

# Minnesota Pollution Control Agency

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August 31, 1994

Ms. Maryanne Hruby  
Executive Director  
Legislative Commission to Review  
Administrative Rules  
State Office Building, Room 55  
100 Constitution Avenue  
St. Paul, Minnesota 55155

Dear Ms. Hruby:

RE: Statement of Need and Reasonableness for Proposed Amendments to the State Air Pollution Control Rules to Incorporate Federal Permit Requirements, Nitrogen Oxides Emission Reduction Requirements, and Continuous Emission Monitoring Requirements for Acid Rain Affected Sources, Minn. Rules Pts. 7007.1075, 7011.0553 and 7017.1020

Enclosed for your review is a copy of the Statement of Need and Reasonableness for proposed rules as required by Minn. Stat. § 14.115, subd. 8 (1992). If you have any questions, please call me at 296-7712.

Sincerely,

A handwritten signature in cursive script that reads "Norma L. Coleman".

Norma L. Coleman  
Planning and Rule Coordinator  
Program Development Section  
Air Quality Division

NLC:jmd

Enclosure

**STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY**

In the Matter of the Proposed  
Amendments to the State Air Pollution  
Control Rules to Incorporate Federal  
Permit Requirements, Nitrogen Oxides  
Emission Reduction Requirements, and  
Continuous Emission Monitoring Requirements  
for Acid Rain Affected Sources, Minn. Rules  
pts. 7007.1075, 7011.0553 and 7017.1020.

**STATEMENT OF NEED  
AND REASONABLENESS**

**I. INTRODUCTION**

This rule consists of proposed amendments to the state air pollution control rules to incorporate by reference the requirements of the federal permit regulation, nitrogen oxide emission reduction requirements, and continuous emission monitoring requirements for acid rain affected sources under Title IV of the Clean Air Act (Act). Title IV of the Clean Air Act Amendments of 1990 (1990 Amendments) established for the first time a national control plan for acid deposition. Clean Air Act (CAA) §§ 401-416.<sup>1</sup> Title IV addresses acid rain in the United States by controlling emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>) from power plants (called "affected sources" in Title IV). The U.S. Environmental Protection Agency (EPA) has promulgated regulations that implement the provisions of Title IV, which are codified at 40 C.F.R. pts. 72-78 (1993).

Because acid deposition is a problem of total regional and national emissions of SO<sub>2</sub> and NO<sub>x</sub>, instead of emissions from any single affected source, Title IV imposes a national cap on annual SO<sub>2</sub> emissions from power plants of 8.9 million tons per year, a reduction of 10 million tons from 1980 emissions. CAA §§ 401(b), 403(a)(1). This SO<sub>2</sub> emissions cap is implemented by issuing to power plants a certain number of allowances to emit SO<sub>2</sub>. Each allowance is an authorization to emit one (1) ton of SO<sub>2</sub>. CAA § 402(3). A utility

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1. These sections are codified at 42 U.S.C. §§ 7651-7651o (1993), but are most often referred to by their Clean Air Act section number.

company may use that allowance, trade it, transfer it to other plants within that utility's system, or sell the allowance to another utility. CAA § 403(b), (f). Title IV also requires power plants to reduce total annual NOX emissions by two (2) million tons by the year 2000. CAA §§ 401(b), 407. EPA has recently promulgated the regulations required to implement these reductions. 59 Fed. Reg. 13538-80 (March 22, 1994) (to be codified at 40 C.F.R. pt. 76).

The SO2 emission reductions under Title IV are accomplished in two phases. Phase I takes effect in 1995, and addresses 110 power plants. CAA § 404. EPA is issuing the permits for the Phase I power plants. CAA § 408(c). Phase II reductions take effect in the year 2000, and apply to virtually all power plants in the United States. CAA § 405. The states will implement Phase II SO2 reductions and the NOX reductions through the operating permit program established under Title V of the 1990 Amendments. CAA § 408(d). The Minnesota Pollution Control Agency (MPCA) recently adopted rules that implement the federal operating permit program requirements of Title V. Minn. R. ch. 7007 (1993). The purpose of this rule amendment is to add into the new operating permit rule the additional permit requirements for power plants subject to Title IV, and to incorporate into Minnesota Rules the NOX emissions and continuous emission monitoring requirements imposed on those power plants by Title IV.

