



BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[EPA-R03-OAR-2024-0070; FRL-11788-01-R3]

Clean Air Act Title V Operating Permit Program Revision; West Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to West Virginia's Title V Operating Permits Program, submitted on behalf of the state by the West Virginia Department of Environmental Protection (WVDEP).

There are three components to the revision: it restructures the Title V operating permit fees collected by WVDEP in order to ensure that the Title V operating program is adequately funded; it amends West Virginia's Title V regulations to comport with Federal permit review, public petition, and affirmative defense requirements; and removes obsolete transitional language. This action is being taken under section 502 of the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2024-0070 at www.regulations.gov, or via email to Opila.MaryCate@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting

comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Yongtian He, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2339. Mr. He can also be reached via electronic mail at he.yongtian@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The West Virginia Title V Operating Permit Program is implemented through its “Requirements for Operating Permits” rule, codified at Title 45, Series 30 of the West Virginia Code of State Regulations (45CSR30). The EPA granted full approval of the

West Virginia Title V Operating Permit Program effective November 19, 2001. *See* 66 FR 50325. On May 3, 2023, WVDEP submitted a revision to 45CSR30 (effective March 31, 2023) for approval into the state’s EPA-approved Title V program. WVDEP revised 45CSR30 to: (1) restructure the Title V program fee as recommended by the EPA in a September 2021 Title V Program Evaluation Report, an August 2019 Title V Permit Fee Evaluation Report, and a May 2015 Title V Program Evaluation Report;¹ (2) comport with the EPA’s “Revisions to the Petition Provisions of the Title V Permitting Program” final Federal rule (85 FR 6431, February 5, 2020) and the EPA’s “Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program” (88 FR 47029, July 21, 2023); and (3) remove obsolete transitional language and provide additional clarifications.

Under 40 CFR 70.9(a) and (b), an approved state Title V operating permits program must require that the owners or operators of 40 CFR part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and ensure that any fee required under 40 CFR 70.9 is used solely for permit program costs. The fee schedule must result in the collection and retention of revenues sufficient to cover the permit program implementation and oversight costs. 40 CFR 70.9(b).

A. Fee Structure Revision

West Virginia’s initial Title V permit emission fee was established in 1994 at 45CSR30.8 and was based on emissions of individual sources subject to the West Virginia Title V Operating Permit Program. The initial fee was \$15 per ton of regulated

¹ The reports are available at www.epa.gov/caa-permitting/title-v-evaluation-report-west-virginia.

pollutant emitted by subject sources. On July 1, 1995, this increased to \$18 per ton. See 81 FR 7463, February 12, 2016, footnote 1. Subject sources were not required to pay annual fees for emissions in excess of 4,000 tons per year, referred to as an emissions fee cap. On June 10, 2015, West Virginia again amended its fee provisions at 45CSR30.8 to increase the annual emission fee from \$18 to \$28 per ton and maintained the emissions fee cap for individual sources at 4,000 tons per year. The EPA approved this revision on February 12, 2016. *See* 81 FR 7463.

The state submission indicates that under the previous fee structure, approximately 60% of Title V fees generated in West Virginia were paid by the top ten emitting sources of West Virginia's approximately 500 Title V facilities. Nine of the top ten sources were coal-fired electric generating units (EGUs), some of which, according to the state, have indicated the possibility of retiring in the near future. Accordingly, the previous fee structure was not flexible in the event of changes to the mix of regulated sources, which would result in projected revenue loss and potential vulnerability with respect to WVDEP's ability to fully fund its Title V program.

In the 2015, 2019 and 2021 Title V Program Evaluation Reports, the EPA recommended that WVDEP reevaluate the Title V fee structure due to the heavy reliance on the top ten sources (approximately 2% of all Title V sources in West Virginia). Due to the anticipated retirement of some or many of these coal-fired EGUs, the EPA projected that WVDEP may begin to experience a shortfall in revenue to cover the costs of implementing its Title V permit program if fees were not adjusted. According to the state submission, the revisions to this rule would expand the number of sources contributing 60% of the revenue from the top 10 (2% of state-wide sources) to the top 96

sources (20% of state-wide sources), thus providing a more diversified and sustainable revenue stream. Therefore, West Virginia amended its fee provisions at 45CSR30.8 to achieve a more sustainable and equitable Title V fee structure that can adjust to the projected changes to sources and emissions for the West Virginia Title V program.

B. Federal Permit Review, Public Petition, and Affirmative Defense Requirement Revisions

In February 2020, the EPA issued a Final Rule revising its regulations with respect to the submission and review of Title V petitions. *See* 85 FR 6431, February 5, 2020. The action sought to “to streamline and clarify” the processes by “implement[ing] changes in three key areas: Method of petition submittal to the agency, required content and format of petitions, and administrative record requirements for permits.” Any air agencies that needed to revise its rules to implement these changes were to initiate the process with the EPA in accordance with 40 CFR 70.4(i).

