ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 72, 73, 74, 75, 77, and 78

[FRL–5656–8]

RIN 2060–AF43, AF46, and AF47

Acid Rain Program: Permits, Allowance System, Sulfur Dioxide Opt-Ins, Continuous Emission Monitoring, Excess Emissions, and Appeal Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; revisions of permits, allowance system, sulfur dioxide opt-ins, continuous emission monitoring, excess emissions, and appeal procedures rules.

SUMMARY: Title IV of the Clean Air Act (the Act) authorizes the Environmental Protection Agency (EPA or Agency) to establish the Acid Rain Program. The purpose of the Acid Rain Program is to significantly reduce emissions of sulfur dioxide and nitrogen oxides from utility electric generating plants in order to reduce the adverse health and ecological impacts of acidic deposition (or acid rain) resulting from such emissions. On January 11 and March 23, 1993, the Agency promulgated final rules governing permitting, the allowance system, continuous emissions monitoring, excess emissions, and appeal procedures.

After considering its experience in applying these rules since 1993, the Agency believes that the permitting, excess emissions, and appeal procedures rules (as well as minor aspects of the monitoring rule) can be streamlined and improved in order to reduce the burden on utilities, State and local permitting authorities, and EPA. The rule revisions in today's proposal streamline the Acid Rain Program while still ensuring achievement of its statutory goals of reducing sulfur dioxide and nitrogen oxides emissions.

In addition, EPA is revising allocations of sulfur dixoxide allowances. Each allowance authorizes the emission of one ton of sulfur dioxide. Under the Acid Rain Program, utility units (i.e., fossil fuel-fired boilers or turbines) are allocated allowances and must not emit sulfur dioxide in excess of the amount authorized by the allowances that they hold. EPA proposes to revise certain units' allowances in response to litigation, in light of Agency errors in making the allocations or errors in data relevant to whether facilities are covered by the Acid Rain Program, or because of more recent information concerning the construction or commercial operation of new units.

DATES: Comments on the regulations proposed by this action must be received on or before January 27, 1997.

ADDRESSES: *Comments.* All written comments must be identified with the appropriate docket number (Docket No. A–95–56) and must be submitted in duplicate to EPA Air Docket Section (6102), Waterside Mall, Room M1500, 1st Floor, 401 M Street, SW, Washington DC 20460.

Docket. Docket No. A–95–56, containing supporting information used to develop the proposal is available for public inspection and copying from 8:30 a.m. to 12 p.m. and 1 p.m. to 3:30 p.m., Monday through Friday, excluding legal holidays, at EPA's Air Docket Section at the above address. Information concerning the original rules and some of the revisions proposed today is found in Docket Nos. A–90–38 (permits), A–91–43 and A–92–06 (allowances), A–90–51 (continuous emissions monitoring), A–91–68 (excess emissions), A–91–69 (general), and A–93–15 (appeals). A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Kathy Barylski, at (202) 233–9074, U.S. Environmental Protection Agency, 401 M St. SW, Acid Rain Division (6204J), Washington, DC 20460 (concerning revisions of parts 73 and 75); Dwight C. Alpern, Attorney-advisor, at (202) 233–9151 (same address) (concerning all other revisions); or the Acid Rain Hotline at (202) 233–9620.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially regulated by this action are fossil-fuel fired boilers or turbines that serve generators producing electricity for sale. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Electric service providers

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in § 72.6 and the exemptions in §§ 72.7 and 72.8 of title 40 of the Code of Federal Regulations and the revised §§ 72.6, 72.7, 72.8, and 72.14 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** Section.

Organization

The information in this preamble is organized as follows:

I. Part 72: Applicability of and Exemptions From Acid Rain Program

A. Revisions Concerning Applicability

Section 72.6 explains what types of units are ''affected units'' subject to emissions reduction or limitation

requirements and other requirements of the Acid Rain Program and what types of units are not affected units. Under § 72.6(b) (5) and (6), qualifying facilities and independent power production facilities meeting certain requirements are not affected units. One such requirement is that the facility had, as of November 15, 1990, a qualifying power purchase commitment, which may be in the form of a letter of intent that is followed by a power sales agreement. Under section 405(g)(6)(A) of the Act, the power sales agreement must be executed ''within a reasonable time'' following the letter of intent. In July 1992 (57 FR 29940, 29947 (July 7, 1992)), EPA proposed a two-year deadline or no later than November 15, 1992 for execution of the power sales agreement. That deadline was not commented on and was made final in March 1993 (58 FR 15634, 15648 (March 23, 1993)). Subsequently, EPA has received public comment that the two-year deadline created a hardship for independent power producers negotiating with multiple regulated purchasers.

To implement the statutory language regarding the time frame for execution of a power sales agreement, EPA could set a fixed deadline (as in the current rule) or could determine a reasonable time frame on a case-by-case basis as part of an applicability determination. Particularly where questions of the applicability of the Acid Rain Program are involved, EPA maintains that it is preferable to establish clear-cut lines. Moreover, EPA is concerned that the two-year period in the current rule for execution of an agreement does not take account of the time necessary to complete agreements where multiple utility purchasers are involved.

Therefore, EPA is proposing to revise the deadline to three years from letter of intent to execution of a power sales agreement. Since under section 405(g)(6)(A) of the Act, the letter of intent must be in place by November 15, 1990, this means that the power sales agreement must have been executed by November 15, 1993, rather than by November 15, 1992 as under the current rule. Public comment indicates that the additional year is reasonable for independent power producers negotiating with multiple regulated purchasers. EPA requests comments on this revision.

Section 72.6(c) sets out procedures for petitioning for a determination from the Administrator as to whether a unit is an affected unit covered by the Acid Rain Program. The current regulation allows the submission of the petition by a certifying official, rather than requiring that the unit have a designated representative who would make the submission. However, the regulation has a general reference to, and requires compliance with, § 72.21, which requires that submissions be made by a designated representative and include certain certifications. To prevent confusion, EPA proposes revisions that pinpoint the certification and notice requirements in § 72.21 that a certifying official's petition must meet. In addition, language is added to § 72.6(c)(1) to clarify that it is the certifying official of an owner or operator of a unit that may submit a petition, and some superfluous language is removed. Further, this section is revised to allow a petition to be submitted at any time but indicating that, if possible, the petition should be submitted before the issuance of an Acid Rain permit. While EPA wants to facilitate the submission of petitions where owners or operators are uncertain as to the status of their unit under the Acid Rain Program, EPA's determination on the petition may obviate the processing and issuance of a permit for the unit.

B. Revisions to Exemptions

In the current rule, EPA established two exemptions from Acid Rain Program requirements. First, in § 72.7 EPA provided for an exemption from requirements concerning permitting, allowances, and continuous emissions monitoring for small, new units (i.e., units that commence commercial operation on or after November 15, 1990 and serve generators with a total nameplate capacity of 25 MWe or less) burning clean fuels. The exemption was adopted because emissions from these units were considered to be *de minimis.* 58 FR 3390, 3594 (January 11, 1993). Second, in § 72.8 EPA provided for an exemption from Phase II permitting requirements for affected units that retire permanently prior to the issuance of a Phase II Acid Rain permit. Units that submitted petitions for such an exemption could also be exempted from monitoring requirements under § 75.67.

1. Fuel Use and Fuel Testing Requirements Under New Units Exemption

EPA is proposing to modify the limitation on fuel use and the requirements for fuel testing under the new units exemption. Under the current rule, units must use exclusively fuels with a sulfur content of 0.05 percent or less by weight, and specified tests to measure sulfur content must be performed for each delivery of fuel (other than natural gas, which is presumed to meet the sulfur content requirement). The records of such tests must be retained at the source for 5 years.

In contrast, today's proposal requires units to use only gaseous fuel with an annual average sulfur content of 0.05 percent by weight or less and only nongaseous fuel that separately meets this same annual average sulfur content limit. The proposal includes formulas for calculating the annual average percentage sulfur content by weight for gaseous fuels and for nongaseous fuels. Similar to the approach in the current rule requiring sampling and sulfur content testing of fuel deliveries, the formulas require use of the measured sulfur content of periodic samples of fuel deliveries during the year to calculate the annual average sulfur content of fuel burned during the year. The formulas require sampling of fuel at least once for each delivery or, for fuel that is delivered to the unit continuously by pipeline, at least once each quarter that the fuel is delivered. Unlike the current rule, the formulas do not require the use of any specific testing methods to measure sulfur content. Sampling and testing of sulfur content of fuel, which may be performed by the fuel supplier rather than the unit's owners and operators, are necessary in order to demonstrate whether the sulfur content limit is met. As under the current rule, the owners and operators of an exempt unit bear the burden of proving compliance with the requirements of the exemption.

However, if the only gaseous fuel burned is natural gas, the proposal provides that the 0.05 percent annual average limit for gaseous fuel is assumed to be met without making any calculations or conducting any sampling or testing. This is consistent with the current § 72.7(d)(2)(ii), which provides that natural gas (which is defined as a ''fluid mixture of hydocarbons containing'', *inter alia,* 20 grains or less of sulfur (40 CFR 72.2)) is assumed to meet the 0.05 percent limit on each delivery of fuel. Moreover, consistent with the current rule, which excludes (through the 0.05 percent sulfur content limit on each delivery) any use of coal by the units, and because the sulfur content of a coal delivery is not necessarily uniform, the proposal expressly bars the use of coal or coal-derived fuel (except coal-derived gas with a sulfur content no greater than natural gas) by exempt units.

EPA believes that the fuel use and testing requirements in the proposal are sufficiently stringent to ensure that minimal emissions from the exempt units and are significantly less

burdensome for the owners and operators of the units involved, which in many cases are municipally owned units. Allowing a unit to burn some fuel that exceeds 0.05 percent sulfur by weight so long as the annual average sulfur content of its fuel (weighted by the weight of the fuel) does not exceed that level will have little effect on the total SO_2 emissions for the year. Separate sulfur content limits are established by gaseous and nongaseous fuels so that very clean gaseous fuel (e.g., pipeline natural gas) cannot be used to offset nongaseous fuel with a sulfur content significantly higher than 0.05 percent. EPA notes that, under this approach, a unit will be able to use landfill or digester gas, which has a higher sulfur content than natural gas but lower than some nongaseous fuels.[1] Using the annual average will give owners and operators more flexibility in that a single delivery of fuel in excess of the limit will not automatically invalidate the exemption, as is the case under the current rule.

EPA also believes that prescribing more detailed testing methods is unnecessary because the appropriate testing methods may vary depending on the specific fuel involved and testing data from the fuel supplier may be sufficient to establish the sulfur content of the fuel.[2] The proposal requires owners and operators to keep records for 5 years (or longer if required in writing by EPA or the permitting authority) that demonstrate that the sulfur content limit has been met. This approach gives owners and operators more flexibility to determine what type of information will support such a demonstration, but the proposal also emphasizes that the burden of proof is on the owners and operators.

2. Administration of New Units Exemption

The purpose of the exemption, of course, is to relieve owners and operators of the burden of complying with permitting, allowance, and monitoring requirements for clean new units and to reduce the concomitant administrative burden on permitting authorities. In issuing new unit exemptions under the current rule, the Agency has found that the procedures for obtaining and maintaining an exemption are somewhat less burdensome than the procedural requirements for units required to have Acid Rain permits. However, the Agency has concluded that the exemption procedures are still more burdensome than necessary. In particular, the current rule provides that: a potentially exempt unit must have a designated representative and submit a petition for a written exemption; the permitting authority must issue a written exemption after providing public notice (e.g., in a local newspaper) and a comment period; and the exemption must be renewed every five years.

The current rule requires a significant amount of processing for each unit that seeks to obtain an exemption. The Agency has already granted about 130 new unit exemptions using current procedures, and, despite extensive public notice, not one comment has been received during the public comment periods. Based on its experience with these exemptions, EPA does not believe that requiring a designated representative to be appointed for each clean unit and submission and processing of forms for a new units exemption every five years provides any significant environmental benefit.

The proposal makes the new unit exemptions largely automatic for those units that meet the criteria, discussed above, concerning capacity, annual fuel use, and recordkeeping. In general, no designated representative, petition for exemption, or renewal petition is required.[3]

The only exception to this approach is for units that are listed and allocated one or more allowances on Table 2 or 3 of § 73.10. Because they are being exempt from the requirement to hold allowances to cover emissions, they should not retain their allowance allocations. The proposal requires the designated representative (who handle the unit's allowance account) to submit to EPA and the State permitting authority a statement that: the unit meets, and will continue to meet, the exemption requirements; he or she is surrendering allowances in the same amount, and of the same or earlier compliance use date as, the unit's allocated allowances; and he or she is returning the proceeds for any allowances withheld from the unit for EPA allowance auctions under subpart E of part 73. However, apparently because the owners and operators of some small units are small entities and not fully aware of their obligations under the Acid Rain Program, some potentially exempt units have still not selected designated representatives even though the units are allocated allowances. In order to facilitate implementation of the exemptions by small entities, the proposal provides that, if there is no designated representative, a certifying official of each owner of the unit may make this submission. This reflects the desirability of ensuring that each owner (or the designated representative representing all owners) is aware of the allowance surrender. The unit will not be exempt until EPA actually deducts the allowances from the unit account in the Allowance Tracking System and receives the allowance auction proceeds. Upon deduction of the allowances, the unit account is closed.

Although units that meet the exemption criteria and are not allocated allowances are automatically exempt, the proposal requires the designated representative (or a certifying official of each owner) of such unit to submit to EPA and the State permitting authority a statement that the unit meets and will continue to meet the exemption, which are referenced in the statement. EPA anticipates providing a standard form for designated representatives or certifying officials for exempt units (whether or not they have allocated allowances) to submit the appropriate information. Providing this type of notice to EPA and the State permitting authorities imposes little burden on the exempt units and has important benefits. First, owners of the units are more likely to consider carefully the basis for the exemption and the continuing requirements under the exemption if each owners' representative must sign and submit such a form. Second, submission of the form will ensure that EPA and State permitting authorities can keep track of which units are exempt and will not treat such units as affected units.

Under the proposal, a new units exemption is effective on January 1 of the first full calendar year for which the unit meets the criteria for an exemption.

[1] This is consistent with EPA's efforts to encourage use, rather than flaring, of such gas. *See* section V of this preamble.

[2] With the elimination of the fuel testing requirements in the current rule, the testing methodologies specified in the current § 72.7 and incorporated by reference in the current § 72.13 are unnecessary, and EPA therefore proposes to remove them. The provisions of § 72.13 are renumbered to reflect this change.

[3] Because the proposed new units exemption and, as discussed below, the proposed retired units exemption, are automatic and written exemptions for these units are no longer issued, the references in the current part 72 to written exemptions under §§ 72.7 and 72.8 are revised. The revisions to these references also reflect, in some cases, the establishment of exemptions for industrial units under proposed § 72.14, which is discussed below. For example, the criteria for State acid rain programs in § 72.72(b) are changed to remove the reference to §§ 72.7 and 72.8 written exemptions and to refer instead to § 72.14 exemptions. By further example, the reference in § 72.9(c)(6) to §§ 72.7 and 72.8 written exemptions is changed to refer to exemptions under §§ 72.7, 72.8, and 72.14. The same change—and the only change proposed to part 74—is proposed in § 74.2.

This reflects the annual nature of the Acid Rain Program. As provided in the current rule, the exemption terminates automatically when the unit involved no longer satisfies the criteria for an exemption. Consistent with the approach taken with other exclusions of units from the Acid Rain Program, a unit that had an automatic exemption that terminates is an affected unit and cannot requalify for the exemption. *See* 40 CFR 72.6(a)(3)(ii) through (vii). As in the current rule, exemption termination subjects the unit to the permitting, allowance, and monitoring requirements of the Acid Rain Program. The unit will have to have a designated representative, who must submit a complete permit application before the later of January 1, 1998 or 60 days after the exemption terminates. The unit will have to comply with the monitoring requirements within 90 days after the termination.

Under the current rule, exempt units are still included in the definition of ''affected unit.'' As a result, they must generally be included in title V operating permits issued by State permitting authorities under part 70 and are not eligible to become opt-in units under part 74. Part 70 requires sources with affected units to have operating permits reflecting Acid Rain Program requirements and any other Clean Air Act requirements to which the sources are subject. If a unit is subject to other Clean Air Act requirements, the unit must continue to comply with such non-title IV provisions, and this will be reflected in the title V operating permit.[4] However, if a unit is not subject to any other Clean Air Act requirements and the unit is exempt from Acid Rain permitting, allowance, and monitoring requirements, question has been raised as to whether the current rule can be read to require the unit to obtain a title V operating permit. In such circumstances, it makes little sense to require a title V operating permit; after all, the only requirements put in the permit will be those for maintaining an exemption and a major purpose of the exemption is to relieve the unit and the permitting authority of permitting burdens. Although the Agency maintains that a title V operating permit is not required for such a unit, the proposal modifies § 72.6(b) to make this explicit by stating that any exempt new unit is an unaffected unit. Further, because the purpose of the exemption is to relieve clean, new units of permitting and other Acid Rain requirements, EPA continues to believe that exempt units should be excluded from applying to re-enter the Acid Rain Program as opt-in sources and the proposal contains such an exclusion.

Finally, as discussed above, EPA has already approved a number of written exemptions for new units under the current rule. Since the proposal provides more flexible requirements for qualifying for and maintaining the exemption (e.g., more flexible sulfur content requirements and no renewal requirement), the units with written exemptions also qualify for the automatic exemption under today's proposal. The proposal makes this clear by including, as one category of units that qualify for the automatic exemption, those new units that have already been granted written exemptions. EPA sees no reason for denying already exempt units the flexibility and streamlining benefits of the proposal and also sees no purpose to retaining permanently two different types of new units exemptions. Consequently, the proposal provides that already exempt units must meet the requirements for maintaining an automatic exemption, in lieu of the requirements contained in the current rule.

However, while the current rule requires exempt units to surrender any allowances allocated to the units under § 73.10 for years for which the units are exempt, the written exemptions already granted did not extend beyond 5 years. The already exempt units have not yet surrendered Phase II allowances and, under the current rule, will have to do so when the exemption is renewed. In extending automatically these exemptions and removing the need for renewal, the proposal requires those exempt units with allocated allowances to surrender such allowances and the proceeds from EPA's auctioning of such allowances.

3. Retired Units Exemption

While retaining the basic criteria in the current rule for qualifying for the retired units exemption, EPA proposes to streamline the procedures for obtaining and maintaining the exemption. In addition, EPA proposes to clarify what Acid Rain requirements are covered by the exemption.

The current rule requires largely the same procedures for the retired units exemption as for the new units exemption: submission of a petition, issuance of a written exemption subject to public notice and comment, and submission of a renewal petition every 5 years. EPA has approved about 155 retired units exemptions under these procedures without receiving any public comments on them. Since the purpose of the exemption is to reduce the burden on the owners and operators of retired units and the permitting authorities, EPA believes that, as in the case of new units exemptions, the procedures for retired units exemptions can be made less burdensome.

The proposal takes essentially the same approach in setting revised procedures for both new units and retired units exemptions. The proposed retired units exemption is automatic so long as the unit meets the criteria for the exemption: i.e., that the unit is permanently retired and does not emit any SO_2 or NO_X starting on the effective date of the exemption. Units that retire are not, of course, necessarily small and, since they probably have been participating in the Acid Rain Program until retirement, probably have designated representatives. Under the proposal, the designated representative of each exempt unit must submit to EPA and the State permitting authority a statement that the unit meets, and will continue to meet, the exemption requirements. EPA anticipates providing a standard form for the designated representative of an exempt unit to submit the appropriate information. Units already granted retired units exemptions also qualify for the automatic exemption and will make no additional submissions. As under the current rule, exempt retired units retain their allocated allowances since, even without the exemption, they would have no SO_2 emissions and would not use any allowances. An exempt unit's Allowance Tracking System account is subject to the requirements for general accounts under part 73. The owners and operators of the unit must retain at the source records demonstrating that the unit qualifies for the exemption. The exemption terminates automatically if the unit resumes operation and emits any SO_2 or NO_X.

EPA is also proposing to modify the current rule to clarify what Acid Rain requirements are covered by the exemption. Currently § 72.8 of the regulations exempts retired units only from the requirements of part 72. Section 75.67(a) currently provides that units that retire before January 1, 1995 and for which a petition for a retired units exemption is submitted prior to monitor certification deadlines may also obtain an exemption from the monitoring requirements of part 75. The Agency maintains that any unit that retires should be automatically exempt, starting in the first full year of

[4] In order to ensure that owners and operators understand this, today's proposal states this expressly. The proposed rule also provides that a permitting authority may use the administrative amendment procedures under § 72.83 to add to the permit an exemption under § 72.7, 72.8, or 72.14.

retirement, from both the Phase II permitting requirements of part 72 and the monitoring requirements of part 75 so long as the unit remains retired. If the unit has no emissions, there is nothing to monitor. The proposal removes § 75.67(a) and adds the monitoring exemption to § 72.8.

However, as noted above, retired units may still receive allowance allocations. Such units must remain subject to subpart B of part 73, which governs allowance allocations. Reflecting these considerations, the proposal exempts retired units from all Acid Rain Program requirements except for the provisions of §§ 72.2 through 72.6, § 72.8, §§ 72.10 through 72.13, and subpart B of part 73. Moreover, retired units that, but for the exemption under § 72.7, would be Phase I units, must still comply with the requirements concerning Phase I Acid Rain permits and reduced utilization of such units during Phase I.[5] The purpose of the retired units exemption is to exempt the units from Phase II permitting, not to allow them to avoid requirements implementing statutory permitting and reduced utilization provisions. In fact, the retired unit exemptions issued by EPA under the current § 72.8 state expressly that they apply to Phase II (as distinguished from Phase I) permitting requirements. In order to clarify that reduced utilization requirements apply to units with retired unit exemptions, the proposal states that the units must submit annual compliance certification reports that include the accounting for reduced utilization and are subject to end-of-year allowance deduction procedures for Phase I years.

For the same reasons as under the proposed new units exemption, EPA proposes that units under the retired units exemption be unaffected units and that they be excluded from becoming opt-in sources. Similarly, retired units already granted written exemptions will be covered by the automatic exemption and must comply with the requirements for maintaining such an exemption.

4. Industrial Units Exemption

The purpose of title IV is to reduce the adverse impacts of acid deposition through reductions of SO_2 and NO_x emissions. Congress addressed SO_2 emissions of both ''utility units'' and ''industrial sources.'' While ''utility units'' are generally required (starting in Phase I, if the unit is listed in Table A of section 404 or is otherwise a Phase I unit, or Phase II) to meet SO_2 emissions limitations and to hold allowances to cover their SO_2 emissions, ''industrial sources'' are not specifically required to limit emissions or hold allowances. Instead, section 406 of the Clean Air Act Amendments of 1990 required the Administrator to prepare and submit to Congress a report that inventories national annual SO_2 emissions from industrial sources. Whenever the inventory indicates that such emissions ''may reasonably be expected to exceed 5.6 million tons per year,'' the Administrator must ''take such actions under the Clean Air Act as may be appropriate to ensure that such emissions do not exceed'' the 5.6 million ton cap. 42 U.S.C. 7656. These actions may include promulgation of standards of performance for new or existing sources.

The statutory definitions of ''utility unit'' and ''industrial source'' draw the line between facilities (utility units) that are subject to the requirement to hold allowances by no later than January 1, 2000 and industrial sources that are not, but could be, made subject to unspecified requirements if the industrial source cap is exceeded. However, ''utility unit'' is broadly defined in section 402 of the Act to encompass units owned by companies that are generally not treated as full-fledged public utilities by State and federal utility regulatory authorities.

Generally, for purposes of State utility regulation, a public utility is an entity that owns or operates facilities whose product or service is dedicated to public use. Typically, the company must devote its facilities to serve the general public or a portion of the general public, not simply selected contract customers.[6] In contrast, under section 201(e) of the Federal Power Act, any persons that sell electricity that is in turn resold are ''public utilities'' and are subject to regulation of their sales rates and other matters by the Federal Energy Regulatory Commission (FERC). While holding that industrial companies that sell utilities incidental amounts of electricity from non-cogeneration units are themselves public utilities, FERC has imposed less burdensome regulatory requirements on such industrial sellers. For example, rate schedules for sales by these industrial sellers must be filed with FERC but the rates are not required to meet traditional cost-of-service standards, under which a rate must be based on the seller's costs (including return on capital) of providing the electricity. *See, e.g., Ford Motor Co. and Rouge Steel Co.,* 50 FERC para. 61,426 (1990), *modified on reh'g,* 50 FERC para. 61,025; *Cliffs Electric Service Co.,* 32 FERC para. 61,372 at 61,833 (1985); *Orange & Rockland Utilities,* 42 FERC para. 61,012 (1988); *St. Joe Minerals Corp.,* 21 FERC para. 61,323 (1982), *modified on rehg.,* 22 FERC 61,211 (1983).

Under section 402 of the Clean Air Act, a utility unit is ''a unit that serves a generator in any State that produces electricity for sale,'' regardless of the amount of the sale relative to total generation by the unit or generator or whether the sale is to the general public or to a public utility for resale to the public. 42 U.S.C. 7651a(17)(A). Consequently, entities (such as independent power producers, small power producers, and cogenerators) that sell electricity to a public utility are affected units unless they qualify for an exemption under other provisions of title IV. Section 402(17)(C) establishes an exemption for units cogenerating steam and electricity: a cogeneration unit is not a ''utility unit'' unless

> the unit is constructed for the purpose of supplying, or commences construction after [November 15, 1990] and supplies, more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. 42 U.S.C. 7651a(17)(C).

In addition, section 405(g)(6) establishes an exemption for ''qualifing small power production facilities'', ''qualifying cogeneration facilities'', and ''new independent power producers''. 42 U.S.C. 7651d(g)(6). Such entities (which are defined in sections 405(g)(6) and 416(a)(2)) that had a committment—through a power sales agreement, a order of a State regulatory authority, a letter of intent, or selection as a winning bidder in a competitive bid

[5] The definition of ''Phase I unit'' in § 72.2 is revised to make it clear that units that, but for a retired units exemption, would be subject to an Acid Rain emission reduction requirement or limitation continue to be treated as Phase I units.

[6] *See, e.g., Arkansas-Louisiana Electric Cooperative* v. *Arkansas Public Service Comm'n,* 194 S.W.2d 673, 678 (S.Ct. Arka. 1946); *Richfield Oil* v. *Public Utilities Comm'n of California,* 354 P.2d 4, 10–11 and 16 (S.Ct. Cal. 1960); Colorado Utilities v. *Public Service Comm'n,* 61 P.2d 849, 854–55 (S.Ct. Colo. 1936); *Mississippi River Fuel* v. *Illinois Commerce Comm'n,* 116 N.E.2d 394, 399 (S.Ct. Ill. 1953); *City of Saint Louis* v. *Mississippi River Fuel,* 97 F.2d 726, 729–30 (8th Cir. 1938); *Llano* v. *Southern Union Gas,* 399 P.2d 646, 653 (S. Ct. N.Mex. 1964); *Ambridge* v. *Public Sevice Comm'n of Pennsylvania,* 165 A. 47, 49 (S. Ct. Penn. 1933); *Humble Oil and Refining* v. *Railroad Comm'n of Texas,* 128 S.W.2d 9, 13 (S.Ct. Tex. 1939); *Valcour* v. *Morrisville,* 184 A. 881, 885 (S. Ct. Ver. 1936); *Inland Empire Rural Electrification* v. *Dept. of Public Service of Washington,* 92 P.2d 258, 262–63 (S.Ct. Wash. 1939); *Wilhite* v. *Public Utilities Comm'n of West Virginia,* 149 S.E.2d 273, 281 (S.Ct W. Wir. 1966); and *Union Falls Power* v. *Oconto Falls,* 265 N.W. 722, 723 (S.Ct. Wisc. 1936) (cases holding that company that serve public, not just selected customers, is public utility). *But see Southern Oklahoma Power* v. *Corporation Comm'n,* 220 P. 370, 371 (S.Ct. Okla. 1923) (holding that generating company the only customer of which is a public utility is itself a public utility).

solilcitation—as of November 15, 1990 to sell power are not affected units. There are no such exceptions for industrial units that do not fall within the exempt categories of units under these sections.

As a result, the requirements of title IV cover non-cogeneration industrial units serving generators that produce electricity almost exclusively for use by an industrial company and only incidentally for sale to a public utility. In one such case, three units and three generators (with a total nameplate capacity of about 190 MWe) are owned and operated solely by the industrial company. Under the interconnection agreement with a public utility and a related power purchase agreement, the public utility provides additional electricity, through backup and emergency service, for use by the industrial company. The industrial company is in turn obligated to sell some electricity on a backup and emergency basis to the public utility and, starting in 1984, has made such sales, which have been less than 10 percent of total annual generation. The industrial company obtains backup for its capacity, and the public utility avoids constructing some additional capacity. Because these industrial units make limited electricity sales only to the public utility, the company is apparently not regulated by the State utility regulatory authority and is subject to relatively light-handed FERC regulation. EPA has received public comment suggesting that the units be exempt from the Acid Rain Program.