## **II. STATEMENT OF MPCA'S STATUTORY AUTHORITY**

The MPCA's statutory authority to adopt these rule amendments is set forth in Minn. Stat. § 116.07, subd. 4 (1992), which provides:

Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, ch. 1046, for the prevention, abatement, or control of air pollution. Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make due allowance for variations therein. Without limitation, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement or control of air pollution.

Under this statute, the MPCA has the necessary statutory authority to adopt the proposed rules.

### III. STATEMENT OF NEED

Minn. Stat. ch. 14 (1992) requires the MPCA to make an affirmative presentation of facts establishing the need for and reasonableness of the rule as proposed. In general terms, this means that the MPCA must set forth the reasons for its proposal and the reasons must not be arbitrary or capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the MPCA is appropriate. The need for the rules is discussed below.

These rule amendments are needed in order to enable the MPCA to fully implement and enforce the new operating permit program required by Title V and, through operating permits, the requirements of Title IV. Title IV requires that each state implement the Phase II SO<sub>2</sub> and NO<sub>X</sub> emission reductions within its borders through a state operating permits program approved under Title V. CAA § 408(d).

Title V requires states to submit to the EPA rules that establish an operating permits program within the state. CAA § 501-507. Among other things, the MPCA must show that it has adequate authority to "issue permits and assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act," and to enforce those permits. CAA § 502(b)(5)(A),(E). In its rules governing state implementation of the federal operating permit program, EPA requires states to demonstrate their ability to issue permits and assure compliance with each "applicable requirement", and to incorporate into permits all "applicable requirements." 40 C.F.R. § 70.4(b)(3)(i), (v) (1993). "Applicable requirement" is defined to include "any standard or other requirement of the acid rain program under Title IV of the Act or the regulations promulgated thereunder." 40 C.F.R. § 70.2 (1993). These definitions have been reflected in Minnesota's new operating permit rule, and affected sources under

Title IV are required to obtain operating permits. Minn. R. pts. 7007.0100, subp. 7(E) and 7007.0200, subp. 3 (1993). Other portions of the state's operating permit rule refer to the requirements of Title IV as well. See Minn. R. pts. 7007.0500, subp. 4 and 7007.0800, subps. 2 and 7 (1993).

EPA, however, did not issue its full guidance on how the states were to implement Title IV until after the MPCA had formally proposed its operating permits rule. Because the new operating permit rule had to be effective and the MPCA's Title V program submittal sent to EPA by November 15, 1993,<sup>2</sup> the MPCA had to proceed to promulgate the operating permit rule without incorporating the material required in EPA's Title IV guidance. Realizing the timing problem facing the states, EPA requested that states submit the missing portions of the Title IV program no later than January 1, 1995. See EPA's Memorandum entitled "Title IV - Title V Interface Guidance for States," at 4 - 5 (Exh. 1). These rule amendments are therefore needed to update the MPCA's rules to fully include all relevant Title IV requirements in state law.

#### **IV. STATEMENT OF REASONABLENESS**

The MPCA is required by Minn. Stat. ch. 14 to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness is the opposite of arbitrariness or capriciousness. It means that there is a rational basis for the MPCA's proposed action. The reasonableness of the proposed rules is discussed below.

In this rule amendment, the MPCA is incorporating into the state air pollution control rules 40 C.F.R. pt. 72 (Part 72), which contains the federal permits regulation for Title IV's acid rain program. The MPCA is also incorporating 40 C.F.R. pt. 75 (Part 75), which governs the continuous emission monitoring required by Title IV. Finally, the MPCA is incorporating 40 C.F.R. pt. 76 (Part 76), which contains the nitrogen oxides emission reduction program under Title IV.