The EPA issued a final rule in July 2023 that removed the “emergency” affirmative defense provisions from the agency’s 40 CFR parts 70 and 71 Title V operating permit program regulations. *See* 88 FR 47029, July 21, 2023. The EPA proposed the removal of these provisions in June 2016 (81 FR 38645, June 14, 2016) and re-proposed in April 2022 (87 FR 19042, April 1, 2022). The final rule provided guidance, referenced in the June 2016 proposal, for the implementation of this rulemaking, noting that some air agencies would need to submit relevant program revisions to their EPA-approved Title V programs. The preamble explained that the EPA “expects that program revisions to remove the Title V emergency defense provisions from state operating permit programs will include, at minimum: (1) a redline document

identifying the state's proposed revision to its 40 CFR part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.” See 88 FR 47029, 47031, July 21, 2023.

II. Summary of Title V Program Revision and EPA Analysis

In the May 3, 2023 submittal, West Virginia sought EPA approval of its revisions to 45CSR30 into its Title V program. West Virginia’s revisions to 45CSR30 restructured fees for its Title V Operating Permit Program, amended its regulations to comport with revisions to Federal permit review and public petition regulations, removed affirmative defense provisions pursuant to revisions to Federal regulations, and removed obsolete language.

A. Fee Structure Revision

To cover all reasonable costs required to implement and administer the West Virginia Title V Operating Permit Program as required by 40 CFR 70.9(a) and (b), the state’s revised fee structure is designed to diversify revenue stream and to be more equitable and sustainable. Title V program costs include those for activities such as reviewing and processing preconstruction and operating permits, conducting inspections, responding to complaints and pursuing enforcement actions, emissions and ambient air monitoring, preparing applicable regulations and guidance, modeling, analyses, demonstrations, emission inventories, and tracking emissions.

West Virginia’s revisions to its Title V fee structure in 45CSR30.8 included five

main changes: (1) replacing the annual emissions only fee to an annual fee that includes an emissions fee, base fee, and complexity fee components; (2) setting the emissions fee factor based on a calculation of the 3-year average of Division of Air Quality (DAQ) Title V Fund expenses, which is then multiplied by the actual emissions released by the specific source to determine the emission fee component; (3) removing the emissions fee cap; (4) eliminating the Certified Emissions Statement (emission reporting requirements remain); and (5) the Title V fee program does not reference the Rule 22 minor source fee program.

The restructured Title V fee in West Virginia is calculated by adding the Consumer Price Index (CPI) adjusted base fee component (BF), the CPI adjusted complexity fee component (CF), and the emissions fee component (EF).

$$\text{Title V fee} = \text{BF} + \text{CF} + \text{EF}$$

All sources required to obtain a Title V operating permit shall pay an annual base fee (BF) of \$5,000. All sources subject to CAA 111 and 112 shall pay a \$1000 complexity fee (CF), independent of the number of standards the source is subject to. Base and complexity fees are adjusted annually by the CPI. CPI for each calendar year is the average CPI for all-urban consumers published by the U.S. Bureau of Labor Statistics.

The Title V emission fee component (EF) is calculated by multiplying the dollar per ton (\$/ton) emission fee factor (EFF) by the source's actual emissions (AE) of all regulated pollutants. The EFF is calculated on June 1 each year by the Secretary in accordance with a formula specified in 45CSR30 based on factors such as three fiscal year average expenses, interest, number of sources, CPI, and total actual emissions.

$$EF = EFF \times AE$$

With this fee structure change, West Virginia indicates that it can ensure that fees will remain sufficient to cover the costs of administering the plan approval application and operating permit process as required by section 502(b). Without this fee structure change, West Virginia indicates that its Title V program is vulnerable and may not be able to adjust to projected source and emission changes in order to sustain its Title V Operating Permit Program in a manner that is consistent with state and Federal requirements. If funds were to become insufficient to sustain an adequate Title V program in West Virginia, the EPA may determine that the state has not taken “significant action to assure adequate administration and enforcement of the Program” and take subsequent action as required under 40 CFR 70.10(b) and (c). This could lead to EPA withdrawing approval of the West Virginia Title V Operating Permit Program. Were that to occur, the EPA would have the authority and obligation to implement a Federal Title V operating permit program in West Virginia pursuant to 40 CFR part 71. The withdrawal of program approval could also lead to the imposition of mandatory and discretionary sanctions under the CAA.

In a December 19, 2023 supplemental letter issued upon request by the EPA, West Virginia provided additional analysis regarding its revised fee structure. WVDEP indicated that it analyzed multiple scenarios before deciding upon the current fee structure. Currently, the state’s Title V program has a surplus but there are measures in place to address a fee shortfall if that were to occur. WVDEP further explained how the fee structure revision will ensure the collection and retention of fees sufficient to meet the requirements of 40 CFR 70.9. This included a detailed explanation of how the emission

fee is calculated, an example of how the EEF is calculated for fiscal year 2024, and how the fees collected are sufficient to fund West Virginia's Title V program.

