State Submission and Response to Public Comments

On October 3, 1994, EPA proposed full approval of the State of Mississippi's Title V Operating Permit Program. See 59 FR 50214. The program elements discussed in the proposed notice are unchanged from the original analysis in the proposed notice and continue to fully meet the requirements of 40 CFR part 70.

1. Definition of Title I Modification

The proposal discussed the State's definition of the phrase "modification under any provision of Title I of the Act." At the time of the proposal, EPA believed that for a State's program to be fully approvable, it would be necessary for the State's definition of "modification under any provision of Title I of the Act" to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under Title I of the Act. This would include State preconstruction review programs approved into the State Implementation Plan (SIP) under section 110(a)(2)(C) and regulations addressing source changes that trigger National Emission Standards for Hazardous Air Pollutants (NESHAPs) established pursuant to section 112 of the Act prior to the 1990 amendments. Mississippi adopted the more encompassing definition of what constitutes a "title I modification" into its program regulations as discussed above in order to obtain full approval of its operating permits program. Two commenters, the National Environmental Development Association/Clean Air Regulatory Project (NEDA/CARP) and the American Forest and Paper Association (AFPA), contended that neither EPA nor Mississippi have any authority to include as "title I modifications" those changes made pursuant to a preconstruction permitting program approved under the SIP. Furthermore, the commenters believe that requiring Mississippi's program regulations to include the more encompassing definition of "title I modification" would reverse the Agency's current operating permits rule.

On August 29, 1994, EPA proposed revisions to the interim approval criteria in 40 CFR 70.4(d) to, among other things, allow state programs with a more narrow definition of "title I modification" to receive interim approval (59 FR 44572). EPA intended to finalize its revisions to the interim approval criteria under 40 CFR 70.4(d) before taking

action on part 70 programs submitted by the states. However, that is no longer possible. Publication of the proposed revisions was delayed until August 29, 1994, and EPA received several requests to extend the public comment period.\1\ Given the importance of the issues in that rulemaking to States, sources and the public, but mindful of the need to take action quickly, EPA agreed to extend the comment period until October 28, 1994 (see 59 FR 52122 (October 14, 1994)). Consequently, final action to revise the interim approval criteria will not occur before the deadline for EPA action on State programs such as Mississippi's that were submitted on or before November 15, 1993.\2\ EPA believes it would be inappropriate to delay action on Mississippi's program, perhaps for several months, until final action is taken on the interim approval revisions. EPA also believes it would be inappropriate to grant interim approval to Mississippi on this issue before final action is taken to revise the current interim approval criteria of 40 CFR 70.4(b) to provide a legal basis for such an interim approval. In lieu of EPA's final promulgation of interim approval criteria, the State has decided that it will implement the narrower definition of what constitutes a ``title I modification.'' Upon EPA's final decision of what constitutes a ``title I modification,'' the State has committed to revise its definition of what constitutes a ``title I modification''.

\1\EPA originally established a 30-day public comment period for the August 29, 1994 proposal. In response to several requests for extension, however, EPA agreed to allow an additional thirty days for public comments. (See 59 FR 52122 (October 14, 1994)).

\2\Section 502(d) requires, in relevant part, that ``[n]ot later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part.''

EPA is allowing this approach to ``title I modification'' for a number of reasons. First, EPA has not yet conclusively determined that a narrower definition of ``title I modification'' is incorrect and thus a basis for disapproval (or even interim approval). The Agency has received numerous comments on this issue as a result of the August 29, 1994, Federal Register notice, and EPA cannot and will not make a final decision on this issue until it has evaluated all of the comments. Second, EPA believes that the Mississippi program should not be disapproved because EPA itself has not yet been able to resolve this issue through rulemaking. Moreover, disapproving programs from states such as Mississippi that submitted their programs to EPA on or before the November 15, 1993, statutory deadline could lead to the perverse result that these states would receive disapprovals, while states which were late in submitting programs could take advantage of revised interim approval criteria if and when these criteria become final. In effect, States would be severely penalized for having made timely program submissions to EPA. Finally, disapproval of a State program for a potential problem that primarily affects permit revision procedures would delay the issuance of part 70 permits, hampering state/federal efforts to improve environmental protection through the operating permits system.