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2. This deadline is established in the Act. CAA § 502(d)(1). The MPCA's operating permit rule became effective on October 18, 1993. The MPCA submitted its Title V program to EPA on November 15, 1993.

Since the MPCA will be developing Phase II acid rain permits under the operating permit rule, it is reasonable to incorporate the requirements for those permits, as contained in Part 72. EPA's NOX emission reduction requirements under Title IV are "applicable requirements" under the operating permit program. The MPCA must therefore incorporate into its rules the requirements of Part 76 and implement the NOX emission reduction requirements in operating permits issued to affected sources.<sup>3</sup>

The MPCA is also incorporating into its continuous emission monitoring rules the requirements of EPA's rule on continuous emission monitoring under Title IV, codified at Part 75. It is reasonable for the MPCA to adopt these requirements because they must be imposed upon affected sources in Minnesota through the operating permit program. Secondly, Part 72 frequently references the requirements of Part 75 and how they apply to affected sources, so it is reasonable to include the requirements of Part 75 in the MPCA's rules. It is also reasonable to adopt Part 75 because EPA indicated in a recent guidance memorandum that it expects the states to have a role in enforcement of the requirements of Part 75 as well as Part 72. See "Acid Rain Compliance/Enforcement Guidance," dated June 27, 1994, by John B. Rasnic, Director of the Manufacturing, Energy and Transportation Division of EPA's Office of Compliance.

It is reasonable that the MPCA incorporate by reference the federal regulations promulgated under Title IV. The 1990 Amendments established the acid rain control plan to be a nationally consistent approach to control acid deposition. The reasons for this are discussed in EPA's Guidance Memorandum and derive from the national system of marketable SO<sub>2</sub> emission allowances that Congress selected as the vehicle for imposing the SO<sub>2</sub> emission reductions. Exh. 1 at 2. These marketable allowances may be sold anywhere in the continental United States, and therefore the allowance and emission tracking system

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3. EPA recently promulgated the final NOX emission reduction rule at 59 Fed. Reg. 13538 - 13580 (March 22, 1994). EPA's guidance to the state issued in early 1993 required states to adopt the provisions of the permit regulation, and to then adopt the NOX emission reductions program once it was promulgated. Exhibit 1 at 3-4. The MPCA proposes to accomplish both tasks in this rulemaking.

is maintained by EPA. Since implementation of Title IV requires national uniformity, it is reasonable to simply incorporate the relevant EPA rules for the Title IV program by reference into Minnesota's state air pollution control rules.

The rule amendments incorporate by reference any future amendments that EPA might make to the acid rain regulations adopted in this rule to avoid any inconsistencies that future federal amendments to these regulations would cause between federal and state rules. Incorporation by reference of applicable federal rules also avoids differences in language between federal and state rules, which can cause interpretive problems for regulated parties and state agency personnel in permitting and enforcement actions. EPA also requires that states incorporate future changes to these regulations. Exh. 1 at 4. It is efficient and reasonable to accomplish this in this rule proceeding.

In its initial guidance to the states, EPA stated that it did not recommend that states incorporate by reference EPA's acid rain rules. Instead, EPA recommended that states adopt a 43 page model state acid rain rule written by EPA. See Exh. 1 at 3. In a subsequent memorandum, EPA explained that it took this position because portions of Part 72 referred to Phase I provisions; Phase I is implemented by EPA under the Act. CAA § 408(c). A number of states, however, expressed a preference for simply incorporating the permit requirements of the acid rain program by reference in order to satisfy the requirements of the Act for state permits under Phase II of the program. EPA reviewed this issue and decided that states could adopt by reference the provisions of the acid rain regulations, and provided suggested language, which the MPCA has followed. See EPA's Memorandum entitled "Incorporation by Reference of Federal Acid Rain Regs," August 9, 1993 (Exh. 2).

