

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 9, 72, 73, 74, 75, 77, and 78**

[FRL-5908-5]

RIN 2060-AF43

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

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**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. On December 27, 1996, the Agency published proposed revisions to those rules, most of which revisions are addressed in today's final rule.

After considering its experience in applying the Acid Rain Program 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. Today's final rule revisions 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 the sulfur dioxide allowances for one unit. 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 annual allowances and must not emit sulfur dioxide in excess of the amount authorized by the allowances that they hold. Today's final rule revises one unit's allowances pursuant to a settlement agreement. In a future final action, EPA will act on the other allowance revisions that were set forth in the December 27, 1996 proposed rule.

**EFFECTIVE DATE:** November 24, 1997.

**ADDRESSES:** Docket No. A-95-56, containing the information used to develop the final rule, 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 federal holidays, at EPA's Air Docket Section (6102), Waterside Mall, Room M1500, 1st Floor, 401 M Street, SW, Washington, DC 20460. Additional information concerning the original rules and today's final revisions 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:** Dwight C. Alpern, Attorney-advisor, at (202) 233-9151 (U.S. Environmental Protection Agency, 401 M Street, SW, Acid Rain Division (6204J), Washington, DC 20460); 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, 72.8, and 72.14 of title 40 of the Code of Federal Regulations. 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:

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**I. General**

A significant number of the revisions in the December 27, 1996 proposal did not receive any comment. Most of the proposed revisions, including all on which comment was received, are discussed in this preamble. Unless otherwise stated below, revisions are adopted in today's final rule for the reasons discussed in the proposal.

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

**A. Applicability**

The proposal included two types of revisions of the existing rule. First, the definition of "power purchase commitment" was revised to extend to three years the period by which a letter of intent must have resulted in execution of a power sales agreement. Second, minor revisions were made to the procedure for petitioning for a determination by the Administrator on the applicability of the Acid Rain Program to a unit. Supportive comment was received on the first revisions, and no comment was received on the second. The revisions are therefore adopted in today's rule.

**B. Exemptions**

**1. New Units Exemption**

Section 72.7 of the existing rule provides an exemption from most Acid Rain Program requirements for new units that serve generators with a total capacity of 25 MWe or less and that combust clean fuels. The proposal made

several types of revisions in order to streamline the new units exemption. With the changes discussed below,<sup>1</sup> revisions are adopted in today's rule for the reasons discussed here and in the proposal.

First, the requirement for the combustion of clean fuels at the unit was revised in the proposal. While the existing rule requires that only fuel with a sulfur content 0.05 percent or less by weight be combusted, the proposal stated that the unit must burn gaseous fuel with an annual average sulfur content of 0.05 percent or less by weight and nongaseous fuel with an annual average sulfur content of 0.05 percent or less by weight. Commenters supported the revisions and explained that the existing rule was unduly restrictive. These revisions are adopted in today's rule.

The proposal also set forth revised procedures for determining annual average sulfur content by weight for gaseous and nongaseous fuel. The proposal eliminated provisions mandating the use of listed methods for measuring sulfur content but included provisions concerning the required frequency of sampling. The proposal provided explicitly that the owners and operators of the unit bear the burden of proving compliance with the sulfur content requirement. Commenters supported these revisions but suggested that EPA state that any "recognized industry standard such as an ASTM method would be acceptable." Commenters also urged that the rule state that a unit that burns only diesel fuel meeting the requirements of diesel fuel for motor vehicles be assumed to meet the limits on sulfur content of fuel.

The proposed revisions are adopted in today's rule. Under the final rule, since methods for measuring sulfur content are not specified, the Agency will evaluate on a case-by-case basis the information provided by the owners and operators of a unit on sulfur content. In order to ensure that owners and

operators understand that they must use a reasonable method to determine sulfur content, the final rule adopts language from section 412 concerning emission monitoring and states that the method of determining sulfur content must provide information that is reasonably precise, reliable, accessible, and timely. EPA anticipates that owners and operators will meet their burden of proof by using a method that is generally recognized in the industry (such as the applicable ASTM method set forth in the existing rule), is applicable to the unit, and is consistent with the other provisions (e.g., sampling frequency requirements) of today's rule.

Further, EPA recognizes that diesel fuel for motor vehicles is required under § 80.29 to have a sulfur content of 0.05% by weight. Commenters have suggested that such diesel fuel should be assumed to meet the sulfur content limit without any testing. One commenter stated that the testing by the unit owner was burdensome and duplicative of testing by the fuel supplier.

However, not all diesel fuel is required to meet the sulfur content limit; only diesel fuel for use in motor vehicles must meet the limit under § 80.29. 40 CFR 80.29(a)(1)(i). A significant amount of diesel fuel is produced for other uses (e.g., as fuel for electric generation by utilities) has a higher sulfur content than mandated for diesel fuel for motor vehicles. *Petroleum Supply Annual 1996*, Vol. 1 at 51, Table 17 (Energy Information Administration, June 1997) (indicating that about 37% of 1996 U.S. distillate production (which is primarily diesel fuel as defined in § 72.2) had a sulfur content above 0.05% by weight).<sup>2</sup> Moreover, the higher-sulfur diesel fuel is used by many utility units that combust diesel fuel. For example, during 1996 and the first half of 1997, diesel fuel with a sulfur content of 0.05% or less by weight accounted for only about 13% of the total heat input for affected units that used diesel fuel and were required to report the sulfur content of their fuel to EPA. Most of the diesel fuel used had a much higher sulfur content; diesel fuel with more than twice the sulfur content (i.e., over 0.10% sulfur by weight) accounted for about 81% of such total heat input.<sup>3</sup>

In contrast, virtually all commercially available natural gas in the U.S. has sulfur content at or below 0.05% by weight. Because of the toxic effects of

hydrogen sulfide and its corrosive effect on pipeline and customer equipment, pipelines generally provide pipeline transportation or distribution service only for natural gas with a very low hydrogen sulfide content (e.g., 0.25 to 0.30 grain per 100 standard cubic feet), which results in total sulfur content far below 0.05% by weight. See, e.g., H. Dale Beggs, *Gas Production Operations* at 204-5, 209-11, and 227 (1984); and 49 CFR 192.475(c) (provision, in U.S. Department of Transportation minimum safety standards for natural gas pipelines, limiting the hydrogen sulfide content of gas "stored in pipe-type or bottle-type holders" to 0.25 grain per 100 standard cubic feet).

Since diesel fuel is widely available that does not meet the sulfur content limit, diesel fuel must be treated like any other fuel that is combusted at an exempt new unit and that could potentially exceed the limit. The owners and operators of the unit combusting the fuel must demonstrate that the limit is being met using the results of reliable testing methods consistent with the sampling and other requirements of today's rule. Of course, under today's rule, the owners and operators are not required to conduct the testing themselves. EPA will consider testing by fuel suppliers in determining whether the owners and operators have met their burden of proof.

Second, the proposal streamlined the procedure for obtaining a new units exemption and reduced the burden imposed by the procedure on owners and operators and permitting authorities. The existing rule required owners and operators of a unit to submit an application and for permitting authorities to provide notice and opportunity for comment before issuing an exemption. The proposal made the obtaining of an exemption largely automatic so long as the capacity, annual fuel use, and recordkeeping requirements are met. Under the proposal, owners and operators of a unit meeting these requirements must submit a statement to the permitting authority (and, if EPA is not the permitting authority, to EPA) that the unit meets, and will continue to meet, the requirements for the exemption. The proposal states that a new units exemption is effective on January 1 of the first full calendar year for which the unit meets the exemption requirements and that the statement must be submitted by December 31 of such year. In short, where the end-of-year submission deadline and other requirements for an exemption are met, the exemption will cover the entire year in which the submission was made. The

<sup>1</sup> In addition, today's rule adds language clarifying that the requirement that a unit serve one or more generators with total nameplate capacity of 25 MWe or less during the period of the exemption does not apply to the time before the unit commenced commercial operation. Today's rule also adds language, under "Special Provisions", to reiterate the fact (reflected in § 72.7(a)) that an exempt unit must continue to meet the requirements (e.g., the sulfur content limits for its fuels) throughout the duration of the exemption. Another addition in today's rule is language clarifying that when the exemption is lost, the unit must comply with Acid Rain permitting and monitoring requirements, starting after the loss of the exemption (e.g., starting on the first date on which the unit is no longer exempt). Similar language is added to the retired units and industrial utility-units exemption provisions.

<sup>2</sup> Relatively little distillate fuel oil is imported into the U.S., and most of it has a sulfur content exceeding 0.05%. *Id.* at 55, Table 20.

