ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 73

[FRL–5845–3]

Acid Rain Program: Phase II Early Reduction Credits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Title IV of the Clean Air Act, as amended by Clean Air Act Amendments of 1990, (the Act) authorizes the Environmental Protection Agency (EPA or Agency) to establish the Acid Rain Program in order to reduce the adverse health and ecological impacts of acidic deposition. On March 23, 1993, the Agency promulgated final rules allocating allowances to utility units, including the criteria and method of allocating early reduction credits under section 404(e) of the Act. This action implements a settlement of litigation between EPA and a utility regarding Phase II early reduction credits. The settlement provides a method by which additional allowances may be loaned to units receiving early reduction credits as an incentive to further reduce emissions prior to the units becoming subject to the applicable Acid Rain Program emission limitations.

In the proposed rules section of this **Federal Register**, EPA is proposing a rule that is identical to this direct final rule. If significant, adverse comments are timely received on the proposed rule (see DATES section), this direct final rule will be withdrawn and all such comments will be addressed in a subsequent final rule based on the proposed rule. If no significant, adverse comments are timely received on the proposed rule, then the direct final rule becomes effective as published and no further action is contemplated on the parallel proposal published today.

DATES: This rule is effective August 8, 1997, unless significant, adverse comments are received by July 24, 1997. If significant, adverse comments are received, EPA will publish notice in the **Federal Register** withdrawing the direct final rule.

Judicial Review. Under section 307(b)(1) of the Clean Air Act (Act), judicial review of this rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of these direct final revisions. Under section 307(b)(2) of the Act, the requirements that are the subject of today's document may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: *Docket and Comments.* Docket No. A–97–31, containing supporting information used to develop these amendments, is available for public inspection and copying from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays, at EPA's Air Docket Section (6102), Waterside Mall, Room M1500, 1st Floor, 401 M Street, SW, Washington DC 20460, telephone 202–260–7548. Written comments should be submitted to the same address. Information concerning the original rules is found in Docket No. A–92–06, the proposed allowance allocation rule. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Kathy Barylski at (202) 233–9074 Acid Rain Division (6204J), U.S. Environmental Protection Agency, 401 M St., S.W., Washington, DC 20460; or the Acid Rain Hotline at (202) 233–9620. Electronic copies of this rulemaking can be accessed through the Acid Rain Division website at http://www.epa.gov/acidrain.

SUPPLEMENTARY INFORMATION: In the Proposed Rules Section of this **Federal Register**, EPA is proposing rule revisions that provide a method by which additional allowances may be loaned to units receiving early reduction credits. This will provide an incentive to further reduce emissions prior to the units becoming subject to the applicable Acid Rain Program emission limitations. EPA considers these revisions to be noncontroversial and anticipates no adverse comments. However, if EPA timely receives significant, adverse comments, EPA will publish a document in the **Federal Register** withdrawing the direct final rule. In that event, all public comments received will be treated as comments on the proposed rule as published in the Proposed Rules Section of this **Federal Register** and will be addressed in a subsequent final rulemaking document. EPA will not institute a second comment period on the document in the Proposed Rules Section of this **Federal Register** or on any subsequent final rule addressing withdrawn portions of this final rule. Any parties interested in commenting on these revisions to part 73 should do so at this time.

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I. Affected 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 that may be affected by this action. To determine whether your facility may be affected 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 proposed on December 27, 1996 (61 FR 68340). 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.

II. Background

The overall goal of the Acid Rain Program is to achieve significant environmental benefits through reductions in emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), the primary causes of acid rain. To achieve this goal at the lowest cost to society, the program employs both traditional and innovative, market-based approaches for controlling air pollution. In addition, the program encourages energy efficiency and promotes pollution prevention.

Title IV of the Clean Air Act sets as a primary goal the reduction of annual SO_2 emissions by 10 million tons below 1980 levels. To achieve these SO_2 emissions reductions, the law requires a two-phase tightening of restrictions placed on fossil fuel-fired power plants. Phase I began in 1995 and affected 110 mostly coal-burning electric utility plants located in 21 eastern and midwestern states. Phase II, beginning in 2000, tightens the annual emissions limits imposed on these large, higher

emitting plants and also sets restrictions on smaller or cleaner plants fired by coal, oil, or gas. Title IV also requires certain coal-fired units to reduce their emissions of NO_X to a level achievable through installation of applicable NO_X control technology. *See* 40 CFR part 76.

The centerpiece of the Acid Rain Program is a unique trading system in which allowances (each authorizing the emission of up to one ton of SO_2) may be bought and sold at prices determined by the free market. Most existing utility units are allocated allowances based on their historic fuel use and emission rates specified in the Act. Affected utility units are required to limit SO_2 emissions to the number of allowances they hold, but because allowances are transferrable, utilities may meet their emissions control requirements in the most cost-effective manner.