At the time EPA's second memorandum was issued, Parts 72 and 75 had been promulgated, but Part 76 had not. EPA therefore recommended in the memorandum that states could adopt Part 72 by reference, and then asked states to commit in their implementation agreement with EPA to adopting EPA's NOX reduction rules when they

were final. Exh. 1 at 4; Exh. 2. Because the NOX rule is now final, it is reasonable to also incorporate the provisions of that rule by reference in this rulemaking.

Incorporation by reference of the federal acid rain requirements is reasonable because it allows Minnesota to comply with the requirements of Titles IV and V of the Act, to implement Title IV in Minnesota consistent with the requirements of the national program, and to establish the federal requirements in Minnesota Rules efficiently.

#### **V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING**

Minn. Stat. § 14.115, subd. 2 (1992), requires the MPCA, when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

- a. The establishment of less stringent compliance or reporting requirements for small businesses;
- b. The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c. The consolidation or simplification of compliance or reporting requirements for small businesses;
- d. The establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- e. The exemption of small businesses from any or all requirements of the rule.

The proposed rules are unlikely to affect small businesses, as defined in Minn. Stat. § 14.115 (1992). The main impact of Title IV is on the power plants owned and operated by large electric utility companies. Additionally, since the federal acid rain requirements that are being incorporated into state rules are already in force and apply to affected sources under Title IV located in Minnesota as a matter of federal law, the MPCA cannot change the applicable federal regulations through this state rulemaking. The MPCA must show its ability to administer and enforce the applicable acid rain regulations in order to comply with the Act and administer the Title V operating permit program within Minnesota.



As a result, the MPCA is not proposing any of the above-listed types of changes in the federal regulations it is incorporating in this rule amendment. If these federal regulations apply to an entity that is a small business, the same requirement would apply to a similarly situated small business in every state of the nation, including Minnesota. Finally, since the incorporation of the federal acid rain regulations into state rules does not change the federal regulations, this rulemaking does not impose any additional requirements on small businesses that are not already present as a matter of federal law.

## **VI. CONSIDERATION OF ECONOMIC FACTORS**

In exercising its powers the MPCA is required by Minn. Stat. § 116.07, subd. 6 (1992) to give due consideration to economic factors. The statute provides:

In exercising all its powers, the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

In proposing this rule amendment to incorporate the federal acid rain regulations into state rules, the MPCA has considered any economic impacts the proposed rule amendments would have. Since the MPCA is incorporating the federal acid rain rules into state rules for purposes of compliance with Titles IV and V of the 1990 Amendments, the state rule amendments proposed in this rulemaking do not impose any additional costs on Minnesota businesses that are not already imposed as a matter of federal law upon Minnesota businesses by the federal acid rain program. This rule, therefore, does not have any economic impact on its own.

## **VII. IMPACTS ON AGRICULTURAL LAND AND FARMING OPERATIONS**

Minn. Stat. § 14.11, subd. 2 (1992) requires that if the agency proposing the adoption of a rule determines that the rule may have a direct and substantial adverse impact on agricultural land in the state, the agency shall comply with specified additional

requirements. The MPCA, in adopting the federal acid rain rules into state rules, is not proposing a rule which may have a direct and substantial adverse impact on agricultural lands in the state, because the federal acid rain regulations apply to power plants which generate electricity and, therefore, do not directly impact agricultural lands in the state.

Minn. Stat. § 116.07, subd. 4 (1992), requires that if a proposed rule affects farming operations, the MPCA must provide a copy of the proposed rule and a statement of the effect of the proposed rule on farming operations to the Commissioner of Agriculture for review and comment. The MPCA, in proposing to include the federal acid rain regulations in state rules, is not proposing a rule which would affect farming operations.