For the reasons mentioned above, EPA is approving the Mississippi program's use of a narrower definition of ``title I modification'' at

this time.\3\ However, should EPA in the interim approval criteria rulemaking make a final determination that such a narrow definition of ``title I modification'' is incorrect and that a revision of the interim approval criteria is warranted, the Agency will propose further action on Mississippi's program so that the State's definition of ``title I modification'' could become grounds for interim approval.\4\ A State program like Mississippi's that receives full approval of its narrower definition pending completion of EPA's rulemaking must ultimately be placed on an equal footing with states that receive interim approval in later months under any revised interim approval criteria because of the same issue. Converting the full approval on this issue to an interim approval after EPA completes its rulemaking will avoid this inequity. EPA anticipates that an action to convert the full approval on the ``title I modification'' issue to an interim approval would be effected through an additional rulemaking, so as to ensure that there is adequate notice of the change in approval status.

\3\ For similar reasons, the EPA will not construe 40 CFR 70.7(e)(2)(i)(A)(3) to prohibit Mississippi from allowing minor NSR changes to be processed as minor permit modifications. See 59 FR 44573-44574.

\4\ State programs with a narrower ``title I modification'' definition that are acted upon by EPA after an Agency decision that such narrower definition is inappropriate would be considered deficient, but would be eligible for interim approval under revised 40 CFR 70.4(b).

2. Section 112(g) Modifications

EPA received a comment regarding the proposed approval of Mississippi's preconstruction permitting program for the purpose of implementing section 112(g) during the transition period between title V approval and adoption of a State rule implementing EPA's section 112(g) regulations. The commenter argued that Mississippi should not, and cannot, implement section 112(g) until: 1) EPA has promulgated a section 112(g) regulation, and 2) the State has a section 112(g) program in place. The commenter also argued that Mississippi's preconstruction review program can not serve as a means to implement section 112(g) because it was not designed for that purpose.

EPA disagrees with the commenter's contention that section 112(g) does not take effect until after EPA has promulgated implementing regulations. The statutory language in section 112(g)(2) prohibits the modification, construction, or reconstruction of a source after the effective date of a title V program unless MACT (determined on a case-by-case basis, if necessary) is met. The unambiguous meaning of this provision is that the prohibition takes effect on the effective date of program approval regardless of whether EPA or a state has promulgated implementing regulations.

The EPA has acknowledged that states may encounter difficulties implementing section 112(g) prior to the promulgation of final EPA regulations (See June 28, 1994 memorandum entitled, ``Guidance for Initial Implementation of Section 112(g),'' signed by John Seitz, Director of the Office of Air Quality Planning and Standards). EPA has issued guidance, in the form of a proposed rule, which may be used to determine whether a physical or operational change at a source is not a modification either because it is below de minimis levels or because it

has been offset by a decrease of more hazardous emissions. See 59 FR 15004 (April 1, 1994). EPA believes the proposed rule provides sufficient guidance to Mississippi and sources until such time as EPA's section 112(g) rulemaking is finalized.

EPA is aware that Mississippi lacks a program designed specifically to implement section 112(g). However, Mississippi does have a preconstruction review program that can serve as a procedural vehicle for rendering federally enforceable a case-by-case MACT or offset determination. EPA's approval of Mississippi's preconstruction review program clarifies that it may be used for this purpose during the transition period to meet the requirements of section 112(g).

EPA believes Mississippi's preconstruction review program will be adequate in most if not all cases because it will allow Mississippi to select control measures that would meet MACT, as defined in section 112, and incorporate these measures into a federally enforceable preconstruction permit. While it is true that Mississippi's preconstruction review authority extends only to criteria pollutants, Mississippi should nevertheless be able to impose federally enforceable measures reflecting MACT for most if not all changes qualifying as modification, construction, or reconstruction under section 112(g). This is because most section 112(b) HAPs are also criteria pollutants, and moreover because measures designed to limit criteria pollutant emissions will often have the incidental effect of limiting non-criteria pollutant HAPs. In the event of a situation where Mississippi's preconstruction permit program cannot be used, the State may utilize its title V permitting program to do any required MACT determinations as a result of 112(g).