This rule relates to a small number of utilities eligible for allowances under section 404(e) of the Act. Section 404(e) allows a carefully delineated group of utilities to receive allowances for SO_2 emissions reductions achieved before their units are subject to the Acid Rain Program SO_2 emissions limitations. For Phase I of early reduction credits, from 1991 through 1994, a utility received 314,248 allowances. This rule modifies the Phase II early reduction credits program, from 1995 through 1999.

III. Phase II Early Reduction Credits

A. Review of 1993 Rule

Section 404(e) of the Act provided a lengthy delineation of eligibility criteria for utility units to be allocated the additional allowances for early reduction. However, the Act was less specific regarding how the reduction of emissions would be calculated. The March 23, 1993 rule (58 FR 15634) provided a methodology that EPA believed fairly represented the intent of the statute and accurately measured the reduction in emissions.

The first issue was to determine the calculation approach. EPA considered a pure emissions approach, an emissions rate approach, and a hybrid. EPA developed the hybrid approach to encourage the utilities to increase utilization at cleaner plants and to discourage operational shifts that would result in additional emissions. This approach is not addressed in today's rule.

The second issue was what comparison year to measure the reduction against. The 1993 rule finalized use of calendar year 1990 as the comparison year.

B. Issues Resolved in Settlement

1. General Approach

One utility with Phase II affected units that are eligible for early reduction credits for emission reductions from 1995 through 1999 initiated litigation regarding both the method of calculating early reduction credits and the comparison year for measuring the reduction. EPA and the utility worked together for over two years to craft a settlement. Under the settlement, the utility may be loaned allowances for fifteen years, while EPA is reasonably assured that the utility will make additional emissions reductions, thus benefitting the environment. These loaned allowances will be in addition to the early reduction credits calculated under the existing rule.

2. Eligibility Criteria

In order to ensure that the settlement results in an environmental benefit, EPA and the utility agreed that the additional loaned allowances will only be available if the weighted average emission rate (based on heat input) for the Phase I year in question for all of the affected units in the unit's dispatch system is below the system-wide weighted average emission rate for 1990. The utility's dispatch system will be the dispatch system as it existed in 1990. In addition, the 1990 SO_2 emission rate for any unit that did not operate at all during 1990 will be deemed to be equal to the weighted average emission rate of all the other units at the same plant that did operate during 1990.

3. Loan of Allowances

The additional allowances will be awarded to the year 2000 subaccount. For each additional allowance, one allowance will be deducted from the year 2015 subaccount. If there are not enough allowances allocated under subpart B of part 73 to a unit's ATS subaccount for the year 2015 to permit the deduction of the entire number of allowances required to be deducted, additional allowances shall be deducted from the unit's ATS subaccount for subsequent years, as necessary to ensure that the required deduction is made. The unit's designated representative may designate by serial number any allowances to be deducted from the subaccount.

4. Reference Point

The utility interested in Phase II early reduction credits had commented that it believed the credits should be based on the difference between a projected emission rate in Phase I and the actual rate. EPA is not reconsidering or modifying here the rule provisions that base the early reduction credits upon the difference between the actual Phase I emission rate and the 1990 emission rate. However, EPA and the utility agreed that a projected emission rate will be used for awarding the additional loaned allowances.

The utility had provided a report prepared in 1991 estimating that the utility's average fuel sulfur content would rise through Phase I, resulting in an average emission rate of 1.75 lb/mmBtu, in the absence of any early reduction credit program. During the course of settlement, the utility provided additional materials from 1995 that confirmed that its average fuel sulfur content would otherwise rise to at least 1.75 lb/mmBtu. Thus, the Agency and the utility agreed that a ''projected baseline emission rate'' of 1.75 lb/mmBtu would be used to calculate the loaned allowances.

The Agency and the utility agreed that the additional loaned allowances would be calculated in an amount equal to the product, rounded to the nearest whole number, of (a) the unit's Phase I year utilization (in mmBtu) and (b) the amount (in lbs/mmBtu) by which the unit's ''projected baseline emission rate'' exceeds the greater of its actual Phase I year emission rate or its 1990 emission rate.

C. Environmental Benefit

Under the existing early reduction credit program (without the allowance loan provisions), the utility would only significantly reduce the emission rate at one large coal plant (to 1.2 lb/mmBtu) and would sign new coal contracts for an average of 1.75 lb/mmBtu. This would result in total early reduction credits of about 106,000 and total system-wide SO_2 emissions of approximately 1.34 million tons, over the five year period from 1995 through 1999.

The utility has estimated that, with the new allowance loan provisions, it would likely sign new coal contracts or buy spot market coal with lower sulfur content and would reduce the emission rate at most of its units. Using an estimate that new coal contracts could average 1.4 lb/mmBtu, the early reduction credit program, as revised by today's rule, could result in 173,000 early reduction credits, 158,000 loaned allowances, and total SO_2 emissions of 1.19 million tons.