<sup>3</sup> *Report to Docket: Diesel Fuel Use of Units Required to Use Fuel Sampling Under part 75, appendix D* (September 16, 1997).

proposed revisions are adopted in today's rule.

The proposal established some additional procedures for the relatively few new units that were allocated allowances.<sup>4</sup> The owners and operators of such units must submit a statement (similar to the one for units without allocations) stating that the owners and operators are surrendering the allowances, and proceeds from the auction of allowances, starting with the first year for which the unit is exempt. Under the proposal, the exemption for a unit allocated allowances is effective on January 1 of the first year for which the Administrator actually deducts the full allowance allocation and actually receives the full amount of auction proceeds. Commenters contended that this "unfairly" makes the exemption contingent on an event (i.e., the deduction of allowances) beyond the control of the owners and operators. Allegedly, the exemption should be contingent only on submission of the statement surrendering allowances and proceeds.

EPA notes that the only issue is the date on which the exemption becomes final. Once the Administrator actually makes the necessary allowance deductions and receives the proceeds, the exemption runs starting from January 1 of the year for which the unit meets the requirements (e.g., fuel sulfur limits and allowance and proceeds surrender) for this exemption. The difficulty with making the exemption effective when the surrender statement is submitted is that there is no guarantee that the unit's allowance account actually has sufficient allowances to deduct or that the proceeds are actually available to and received by the Administrator.

In order to ensure that the actual deduction of allowances in the unit's Allowance Tracking System account is not unduly delayed, the final rule requires that, within 5 business days of receiving the owners' and operators' surrender statement, the Administrator either makes the allowance deductions or notifies the owners and operators that there are insufficient allowances for the deductions. This is the same period of time in which, under §§ 73.52 and 73.53, the Administrator must act on an allowance transfer request. The

<sup>4</sup> While the proposal referred to allowances allocated under Table 2 or 3 of subpart B of part 73, today's rule simply refers to allowances allocated under that subpart. Under part 73 as currently organized, all allocations to new units are included in the tables. Since in the future EPA may reorganize the allowance allocation information that is currently presented in two separate tables, today's rule adopts a more general reference to new-unit allowance allocations.

approach adopted in today's rule accommodates both the concern that the necessary number of allowances actually be available for deduction before the exemption is effective and the concern that the effectiveness of the exemption not be unnecessarily delayed.

Finally, the proposal provided that a unit with a new units exemption is not an "affected unit" and so does not need an operating permit under part 70 or 71 unless such a permit is required because non-title IV, federal requirements applicable to the unit. See 61 FR 68343. However, for the case where, because of non-title IV requirements, the source at which the unit is located has or must have an operating permit, the proposal did not exclude the new units exemption from the general requirement to incorporate applicable federal requirements in the operating permit. See 42 U.S.C. 7661a(b)(5)(A) and 7661c(a). The final rule adopts the proposed provision and makes it clear that if, because of non-title IV requirements, an operating permit is issued to the source, the new units exemption must be reflected in that operating permit. In particular, after the actions necessary for the new units exemption to take effect have been completed (e.g., the receipt by the permitting authority of a statement of exemption by the owners and operators of the unit and the notification by the Administrator that he or she has deducted any allowances, and received any allowance proceeds, required to be surrendered), the permitting authority must add the provisions and ongoing requirements of the exemption to any operating permit that covers the source at which the unit is located. Consistent with the elimination of the requirement for notice and comment on a new unit's exemption, the addition of the exemption to the permit is an administrative amendment. A written new units exemption issued under the existing rule prior to revision by today's rule must similarly be added to any operating permit.

Under this approach, the exemption alone will not result in issuance of an operating permit, but, if an operating permit would be issued for the source in any event, that operating permit will include the ongoing requirements imposed on the unit under the exemption. This approach reasonably implements the concept that an operating permit should include the applicable federal requirements for a source. For the same reasons, analogous provisions are included in today's rule with regard to the retired units

exemption and the industrial-utility units exemption.

## 2. Retired Units Exemption

Section 72.8 of the existing rule provides an exemption from Acid Rain Program requirements for retired units. The proposal made several types of revisions in order to streamline this retired units exemption. First, while the existing rule required owners and operators of a unit to submit an application for the exemption and for permitting authorities to provide public notice and opportunity for comment before issuing a final exemption, the proposal made the obtaining of an exemption largely automatic so long as the unit is permanently retired. Second, the proposal clarified that the exemption applies to most Acid Rain Program requirements.

No comments were received on these proposed revisions. In order to make it clear that only Phase I or Phase II units, and not opt-in units under part 74, are eligible for the retired units exemption, today's rule states that the exemption applies to "any affected unit (except for an opt-in source)". This exclusion of opt-in sources is consistent with the existing provisions of part 74 that impose separate requirements with regard to permanent shutdown of opt-in sources. See, e.g., 40 CFR 74.46. In addition, to provide flexibility where a retired unit has no allowance allocations and has not selected a designated representative, the final rule allows a certifying official to submit notice of the exemption to the permitting authority. For the reasons discussed here and in the proposal, the revisions, as modified, are adopted in today's rule.

## 3. Industrial Utility-Units Exemption

*Scope of Exemption.* In the proposal EPA established a new exemption for certain industrial units that generate only incidental amounts of electricity for sale. As explained in detail in the preamble of the proposal, "utility units" (the entities subject to the Acid Rain SO<sub>2</sub> emission limitation and other requirements of the Acid Rain Program) include, with certain exceptions, any unit serving a generator that produced electricity for sale any time starting in 1985. With certain exceptions (e.g., for cogenerators), an industrial unit serving a generator that produced any amount of electricity for sale (referred to hereinafter as simply an "industrial utility-unit")<sup>5</sup> is an affected unit under

<sup>5</sup> The proposal referred to these units as simply "industrial units". In order to minimize confusion between these units and industrial boilers not used

the Acid Rain Program regardless of the amount of the sale relative to the total generation by the generator and whether or not the sale is to the general public or to a public utility for resale to the public. Moreover, the requirement to hold allowances to cover SO<sub>2</sub> emissions and to meet any applicable NO<sub>x</sub> emission limitation under the Acid Rain Program applies to all emissions from the unit, not simply the portion that might be attributed to generation of the electricity sold.

Despite the applicability of the requirement to hold allowances, EPA has not allocated allowances to industrial utility-units that might have qualified for allowance allocations under section 405 of the Act, including some units whose owners submitted timely comments relating to allowance allocations. On March 23, 1993, EPA issued notices stating that such industrial utility-units would not be included in the National Allowance Database, on which allowance allocations are based, because EPA "believe[d]" that the units were not affected units. 58 FR 15720, 15727 (1993). On the same date, EPA also issued a final allowance allocation list that allocated allowances only to units then "believed" to be affected units. 58 FR 15634, 15641 (1993). EPA stated that no allowances would be allocated to units that were subsequently determined to be, or that subsequently became, affected units. *Id.*

In light of these circumstances, EPA proposed a limited exemption from the Acid Rain Program for industrial utility-units that served, any time starting in 1985, a generator that produced electricity for sale. First, the industrial utility-unit must 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.<sup>6</sup> Such unit must not be a cogeneration unit since cogeneration units already are covered by an express exemption in the title IV. Further, on or before March 23, 1993, the owners or operators of the unit must have entered into an interconnection agreement (and any related power purchase agreement)

in generation of electricity for sale, and because generation of electricity for sale makes industrial units "utility units" under title IV, the final rule refers to the units as "industrial utility-units".

<sup>6</sup>In order to prevent the requirement from being circumvented through the position of the owner or operator in the corporate structure, the proposal stated that no owner or operator, subsidiary or affiliate or parent company of the owner or operator, or combination thereof could have such a principal business. Consistent with this approach, the final rule also applies this to any division of the owner or operator.

with a public utility requiring that the generator served by the unit produce electricity for sale only for incidental sales of electricity to that public utility. Moreover, in 1985 and any year thereafter, the generator served by the unit must have actually produced only incidental electricity sales for the utility, as required under the interconnection agreement and any related power purchase agreement. Incidental sales were defined as sales not exceeding the lesser of 10 percent of the generating output capacity of the generator or 10 percent of the actual annual electric output of the generator.