### **VIII. COST TO LOCAL PUBLIC BODIES**

Minn. Stat. § 14.11, subd. 1 (1992), requires the MPCA to include a statement of the rules' estimated cost to local public bodies in the notice of intent to adopt rules if the rule would have a total cost of over \$100,000 to local public bodies in the state in either of the two years immediately following adoption of the rule. Adoption of this rule amendment may impose additional cost on local public bodies in the state, because it may apply to regulate emissions from at least two power plants owned and operated by local municipal utilities.<sup>4</sup> The requirements of the federal acid rain program apply in Phase I (1995 - 1999) only to Northern States Power Company, a private, investor-owned electric utility. Phase II requirements impact at least two municipal utility power plants in the state, but will not do so until the year 2000, and therefore this rule would not impose any costs on local public bodies in the two years immediately following its adoption. Finally, since the MPCA is incorporating the federal acid rain regulations into state rules in order to comply with the requirements of the 1990 Amendments, the state rule amendments proposed in this rulemaking do not impose any additional costs on local public bodies that are not already imposed as a matter of federal law upon local public bodies by the requirements of

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4. The Silver Lake Plant of Rochester Public Utilities and the Northeast Station of Austin Utilities are subject to Phase II of Title IV.

the federal acid rain program which are being incorporated. This rule, therefore, does not have any economic impact on local public bodies on its own.

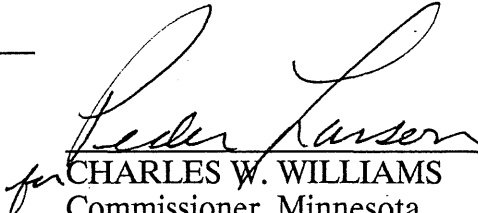
#### IX. REVIEW BY COMMISSIONER OF TRANSPORTATION

Minn. Stat. § 174.05 requires the MPCA to inform the Commissioner of Transportation of all rulemakings that concern transportation, and requires the Commissioner of Transportation to prepare written review of the rules. The adoption of the federal acid rain regulations into Minnesota rules do not concern transportation; they affect the operation of electric utility power plants. The requirements of Minn. Stat. § 174.05 are therefore not applicable.

#### X. CONCLUSION

Based on the foregoing, the proposed amendments to the State air pollution control rules to incorporate the federal acid rain requirements into State rules, attached to this Statement of Need and Reasonableness, are both needed and reasonable.

Dated: August 25, 1994

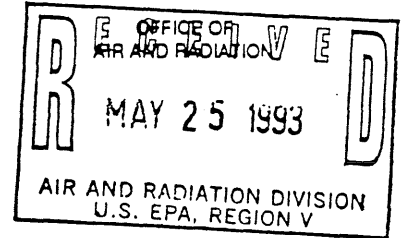
  
for CHARLES W. WILLIAMS  
Commissioner, Minnesota  
Pollution Control Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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MAY 21 1993



MEMORANDUM

SUBJECT: Title IV-Title V Interface Guidance for States

FROM: *for* Lydia Wegman, Deputy Director *Denise England Denise*  
Office of Air Quality Planning and Standards

Paul Stolpman, Acting Director *Paul Stolpman*  
Office of Atmospheric Programs

TO: Director, Air Division, Regions I-X

The purpose of this guidance is threefold. First, it is intended to clarify the primary criteria for approval of state submittals to carry out the acid rain portion of the operating permits program under 40 CFR Part 70. Second, it discusses key dates in the submittal/approval process and lays out a proposed schedule for certain subsequent deadlines. Last, it introduces the attached guidance package, which is designed to assist states as they focus on issues pertaining to EPA requirements for Titles IV and V.<sup>1</sup>

**BACKGROUND**

Under Title V of the Clean Air Act Amendments and its implementing regulations published at 40 CFR part 70, states are required to submit acceptable operating permits programs to EPA by November 15, 1993. Permitting provisions of Title IV of the Act fall under the regulatory umbrella of Title V, requiring EPA to establish criteria for the approval of Title V programs that are compatible with the national Acid Rain Program.

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<sup>1</sup> The policies set out in this memorandum and its attachments are intended solely as guidance, do not represent final EPA action, and cannot be relied upon to create any rights enforceable by any party.