Another consequence of the fact that Mississippi lacks a program designed specifically to implement section 112(g) is that the applicability criteria found in its preconstruction review program may differ from those in section 112(g). However, whether a particular source change qualifies as a modification, construction, or reconstruction for section 112(g) purposes will be determined according to the statutory provisions of section 112(g), using the proposed rule as guidance. As noted in the June 28, 1994 guidance, EPA intends to defer wherever possible to a State's judgment regarding applicability determinations. This deference must be subject to obvious limitations. For instance, a physical or operational change resulting in a net increase in HAP emissions above 10 tons per year could not be viewed as a de minimis increase under any interpretation of the CAA. The EPA would expect Mississippi to be able to issue a preconstruction permit containing a case-by-case determination of MACT in such a case even if review under its own preconstruction review program would not be triggered.

3. ``Prompt'' Reporting of Deviations From Permit Limits

In the proposed full approval notice EPA stated that Mississippi's regulations should define the meaning of ``prompt'' as used in the requirement found at 40 CFR 70.6(a)(3)(iii)(B) which require ``prompt'' reporting of deviations from applicable requirements. The Agency indicated that an acceptable alternative to defining what constitutes ``prompt'' reporting of deviations from applicable requirements is to define ``prompt'' in each individual permit.

One commenter supports this approach and asserts that it is necessary for EPA to revise several of its earlier interim approval notices, in which the Agency conditioned final approval on including a definition of ``prompt'' in the state operating permits program, in order to provide a consistent application of the appropriate

interpretation of its rules. EPA has consistently asserted that this is an acceptable alternative to defining prompt in the body of the permitting regulations and sees no need to revisit past interim approval actions to clarify this interpretation of the definition of what constitutes ``prompt'' reporting of deviations from applicable requirements.

4. Full Approval Under Current Part 70 Regulations

One commenter submitted comments previously submitted on the proposed part 70 operating permits rule, and objected to the full approval of Mississippi on the same grounds that it objected to the promulgation of the part 70 rule itself. The EPA believes the appropriate forum for pursuing objections to the legal validity of the Part 70 rule is through a petition for review of the rule in the D.C. Circuit Court of Appeals. The EPA notes that this commenter has filed such a petition. However, unless and until the part 70 rule is revised, EPA must evaluate programs according to the rule that is in effect.

B. Final Action

The EPA is promulgating full approval of the operating permits program submitted to EPA by the State of Mississippi program on November 12, 1993. Mississippi has demonstrated that the program will be adequate to meet the minimum elements of a State operating permits program as specified in 40 CFR part 70.

The scope of the State's part 70 program approved in this notice applies to all 70 sources (as defined in the approved program) within the State, except any sources of air pollution over which an Indian Tribe has jurisdiction. See, e.g., 59 FR 55813, 55815-18 (Nov. 9, 1994). The term ``Indian Tribe'' is defined under the Act as ``any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'' See section 302(r) of the CAA; see also 59 FR 43956, 43962 (Aug. 25, 1994); 58 FR 54364 (Oct. 21, 1993).

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(1)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(1)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is also promulgating full approval under section 112(1)(5) and 40 CFR part 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from federal standards as promulgated. This program for delegations applies to sources covered by the part 70 program as well as nonpart 70 sources.

III. Administrative Requirements

A. Docket

Copies of the State's submittal and other information relied upon for the final full approval, including the seven public comments received and reviewed by EPA on the proposal, are contained in docket number [insert docket number] maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of

this final full approval. The docket is available for public inspection at the location listed under the ADDRESSES section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR Part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 70

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

Dated: December 15, 1994
John H. Hankinson, Jr.,
Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

2. Appendix A to part 70 is amended by adding the entry for Mississippi in alphabetical order to read as follows:

Appendix A to Part 70--Approval Status of State and Local Operating Permits Programs

* * * * *

Mississippi

(a) Department of Environmental Quality: submitted on November 15, 1993; full approval effective on January 27, 1995.

(b) Reserved

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