The environment could experience a reduction of 150,000 tons of SO_2 over five years (1.34 million tons minus 1.19 million tons), and 67,000 tons of the reduction (173,000 early reduction credits minus 106,000 early reduction

credits) would be offset by early reduction credits. Therefore, the utility would receive 158,000 loaned allowances to compensate for an additional 83,000 tons of emission reductions (150,000 tons of emission reductions minus 67,000 tons of emission reductions offset by early reduction credits). EPA believes that, because the allowances are merely loaned, the environment may benefit by up to 83,000 tons less of SO_2 emitted to the atmosphere.

IV. 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, 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 not a ''significant regulatory action'' because the rule does not meet any of the criteria listed above. As such, this action was not submitted to OMB for review.

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 promulgating 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 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.

The revisions to part 73 will not have a significant effect on regulated entities or State permitting authorities. The revisions represent an economic benefit to the affected utility and a benefit to the environment. The early reduction credit program is operated entirely by the EPA and, therefore, the changes will not burden the State or local permitting authorities.

C. Paperwork Reduction Act

This rule will increase the information collection requirements of the existing regulations, but only for utilities that are eligible and wish to participate in the early reduction credit program. As only two utilities are eligible for early reduction credits, an information collection report is not required in connection with today's rule. Therefore, no information collection report has been prepared or submitted to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

D. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. Only two utilities are potentially affected by this rule, and neither of those utilities is a small entity.

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.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 73

Air pollution control, Electric utilities, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: June 16, 1997.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 73 is amended as set forth below.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

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

2. Section 73.20 is amended by revising paragraph (e)(4) and by adding paragraph (f) to read as follows:

§ 73.20 Phase II early reduction credits.

* * * * *

(e) * * *

(4) For any unit that did not operate during 1990, the unit's 1990 SO_2 emission rate will be equal to the weighted average emission rate of all of the other units at the same source that did operate during 1990.

* * * * *

(f) *Allowance loan program.* (1) *Eligibility.* Units eligible for Phase II early reduction credits under paragraph (a) of this section are eligible for allowances under this paragraph (f) if the weighted average emission rate (based on heat input) for the prior year for all of the affected units in the unit's dispatch system was less than the system-wide weighted average emission rate for 1990. The weighted average emission rate shall be calculated as follows:

$$\text{Weighted Average Emission Rate} = \frac{\sum \text{Unit Emission Rate} \times \text{Unit Utilization (inmmBtu)}}{\sum \text{Unit Utilization}}$$

For the purposes of this calculation, the unit's dispatch system will be the dispatch system as it existed as of November 15, 1990.

(2) *Allowance Calculation.* Allowances under this paragraph (f) shall be calculated as follows:

$$\text{Unit Allowances} = \left[1.75 - \frac{\text{Greater of 1990 emission rate or}}{\text{Prior year emission rate}}\right] \times \text{Prior year utilization/2000}$$

(3) *Allowance Loan.* (i) The number of allowances calculated under paragraph (f)(2) of this section shall be allocated to the unit's year 2000 subaccount.

(ii) The number of allowances calculated under paragraph (f)(2) of this section shall be deducted, contemporaneously with the allocation under paragraph (f)(3)(i) of this section, from the unit's year 2015 subaccount.

(iii) Notwithstanding paragraph (f)(3)(ii) of this section, if the number of allowances to be deducted exceeds the amount of allowances allocated to the unit for the year 2015, allowances in the year 2015 subaccount equal to the amount of allowances allocated to the unit for the year 2015 shall be deducted. In addition to the deduction from the year 2015 subaccount, a sufficient amount of allowances in the year 2016 subaccount (up to the amount of allowances allocated to the unit for the year 2016) shall be deducted contemporaneously, such that the sum of the allowances deducted from the subaccounts equals the number of allowances required to be deducted under paragraph (f)(3)(ii) of this section.

(iv) Notwithstanding paragraph (f)(3)(ii) of this section, the procedure in paragraph (f)(3)(iii) shall be applied as follows to each year after 2015 (year-by-year in numerical order) for which the number of allowances to be deducted from that year's subaccount exceeds the number allocated to the unit for that year: allowances equal to the number allocated for that year shall be deducted from that year's subaccount and the remainder (up to the amount allocated) necessary to equal the number of allowances required to be deducted under paragraph (f)(3)(ii) of this section shall be deducted from the next year's subaccount.

(v) The owners and operators of the unit shall ensure that sufficient allowances are available to make the full deductions required under paragraphs (f)(3)(ii), (iii), and (iv) of this section. The designated representative may specify the serial number of each allowance to be deducted.

(4) *ERC Units.* Any unit to which allowances are allocated under paragraph (f)(3)(i) of this section shall be considered an ERC unit for purposes of applying the restrictions in paragraph (e)(6) of this section.

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