In order to determine the scope of the issue, EPA attempted to estimate the number of units that might be covered by such an exemption for industrial units. About 3,400 industrial combustion sources are included in the 1990 Interim Inventory (a database based on the 1985 NAPAP inventory with emissions projections for 1995). EPA removed, from this group of possibly affected industrial units, those industrial units thought to be: self-generators consuming rather than selling their generation; cogenerators exempt under section 402(17)(C); or units exempt under section 402(b) because they were serving only generators with a nameplate capacity of 25 MWe or less. EPA estimated that about 140 remaining industrial units possibly may be affected units under title IV. Based on discussions with industry representatives and on review of the electric rate schedules filed at FERC for electricity sellers that are not traditional utilities, EPA concludes that most of these remaining industrial units are not selling any electricity and that there are about 15 industrial units that sell some electricity and so are affected units under the current Acid Rain rules. *See Report to Docket: Industrial Units.*

Even if electricity sales to a public utility make up a very small portion of the total amount of electricity produced by an industrial unit and associated generator, the Acid Rain Program imposes allowance requirements relating to all SO_2 emissions from the unit. In such a case, no distinction is made between emissions associated with the small amount of electricity sales and emissions associated with the vast majority of electricity used by the industrial company itself. An affected industrial unit must hold allowances, as of the allowance transfer deadline, that cover all of the unit's SO_2 emissions during the year. 40 CFR 72.9(c)(1)(i). Similarly, any NO_x emission limitation applicable to the industrial unit covers all NO_x emissions from the unit. *See, e.g.*, 40 CFR 76.5, 76.6, and 76.7.

The cost to some industrial companies of holding sufficient allowances may be exacerbated by the fact that, even though certain existing industrial units could have qualified for allowance allocations for Phase II under section 405 of the Act, none were allocated any allowances. *See* 40 U.S.C. 73.10 (Tables 2 and 3, which do not include any such units). Information on such units was not included in the National Allowance Data Base (NADB), which was used to develop allowance allocations. However, based on information compiled by the Department of Energy on electric generators owned by nonutility electric power producers, EPA developed and published the Adjunct Data File, which listed units owned by ''nontraditional'' utilities. 57 FR 30034, 30040 (July 7, 1992). EPA noted that the listed facilities potentially could be affected units, but that it did not have sufficient information to make an applicabililty determination or to allocate allowances to those that were affected units. Consequently, in publishing the file, EPA requested owners or operators of units that were then or might, in the future, become affected units to provide EPA the data elements necessary for allocating allowances. In addition, EPA gave notice that if the data was not provided by September 8, 1992, the units involved would not be allocated any allowances and, to the extent allowances were needed, would have to obtain them on the open market. *Id.* A number of industrial companies submitted comments on the Adjunct Data File, each arguing that their units were not affected units.

On March 23, 1993, EPA issued a notice stating that (with a few exceptions not relevant here) that it ''believes'' that none of the units in the Adjunct Data File were affected units. 58 FR 15720, 15727 (March 23, 1993). No allowances were allocated to industrial units in the Adjunct Data File (including some units identified in *Report to Docket: Industrial Units* as potentially covered by the proposed industrial unit exemption) or to any other industrial units. However, EPA stressed that the omission of a unit from the tables indicating allowance allocations does not mean that the unit is an unaffected unit: ''[a]pplicability will be determined under the (Acid Rain) rules in 40 CFR 72.6.'' *Id.*

In addition to being required to hold allowances covering all SO_2 emissions and to meet any applicable NO_x emission limitation, an affected industrial unit, like all affected units, must install, operate, and maintain continuous emission monitoring systems for all SO_2, NO_x, and CO_2 emissions and for opacity. After EPA approves certification of the systems, they must be tested periodically to ensure that the monitoring data is accurate. Further, monitoring data (including hourly emissions data) must be reported to EPA on a quarterly basis. The average cost per unit of acquisition, installation, operation, and maintenance of a continuous emission monitoring system (including data handling hardware) is estimated to be about $90,600 (in 1993 dollars). *Economic Analysis of the Title IV Requirements of the 1990 Clean Air Act Amendments* at 34 (ICF Resources Inc. 1995) (estimating total annualized emission monitoring costs under title IV of $200 million for 2,096 units during the period 1997–2010).

The costs of the Acid Rain Program are more likely to be a problem for industrial companies than for public utilities, which in general have greater ability to pass through to customers the costs of acquiring allowances. First, public utilities generally are subject to cost of service ratemaking and charge rates covering their costs of service. Second, virtually all fossil fuel-fired utility generation is covered by the Acid Rain Program. In contrast, the prices charged by industrial companies for their industrial products are generally limited by competitive market prices and relatively few industrial units are covered by the program. Particularly if one industrial company, but not its competitors, must meet the costs of the Acid Rain Program as applied to its units, market prices will not necessarily cover all such costs. EPA notes that in

section 405(g)(6)(A) cogeneration units that, as of November 15, 1990, had already contracted or otherwise committed to sell electricity to a public utility were exempted from the Acid Rain Program because of their limited ability to pass through allowance costs to customers. 58 FR 15634, 15638 (March 23, 1993); *see also* Cong. Rec. S3027–28 (March 22, 1990).

In short, as a result of a very small portion of its operations (i.e., incidental electricity sales to public utilities under existing interconnection and power purchase agreements), a non-cogeneration industrial unit may be subject to allowance and monitoring requirements affecting all of its electric generation activities and imposing significant costs.[7] Further, once the industrial unit has begun making any such incidental electricity sales, the unit becomes an affected utility unit permanently subject to all the requirements of the Acid Rain Program. In the absence of an exemption, such a unit is an affected utility unit if, during 1985, it served a generator that produced electricity sold to a public utility or if, at any time thereafter, the unit serves such a generator. *See* 42 U.S.C. 7651a(17)(A). The unit remains an affected utility unit even if the industrial company subsequently terminates its interconnection agreement with and stops selling electricity to the public utility.

EPA is concerned that, because of an incidental portion of the operations of a non-cogeneration industrial unit, an industrial company will be burdened with significant regulatory requirements and resulting costs that were unanticipated when the incidental electricity sales were made and that are unavoidable in that they remain even if the incidental sales are now terminated. However, this concern applies only where (1) the industrial units are not cogeneration units; (2) these units serve generators that were contractually obligated to make incidental sales under an interconnection agreement (and any related power purchase agreement) and have made only incidential electricity sales; and (3) this contractual obligation was effective on or before March 23, 1993. This new exemption is not necessary for cogeneration units since Congress already provided an exemption for cogeneration units based on the amount of utility sales. Moreover, non-cogeneration industrial units making more than incidental electricity sales should be affected units since, in title IV, Congress generally applied the Acid Rain Program to units serving generators that sell electricity.

The basis for limiting the exemption to units under a contractual obligation as of March 23, 1993 is related to the Agency's handling of allowance allocations for industrial units. After November 15, 1990, industrial units' owners were on constructive notice that if they contractually obligated themselves to sell electricity, they would be subject to title IV requirements. However, as noted above, on March 23, 1993 EPA issued a notice stating that it believed that the industrial units listed in the Adjunct Data File (a list of units owned by ''nontraditional utilities'') were unaffected units. 58 FR 15727. The notice did not explain the basis for this ''belief'', which appears to have been erroneous with regard to at least some of the listed noncogeneration industrial units. As a result, EPA did not add the industrial units to the allowance allocation tables and did not allocate any allowances to these units. *Id*. Also on March 23, 1993, EPA issued a final list of the Phase II allowance allocations under section 403(a) of the Act.[8] 58 FR 15634 (March 23, 1993). As discussed below, EPA is today correcting certain Agency errors in the March 23, 1993 allocations. However, except for these limited corrections, EPA will not allocate allowances to units that were not listed as receiving allowance allocations in the March 23, 1993 notice and that become affected units after that date. 58 FR 15641. Consequently, if, after March 23, 1993, a non-cogeneration industrial unit becomes contractually obligated to sell electricity to a utility and, by making the sales, becomes an affected unit, the unit will not be allocated allowances. Non-generation industrial units that were contractually obligated on or before March 23, 1993 and were affected units probably should have been, but were not, allocated allowances. Therefore, EPA proposes to apply the new exemption to non-cogeneration industrial units that were contractually obligated as of March 23, 1993.

Under this approach, the non-cogeneration industrial units that meet the exemption criteria and are issued an exemption may continue to serve generators making incidential, contractually required electricity sales and remain exempt. However, if the units serve generators that make sales after the contractual obligation is no longer in effect or to make sales beyond the contractual obligation, the units will become affected units under the Acid Rain Program.

Exempting non-cogeneration industrial units will exempt their SO_2 emissions from the requirement to hold allowances and thus from the 8.95 million ton cap in Phase II for utility units. The total estimated annual SO_2 emissions from exempt industrial units are relatively small: about 47,000 tons. *Report to Docket: Industrial Units.* The environmental impact of removing these units from the utility unit cap is mitigated by the fact that emissions from the exempt industrial units are still subject to the 5.6 million ton cap for industrial sources. As discussed above, the Administrator is required to take action under section 406 of the Clean Air Act Amendments of 1990 to ensure that the industrial source cap is not exceeded.

The industrial units exemption will also exempt these units from Acid Rain NO_X emissions limitations to the extent that the units have coal-fired boilers of the types covered in Phase II. Again, the total estimated annual NO_X emissions from exempt units is relatively small: about 19,000 tons. *Id*. In April 1995 EPA promulgated NO_X emission limitations for dry bottom wall-fired or tangentially fired boilers. 60 FR 18751, 18763 (April 13, 1995). In January 1996, EPA proposed to revise these limitations and establish new limitations for most other types of existing coal-fired boilers. 61 FR 1442, 1480 (January 19, 1996).

For these reasons, EPA proposes to establish a narrow exemption for non-cogeneration industrial units, i.e., non-cogeneration units that have no owner or operator of which the principal business is electricity sale, transmission, or distribution or that is a public utility subject to State or local utility regulation. In determining whether this requirement is met, any affiliate or subsidiary or parent company of an owner or operator will be considered so that the requirement cannot be circumvented through the position of the owner or operator in a corporate structure. The exemption will apply where there is a showing that, on or before March 23, 1993, the owners or operators of the unit entered into an interconnection agreement (and any related power purchase agreement) with a public utility requiring that generators served by the unit produce electricity for sale only for incidental sales of electricity to a public utility. There also must be a showing that the unit served generators that, in 1985 and any year thereafter, actually produced electricity

[7] The Acid Rain Program also requires the owners and operators of affected industrial units to select a designated representative and obtain an Acid Rain permit covering the units. While these requirements impose some costs, the costs are relatively small.

[8] Section 403(a) required the final list of allowance allocations to be published by December 31, 1992, but the final list was issued late.

for sale only for incidental electricity sales to a public utility as required under that interconnection agreement and any related power purchase agreement. If any of the requirements of the exemption are not met, the exemption terminates automatically.

Two aspects of the proposed exemption ensure that it is limited to situations involving only incidental electricity sales. First, the sales must be required under an interconnection agreement (and any related power purchase agreement) between the owners or operators of the industrial unit and the public utility to which the electricity sales are made. The fact that the sales are made in connection with the agreement through which the industrial company obtains electricity for its own use from the public utility indicates that the sales are incidental to the industrial company's business. Second, the sales to the public utility must not exceed, in any calendar year, the lesser of 10 percent of the generating output capacity of the generator served by the unit (which is the nameplate capacity of the generator times the number of hours (8,760) in a year) for that year or 10 percent of the actual annual electric output of the generator. EPA believes that these limits on the amount of annual sales are reasonable and will help ensure that the unit's electricity sales are truly incidental. Applying these limits to a hypothetical industrial unit serving a generator with nameplate capacity of 75 MWe, the generator output capacity is 657,000 MWe-hr. Assuming that the generator's actual annual electrical output is 300,000 MWe-hr, this unit can sell up to 30,000 MWe-hr and qualify for an industrial unit exemption under this proposal.

Because of EPA's lack of experience with this proposed exemption and because applying the exemption criteria to specific cases may require analysis and exercise of administrative judgment and may benefit from public comment, EPA proposes to require submission of an application for an exemption and provide for public notice and comment before approving or disapproving the exemption for any industrial unit. The designated representative of an industrial unit must submit an application that provides the information necessary to rule on the exemption. Using the procedures applicable to permit issuance, the permitting authority will issue a draft exemption or denial of exemption for public comment and then issue or deny a final exemption (or proposed exemption if a State is the permitting authority). An industrial unit with an approved exemption will become an unaffected unit and will be exempt from the provisions of the Acid Rain Program, except for the provisions of § 72.14 (the new section providing for and setting conditions on the exemption), §§ 72.2 through 72.6, §§ 72.10 through 72.13. Like other exempt units, an exempt industrial unit cannot become an opt-in source. The exemption need not be renewed and is effective so long as the unit meets the requirements, discussed above, for maintaining the exemption.

EPA requests comment on all aspects of the proposed industrial unit exemption.

II. Part 72: Interaction of Acid Rain Permitting and Title V

Section 408 of the Act requires that title IV be implemented by ''permits issued to units subject to this title (and enforced) in accordance with the provisions of title V, as modified by (title IV) . . . No permit shall be issued that is inconsistent with the requirements of (title IV), and title V as applicable.'' 42 U.S.C. 7651g(a).

Title V, in turn, sets forth requirements for permit programs to be implemented by State and local air pollution control agencies. Under title V, it is unlawful to operate an affected source in the Acid Rain Program or other specified sources ''except in compliance with a permit issued by a permitting authority under (title V).'' 42 U.S.C. 7652b(a). The permit must include enforceable emission limitations and standards and other conditions ''as are necessary to ensure compliance with applicable requirements of (the Act).'' 42 U.S.C. 7652d(a). Title V states that its provisions ''apply to permits implementing the requirements of title IV except as modified by that title.'' 42 U.S.C. 7652f(b).

EPA proposes to revise the current regulations governing the interaction of titles IV and V with regard to several matters: the provisions explaining the relationship between the Acid Rain rules and rules implementing title V (i.e., parts 70 and 71); establishment of State authority to administer and enforce Acid Rain permits; and the required elements of a State Acid Rain program.

A. Relationship Between Acid Rain Rules and Parts 70 and 71

The current part 72 states that parts 72 and 78 take precedence over part 70 (which governs title V permitting) to the extent that any requirements of parts 72 and 78 are ''inconsistent with'' part 70. 40 CFR 72.70(b). The current rules also state that part 72 governs Acid Rain permitting by the Administrator but do not specifically address the rules (i.e., part 71) for permitting by the Administrator under title V since part 71 had not been issued when the current part 72 was issued. *See* 40 CFR 72.60(a). As noted above, both titles IV and V establish the precedence of the Acid Rain regulations over title V regulations for purposes of administering Acid Rain permits. Since the issuance of the current part 72 in January 1993, additional Acid Rain regulations relating to permit administration (i.e., part 74 for opt-in sources and part 76 for NO_x emissions) have been promulgated. In addition, part 71, setting forth permitting procedures for the Administrator under title V, has been proposed and then issued as a final rule. 61 FR 34202 (July 1, 1996).

EPA proposes today to revise the current provisions addressing the relationship between Acid Rain and title V rules to reflect the additional rulemaking activity. The revisions also clarify what constitutes an ''inconsistency'' between the two sets of regulations and the circumstances under which the Acid Rain rules take precedence. With regard to State permitting activities, the proposal states in § 72.70(b) that parts 72, 74, 76, and 78 take precedence to the extent that such parts ''contain provisions not included in, or expressly eliminate or replace provisions of, part 70 concerning the acid rain permit application and the Acid Rain portion of an operating permit.'' [9]

An analogous provision is proposed in § 72.60(a) with regard to permitting by the Administrator. In addition, the proposal explains that the Acid Rain requirements concerning permit applications, compliance plans, permit content and permit shield, permit processing and issuance, permit revision, and administrative appeals replace the provisions in part 71 with regard to Acid Rain permit applications and permits. The provision also states that the part 71 provisions concerning Indian tribes, delegation of a part 71 program, affected State review of draft permits, and public petitions to reopen a permit for cause are not eliminated or replaced by the Acid Rain provisions and so apply to the Acid Rain Program.

[9] Language in the current § 72.70(b) concerning petitions for exemption and draft, proposed, and final written exemptions is removed because it is redundant. The requirements for exemptions are already included in part 72.

B. State Authority To Administer and Enforce Acid Rain Permits

The current rule provides that if a State or local agency receives full, interim, or partial approval of an operating permits program under title V by July 1, 1996, that agency becomes the permitting authority for the issuance of Phase II Acid Rain permits.*See* 40 CFR 72.73(a). (Under the Acid Rain Program, the term ''State'' is defined to include the 48 continguous States, the District of Columbia, and local authorities; henceforth in this preamble, ''State'' will be used with that meaning.)[10] The State permitting authority must issue Phase II Acid Rain permits by December 31, 1997. If the State operating permits program is not approved by July 1, 1996, the Administrator is the permitting authority for Phase II Acid Rain permits and must issue them by January 1, 1998. After a State operating permits program is approved, the Administrator will suspend issuance of Acid Rain permits. *See* 40 CFR 72.74.

EPA has found that this approach should be modified. Some States have submitted, and EPA has granted interim or full approval of, operating permits programs that do not include all necessary Acid Rain provisions. State permitting authorities that have approval but lack a full Acid Rain program are not in a position to process, issue, and otherwise administer properly Acid Rain permits. Further, some States have indicated that they want to adopt some portions of the Acid Rain Program (e.g., the permitting requirements for sources with Phase I and Phase II units)[11] but not other portions of the program (e.g., permitting requirements for opt-in sources).

Consequently, EPA proposes to revise the current rule to reflect the variety of circumstances concerning State adoption of Acid Rain programs. Under the proposal, a State becomes responsible for administering and enforcing Acid Rain permits for affected sources if it has both an operating permits program approved under part 70 *and* Acid Rain regulations that are accepted by the Administrator through a notice in the Federal Register that cover the sources. (The term ''administer'' includes all aspects of processing a permit, e.g., issuance, renewal, and revision.) Until these requirements are met, the Administrator will be the permitting authority for purposes of issuing Acid Rain permits (or the Acid Rain portion of operating permits) for the sources.

Section 408(d) of the Act requires that Phase II Acid Rain permits be issued for sources with Phase I and Phase II units by December 31, 1997 if a State is the permitting authority. In order to allow sufficient time for a State to meet this statutory deadline, the proposal states that a State must have an approved operating permits program (whether full or interim approval) and accepted Acid Rain regulations by January 1, 1997 or such later date as the Administrator may set (rather than a fixed date of July 1, 1996, as in the current rule) if the State is to be the permitting authority for the initial Phase II Acid Rain permits. Otherwise, the Administrator will be responsible for issuing such permits. EPA has already issued notices identifying the status of State permitting authorities' acid rain regulations. *See, e.g.*, 60 FR 16127 (March 29, 1995); 60 FR 52911 (October 11, 1995); and 60 FR 62846 (December 7, 1995).

If EPA is issuing permits and, after January 1, 1997, the State meets the requirements to become the permitting authority for Acid Rain permits, the Administrator will cease issuing Phase II Acid Rain permits to sources in that State. However, the Administrator will continue to administer and enforce those Acid Rain permits that he or she has already issued until the permits are replaced by State-issued Acid Rain permits. The State may issue replacement permits on or before the expiration date of the EPA-issued permits. Further, the Administrator may retain jurisdiction over the EPA-issued permits until any administrative or judicial appeals of them are completed.

The proposal also provides flexibility where a State has proposed a partial Acid Rain program, e.g., where the proposed program covers permitting of Phase I and Phase II units but not opt-in sources. In that circumstance, the Administrator may accept the State Acid Rain regulations, issue a notice stating that the State is the permitting authority for Phase I and Phase II units, and retain the authority to issue permits for opt-in sources.

If a State has become the Acid Rain permitting authority but the Administrator determines that the State is not adequately administering or enforcing the State Acid Rain program, the proposal sets forth a procedure for withdrawal of that program and for administration and enforcement by the Administrator. The procedure is modeled after, but not identical to, the analogous procedures under parts 70 and 71. Because the Acid Rain Program relies on a nationwide, market-based system of allowances to achieve cost-effective SO2 emissions reductions, it is particularly important that Acid Rain requirements be implemented in a uniform manner by permitting authorities throughout the U.S. In order to provide the Administrator the flexibility to respond in a timely fashion where Acid Rain requirements are not being properly implemented, the proposal does not fix the time frames by which a State must address deficiencies in its program or by which EPA becomes the permitting authority. The proposal leaves it to the Administrator to set these time frames based on the specific circumstances.

The proposal also includes a provision under which the Administrator may delegate to a State all or part of his or her responsibility to administer and enforce Phase II Acid Rain permits. If a State does not meet the requirements for acting as the Acid Rain permitting authority (e.g., does not yet have Acid Rain regulations accepted by EPA), the Administrator may delegate to the State the administration and enforcement of Phase II Acid Rain permits using regulations established by the Administrator. This approach is analogous to the approach in part 71.[12]

Further, the current rule does not expressly address the question of whether the provisions of Phase I or Phase II Acid Rain permits issued by the Administrator constitute ''applicable requirements'' under part 70. It may be argued that under title V the provisions of federally issued Acid Rain permits are ''applicable requirements'' under part 70 and therefore must be included in State-issued operating permits. In

[10] In the proposal, EPA is expanding the definition of ''State'' to include eligible Indian tribes in order to be consistent with the treatment of Indian tribes that has been proposed for parts 70 and 71. *See* 59 FR 43956 (August 25, 1994) (proposed regulations implementing section 301(d) of the Act), 60 FR 45530 (August 31, 1995) (proposed revisions to part 70), 60 FR 20804 (April 27, 1995) (proposed part 71), and 61 FR 34213–4 (final part 71). To ensure that the approach taken to Indian tribes under part 72 is consistent with the approach that is ultimately adopted under parts 70 and 71, today's proposal provides that ''eligible Indian tribe'' be defined as in part 71. EPA's proposals concerning the treatment of Indian Tribes were issued subject to public comment and may be modified before they are issued in final form. EPA may need to make conforming changes to today's proposal to reflect any relevant revisions made to those proposals.

[11] Phase I units are subject to Acid Rain emissions reduction requirements or emissions limitations starting in Phase I. Phase II units are subject starting in Phase II. While only Phase I units must have Acid Rain permits for Phase I, both Phase I and Phase II units must have permits for Phase II. Section 72.31 is revised to clarify that Phase II permit applications must cover all affected units at the source.

[12] The definition of ''permitting authority'' in § 72.2 is revised to include a State permitting authority to which authority to administer and enforce Acid Rain permits is delegated.

that case, a State would have to formally incorporate, in each operating permit for an affected source, any federally issued Acid Rain permit.

However, title IV, which supersedes title V in Acid Rain matters, requires all Phase I Acid Rain permits to be issued by the Administrator. There is little purpose in requiring States to duplicate Phase I permits in their operating permits. Moreover, any revisions of federal Phase I permits would have to be repeated for any State operating permits that included Phase I provisions. With regard to federally issued Phase II Acid Rain permits, the proposal explicitly requires that States replace the federal permit with a State-issued Acid Rain permit by the end of the five-year effective period of the federal permit. It is unnecessarily burdensome to require State incorporation of the federal permit in the operating permit prior to the federal permit's expiration. To incorporate the federal permit, the State must essentially repeat the notice and comment process that was used to issue the federal permit in the first place. Consequently, the proposal states that the provisions of federally issued Phase I or Phase II Acid Rain permits shall not be ''applicable requirements'' for purposes of part 70.

Finally, the current § 72.73(b)(2) requires State permitting authorities to reopen Phase II Acid Rain permits by January 1, 1999 ''to add'' Acid Rain NO_X requirements. It is unclear whether this language requires the reopening process to be completed or simply to begin by that date. Under part 76, Phase II NO_X compliance plans must be submitted to permitting authorities by January 1, 1998. It seems desirable to have a deadline (prior to Phase II) by which Acid Rain permits will include Phase II NO_X requirements. However, EPA is also concerned that State permitting authorities have sufficient time to process the permits. EPA therefore proposes to clarify in § 72.73(b)(2) that the reopening process and the addition of NO_X requirements must be completed by July 1, 1999.[13]

C. Required Elements for State Acid Rain Program

The current rule sets forth the criteria for approval of the Acid-Rain-related provisions of State operating permit programs. The basic approach is that the State Acid Rain program is required to comply with part 70 requirements and the additional Acid-Rain-specific requirements listed in § 72.72(b). Where the listed requirements are inconsistent with part 70 requirements, the listed requirements must be met in lieu of such part 70 requirements.

EPA has carefully re-examined the listed Acid-Rain-specific requirements with an eye to minimizing the differences between State Acid Rain permit procedures and other State operating permit procedures. EPA recognizes that the Acid Rain permits make up a relatively small portion of a full State operating permit program. Minimizing the number of unique Acid Rain requirements and reducing the number of different procedures that must be followed will reduce the burden on States and affected-source owners and operators. In addition, removal of Acid Rain requirements that duplicate provisions already in part 70 will streamline § 72.72 and reduce the potential for confusion as to whether something other than the part 70 provisions is required.

Upon re-examination of the listed requirements in § 72.72(b), EPA believes that the following requirements are unnecessary or redundant and proposes to eliminate or revise them in order to allow States to streamline their Acid Rain programs and permit administration:

1. The requirement that the State permitting authority submit to EPA any written notice of the completeness of a permit application and a copy of each draft permit imposes an unnecessary burden. Therefore, EPA proposes to remove the requirement. The permitting authority already must provide EPA copies of the application and the proposed permit under part 70, and that seems sufficient.

2. The requirement that the permitting authority include a statement of basis in the draft permit is redundant since that is already required under part 70. EPA therefore proposes to remove the provision.

3. The requirement that the permitting authority provide for public notice of the opportunity to comment and request a hearing is proposed to be revised to be less burdensome. First, based on its experience in processing Phase I Acid Rain permits, EPA maintains that, where a unit is required in a draft permit simply to comply with the standard SO_2 emissions limitation (i.e., the requirement to hold allowances covering emissions), there is little in the portion of the draft permit on which to comment. EPA believes that this is also the case to the extent a draft permit for a unit subject to Acid Rain NO_X requirements imposes only the standard NO_X emissions limitations under §§ 76.5, 76.6, or 76.7, a NO_X averaging plan, or a NO_X early election plan. There is little to comment on because the requirements for compliance in these circumstances are set forth in detail in the rule and there is little discretion involved in adopting such permit provisions. In contrast, other compliance options, such as Phase II repowering plans or NO_X alternative emission limitations, have more general requirements that must be crafted to fit the unique circumstances of the unit involved. Few, if any, comments were received on draft Phase I permits for units that were simply adopting the standard SO_2 or NO_X emissions limitations or NO_X averaging plans. The Agency also found that providing notice in a newspaper local to each source is a time consuming and expensive process. Consequently, if a draft permit or permit revision only requires units to meet the standard SO_2 or NO_X emissions limitations or a NO_X averaging plan, EPA proposes to give permitting authorities the discretion to give notice by serving a notice on the appropriate list of persons and omitting publication in a local newspaper or State publication.[14]

Second, the proposal explicitly provides that a State permitting authority may, in its discretion, use the so-called ''direct final'' procedure in order to meet the requirements for issuing draft permits, providing notice and comment, and issuing proposed permits. Under the ''direct final'' procedure (which has been used by EPA in rulemakings and other actions under the Clean Air Act)[15] the State permitting authority may issue, as a single document, a draft Acid Rain permit and a proposed Acid Rain permit and provide notice of the opportunity for public comment on the draft Acid Rain permit. In the notice the State permitting authority states that, if no significant, adverse comment on the draft Acid Rain permit is timely submitted, the proposed Acid Rain permit will be deemed to be issued on a specified date without further notice. The notice also states that, if such significant, adverse comment is timely submitted, a proposed Acid Rain permit or denial of a proposed Acid Rain permit will be issued and the comments addressed. This procedure streamlines the permitting process in cases where no adverse comment is anticipated. While EPA believes that the current rule

[13] A similar revision is proposed, in § 72.74(c)(2), where the Administrator is the permitting authority, except that reopening must be completed within 6 months of submission of a complete NO_X compliance plan.

[14] In addition, the specific references in the current rule to part 70 provisions stating what persons must be served notice are superfluous and so are eliminated.

[15] *See, e.g.,* 60 FR 18462 and 18472 (April 11, 1995).

does not bar using this streamlined procedure, the proposed rule makes explicit the option to use the procedure.[16]

4. The requirements that the permitting authority submit a copy of the proposed permit for review by the Administrator and affected States and incorporate changes resolving objections to the proposed permit are redundant since part 70 already imposes these requirements. These provisions in § 72.72(b) are unique only to the extent that they specifically refer to issuance or denial of Acid Rain permits. EPA believes that such reference is unnecessary because the authority to deny a permit where basic requirements (e.g., meeting the applicability criteria for the Acid Rain Program) are not met is obvious. EPA does not see any reason for addressing the possibility of permit denials differently in part 72 than in part 70 and part 71.