The proposal established a petition and notice-and-comment procedure for owners or operators to apply for the exemption and for the Agency to review and approve or disapprove the exemption. If, after approval of the exemption, any of the conditions for obtaining the exemption are no longer met, the exemption terminates automatically. The proposal, as changed below, is adopted for the reasons discussed here and in the proposal.<sup>7</sup>

All parties commenting on the new industrial utility-units exemption supported the concept of such an exemption. However, these commenters objected to various, specific provisions. First, commenters claimed that EPA should "totally" exempt industrial utility-units without regard to the amount of electricity sold by an industrial utility-unit and/or without regard to whether the unit was contractually obligated to sell electricity on or before March 23, 1993. Allegedly, industrial utility-units not qualifying for the exemption will incur significant costs "not related" to the objectives of title IV. It was argued that if industrial utility-units that cannot meet the criteria of the rule are not exempt, "agreements" providing for sales by industrial utility-units to utilities may be "discontinued", forcing utilities to "look elsewhere for their emergency and backup power needs." It was also argued that the costs of complying with the Acid Rain Program "will exceed the benefits of the limited reductions to be

<sup>7</sup>In the proposal, EPA relied on the *Report For Docket: Industrial Units* (October 31, 1996). In the report, EPA estimated the number of industrial utility-units in the U.S. that may qualify for an industrial utility-units exemption under § 72.14 and their total annual SO<sub>2</sub> and NO<sub>x</sub> emissions. One commenter asserted that the report overestimated the emissions for two units owned by the commenter. Assuming the accuracy of the commenter's emission estimates, the total annual SO<sub>2</sub> and NO<sub>x</sub> emissions estimates for industrial utility-units are reduced by about 10%, i.e., to about 41,000 tons of SO<sub>2</sub> and 17,000 tons of NO<sub>x</sub>. This is not a significant change and does not affect EPA's determinations concerning the industrial utility-units exemption.

achieved by the regulations" since the estimated amount of SO<sub>2</sub> emissions is small relative to the annual 8.95 million ton cap for utility units. Since industrial utility-units are allegedly subject to the nationwide cap of 5.60 million tons on total annual SO<sub>2</sub> emissions by "industrial sources", regulation of industrial utility-units under the existing Acid Rain regulations was claimed to be unnecessary.

However, EPA begins with the fact, undisputed by any commenter, that Congress included non-cogeneration industrial utility-units in the Acid Rain Program and thus under the annual 8.95 million ton cap for SO<sub>2</sub> emissions and under applicable NO<sub>x</sub> emission limitations. See 61 FR 68344. Further, although the preamble of the proposal stated that industrial utility-units are also under the 5.60 million ton cap for "industrial sources" under section 406(b) of the Clean Air Act Amendments of 1990, EPA now believes, on further consideration, that industrial utility-units (which served, any time starting in 1985, a generator that produced electricity for sale) are not covered by the latter cap.

Section 406(b) of the Clean Air Act Amendments of 1990 states that if SO<sub>2</sub> emissions from "industrial sources \* \* \* may reasonably be expected to reach levels greater than 5.60 million tons per year," the Administrator may take actions "to ensure that such emission do not exceed" the cap. 42 U.S.C. 7651 note. From section 406(a), it is clear that the definition of "industrial source" in section 402 of the Clean Air Act applies. Under section 402, an "industrial source" is: a unit that does not serve a generator that produces electricity, a "nonutility unit" as defined in this section, or a process source as defined in section 410(e). 42 U.S.C. 7651a(24)

As discussed above, an industrial utility-unit is a unit that is not owned or operated by a utility but that served, anytime starting in 1985, a generator that produced electricity for sale and therefore is a utility unit under section 402(17). Such a unit does not fall within any of the three groups of units that are defined as "industrial sources".<sup>8</sup> Consequently, the units that are under consideration in this rulemaking for

<sup>8</sup>Section 406(a) also states that "industrial sources" include units subject to section 405(g)(6), i.e., certain qualifying facilities and independent power production facilities that are exempt from title IV. The reference in section 406(b) to units "subject to section 405(g)(5)" is an inadvertent error that should be read as citing section 405(g)(6). See *National Annual Industrial Sulfur Dioxide Emission Trends 1995-2015*, EPA-454-R-95-001, at ES-2 (EPA 1995). Industrial utility-units are not exempt under section 405(g)(6).

inclusion in the industrial utility-units exemption are not covered by the 5.60 million ton cap. Contrary to commenters, the Clean Air Act Amendments of 1990 do not give EPA the "option" of regulating industrial utility-units under section 406. In contrast, Congress exempted certain cogeneration facilities from the Acid Rain Program (e.g., the 8.95-million-ton cap) and included them in the 5.60-million-ton cap. Under section 402(17)(C) and (25), exempt cogeneration facilities are excluded from the definition of "utility unit" and so are "nonutility" units covered by the "industrial source" cap.

This reinforces the conclusion that industrial utility-units are intended to be covered by the Acid Rain Program and leads to the conclusion that a blanket exemption for all industrial utility-units is inconsistent with the overall regulatory scheme under title IV.<sup>9</sup> Exempting all industrial utility-units, without regard to the amount of their electricity sales or to when the sales became contractually obligated, would result in a potentially increasing group of existing and future units that would generate electricity for sale but would be outside both the utility unit and the "industrial source" caps. Particularly since the ongoing changes in the structure of the electric industry make it difficult to predict how many industrial utility-units there may be in the future and how they may be used, EPA rejects such an open-ended exemption from both caps.<sup>10</sup> Moreover, commenters supporting a blanket exemption ignore the fact that the Acid Rain Program is aimed at reducing both SO<sub>2</sub> emissions and NO<sub>x</sub> emissions. To the extent that existing coal-fired industrial utility-units are Group 1 (i.e., dry bottom wall-fired or tangentially fired) or Group 2 (i.e., cell burner, cyclone, wet bottom, or vertically fired) boilers, exempting them removes the applicability of the Group 1 or Group 2 NO<sub>x</sub> emission limits, which in some cases may be the only NO<sub>x</sub> limits for these boilers under the Act.

<sup>9</sup> EPA rejects as speculative and irrelevant the commenter's suggestion that title IV may be amended in a way that would require non-exempt industrial utility-units to make additional, "prohibitively expensive" reductions.

<sup>10</sup> Even if the "total" exemption were limited to the specific possible industrial utility-units identified thus far by EPA (see *Report to Docket: Industrial Units* (October 31, 1996)), the amount of generation and emissions covered by a "total" exemption could increase in the future. Moreover, the commenters suggested no basis for limiting a "total" exemption to those tentatively identified industrial utility-units if other units are subsequently found to meet the "total"-exemption criteria.

EPA also rejects, as unsupported and speculative, the claim that subjecting industrial utility-units to Acid Rain Program requirements will make interconnection agreements and related power sales agreements between such units and utilities economically prohibitive. EPA agrees that industrial companies may have more difficulty than utilities (at least under the current scheme of utility rate regulation) in passing through the costs of the Acid Rain Program. However, that is a far cry from concluding that electricity sales by existing industrial utility-units would cease or that no new industrial utility-units would contract to make such sales.

EPA therefore maintains that, if there is to be any exemption for industrial utility-units, the exemption must be strictly limited in order to resolve the specific problem set forth in the preamble of the proposal. That problem is that some industrial utility-units have only incidental activities (i.e., electricity sales) bringing the entire operation of the unit under the Acid Rain Program and that these units likely qualified for, but were not allocated, allowances. Strictly limiting the exemption to address this problem will minimize the potential environmental impact of this resolution on SO<sub>2</sub> and NO<sub>x</sub> emissions and will better harmonize the exemption with the basic regulatory scheme under title IV. In fact, without the specific limits on the exemption set forth in today's rule based on the magnitude of electricity sales and the time period when electricity sales first became contractually required, EPA would reconsider whether any exemption for industrial utility-units should be established.

As an alternative to a blanket exemption for industrial utility-units, one commenter suggested modifying the definition of "incidental sales of electricity" so that units selling up to one-third (rather than up to 10 percent, as under the proposal) of their electric generation to utilities could qualify as exempt industrial utility-units. Allegedly, limiting sales to up to one-third of annual electric generation would be consistent with the statutory exemption for cogeneration facilities. Under section 402(17)(C) and § 72.6(b)(4), a cogeneration facility that supplies to a utility, on an annual basis, an amount of electricity not exceeding one-third of its potential electrical output capacity or 219,000 MWe-hrs is an unaffected unit and is not subject to the Acid Rain Program. The commenter supported limiting industrial utility-units to annual electricity sales equal to the lesser of one-third of capacity or one-third of actual generation.