The Acid Rain Program has a number of unique characteristics that make national consistency particularly important and thus, a number of requirements that cannot be devolved to the states. First, the operation of the sulfur dioxide allowance system is managed at EPA headquarters where all trades of allowances are recorded and where, at the end of each calendar year, the determination of compliance or non-compliance is made (i.e., whether the unit does or does not hold enough allowances to cover all SO<sub>2</sub> emissions). Automatic fines for exceedences are due and payable to the Administrator without demand. Second, the mandatory hourly recordation of specified emissions on continuous emission monitor systems (CEMS) will be transmitted in electronic format directly from the utility to the headquarters database quarterly. Quality assurance systems to check the operation of CEMS are also expected to be operated either out of headquarters or the regional offices. Lastly, the only alternative compliance plan during Phase II of the program (excluding NO<sub>x</sub> options) is the issuance of additional allowances for qualifying repowering technologies. The Act requires that the determination of whether utilities are using qualifying technologies must be made by EPA in consultation with the Department of Energy.

The permitting portion of the program is implemented in two phases. Phase I permitting, now underway, involves the federal issuance of acid rain permits to 110 affected sources that are required to fully comply with the requirements of the Acid Rain Program beginning January 1, 1995. (Concurrently, headquarters, regional staff, and some states using section 105 grant funds, have begun the process of certifying all affected utility CEMS.) Phase II permitting involves the issuance of permits to over 800 acid rain affected sources (including those affected sources permitted in Phase I) that are required to come into full compliance January 1 of the year 2000, when Phase II begins. Issuance of Phase II permits, however, will be the responsibility of states that have submitted a timely and satisfactory Title V Operating Permit Program, which will include a Title IV component.

States should note that in areas where Title IV and Title V regulations differ, Title IV rules supersede those of Title V. The fundamental differences between Titles IV and V are identified in attachment A, and include mandatory use of the permit shield, certain applications of expedited permit revision procedures, and permits five years in duration. In addition, EPA retains enforcement responsibility for Phase I affected sources.

## **CRITERIA FOR APPROVAL OF ACID RAIN PORTION OF TITLE V STATE SUBMITTALS**

Title V and part 70 require an approvable operating permits program to assure compliance with all applicable requirements, including the requirements of the Acid Rain Program. To meet these requirements, the state permitting authority must, among other things, have the statutory and regulatory authority necessary to implement Phase II

of the program. Although it is necessary for a state to submit documentation on a wide variety of items in order to receive approval under the Title V operating permits program for a Title IV program, the Agency is most interested in assuring that an approvable acid rain program meet five major criteria:

***Legal Authority*** -- A state must demonstrate that it has the legal authority to create, administer and enforce an acid rain permitting program that is consistent with the provisions of Title IV of the Act and its implementing regulations contained in the Code of Federal Regulations. As with Title V, a letter from a state's Attorney General declaring that a state has the authority to do so will suffice in meeting this requirement. Language needed to enable state acid rain programs can be relatively simple. For example:

*The state permitting authority shall develop, adopt, and implement standards, permitting procedures, and implementation plans necessary to control sulfur dioxide and nitrogen oxide emissions from affected sources in accordance with Title IV of the federal Clean Air Act, as amended, and all existing and future implementing regulations promulgated by the United States Environmental Protection Agency.*

By passing or adopting broad language such as this, most states should have sufficient authority to carry out all requirements of the Acid Rain Program. To assist a state in evaluating whether its broad authority is adequate, Attachment A lists several specific authorities unique to the Acid Rain Program that must be covered by a state's broad legal authority or under some other authority.

***Regulatory Authority*** -- A state must demonstrate that it has the regulatory authority to administer an acid rain program. The best confirmation of this authority would be the inclusion of the state acid rain regulations themselves along with the rest of the Title V submittal. Model state regulations are included in Attachment 5 to this memo. While the actual language of this model regulation is not intended to be mandatory, it does represent the "heart" of the Acid Rain Program, and all provisions enumerated in the model regulations should be included in a state's regulations.