5. The requirement that invalidation of the Acid Rain portion of the operating permit not affect the remaining provisions of the permit and vice versa is redundant. Part 70 already requires that invalidation of any operating permit provision not affect any other operating permit provisions.

6. The limitation on the filing of State administrative or judicial appeals of an Acid Rain permit to no more than 90 days from the issuance of the permit to be appealed makes appeals of Acid Rain provisions different from appeals of any other aspect of an operating permit. Under part 70, the availability of and procedures for administrative appeals are left entirely to the States; there are no mandated time limitations on filing such appeals. With regard to judicial appeals, part 70 provides that appeals may be filed after a fixed period (which may not exceed 90 days) if the appeal is based solely on grounds arising after the deadline. EPA has proposed to lengthen the maximum period under part 70 from 90 to 125 days. 59 FR 44460, 44516 (August 29, 1994). EPA sees no reason for treating appeals of Acid Rain provisions differently than appeals of other permit provisions and is concerned that the different appeal periods may engender confusion. Having different appeal periods could result in different parts of the same operating permit having different deadlines for filing appeals. The proposal eliminates the limitation on Acid Rain appeals.

7. The requirement that a permitting authority give the Administrator notice of administrative or judicial orders relating to an Acid Rain permit is retained. The proposal removes language indicating that, after issuance of such an order, the Administrator will review and may veto the Acid Rain permit under the procedures for reviewing proposed permits under § 70.8. The language was intended to provide for EPA review where, for example, an Acid Rain permit that had already undergone EPA review under § 70.8 was then significantly altered on appeal. Upon reconsideration, EPA concludes that this approach in the current § 72.72 is confusing since it may put into question whether an ostensibly final permit becomes a proposed permit when there is a State determination (e.g., a State court order) modifying the permit. This approach is also unnecessary since the Administrator already has the authority to reopen permits for cause, which authority is available in the event of such a State determination or interpretation.[17]

8. The requirement that State administrative appeals not result in the stay of any provisions that could not be stayed under part 78 is proposed to be removed for several reasons. First, as discussed below (in section VII of this preamble), the provision on stays in part 78 is eliminated because, under current case law, a permit appealed under part 78 is not a final agency action, and cannot be implemented, pending the administrative appeal. Further, in reviewing State operating permit programs, EPA has found that States have a variety of administrative appeals processes. In many States the administrative appeal precedes the issuance of a final permit and so the stay provision in the current part 72 is meaningless. In addition, the provision bars stays of requirements in the permit (i.e., allowance allocations, the standard Acid Rain requirements, monitoring and reporting requirements, and the certificate of representation) that are imposed, under part 72 and other Acid Rain rules, independently from the permit. Even if a source has no permit, the source must meet these requirements. In short, the stay provision has little practical effect.

9. The requirements that State permitting authorities ''coordinate'' with utility regulatory authorities and evaluate the sufficiency of fees supporting the State acid rain program are proposed to be removed as unnecessary. The relationship between State agencies is best left to the States, and part 70 fully addresses issues concerning fees.

In reconsidering the requirements for State operating permit programs, EPA has become aware of another issue concerning State programs. The current rule requires that a permitting authority issue, for each affected source, only one Acid Rain permit covering all affected units at that source. EPA received comment that, in a few cases, States have historically issued separate permits to units that are at the same source but that were constructed at different times. The States plan to continue separate permitting of the units under their operating permits programs. Rather than requiring State permitting authorities to restructure their permitting of such sources, EPA proposes to give permitting authorities the discretion to allow separate Acid Rain permit applications for, and thus to issue separate Acid Rain permits to, the units at the source. However, this provision does not change the designated-representative requirements for the units: all units at the source must still have the same designated representative and, if applicable, the same alternate designated representative.

A large number of State permitting authorities have already adopted Acid Rain regulations consistent with the current provisions of part 72. The most efficient and most frequently used method of State adoption of Acid Rain regulations has been incorporation of part 72 by reference. The part 72 rule changes proposed today are primarily aimed at streamlining Acid Rain permitting (whether EPA or the State is the permitting authority). EPA therefore anticipates that State permitting authorities will want to adopt the final revisions relatively soon after promulgation. However, EPA recognizes that revising State regulations, even when accomplished through incorporation by reference of the revised part 72, can be a time consuming process. Moreover, State permitting authorities are required to issue initial Phase II Acid Rain permits by December 31, 1997. None of today's proposed revisions are so fundamental that a State permitting authority with Acid Rain regulations consistent with the current part 72 should not start or even complete the process of issuing the Phase II permits before revising its Acid Rain regulations to conform to today's revisions. In order to ensure that States have both sufficient authority to issue Phase II permits and sufficient time to revise their Acid Rain regulations, EPA will continue to accept State Acid Rain

[16] For the same reasons, the proposed rule includes an analogous provision in subpart F, which sets forth the Acid Rain permit issuance procedures when the Administrator is the permitting authority.

[17] For the same reasons, an analogous provision in § 72.80(e) is also removed.

rules that conform with the current part 72 until 2 years after the date on which the final revisions are promulgated. Starting on the date 2 years after the promulgation of the final revisions, EPA expects all State Acid Rain regulations to incorporate the revisions.

EPA notes that many States have not added to their Acid Rain rules the provisions of part 74 (opt-in program) and part 76 (NOx compliance plans and emissions limitations), which were issued relatively recently in April 1995. Further, EPA has proposed additional part 76 provisions setting Phase II NOx emissions limitations and expects to issue final provisions by January 1, 1997. States may want to consider coordinating adoption of the final revisions based on today's proposal with adoption of the provisions of parts 74 and 76.

III. Part 72: Miscellaneous Permitting Matters

In addition to the revisions discussed above, EPA proposes a number of revisions of sections of part 72 concerning matters such as designated representatives, compliance plans, federal procedures for permit issuance and revision, and confirmation reports on verified savings from energy conservation and increased unit efficiency measures. The primary purpose of these proposed changes is to streamline the Acid Rain rules and reduce the administrative burden on owners and operators of affected units.

A. Definitions

In addition to the definition revisions discussed elsewhere in this notice, the Agency proposes the following revisions.

The definition of ''Acid Rain emissions limitation,'' for purposes of sulfur dioxide emissions, is revised to make complete the list of statutory provisions under which affected units may be allocated allowances. Section 404(h), which is inadvertantly left out of the current definition, is added. The definition of the term, for purposes of nitrogen oxides emissions, is revised to remove references to regulations implementing section 407 of the Act. The NO_x Acid Rain regulations in part 76 became final on May 23, 1995 and so the definition is revised simply to cite part 76. Analogous changes are made elsewhere in part 72 to replace general references to regulations under section 407 by specific references to part 76 or sections of part 76.

The definition of ''coal-fired'' is revised to exclude the superfluous reference to part 73 and to correct the reference to the regulations implementing section 407 of the Act (i.e., part 76) to reflect the fact that part 76 includes its own definition of ''coal-fired.''

The definition of ''dispatch system'' is eliminated. In light of the detailed provisions concerning dispatch system in section 72.33, the definition is superfluous and potentially confusing.

The definition of ''permitting authority'' is revised to omit some superfluous language and to reference part 70, rather than refering generally to the regulations promulgated under title V. Such general references in other provisions of part 72 are also changed to specific references to parts 70 and 71 as appropriate.

The definition of ''submit or serve'' is revised in order to allow documents, information, or correspondence to be provided to the Administrator or any State permitting authority using any service of the U.S. Postal Service or any equivalent means of dispatch and delivery. The requirement in the current rule that such delivery be accomplished using only certified mail or an equivalent service is eliminated. Based on its experience in operating the Acid Rain Program, EPA has found that the certified-mail requirement is not necessary and may be burdensome on private parties.

B. Designated Representative

The current rule requires the selection of one designated representative for each affected source and allows the selection of one alternate designated representative per source. EPA has received comment requesting that under certain limited circumstances a second alternate designated representative be allowed. According to the commenter, in general, the current rules give operating companies the flexibility of having a designated representative at the upper management level and an alternate who is closer to the plant operations level in the company. Allegedly, this flexibility is in effect denied to operating companies that are part of a holding company if the holding company plans to use a NOx averaging plan under part 76 to comply with the applicable Acid Rain NOx emission limitation.

Under § 76.11, units that are subject to the standard NOx emission limitations (in §§ 76.5, 76.6, or 76.7), are under the control of the same owner or operator, and have the same designated representative may average their NO_x emissions through a compliance plan approved by the permitting authority. The detailed requirements for determining whether units are in compliance with the plan are set forth in § 76.11. The commenter states that it is one of several operating companies in a holding company and that all of the operating companies intend to participate in a holding-company-wide NO_x averaging plan, which under § 76.11 requires the selection of a single designated representative for the entire holding company. According to the commenter, that designated representative must, as a practical matter, be someone at the holding-company management level. Since each operating company can select only one alternate, each operating company will be unable to have a designated representative or alternate at both the management and the operations levels of the operating company. Allegedly, this is important because each operating company operates relatively independently, reflecting the fact that each is in a different State and is subject to regulation by a different utility regulatory authority.

In order to accomodate this limited circumstance where additional flexibility may be needed, EPA proposes to allow the selection of a second alternate designated representative in this circumstance. The Agency requests comment on the need for this flexibility in this case.

The current rule also establishes procedures for the selection of a designated representative and an alternate. Using these procedures, all Phase I units and many Phase II units have selected designated representatives. In addition, alternates were originally selected or were added later in some cases, and some units have changed their representatives. Based on this experience with the prescribed procedures, EPA proposes to simplify the procedures and reduce the burden they impose on owners and operators. The Agency maintains that this can be done without negatively impacting the rights of minority or other owners.

In particular, §§ 72.20(c) and 72.24(a)(5) require that whenever a designated representative or alternate is originally selected or changed, notice must be provided daily for one week in a newspaper of general circulation where the source is located or in a State publication. The Agency has learned that this provision of newspaper notice is often expensive and can be particularly cumbersome where a single designated representative or alternate is selected or changed for a group of units spread over a relatively wide geographic area (e.g., a State) or where local newpapers are weekly rather than daily. While some notice of designated-representative selection seems desirable, EPA believes that the current rule is

unduly burdensome. EPA proposes to revise the rules to require only one notice in the newspaper (i.e., notice for one day), rather than daily notices for a week. Further, since the designated representative is the primary person representing the owners and operators and is responsible for all actions by any alternate, it seems unnecessary to require notice of selection or change of an alternate.

EPA also proposes a minor correction of § 72.25. That section currently provides that the Administrator will rely on a certificate of representation until a superseding one is ''submitted.'' 40 CFR 72.25(a). However, the Administrator will be unaware of any superseding certificate until he or she receives it. Further, § 72.20(b) states that a certificate of representation is binding upon receipt of the complete certificate by the Administrator. Section 72.25 is therefore revised to provide that a certificate is relied on until ''receipt'' of a superseding certificate.

C. Compliance Plans

l. Submission of Substitution and Reduced Utilization Plans

Sections 72.41 and 72.42 currently state that a new substitution plan or reduced utilization plan may be submitted not later than 90 days before the allowance transfer deadline. A submission must be made by both the Phase I unit and its prospective substitution or compensating unit so that the plan will be reflected in their Acid Rain permits. However, there are other provisions of the rules that affect when such plans may be approved and take effect and that must be considered in deciding when to submit a plan. An affected unit must, as of the allowance transfer deadline, hold sufficient allowances to cover its emissions for the prior year. Consequently, the status of a unit as an affected unit for a given year (e.g., in Phase I, its status as a substitution unit or a compensating unit) must be determined as of the allowance transfer deadline. A new compliance plan designating a new substitution or compensating unit for a Phase I unit must be approved and active by the allowance transfer deadline in order to be effective for the year to which the allowance transfer deadline applies.

A new plan may include both a Phase I unit and a prospective substitution or compensating unit at a source that has no Phase I units and so lacks a Phase I permit. Since each unit must have a Phase I permit that includes the plan, the plan must be added to the Phase I unit's existing permit and included in a new Phase I permit for the source with the substitution or compensating unit. Because the Agency has up to 6 months to act on a new permit, the Phase I unit's plan and the source's new permit application that includes the plan should be submitted at least 6 months before the allowance transfer deadline. Later submission will not ensure approval of the plan in time for use for the year to which that allowance transfer deadline applies.

If all the units in a new plan are at sources that already have Phase I permits, then the plan can be added to both the Phase I unit's permit and the prospective substitution or compensating unit's permit through a permit revision. If the permit modification procedures are used, the Agency still has up to 6 months to act. However, if the fast-track amendment procedures are used, the Agency has 60 days from the start of the public comment period to act. In the latter case, the submission deadline of 90 days prior to the allowance transfer deadline provides sufficient time for approval of the plan.[18]

In order to ensure that designated representatives consider the procedures and timing that must be followed in submitting new plans, EPA proposes to revise §§ 72.41(b)(3) and (c)(4). The revisions state that new plans must be submitted no later than 6 months prior to the allowance transfer deadline but that, if the fast-track amendment procedures are available, submission must be no later than 90 days before the allowance transfer deadline.

2. Repowering Extension Plans

The current § 72.44 includes provisions concerning failed repowering projects. The regulation requires that, if efforts to complete and test the project are terminated prior to construction or start-up testing, the designated representative must demonstrate to the satisfaction of the Administrator that the efforts were in good faith. Similarly, if the project is properly constructed and tested but is unable to achieve emission reductions specified in the repowering extension plan, a demonstration must be provided. Under the current § 72.81(a), determinations concerning failed projects must be processed as permit modifications. However, the interaction between the demonstration requirements in the current § 72.44(g) and the procedures in § 72.81 is unclear, particularly when the State permitting authority issued the permit containing the repowering extension plan and is therefore handling the permit modifications.

EPA proposes to revise § 72.44(g) to clarify the interaction of the substantive and procedural requirements concerning failed projects. Under the revisions, the designated representative submits to the permitting authority a permit modification in which he or she makes the necessary demonstrations. The Administrator determines whether the demonstrations have been made. Where the State is the permitting authority, the State acts on the permit modification consistent with the Administrator's determination.

D. Federal Permit Issuance

1. The current § 72.60(b) requires that the Administrator issue or deny an Acid Rain permit within 6 months of receipt of a complete permit application. However, § 72.74(b) provides that initial Phase II permits, for which applications are due by January 1, 1996, must be issued by the statutory deadline of January 1, 1998 if they are issued by the Administrator. EPA proposes to revise § 72.60(b) to provide that deadline in § 72.74(b) applies, rather than the 6-month deadline, to any initial Phase II permits issued by the Administrator.

2. The current § 72.61 provides that a permit application is deemed complete after 30 days in the absence of notification by the Administrator that it is incomplete. When additional information is requested by the Administrator, the designated representative has at least 30 days to respond. EPA proposes to revise this section to make it consistent with the currently different completeness provisions of part 71 (and part 70) in order to avoid having two types of completeness procedures. Under the revisions, automatic completeness occurs after 60 days from receipt and additional information must be submitted within a reasonable period specified by the Administrator. In addition, language in parts 70 and 71 is added to this section requiring designated representatives to provide supplementary information when they become aware that relevant information was not submitted or incorrect information was submitted.[19]

3. As discussed above, EPA is proposing to revise the provisions for Acid Rain permitting by States in order to allow, for certain types of draft permits, service of notice on a list of persons and foregoing of newspaper

[18] Section 72.30(b)(3) references the deadlines in subpart D of part 72 and part 76 for applying for compliance plans. The provision is redundant and is therefore removed.

[19] This language in parts 70 and 71 is also added to § 72.80 with regard to permit revisions.

notice. For the same reasons, EPA proposes a similar type of revision for federal Acid Rain permitting. The Administrator may provide Federal Register notice and notice for a list of persons and omit newspaper notice where the only Acid Rain emissions limitations in the draft permit are the requirements to hold sufficient allowances for SO_2 or to comply with NO_X emission limitations under §§ 76.5, 76.6, 76.7, or 76.11.

Moreover, the list of persons required to be served notice of draft and final permits under the current rule is different than the list of persons required to be served under parts 70 and 71. This difference complicates the notice process without any significant benefit. EPA proposes to revise the list of persons for required service of federally-processed draft and final permits to be consistent with parts 70 and 71.[20] For example, parts 70 and 71 do not require service on the State or local utility regulatory authorities with jurisdiction over the unit involved or the owners of the unit. No utility regulatory authorities commented on any of the Acid Rain permits or permit revisions that have been issued by EPA for Phase I. The proposal therefore eliminates such authorities from automatically-required service.[21] Any utility regulatory authorities that want to receive notice of draft and final permits will still have the option of requesting to be treated as an interested person and thereby receiving notice.

E. Permit Revision

1. EPA proposes to make minor revisions to remove specific reference to part 70 procedures from, and to add specific references to § 72.80 in, § 72.81 concerning permit modifications.

2. EPA proposes to lengthen the deadline by which a State permitting authority must act on a fast-track modification. Under the current rule, the Administrator or State permitting authority must act within 30 days of the close of the 30-day comment period. State permitting authorities must handle many more permits covering a broader range of types of sources and emission limitations than EPA's Acid Rain Division, which handles only Acid Rain permits for the Administrator. EPA is concerned that the 30-day deadline for States to act on a fast-track modification may be unrealistic in light of their other, significant responsibilities. To put the 30-day deadline in perspective, States under title V can take up to 18 months to issue permits or make significant permit modifications. Under today's proposal, the 30-day deadline will continue to apply to the Administrator but a 90-day deadline from the end of the comment period will apply to State permitting authorities.

3. EPA proposes to remove and replace certain confusing language at the end of the fast-track modification provisions concerning review by the Administrator and affected States. The current language makes fast-track modifications subject to the same review as significant permit amendments. The proposal states this more directly. Such review is appropriate since fast-track modifications can involve important changes to a permit.

4. The current rule concerning administrative permit amendments relies heavily on, and cites, the part 70 administrative permit amendment procedures. These part 70 procedures are currently the subject of an on-going rulemaking in which extensive revisions have been proposed. *See* 59 FR 44475–79. EPA proposes to remove the citations to part 70 and to set forth in § 72.83 itself the procedures for administrative amendments to Acid Rain permits. EPA believes that the administrative amendment procedures currently applicable to Acid Rain permits are simple and, except as discussed below, should not be substantively changed.

While the proposal continues to require action by the permitting authority within 60 days of receipt, the period for acting on one potentially very complicated administrative amendment, i.e., the addition of an alternative emissions limitation demonstration period for NO_X, is lengthened to 90 days. Before implementing the addition of an alternative emissions limitation demonstration period, a permitting authority must determine whether the requirements of § 76.10 have been met. The designated representative must provide extensive information, e.g., showing that the unit has a properly installed and operated NO_X emission control system designed to meet the standard NO_X emission limitation (under §§ 76.5, 76.6, or 76.7), describing why the unit cannot meet the standard emission limitation, and outlining the testing and procedures to be undertaken to determine the maximum emission reduction that can be achieved with the installed system. EPA maintains that 60 days will likely be insufficient time, particularly for State permitting authorities, to evaluate this information and, if the requirements of § 76.10 are met, grant a requested alternative emissions limitation demonstration period and that 90 days is a more reasonable deadline.

The proposal also adds a provision explicitly allowing the permitting authority to make administrative permit amendments (other than the addition of an alternative emission limitation demonstration period) on its own motion. This procedure may be used to correct minor errors in a permit that come to the attention of the permitting authority.

Also added to § 72.83 are provisions in the current part 70 that allow immediate implementation of administrative permit amendments that meet applicable requirements and that eliminate review of such amendments by the Administrator or affected States. This adds directly to part 72 provisions that the current § 72.83 makes applicable by reference to part 70.

5. The current rule concerning permit reopenings relies heavily on, and cites, part 70 reopening procedures. EPA proposes to eliminate the references and set forth in § 72.85 the full procedures. Consistent with the current part 70 provisions, the proposal states that reopening for cause may occur when: Additional Acid Rain requirements become applicable; there is a material mistake in the permit; inaccurate statements were made in establishing a permit term or condition; or a permit revision is necessary to assure compliance with the Acid Rain Program.

F. Reduced Utilization Accounting

Under the current rule, Phase I units must account for any underutilization. A few revisions are proposed with regard to this accounting.

1. The current rule allows a designated representative to submit an identification of dispatch system in order to change a unit's dispatch system from what is listed in the NADB, which indicates the operator of each unit. A dispatch-system identification must be submitted by January 30 of the first year for which the new dispatch system is to take effect. Traditionally, there have been relatively few changes in the operator and the dispatching of utility

[20] The same change is proposed for the list of persons on which requested fast-track amendments submitted to the Administrator must be served under § 72.82. Where requested fast-track amendments are submitted to the State as the permitting authority, the proposal provides that the list of persons is the same persons on which the State permitting authority must serve notice of draft permits under the State operating permits program. Further, since parts 70 and 71 require service of notice on ''affected States'' and include a definition of that term, today's proposal includes a new definition that adopts the ''affected State'' definition in part 71.

[21] The proposal therefore also eliminates the requirement to identify such authorities in submissions to EPA (e.g., in a source's certificate of representation).

units. However, in light of increased competition in the electric industry and the potential of future restructuring of the industry, the Agency is concerned that changes in owners and operators and in dispatching of units may occur more frequently and at times that make it impossible to meet the January 30 deadline. EPA therefore proposes to give the Administrator the discretion to grant exemptions from that deadline in order to allow late submissions.

2. The current rule sets forth procedures for claiming kilowatt hour savings from energy conservation measures or heat rate reductions from improved unit efficiency measures and using the resulting heat input reductions to reduce the surrender of allowances to account for reduced utilization of Phase I units. In the annual compliance certification reports submitted by March 1, a designated representative may include estimated savings from energy conservation or estimated heat rate reductions from improved unit efficiency measures for the prior year. If any such estimates are included in the annual compliance certification report, the designated representative must submit a confirmation report by July 1 that provides and supports the verified amounts.

The current language in § 72.91(b)(1)(iii) concerning the methods for supporting the verified amounts of kilowatt hour savings, heat rate improvement, and resulting heat input reductions needs some clarification.[22] The purpose of the provision is to provide two alternative approaches to verification: documentation that may follow the EPA Conservation Verification Protocol; or certification by the appropriate State utility regulatory authority. The current provision could be read to require that only one of these approaches be used for all estimated savings and heat input reductions so that, for example, if certification is to be used, it must be used for all the estimates. EPA proposes to revise the provision to make it clear that there is flexibility to use documentation with regard to improved unit efficiency measures or some energy conservation measures and to use certification for other measures.

3. The current regulatory provisions concerning heat input reductions due to measures that reduce a unit's heat rate need clarification and revision. A measure that reduces a unit's heat rate may be treated as a supply-side energy conservation measure by another unit or as an improved unit efficiency measure by the unit at which the measure is implemented. Over a given period of time, a number of specific measures may be implemented at a unit to reduce its heat rate. However, these measures may be offset by reductions in generation efficiency at the same unit resulting from other factors, e.g., from the aging or changed operations of the unit. In that case, even though each measure may, in itself, reduce the heat rate of the unit below what the heat rate would otherwise have been, the net effect of all the measures on the unit's heat rate will be less than the sum of the reductions attributed to each measure.

It is the net effect of these measures on the unit's heat rate that should be treated as accounting for reduced utilization. Consequently, EPA proposes to add a provision that puts a ceiling on the total heat input reductions that may be claimed for all measures that reduce a given unit's heat rate, whether the measures are treated as energy conservation or improved unit efficiency measures. Under the proposal, the total verified heat input reductions attributed to such measures may not exceed the difference between the kilowatt hour generation attributed to the unit for the calendar year times the difference between the unit's heat rate for 1987 and its heat rate for the calendar year. This ensures that heat input reductions cannot exceed the heat input reductions attributable to net heat rate improvement since the end of the base period (i.e., 1985–1987). Heat rate improvements made up through 1987 are already reflected in the baseline utilization and so cannot be used to account for underutilization of a unit since the base period. *See* 58 FR 60950, 60961 (November 18, 1993).

In light of this ceiling on heat input reductions claimed for energy conservation measures improving generation efficiency (as well as for improved unit efficiency measures), EPA sees no need to burden State utility regulatory authorities with the verification of claimed reductions from this limited category of energy conservation measures. EPA will instead review the verification presented by designated representatives and will compare the claimed heat input reductions to the ceiling. Consequently, EPA proposes to remove the option of verification by State utility regulatory authorities of claimed reductions from energy conservation measures improving generation efficiency.

4. The current rule provides that, if the total verified amount of heat input reductions in the confirmation report differs from the total estimated amount in the annual compliance certification report, the confirmation report must calculate the number of allowances, if any, to be surrendered or returned as a result. EPA maintains that the provision concerning calculation of allowances to be returned needs clarification and revision.

a. Under the current rule, if the total verified heat input reductions exceed the total estimated heat input reductions, returned allowances are to be calculated using a specified formula in § 72.91(b)(4) based on the difference between the verified and estimated amounts. Section 72.91(a)(7) sets a limit on the total amount of ''plan reductions'' (i.e., offsets to underutilization that are attributed to energy conservation, improved unit efficiency, sulfur-free generation, and compensating units). A Phase I unit's plan reductions minus any compensating generation that it provides as a compensating unit cannot exceed the Phase I unit's baseline minus its actual utilization. The purpose of this limitation is ''to prevent plan reductions from one Phase I unit from being used to offset the underutilization of another Phase I unit that has no reduced utilization plan.'' 58 FR 60962. This purpose applies equally whether the plan reductions involved reflect *estimated* offsets from conservation and improved unit efficiency or *verified* offsets. The confirmation process simply replaces estimated with verified offset amounts and corrects for any differences; it is not intended to allow greater offsets than if the verified offset amounts had been available when the annual compliance certification report was submitted.

The simplest way to ensure that designated representatives understand that this limitation applies is to limit the number of allowances that are to be returned to the total number of allowances that were deducted from the unit's Allowance Tracking System account for underutilization based on the annual compliance certification report. EPA proposes to add language (in § 72.91(b)(4)(iv)) setting forth this limitation. To the extent allowances were deducted based on the annual certification report, then those allowances represented underutilization of the unit (i.e., a positive difference between the unit's baseline and its actual utilization after accounting for all offsets). If allowances in excess of the amount of that allowance deduction were returned, then verified offsets from

[22] The verification process, found in § 72.91(b), is incorrectly cross-referenced in § 72.43(b)(2)(iii)(B) of the current rule. Today's proposal corrects the reference. In addition, certain typographical errors in § 72.91(b) (e.g., incomplete reference to ''improved unit efficiency measures'') are corrected.

conservation or improved unit efficiency would be used, in effect, to offset some other unit's underutilization.

b. Under the current rule, if the total verified offsets are less than the total estimated offsets, surrendered allowances are to be calculated using the absolute value of the formula specified for returning allowances in § 72.91(b)(4). EPA has found that this provision concerning the allowances to be surrendered is not correct in all cases and should be revised.

Under §§ 72.91 and 72.92, allowance surrender is determined initially on a dispatch-system-wide basis so that underutilization of one Phase I unit in the dispatch system may be offset by overutilization of another Phase I unit in that dispatch system. Once it is determined that allowances must be surrendered for the dispatch system, each Phase I unit's share of the surrender is calculated. The approach in the current rule is accurate if the Phase I unit had to surrender allowances based on the annual compliance certification report. In that case, the unit's underutilization was not offset completely by other Phase I units and any overstatement of offsets in the estimates used in the annual compliance certification report must result in additional surrender of allowances by the unit.

In contrast, if the Phase I unit did not have to surrender allowances based on the annual compliance certification report, the overstatement of offsets in the estimates could be offset by overutilization of other Phase I units. The provisions of the current § 72.91(b)(5) do not take account of that possibility.

EPA proposes to revise § 72.91(b)(5) to correct this problem and ensure that the confirmation process does not result in the surrender of more allowances than if the verified amounts for conservation or improved unit efficiency offsets had been available when the annual compliance certification report was submitted. The revision provides that each Phase I unit that used estimated conservation or improved unit efficiency offsets must recalculate its adjusted utilization using the verified amounts and then that the allowance surrender formula in § 72.92(c) must be reapplied using the recalculated adjusted utilizations. To the extent this results in greater allowance surrender than the surrender based on the annual compliance certification report, the difference must be surrendered.

c. Under the current rule, the designated representative must include in the confirmation report calculations of any change in the excess emissions that were previously determined based on the annual compliance certification report. EPA has decided that this is an unnecessary burden to impose on the designated representative. The current rule does not require the designated representative to calculate in the annual compliance certification report the amount of any excess emissions. Moreover, under the revisions of part 77 discussed below, the offset plan submitted by the designated representative of a unit with excess emissions will also not be required to state the amount of excess emissions.

Consistent with this approach, EPA proposes to eliminate the requirement that the confirmation report calculate the impact of the verified offsets on excess emissions. Instead, § 72.91(b)(6) and (7) are revised to require the Administrator to determine the amount of excess emissions (if any) that would have resulted if the verified, rather than estimated, offsets had been used to make deductions from the allowances in the unit's compliance subaccount as of the allowance transfer deadline. Further, if the resulting excess emissions differ from the amount determined based on the estimated offsets, the Administrator must determine whether additional offset allowances must be deducted and penalty payments must be made or whether allowances and penalty payments must be returned.