Reflecting that the rationales for the industrial utility-units exemption and the statutory cogeneration facility exemption are not identical, today's rule does not make the requirements for the two types of exemptions identical. On one hand, the cogeneration facility exemption reflects Congressional intent, manifest in section 402(17)(C) of the Act, that certain cogeneration facilities be entirely exempt from the Acid Rain Program whether or not they had contracted before enactment of title IV to provide electricity at a fixed price. Presumably, this is because, by using the same steam both for electric generation and industrial purposes, cogeneration facilities are inherently more efficient than other units that generate electricity. See 40 CFR 72.2 (defining "cogeneration unit" as unit producing electricity and useful thermal energy "through sequential use of energy"). On the other hand, the industrial utility-units exemption addresses the category of industrial utility-units, which were intended by Congress to be subject to the Acid Rain Program but, with regard to certain individual units, were not allocated allowances for which they likely qualified. They lack the sequential use of energy that makes cogeneration facilities inherently more efficient. As discussed above, EPA maintains that the industrial utility-units exemption should, under these circumstances, be more narrowly drawn than the provisions for exempting cogeneration facilities. Consequently, EPA disagrees with the approach of using the limit on electricity sales by exempt cogeneration facilities in setting the limit on electricity sales by exempt industrial utility-units.

In the proposal, the industrial utility-units exemption is limited to units that were contractually obligated as of March 23, 1993 to make only incidental sales of electricity to utilities. The proposal defines "incidental sales" as sales not exceeding 10 percent of either nameplate capacity or total actual generation because that level seemed to be consistent with the general level of historical electricity sales by the type of unit intended to be covered by the exemption. This approach limits the exemption by restricting both the number of units covered by the exemption and the amount of electricity sales to historical levels and does not allow expansion beyond those levels. None of the commenting owners of units potentially qualifying for the industrial utility-units exemption claimed that they had actually made, in any past year, electricity sales in excess

of the 10 percent limit or that the 10 percent limit is unrepresentative of historical levels. EPA maintains that it is appropriate to impose on the industrial utility-units exemption a limit reflecting historical levels and that, on their face, electricity sales as high as one-third of total generation cannot be regarded as simply incidental to the operation of the unit involved. For these reasons, while choosing a 10-percent level as the cutoff point for "incidental sales"—like choosing any specific cutoff point—is to some extent arbitrary, EPA maintains that the chosen level is reasonable. Today's rule, like the proposal, defines "incidental electricity sales" as an amount of electricity sales that does not exceed the smaller of 10 percent of the nameplate capacity of the generator served by the unit times 8,760 hours per year or 10 percent of the actual annual electric output of that generator.

Today's rule also continues to impose the incidental-electricity-sales limit on sales starting in 1985 and continues to require that the contractual obligation to make such sales must have been in place on March 23, 1993. One commenter objected to having "two different deadlines" and argued that only sales starting in 1993 should have to meet the incidental-electricity-sales limit. EPA rejects this approach.

Under the industrial utility-units exemption, EPA considers the electricity sales of the unit starting in 1985 because that is analogous to the approach taken by Congress in section 402(17) in determining what units are utility units that are subject to the Acid Rain Program. With certain exceptions, any unit that at any time starting in 1985 or thereafter serves a generator that produces electricity for sale is a "utility unit" subject to the Acid Rain Program. 42 U.S.C. 7651a(17)(A). In crafting the industrial utility-units exemption, EPA reasonably takes a parallel approach of considering actual sales starting in 1985. Actual sales before 1985 will not be considered. EPA sees no basis for the commenter's suggestion of ignoring any non-incidental electricity sales from 1985 to 1993. In essence, EPA is requiring that, in order to be exempt, a unit must have maintained its character as an industrial utility-unit making only incidental sales throughout the period generally used to determine applicability of the Acid Rain Program.

The rationale for the "second deadline" in the industrial utility-units exemption—i.e., the requirement that there be, as of March 23, 1993, a contractual obligation to make incidental electricity sales—is set forth in detail in the proposal and is adopted

here. 61 FR 68346. This requirement also makes it likely that the unit was either (i) in commercial operation as of November 15, 1990 or (ii) was under construction by December 31, 1990 and therefore qualified for, but was not allocated, allowances in Phase II. See 42 U.S.C. 7651d(a)–(f) and (h)–(i) (allowances for existing units) and (g) (allowances for units under construction and operating by specified deadlines).

*Termination of exemption.* Under the proposal, a unit's industrial utility-units exemption terminates automatically once any of the original requirements for granting the exemption are no longer met. Commenters raised concern that the proposal terminates the exemption if the contractual agreement that requires incidental electricity sales by the unit, and on which the granting of the exemption was originally based, expires or is amended. A particular agreement may have a termination date even though the parties intend for the relationship to continue. Further, an agreement may be modified directly or through replacement by a new agreement, e.g., in order to change the names of the parties or the electricity prices. According to commenters, the exemption should not be terminated so long as there is not an obligation to sell more than an incidental amount of electricity.

EPA understands the concern that replacement of the interconnection agreement on which an exemption is based (or of the power purchase agreement related to the interconnection agreement) by a follow-on agreement that continues to require the same amount of electricity sales should not result in termination of the exemption. EPA also recognizes a similar concern with regard to amendment of the interconnection agreement or power purchase agreement. On one hand, the rule should provide for some flexibility allowing agreements to be modified or replaced so long as the underlying electricity sales obligation of the industrial utility-unit is not altered in a way that undermines the original basis for the unit's exemption. On the other hand, EPA is concerned that this flexibility should not have the effect of allowing expansion of the unit's exemption beyond its original scope. For example, just as a unit that as of March 23, 1993 did not serve a generator required to produce electricity for sale and that begins after that date to be involved in electricity sales is not exempt, an exempt unit should not be able to expand its involvement in electricity sales after March 23, 1993 and retain the exemption. Finally, EPA believes it must consider that future

modifications or replacements of agreements will be taking place in the context of restructuring of the electric industry, where utilities may be restructured and renamed.

In order to meet all of these concerns, today's rule provides that, in applying the automatic-termination provisions of the exemption, the interconnection agreement (and related power purchase agreement) and any successor agreement will be considered. For example, the proposal stated that if the interconnection agreement on which the exemption is based expires or terminates and the generator served by the unit continues to produce electricity for sale, the exemption for the unit terminates. Under today's rule, if that interconnection agreement is replaced or supplemented by a "successor agreement", the expiration or termination of the original agreement will not cause termination of the exemption. Today's rule defines "successor agreement" in a way that is aimed, on one hand, at requiring the unit to continue to meet the basic requirements for the exemption and taking account of future electric industry restructuring and, on the other hand, at preventing this flexibility from being used to expand beyond the original scope of the exemption when it was approved.

A "successor agreement" is defined as an agreement that modifies, replaces, or supersedes the interconnection agreement or related power purchase agreement on which the exemption was originally based. Further, a "successor agreement" must be between owners and operators of the unit and another party (which may be the same party as in the original agreement) that (i) is principally in the electric utility business or is a public utility subject to State or local jurisdiction and (ii) is obligated to sell electricity to the owners and operators of the unit. In addition, the "successor agreement" must require the generator served by the unit to produce electricity for sale only for incidental electricity sales to that party. Finally, the total amount of electricity that the generator served by the unit is required to produce for sale under all such contracts that are in effect (i.e., the interconnection agreement, related power purchase agreement, and any successor agreement) must not exceed the amount that such generator was required to produce for sale under the original interconnection agreement and related power purchase agreement on which the exemption was initially based.

*Procedural and other issues.* Under the proposal, a unit seeking an

industrial utility-units exemption must submit a petition to the local permitting authority. The processing of the petition is similar to that for an Acid Rain permit. However, once an exemption is approved, it has no uniform, fixed term and continues in effect unless and until it is automatically terminated. Commenters claimed that the process of petitioning for the exemption would be burdensome. They noted that the proposal removed the requirements to apply for the new units or retired units exemption and argued that the industrial utility-units exemption should similarly be made "self-executing".

When the new units and retired units exemptions were first adopted by rule, the regulations required submission of petitions for the exemptions, processing by the permitting authority using the permit notice-and-comment procedures, and renewal every five years. The December 27, 1996 proposal and today's rule make those exemptions self-executing for the most part. With some exceptions, owners and operators of units meeting the fairly straightforward requirements of the new units or retired units exemptions need only notify the permitting authority and EPA of their qualification for the exemption.