EPA has explored the possibility of states incorporating Acid Rain Program regulations found in 40 CFR part 72 by reference, and found that doing so "across the board" could generate confusion in many instances. It is recommended, therefore, that states do not incorporate by reference unless a specific portion of the rules is found to be appropriate; adoption of the model rule (or a reasonable approximation of it) will suffice in meeting EPA requirements for acceptable state acid rain regulations.

***Forms*** -- A state is required to use certain forms or formats consistent with the information requirements of EPA in regulating Phase II affected units (see

attachments and 40 CFR 72.72(b)(4)). EPA is encouraging states to pattern their forms after EPA's. NO<sub>x</sub> forms will be available when the final NO<sub>x</sub> rule is promulgated.

*Regulatory Revisions* -- A state must demonstrate the commitment and ability to revise its regulations as necessary to accommodate federal revisions and additions to the Acid Rain regulations and to Title IV. A state's enabling authority must not bar such revisions to its regulations. It is particularly important that states be prepared to incorporate part 76 (NO<sub>x</sub>) of the Acid Rain Program into their Title IV-Title V program once final part 76 is promulgated. State permitting authorities are required to reopen acid rain permits to add Acid Rain Program NO<sub>x</sub> requirements no later than January 1, 1999, provided that the designated representatives for affected sources have submitted timely and complete acid rain permit applications for NO<sub>x</sub>. (See 40 CFR 72.73(b)(2), 72.85, and 72.21) Similarly, states must also have the capacity to integrate the opt-in portion of the Acid Rain Program (part 74) once this rule is promulgated. In addition, existing part 72 may be amended or corrected from time to time, and such changes must be incorporated in the state program.

EPA will develop guidance to assist states in incorporating both NO<sub>x</sub> and opt-in requirements into their acid rain programs once these rules are finalized. EPA will also develop a schedule and process to evaluate and approve/disapprove a state's incorporation of these requirements.

*Commitment to Acid Rain Deadlines* -- States must include a schedule in their Title V submittals for both the submission of permit applications from affected sources, as well as issuance of permits to the same, in accordance with the statutory deadlines and regulations for Phase II. A schedule for the reopening of the acid rain portion of permits to add Acid Rain Program NO<sub>x</sub> requirements in accordance with the final part 76 regulations must also be included in the submittal.

## **APPROVAL SCHEDULE FOR ACID RAIN PORTION OF TITLE V STATE SUBMITTALS**

All states must submit their Title V programs (including provisions for implementing Title IV requirements) for EPA approval by November 15, 1993. EPA recognizes, however, that some states may require additional time to complete development of their full acid rain program. Therefore, if a state is unable to submit a complete acid rain program (i.e., one that has all the required components enumerated in the "Criteria for Approval" portion of this memo, including regulations) by this deadline, it may choose to make a commitment in the November 15, 1993 submittal (e.g., in the Governor's letter of submittal to EPA) to submit all missing portions of its acid

rain program no later than January 1, 1995. An agreement delineating a schedule of deadlines for submission of the rest of its acid rain program should accompany the package. EPA encourages states to submit missing portions before the January 1, 1995 deadline, in order to allow enough time to review them for completeness and consistency with the requirements of Title IV-Title V.

States that comply with the requirements set forth by part 70 and that include either full acid rain program elements or the above commitment to supply missing elements, will be eligible to receive "full approval" from EPA by November 15, 1994. EPA will review missing Title IV elements as they are received and, unless these submittals are unacceptable, will continue to hold the state in full approval status. EPA intends to inform states of when their submittals are judged to be acceptable but will generally do so through means such as letters, and not Federal Register notices. If, however, EPA finds that a Title V program is not being properly administered or enforced for Title IV purposes (e.g., a state has not fulfilled commitments made in its November 15, 1993 submittal concerning the Acid Rain Program), the Administrator will publish a notice in the Federal Register making this announcement and noting where permit applications are to be delivered. With the publication of the Federal Register notice, the Administrator will elect to exercise one or more actions as appropriate. These include:

- 1) EPA withdrawal of approval for an entire part 70 program submittal or the acid rain portion of it; and
- 2) Application of appropriate sanctions under section 179(b) of the Act.