5. The current § 72.95 sets forth the formula for making allowance deductions for each year that a unit is subject to the Acid Rain emissions limitations for SO_2. Although the formula does not specifically refer to allowance deductions with respect to substitution or compensating units, §§ 72.41(d)(3) and (e)(1)(iii)(B) and 72.43(d)(2) expressly require such deductions under certain circumstances. In order to make the formula consistent with those express deduction provisions, EPA proposes to revise the formula to include those deductions, which are required in any event.

IV. Part 73: Allowances

A. Revision of Table 2 Allowances

EPA proposes to revise the allowances of certain units on Table 2 of § 73.10(b).

l. Allowance Determinations Remanded to EPA

Section 405(c) of the Act establishes allowances in Phase II for smaller units (under 75 MWe nameplate capacity) with higher emissions (over 1.2 lb/mmBtu). Paragraph (c)(1) of the section specifies the formula for calculating basic allowances for units owned by larger operating companies (with capacity of at least 250 MWe). Paragraph (c)(2) specifies the formula for basic allowances for such units owned by smaller operating companies (with capacity of less than 250 MWe). Paragraph (c)(3) provides special basic allowances for such units that are owned by larger operating companies (with capacity greater than 250 MWe and less than 450 MWe) that serve fewer than 78,000 customers. Paragraph (c)(4) provides bonus allowances for units under paragraph (c)(1) for the period 2000 through 2009. Paragraph (c)(5) provides special basic allowances to units under paragraph (c)(1) in utility systems that have units with high costs for retrofitting flue gas desulfurization devices.

The language in section 405(c) raises questions of how to measure utility capacity or size for purposes of applying the various paragraphs in the section. Paragraphs (c)(1) and (2) state that they apply to units of a ''utility operating company whose aggregate nameplate fossil fuel steam-electric capacity is'' of specified magnitudes. 42 U.S.C. 7651d(c)(1) and (2). In contrast, paragraph (c)(3) states that it applies to units of ''a utility operating company with, as of December 31, 1989, a total fossil fuel steam-electric generating capacity'' within a specified range of megawatts and with fewer than 78,000 electrical customers.

EPA proposed and finalized Phase II allowances allocations based on its interpretation that, despite the language differences among these statutory phrases, all of the phrases incorporate the same approach for defining a utility operating company's capacity. In applying all the provisions of section 405(c), EPA summed the nameplate capacity of the generators operated by the unit's operating utility to determine that utility's capacity. *See* 57 FR 29940, 29953–54 (July 7, 1992); and 58 FR 15662 and 15697.

Two utilities challenged EPA's allowance allocations to their units under section 405(c). Madison Gas & Electric Co. (Madison Gas) challenged EPA's position that only the nameplate capacities of the units *operated* by a given utility should be considered in determining utility capacity, rather than instead considering the nameplate capacity of the units *owned* in whole or in part by the utility. The City of Springfield, Illinois, City Water, Light and Power (City of Springfield) challenged EPA's use of nameplate capacity, rather than summer net dependable capability, as the measure of generating capacity under section

405(c)(3). Madison Gas and City of Springfield petitioned for judicial review of their allowance allocations. On May 27, 1994, the U.S. Court of Appeals for the Seventh Circuit remanded to EPA the allowance allocations for these utilities in order for the Agency to reconsider these two issues concerning utility capacity. *Madison Gas & Electric* v. *U.S. EPA*, 4 F.3d 529 (7th Cir. 1994).

Madison Gas argued, in its comments on EPA's original allowance allocations, that the language of section 405(c)(1) and (2) compel EPA to measure utility capacity based on the utility's ownership of capacity in any unit, including partially owned units. Sections 405(c)(1) and (2) apply to units owned by a utility ''whose aggregate nameplate fossil fuel steam-electric capacity'' is of a specified magnitude. 42 U.S.C. 7651d(c)(1) and (2). According to Madison Gas, the use of the word ''whose'' in this context means that the capacity must be owned by the utility. In contrast, EPA read the word ''whose'' to mean that the capacity must be operated by the utility.

EPA now believes that this language in section 405(c)(1) and (2) can support either interpretation. Further, EPA has identified at least two other utilities whose allocations would be affected by the adoption of Madison Gas's interpretation. EPA is concerned that adopting Madison Gas's interpretation and reducing, at this late date, the number of allowances allocated to these other utilities would disrupt the compliance planning already undertaken for these units. Therefore, on reconsideration, EPA believes that a fair and appropriate approach is to read the language in section 405(c)(1) and (2) to mean either aggregate nameplate capacity owned by a utility operating company or aggregate nameplate capacity operated by a utility operating company and to apply the most favorable reading to the utility involved. EPA believes that permitting the alternative interpretations is acceptable in light of the ambiguity of the statutory language. Moreover, this gives the three utilities affected by this issue the opportunity to claim and receive the most favorable allowance allocation available under these provisions, with little practical effect on other utilities.

From data submitted by Madison Gas in its comments on the original allowance allocations, Madison Gas, as of 1989, owned more than 250 MWe of capacity. Madison Gas recognized that the interpretation of section 405(c) (1) and (2) that it favors results in it receiving more allowances each year during 2000 through 2009 but fewer allowances each year thereafter and fewer total allowances. EPA therefore proposes to apply Madison Gas' interpretation of the provisions and to provide allowances to Madison Gas' Blount Street plant in Wisconsin as follows: unit 7, 116 unadjusted basic allowances each year in perpetuity under section 405(c)(1) and 1374 bonus allowances each year during 2000–2009 under section 405(c)(4); unit 8, 473 unadjusted basic allowances and 716 bonus allowances; and unit 9, 633 unadjusted basic allowances and 629 bonus allowances. These will be in lieu of the allowances for the units in the current Table 2.

Two other utilities are potentially affected by the interpretation of the utility-size language in section 405(c) (1) and (2). If the language is interpreted to refer to total owned capacity, Potomac Edison Company's R P Smith unit 9 in Maryland will be provided 320 unadjusted basic allowances under section 405(c)(1) and 354 bonus allowances under section 405(c)(4). Interpreting section 405 as referring to operated capacity, the unit receives 386 unadjusted basic allowances under section 405(c)(2) and no bonus allowances. City of Henderson's Henderson unit in Kentucky would have a lower allowance allocation when total owned capacity, rather than total operated capacity, is considered. EPA proposes to change the allowances for the R P Smith unit and leave unchanged the allowances for the Henderson unit. Comments are requested on this proposed resolution and from any utility with a unit that may be affected by the proposed interpretation of utility capacity.

City of Springfield argued, in its comments on the original allowance allocations, that EPA should not use nameplate capacity for determining utility capacity under section 405(c)(3). While section 405(c) (1) and (2) refer to a utility's ''aggregate nameplate fossil fuel steam-electric capacity, section 405(c)(3) refers to a utility's ''total fossil fuel steam-electric generating capacity.'' Data available from the Energy Information Administration (EIA) of the Department of Energy includes three different ''capacity'' terms: nameplate capacity, summer net dependable capability, and winter net dependable capability. Nameplate capacity is the gross maximum capacity (in MWe) that a generator is designed to deliver, whereas capability refers to the highest number of MWe actually delivered during a given season. City of Springfield recommended summing, for a utility, the summer net dependable capability of each of its units in applying section 405(c)(3).

Under EPA's original allowance allocations, City of Springfield's Lakeside units 7 and 8 received basic allowances under section 405(c)(1) because City of Springfield operated units with a total of 463 MWe of nameplate capacity. Since the total summer net dependable capability of these units was 443 MWe, City of Springfield's interpretation will result in Lakeside units 7 and 8 instead receiving unadjusted basic allowances under section 405(c)(3).

EPA now agrees that the utility-capacity language in section 405(c)(3) is ambiguous, particularly in light of the specific references in section 405(c) (1) and (2) to nameplate capacity. The legislative history does not directly address the use of different utility-capacity language in these provisions of section 405. Further, differences in statutory language are generally interpreted as differences in meaning. Section 405(c)(3), unlike section 405(c) (1) and (2), does not specify nameplate capacity. Under these circumstances, EPA agrees that it is reasonable to conclude that some other capacity measure was intended to be used. Most utilities in the United States are summer peaking utilities and have larger summer net dependable capability than winter net dependable capability. Consequently, given the capacity measures in available EIA data, summer net dependable capability is the most logical alternative to nameplate capacity. EPA has not identified any units, other than the City of Springfield's units in Illinois, whose allocations are affected by this change in interpretation of section 405(c)(3).

Therefore, EPA proposes, for the purposes of section 405(c)(3) only, to interpret utility capacity as the aggregate summer net dependable capability. This allows City of Springfield's Lakeside unit 7 to receive 2,919 unadjusted basic allowances for 2000 through 2009 and 722 unadjusted basic allowances for 2010 and thereafter. Lakeside unit 8 will receive 1,652 unadjusted basic allowances for 2000 through 2009 and 371 for 2010 and thereafter. These allowances will be in lieu of the basic allowances provided to the units in the current Table 2. Comments are requested on this approach.

EPA proposes another revision related to the application of section 405(c)(3). As noted above, eligibility for section 405(c)(3) allocations is contingent on a unit being owned by an electric generating company with fewer than 78,000 customers as of November 15, 1990. The current rule defines

''customer'' as ''a purchaser of electricity not for purposes of transmission or resale.'' 40 CFR 72.2. EPA understands that generating rural electrical cooperatives under the Rural Electrification Act (7 U.S.C. 901, *et seq.*) are required to serve distributing cooperatives, which in turn serve the retail customers. Generating rural electrical cooperatives therefore do not have ''customers,'' as the term is currently defined. In order to address the unique circumstances of such cooperatives, EPA is proposing to revise the definition of ''customer'' to provide that customers of a generating rural electrical cooperative's distributing cooperative are considered customers of the generating cooperative.

The effect of this change is to make Southern Illinois Power Cooperative's Marion plant in Illinois eligible for allowances under section 405(c)(3). For years 2000 through 2009, Marion units 1, 2, and 3 will be provided 2,376, 2,434, and 2,640 unadjusted basic allowances respectively, rather than their current allowances for those years of 534, 547, and 593.

EPA proposes to implement, in this rulemaking, the above discussed revisions in the unadjusted allowances for the Madison Gas, Potomac Edison, City of Springfield, and Southern Illinois Power units in Table 2. However, EPA proposes that in this proceeding it will not insert in the table the adjusted allowance figures (i.e., the allowance allocations, which take account of the 8.9 million ton nationwide cap on SO_2 emissions and are referred to as the ''total annual phase II'' allowances in Tables 2 and 3) for these units and will not revise the allowance allocations of the other units on the tables to take account of the allowance impact of the revised Madison Gas, Potomac Edison, City of Springfield, and Southern Illinois Power unadjusted allowances. Instead, all of these changes will be made in a future rulemaking.

With few exceptions, sections 403(a) and 405(a)(3) prohibit total annual allowance allocations in Phase II for all affected units from exceeding 8.95 million. In this way, annual, nationwide SO_2 emissions are essentially capped at 8.95 million tons. When total unadjusted annual basic allowances calculated under section 405 exceed the 8.95 million ceiling, each unit's basic allowances must be adjusted (i.e., ''racheted'' down proportionately) to prevent the ceiling from being exceeded. Because the current Tables 2 and 3 already reflect a ratcheting down of each unit's allowances, any net increase or decrease in the unadjusted annual basic allowances in Phase II for any affected units probably changes the amount of ratcheting and thus probably requires a change in the allowance allocations shown on Table 2 or 3 for every other unit. Only if the increases in unadjusted basic allowances proposed today were essentially equal to the proposed decreases would the allowance allocations of the other units remain unchanged. In point of fact, the net effect of the revisions proposed today (including the allowance revisions discussed above and the corrections of Agency errors and addition of units to and deletion of units from the tables discussed below) is a relatively small net reduction in the total number of unadjusted basic allowances. This will result in a small reduction in the level of ratcheting necessary to implement the 8.95 million allowance ceiling. Reduced ratcheting may result in a relatively small number of additional allowances being allocated for Phase II to many units that are not otherwise affected by today's proposal.

Adjusting all the allocation entries on Tables 2 and 3 is administratively burdensome and expensive. Moreover, under section 403 of the Act, the allocations in the tables will have to be adjusted, and the tables republished, in June 1998 in any event. Section 403(a) required the Administrator to publish a final list of allowances allocations by December 31, 1992, reflecting estimated allowances to be allocated to units that apply for and receive repowering extensions in the future under section 409. Section 403(a) also requires the Administrator to publish a revised final list by June 1, 1998, reflecting, *inter alia*, allowances allocated to units for which repowering extensions are actually approved.

EPA believes that no one will be prejudiced in any significant way by EPA's deferring allowance adjustments until the 1998 publication of the final list of allowance allocations. The owners of units whose unadjusted allowances are increased if today's proposal is finalized can trade the allowance increase in anticipation of the actual allocation in 1998. *See* 42 U.S.C. 7651b(b). As noted above, the change in the ratchet and the difference between the amount of the unadjusted allowances for these units and the amount allocated to them after adjustment due to ratcheting will be relatively small. Similarly, the amount of the ratcheting adjustment in 1998 of the allowances of other units otherwise not affected by today's proposal will be small. The owners of units that, under the proposal, are on Table 2 or 3 can trade their current allocations and base trading decisions on the existing ratchet for Phase II (about 10%).

Consistent with its authority under section 403(b) to establish allowance system regulations, EPA proposes to revise the unadjusted allowances for the Madison Gas, Potomac Edison, City of Springfield, and Southern Illinois Power units in Table 2. The proposal includes a provision stating that the unadjusted allowances in Table 2 (or Table 3, as appropriate) for these (and certain other) units are superseded and setting forth the new number of unadjusted allowances for such units. However, EPA proposes not to change, in this rulemaking, the ratchet used to adjust all allowances on the tables. Rather than recalculating the ratchet and applying it to all units in the tables, EPA will leave in place the current allowance allocations for the Madison Gas, Potomac Edison, City of Springfield, and Southern Illinois Power units and the other units remaining in the tables. When EPA develops the June 1998 revised list of allowance allocations required under section 403, EPA will calculate a new ratchet and apply it to the unadjusted basic allowances of all units remaining on Tables 2 and 3. The resulting allowance allocations will then be reflected in the units' Allowance Tracking System accounts.

2. Correction of Agency Errors

EPA developed the NADB in order to calculate Phase II allowance allocations for all affected units. In July 1991, EPA released for comment version 2.0 of the NADB. 56 FR 33278 (July 19, 1991). Section 402(4)(C) of the Act required the Administrator, by December 31, 1991, to ''supplement data needed in support of [title IV] and correct any factual errors in data from which affected Phase II units' baselines or actual 1985 emission rates have been calculated * * * for purposes of issuing allowances under the title.'' 42 U.S.C. 7651a(4)(C). EPA stated in the July 1991 notice that it would not accept comments on the data base after September 3, 1991 (the close of the comment period) except if the data sought was not available by that date. EPA added that it would not change any data after December 31, 1991, when it expected to issue the final data base. 56 FR 33279 and 33283.

In July 1992, EPA released version 2.1 of the NADB, believing that version to be the final, and proposed Phase I and Phase II allowance allocations. 57 FR 30034. After correcting errors made by the Agency in version 2.1, EPA released version 2.11 of the NADB in March 1993, along with the final Phase II allowance allocations. 58 FR 15720 (NADB); and 58 FR 15634 (allocations).

The corrections to the NADB were made ''only in response to comments, verified by EPA, that either changes were made to the data which, based on the data in the possession of EPA at the time, were known to be incorrect or the Agency failed to make a correction requested by a commenter that was true and properly documented at the time.'' 58 FR 15720. At that time, EPA believed it had corrected all of these errors.

However, several utilities subsequently informed EPA that the NADB still contained errors that were of the type that EPA had intended to correct. In the following cases, EPA agrees that the error in the current NADB results from the Agency's own actions. This is because the NADB data issues had been identified to EPA by a commenter by December 31, 1991 and the commenter submitted to EPA, before EPA's issuance of NADB version 2.1 on July 7, 1992, sufficient documentation to support the correction of the data. Because in the March 1993 notices EPA had intended to correct such problems, EPA proposes today to correct them by revising the units' unadjusted allowances to reflect the correct data. Consistent with the approach taken in the March 1993 notices, EPA will not address any errors that were not identified by December 31, 1991 or not sufficiently documented by July 7, 1992 and will not consider new requests for data changes, new data submissions, or new requests for outage adjustments.[23]

a. In the case of Manitowoc unit 8 in Wisconsin, the shared heat input at 60 percent capacity (HT60SHR) is not accurate. While EPA developed a methodology for sharing heat input at 60 percent capacity (HEAT60) that was accurate for most situations, the methodology was inaccurate for Manitowoc's unique circumstances, i.e., where only one boiler in a multiheader configuration was on-line as of December 31, 1987. The owner of Manitowoc timely commented on the inaccuracy on August 30, 1991. However, EPA failed in March 1993 to correct the methodology in a way that would account for Manitowoc's situation. EPA has reviewed the methodology for splitting HEAT60 and developed a method that is appropriate for multi-header configurations where one or more, but not all, units came on-line after the baseline period. EPA is proposing to use the proportional share of design heat input. For example, if boiler 1 had a 100 mmBtu/hr design heat input, boiler 2 had 200 mmBtu/hr and boiler 3 had 300 mmBtu/hr, boiler 1 would be allotted ⅙ of the generator's HEAT60, boiler 2 would be allotted ⅓, and boiler 3 would be allotted ½. For Manitowoc unit 8, this approach will result in 271 unadjusted basic allowances, as opposed to 27 listed in the current Table 2.

b. In the case of the Reedy Creek Improvement District's (Reedy Creek) Combined Cycle 1, unit 32432 (formerly unit 11*STG) in Florida, EPA erroneously failed to include the unit in Table 2, believing the unit was a simple combustion turbine and so was not an affected unit. Reedy Creek's timely comments, submitted on August 30, 1991, provided sufficient information to properly characterize the unit as a combined cycle turbine with auxiliary firing and thus as an affected unit and to determine its allowance allocation. EPA proposes to include the unit in Table 2 with 69 unadjusted basic allowances under section 405(g)(1).

c. In the case of Central Louisiana Electric Company's (Central Louisiana) Rodemacher unit 2, EPA failed to correctly characterize the outage request for the unit. Central Louisiana submitted the outage request for the unit on March 21, 1991 and supplemented the request with additional information on February 10, 1992. On July 7, 1992, as part of the notice of the NADB (57 FR 30034), EPA proposed a classification scheme for outage requests received by EPA prior to finalization of the NADB. EPA proposed, at that time, and later finalized allowing baseline adjustments for discontinuous but related outages totalling four months or greater (''Category II''). *See* 58 FR 15724. However, EPA mischaracterized Rodemacher unit 2's outage as less than four months. EPA now recognizes that Central Louisiana's earlier submissions provided timely notice and sufficient documentation of a discontinuous outage at Rodemacher of over four months. Unfortunately, the February 10, 1992 supplemental submission documenting the requested outage was received by EPA but was not directed to the docket or the Acid Rain Division to be considered with other outage requests. The outage at Rodemacher clearly fits the Category II classification and would have been so classified in 1992 if Central Louisiana's supplemental submission had been docketed. EPA stresses that it is not reconsidering or changing the criteria for evaluating outage requests but rather is correcting its mistake in applying the existing criteria. Therefore, EPA proposes to allow 2,312 additional unadjusted basic allowances for Rodemacher unit 2, bringing its total to 20,774.

d. For the reasons discussed above in section IV(A)(1) of this preamble, EPA is proposing today changes to the unadjusted allowances for the Manitiwoc and Rodemacher units and adding the Combined Cycle 1 unit and its unadjusted allowances to Table 2, as addressed in this section, but is not proposing to change or add the resulting allowance allocations in this rulemaking. The units' allowance allocations reflecting the new figures for unadjusted allowances will be put in Table 2 when the revised Tables 2 and 3 are issued in June 1998. At that time, any resulting revisions of the allowance allocations for the other units on the tables will also be made.

B. Deletion of Units From Table 2

EPA proposes to delete certain units from Table 2 of § 73.10(b), which set forth the Phase II allowance allocations for existing units. Because of data errors, these units were erroneously treated as affected units and included in the table. As discussed above, EPA generally will consider correcting NADB data errors and, as a result, changing an affected unit's allowances *only* where a data problem was identified to EPA by a commenter by December 31, 1991 and was sufficiently documented by July 7, 1992. Because the March 1993 notices were intended to correct such errors, EPA now considers the errors to be Agency errors and, as noted above, proposes to correct them. Other NADB data errors relating to allocations of affected units will not be corrected. However, EPA is taking a different approach to data errors (whether or not the data is in the NADB) that result in units being improperly categorized as affected units when they actually are unaffected units.

In the latter cases, EPA will delete the units from Table 2 (or Table 3, as appropriate) regardless of whether the data errors result from the Agency's own actions. Any allowances allocated to such units must be offset by return of the same number of allowances with the same or an earlier compliance use date as those allocated. Further, the proceeds from EPA's auctioning of any allowances allocated to such units must be returned to EPA. Data errors, regardless of their cause, cannot expand

[23] As discussed below in sections IV(B) and (C) of this preamble, there are two exceptions to this approach toward data errors. First, where data errors result in unaffected facilities being improperly categorized as affected units, EPA proposes to adopt the proper categorization of the units regardless of when the data errors are corrected. Second, where projections, rather than actual data, are involved (i.e., projected dates for commencement of commercial operation), EPA will correct the projected dates if EPA is made aware of the actual dates within a reasonable time after commercial operation is commenced and all other necessary data had been provided by December 31, 1991.

the applicability of the Acid Rain Program as set forth in title IV of the Act.[24] The deletion of units from Table 2 is discussed below.

1. Following publication of the March 1993 notices, EPA was notified by owners or operators of Grand Avenue, Kettle Falls, Maddox, Mobile, R S Nelson, and South Meadow that these units are not affected units under § 72.6 (the applicability provisions of the Acid Rain Program) and so should not have been listed in Table 2. All of the units were allocated allowances.

EPA agrees that Grand Avenue units 7 and 9 in Missouri are cogeneration facilities excluded from the Acid Rain Program under section 402(17)(C) of the Act and § 72.6(b)(4)(i). The Grand Avenue units commenced operation prior to 1990. The NADB does not include data on the operations of cogeneration units. The units were designed and operated to produce municipal steam heat and electricity and are still operated in that manner. They each supplied less than 219,000 MWe-hr per year in 1985–1987 and in every year since 1990. EPA proposes to remove the units from Table 2.

EPA agrees that Kettle Falls in Washington also should be deleted from Table 2 and excluded from the Acid Rain Program as a solid waste incinerator under § 72.6(b)(7). This unit commenced commercial operation in 1983 burning ''hog'' fuel (waste from the logging and lumber industry). The NADB erroneously labeled Kettle Falls as an oil and gas-fired unit. In 1991 during development of the NADB, EPA had data demonstrating Kettle Falls' use of non-fossil fuel and qualification under § 72.6(b)(7). EPA proposes to delete the unit from Table 2.

Maddox unit **3 in New Mexico is a simple combustion turbine (as defined in § 72.2) that originally commenced commercial operation in 1963. The turbine was moved from one site in New Mexico, where it was called ''Roswell,'' to its present site in 1989. Section 402(8) of the Act and § 72.6(b)(1) exclude from the Acid Rain Program simple combustion turbines that commenced commercial operation prior to November 15, 1990. Because Maddox **3 meets these criteria, EPA agrees that it should be removed from Table 2.

EPA agrees that Mobile unit **2 in South Dakota is not an affected unit under the Acid Rain Program. Only units at stationary sources are affected units. 60 FR 17100, 17108 (April 4, 1995). Mobile **2 is a mobile source, not a stationary source, and thus, should not be included on Table 2 as an affected unit in the Acid Rain Program.

The operator of R S Nelson units 1 and 2 in Lousiana requested on July 17, 1992 that the units be removed from Table 2 because they are a qualifying facility excluded from the Acid Rain Program under § 72.6(b)(5). EPA failed to act on the request before finalization of the allocations in March 1993 but now agrees with the request. The units are a ''qualifying facility'' (Federal Energy Regulatory Commission Docket No. QF86–512) and are subject to a qualifying power purchase commitment, as defined in § 72.2. The installed capacity of the units is 227.2 MWe (measured in gross), which does not exceed 130% of the planned net output capacity of 201 MWe (measured in net). EPA proposes to remove the units from Table 2.

EPA agrees that South Meadow units 11, 12, and 13 (now called ''Mid-CT RRF'') in Connecticut should be deleted from Table 2 because they are solid waste incinerators excluded from the Acid Rain Program under § 72.6(b)(7). The NADB erroneously failed to reflect that, while these units were originally coal-fired utility units, they were shut down in 1969 and were substantially modified and resumed operation as solid waste incinerators in 1988. EPA proposes to delete them from Table 2.

2. EPA believes the following additional units, presently listed in Table 2, are not affected units under § 72.6:

State	Plant	Units	ORIS
CO	Valmont	11,12,13,22,23	0477
KS	Ripley	**2,**3	1244
MI	Delray	11	1728
MS	Wright	W4	2063
NY	Rochester 3	1,2,4	2640
PA	Richmond	63,64	3168
PA	Southwark	11,12,21,22	3170
TX	Concho	2,4,5,6	3518
TX	Deepwater	DWP1–DWP6	3461

The units were not in operation during the baseline period (1985- 1987) and were designated by the Energy Information Administration (EIA) of the U.S. Department of Energy as having retired before November 15, 1990. In the preamble of the March 1993 notice of final allowance allocations (58 FR 15636), EPA discussed the treatment of retired units. At that time, EPA attempted to identify all units that were not in operation during the baseline period and that had retired prior to November 15, 1990; such units were considered to be unaffected units and were deleted from Table 2. Because the units listed above also meet these criteria, EPA proposes to delete them from Table 2. Most of these units were not allocated allowances.

EPA requests notification during the comment period by the owners or operators of any other unit listed on Table 2 that was not in operation during 1985–1987 and that is designated by EIA as having retired before November 15, 1990. If the unit will not be returned to service, EPA may delete such units from Table 2.

3. EPA believes that several other facilities listed in Table 2 are unaffected units because they are not fossil fuel-fired combustion devices. El Centro 2 in California, Lauderdale PFL4 and PFL5 in Florida, and Chesterfield **8B in Virginia are heat recovery boilers that use exhaust gases from combustion turbines to produce steam in the boilers and do not use any fossil fuel, e.g., through auxiliary firing. NA 2—7246 **1 in Arkansas is planned to be a hydroelectric generation facility and thus will not use any fossil fuel. These facilities were allocated allowances in Table 2. EPA proposes to remove these facilities from Table 2.

4. EPA reviewed the status of all units listed in Table 2 using the Department of Energy's ''Inventory of Power Plants 1993'' (published in December 1994)

[24] While the July 1991 notice established a December 31, 1991 cut-off for changing NADB data, the notice did not suggest that units that are unaffected units and ineligible for any allowances would continue to be allocated allowances. EPA explained that ''[u]nits eligible for allowances will be allocated allowances based on the data contained in the final database.'' 56 FR 33283.

and ''Inventory of Power Plants 1994'' (published in October 1995). Based on that review, EPA proposes to delete units from Table 2 that have been canceled or postponed indefinitely and therefore are not affected units at this time. None of these units were allocated allowances in Table 2. EPA requests comment from the owners or operators of the following units concerning deletion of the units from Table 2:

State	Plant	Unit	ORIS
AL	Future Fossil	**1	7064
	McIntosh CAES	**2	7063
	McWilliams	**CT1 **CT2 **CT3	0553
IL	Lakeside	GT2	0964
IN	Na1—7221	**2	7221
	Na1—7228	**4,**5	7228
KY	J K Smith	1	0054
MN	Future Base	**1	7240
MO	Combustion Turbine 1 (''CT Plant 1'')	**NA7	7160
MO	Empire Energy Ctr	**4 **NA2 **NA3	6223
NE	NA1—7019	**NA2	7019
NJ	Butler	**4	7152
NJ	NA5—7217	**2	7217
	NA6—7218	**2	7218
NM	Escalante	**2	0087
ND	Dakotas	**1	7081
OK	Inola	**1	0798
	GT98	**1, **2	7243
	GT99	**1–**3	7225
	NA1–7216	**1, **2	7216
	San Miguel	**2	6183
	TNP One	**3, **4	7030
WI	Manitowoc	9	4125
	Na–7222	**1	7222

EPA also requests comment from owners or operators of other units in Table 2 that will not be built or that actually are not affected units under § 72.6. EPA notes that if the owners and operators of any unit listed in Table 2 believe that their unit is not an affected unit, a certifying official for owners or operators of the unit may submit a petition under § 72.6(c) to have the Administrator determine if the Acid Rain Program rules apply to the unit.[25] Units that are not affected units or will not be built may be deleted from Table 2.