In the case of the industrial utility-units exemption, EPA has decided that it is necessary to require the submission of a petition and processing by the permitting authority. This is a newly established exemption, with which the Agency has had no experience. Moreover, in determining whether to establish the exemption, EPA has found it difficult to obtain information on which units might qualify. *See Report to Docket: Industrial Units* (October 31, 1996). In addition, determination of whether a unit qualifies for the exemption is not as straightforward as the determination of qualification for the new units or retired units exemption. Qualification for an industrial utility-units exemption depends, in part, on interpretation of interconnection and power purchase agreements. Further, particularly in light of other provisions of today's rule that streamline the permit processing procedures and thus also apply to processing of a petition for industrial utility-units exemption, EPA maintains that the petition and review requirements for the exemption are not unduly burdensome on either the unit owners and operators or the permitting authorities. Today's rule requires a one-time review process in that once approved, the exemption continues in effect without the need for renewal.

One final issue raised by a commenter (Zinc Corporation of America) is whether industrial utility-units that do not qualify for an industrial utility-units exemption should be allocated allowances. Allegedly, such units qualify for allowances but were not allocated any due to EPA's "oversight in allowance allocation".

The difficulty with this argument is that it ignores the fact that EPA has previously specified deadlines by which parties claiming that an erroneous failure to allocate allowances to a unit were required to submit such claims and necessary supporting information to EPA. As explained in the proposal (61 FR 68345), EPA issued in July 1992 the Adjunct Data File listing units of "nontraditional utilities". 57 FR 30034, 30040 (July 7, 1992). EPA indicated that the units might or might not be affected units and that, in any event, it lacked sufficient information on which to base any allowance allocation. *Id.* Further, EPA gave notice that if the data necessary for allowance allocation was not provided by September 8, 1992 for "a unit that may be affected now or in the future", the unit would not be allocated allowances. *Id.* Moreover, believing that it had corrected all timely identified errors in the data and resulting allocations, EPA stated in the March 23, 1993 notice on final allowance allocations that no allowances will be allocated to any affected unit that was not allocated allowances in that notice. 58 FR 15634, 15641 (March 23, 1993).

Neither Zinc Corporation of America nor the predecessor-owner (St. Joe Minerals Corporation) of the units now owned by Zinc Corporation of America submitted any data or any objection to the lack of allowance allocations for the units. The only companies that have units identified by EPA as potentially industrial utility-units and that submitted any comments concerning allowance allocations were LTV Steel Mining Company and Ford Motor Company. Both companies claimed that their units were not affected units, and neither has ever objected to the lack of allowance allocations.

Thus, there is no basis for allocating allowances now or in the future to industrial utility-units, as suggested by the commenter, if EPA ultimately determines that any such units do not qualify for the industrial utility-units exemption.<sup>11</sup> Such units are treated like

<sup>11</sup> EPA stresses that it has made no determination at this time on the qualification of these companies' units for the industrial utility-units exemption and will await submission of the necessary applications before making any determination. None of the

any other unit that has not been allocated allowances and becomes an affected unit after that date: No allowances will be allocated. EPA's approach of declining to allocate allowances when the deadline for submission of information for allowance allocation is missed has been upheld by the courts. *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 872-73 (1996).

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

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

The proposal attempted to clarify the extent to which the Acid Rain rules apply in lieu of provisions of parts 70 and 71, which address permitting by State permitting authorities and by the Administrator under title V of the Act. No comments were received on these revisions. The revisions are adopted in today's rule with some changes. The language in several sections of the proposal stating that the Acid Rain rules "supersede" provisions of parts 70 or 71 is removed from the final rule because of concern that such language might cause confusion as to whether parts 70 and 71 remain in effect at all.

Instead, today's § 72.60 clarifies that part 72 governs, notwithstanding the requirements of part 71, and the list of specific procedural matters that part 72 governs is clarified and augmented so that the list includes all matters covered by subparts C, D, E, F, and H of part 72.<sup>12</sup> The list of specific matters to which part 71 still applies is also clarified. Further, today's § 72.70 retains the language in the existing rule stating that subpart G governs to the extent that the subpart is "inconsistent" with part 70. Upon reconsideration of the language, EPA concludes that this existing language is reasonably clear, particularly with the revisions in § 72.72 reducing the number of differences between subpart G and part 70. EPA also notes that the existing language avoids any potential confusion about the overall effectiveness of part 70.

#### B. State Authority to Administer and Enforce Acid Rain Permits

Under the proposal, a State becomes responsible for administering and enforcing Acid Rain permits for affected sources if the State has an operating permits program approved under part

companies that commented stated that it could not meet the proposed exemption requirements.

<sup>12</sup> For similar reasons, the same general approach is used in § 72.80, which states that subpart H, rather than part 70 or 71, governs revisions of Acid Rain permit provisions.

70 and to the extent the State Acid Rain regulations are accepted by the Administrator. The proposal also established a procedure for withdrawal of the Acid Rain Program from a State where the Administrator determines that the State is not adequately administering or enforcing the program.

Today's rule adopts the revisions, with several changes. Under the proposal, the Administrator accepts all or a portion of State Acid Rain regulations through issuance of a notice in the **Federal Register**. Particularly since the State regulations will then become part of the State title V operating permits program, EPA believes that notice and opportunity for public comment should be provided before the Administrator issues a final acceptance or rejection of all or a portion of the State regulations. This approach is consistent with the requirement in part 70 that notice and opportunity for public comment be provided on the Administrator's approval or disapproval of a State operating permits program under title V. See 40 CFR 70.4(e). Today's rule includes language that imposes a notice-and-comment requirement but is flexible enough to allow use of a direct final procedure under which, for example, the proposed and final acceptance of State regulations are issued in simultaneous notices and the acceptance becomes automatically final if no significant, adverse comments are timely submitted.

Further, the proposal revised the provision concerning the date by which a State permitting authority must reopen Phase II Acid rain permits to add Acid Rain NO<sub>x</sub> requirements. The existing provision requires the permits to be reopened by January 1, 1999 but is unclear as to whether this is the deadline for completion, or simply commencement, of the reopening procedure. In order to clarify the provision and ensure that State permitting authorities have sufficient time to process the permits, the proposal stated that the reopening must be completed by July 1, 1999.

Commenters objected to the July 1, 1999 completion deadline on the ground that utilities need more than 6 months to plan for compliance with the NO<sub>x</sub> terms of their Acid Rain permits. No comment was received supporting the Agency's concern that State permitting authorities might need additional time beyond January 1, 1999 to complete the reopening of the permit. Further, as discussed elsewhere in this preamble, today's rule includes provisions that enable State permitting authorities to expedite permit

processing, e.g., the provisions for elimination of newspaper notice and for use of direct proposed procedures. By further example, today's rule provides that any EPA-approved early election plan that has not been terminated must be added to the Phase II permit through an administrative amendment, rather than through a notice-and-comment procedure. This reflects the fact that § 76.8, governing early election plans, requires a State permitting authority to approve, as part of the Phase II permit, any ongoing early election plans previously approved by EPA. These streamlining provisions will reduce the administrative burden on the State permitting authorities.

Consequently, today's rule retains the January 1, 1999 deadline and makes it clear that the reopening of the permit to add NO<sub>x</sub> requirements must be completed by that deadline. By its terms, the January 1, 1999 deadline for adding the NO<sub>x</sub> provisions only applies to the extent that the provisions were included in a timely, complete permit application concerning NO<sub>x</sub> emissions. EPA notes that, under § 76.9(b)(2), such permit application must be submitted by January 1, 1998 and that, where the State permitting authority with jurisdiction over the unit has responsibility for issuing Acid Rain permits covering NO<sub>x</sub>, the submission should be made to that State permitting authority.

Finally, language is added (e.g., to § 72.73(b)(1) and § 72.74(a)) to make it clear that the State permitting authority issues Acid Rain permits to the extent that it has State Acid Rain regulations, accepted by EPA, that apply to the sources involved and to the Acid Rain requirements involved. For example, if accepted State Acid Rain regulations include the Acid Rain emissions limitation for SO<sub>2</sub> but not the emissions limitations for NO<sub>x</sub> by the applicable deadline under § 72.73, EPA has the flexibility to determine whether the State permitting authority will be responsible for issuing Acid Rain permits covering both SO<sub>2</sub> requirements under part 72 and NO<sub>x</sub> requirements under part 76.

### *C. Required Elements for State Acid Rain Program*

The existing rule set forth the criteria for approval of a State operating permit program under title V and acceptance of the State Acid Rain regulations. The proposal eliminated or modified several of the criteria in the existing rule because EPA believed that they were unnecessary or redundant. Comments were received on only three of these revisions. With the changes discussed

below, all the revisions are adopted in today's rule for the reasons discussed here and in the proposal.

