6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL-6918-9]

State Operating Permits Programs; Revision to Interim Approval Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action would amend EPA's regulations governing the interim approval of State and local operating permits programs. Currently, the regulations allow the Agency to extend expiration dates of interim approvals beyond 2 years from the date the interim approval is originally granted. This action removes that provision.

DATES: Submit comments on or before [Insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A-93-50, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. The EPA requests that a separate copy also be sent to the contact person listed

below.

Supporting material used in developing the proposal and final regulatory revisions is contained in Docket Number

A-93-50. This docket is available for public inspection and copying between 8:30 a.m. and 5:30 p.m., Monday through Friday, at the address listed above, or by calling (202) 260-7548. The Docket is located at the above address in Room M-1500, Waterside Mall (ground floor). A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Roger Powell, Mail Drop 12, United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (telephone 919-541-5331, e-mail: powell.roger@epa.gov).

SUPPLEMENTARY INFORMATION:

I. Background

If an operating permits program administered by a State or local permitting authority under title V of the Clean Air Act (Act) does not fully meet, but does "substantially [meet]," the requirements of part 70, EPA may grant that program "interim approval." (See §70.4(d)(1).) Permits issued under an interim approval are fully effective and expire at the end of their fixed

term, unless renewed under a part 70 program. (See §70.4(d)(2).) To obtain full approval, a permitting authority must submit to EPA program revisions correcting all deficiencies that caused the operating permits program to receive interim instead of full approval. Such submittal must be made no later than 6 months prior to the expiration of the interim approval. (See §70.4(f)(2).) Originally 99 State and local permitting programs were granted interim approval. For 14 of the original interim approved programs, permitting authorities have corrected the deficiencies identified in their interim approvals, and we have granted all of these programs full approval. (See part 70, Appendix A.)

On August 29, 1994 (59 FR 44460), and August 31, 1995 (60 FR 45530), we proposed revisions to our part 70 operating permits program regulations. Primarily, the proposals addressed changes to the system for revising permits, but a number of other proposed changes were also included. The preamble to the August 31, 1995, proposal noted the concern of many permitting authorities over having to revise their operating permits programs twice; once to correct interim approval deficiencies, and again to address the revisions to part 70. In the August 1995

preamble, we proposed that States with interim approval ". . . should be allowed to delay the submittal of any program revisions to address program deficiencies previously listed in their notice of interim approval until the deadline to submit other changes required by the proposed revisions to part 70" (60 FR 45552).

II. Extension of Interim Approval Expiration Dates

On October 31, 1996 (61 FR 56368), we amended §70.4(d)(2) to permit the Administrator to grant extensions to interim approval expiration dates to allow permitting authorities the opportunity to combine their program revisions correcting interim approval deficiencies with their program revisions that will conform to the part 70 revisions. In this rulemaking, we granted a 10-month extension to all interim approved programs for which the interim approval was granted prior to the date of issuance of a memorandum announcing our position on this issue (memorandum from Lydia N. Wegman to Regional Division Directors, "Extension of Interim Approvals of Operating Permits Programs," June 13, 1996).

We then extended the interim approval expiration

dates for certain State and local permitting programs a second time, on August 29, 1997 (62 FR 45732). On July 27, 1998, we published a direct final rulemaking extending interim approval expiration dates a third time, this time covering all interim approved programs, until June 1, 2000. In each of these instances, delays in the expected promulgation of the final part 70 revisions beyond the previous interim approval expiration dates led us to grant the further extensions of the expiration deadlines. We intended these extensions to provide the time needed for State and local agencies to combine their program revisions for both the interim approval deficiencies and the part 70 revisions.

On February 14, 2000 (65 FR 7333), we published a direct final rulemaking to extend interim approvals a fourth time. In this action, we would have set an interim approval expiration date of June 1, 2002, for all programs. We received an adverse comment on that action and withdrew the direct final action on March 29, 2000 (65 FR 16523).

The commenter asserted that our proposed action was contrary to the express terms of the Act and must be withdrawn. The commenter referred to section 502(g) of

the Act which provides that "[a]n interim approval under [Section 502(g)] shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed."

This commenter further argued that our existing regulations (§70.4(d)(2)) do not justify an extension of interim approval deadlines until June 1, 2002. The commenter stated that to the extent that §70.4(d)(2) allowed an extension of interim approvals by up to 10 months on an individual basis, we had already granted this 10-month extension in the October 31, 1996, rulemaking.

This commenter also asserted that to the extent §70.4(d)(2) allowed longer interim approval periods for States to combine program changes, this provision did not justify the proposed extension to June 1, 2002, because §70.4(d)(2) contemplated such extensions only after the promulgation of part 70 revisions, which had not occurred. Moreover, the commenter noted that this provision authorized additional time “only once per State” and that we had already granted multiple extensions in the past.