5. EPA proposes to implement, in today's rulemaking, the above-discussed deletions from Table 2 and the other deletions from or additions to Tables 2 and 3 addressed in this proposal. However, for the reasons previously discussed, EPA proposes that, in this rulemaking, it will not change the allowance allocations of units remaining on the tables or show the allowance allocations of units added to the tables. These changes will be made in a future rulemaking in June 1998.

Specifically, with regard to units proposed for deletion from Table 2 or 3, EPA proposes, in this rulemaking, to remove from the table each such unit and the information concerning its allowances. Further, EPA proposes to require the designated representative of each unit that is proposed for deletion as an unaffected unit and has been allocated allowances, pursuant to the tables, to surrender to EPA, for each such allowance, an allowance of the same or earlier compliance use date. The Agency will deduct such allowances from the unit's Allowance Tracking System account. The designated representative of each such unit must also return to EPA the allowance proceeds that were distributed for any allowances withheld from such unit for the EPA allowance auction under subpart E of part 73. If, as proposed today, these units are not affected units, they were not eligible for any allowance allocations, and any allowances or allowance proceeds that they received must be returned. The allowances and proceeds must be returned within 60 days of the effective date of the final rule resulting from today's proposal. In the future, EPA will redistribute the returned allowance proceeds among the units that are properly allocated allowances and from which allowances are properly withheld for the auction. At that time, EPA will explain the procedure used for making the redistribution.

With regard to units proposed for addition to a table, EPA proposes to add to the appropriate table the units proposed for addition and their unadjusted basic allowances. EPA proposes not to change, in this rulemaking, the ratchet used to adjust all allowances on the tables. Rather than recalculating the ratchet and applying it to units added to or remaining in the tables, EPA will not calculate the allowance allocations (''total annual phase II allowances'' in the tables) for the added units but will show these allocations as ''NA'' (not available). Allowances will not be placed in the Allowance Tracking System accounts of the added units at this time. Further, EPA will not change the allowance allocations (and the allowances actually reflected in the Allowance Tracking System accounts) for the units remaining in the tables. When EPA develops the June 1998 revised list of allowance allocations required under section 403, EPA will calculate a new ratchet and apply it to the unadjusted basic allowances of all units on Tables 2 and 3 at that time. The resulting allowance allocations (including those for the added units) will then be reflected in the units' Allowance Tracking System accounts.

[25] The applicability of the Acid Rain Program is described in the guidance document, ''Do the Acid Rain SO_2 Regulations Apply to You?'', which is available from the Acid Rain Hotline at (202) 233–9620.

C. Additions of Units to and Deletions of Units From Table 3

The current Table 3 of § 73.10 lists units that were expected to be eligible for allowances under section 405(g)(4) of the Act. Units were considered eligible if EPA was informed (as reflected in the EPA's Supplemental Data File finalized on March 23, 1993) that they had commenced construction prior to December 31, 1990 and (as reflected in the NADB) that they were planning to commence commercial operation from January 1, 1993 through December 31, 1995. EPA required that owners and operators of units on Table 3 submit documentation to EPA by December 31, 1995 of the commencement of construction. 58 FR 15722. For units commencing construction before December 31, 1990, eligibility under section 405(g)(4) ultimately depends on them being affected units that actually commenced commercial operation by what was a future date (December 31, 1995) at the time the data underlying Table 3 was gathered. While some data about a unit (e.g., its generating capacity or allowable emissions rate) is known before construction is completed or operation begins, other information (in this case, the commencement date for commercial operation) can only be a projection that, not surprisingly, may turn out to be wrong.

As discussed above, EPA's general approach to correcting data errors that lead to allowance revisions has been to require that the owners or operators have informed EPA by December 31, 1991 and sufficiently documented the correction by July 7, 1992. However, as of either of those dates, owners or operators of units in Table 3 that ultimately commenced commercial operation in 1993–1995 had only projections of commercial operation commencement dates, not *actual* data. Because such owners or operators could not have informed EPA by December 31, 1991 that the projected dates were erroneous, EPA is taking a different approach with regard to errors in the projected dates. EPA proposes to correct errors in a unit's projected commercial operation dates and to make the resulting allowance revisions if the Agency was made aware of the error within a reasonable time after the actual commencement of commercial operation. In addition, EPA is continuing to take the approach of correcting data errors (e.g., as discussed below, errors concerning completion of construction of units or status of units as fossil fuel-fired combustion devices), regardless of when EPA became aware of the corrected information, to the extent necessary to ensure that unaffected units are not erroneously treated as affected units. As a result, EPA proposes several additions of units to and deletions of units from Table 3.

a. EPA has reviewed various documents regarding planned utility units and understands that many units presently listed on Table 3 are not likely ever to be built. In some cases, EPA's information in the Supplemental Data File on construction commencement was erroneous, and, in other cases, construction was commenced but not completed. Obviously, such units are not affected units and should not be included in any table as affected units. From the Department of Energy's ''Inventory of Power Plants 1993'' and ''Inventory of Power Plants 1994'', EPA believes the following units will not be built and proposes to delete them from Table 3:

State	Plant	Units	ORIS
FL	G W Ivey	**2	0665
IL	Lakeside	GT1	0964
IA	Na1—7230	**1	7230
MO	Empire Energy Ctr	**3	6223
	Lake Road	**8	2098
NJ	Butler	**3	7152
OH	Dover	**7	2914
PA	Trenton Cogen Proj	**1	9902
SC	NA2—7107	**GT2	7107
	NA3—7108	**GT3	7108
SD	Ct	**5	7236
UT	Bonanza	**2	7790
WI	Combustion Turbine	**1	7157
	Na2	**1	7250

Table 3 also currently includes other units that are not affected units. Harbor Gen Station **10 in California, Martin **3ST and **4ST in Florida, and Clark **9 and **10 in Nevada on Table 3 are heat recovery boilers served by existing simple turbines. As discussed above, this type of unit is not a fossil fuel-fired combustion device. Therefore, these are not affected units and should not be listed in any of the tables. EPA today proposes to delete them from Table 3.

In addition, EPA proposes to delete the following units from Table 3 and include them on Table 2 with zero allowances. NA1–7228 **1, **2, and **3 in Indiana did not submit the required documentation of the date for commencement of construction. Harry Allen **GT1 and **GT2 in Nevada did not commence construction before January 1, 1990. The remaining units did not commence commercial operation before December 31, 1995.

State	Plant name	Units	ORIS code
AL	McWilliams	**4	0533
AZ	Springerville	3	8223
IN	NA1–7228	**1, **2, **3	7228
KS	Wamego	**NA1	1328
MD	Easton 2	**25	4257
	Perryman	**51	1556
MS	Moselle	**4, **5	2070
MO	Combustion Turbine 1	**1	7160
MO	Combustion Turbine 2	**2	7161

State	Plant name	Units	ORIS code
NE	Na1–7019	**NA1	7019
NV	Harry Allen	**GT1, **GT2	7082
NJ	Butler	**1	7152
NJ	Na1–7139	**1	7139
NJ	Na2–7140	**1	7140
OH	Woodsdale	**GT7	7158
SC	NA1- 7106	**GT1	7106
VA	East Chandler	**2	7186

Finally, Twin Oak 2 in Texas is eligible for allowances under section 405(g)(2) and was listed in Table 3 as also eligible for allowances under section 405(g)(4). This unit did not actually commence commercial operation by December 31, 1995 and therefore is not eligible under section 405(g)(4). EPA proposes that Twin Oak 2 be removed from Table 3 and listed in Table 2 with 1,760 unadjusted basic allowances under section 405(g)(2).

b. EPA understands that Angus Anson unit 3 in Minnesota (listed in Table 2 as ''NA1–7237, **2''), Cope unit 1 in South Carolina (listed in Table 2 as ''NA4–7210, **ST1'') and Fond Du Lac CT3 in Wisconsin (listed in Table 2 as ''Na1–7203'') actually commenced construction prior to December 31, 1990 and commercial operation in 1995 and are not listed in Table 3. In 1991, EPA had received documentation of their pre-1991 commencement of construction but did not list the units in Table 3 because they were not projected to commence commercial operation until 1996. EPA was informed, within a reasonable time after actual commencement of commercial operation, that the projections were wrong. EPA proposes to include these units in Table 3 with the following unadjusted basic allowances under section 405(g)(4) of the Act: Angus Anson unit 3, 1,166 allowances; Cope unit 1, 2,989 allowances; and Fond Du Lac CT3, 44 allowances.

In addition, EPA believes that it erred by not including West Marinette unit 33 in Wisconsin in Table 3. On August 28, 1991, the owner of West Marinette informed EPA that the unit had commenced construction before December 31, 1990 and was projected to commence commercial operation before 1996. EPA erroneously recorded the date for commencement of construction as being after 1990 and therefore failed to include the unit in the table. Because the owner timely informed EPA of the data error and because the unit actually commenced commercial operation in 1995, EPA considers this an Agency error and is correcting the error and adding the unit to Table 3. West Marinette unit 33 is eligible for 874 unadjusted basic allowances.

EPA proposes to include these three units in Table 3 with the proper unadjusted basic allowances.

c. EPA is proposing to make, in this rulemaking, the deletions and additions of units and the changes to the unadjusted allowances discussed in this section. These changes will be implemented in the manner described, and for the reasons discussed, in section IV(B) of this preamble. The units' allowance allocations will be revised to reflect the new figures for unadjusted allowances when the revised Tables 2 and 3 are issued in June 1998.

D. 1998 Revision of Allowance Allocations

As noted above, section 403(a)(1) of the Act requires EPA to publish a revised statement of allowance allocations no later than June 1, 1998. That revision must account for units eligible for allowances under section 405(g)(4) (units commencing operation from 1992 through 1995), units eligible for allowances under section 405(i)(2) (units that reduce their emissions rates), and section 409 (units with approved repowering extensions). Rules for the revision of allowance allocations were published on March 23, 1993. 58 FR 15634.

EPA is presently planning the procedures for revising allowance allocations in 1998. EPA has determined that the current regulations should be revised to facilitate the 1998 allowance allocation revision.

The current rule requires each unit eligible under section 405(i)(2) to submit a copy of the Form EIA–767 (showing the actual SO_2 emissions rate) for the unit for 1997 no later than March 1, 1998. Because EPA must provide a comment period on the revision to allocations and because of the administrative requirements for issuance of rules, there is insufficient time for EPA to issue a final rule in June 1998 using data submitted to EPA in March 1998. EPA is therefore proposing to use instead 1996 actual SO_2 emissions rate data as reported by the unit's continuous emissions monitors under part 75. That data will be available in the spring of 1997, allowing EPA time to complete the revisions by the statutory deadline. Submission of the 1997 Form EIA–767 will no longer be required.

The revisions to the allowance allocations are also dependent upon a reasonably accurate calculation of the number of allowances allocated for units with repowering extensions. EPA finalized the allowance allocations in 1993 based on its estimate of the number of allowances that could be allocated for units projected to apply for and be granted repowering extensions. The current part 72 allows for approval of a conditional repowering extension plan that does not go into effect until the plan is activated, which may occur as late as December 31, 1997. Thus, until January 1998, EPA will not know the number of repowering extension plans in effect and the resulting number of allowances to be allocated for units with repowering extensions. This date is too late for EPA to complete allowance allocation revisions by June 1998.

Therefore, EPA proposes to require activation of repowering extension plans by June 1, 1997. That is the same date as the deadline for submission to EPA of petitions for approval of repowering technology under § 72.44(d). Under § 72.44, a repowering extension can be approved only if the Administrator determines that the technology proposed to be used for repowering is a qualified repowering technology, consistent with the definition of ''repowering'' in section 402(12) of the Act. EPA believes that, as a practical matter, the June 1, 1997 deadline will provide sufficient flexibility for a utility to decide whether to commit to repowering a unit, particularly since the utility will still have until December 31, 1999 to terminate a repowering extension plan. Although the June 1998 revision will reflect repowering plans that the utility retains the right to terminate, EPA maintains that approved plans provide a sounder basis for the June 1998

allocations than conditional plans that may not even be activated.

E. Revisions to Small Diesel Refinery Provisions

Section 410(h) of the Act provides a total of 35,000 allowances for small diesel refineries that desulfurize diesel fuel from October 1, 1993 through December 31, 1999. Small diesel refineries are not affected units under the Acid Rain Program and do not need allowances to comply with any provision of the Act but may sell their allowances. Regulations for the allocation of allowances to small diesel refineries are contained in subpart G of part 73.

After finalization of subpart G, EPA was informed that the equation in § 73.90(c), for calculating allowances in instances where the allowances requested by small refineries exceed the 35,000 limit under section 410(h), is in error. EPA agrees. The factor for prorating allowances to the 35,000 level was inverted. Today, EPA proposes to correct the equation and eliminate some redundant language.

Also, after finalizing the rule, EPA realized that the list of items (in § 73.90(a)) to be submitted to support a certification that the refinery is a small diesel refinery eligible for allowances is insufficient, as compared to the definition of small diesel refinery in § 72.2. That definition requires data on crude oil throughput for 1988 through 1990 but the current rule requires submission of EIA–810 forms only for 1990. EPA has had to routinely request applicants to supplement their initial submissions with copies of the 1988 and 1989 EIA–810 forms. It is less burdensome for the applicant and EPA to have properly stated submission requirements in the first instance. Today, EPA proposes to revise the rule to correct this error.

V. Part 75: Monitoring Requirements for Units Burning Digester and Landfill Gas

EPA has received questions regarding treatment, under part 75, of utility units that burn digester or landfill gas in addition to natural gas. The definition of ''natural gas'' clearly excludes digester and landfill gas. The present definition of ''gas-fired'' includes natural gas and other gaseous fuels, but, for the purposes of monitoring requirements under part 75, excludes gaseous fuels that contain more sulfur than natural gas. In general, digester and landfill gas contain significantly more sulfur than natural gas, although still much less than coal. The monitoring rules of part 75 treat units that burn digester or landfill gas as ''other'' units, subject to the same requirements as coal-fired units to use continuous emissions monitoring systems to monitor SO_2, NO_X, carbon dioxide, and opacity.

Use of digester or landfill gas for generation of electricity is encouraged by the Agency in order to decrease the emission of greenhouse gases and to efficiently use this waste product. However, the Agency has limited information concerning the range of the sulfur content of digester or landfill gas and methods, other than continuous emissions monitoring, for determining the amount of SO_2 emissions from units combusting such gas. On one hand, EPA does not wish to discourage electricity production from digester and landfill gases by having overly burdensome monitoring requirements. In fact, use of such gases for electric generation can reduce methane and other emissions while reducing the financial burden on municipal landfills and other emitters of such gases. 61 FR 9905,9909–10 (March 12, 1996). On the other hand, accurate monitoring of SO_2 emissions from affected units is essential to the integrity and effectiveness of the Acid Rain Program.

Under these circumstances, EPA is not proposing any changes to part 75 concerning monitoring of emissions from units combusting digester or landfill gas. Instead, the Agency requests information on: the sulfur content of such gas and the variability of sulfur content over time; the available methods, in addition to continuous emissions monitoring, for determining SO_2 and NO_X emissions from units combusting such gas; and the cost and accuracy of such methods. Other than the change in § 75.67(a), discussed above, concerning exemptions from monitoring requirements for retired units, EPA is not proposing any changes to part 75 and will not accept comments on any other provisions of part 75 in this rulemaking.[26]

VI. Part 77: Excess Emissions

A. Immediate Deduction of Allowances to Offset Excess Emissions

Under the current rule, the designated representative of a unit that has excess emissions for a calendar year must submit an offset plan showing when allowances offsetting the excess emissions should be deducted. In the plan, the designated representative must state the amount of the excess emissions and of the resulting offset allowances and may state that the allowances should be deducted either immediately or on a future specified date. A plan providing for immediate deduction of all offset allowances will generally be approved without any further proceedings. A plan specifying a future date for deduction must be processed using notice and comment procedures analogous to the Agency's Acid Rain permit issuance procedures. If the future deduction date is in a year after the year in which the plan is submitted, there must be a showing that a deduction during the year of submittal will interfere with electric reliability.

This approach provides the options of, *inter alia,* submitting an offset plan for immediate deduction of allowances, which is automatically approved, or an offset plan providing for deduction later in the year in which the plan is submitted, which must go through notice and comment. However, since offset plans are submitted by March 1 and deductions will not actually be made until after completion of Agency review of emission data for the calendar year of the excess emissions, there is relatively small timing difference between an immediate deduction and one that takes place by the end of the same year. It seems doubtful that a designated representative would find that the timing difference warrants the burden of the notice and comment procedures applicable to plans not providing for immediate deductions. Further, it is less administratively burdensome for EPA to make deductions when it is already examining a unit's Allowance Tracking System acccount to determine if the allowances cover the unit's emissions than to defer the deductions to a later date in the same year. From a public policy standpoint, immediate deductions will also have the advantage of a more timely closing of compliance activities for the unit for the year of the excess emissions.

For these reasons, EPA proposes to modify the current rule to require the offset plan to provide either for immediate deduction or deduction on a specified date in a subsequent year. Immediate deduction offset plans will continue to be subject to automatic approval while any other plans will have to include a showing of the impact of an immediate deduction on electric reliability and will be subject to notice and comment.[27]

[26] Under § 75.50, information required under part 75 must be retained for at least 3 years from the date of each record. The general recordkeeping provision in § 72.9(f)(1), which requires record retention for at least 5 years, is revised to incorporate specifically the 3-year period for part 75 records.

[27] Revisions concerning the notice and comment procedure for offset plans are also proposed. The

Continued

In addition, under the proposal, it will be optional to specify in the offset plan the number of offset allowances to be deducted. Excess emissions and the offset requirement are determined by allowance account data, monitoring data, and other data (e.g., for Phase I, reduced utilization data) submitted to and reviewed by the Administrator. There is no purpose in requiring the designated representative to state in the plan the amount of excess emissions and of resulting offset allowances. This is consistent with the approach taken in the requirements for the annual compliance certification report, which does not require the designated representative to certify the amount of annual emissions or of allowances held as of the allowance transfer deadline. *See* 40 CFR 72.90.

B. Deadline for Payment of Excess Emissions Penalties

Under the current rule, the owners and operators of a unit must pay any excess emissions penalties ($2,000, adjusted for inflation, per excess ton) by 60 days after the end of the year (i.e., by March 1) in which the excess emissions occur. Penalty payments for additional excess emissions resulting from the process of confirming kilowatt hour savings or heat rate improvement from energy conservation or improved unit efficiency measures under § 72.91(b) must be paid by July 1.

The difficulty with this approach is that the Agency's review of the emissions for that year may not have been completed by the date that the payment is due. With regard to Phase I, the information concerning reduced utilization and allowance surrender, which also affect the excess emissions determination, will be submitted around the same time (i.e., no later than March 1) and will not have yet been reviewed. Moreover, reduced utilization information submitted by March 1 by Phase I units with reduced utilization plans relying on energy conservation or improved unit efficiency measures will reflect only estimates of the kilowatt hour savings or heat rate improvement from conservation or improved efficiency. Verified figures will not be submitted until July 1, and the Administrator has the discretion to extend the July 1 submission date for good cause. Agency review of emissions data and reduced utilization information may result in a change in the determination of excess emissions and the penalty payment that is due.

Consequently, while section 411(a) of the Act expressly requires automatic payment of excess emissions penalties without demand by the Agency, the requirement to submit such payments by March 1 seems premature. Further, if Agency review results in a reduction in the amount calculated as excess emissions, there will have to be a refund of overpayment of penalties.

For these reasons, EPA proposes to change the current rule to provide that excess emissions penalties are automatically due 30 days after the Administrator serves the designated representative of the unit involved a notice, stating that the Agency has completed the end-of-year recordation process set forth in the current § 73.34(a), but, in any event, no later than July 1 of the year after the year in which the excess emissions occur. That end-or-year recordation process entails: deduction of allowances, from the balance in the unit's compliance subaccount as of the allowance transfer deadline, for SO_2 emissions during the prior calendar year; deduction of allowances pursuant to any other rule provisions (e.g., for reduced utilitization) from such balance; and transfer into the compliance subaccount of allowances allocated for the new calendar year. EPA anticipates that the notice will also provide information on the final balance in the account after all deductions are made. EPA notes that under the current § 73.50(b)(2) the unit's compliance subaccount is frozen, so that no transfers can be made in or out of the account, until the recordation process in § 73.34(a) is completed.

If the penalty is not paid within 30 days after the notice is sent, EPA proposes that a second notice will be sent by the Administrator, i.e., a demand notice stating that the excess emissions penalty and interest charges are due. Interest will accrue from the date on which the second notice is mailed. This is consistent with the requirements of the Debt Collection Act (31 U.S.C. 3717).

With regard to additional excess emissions that may stem from the process of confirming the results of energy conservation or improved unit efficiency measures, EPA proposes to make the payment due 30 days after the Administrator serves the designated representative a notice stating that the process set forth in § 72.92(b) is completed. Under § 72.92(b), the Administrator must review the confirmation report and determine whether additional excess emissions have resulted and whether any penalty (or refund of a penalty) is owed.

C. Excess NO_X Emissions Under NO_X Averaging Plans

The current § 77.6 states that owners and operators of each unit with excess emissions of NO_X during a year must pay a penalty of $2,000 (adjusted by the Consumer Price Index) per ton of excess emissions of NO_X. In part 76, § 76.13 states how to calculate the amount of excess emissions of NO_X. In particular, § 76.13(b) addresses the calculation where a unit is in an approved NO_X averaging plan under § 76.11.

Each unit in a NO_X averaging plan has an individual NO_X emission limitation (in lbs of NO_X/mmBtu of heat input) and an individual heat input limit. However, if a group showing of compliance by the units in the plan can be made (i.e., if the Btu-weighted average emission rate for the units is less than or equal to the Btu-weighted average emission rate had the units operated in compliance with the standard emission limitations applicable to the units in the absence of the NO_X averaging plan), the units are deemed to be in compliance with their individual emission limitations and heat input limits. *See* 40 CFR 76.11(d)(1)(ii) (A) and (C). Under § 76.13(b), if at least one unit in a NO_X averaging plan fails to meet its individual emission limitation or heat input limit and the units in the plan fail to make a group showing of compliance, excess emissions for NO_X equal the difference between actual total NO_X emissions for the group of units for the year and total NO_X emissions for the group for the year if each unit had met the standard emission limitations otherwise applicable to the unit.

Applying the current § 77.6(b), each unit that is in the NO_X averaging plan and that has excess emissions of NO_X must pay $2,000 (adjusted for inflation) per ton for the total amount of excess emissions under the plan as set forth in § 76.13(b). If more than one unit violates its individual emission limitation or heat input limit, this could result in multiple $2,000 penalty payments on the same ton of excess emissions. EPA proposes to change part 77 to prevent such a result. The proposal states that where a NO_X averaging plan covers one or more units that fail to meet their individual emission limitations or heat

provisions setting the time period for submission of supplemental information requested by the Administrator and establishing the list of persons on which the Administrator must serve notice of a draft offset plan are revised for the same reasons as the analogous revisions (discussed above) of the notice and comment procedure for Acid Rain permits. Further, the proposal requires service of automatic approvals of immediate-deduction offset plans only on the designated representative of the unit involved and no longer requires service on other persons. This seems appropriate since with the completion of the immediate deduction, the designated representative has fully completed his or her offset obligation and the approval of the offset plan will still be noticed in the Federal Register.

input limits for the year and a group showing of compliance cannot be made, excess emissions occur at all such units in the plan and the total amount of excess emissions for such units for the year will equal the amount of excess emissions calculated in accordance with § 76.13(b). The owners and operators of these units are responsible for paying the resulting excess emissions penalty under § 77.6(b). Which of the owners and operators actually make the payments is left to the owners and operators to determine so long as the correct total amount of penalties is paid.

VII. Part 78: Administrative Appeals

In a proposal promulgated on September 24, 1993, EPA proposed to add language to part 78 to clarify that, where a person contests a decision of the Administrator under the Acid Rain Program, exhaustion of the administrative appeals under part 78 is a prerequisite to judicial review. 58 FR 50088, 50104 (September 24, 1993). The proposal did not change the language in § 78.7 providing that decisions on administrative appeal will be effective pending such appeal unless a stay is granted by the Environmental Appeals Board or the Presiding Officer.

The Agency received comments on the proposed language. The commenters argued that the current part 78 is not ambiguous and should be interpreted not to require exhaustion of administrative remedies prior to judicial review. The commenters cite *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993), in which the Supreme Court held that exhaustion of administrative appeals is ''a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.'' According to the Supreme Court, the requirement for exhaustion of administrative remedies must be ''clearly'' imposed by statute or rule. *Id.* at 146. Moreover, the commenters allege that because part 78 does not include a complete list of the specific decisions of the Administrator that are appealable under part 78, a requirement for exhaustion of administrative remedies would not be sufficiently clear. Finally, the commenters state that since the September 24, 1994 proposal would make the Administrator's decisions inoperative pending administrative appeal, this may have a disruptive effect and the Agency should solicit additional comment on the effect of the September 24, 1993 proposal.

EPA proposes to modify the language in part 78 to state clearly that exhaustion of administrative appeals is a prerequisite for judicial review of any decision appealable under part 78, i.e., any final decision of the Administrator under the Acid Rain Program (excluding the matters listed in § 78.3(d)). In addition to the changes in the September 24, 1993 proposal, changes are proposed to make it clear that if a petition for review under part 78 is not filed for a decision appealable under that part, the exhaustion prerequisite for judicial review is not met and to provide that if such a petition is filed, the decision is inoperative pending completion of the administrative appeal procedures. One such change is the elimination of § 78.7 limiting the granting of stays of decisions during administrative appeal. Another change is the removal of the current provision in § 78.3(d)(1) barring appeal of matters for which a claim of error could have been, but was not, submitted.[28] This latter change will ensure that Agency decisions on such matters are reviewed by a superior agency authority (i.e., the Environmental Appeals Board) before judicial review can be sought.

These revisions in part 78 require a few conforming changes in part 72, which are included in today's proposal. Section 72.32 is revised to state that an affected unit is governed by its complete permit application until its Acid Rain permit is issued or denied. If an administrative appeal of a permit is filed under part 78, the permit is not in effect during the appeal and the application continues to govern until there is final agency action subject to judicial review. If an administrative appeal is filed under State appeal procedures, the State procedures will determine when the permit is ''issued'' and thus in effect. Further, since the revised provisions of this section and of sections in part 78 address in detail when an Acid Rain permit is final, the references to administrative appeals in the definition of ''Acid Rain permit'' in § 72.2 are superfluous and are removed.

EPA maintains that the approach proposed here for administrative appeals is consistent with *Darby* and provides an opportunity for the Agency to correct decisions that persons allege are erroneous. Because § 78.1 provides, in paragraph (a), a clear, general description of the decisions that are appealable under part 78 and, in paragraph (b), a list of the many (but not necessarily all) of the specific types of decisions that are appealable, EPA believes that the mandate to exhaust administative remedies prior to judicial appeal is clear and meets the requirements of *Darby*.

A few additional changes to part 78 are proposed. The provisions setting time periods for filings by parties (e.g., the 30-day time periods within which motions to intervene in part 78 appeal proceedings may be filed and within which parties may file objections to a proposed decision of a Presiding Officer) are changed. In order to provide more flexibility, the changes allow the Administrator, Environmental Appeals Board, or Presiding Officer (as appropriate) to set reasonable time periods that are shorter or longer time than the usually applicable time periods in the rule. Since a decision appealed under part 78 is inoperative pending completion of the administrative appeal, the Agency needs to have the ability to accelerate the appeals proceeding where delay due to the pending appeal will have significant, adverse consequences. In addition, the usually applicable time period within which the Environmental Appeals Board may decide *sua sponte* to review a Presiding Officer's proposed decision is lengthened to 45 days so that, before the Board must decide whether to undertake review, the Board will know whether any party has requested such review. Further, requirements for service of notices of petitions for administrative review are changed to be consistent with the changes proposed above for service requirements, under part 72, for notices of draft Acid Rain permits.

VIII. Administrative Requirements

A. Executive Order 12866

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

(1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, 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,

[28] In addition, since the right to administrative appeal is no longer conditioned on taking the opportunity to file a claim of error, references in several sections in part 78 to such opportunity are replaced by references to actual submissions of, or Agency responses to, such claims.

or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because the rule seems to raise novel legal or policy issues. As such, this action was submitted to OMB for review. Any written comments from OMB to EPA, any written EPA response to those comments, and any changes made in response to OMB suggestions or recommendations are included in the docket. The docket is available for public inspection at the EPA's Air Docket Section, which is listed in the **ADDRESSES** section of this preamble.

B. Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'') requires that the Agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year. Section 203 requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule.

Under section 205 of the Unfunded Mandates Act, the Agency must identify and consider a reasonable number of regulatory alternatives before promulating a rule for which a budgetary impact statement must be prepared. The Agency must select from those alternatives the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or the selection of this alternative is inconsistent with law.

Because this proposed rule is estimated to result in the expenditure by State, local, and tribal governments or the private sector of less than $100 million in any one year, the Agency has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, the Agency is not required to develop a plan with regard to small governments.