First, the existing rule required State permitting authorities to give written notice of draft permits to specified persons and also to provide notice in a newspaper or State publication. The proposal gave State permitting authorities the option of foregoing newspaper or State publication notice of draft permits that require only that a unit meet the standard SO<sub>2</sub> or NO<sub>x</sub> emission limitations, a NO<sub>x</sub> averaging plan, or a NO<sub>x</sub> early election plan. Commenters supported this revision, which is adopted in today's rule.

Second, the proposal gave State permitting authorities the option of using what was referred to as a "direct final" procedure for issuing Acid Rain permits. Under the procedure, a State permitting authority issues simultaneously a draft permit and a proposed permit. If no significant, adverse comments are received, the proposed permit is deemed to be issued and, after the period for review by the Administrator, the State permitting authority issues the final permit. Commenters supported this option and urged that EPA clarify that it applies to permit revisions as well as permit issuance. EPA notes that the procedure is misnamed in the proposal in that the permit that is issued in the absence of significant, adverse comment is a "proposed permit" that is still subject to the Administrator's review. Consequently, today's rule refers to this option as the "direct proposed" procedure and adopts the provision.<sup>13</sup>

With regard to the use of the direct proposed procedure for permit revisions, EPA notes that § 72.81(c)(2) in the proposal and in today's rule states that, with certain exceptions not relevant here, permit modifications must be treated as permit applications. Consistent with § 72.81(c)(2), the procedures for permit issuance (including, e.g., the direct proposed procedure) apply to permit modifications. Similarly, permit issuance procedures apply to permit reopenings. Because the other types of permit revisions, i.e., fast-track

<sup>13</sup> Today's rule also removes language in § 72.72(b)(1)(iv) stating that after the comment period on a draft permit, the State permitting authority will issue or deny a proposed permit. Some State permitting authorities have provided, with EPA's concurrence, that the comment period on the draft permit and EPA's review of the permit run concurrently so long as no adverse comment is received and no change is made in the draft permit. The language in § 72.72 is removed in order to allow State permitting authorities to take this approach, which reduces the length of the permitting process, for Acid Rain permits.

modifications and administrative permit amendments, have their own procedures set forth in the proposal and today's rule, the direct proposed procedure does not apply to such revisions.

Third, the proposal eliminated a provision in the existing rule limiting 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. As a result, part 70, which imposes no limit on State administrative appeals and limits judicial appeals to no more than 90 days from permit issuance, would govern appeals of Acid Rain permits. 40 CFR 70.4(b)(3)(xii); *see also* 59 FR 44460, 44516 (August 29, 1994) (proposing to allow States to provide up to 125 days for judicial appeals).

Commenters objected to the removal of any limit on the periods for State administrative appeals, and for judicial appeals, under part 72. The commenters contended that, in the absence of a limit in part 72 (or in part 70) on administrative appeals, owners and operators "would never be able to know whether their permits would be subject to challenge". However, the commenters ignored the fact that, in imposing no federally mandated limit on State administrative appeals, part 72 leaves the matter to the States, which are highly likely to impose such limits in the interests of finality and administrative efficiency. EPA is not aware of any State operating permit programs that, to the extent they provided for administrative appeal, failed to set a time limit on the filing of administrative appeals. In short, the question here is not whether to have any limit but rather whether to leave the matter for the States or impose a federally mandated limit. EPA maintains that it is preferable to allow each State flexibility to craft time limits for Acid Rain appeals. Under this approach, each State can set a single time limit appropriate for and applicable to all administrative appeals—and also one for all judicial appeals—of the entire title V operating permit, rather than having one set of time limits for an Acid Rain permit and another set of time limits for the remaining portions of the operating permit.

The commenters contended that the Acid Rain permits are a "stand-alone portion" of the operating permit and so it would not be confusing to have a different deadline for appealing the Acid Rain portion and appealing the rest of the operating permit. EPA disagrees. Although the Acid Rain permit is a separate portion of the

operating permit, State permitting authorities are likely, as a matter of efficiency, to conduct notice and comment and other permitting procedures for the rest of the operating permit at one time and to issue a single, all inclusive operating permit, particularly since the Acid Rain permit is likely to comprise a relatively small part of the entire title V operating permit. In fact, in response to State concern over how to coordinate the processing of the Acid Rain permit and the operating permit, EPA has issued guidance on alternative approaches for achieving coordination. *See Guidance on Coordinating Title IV/Title V Permitting Schedules* (March 15, 1994). EPA believes that having a single administrative appeal deadline and a single judicial appeal deadline for the entire operating permit is simpler and less likely to result in inadvertent failure to meet the applicable filing deadline.

The commenters also alleged that the Acid Rain portion incorporates new compliance obligations while the remainder of the operating permit merely restates existing obligations. This, of course, depends on the timing of the issuance of the operating permit. State permitting authorities are allowed to phase in the issuance of operating permits and new obligations may arise before issuance of, and therefore may be included in, a given operating permit. Moreover, to the extent this distinction applies, it is likely to apply only for the initial Phase II Acid Rain permit; in most cases, a subsequent Acid Rain permit will restate the obligations (e.g., the requirement to hold sufficient allowances to cover SO<sub>2</sub> emissions) already in the initial Acid Rain permit.

EPA concludes that, with regard to the question of limiting State administrative and judicial appeals, the Acid Rain portions of operating permits should not be treated any differently than the remaining portions of operating permits. The provision in the proposal is adopted in today's rule.

In the proposal EPA noted that many States have already adopted Acid Rain rules based on the existing rule. EPA stated that it expected that, if rule revisions are adopted in final, States will incorporate the revisions within 2 years after the promulgation of the final rule. No comment was received on this approach, and EPA continues to believe that this is a reasonable time frame. To the extent a State permitting authority fails to incorporate the revisions in a timely manner, EPA will consider whether the State is adequately administering and enforcing the Acid Rain Program and may take action

under § 72.74 of today's rule to administer all or a part of the Acid Rain Program for sources located in the State.

#### IV. Part 72: Miscellaneous Permitting Matters

##### A. Definitions

The proposal modified or eliminated several definitions. Only one of the changes (i.e., the revised definition of "submit or serve" to eliminate the requirement for use of certified mail) received comment and that comment was supportive. The definition revisions, as modified below, are adopted in today's rule.<sup>14</sup>

##### B. Designated Representative

The proposal included two types of revisions concerning designated representatives. First, the procedures for selecting or changing the designated representative or an alternate were simplified and made less burdensome. Commenters supported the revisions, which are adopted in today's final rule.

Second, the proposal provided the option of selecting two alternate designated representatives for an affected source in certain limited circumstances. The proposal was aimed at providing flexibility for sources with units located in more than one State that are in a NO<sub>x</sub> averaging plan under § 76.11 and that are subject to two levels of management, one at the subsidiary operating company and one at the parent company. In particular, as requested by a commenter, the proposal allowed a multi-state utility holding company with a NO<sub>x</sub> averaging plan covering units in two or more States to designate for sources with units in the plan a single designated representative at the holding company level and two alternates, one at the management level and one at the operations level of the operating company. Commenters supported the additional flexibility but suggested certain changes to the proposal.<sup>15</sup>

<sup>14</sup> One of the proposed definitions, "State", is modified in today's rule. The proposed definition removed language, stating that "State" has its conventional meaning where it is clear "from the context", and listed one specific instance where the conventional meaning would apply. Because there are several contexts in which the conventional meaning applies, today's rule retains the formulation in the existing rule. Thus, for example, in § 72.40(b)(2) the term "State" has its broader meaning (which includes the jurisdiction of any non-federal permitting authority) while in § 72.22(e)(1)(i) "State" has its conventional meaning.

<sup>15</sup> One commenter suggested that there is no basis for the requirement in § 76.11 that units in a NO<sub>x</sub> averaging plan have the same designated representative. This suggestion is outside the scope of the rulemaking. While it is unclear whether the commenter intended to raise that issue here, EPA

The commenter that originally requested this type of provision in the proposal expressed concern that the references in the proposal to a holding company with multiple subsidiaries may become obsolete in light of future restructuring of the electric industry. For example, a holding company with subsidiaries operating generation facilities may be restructured to include all generation facilities in a single subsidiary. This commenter also was concerned that the proposal limited the option of having two alternates to cases where the NO<sub>x</sub> averaging plan covered all units operated by the subsidiaries. If any units are covered by early election plans or have alternative emission limitations and so are outside the NO<sub>x</sub> averaging plan, the proposal would not apply. Other commenters echoed these concerns but suggested that EPA allow any source to have two alternates, regardless of whether the source has units that are in a NO<sub>x</sub> averaging plan or are subject to management at both the subsidiary and parent company levels.