We considered these comments, as well as the further delays in promulgating the revisions to part 70 and the recently determined need for a supplemental part 70 proposal before the part 70 revisions can be promulgated. In light of those considerations and the need to provide State and local agencies with sufficient time to correct their interim approval deficiencies, on May 22, 2000, we published a final action extending interim approvals until December 1, 2001, and indicated that we will not extend interim approvals further. Consequently, a Federal permitting program will apply by operation of law in any area without a fully approved program as of December 1, 2001.

III. Litigation on Extension

The Sierra Club and New York Public Interest Research Group (NYPIRG) challenged our final action in the Court of Appeals for the District of Columbia Circuit [Sierra Club et al. v. EPA (D.C. Cir. No. 00-1262)]. As a result of that litigation, we have entered into a settlement agreement with the litigants that will hold that case in abeyance, pending implementation of the settlement agreement.

IV. Regulatory Revision

One of the terms of the settlement agreement is that we will remove from §70.4(d)(2) the language added on October 31, 1996, to allow granting extensions to interim approval expiration dates. The language of §70.4(d)(2) is proposed to be amended to restore it to the original language that was in that section when part 70 was promulgated. The revision to this provision is consistent with our intent not to extend further the interim approval of the current operating permits programs. This action, if finalized, will have no effect on the current expiration date of December 1, 2001, for programs that received an extension of their interim approvals in the May 22, 2000, action.

V. Administrative Requirements

A. Docket

The docket for this regulatory action is A-93-50. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this rulemaking. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that the parties can effectively participate in the rulemaking process, and (2) to serve as the record in case of

judicial review (except for interagency review materials). The docket is available for public inspection at EPA's Air Docket, which is listed under the ADDRESSES section of this notice.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether each regulatory action is "significant," and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

1. Have an annual effect on the economy of $100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligation of recipients thereof.

4. Raise novel legal or policy issues arising out of

legal mandates, the President's priorities, or the principles set forth in 12866.

This action is not a "significant" regulatory action pursuant to Executive Order 12866 because it does not substantially change the existing part 70 requirements for States or sources; requirements which have already undergone OMB review. As such, this action is exempted from OMB review.

C. Regulatory Flexibility Act Compliance

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), I certify that this action will not have a significant economic impact on a substantial number of small entities. In developing the original part 70 regulations, the Agency determined that they would not have a significant economic impact on a substantial number of small entities. Similarly, the same conclusion was reached in an initial regulatory flexibility analysis performed in support of the proposed part 70 revisions (a subset of which constitutes the action in this rulemaking). This action does not substantially alter the part 70 regulations as they pertain to small entities and accordingly will not have a significant economic impact on a substantial number of

small entities.

D. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in part 70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*. and has assigned OMB control number 2060-0243. The Information Collection Request (ICR) prepared for part 70 is not affected by the action in this rulemaking notice because the part 70 ICR determined burden on a nationwide basis, assuming all part 70 sources were included without regard to the approval status of individual programs. The action in this rulemaking notice does not alter the assumptions of the approved part 70 ICR used in determining the burden estimate. Furthermore, this action does not impose any additional requirements which would add to the information collection requirements for sources or permitting authorities.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of

the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of

affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the action in this rulemaking does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector, in any one year. Although the part 70 regulations governing State operating permit programs impose significant Federal mandates, this action does not amend the part 70 regulations in a way that significantly alters the expenditures resulting from these mandates. Therefore, the Agency concludes that it is not required by section 202 of the UMRA of 1995 to provide a written statement to accompany this regulatory action.

F. Applicability of Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1977), applies to any rule that EPA determines

(1) is “economically significant” as defined under

Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

G. Executive Order 13132 (Federalism)

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Order to include regulations that have

"substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position

supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of 13132 in a meaningful and timely manner.

This rule change will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

H. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If

EPA complies by consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule does not significantly or uniquely affect the communities of Indian tribal governments because it applies only to State and local permitting programs. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or

otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by one or more voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Integovernmental relations, Reporting and recordkeeping requirements.

_____ _____

Dated: December 12, 2000.

Robert Perciasepe,
Assistant Administrator, Office of Air and Radiation.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 70 - [AMENDED]

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

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

2. Section 70.4 is amended by revising paragraph (d)(2) to read as follows:

§ 70.4 State program submittals and transition.

* * * * *

(d) * * *

(2) Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources shall become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall expire at the end of their fixed term, unless renewed under a part 70 program.

* * * * *