As discussed in detail in this preamble, the proposal has the net effect of reducing the burden of parts 72, 77, and 78 of the Acid Rain regulations on regulated entities (including both investor-owned and municipal utilities) and on State permitting authorities (which may include State, local, and tribal governments). For example, the proposal reduces the burden of obtaining or providing new units and retired units exemptions from the Acid Rain Program and of issuing Acid Rain permits.

The proposed revisions to part 73 also do not have a significant, adverse effect on regulated entities (including small entities) and have no effect on State permitting authorities. The proposal increases the annual unadjusted basic allowances for certain units and reduces the annual unadjusted basic allowances of other units, for a net reduction in total basic allowances of about 27,000 during 2000–2009 and 24,000 in 2010 and thereafter. Since sections 403(a) and 405(a)(3) of the Act set a nationwide cap on annual allowance allocations, the net reduction of allowances under this proposal will result in a small increase in the annual allocations of each of the other units that already receive allowances; the total increase will equal the amount of the above-discussed reductions. In addition, the proposal increases the annual bonus allowances by a total of about 3,000 during 2000–2009; these end in 2009 and are not subject to the cap.

In most cases where a unit's allowance allocation is reduced, the entire allocation is eliminated because EPA proposes to find that the unit is an unaffected unit and therefore to remove the unit from Table 2 or 3. These tables list affected units, which are expected to comply with all Acid Rain Program requirements. The loss of allowances is more than offset by the removal of any obligation of such a unit to meet the emission limitations and permitting, monitoring, and recording and recordkeeping requirements of the program. The only units that have reduced allowance allocations and that remain affected units are units that were conditionally granted allowances under section 405(g)(4) of the Act and therefore were listed on Table 3 of § 73.10(c). The allowances were conditioned on the owners and operators documenting that the units commenced construction before December 31, 1990 and commenced commercial operation by December 31, 1995. Because these conditions were not met by certain units, the units are not eligible for the allowances. See 58 FR 15641. Today's rule revisions simply reflect this ineligibility and propose to delete the units from Table 3 and add them to Table 2 with zero allowances. EPA maintains that the rule, therefore, does not have a significant, adverse impact on regulated entities, including entities that are owners or operators of the units removed from Table 3.

As part of the process of developing this proposal, EPA discussed with some State air regulators, the proposed revisions to part 72 affecting State permitting authorities. These air regulators expressed general support for the approach of reducing the need for States to review and approve new unit or retired unit exemptions. They also generally supported the approach of streamlining notice and comment procedures for issuance of Acid Rain permits and spelling out more clearly or reduce the differences between the Acid Rain and title V permitting procedures. The approach of allowing States not to adopt opt-in regulations and providing that the Administrator issue opt-in permits under part 74 for sources in such States was also generally supported.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1633.10) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460 or by calling (202) 260–2740.

The only additional information required by this collection of information is data concerning industrial units that exercise the option of applying for an exemption from most requirements of the Acid Rain Program, e.g., allowance, monitoring, and annual compliance requirements. This is a new industrial units exemption that EPA proposes, in today's rule, to establish. The requirements from which qualified industrial units will be exempt are significantly more burdensome than the information collection requirements for obtaining the exemption.[29] In order to

[29] Because the information collection burden on non-cogeneration industrial units in the absence of this new exemption was not included in the ICR for the current rule, the effect of removing such burden through the new exemption is not included in the ICR for today's proposal. Consequently, the ICR for today's proposal shows an increase in burden even though exempt industrial units will actually experience a significant net reduction in the burden imposed on them by the Acid Rain Program. In addition, as discussed in detail in this preamble, today's proposal includes other revisions that will reduce somewhat the burden of the program on

obtain the exemption, an industrial unit must meet the information collection requirements, which involve submission of information that is necessary, and will be used, for determining whether the units qualify and will continue to qualify for the exemption.

The additional information collection increases the estimated burden, as compared to the burden under the current regulations, by an average of 24 hours per response for about 15 responses. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to: the Director, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M St., S.W., Washington, DC 20460; and the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 27, 1996, a comment to OMB is best assured of having its full effect if OMB receives it by January 27, 1997. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, et seq., requires federal agencies to consider potential impacts of its regulations on small entities. Under 5 U.S.C. 604(a), an agency issuing a notice of proposed rulemaking must prepare and make available for public comment an initial regulatory flexibility analysis. Such an analysis is not required if the head of an agency determines, under 5 U.S.C. 605(b), that the proposed rule will not have a significant economic impact on a substantial number of small entities.

In the preamble of the January 11, 1993 rule, the Administrator certified that the rule, including the provisions revised by today's proposal, would not have a significant, adverse impact on small entities. 58 FR 3649. The proposed revisions are not significant enough to change the overall economic impact addressed in the January 11, 1993 preamble. Moreover, as discussed in detail in this preamble, the proposal has the net effect of reducing the burden of the Acid Rain regulations on regulated entities, including small entities. For example, the proposal makes it less burdensome to obtain new units and retired units exemptions from the Acid Rain Program. Further, as discussed in section VIII(B) of this preamble, while the proposal reduces and, in some cases, increases the allowance allocations for individual units, these changes in allocations will not have a significant, adverse effect on the owners or operators of the units. Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the revised rule will not have a significant, adverse impact on a substantial number of small entities.

E. Miscellaneous

In accordance with section 117 of the Act, issuance of this rule was preceded by consultation with any appropriate advisory committees, independent experts, and federal departments and agencies.

List of Subjects in 40 CFR Parts 72, 73, 74, 75, 77, and 78

Environmental protection, Acid rain, Administrative practice and procedure, Air pollution control, Compliance plans, Continuous emissions monitors, Electric utilities, Intergovernmental relations, Nitrogen oxides, Penalties, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: November 21, 1996.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter 1 of the Code of Federal Regulations is proposed to be amended as follows:

PART 72—[AMENDED]

1. The authority citation for part 72 is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651, *et seq.*

§ 72.1 [Amended]

2. Section 72.1 is amended by removing from paragraph (b) the words ''part 70'' and adding, in their place, the words ''parts 70 and 71''.

3. Section 72.2 is amended by: Removing the definition for ''Dispatch system''; adding in alphabetical order the definitions for ''Affected States'' and ''Eligible Indian tribe''; and revising paragraphs (1)(i) and (2) of the definition for ''Acid Rain emissions limitation'', the definition for ''Acid Rain permit or permit'', paragraph (2) of the definition of ''Coal-fired'', the definitions for ''Customer'' and ''Permitting authority'' and ''Phase I unit'', paragraph (3) of the definition of ''Power purchase commitment'', and the definitions for ''Submit or serve'' and ''State'' and ''State operating permits program'' to read as follows:

§ 72.2 Definitions.

* * * * *

Acid Rain emissions limitation means:

(1) * * *

(i) The tonnage equivalent of the allowances authorized to be allocated to an affected unit for use in a calendar year under section 404(a)(1), (a)(3), and (h) of the Act, or the basic Phase II allowance allocations authorized to be allocated to an affected unit for use in a calendar year, or the allowances authorized to be allocated to an opt-in source under section 410 of the Act for use in a calendar year;

* * * * *

(2) For purposes of nitrogen oxides emissions, the applicable limitation under part 76 of this chapter.

* * * * *

Acid Rain permit or permit means the legally binding written document or portion of such document, including any permit revisions, that is issued by a permitting authority under this part and specifies the Acid Rain Program requirements applicable to an affected source and to the owners and operators and the designated representative of the affected source or the affected unit.

* * * * *

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units that are not exempt. Because the burden reduction for non-exempt units is small relative to the total burden of the Acid Rain Program, the reduction is not reflected in the ICR for today's proposal.

Affected States means any affected State as defined in part 71 of this chapter.

* * * * *

Coal-fired means * * *

(2) For all other purposes under the Acid Rain Program, except for purposes of applying part 76 of this chapter, a unit is ''coal-fired'' if it uses coal or coal-derived fuel as its primary fuel (expressed in mmBtu); *provided* that, if the unit is listed in the NADB, the primary fuel is the fuel listed in the NADB under the data field ''PRIMEFUEL''.

* * * * *

Customer means a purchaser of electricity not for the purposes of retransmission or resale. For generating rural electrical cooperatives, the customers of the distribution cooperatives served by the generating cooperative will be considered customers of the generating cooperative.

* * * * *

Eligible Indian tribe means any eligible Indian tribe as defined in part 71 of this chapter.

* * * * *

Permitting authority means either:

(1) When the Administrator is responsible for administering Acid Rain permits under subpart G of this part, the Administrator or a delegatee agency authorized by the Administrator; or

(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to administer Acid Rain permits under subpart G of this part and part 70 of this chapter.

* * * * *

Phase I unit means any affected unit, except an affected unit under part 74 of this chapter, that is subject to an Acid Rain emissions reduction requirement or Acid Rain emissions limitation beginning in Phase I; or any unit exempted under § 72.8 that, but for such exemption, would be subject to an Acid Rain emissions reduction requirement or Acid Rain emissions limitation beginning in Phase I.

* * * * *

Power purchase commitment means a commitment or obligation of a utility to purchase electric power from a facility pursuant to:

* * * * *

(3) A letter of intent or similar instrument committing to purchase power (actual electrical output or generator output capacity) from the source at a previously offered or lower price and a power sales agreement applicable to the source is executed within the time frame established by the terms of the letter of intent but no later than November 15, 1993 or, where the letter of intent does not specify a time frame, a power sale agreement applicable to the source is executed on or before November 15, 1993; or

* * * * *

Submit or serve means to send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation:

(1) In person;

(2) By United States Postal Service; or

(3) By other equivalent means of dispatch, or transmission, and delivery. Compliance with any ''submission'', ''service'', or ''mailing'' deadline shall be determined by the date of dispatch, transmission, or mailing and not the date of receipt.

* * * * *

State means one of the 48 contiguous States and the District of Columbia, any non-federal authorities in or including such States or the District of Columbia (including local agencies, interstate assocations, and State-wide agencies), and any eligible Indian tribe in an area in such State or the District of Columbia. The term ''State'' shall have its conventional meaning when used in the phrase ''the 48 contiguous States.''

State operating permit program means an operating permit program that the Administrator has approved under part 70 of this chapter.

* * * * *

4. Section 72.6 is amended by adding paragraphs (b)(9) and revising paragraph (c) (1) and (2) to read as follows:

§ 72.6 Applicability.

* * * * *

(b) * * *

(9) A unit for which an exemption under § 72.7, § 72.8, or § 72.14 is in effect. Although such a unit is not an affected unit, the unit shall be subject to the requirements of § 72.7, § 72.8, or § 72.14, as applicable to the exemption.

(c) A certifying official of an owner or operator of any unit may petition the Administrator for a determination of applicability under this section.

(1) Petition Content. The petition shall be in writing and include identification of the unit and relevant facts about the unit. In the petition, the certifying official shall certify, by his or her signature, the statement set forth at § 72.21(b)(2). Within 10 business days of receipt of any written determination by the Administrator covering the unit, the certifying official shall provide each owner or operator of the unit, facility, or source with a copy of the petition and a copy of the Administrator's response.

(2) *Timing.* The petition may be submitted to the Administrator at any time but, if possible, should be submitted prior to the issuance (including renewal) of a Phase II Acid Rain permit for the unit.

* * * * *

5. Section 72.7 is revised to read as follows:

§ 72.7 New units exemption.

(a) *Applicability.* This section applies to any new utility unit that has not previously lost an exemption under paragraph (e)(4) of this section and that, in each year starting with the first year for which the unit is to be exempt under this section,

(1) serves one or more generators with total nameplate capacity of 25 MWe or less,

(2) burns fuel that does not include any coal or coal-derived fuel (except coal-derived gaseous fuel with a sulfur content no greater than natural gas) and

(3) burns gaseous fuel with an annual average sulfur content of 0.05 percent or less by weight (as determined under paragraph (c)(3) of this section) and nongaseous fuel with an annual average sulfur content of 0.05 percent or less by weight (as determined under paragraph (c)(3) of this section).

(b)(1) Any new utility unit that meets the requirements of paragraph (a) of this section and that is not allocated any allowances on Table 2 or 3 of § 73.10 of this chapter shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, and §§ 72.10 through 72.13.

(2) The exemption under paragraph (b)(1) of this section shall be effective on January 1 of the first full calendar year for which the unit will meet the requirements of paragraph (a) of this section. By December 31 of the first year for which the unit is to be exempt under this section, a statement signed by the designated representative (authorized in accordance with subpart B of this part) or, if no designated representative has been authorized, a certifying official of each owner of the unit shall be submitted to permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit. If the Administrator is not the permitting authority, a copy of the statement shall be submitted to the Administrator. The statement, which shall be in a format prescribed by the Administrator, shall identify the unit, state the nameplate capacity of each generator served by the unit and the fuels currently burned or expected to be burned by the unit and their sulfur content by weight, and state that the

owners and operators of the unit will comply with paragraph (e) of this section.

(c)(1) Any new utility unit that meets the requirements of paragraph (a) of this section and that is allocated one or more allowances in Table 2 or 3 of § 73.10 of this chapter shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, and §§ 72.10 through 72.13, if each of the following requirements are met:

(i) The designated representative (authorized in accordance with subpart B of this part) or, if no designated representative has been authorized, a certifying official of each owner of the unit submits to the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit a statement (in a format prescribed by the Administrator) that

(A) identifies the unit and states the nameplate capacity of each generator served by the unit and the fuels currently burned or expected to be burned by the unit and their sulfur content by weight,

(B) states that the owners and operators of the unit will comply with paragraph (e) of this section,

(C) surrenders allowances equal in number to, and with the same or earlier compliance use date as, all of those allocated to the unit under subpart B of part 73 of this chapter for the first year that the unit is to be exempt under this section and for each subsequent year, and

(D) surrenders any proceeds for allowances under paragraph (c)(1)(i)(C) withheld from the unit under § 73.10 of this chapter. If the Administrator is not the permitting authority, a copy of the statement shall be submitted to the Administrator.

(ii) The Administrator deducts from the unit's Allowance Tracking System account allowances under paragraph (c)(1)(i)(C) of this section and receives proceeds under paragraph (c)(1)(i)(D) of this chapter. Upon completion of such deductions and receipt of such proceeds, the Administrator will close the unit's Allowance Tracking System account and notify the designated representative (or certifying official) and, if the Administrator is not the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit, the permitting authority.

(2) The exemption under paragraph (c)(1) of this section shall be effective on January 1 of the first full calendar year for which the requirements of paragraphs (a) and (c)(1) of this section are met.

(3) Compliance with the requirement that fuel burned during the year have an annual average sulfur content of 0.05 percent by weight or less shall be determined as follows:

(i) For gaseous fuel burned during the year, if natural gas is the only gaseous fuel burned, the requirement is assumed to be met;

(ii) For gaseous fuel burned during the year where other gas in addition to or besides natural gas is burned, the requirement is met if the annual average sulfur content is equal to or less than 0.05 percent by weight. The annual average sulfur content, as a percentage by weight, for the gaseous fuel burned shall be calculated as follows:

$$\%S_{annual} = \frac{\sum_{n=1}^{last} \%S_n V_n d_n}{\sum_{n=1}^{last} V_n d_n}$$

Where:

$\%S_{annual}$ = annual average sulfur content of the fuel burned during the year, as a percentage by weight;

$\%S_n$ = sulfur content of the nth sample of the fuel delivered during the year to the unit, as a percentage by weight;

V_n = volume of the fuel in a delivery during the year to the unit of which the nth sample is taken, in standard cubic feet; or, for fuel delivered during the year to the unit continuously by pipeline, volume of the fuel delivered starting from when the nth sample of such fuel is taken until the next sample of such fuel is taken, in standard cubic feet;

d_n = density of the nth sample of the fuel delivered during the year to the unit, in lb per standard cubic foot; and

n = each sample taken of the fuel delivered during the year to the unit, taken at least once for each delivery; or, for fuel that is delivered during the year to the unit continuously by pipeline, at least once each quarter during which the fuel is delivered.

(iii) For nongaseous fuel burned during the year, the requirement is met if the annual average sulfur content is equal to or less than 0.05 percent by weight. The annual average sulfur content, as a percentage by weight, shall be calculated using the equation in paragraph (c)(3)(ii) of this section. In lieu of the factor, volume times density (V_n d_n), in the equation, the factor, mass (M_n), may be used, where M_n is: mass of the nongaseous fuel in a delivery during the year to the unit of which the nth sample is taken, in lb; or, for fuel delivered during the year to the unit continuously by pipeline, mass of the nongaseous fuel delivered starting from when the nth sample of such fuel is taken until the next sample of such fuel is taken, in lb.

(d)(1) A utility unit that was issued a written exemption under this section and that meets the requirements of paragraph (a) of this section shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, and §§ 72.10 through 72.13 and shall be subject to the requirements of paragraphs (d)(2) and (e) of this section in lieu of the requirements set forth in the written exemption.

(2) If a utility unit under paragraph (d)(1) of this section is allocated one or more allowances in Table 2 or 3 of § 73.10 of this chapter, the designated representative (authorized in accordance with subpart B of this part) or, if no designated representative has been authorized, a certifying official of each owner of the unit shall submit to the permitting authority that issued the written exemption a statement (in a format prescribed by the Administrator) meeting the requirements of paragraph (c)(1)(i)(C) and (D) of this section. The statement shall be submitted by December 31, 1997 and, if the Administrator is not the permitting authority, a copy shall be submitted to the Administrator.

(e) *Special Provisions.* (1) The owners and operators and, to the extent applicable, the designated representative of a unit exempted under this section shall comply with the requirements of the Acid Rain Program concerning all periods for which the exemption is not in effect, even if such requirements arise, or must be complied with, after the exemption takes effect.

(2) For any period for which a unit is exempt under this section, the unit is not an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter and is not eligible to be an opt-in source under part 74 of this chapter. As an unaffected unit, the unit shall continue to be subject to any other applicable requirements under parts 70 and 71 of this chapter.

(3) For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under this section shall retain at the source that includes the unit records demonstrating that the requirements of paragraph (a) of this section are met. The 5-year period for keeping records may be extended for cause, at any time prior to the end of the period, in writing by the Administrator or the permitting authority.

(i) Such records shall include, for each delivery of fuel to the unit, the type of fuel and the sulfur content or, for fuel delivered to the unit

continuously by pipeline, the type of fuel and the sulfur content of each sample taken.

(ii) The owners and operators bear the burden of proof that the requirements of paragraph (a) of this section are met.

(4) *Loss of exemption.* (i) On the earliest of the following dates, a unit exempt under paragraph (a) of this section shall lose its exemption and become an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter:

(A) The date on which the unit first serves one or more generators with total nameplate capacity in excess of 25Mwe;

(B) The date on which the unit burns any coal or coal-derived fuel except for coal-derived gaseous fuel with the sulfur content no greater than natural gas; or

(C) January 1 of the year following the year in which the annual average sulfur content for gaseous fuel burned at the unit exceeds 0.05 percent by weight (as determined under paragraph (c)(3) of this section) or for nongaseous fuel burned at the unit exceeds 0.05 percent by weight (as determined under paragraph (c)(3) of this section).

(ii) Notwithstanding § 72.30(b) and (c), the designated representative for a unit that loses its exemption under this section shall submit a complete Acid Rain permit application on the later of January 1, 1998 or 60 days after the date on which the unit is no longer exempt.

(iii) For the purpose of applying monitoring requirements under part 75 of this chapter, a unit that loses its exemption under this section shall be treated as a new unit that commenced commercial operation on the date on which the unit is no longer exempt.

6. Section 72.8 is revised to read as follows:

§ 72.8 Retired units exemption.

(a) This section applies to any affected unit that is permanently retired.

(b)(1) Any affected unit that is permanently retired shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, §§ 72.10 through 72.13, and subpart B of part 73 of this chapter.

(2) The exemption under paragraph (b)(1) of this section shall become effective on January 1 of the first full calendar year during which that the unit will be permanently retired. By December 31 of the first year that the unit is to be exempt under this section, the designated representative (authorized in accordance with subpart B of this section) of the unit shall submit a statement to the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit. If the Administrator is not the permitting authority, a copy of the statement shall be submitted to the Administrator. The statement shall state (in a format prescribed by the Administrator) that the unit is permanently retired and will comply with the requirements of paragraph (d) of this section.

(c) A utility unit that was issued a written exemption under this section and that is permanently retired shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, §§ 72.10 through 72.13, and subpart B of part 73 of this chapter, and shall be subject to the requirements of paragraph (d) of this section in lieu of the requirements set forth in the written exemption.

(d) *Special Provisions.* (1) A unit exempt under this section shall not emit any sulfur dioxide and nitrogen oxides starting on the date that the exemption takes effect. The owners and operators of the unit will be allocated allowances in accordance with subpart B of part 73 of this chapter. If the unit is a Phase I unit, for each calendar year in Phase I, the designated representative of the unit shall submit a Phase I permit application in accordance with subparts C and D of this part 72 and an annual certification report in accordance with §§ 72.90 through 72.92 and is subject to §§ 72.95 and 72.96.

(2) A unit exempt under this section shall not resume operation unless the designated representative of the source that includes the unit submits a complete Acid Rain permit application under § 72.31 for the unit not less than 24 months prior to the later of January 1, 2000 or the date the unit is to resume operation.

(3) The owners and operators and, to the extent applicable, the designated representative of a unit exempted under this section shall comply with the requirements of the Acid Rain Program concerning all periods for which the exemption is not in effect, even if such requirements arise, or must be complied with, after the exemption takes effect.

(4) For any period for which a unit is exempt under this section, the unit is not an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter and is not eligible to be an opt-in source under part 74 of this chapter. As an unaffected unit, the unit shall continue to be subject to any other applicable requirements under parts 70 and 71 of this chapter.

(5) For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under this section shall retain at the source that includes the unit records demonstrating that the unit is permanently retired. The 5-year period for keeping records may be extended for cause, at any time prior to the end of the period, in writing by the Administrator or the permitting authority. The owners and operators bear the burden of proof that the unit is permanently retired.

(6) *Loss of exemption.* (i) On the earlier of the following dates, a unit exempt under this section shall lose its exemption and become an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter:

(A) The date on which the designated representative submits an Acid Rain permit application under paragraph (d)(2) of this section; or

(B) The date on which the designated representative is required under paragraph (d)(2) of this section to submit an Acid Rain permit application.

(ii) For the purpose of applying monitoring requirements under part 75 of this chapter, a unit that loses its exemption under this section shall be treated as a new unit that commenced commercial operation on the date on which the unit resumes operation.

§ 72.9 [Amended]

7. Section 72.9 is amended by:

a. removing from paragraphs (b)(1) and (2) the words ''and section 407 of the Act and regulations implementing section 407 of the Act'';

b. removing from paragraph (b)(3) the words ''and regulations implementing section 407 of the Act'';

c. removing from paragraph (c)(6) the words ''the written exemption under §§ 72.7 and 72.8'' and adding in their place, the words ''an exemption under §§ 72.7, 72.8, or 72.14'';

d. removing from paragraph (f)(1)(ii) the punctuation ''.'' and adding in its place the words ''; *provided* that a 3-year period (rather than a 5-year period) for recordkeeping under part 75 shall apply.'' ;

e. removing from paragraph (g)(1) the words ''a written exemption under § 72.7 or § 72.8'' and adding, in their place, the words ''an exemption under §§ 72.7, 72.8, or 72.14'';

f. removing from paragraph (g)(6) the words ''part 76 of this chapter'' and adding, in their place, the words ''§ 76.11 of this chapter; and

g. removing from paragraph (h) introductory text the words ''a written exemption under §§ 72.7 or 72.8'' and adding, in their place, the words ''an exemption under §§ 72.7, 72.8, or 72.14''.

§ 72.13 [Amended]

8. Section 72.13 is amended by:

a. removing paragraphs (a)(1), (a)(5), (a)(6), (a)(7), (a)(9), and (a)(10);

b. redesignating paragraph (a)(2) as paragraph (a)(1);

c. redesignating paragraph (a)(3) as paragraph (a)(2);

d. redesignating paragraph (a)(4) as paragraph (a)(3), and

e. redesignating paragraph (a)(8) as paragraph (a)(4).

9. Section 72.14 is added to read as follows:

§ 72.14 Industrial units exemption.

(a) *Applicability.* This section applies to any non-cogeneration, utility unit that has not previously lost an exemption under paragraph (d)(4) of this section and that meets the following criteria:

(1) Starting on the date of the signing of the interconnection agreement under paragraph (a)(2) of this section and thereafter, there has been no owner or operator of the unit, subsidiary or affiliate or parent company of an owner or operator of the unit, or combination thereof whose principal business is the sale, transmission, or distribution of electricity or that is a public utility under the jurisdiction of a State or local utility regulatory authority;

(2) On or before March 23, 1993, the owners or operators of the unit entered into an interconnection agreement and any related power purchase agreement with a person whose principal business is the sale, transmission, or distribution of electricity or that is a public utility under the jurisdiction of a State or local utility regulatory authority, requiring the generator or generators served by the unit to produce electricity for sale only for incidental electricity sales to such person;

(3) The unit served or serves one or more generators that, in 1985 or any year thereafter, actually produced electricity for sale only for incidental electricity sales required under the interconnection agreement and any related power purchase agreement under paragraph (a)(2) of this section; and

(4) Incidental electricity sales, under this section, are total annual sales of electricity produced by a generator that do not exceed 10 percent of the nameplate capacity of that generator times 8,760 hours per year and do not exceed 10 percent of the actual annual electric output of that generator.

(b) *Petition for exemption.* The designated representative (authorized in accordance with subpart B of this part) of a unit under paragraph (a) of this section may submit to the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit a complete petition for an exemption for the unit from certain requirements of the Acid Rain Program. If the Administrator is not the permitting authority, a copy of the petition shall be submitted to the Administrator. A complete petition shall include the following elements in a format prescribed by the Administrator:

(1) Identification of the unit;

(2) A statement that the unit is not a cogeneration unit;

(3) A list of the current owners and operators of the unit and any other owners and operators of the unit, starting on the date of the signing of the interconnection agreement under paragraph (a)(2) of this section, and a statement that, starting on that date, there has been no owner or operator of the unit, subsidiary or affiliate or parent company of an owner or operator of the unit, or combination thereof whose principal business is the sale, transmission, or distribution of electricity or that is a public utility under the jurisdiction of a State or local utility regulatory authority;

(4) A summary of the terms of the interconnection agreement and any related power purchase agreement under paragraph (a)(2) of this section, including the date on which the agreement was signed, the amount of electricity that may be required to be produced for sale by the generator served by the unit, and the provisions for expiration or termination of the agreement;

(5) A copy of the interconnection agreement and any related power purchase agreement under paragraph (a)(2) of this section;

(6) The nameplate capacity of each generator served by the unit;

(7) For each year starting in 1985, the actual annual electrical output of each generator served by the unit, the total amount of electricity produced for sales to any customer by each generator, and the total amount of electricity produced and sold as required by the interconnection agreement and any related power purchase agreement under paragragh (a)(2) of this section;

(8) A statement that the generator or generators served by the unit actually produced electricity for sale only for incidental electricity sales (in accordance with paragraph (a)(4) of this section) required under the interconnection agreement and any related power purchase agreement under paragraph (a)(2) of this section; and

(9) The special provisions of paragraph (d) of this section.

(c) *Permitting Authority's Action.*

(1) (i) For any unit meeting the requirements of paragraphs (a) and (b) of this section, the permitting authority shall issue an exemption from the requirements of the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6 and §§ 72.10 through 72.13.

(ii) If a petition for exemption is submitted for a unit but the designated representative fails to demonstrate that the requirements of paragraph (a) are met, the permitting authority shall deny an exemption under this section.

(2) In issuing or denying an exemption under paragraph (c)(1) of this section, the permitting authority shall treat the petition for exemption as a permit application and apply the procedures used for issuing or denying draft, proposed (if the Administrator is not the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit), and final Acid Rain permits.

(3) An exemption issued under paragraph (c)(1)(i) of this section shall become effective on January 1 of the first full year the unit meets the requirements of paragraph (a) of this section.

(4) An exemption issued under paragraph (c)(1)(i) of this section shall be effective until the date on which the unit loses the exemption under paragraph (d)(4) of this section.

(d) *Special Provisions.* (1) The owners and operators and, to the extent applicable, the designated representative of a unit exempt under this section shall comply with the requirements of the Acid Rain Program concerning all periods for which the exemption is not in effect, even if such requirements arise, or must be complied with, after the exemption takes effect.

(2) For any period for which a unit is exempt under this section, the unit is not an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter and is not eligible to be an opt-in source under part 74 of this chapter. As an unaffected unit, the unit shall continue to be subject to any other applicable requirements under parts 70 and 71 of this chapter.

(3) For a period of 5 years from the date the records are created, the owners and operators of a unit exempt under this section shall retain at the source that includes the unit records demonstrating that the requirements of paragraph (a) of this section are met. The 5-year period for keeping records may be extended for cause, at any time prior to the end of the period, in writing by the Administrator or the permitting authority. Such records shall include the following information:

(i) A copy of the interconnection agreement and any related power

purchase agreement under paragraph (a)(2) of this section;

(ii) The nameplate capacity of each generator served by the unit; and

(iii) For each year starting in 1985, the actual annual electrical output of each generator served by the unit, the total amount of electricity produced for sales to any customer by each generator, and the total amount of electricity produced and sold as required by the interconnection agreement and any related power purchase agreement under paragraph (a)(2) of this section.