This rulemaking proposes to approve West Virginia's restructuring of its Title V fee program in order to achieve a more diversified, equitable and sustainable fee collection system. In proposing such approval, the EPA has determined that the revision meets the requirements in section 502 of the CAA and 40 CFR 70.9 for the collection of sufficient Title V fees to cover permit program implementation and oversight costs.

B. Affirmative Defense, Permit Review and Public Petition Requirement Revisions

In the revision to 45CSR30, WVDEP removed section 5.7: Emergency provisions pursuant to the EPA's removal of the Federal affirmative defense provisions 40 CFR 70.6 (g) and 71.6 (g) in its July 21, 2023 final rule (88 FR 47029). "These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances." *Id.* The provisions, which have never been required elements of state operating permit programs, were removed because they were inconsistent with the EPA's interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal is also consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA's treatment of affirmative defenses across different CAA programs. The final rule also provided guidance on the need and process for some state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar Title V affirmative

defense provisions from their EPA-approved Title V programs, and to remove similar provisions from individual operating permits.

WVDEP's removal of section 5.7 is consistent with the Federal final rule and 40 CFR part 70 regulations. West Virginia submitted a redline document identifying the state's proposed revision to its part 70 program rules. In the December 2023 supplemental letter, WVDEP provided clarification on its legal authority authorizing the revision to 5.7 and provided a schedule to remove affirmative defense provisions from individual permits in West Virginia.

WVDEP also revised section 7.1, 7.3 and 7.4 of 45CSR30 on public petitions and permit review requirements to comport with revisions to Federal counterpart regulations, "Revisions to the Petition Provisions of the Title V Permitting Program" (85 FR 6431, February 5, 2020). The EPA revised the regulations to streamline and clarify processes related to submission and review of Title V petitions. The Federal rule implements changes in three key areas: method of petition submittal to the agency; required content and format of petitions; and administrative record requirements for permits. In the first area, the EPA established an electronic submittal system as the preferred method of submittal, with specified email and physical addresses as alternate routes to submit petitions. To help petitioners in preparing their petitions, as well as the EPA in reviewing and responding to petitions, the EPA incorporated certain content and format requirements into the regulations. Finally, the EPA requires permitting authorities to prepare a written response to comments (RTC) document if significant comments are received during the public participation process on a draft permit, and requiring that the RTC, when applicable, be sent to the agency with the proposed permit and necessary

documents including the statement of basis for its 45-day review. WVDEP's revision of sections 7.1, 7.3 and 7.4 of 45CSR30 is to reflect the changes in these three areas and is consistent with the Federal final rule.

Additionally, WVDEP revised section 1 regarding the scope of the rule, filing date, and effective date, some definitions in section 2 to provide additional clarifications, and removed other obsolete transitional language in sections 4, 6 and 9 of 45CSR30.

This rulemaking proposes to approve West Virginia's revisions removing the affirmative defense provisions, comporting with Federal changes to the permit review and public petition requirements, and adding clarifying language. The revisions and state submission are consistent with the EPA's implementation guidance in the relevant Federal final rules.

III. Proposed Action

Pursuant to 40 CFR 70.4(i)(2), the EPA is proposing to approve a revision to the West Virginia Title V Operating Permit Program submitted on May 3, 2023, to restructure its fee schedule in order to achieve a diversified, equitable and sustainable fee revenue system. The EPA is also proposing to approve revisions to the EPA approved West Virginia Title V program that remove emergency affirmative defense provisions, ensure that petition review and public participation provisions are consistent with Federal counterpart regulations, and add clarifying language. The revisions meet the relevant requirements of section 502 of the CAA and 40 CFR 70.4 and 70.9. The EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator approves Title V operating permit program revisions that comply with the Act and applicable Federal Regulations. See 42 U.S.C. 7661a(d). Thus, in reviewing Title V operating permit program submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology

Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;

This proposed rulemaking does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the Title V action is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

Executive Order 12898 directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations.

EPA believes that this Title V action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This Title V action merely approves into West Virginia's part 70 operating permit program the relevant West Virginia regulations for fees that are required to administer the Title V program in West Virginia, revises state regulations to comport with amended EPA regulations addressing Federal permit review, public petition, and affirmative defense requirements, and removes obsolete language. The Title V fees are already being collected by the State, the EPA regulations which the state is mirroring via these revisions are in effect, and the removal of obsolete language ensures clarity in the regulatory process. This Title V action therefore does not directly address emission limits or otherwise directly affect any human health or environmental conditions in the

state of West Virginia. In addition, EPA is providing meaningful involvement on this rulemaking through the notice and comment process, and that is in addition to the State-level notice and comment process held by West Virginia.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Adam Ortiz,

Regional Administrator,

Region III.

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