While retaining the general rule that a source must have one designated representative and may have one alternate, EPA proposed allowing two alternates in limited circumstances where it was shown that such flexibility might be needed. The proposed provision, as modified in today's rule, covers the only specific circumstance for which a need for multiple alternates has been explained by commenters, i.e., where units are in different States but in the same NO<sub>x</sub> averaging plan and are subject to both subsidiary and parent company management. While commenters make a general suggestion that having two alternates gives greater assurance that a "point of contact" for a source will be available "at all times", the commenters do not claim that having one alternate has generally been insufficient or point to any other specific circumstances where two alternates are needed. EPA therefore declines to expand the provision any further.

For the reasons discussed here and in the proposal, today's rule adopts the proposed provision, with changes to meet other concerns stated by commenters. First, the provision expressly covers a unit whose utility system is the subsidiary of a company (not necessarily a "holding company"). Second, the provision will cover cases where the units in the NO<sub>x</sub> averaging plan are operated by a single subsidiary or by two or more subsidiaries. Each unit must be in a utility-system

subsidiary of a company, but they may be in the same such subsidiary. Third, the NO<sub>x</sub> averaging plan need not include all units operated by subsidiaries of the company; instead the plan must simply cover two or more units in more than one State.

#### C. Compliance Plans

The proposal revised the provisions concerning the submission of substitution plans and reduced utilization plans in order to clarify the deadlines and the procedures to be used. No comments were received, and the revisions are adopted in today's rule.

The proposal also revised the procedures for review of failed repowering projects. No comments were received on the revisions, which are adopted in today's rule.

Finally, the proposal revised the deadline for activating conditional repowering extension plans from December 31, 1997 to July 1, 1997. No comments were received. However, today's rule is being published after July 1, 1997, and EPA has decided not to revise the activation deadline retroactively.

#### D. Federal Permit Issuance

The proposal made several revisions to the federal permit issuance procedures. For example, the period after which an Acid Rain permit application received by EPA is deemed to be complete was lengthened from 30 days to 60 days. This was done in order to be consistent with part 71, under which the period applicable to operating permit applications is 60 days. Commenters objected that this prolongs the "period of uncertainty" over the completeness of the Acid Rain application and stated that Acid Rain permitting "generally proceeds along a separate track" from other title V permitting. However, the commenters' assumption that the Acid Rain portion of the operating permit is processed separately from the rest of the operating permit is not necessarily correct. If the State permitting authority is generally responsible for issuing title V operating permits but, because its Acid Rain rules are not fully approved, EPA issues the Acid Rain permits, then the Acid Rain permits may be processed separately. In cases where EPA is responsible for issuing entire title V operating permits (including the title IV portion), the title IV and title V procedures may be coordinated as a matter of efficiency, particularly if EPA delegates the title IV and title V permitting to the State. See 40 CFR 71.10 (delegation of permitting under title I); and 72.74(a)(2) of today's

rule (delegation of permitting under title IV). A single completeness review (as well as a single notice and comment procedure) may be conducted for the entire operating permit. EPA maintains that the ability to coordinate Acid Rain permitting and title V permitting and to realize potential efficiencies is enhanced by minimizing the differences between Acid Rain permitting and title V permitting.

Moreover, the Acid Rain portion of the operating permit is generally relatively small compared to the entire title V permit application. It is therefore logical to make the completeness review period for the title IV permit conform to the 60-day period for title V permits, rather than to shorten the title V completeness review period to 30 days. While the period during which owners and operators are uncertain about the completeness of Acid Rain permit applications will be lengthened for 30 days, EPA maintains that the advantage of a consistent completeness review period outweighs the relatively minor, additional uncertainty.

Further, the proposed rule altered the provision concerning the time period within which a designated representative must respond to a request for supplemental information by the Administrator. While the existing rule set an automatic 30-day period for responding and allowed the Administrator to lengthen the response period, the proposal stated that a reasonable period would be set on a case-by-case basis by the Administrator. A commenter objected on the ground that it is unlikely that a period less than 30 days would be reasonable and that it would generally be in the interest of a designated representative to respond expeditiously. However, the commenter ignores the fact that there can be significant, but readily remedied gaps or errors in the information submitted to EPA in a permit application. Setting a minimum response period of 30 days is likely to lengthen unnecessarily the permitting process. In addition, while the Agency could treat applications with such errors as incomplete and avoid the minimum 30-day response period, EPA maintains that it is preferable to have the flexibility to set a reasonable, short response period. This flexible approach both promotes orderly and expeditious processing of permits and protects the designated representative from unreasonable requests. This is also preferable to the commenter's approach of assuming that designated representatives will necessarily respond expeditiously and in a time frame that meets the Agency's schedule for permit processing.

did not propose, and is not considering here, such a change in § 76.11.

### E. Permit Revision

The proposal made several changes to the permit revision procedures. Changes concerning permit reopenings received no comment and are adopted in the final rule; changes concerning fast-track amendments and administrative amendments are adopted as discussed below.

With regard to fast-track modifications, the proposal lengthened the period within which a State permitting authority must act on a fast-track modification of a permit from 30 to 60 days after the end of the public comment period. Commenters objected claiming that there is no evidence that State permitting authorities need more time and that the revisions entitled to fast-track modification required little exercise of administrative discretion and are unlikely to receive public comment.

EPA notes that, while a NO<sub>x</sub> averaging plan or plan change may require little administrative discretion and elicit little comment, the processing of other types of revisions (e.g., changes to repowering plans or thermal energy plans) is more likely to involve discretion or public comment. Further, the processing of Acid Rain permits and permit revisions represents a very small portion of the operating permit processing required of State permitting authorities under title V. Reflecting the significant burden of operating permit processing, part 70 allows State permitting authorities to take up to 18 months from receipt of a complete permit application to issue an operating permit and a similar period to make significant modifications to an existing operating permit. 40 CFR 70.7(a)(2) and (e)(4)(ii). By comparison, a 90-day period (i.e., the 30-day comment period and 60 days after the end of the period) for completing a fast-track modification is certainly expedited. EPA maintains that, in light of the permitting burden faced by State permitting authorities, it is preferable to set a more realistic, and yet still expedited, deadline for action by State permitting authorities.

With regard to administrative amendments, the proposal set forth the amendment procedures in detail, rather than citing the procedures in part 70. Further, the period for action on one administrative amendment, an alternative emission limitation (AEL) demonstration period, was lengthened from 30 days to 60 days after receipt of an AEL demonstration petition determined by the permitting authority to meet all the requirements of § 76.10. No comments were made on these

revisions, which are adopted in today's rule.

In addition, the administrative amendment procedures were changed to allow a permitting authority to correct minor errors in a permit on its own motion. Noting that the proposed provision was not explicitly limited to "minor" errors, commenters argued that notice should be given to the designated representative before even minor changes are made to the permit. In response to these concerns, today's rule explicitly limits administrative permit amendments on the motion of the permitting authority to corrections of typographical errors or similarly noncontroversial changes (e.g., adding a new unit or retired unit exemption for which the requirements were previously met). Moreover, the rule requires that a permitting authority provide at least 30 days' notice to the designated representative of the source involved before making, on its own motion, any administrative permit amendments. This approach will enable the permitting authority to correct minor errors with minimal delay while providing the designated representative the opportunity to comment.

In order to make the reopening provision consistent with the provision allowing a permitting authority to make administrative amendments on its own motion, language is added to § 72.85. This language makes it clear that administrative amendment procedures, rather than reopening procedures, may be used for typographical or similar errors.

### F. Reduced Utilization Accounting

The proposal made several changes in the reduced utilization accounting provisions. Most of the changes received no comment or only favorable comment and are adopted in today's rule. Commenters objected to one change: The provision that, in accounting for the effect of heat rate improvements on a Phase I unit's utilization, credit for such improvements must be limited to the net effect of the improvements on the unit's heat rate. According to the commenters, if a unit's heat rate (i.e., Btu/Kwh) since the 1985–1987 base period deteriorates (i.e., increases) and measures are taken that offset that deterioration, the entire effect of the heat rate improvements should be included in accounting for reduced utilization. The commenters alleged that the statutory reduced utilization provision in section 408(c)(1)(B) of the Act establishes a "baseline" heat input, not a "baseline" heat rate.