(4) *Loss of exemption.* (i) On the earliest of the following dates, a unit exempt under this section shall lose its exemption and become an affected unit under the Acid Rain Program and parts 70 and 71 of this chapter:

(A) The first date on which there is an owner or operator of the unit, subsidiary or affiliate or parent company of an owner or operator of the unit, or combination thereof, whose principal business is the sale, transmission, or distribution of electricity or that is a public utility under the jurisdiction of a State or local utility regulatory authority.

(B) If any generator served by the unit actually produces any electricity for sale other than for sale to the person specified as the purchaser in the interconnection agreement or any related power purchase agreement under paragraph (a)(2) of this section, then the day after the date on which such electricity is sold.

(C) If any generator served by the unit actually produces any electricity for sale to the person specified as the purchaser in the interconnection agreement or any related power purchase agreement under paragraph (a)(2) of this section where such sale is not required under that interconnection agreement or related power purchase agreement or where such sale will result in total sales for a calendar year exceeding 10 percent of the nameplate capacity of that generator times 8,769 hours per year, then the day after the date on which such sale is made.

(D) If any generator served by the unit actually produces any electricity for sale to the person specified as the purchaser in the interconnection agreement or related power purchase agreement under paragraph (a)(2) of this section where such sale results in total sales for a calendar year exceeding 10 percent of the actual electric output of the generator for that year, then January 1 of the year after such year.

(E) If the interconnection agreement or related power purchase agreement under paragraph (a)(2) of this section expires or is terminated and any generator served by the unit actually produces any electricity for sale, then the day after the date on which such electricity is sold.

(ii) Notwithstanding § 72.30 (b) and (c), the designated representative for a unit that loses its exemption under this section shall submit a complete Acid Rain permit application on the later of January 1, 1998 or 60 days after the date on which the unit is no longer exempted.

(iii) For the purpose of applying monitoring requirements under part 75 of this chapter, a unit that loses its exemption under this section shall be treated as a new unit that commenced commercial operation on the date on which the unit is no longer exempted.

10. Section 72.22 is amended by adding paragraph (e) to read as follows:

§ 72.22 Alternate designated representative.

* * * * *

(e)(1) Notwithstanding paragraph (a) of this section, the certification of representation may designate two alternate designated representatives for a unit if:

(i) the unit's utility system is a subsidiary of a holding company with two or more subsidiaries that are utility systems in two or more of the contiguous 48 States or the District of Columbia; and

(ii) a single designated representative is designated for all the units in the utility-system subsidiaries of the holding company under paragraph (e)(1)(i) of this section and submits a NO_x averaging plan under § 76.11 of this chapter that covers all such units subject to part 76 of this chapter, is approved by the permitting authority, and continues to be in effect.

(2) Except in this paragraph (e), whenever the term ''alternate designated representative'' is used under the Acid Rain Program, the term shall be construed to include either of the alternate designated representatives authorized under this paragraph (e). Except in this section, § 72.23, and § 72.24, whenever the term ''designated representative'' is used under the Acid Rain Program, the term shall be construed to include either of the alternate designated representatives authorized under this paragraph (e).

11. Section 72.24 is amended by revising paragraphs (a) (3), (5), (10), and (11) to read as follows:

§ 72.24 Certificate of representation.

(a) * * *

(3) A list of the owners and operators of the affected source and of each affected unit at the source.

* * * * *

(5) The following statement: ''I certify that I have given notice of the agreement, selecting me as the 'designated representative' for the affected source and each affected unit at the source identified in this certificate of representation, in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice.''

* * * * *

(10) If an alternate designated representative is authorized in the certificate of representation, the following statement: ''The agreement by which I was selected as the alternate designated representative includes a procedure for the owners and operators of the source and affected units at the source to authorize the alternate designated representative to act in lieu of the designated representative.''

(11) The signature of the designated representative and any alternate designated representative who is authorized in the certificate of representation and the date signed.

* * * * *

12. Section 72.25 is amended by removing from paragraph (a) the words ''submitted to'' and adding, in their place, the words ''received by''.

13. Section 72.30 is amended by removing paragraph (b)(3) and adding paragraph (e) to read as follows:

§ 72.30 Requirement to apply.

* * * * *

(e) Where two or more affected units are located at a source, the permitting authority may, in its sole discretion, allow the designated representative of the source to submit, under paragraph (a) or (c) of this section, two or more Acid Rain permit applications covering the units at the source, *provided* that each affected unit is covered by one and only one such application.

14. Section 72.31 is amended by removing from paragraph (b) the words ''Phase II unit'' and adding in their place the words ''affected unit (except as provided under part 74 of this chapter)''.

15. Section 72.32 is amended by revising paragraphs (b) and (c) and adding paragraph (d) to read as follows:

§ 72.32 Permit application shield and binding effect of permit application.

* * * * *

(b) Prior to the date on which an Acid Rain permit is issued or denied, an affected unit governed by and operated

in accordance with the terms and requirements of a timely and complete Acid Rain permit application shall be deemed to be operating in compliance with the Acid Rain Program.

(c) A complete Acid Rain permit application shall be binding on the owners and operators and the designated representative of the affected source and the affected units covered by the permit application and shall be enforceable as an Acid Rain permit from the date of submission of the permit application until the issuance or denial of an Acid Rain permit covering the units.

(d) If agency action concerning a permit is appealed under part 78 of this chapter, issuance or denial of the permit shall occur when the Administrator takes final agency action subject to judicial review.

16. Section 72.33 is amended by adding a sentence to the end of paragraph (b)(3) to read as follows:

§ 72.33 Identification of dispatch system.

* * * * *

(b) * * *

(3) * * * A designated representative may request, and the Administrator may grant at his or her discretion, an exemption allowing the submission of an identification of dispatch system after the otherwise applicable deadline for such submission.

* * * * *

17. Section 72.40 is amended by:

a. removing from paragraph (a)(2) the words ''applicable emission limitation established by regulations implementing section 407 of the Act'' and adding, in their place, the words ''applicable emission limitation under §§ 76.5, 76.6, and 76.7 of this chapter'';

b. removing from paragraph (a)(2) the words ''in accordance with section 407 and the regulations implementing section 407'' and adding, in their place, the words ''part 76 of this chapter'';

c. removing from paragraph (b)(1) the words ''an NO_X averaging plan contained in part 76 of this chapter'' and adding, in their place, the words ''a NO_X averaging plan under § 76.11 of this chapter''; and

d. removing from paragraphs (c) introductory text, (c)(1), and (d)(1) the words ''regulations implementing section 407 of the Act'' and adding, in their place, the words ''part 76 of this chapter''.

§ 72.41 [Amended]

18. Section 72.41 is amended by: removing from paragraph (b)(3) the words ''90 days'' and adding, in their place, the words ''6 months (or 90 days if submitted in accordance with § 72.82)''; and removing from paragraph (e)(1)(ii) the words ''section 407 of the Act and regulations implementing section 407 of the Act'' and adding, in their place, the words ''part 76 of this chapter''.

§ 72.43 [Amended]

19. Section 72.43 is amended by: removing from paragraph (b)(2)(iii)(B) the words ''under § 72.92'' and adding, in their place, the words ''under § 72.91(b)''; removing from paragraph (b)(4) the words ''90 days'' and adding, in their place, the words ''6 months (or 90 days if submitted in accordance with § 72.82 or § 72.83)''; and removing from paragraph (f)(1)(i) the words ''section 407 of the Act and regulations implementing section 407 of the Act'' and adding, in their place, the words ''part 76 of this chapter''.

§ 72.44 [Amended]

20. Section 72.44 is amended by:

a. removing from paragraph (c)(3) the words ''December 31'' and adding, in their place, the words ''June 1'';

b. removing from paragraphs (g) (1)(i) and (2) the words ''proposed permit revision'' and adding, in their place, the words ''requested permit modification'';

c. adding between the first and second sentences of paragraphs (g) (1)(i) and (2), introductory text, the words ''If the Administrator is not the permitting authority, a copy of the requested permit modification shall be submitted to the Administrator.'';

d. removing from paragraph (g)(2)(iii) the words ''December 21'' and adding, in their place, the words ''December 31''; and

e. removing from paragraph (h)(1)(ii) the words ''section 407 of the Act and regulations implementing section 407 of the Act'' and adding, in their place, the words ''part 76 of this chapter''.

§ 72.51 [Amended]

21. Section 72.51 is amended by: removing the words ''parts 73, 75, 77, and 78 of this chapter, and regulations implementing section 407 of the Act'' and adding, in their place, the words ''parts 73, 74, 75, 76, 77, and 78 of this chapter''; and removing the words ''of this part''.

22. Section 72.60 is revised to read as follows:

§ 72.60 General.

(a) *Scope.* This subpart and parts 74, 76, and 78 of this chapter contain the procedures for federal issuance of Acid Rain permits for Phase I of the Acid Rain Program and Phase II for sources for which the Administrator is the permitting authority under § 72.74. This part and parts 74, 76, and 78 of this chapter supersede part 71 of this chapter to the extent that they contain provisions that are not included in, or that expressly eliminate or replace provisions of, part 71 of this chapter.

(1) The provisions of subparts C, D, E, F, and H of this part and of parts 74, 76, and 78 of this chapter replace the provisions of part 71 of this chapter concerning, for Acid Rain permit applications and permits: submission, content, and effect of permit applications; content and requirements of compliance plans and compliance options; content of permits and permit shield; procedures for determining completeness of permit applications; issuance of draft permits; public notice and comment and public hearings on draft permits; response to comments on draft permits; issuance of permits; permit revisions; and administrative appeal procedures. The provisions of part 71 of this chapter concerning Indian tribes, delegation of a part 71 program, affected State review of draft permits, and public petitions to reopen a permit for cause are not eliminated or replaced by this part or part 74, 76, or 78 of this chapter.

(2) The procedures in this subpart do not apply to the issuance of Acid Rain permits by State permitting authorities with operating permit programs approved under part 70 of this chapter, except as expressly provided in subpart G of this part.

(b) *Permit Decision Deadlines.* Except as provided in § 72.74(c)(1)(i), the Administrator will issue or deny an Acid Rain permit under § 72.69(a) within 6 months of receipt of a complete Acid Rain permit application submitted for a unit, in accordance with § 72.21, at the U.S. EPA Regional Office for the Region in which the source is located.

(c) *Use of Direct Final Procedures.* The Administrator may, in his or her discretion, issue, as single document, a draft Acid Rain permit in accordance with § 72.62 and an Acid Rain permit in final form and may provide public notice of the opportunity for public comment on the draft Acid Rain permit in accordance with § 72.65. The Administrator may provide that, if no significant, adverse comment on the draft Acid Rain permit is timely submitted, the Acid Rain permit will be deemed to be issued on a specified date without further notice and, if such significant, adverse comment is timely submitted, an Acid Rain permit or denial of an Acid Rain permit will be issued in accordance with § 72.69. Any notice provided under this paragraph (c) will include a description of the procedure in the prior sentence.

23. Section 72.61 is amended by revising paragraphs (a) and (b)(2)(i) and adding paragraph (b)(3) to read as follows:

§ 72.61 Completeness.

(a) *Determination of Completeness.* The Administrator will determine whether the Acid Rain permit application is complete within 60 days of receipt by the U.S. EPA Regional Office for the region in which the source is located. The permit application shall be deemed to be complete if the Administrator fails to notify the designated representative to the contrary within 60 days of receipt.

(b) * * *

(2)(i) Within a reasonable period determined by the Administrator, the designated representative shall submit the information required under paragraph (b)(1) of this section.

* * * * *

(3) Any designated representative who fails to submit any relevant information or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary information or corrected information to the Administrator.

24. Section 72.65 is amended by revising paragraphs (b)(1)(ii), (b)(1)(iii), and (b)(2) to read as follows:

§ 72.65 Public notice of opportunities for public comment.

* * * * *

(b) * * *

(1) * * *

(ii) The air pollution control agencies of affected States; and

(iii) Any interested person.

(2) Giving notice by publication in the Federal Register and in a newspaper of general circulation in the area where the source covered by the Acid Rain permit application is located or in a State publication designed to give general public notice. Notwithstanding the prior sentence, if a draft permit requires the affected units at a source to comply with § 72.9(c)(1) and to meet any applicable emission limitation for NO_X under §§ 76.5, 76.6, 76.7, 76.8, or 76.11 of this chapter and does not include for any unit a compliance option under § 72.44, part 74 of this chapter, or § 76.10 of this chapter, the Administrator may, in his or her discretion, provide notice of the draft permit by Federal Register publication and may omit notice by newspaper or State publication.

* * * * *

25. Section 72.69 is amending by revising paragraph (a) to read as follows:

§ 72.69 Issuance and effective date of Acid Rain permits.

(a) After the close of the public comment period, the Administrator will issue or deny an Acid Rain permit. The Administrator will serve a copy of any Acid Rain permit and the response to comments on the designated representative for the source covered by the issuance or denial and serve written notice of the issuance or denial on any persons who are entitled to written notice under § 72.65(b)(1) (ii) or (iii) or who submitted written or oral comments on the issuance or denial of the draft Acid Rain permit. The Administrator will also give notice in the Federal Register.

* * * * *

26. Section 72.70 is revised to read as follows:

§ 72.70 Relationship to title V operating permit program.

(a) *Scope.* This subpart sets forth criteria for acceptance of State acid rain programs, the procedure for including State acid rain programs in a title V operating permit program, and the requirements with which State permitting authorities with accepted programs shall comply, and with which the Administrator will comply in the absence of an accepted State program, to issue Phase II Acid Rain permits.

(b) *Relationship to operating permit program.* Each State permitting authority with an affected source shall act in accordance with this part and parts 70, 74, 76, and 78 of this chapter for the purpose of incorporating Acid Rain Program requirements into each affected source's operating permit or for issuing exemptions under § 72.14. To the extent that this part or parts 74, 76, or 78 of this chapter contain provisions that are not included in, or that expressly eliminate or replace provisions of, part 70 of this chapter, this part and parts 74, 76, and 78 of this chapter shall take precedence.

27. Section 72.71 is revised to read as follows:

§ 72.71 Acceptance of State Acid Rain programs—general.

(a) Each State shall submit, to the Administrator for review and acceptance, a State Acid Rain program meeting the requirements of §§ 72.72 and 72.73.

(b) The Administrator will review each State Acid Rain program or portion of a State Acid Rain program and accept, by notice in the Federal Register, all or a portion of such program to the extent that it meets the requirements of §§ 72.72 and 72.73. At his or her discretion, the Administrator may accept, with conditions and by notice in the Federal Register, all or a portion of such program despite the failure to meet requirements of §§ 72.72 and 72.73. On the later of the date of publication of such notice in the Federal Register or the date on which the State operating permit program is approved under part 70 of this chapter, the State Acid Rain program accepted by the Administrator will become a portion of the approved State operating permit program.

(c)(1) Except as provided in paragraph (c)(2) of this section, the Administrator will issue all Acid Rain permits for Phase I. The Administrator reserves the right to delegate the remaining administration and enforcement of Acid Rain permits for Phase I to approved State operating permit programs.

(2) The State permitting authority will issue an opt-in permit for a combustion or process source subject to its jurisdiction if, on the date on which the combustion or process source submits an opt-in permit application, the State permitting authority has opt-in regulations accepted under paragraph (b) of this section and an approved operating permits program under part 70 of this chapter.

28. Section 72.72 is amended by:

a. removing paragraphs (b)(1)(i)(C), (b)(1)(vii), (b)(1)(viii), (b)(1)(xi), (b)(1)(xiii), (b)(5)(vii), (b)(7), and (b)(8);

b. removing the last sentence of paragraph (b)(5)(v);

c. redesignating paragraphs (ix) and (x) as paragraphs (vii) and (viii) respectively;

d. redesignating paragraph (xii) as paragraph (ix);

e. redesignating paragraph (xiv) as paragraph (x);

f. removing and reserving paragraph (b)(5)(ii); and

g. revising the heading, the introductory text, and paragraphs (b) introductory text, (b)(1)(ii), (b)(1)(iii), (b)(1)(iv), (b)(1)(v), (b)(1)(vi), the first sentence of (b)(5)(i), (b)(5)(vi), and (b)(6) to read as follows:

§ 72.72 Criteria for State operating permit program.

A State operating permit program (including a State Acid Rain program) shall meet the following criteria. Any aspect of a State operating permits program or any implementation of a State operating permit program that fails to meet these criteria shall be grounds for withdrawal of all or part of the Acid Rain portion of an approved State operating permit program by the Administrator or for disapproval or withdrawal of approval of the State

operating permit program by the Administrator.

* * * * * *

(b) The State operating permit program shall require the following provisions, which are adopted to the extent that this paragraph (b) is incorporated by reference or is otherwise included in the State operating permit program.

(1) * * *

(ii) *Draft Permit.* (A) The State permitting authority shall prepare the draft Acid Rain permit in accordance with subpart E of this part and part 76 of this chapter or, for a combustion or process source, with subpart B of part 74 of this chapter, or deny a draft Acid Rain permit.

(B) Prior to issuance of a draft permit for a combustion or process source, the State permitting authority shall provide the designated representative of a combustion or process source an opportunity to confirm its intention to opt-in, in accordance with § 74.14 of this chapter.

(iii) *Public Notice and Comment Period.* Public notice of the issuance or denial of the draft Acid Rain permit and the opportunity to comment and request a public hearing shall be given by publication in a newpaper of general circulation in the area where the source is located or in a State publication designed to give general public notice. Notwithstanding the prior sentence, if a draft permit requires the affected units at a source to comply with § 72.9(c)(1) and to meet any applicable emission limitation for NO_X under §§ 76.5, 76.6, 76.7, 76.8, or 76.11 of this chapter and does not include for any unit a compliance option under § 72.44, part 74 of this chapter, or § 76.10 of this chapter, the State permitting authority may, in its discretion, provide notice by serving notice on persons entitled to receive a written notice and may omit notice by newspaper or State publication.

(iv) *Proposed permit.* Following the public notice and comment period on a draft Acid Rain permit, the State permitting authority shall incorporate all changes necessary and issue a proposed Acid Rain permit in accordance with subpart E of this part and part 76 of this chapter or, for a combustion or process source, with subpart B of part 74 of this chapter, or deny a proposed Acid Rain permit.

(v) *Direct final procedures.* The State permitting authority may, in its discretion, issue, as a single document, a draft Acid Rain permit in accordance with paragraph (b)(1)(ii) of this section and a proposed Acid Rain permit and may provide public notice of the opportunity for public comment on the draft Acid Rain permit in accordance with paragraph (b)(1)(iii) of this section. The State permitting authority may provide that, if no significant, adverse comment on the draft Acid Rain permit is timely submitted, the proposed Acid Rain permit will be deemed to be issued on a specified date without further notice and, if such significant, adverse comment is timely submitted, a proposed Acid Rain permit or denial of a proposed Acid Rain permit will be issued in accordance with paragraph (b)(1)(iv) of this paragraph. Any notice provided under this paragraph (b)(1)(v) shall include a description of the procedure in the prior sentence.

(vi) *Acid Rain Permit Issuance.* Following the Administrator's review of the proposed Acid Rain permit, the State permitting authority shall or, under part 70 of this chapter, the Administrator will, incorporate any required changes and issue or deny the Acid Rain permit in accordance with subpart E of this part and part 76 of this chapter or, for a combustion or process source, with subpart B of part 74 of this chapter.

(5) * * * (i) Appeals of the Acid Rain portion of an operating permit issued by the State permitting authority that do not challenge or involve decisions or actions of the Administrator under this part or part 73, 74, 75, 76, 77, or 78 of this chapter shall be conducted according to procedures established by the State in accordance with part 70 of this chapter. * * *

(vi) A failure of the State permitting authority to issue an Acid Rain permit in accordance with § 72.73(b)(1) or, with regard to combustion or process sources, § 74.14(c)(6) of this chapter shall be ground for filing an appeal.

(6) *Industrial Units Exemption.* The State permitting authority shall act in accordance with § 72.14 on any petition for exemption from requirements of the Acid Rain Program

29. Section 72.73 is revised to read as follows:

§ 72.73 State issuance of Phase II permits.

(a) *State Permit Issuance.* (1) A State that is authorized to administer and enforce an operating permit program under part 70 of this chapter and that has a State Acid Rain program accepted by the Administrator under § 72.71 shall be responsible for administering and enforcing Acid Rain permits effective in Phase II for all affected sources:

(i) That are located in the geographic area covered by the operating permits program; and

(ii) To the extent that the accepted State Acid Rain program is applicable.

(2) In administering and enforcing Acid Rain permits, the State permitting authority shall comply with the procedures for issuance, revision, renewal, and appeal of Acid Rain permits under this subpart.

(b) *Permit Issuance Deadline.* (1) On or before December 31, 1997, a State that is responsible under paragraph (a) of this section as of January 1, 1997 or such later date as the Administrator may establish, for administering and enforcing Acid Rain permits shall issue an Acid Rain permit for Phase II covering the affected units (other than opt-in sources) at each source in the geographic area for which the program is approved; *provided* that the designated representative of the source submitted a timely and complete Acid Rain permit application in accordance with § 72.21 and meets the requirements of this subpart and part 70 of this chapter.

(2) Each Acid Rain permit issued in accordance with this section shall have a term of 5 years commencing on its effective date; *provided* that, at the discretion of the permitting authority, the first Acid Rain permit for Phase II issued to a source may have a term of less than 5 years where necessary to coordinate the term of such permit with the term of an operating permit to be issued to the source under a State operating permit program. Each Acid Rain permit issued in accordance with paragraph (b)(1) of this section shall take effect by the later of January 1, 2000, or, where the permit governs a unit under § 72.6(a)(3) of this part, the deadline for monitor certification under part 75 of this chapter.

(3) *Nitrogen Oxides.* Within the period required under the approved State operating permit program but not later than July 1, 1999, the State permitting authority shall reopen the Acid Rain permit and add the Acid Rain Program nitrogen oxides requirements; *provided* that the designated representative of the affected source submitted a timely and complete Acid Rain permit application for nitrogen oxides in accordance with § 72.21.

30. Section 72.74 is revised to read as follows:

§ 72.74 Federal issuance of Phase II permits.

(a)(1) The Administrator will be responsible for administering and enforcing Acid Rain permits for Phase II for any affected sources in a geographic area that is not under the jurisdiction of a State permitting authority responsible, as of January 1, 1997 or such later date

as the Administrator may establish, for administering and enforcing Acid Rain permits for such sources under § 72.73(a).

(2) After the State permitting authority becomes responsible for administering and enforcing Acid Rain permits under § 72.73(a), the Administrator will suspend federal administration of Acid Rain permits for Phase II for sources and units subject to the accepted State Acid Rain program, except as provided in paragraph (b)(4) of this section.

(b)(1) The Administrator will administer and enforce Acid Rain permits effective in Phase II for sources and units during any period that the Administrator is administering and enforcing an operating permit program under part 71 of this chapter for the geographic area in which the sources and units are located.

(2) The Administrator will administer and enforce Acid Rain permits effective in Phase II for sources and units otherwise subject to a State Acid Rain program under § 72.73(a) if:

(i) The Administrator determines that the State permitting authority is not adequately administering or enforcing all or a portion of the State Acid Rain program, notifies the State permitting authority of such determination and the reasons therefore, and publishes such notice in the Federal Register;

(ii) The State permitting authority fails either to correct the deficiencies within a reasonable period (established by the Administrator in the notice under paragraph (b)(3)(i) of this section) after issuance of the notice or to take significant action to assure adequate administration and enforcement of the program within a reasonable period (established by the Administrator in the notice) after issuance of the notice; and

(iii) The Administrator publishes in the Federal Register a notice that he or she will administer and enforce Acid Rain permits effective in Phase II for sources and units subject to the State Acid Rain program or a portion of the program. The effective date of such notice shall be a reasonable period (established by the Administrator in the notice) after the issuance of the notice.

(3) When the Administrator administers and enforces Acid Rain permits under paragraph (b)(1) or (b)(2) of this section, the Administrator will administer and enforce each Acid Rain permit issued under the State Acid Rain program or portion of the program until the permit is replaced by a permit issued under this section. After the later of the date for publication of a notice in the Federal Register that the State operating permit program is currently approved by the Administrator or that the State Acid Rain program or portion of the program is currently accepted by the Administrator, the Administrator will suspend federal administration of Acid Rain permits effective in Phase II for sources and units subject to the State Acid Rain program or portion of the program, except as provided in paragraph (b)(4) of this section.

(4) After the State permitting authority becomes responsible for administering and enforcing Acid Rain permits effective in Phase II under § 72.73(a), the Administrator will continue to administer and enforce each Acid Rain permit issued under paragraph (a)(1), (b)(1), or (b)(2) of this section until the permit is replaced by a permit issued under the State Acid Rain program. The State permitting authority may replace an Acid Rain permit issued under paragraph (a)(1), (b)(1), or (b)(2) of this section by issuing a permit under the State Acid Rain program by the expiration of the permit under paragraph (a)(1), (b)(1), or (b)(2) of this section. The Administrator may retain jurisdiction over the Acid Rain permits issued under paragraph (a)(1), (b)(1), or (b)(2) of this section for which the administrative or judicial review process is not complete and will address such retention of jurisdiction in a notice in the Federal Register.

(c) *Permit Issuance Deadline.* (1)(i) On or before January 1, 1998, the Administrator will issue an Acid Rain permit for Phase II setting forth the Acid Rain Program sulfur dioxide requirements for each affected unit (other than opt-in sources) at a source not under the jurisdiction of a State permitting authority that is responsible, as of January 1, 1997 or such later date as the Administrator may establish, under § 72.73(a) of this section for administering and enforcing Acid Rain permits; *provided* that the designated representative for the source submitted a timely and complete Acid Rain permit application in accordance with § 72.21. The failure by the Administrator to issue a permit in accordance with this paragraph shall be grounds for the filing of an appeal under part 78 of this chapter.

(ii) Each Acid Rain permit issued in accordance with this section shall have a term of 5 years commencing on its effective date. Each Acid Rain permit issued in accordance with paragraph (c)(1)(i) of this section shall take effect by the later of January 1, 2000 or, where a permit governs a unit under § 72.6(a)(3), the deadline for monitor certification under part 75 of this chapter.

(2) *Nitrogen Oxides.* Not later than 6 months following submission by the designated representative of an Acid Rain permit application for nitrogen oxides, the Administrator will reopen the Acid Rain permit for Phase II and add the Acid Rain Program nitrogen oxides requirements for each affected source not under the jurisdiction of a State permitting authority that is responsible, as of January 1, 1997 or such later date as the Administrator may establish, under § 72.73(a) for issuing Acid Rain permits with such requirements; *provided* that the designated representative for the source submitted a timely and complete Acid Rain permit application for nitrogen oxides in accordance with § 72.21.

(d) *Permit Issuance.* (1) The Administrator may utilize any or all of the provisions of subparts E and F of this part to administer Acid Rain permits as authorized under this section or may adopt by rulemaking portions of a State Acid Rain program in substitution of or in addition to provisions of subparts E and F of this part to administer such permits. The provisions of Acid Rain permits for Phase I or Phase II issued by the Administrator shall not be applicable requirements under part 70 of this chapter.

(2) The Administrator may delegate all or part of his or her responsibility, under this section, for administering and enforcing Phase II Acid Rain permits or opt-in permits to a State. Such delegation will be made consistent with the requirements of this part and the provisions governing delegation of a part 71 program under part 71 of this chapter.

31. Section 72.80 is amended by revising paragraphs (a), (b), (d), (e), (f), and (g) to read as follows:

§ 72.80 General.

(a) The subpart shall govern revisions to any Acid Rain permit issued by the Administrator and to the Acid Rain portion of any operating permit issued by a State permitting authority.

(b) The provisions of this subpart shall supersede the operating permit revision procedures specified in parts 70 and 71 of this chapter with regard to revision of any Acid Rain Program permit provision.

* * * * *

(d) The terms of the Acid Rain permit shall apply while the permit revision is pending, except as provided in § 72.83 for administrative permit amendments.

(e) The standard requirements of § 72.9 shall not be modified or voided by a permit revision.

(f) Any permit revision involving incorporation of a compliance option that was not submitted for approval and comment during the permit issuance process or involving a change in a compliance option that was previously submitted, shall meet the requirements for applying for such compliance option under subpart D of this part and parts 74 and 76 of this chapter.

(g) Any designated representative who fails to submit any relevant information or who has submitted incorrect information in a permit revision shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary information or corrected information to the permitting authority.

* * * * *

32. Section 72.81 is amended by: removing from paragraph (c)(1)(ii) the words ''and under § 70.7(e)(4)(ii) of this chapter''; and revising paragraph (c)(2) to read as follows:

§ 72.81 Permit modifications.

* * * * *

(c) * * *

(2) For purposes of applying paragraph (c)(1) of this section, a requested permit modification shall be treated as a permit application, to the extent consistent with § 72.80 (c) and (d).