If a state fails to submit, administer, or enforce an acceptable Title V operating permit program for Title IV purposes, EPA retains, under 40 CFR 72.74, the option of withdrawing only the acid rain portion of the program and issuing a Phase II Acid Rain permit, rather than withdrawing the entire program and issuing a comprehensive operating permit. If a state operating program with an acceptable acid rain component is given full, interim, or partial approval by the Administrator no later than July 1, 1996, that state is responsible for issuing comprehensive part 70 permits, including the acid rain portion, to all of its Phase II sources in the approved program by December 31, 1997.

## **FUTURE GUIDANCE**

EPA is currently drafting guidance for states in two areas: fees under Phase I and coordination of Title IV-Title V permitting schedules. These memos will be distributed by EPA as soon as they are finalized. With the exception of the EPA forms, model permit application, and fact sheets (which are otherwise generally available), this package will be available on the TTN bulletin board for states to download if needed.



If there are any questions regarding this package, or suggestions for additional future guidance, please contact Donna Deneen at (202) 233-9089, Robert Miller at (202) 233-9077 (Title IV-Title V contacts at EPA's Acid Rain Division), or Mike Trutna at (919) 541-5345, contact for national interface of Title IV-Title V at OAQPS.

cc: M. Shapiro, OAR  
R. Brenner, OPAR  
J. Beale, OPAR  
J. Seitz, OAQPS  
A. Eckert, OGC

## INCORPORATION BY REFERENCE OF FEDERAL ACID RAIN REGS

August 9, 1993

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.

1 Pollution Control Agency

2

3 Proposed Permanent Rules Relating to Incorporation of Federal

4 Acid Rain Program Requirements

5

6 Rules as Proposed (all new material)

7 7007.1075 PERMIT REQUIREMENTS FOR AFFECTED SOURCES.

8 Code of Federal Regulations, title 40, part 72, as amended,  
 9 entitled "Permits Regulation," is adopted and incorporated by  
 10 reference, for purposes of implementing an acid rain program  
 11 that meets the requirements of title IV of the act. The term  
 12 "permitting authority" means the agency. The provisions of this  
 13 part apply to affected sources and take precedence if they  
 14 conflict with or are not included in parts 7007.0100 to  
 15 7007.1850.

16 7011.0553 NITROGEN OXIDES EMISSION REDUCTION REQUIREMENTS FOR  
17 AFFECTED SOURCES.

18 Affected sources, as defined in part 7007.0100, subpart 4,  
 19 shall comply with Code of Federal Regulations, title 40, part  
 20 76, as amended, entitled "Acid Rain Nitrogen Oxides Emission  
 21 Reduction Program," which is adopted and incorporated by  
 22 reference.

23 7017.1020 CONTINUOUS EMISSION MONITORING BY AFFECTED SOURCES.

24 Affected sources, as defined in part 7007.0100, subpart 4,  
 25 shall comply with Code of Federal Regulations, title 40, part  
 26 75, as amended, entitled "Continuous Emission Monitoring," which  
 27 is adopted and incorporated by reference.

Approved  
 by Revisor Ch

# Office of the Revisor of Statutes

## Administrative Rules



**TITLE:** Proposed Permanent Rules Relating to Incorporation  
of Federal Acid Rain Program Requirements

**AGENCY:** Pollution Control Agency

**MINNESOTA RULES:** Chapters 7007; 7011; and 7017

The attached rules are approved for  
publication in the State Register

A handwritten signature in cursive script, reading "Carla Riehle".

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Carla M. Riehle  
Senior Assistant Revisor