

MEMORANDUM

SUBJECT: Acid Rain-Title V Guidance on Fees and Incorporation by Reference

FROM: Brian J. McLean, Director, Acid Rain Division

TO: Air, Pesticides, and Toxics Division Directors  
Regions I, IV, and VI

Air and Waste Management Division Director  
Region II

Air and Toxics Division Directors  
Regions III, VII, VIII, IX, and X

Air and Radiation Division Director  
Region V

The attached documents provide 1) guidance with respect to the use of emissions-based fees during Phase I of the Acid Rain Program, and 2) model language for states who wish to incorporate by reference the federal Acid Rain rules to satisfy the requirement to have regulatory authority to carry out a state acid rain program. Both of these documents supplement the Acid Rain-Title V guidance package directed toward States and other permitting authorities on May 21, 1993. The policies set out in this memorandum and the attachments 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 attached fee guidance briefly describes which acid rain affected sources are subject to fees for support of Title V permitting efforts by states, and how certain Acid Rain compliance plans and the activation/termination of these plans affect fee assessment.

The attached incorporation by reference guidance provides model language to states who prefer to incorporate by reference the federal Acid Rain regulations rather than writing state acid rain regulations. The May 21 package discouraged states from incorporating by reference the federal Acid Rain regulations, primarily because of the Phase I language embodied within them. However, upon further consideration and in light of substantial state interest in incorporation by reference, EPA has modified its position and now considers incorporation by reference a practical and acceptable alternative to drafting state regulations. EPA has therefore developed with OGC written model language that can be used by states that prefer to incorporate by reference the federal Acid Rain regulations.

If you have questions or comments, please contact Robert Miller at (202) 233-9077 or Donna Deneen at (202) 233-9089.

#### Attachments

cc: Air Branch Chief, Regions I-X  
M. Shapiro  
R. Brenner  
A. Eckert  
J. Beale  
L. Wegman  
P. Stolpman

# STATE ACID RAIN OPERATING PERMIT FEES GUIDANCE

August 9, 1993

This guidance document has been developed to assist State and local permitting authorities in determining when emission-based fees may be collected from a Phase I or Phase II acid rain source, and to what extent such fees may be used to fund the direct and indirect costs of an operating permit program pursuant to §502(b)(3) of the Clean Air Act Amendments of 1990 (Act). The policies set out in this document, however, are intended solely as guidance, do not represent final agency action, and cannot be relied upon to create any rights enforceable by any party.

Section 408(c)(4) of the Act states that no fee shall be required to be paid pursuant to §502(b)(3) with respect to emissions during the years 1995 through 1999 inclusive. This means that emission-based fees collected for emissions generated in 1995 through 1999 may not be used for the purpose of funding the direct and indirect costs of an operating permit program. Emission-based fees collected for emissions generated prior to 1995 or after 1999, application fees, processing fees, and other nonemission-based fees may, however, be used for this purpose.

The fee exemption applies to emissions of all pollutants from Phase I units and "active" substitution units during the years 1995 through 1999 inclusive. Section 408(c)(4) does not prohibit State and local permitting authorities from collecting emission-based fees from acid rain sources, but rather prevents the use of those fees to fund the direct and indirect costs of an operating permit program.

The fee exemption does not apply to:

- (1) Units in a "conditional" substitution plan. A source may activate a conditional plan on or before November 30 of the year in which it wishes to implement the plan. Until the conditional plan is activated, the fee exemption would not apply.
- (2) Substitution units whose substitution plans have been "terminated." A substitution plan may be terminated on or before November 30 of the year for which the termination is to take effect. The fee exemption does not apply to the unit, as of January 1st, for the calendar year for which the substitution plan is terminated.
- (3) Compensating units. The fee exemption does not apply to units that are designated as compensating units in a reduced utilization plan under §408(c)(1).
- (4) Phase II units (except "active" substitution units) and "opt-in" units under §410(h) are not entitled to the emissions fee exemption.

The exemption applies on a calendar year basis, regardless of the collection schedule of an individual State. If a conditional plan is activated on November 30 1995, then it is exempt from

emissions-based fees from January 1st 1995 until January 1st for all years in which the substitution plan is in effect, or December 31st 1999, whichever is earlier. If a State calculates emission-based fees on a Phase I affected unit on a basis other than a calendar year (for instance, from March 1, 1994 to February 28, 1995), the portion of fees that corresponds to the period when the unit was entitled to the fee exemption (in this case, from January 1, 1995 through February 28, 1995) may not be used to fund the State's operating permit program. The portion of fees that covers the period when the unit was not exempt (in this case, from March 1, 1994 to December 31, 1994) may be used to fund the program.

If you have questions or comments, contact Robert Miller at (202) 233-9077 or Donna Deneen at (202) 233-9089 (both at EPA Headquarters, Acid Rain Division), or Kirt Cox at (919) 541-5399 or Candace Carraway at (919) 541-3189 (both at EPA Headquarters, Office of Air Quality Planning and Standards).

# INCORPORATION BY REFERENCE OF FEDERAL ACID RAIN REGS

January 26, 1998

This incorporation by reference guidance provides model language to states that wish to incorporate by reference the federal Acid Rain permitting regulations (40 CFR part 72). In the May 21, 1993 Acid Rain-Title V guidance package, states were discouraged from incorporating the federal Acid Rain regulations by reference because the Phase I provisions (where EPA has sole permitting responsibility) are extraneous from the standpoint of a state. Nonetheless, a number of states have expressed a preference for using incorporation by reference language to satisfy their regulatory authority requirements.

EPA believes that these states can be accommodated without compromising the integrity of the Acid Rain Program, and has therefore drafted the following model language that can be used to incorporate the provisions of 40 CFR part 72. The actual language a state uses will depend on the laws and regulations under which the state operates.

*"The [Name of Permitting Authority] hereby adopts and incorporates by reference the provisions of 40 CFR part 72, as in effect on [date of this action or date state commenced incorporation process], for purposes of implementing an acid rain program that meets the requirements of title IV of the Clean Air Act. The term "permitting authority" shall mean the [Name of Permitting Authority] and the term "Administrator" shall mean the Administrator of the United States Environmental Protection Agency.*

*"If the provisions or requirements of 40 CFR part 72 conflict with or are not included in [the regulations adopted pursuant to title V], the part 72 provisions and requirements shall apply and take precedence."*

As noted in the May 21, 1993 cover memo to the Acid Rain-Title V guidance package, a state must also demonstrate a commitment to revise its regulations to accommodate federal regulatory modifications. From a procedural standpoint, some states may be able to adopt a version of the regulations already promulgated, but lack the capacity to automatically adopt future revisions. States could meet this requirement by including the following language in its implementation agreement:

*"The [Name of Permitting Authority] commits to take action, following promulgation by EPA of regulations implementing sections 407 and 410 of the Clean Air Act, or revising either part 72 or the regulations implementing sections 407 or 410, to either incorporate such new or revised provisions by reference or submit, for EPA approval, [Name of Permitting Authority] regulations implementing these provisions."*

If you have questions or comments, please contact EPA Headquarters, Acid Rain Division, and speak with either Donna Deneen at (202) 233-9089 or Robert Miller at (202) 233-9077.