33. Section 72.82 is amended by revising paragraphs (a) and (d) to read as follows:

§ 72.82 Fast-track modifications.

* * * * *

(a) If the Administrator is the permitting authority, the designated representative shall serve a copy of the fast-track modification on the Administrator and any person entitled to a written notice under § 72.65(b)(1)(ii) and (iii). If a State is the permitting authority, the designated representative shall serve such a copy on the Administrator, the permitting authority, and any person entitled to receive a written notice of a draft permit under the approved State operating permit program. Within 5 business days of serving such copies, the designated representative shall also give public notice by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice.

* * * * *

(d) Within 30 days of the close of the public comment period if the Administrator is the permitting authority or within 90 days of the close of the public comment period if a State is the permitting authority, the permitting authority shall consider the fast-track modification and the comments received and approve, in whole or in part or with changes or conditions as appropriate, or disapprove the modification. A fast-track modification shall be subject to the same provisions for review by the Administrator and affected States as are applicable to a permit modification under § 72.81.

34. Section 72.83 is amended by: removing from paragraph (a)(10) the words ''regulations implementing section 407 of the Act'' and adding, in their place, the words ''part 76 of this chapter''; and revising paragraphs (a)(12) and (b) and adding paragraphs (a)(13), (a)(14), (c), and (d) to read as follows:

§ 72.83 Administrative permit amendment.

(a) * * *

(12) The addition of a NO_X early election plan under § 76.8 of this chapter that was approved by the Administrator;

(13) The addition of an exemption for which the requirements have been met under § 72.7, 72.8, or 72.14; and

(14) Incorporation of changes that the Administrator has determined to be similar to those in paragraphs (a) (1) through (13).

(b)(1) The permitting authority will take final action on an administrative permit amendment within 60 days, or, for the addition of an alternative emissions limitation demonstration period, within 90 days, of receipt of the requested amendment and may take such action without providing prior public notice. The source may implement any changes in the administrative permit amendment immediately upon submission of the requested amendment, provided that the requirements of paragraph (a) of this section are met.

(2) The permitting authority may, on its own motion, make an administrative permit amendment without providing prior public notice.

(c) The permitting authority will designate the permit revision under paragraph (b) of this section as having been made as an administrative permit amendment and will notify the designated representative after making such revision. Where a State is the permitting authority, the permitting authority shall submit the revised portion of the permit to the Administrator.

(d) An administrative amendment shall not be subject to the provisions for review by the Administrator and affected States applicable to a permit modification under § 72.81.

35. Section 72.85 is amended by revising paragraphs (a) and (c) to read as follows:

§ 72.85 Permit reopenings.

(a) The permitting authority shall reopen an Acid Rain permit for cause whenever:

(1) Any additional requirement under the Acid Rain Program becomes applicable to any affected unit governed by the permit;

(2) The permitting authority determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit; or

(3) The permitting authority determines that the permit must be revised or revoked to assure compliance with Acid Rain Program requirements.

* * * * *

(c) As provided in §§ 72.73(b)(3) and 72.74(c)(2), the permitting authority shall reopen an Acid Rain permit to incorporate nitrogen oxides requirements, consistent with part 76 of this chapter.

* * * * *

36. Section 72.91 is amended by:

a. removing from paragraph (b)(1)(i) the words ''improved unit measures'' and adding, in their place, the words ''improved unit efficiency measures'';

b. removing from paragraph (b)(1)(iii), introductory text, the words ''all figures'' and adding, in their place, the words ''each figure'';

c. removing from paragraph (b)(1)(iii)(B) the words ''measures, and'' and adding, in their place, the words ''measures, or'';

d. removing from paragraph (b)(1)(iii)(C) the words ''measures.'' and adding, in their place, the words ''measures, except measures relating to generation efficiency.'';

e. removing from the formula in paragraph (b)(4) the word ''hear'' and adding, in its place, the word ''heat'';

f. removing from paragraph (b)(4)(i) the word ''units''' and adding, in its place, the word ''unit's''; revising paragraphs (b)(5), (b)(6), and (b)(7); and

g. adding paragraphs (b)(1)(iv) and (b)(4)(iv) to read as follows:

§ 72.91 Phase I unit adjusted utilization.

* * * * *

(b) * * *

(1) * * *

(iv) The sum of the verified reductions in a unit's heat input from all measures implemented at the unit to reduce the unit's heat rate (whether the measures are treated as supply-side measures or improved unit efficiency measures) shall not exceed the

generation (in kwh) attributed to the unit for the calendar year times the difference between the unit's heat rate for 1987 and the unit's heat rate for the calendar year.

* * * * *

(4) * * *

(iv) The allowances credited shall not exceed the total number of allowances deducted from the unit's compliance subaccount for the calendar year in accordance with §§ 72.92 (a) and (c) and 73.35(b) of this chapter.

(5) If the total, included in the confirmation report, of the amount of verified reduction in the unit's heat input for energy conservation and improved unit efficiency measures is less than the total estimated in the unit's annual compliance certification report for such measures for the calendar year, then the designated representative shall include in the confirmation report the number of allowances to be deducted from the unit's compliance subaccount calculated in accordance with this paragraph (b)(5).

(i) If any allowances were deducted from the unit's compliance subaccount for the calendar year in accordance with §§ 72.92 (a) and (c) and 73.35(b) of this chapter, then the number of allowances to be deducted under this paragraph (b)(5) equals the absolute value of the result of the formula for allowances credited under paragraph (b)(4) of this section (excluding paragraph (b)(4)(iv) of this section).

(ii) If no allowances were deducted from the unit's compliance subaccount for the calendar year in accordance with §§ 72.92 (a) and (c) and 73.35(b) of this chapter:

(A) The designated representative shall recalculate the unit's adjusted utilization in accordance with paragraph (a) of this section, replacing the amounts for reduction from energy conservation and reduction from improved unit efficiency by the amount for verified heat input reduction. ''Verified heat input reduction'' is the total of the amounts of verified reduction in the unit's heat input (in mmBtu) from energy conservation and improved unit efficiency measures included in the confirmation report.

(B) After recalculating the adjusted utilization under paragraph (b)(5)(ii)(A) of this section for all Phase I units that are in the unit's dispatch system and to which paragraph (b)(5) of this section is applicable, the designated representative shall calculate the number of allowances to be surrendered in accordance with § 72.92(c)(2) using the recalculated adjusted utilizations of such Phase I units.

(C) The allowances to be deducted under this paragraph (b)(5) shall equal the amount under paragraph (b)(5)(ii)(B) of this section minus the amount for allowances deducted from the unit's compliance subaccount for the calendar year in accordance with §§ 72.92(a) and (c) and 73.35(b) of this chapter; *provided* that if the amount calculated under this paragraph (b)(5)(ii)(C) is equal to or less than zero, then the amount of allowances to be deducted is zero.

(6) The Administrator will determine the amount of allowances that would have been included in the unit's compliance subaccount and the amount of excess emissions of sulfur dioxide that would have resulted if the deductions made under § 73.35(b) of this chapter had been based on the verified, rather than the estimated, reduction in the unit's heat input from energy conservation and improved unit efficiency measures.

(7) The Administrator will determine whether the amount of excess emissions of sulfur dioxide under paragraph (b)(6) of this paragraph differs from the amount of excess emissions determined under § 73.35(b) of this chapter based on the annual compliance certification report. If the amounts differ, the Administrator will determine: the number of allowances that should be deducted to offset any increase in excess emissions or returned to account for any decrease in excess emissions; and the amount of excess emissions penalty (excluding interest) that should be paid or returned to account for the change in excess emissions. The Administrator will deduct immediately from the unit's compliance subaccount the amount of allowances that he or she determines is necessary to offset any increase in excess emissions or will return immediately to the unit's compliance subaccount the amount of allowances that he or she determines is necessary to account for any decrease in excess emissions. The designated representative may identify the serial numbers of the allowances to be deducted or returned. In the absence of such identification, the deduction will be on a first-in, first-out basis under § 73.35(b)(2) of this chapter and the return will be at the Administrator's discretion.

* * * * *

37. Section 72.95 is amended by revising the formula in the introductory text and adding paragraph (d) to read as follows:

§ 72.95 Allowance deduction formula

* * * *

Total allowances deducted=Tons emitted+Allowances surrendered for underutilization+Allowances deducted for Phase I extensions+Allowances deducted for substitution or compensating units

Where:

* * * *

(d) ''Allowances deducted for substitution or compensating units'' is the total number of allowances calculated in accordance with the surrender requirements specified under § 72.41(d)(3) or (e)(1)(iii)(B) or § 72.43(d)(2).

PART 73—[AMENDED]

38. The authority citation for part 73 is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651, *et seq.*

39. Section 73.10 is amended by revising the heading and adding paragraphs (b)(3), (b)(4), (b)(5), and (c)(3) to read as follows:

§ 73.10 Initial allocations for Phase I and Phase II.

* * * * *

(b) * * *

(3) Notwithstanding the amounts in Table 2 of this section, the unadjusted basic allowances for years 2000–2009 and for years 2010 and thereafter for the following boilers are: Illinois, Lakeside, 7, 2,919 unadjusted basic for 2000–2009 and 722 unadjusted basic for 2010 and thereafter; Illinois, Lakeside, 8, 1,652 unadjusted basic for 2000–2009 and 371 unadjusted basic for 2010 and thereafter; Illinois, Marion, 1, 2,376 unadjusted basic for 2000–2009 and for 2010 and thereafter; Illinois, Marion, 2, 2,434 unadjusted basic for 2000–2009 and for 2010 and thereafter; Illinois, Marion, 3, 2,640 unadjusted basic for 2000–2009 and for 2010 and thereafter; Louisiana, Rodemacher, 2, 20,774 unadjusted basic for 2000–2009 and for 2010 and thereafter; and Wisconsin, Manitowoc, 8, 271 unadjusted basic for 2000–2009 and for 2010 and thereafter.

(4) Notwithstanding the amounts in Table 2 of this section, the unadjusted basic allowances and total bonus allowances for years 2000–2009 and for years 2010 and thereafter for the following boilers are: Maryland, R P Smith, 9,320 unadjusted basic and 354 total bonus for 2000–2009 and 320 unadjusted basic for 2010 and thereafter; Wisconsin, Blount Street, 7, 116 unadjusted basic and 1,374 total bonus for 2000–2009 and 116 unadjusted basic for 2010 and thereafter; Wisconsin, Blount Street, 8,473 unadjusted basic and 716 total

bonus for 2000–2009 and 473 unadjusted basic for 2010 and thereafter; and Wisconsin, Blount Street, 9,633 unadjusted basic and 629 total bonus for 2000–2009 and 633 unadjusted basic for 2010 and thereafter.

(5) If a unit was allocated allowances in Table 2 of this section as of March 23, 1993 is subsequently removed from Table 2, the owners of the unit shall surrender, for each allowance allocated to the unit in such table, an allowance of the same or earlier compliance use date as the allowance allocated and shall return to the Administrator any proceeds received for allowances withheld from the unit under § 73.10 of this chapter. The allowances shall be surrendered and the proceeds shall be returned within 60 days after the effective date of this paragraph (b)(5).

(c) * * *

(3) If a unit was allocated allowances in Table 3 of this section as of March 23, 1993 is subsequently removed from Table 3, the owners of the unit shall surrender, for each allowance allocated to the unit in such table, an allowance of the same or earlier compliance use date as the allowance allocated and shall return to the Administrator any proceeds received for allowances withheld from the unit under § 73.10 of this chapter. The allowances shall be surrendered and the proceeds shall be returned within 60 days after the effective date of this paragraph (c)(3).

* * * * *

§ 73.10 [Amended]

40. Section 73.10, paragraph (b)(2), Table 2, is amended by:

a. removing the entries for Alabama, Future Fossil, **1; Alabama, McIntosh CAES, **2; Alabama, McWilliams, **CT1; Alabama, McWilliams, **CT2; Alabama, McWilliams, **CT3; Arkansas, NA2—7246, **1; California, El Centro, 2; Colorado, Valmont, 11; Colorado, Valmont, 12; Colorado, Valmont, 13; Colorado, Valmont, 22; Colorado, Valmont, 23; Connecticut, South Meadow, 11; Connecticut, South Meadow, 12; Connecticut, South Meadow, 13; Florida, Lauderdale, PFL4; Florida, Lauderdale, PFL5; Illinois, Lakeside, GT2; Indiana Na1—7221, **2; Indiana, Na1—7228, **4; Indiana, Na1—7228, **5; Kansas, Ripley, **2; Kansas, Ripley, **3; Kentucky, J K Smith, 1; Louisiana, R S Nelson, 1; Louisiana, R S Nelson, 2; Michigan, Delray, 11; Minnesota, Future Base, **1; Minnesota, NA1–7237, **2; Mississippi, Wright, W4; Missouri, Combustion Turbine 1, **NA7; Missouri, Empire Energy Ctr, **4; Missouri, Empire Energy Ctr, **NA2; Missouri, Empire Energy Ctr, **NA3; Missouri, Grand Avenue, **7; Missouri, Grand Avenue, **9; Nebraska, NA1—7019, **NA2; New Jersey, Butler, **4; New Jersey, NA5—7217, **2; New Jersey, NA6—7218, **2; New Mexico, Escalante, **2; New Mexico, Maddox, **3; New York, Rochester 3, 1; New York, Rochester 3, 2; New York, Rochester 3, 4; North Dakota, Dakotas, **1; Oklahoma, Inola, **1; Pennsylvania, Richmond, 63; Pennsylvania, Richmond, 64; Pennsylvania, Southwark, 11; Pennsylvania, Southwark 12; Pennslyvania, Southwark, 21; Pennsylvania, Southwark, 22; South Carolina, Na4—7210, **ST1; South Dakota, Mobile, **2; Texas, Concho, 2; Texas, Concho, 4; Texas, Concho, 5; Texas, Concho, 6; Texas, Deepwater, DWP1; Texas, Deepwater, DWP2; Texas, Deepwater, DWP3; Texas, Deepwater, DWP3; Texas, Deepwater, DWP4; Texas, Deepwater, DWP5; Texas, Deepwater, DWP6; Texas, GT98, **1; Texas, GT98, **2; Texas, GT99, **1; Texas, GT99, **2; Texas, GT99, **3; Texas, NA1—7216, **1; Texas, NA1—7216, **2; Texas, San Miguel, **2; Texas, TNP One, **3; Texas, TNP One, **4; Virginia, Chesterfield, **8B; Washington, Kettle Falls, 1; Wisconsin, Manitowoc, 9; Wisconsin, Na1—7203, **CT3; and Wisconsin, Na—7222, unit **1; and

b. by adding in alphabetical order the entries ''Alabama'' ''McWilliams'', ''**4'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Arizona'', ''Springerville'', ''3'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Florida'', ''Reedy Creek Combined Cycle'', ''32432'', ''69'', ''0'', ''0'', ''0'', ''NA'', ''18'', ''0'', ''0'', and ''NA''; ''Indiana'', ''NA1—7228'', ''**1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Indiana'', ''NA1—7228'', ''**2'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'' and ''0''; ''Indiana'', ''NA1—7228'', ''**3'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'' and ''0''; ''Kansas'', ''Wamego'', ''**NA1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'' and ''0''; ''Maryland'', ''Easton 2'', ''**25'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Maryland'', ''Perryman'', ''**51'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Mississippi'', ''Moselle'', ''**4'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'' and ''0''; ''Mississippi'', ''Moselle'', ''**5'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Missouri'', ''Combustion Turbine 1'', ''**1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Missouri'', ''Combustion Turbine 2'', ''**2'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Nebraska'', ''Na1—7019'', ''**NA1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Nevada'',''Harry Allen'', ''**GT1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Nevada'',''Harry Allen'', ''**GT2'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''New Jersey'', ''Butler'', ''**1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''New Jersey'', ''Na1—7139'', ''**1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''New Jersey'', ''Na2—7140'', ''**1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Ohio'', ''Woodsdale'', ''**GT7'', 2 ''South Carolina'', ''NA1—7106'', ''GT1'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', and ''0''; ''Texas'', ''Twin Oak'', ''2'', ''1,760'', ''0'', ''0'', ''0'', ''NA'', ''1,760'', ''0'', ''0'', and ''NA''; and ''Virginia'', ''East Chandler'', ''**2'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'', ''0'' and ''0''.

41. Section 73.10, paragraph (c)(2), Table 3 is amended by:

a. removing the entries for Alabama, McWilliams, **4; Arizona, Springerville, 3; California, Harbor, **10; Florida, G W Ivey, **22; Florida, Martin, **3ST; Florida, Martin, **4ST; Illinois, Lakeside, GT1; Indiana, NA1—7228, **1; Indiana, NA1—7228, **2; Indiana, NA1—7228, **3; Iowa, Na1—7230, **1; Kansas, Wamego, **NA1; Maryland, Easton 2, **25; Maryland, Perryman, **51; Mississippi, Moselle, **4; Mississippi, Moselle, **5; Missouri, Combustion Turbine 1, **1; Missouri, Combustion Turbine 2, **2; Missouri, Empire Energy Center, **3; Missouri, Lake Road, **8; Nebraska, NA1—7019, **NA1; Nevada, Clark, **9; Nevada, Clark, **10; Nevada, Harry Allen, **GT1; Nevada, Harry Allen, **GT2; New Jersey, Butler, **1; New Jersey, Butler, **3; New Jersey, Na1—7139; New Jersey, Na2—7140, **1; Ohio, Dover, **7; Ohio, Woodsdale, **GT7; Pennsylvania, Trenton Cogen Proj, **1; South Carolina, NA1—7106, **GT1; South Carolina, NA2—7107, **GT2; South Carolina, Na3—7108, **GT3; South Dakota, CT, **5; Texas, Twin Oak, 2; Utah, Bonanza, **2; Virginia, East Chandler, **2; Wisconsin, Combustion Turbine, **1; and Wisconsin, Na2, **1; and b. adding in alphabetical order the entries ''Minnesota'', ''Angus Anson'', ''3'', ''1,166'', ''0'', ''0'', ''0'', ''NA'', ''1,166'', ''0'', ''0'', and ''NA''; ''South Carolina'', ''Cope'', ''1'', ''2,989'', ''0'', ''0'', ''0'', ''NA'', ''2,989'', ''0'', ''0'', and ''NA''; ''Wisconsin'', ''Fond du Lac'', ''**CT3'', ''44'', ''0'', ''0'', ''0'', ''NA'', ''44'', ''0'', ''0'', and ''NA''; and ''Wisconsin'', ''West Martinette'', ''33'', ''874'', ''0'', ''0'', ''0'', ''NA'', ''874'', ''0'', ''0'', and ''NA''.

42. Section 73.19 is amended by removing and reserving paragraph (b)

and revising paragraph (a)(5) to read as follows:

§ 73.19 Certain units with declining SO_2 rates.

(a) * * *

(5) Its 1996 annual SO_2 emission rate (determined in accordance with part 75 of this chapter) is less than 1.2 lb/mmBtu;

* * * * *

43. Section 73.90 is amended by: removing from the formula in paragraph (c)(3) the words ''Total Allowances Requested'' and adding, in their place, the words ''35,000''; removing from the formula in paragraph (c)(3) the words ''35,000'' and adding, in their place, the words ''Total Allowances Requested''; and revising paragraphs (a)(1), (a)(2), and (a)(3) to read as follows:

§ 73.90 Allowance allocations for small diesel refineries.

(a) * * *

(1) Photocopies of Form EIA–810 for each month of calendar years 1988 through 1990 for the refinery;

(2) Photocopies of Form EIA–810 for each month of calendar years 1988 through 1990 for each refinery owned or controlled by the refiner that owns or controls the refinery seeking certification; and

(3) A letter certified by the certifying official that the submitted photocopies are exact duplicates of those forms filed with the Department of Energy for 1988 through 1990.

* * * * *

PART 74—[AMENDED]

44. The authority citation for part 74 continues to read as follows:

Authority: 42 U.S.C. 7601 and 7651 *et seq.*

§ 74.2 [Amended]

45. Section 74.2 is amended by removing the words ''a written exemption under § 72.7 or § 72.8 of this chapter'' and adding, in their place, the words ''an exemption under § 72.7, § 72.8 or § 72.14 of this chapter''.

PART 75—[AMENDED]

46. The authority citation for part 75 is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651 *et seq.*

§ 75.67 [Amended]

47. Section 75.67 is amended by removing and reserving paragraph (a).

PART 77—[AMENDED]

48. The authority citation is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651j.

49. Section 77.3 is amended by revising paragraphs (d)(3),(5), and (6) to read as follows:

§ 77.3 Offset plans for excess emissions of sufur dioxide.

* * * * *

(d) * * *

(3) At the designated representative's option, the number of allowances to be deducted from the unit's Allowance Tracking System account to offset the excess emissions for the year for which the plan is submitted.

* * * * *

(5) A statement either that allowances to offset the excess emissions are to be deducted immediately from the unit's compliance subaccount or that they are to be deducted on a specified date in a subsequent year.

(6) If the proposed offset plan does not propose an immediate deduction of allowances under paragraph (d)(5) of this section, a demonstration that such a deduction will interfere with electric reliability.

50. Section 77.4 is amended by revising paragraphs (b)(1), (c)(2)(i), (f)(2)(i), (g)(2)(i)(B), (g)(2)(i)(C), the last two sentences of (k)(1), and (k)(2) to read as follows:

§ 77.4 Administrator's action on proposed offset plans.

* * * * *

(b) *Review of proposed offset plans.* (1) If the designated representative submits a complete proposed offset plan for immediate deduction, from the unit's compliance subaccount, of allowances required to offset excess emissions of sulfur dioxide, the Administrator will approve the proposed offset plan without further review and will serve written notice of any approval on the designated representative. The Administrator will also give notice of any approval in the Federal Register. The plans will be incorporated in the unit's Acid Rain permit in accordance with § 72.84 of this chapter (automatic permit amendment) and will not be subject to the requirements of paragraphs (d) and (k) of this section.

* * * * *

(c) * * *

(2)(i) The designated representative shall submit the information required under paragraph (c)(1) of this section within a reasonable period determined by the Administrator.

* * * * *

(f) * * *

(2) * * *

(i) The reasons, and supporting authority, for approval or disapproval of any proposed offset plan that does not require immediate deduction of allowances, including references to applicable statutory or regulatory provisions and to the administrative record; and

* * * * *

(g) * * *

(2) * * *

(i) * * *

(B) The air pollution control agencies of affected States; and

(C) Any interested person.

* * * * *

(k) * * *

(1) * * * The Administrator will serve a copy of any approved offset plan and the response to comments on the designated representative for the affected unit involved and serve written notice of the approval or disapproval of the offset plan on any persons who are entitled to written notice under paragraphs (g)(2)(i)(B) and (C) of this section or who submitted written or oral comments on the approval or disapproval of the draft offset plan. The Administrator will also give notice in the Federal Register.

(2) The Administrator will approve an offset plan requiring immediate deduction from the unit's compliance subaccount of all allowances necessary to offset the excess emissions except to the extent the designated representative of the unit demonstrates that such a deduction will interfere with electric reliability.

* * * * *

51. Section 77.6 is amended by revising paragraph (a) to read as follows:

§ 77.6 Penalties for excess emissions of sulfur dioxide and nitrogen oxides.

(a)(1) If excess emissions of sulfur dioxide or nitrogen oxide occur at an affected unit during any year, the owners and operators of the affected unit shall pay, without demand, an excess emissions penalty, as calculated under paragraph (b) of this section.

(2) If one or more affected units governed by an approved NO_X averaging plan under § 76.11 of this chapter fail (after applying § 76.11(d)(1)(ii)(C) of this chapter) to meet their respective alternative contemporaneous emission limitations or annual heat input limits, then excess emissions of nitrogen oxides occur during the year at each such unit. The sum of the excess emissions of nitrogen oxides of such units shall equal the amount determined under § 76.13(b) of this chapter. The owners and operators of such units shall pay an excess emissions penalty, as calculated under paragraph (b) of this section using the sum of the excess emissions of nitrogen oxides of such units.

(3) Except as otherwise provided in this paragraph (a)(3), payment under paragraphs (a) (1) or (2) of this section shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that the process of recordation set forth in § 73.34(a) of this chapter is completed or by July 1 of the year after the year in which the excess emissions occurred, whichever date is earlier. Payment under paragraph (a)(1) of this section for any increase in excess emissions of sulfur dioxide determined after adjustments made under § 72.91(b) of this chapter shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that process set forth in § 72.91(b) of this chapter is completed.

* * * * *

PART 78—[AMENDED]

52. The authority citation for part 78 continues to read as follows:

Authority: 42 U.S.C. 7601 and 7651, *et seq.*

53. Section 78.1 is amended by revising paragraphs (a) and (b)(1)(v) to read as follows:

§ 78.1 Purpose and scope.

(a)(1) This part shall govern appeals of any final decision of the Administrator under parts 72, 73, 74, 75, 76, and 77 of this chapter; *provided* that matters listed § 78.3(d) and preliminary, procedural, or intermediate decisions, such as draft Acid Rain permits, may not be appealed.

(2) Filing an appeal, and exhausting administrative remedies, under this part shall be a prerequisite to seeking judicial review. For purposes of judicial review, final agency action occurs only when a decision appealable under this part is issued and the procedures under this part for appealing the decision are exhausted.

(b) * * *

(1) * * *

(v) The issuance or denial of an exemption under § 72.14 of this chapter;

* * * * *

§ 78.31 [Amended]

54. Section 78.3 is amended by:

a. removing from paragraph (b)(1) the words ''60 days'' and adding, in their place, the words ''60 days (or other reasonable period established by the Administrator in such decision)'';

b. removing from paragraph (b)(1) the words ''action.'' and adding, in their place, the words ''action and shall not meet the prerequisite for judicial review under § 72.1(a)(2).'';

c. removing from paragraph (b)(3)(ii) the words ''the persons entitled to written notice under § 72.65(b)(1) (ii), (iii), and (iv) of this chapter.'' and adding, in their place, the words ''the air pollution control agencies of affected States and any interested person.'';

d. adding at the end of paragraph (c)(6) the word ''and''; removing from paragraph (c)(7) the words ''; and'' and adding, in their place, the word ''.'';

e. removing paragraph (c)(8);

f. removing paragraph (d)(1); and

g. redesignating paragraphs (d)(2), (d)(3), and (d)(4) as paragraphs (d)(1), (d)(2), and (d)(3) respectively.

55. Section 78.4 is amended by: removing from paragraph (c)(1) the words ''7 days'' and adding, in its place, the words ''7 days (or other reasonable period established by the Environmental Appeals Board or Presiding Officer),''; and removing from paragraph (c)(1) the words ''it, unless the Environmental Appeals Board or Presiding Officer authorizes a longer time based on good cause.'' and adding, in their place, the words ''it.''.

§ 78.5 [Amended]

56. Section 78.5 is amended by removing from paragraph (a) the words ''to submit a claim of error notification'' and adding, in their place, the words ''a claim of error notification was submitted''.

§ 78.7 [Removed]

57. Section 78.7 is removed and reserved.

58. Section 78.11 is amended by removing from paragraph (a) the words ''30 days'' and adding, in their place, the words ''30 days (or other reasonable period established by the Administrator when giving notice)''.

§ 78.12 [Amended]

59. Section 78.12 is amended by removing from paragraph (a)(2) the words ''a written exemption under §§ 72.7 or 72.8'' and adding, in their place, the words ''an exemption under § 72.14''.

§ 78.14 [Amended]

60. Section 78.14 is amended by; removing from paragraph (a), introductory text, the word ''theses'' and adding, in its place, the word ''these''; removing from paragraph (a)(10) the words ''15 days'' and adding, in their place, the words ''15 days (or other reasonable period established by the Presiding Officer)''; and removing from paragraph (c)(1) the words ''Rule 408 of''.

§ 78.15 [Amended]

61. Section 78.15 is amended by: removing from paragraph (c) the words ''10 days'' and adding, in their place, the words ''10 days (or other reasonable period established by the Presiding Officer)''; and removing the last sentence from paragraph (c).

§ 78.16 [Amended]

62. Section 78.16 is amended by removing from paragraphs (d)(1) and (d)(2) the words ''7 days'' and adding, in their place, the words ''7 days (or other reasonable period established by the Presiding Officer)''.

§ 78.17 [Amended]

63. Section 78.17 is amended by: removing the words ''45 days'' and adding, in their place, the words ''45 days (or other reasonable period established by the Presiding Officer)''; and removing the words '', for good cause shown, may shorten or extend the time for filing and''.

§ 78.18 [Amended]

64. Section 78.18 is amended by removing from paragraph (b), introductory text, the words ''30 days after service unless within that time:'' and adding, in their place, the word ''unless:''.

§ 78.20 [Amended]

65. Section 78.20 is amended by: removing from paragraph (a), introductory text, the words ''30 days'' and adding, in their place, the words ''30 days (or other reasonable period established by the Environmental Appeals Board)''; and removing from paragraph (b) the words ''30 days'' and adding, in their place, the words ''45 days (or other reasonable period established by the Environmental Appeals Board)''.

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