In asserting that there is no connection between utilization in the

base period and heat input in the base period, the commenters ignore the basic purpose of accounting for reduced utilization and heat rate improvements. The purpose of the reduced utilization provisions is to ensure that any increased emissions resulting from reducing utilization of, and shifting generation from, Phase I units to units compensating for the reduced utilization "are accounted for in the allowance system." 56 FR 63002, 63019 (December 3, 1991). Reduced utilization "as a result of \* \* \* improved unit efficiency programs" need not be accounted for through allowance surrender because these programs "cause decreases in utilization without any shifts of generation to unaffected units." 56 FR 63021. To the extent utilization (i.e., total annual heat input in mmBtus) at a Phase I unit is reduced below the baseline level because that unit has improved its heat rate after 1987 *over the level reflected in the baseline utilization*, there is no increase in SO<sub>2</sub> emissions and allowances need not be surrendered. In this case, the Phase I unit is using less fuel because it can produce a kilowatt-hour of electricity with less fuel and thus less SO<sub>2</sub> emissions.

However, if the Phase I unit's heat rate deteriorates from the level reflected in the unit's baseline utilization and heat rate improvement measures are instituted after 1987 that bring heat rate back to the level reflected in the baseline utilization, then the unit is using the same amount of fuel to produce a kilowatt-hour of electricity. In the latter case, the heat rate improvements made after 1987 do not account for the use of less fuel at the Phase I unit. Just as heat rate improvements made before 1987 and reflected in baseline utilization cannot account for utilization below baseline, heat rate improvements made after 1987 that simply restore the heat rate to the level reflected in the baseline cannot account for reduced utilization. See 61 FR 68354. The same logic applies if a Phase I unit is attempting to account for its reduced utilization through heat rate improvements at another unit that simply restore the latter unit's heat rate to the 1987 level.

Thus, contrary to the commenters' assertions, EPA did not simply "assume" that limiting heat rate improvement to net improvement since 1987 is warranted. On the contrary, EPA explained, albeit in less detail than in today's rule, the basis for the limitation. *Id.* Moreover, the limitation is consistent with long-standing explanations of the purpose of reduced utilization accounting, as discussed

above, and with other, regulatory provisions governing such accounting. In particular, limiting heat rate improvement to net improvement since 1987 is analogous to the approach taken in the existing rule concerning sulfur-free generation, which is not at issue here. Only the net increase in current generation at a sulfur-free generator (i.e., the increase in current generation over the sulfur-free generator's average 1985-1987 annual generation), not the increase from one year to the next, is used to account for reduced utilization. See 40 CFR 72.91(a)(3)(iii); and 58 FR 3590, 3606-7 (January 11, 1993).<sup>16</sup> The commenters' approach is therefore rejected as inconsistent with the entire thrust of reduced utilization accounting, and the proposed provision is adopted in today's rule.

## V. Part 73: Allowances

### A. Allowance Tables

In the proposal, EPA proposed a number of changes in unadjusted allowances and in the units and allowance figures listed in Tables 2 and 3 of § 73.10, reflecting those allowance changes. For purposes of the proposal, EPA was able to list the changes in the rule without reprinting Tables 2 and 3. However, consistent with the requirements of the **Federal Register** concerning finalization of multiple changes to regulatory tables and in the interest of facilitating public understanding of the final changes, EPA concludes that the changes should be finalized through republication of information in the tables. Further, section 403(a) of the Act requires the Administrator to issue prior to June 1, 1998 a revision of the final allowance allocations primarily to account for allocations for repowered units under section 409. That revision will necessitate recalculation of all units' allowance allocations and so must also be implemented through republication of information in Tables 2 and 3. In order to avoid the confusion likely to result from, and the large expense associated with, multiple republications of information in the tables, EPA has decided not to finalize at this time the allowance revisions in the December 27, 1996 rule. Instead, EPA intends to

<sup>16</sup> While EPA uses 1985-1987 average sulfur-free generation as the benchmark for limiting the use of sulfur-free generation in reduced utilization accounting, the proposal and today's rule use 1987 heat rate as the benchmark for limiting the use of unit efficiency improvements. This is because annual generation was more likely to vary during 1985-1987 than was a unit's annual heat rate and the use of the 1987 heat rate, which captures any efficiency improvement measures instituted before 1988, is less burdensome for utilities and EPA to determine than the average 1985-1987 heat rate.

propose in the near future the revisions associated with the June 1, 1998 allocations and to coordinate finalization of both the allowance revisions in the December 27, 1996 proposal and that future proposal.

The only exception to this approach is the allowance changes for Central Louisiana Electric Company's Rodemacher unit 2. In the December 27, 1996 proposal, the allowances for Rodemacher unit 2 were changed to 20,774 unadjusted allowances. Under a settlement of litigation concerning Rodemacher unit 2's allowance allocation, the Administrator agreed to sign a final rule adopting the revision to the unit's allowances by October 1997. Consistent with that settlement, the proposed unadjusted allowances for Rodemacher unit 2 are adopted in today's rule. This single change can be made without republishing the allowance tables.

### B. Small Diesel Refinery Provisions

The proposal made certain revisions to the provisions to small refinery allowance allocations. No comment was received, and the revisions are adopted in today's rule.

## VI. Part 75: Monitoring of Units Burning Digester or Landfill Gas

In the proposal, EPA requested comment on monitoring requirements for units burning digester or landfill gas. No comments were received. EPA intends to consider this matter in future proceedings.

## VII. Part 77: Excess Emissions

The proposal made changes to part 77 concerning immediate deduction of allowances to offset excess emissions, the deadline for paying excess emissions penalties, and excess NO<sub>x</sub> emissions under a NO<sub>x</sub> averaging plan. The changes received no comment or only favorable comment and are adopted in the final rule.

## VIII. Part 78: Administrative Appeals

The proposal made changes to part 78 to clarify that an administrative appeal is a prerequisite for judicial review of decisions of the Administrator under the Acid Rain Program and to ensure that the requirement for exhaustion of administrative remedies is consistent with the Supreme Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993). On September 24, 1993, the Agency originally proposed to add language stating explicitly that administrative appeal is a prerequisite for judicial review. 58 FR 50088, 50104 (1993). Certain commenters stated, in response to the September 24, 1993 proposal,

that, in light of the alleged potential for "disruptive effects" resulting from an administrative exhaustion requirement, the Agency should solicit additional comment on the effect of *Darby* on part 78. EPA therefore did not finalize the September 24, 1993 proposal. Instead, EPA provided further opportunity for comment by publishing the December 27, 1996 proposal, which included both the changes explicitly requiring exhaustion of administrative remedies and some additional changes to conform with *Darby*. In its comments on the December 27, 1996 proposed rule, the same commenters submitted further comments. In their second set of comments, the commenters failed to go beyond their generalized claim of "disruptive effects". Rather than providing any specific claims or examples of when administrative appeal of a particular type of Administrator's decision would be "disruptive" to the Acid Rain Program or to affected sources' compliance efforts, the commenters simply expressed general concern that EPA "failed to consider" unspecified "disruptive" effects.

In the September 24, 1993 and December 27, 1996 proposals, EPA set forth both the basis for requiring exhaustion of administrative remedies and provisions addressing concerns over delay pending completion of administrative review. Requiring exhaustion of administrative remedies promotes efficient use of administrative and judicial resources in that it "allows the Agency to review \* \* \* decisions for correctness before having to defend (them) \* \* \* in Federal court." 58 FR 50104 (quoting the original proposed appeals procedures at 56 FR 63002, 63033 (December 3, 1991)). Decisions that a petitioner shows are erroneous can be reversed or corrected without resource-intensive litigation before the federal courts and decisions that a petitioner shows are insufficiently explained can be reexamined and either reversed or better explained. The overall effect is to increase the likelihood of sound decision-making and reduce the need for recourse to the courts.<sup>17</sup>

<sup>17</sup> EPA maintains that, contrary to commenters' assertion, the provision in section 307(b)(1) of the Clean Air Act on motions for reconsideration is irrelevant to the question of administrative appeals and is not properly interpreted as evidencing "hostility" to the exhaustion requirement involved here. Section 307(b)(1) involves judicial appeals and the effect of agency reconsideration of a final action on such appeals. To the extent section 307(b)(1) addresses reconsideration of a final rule, the section is irrelevant to this case, which concerns administrative appeals of individual, adjudicative decisions. To the extent the section addresses reconsideration of an adjudicative decision, the section is still irrelevant here. Reconsideration

Further, while nothing in the record indicates that delay pending administrative appeal of Acid Rain Program decisions (during which appeal the decisions will not be operative) will likely have "significant, adverse consequences", the December 27, 1993 proposal took reasonable account of the general possibility of such consequences pending appeal.<sup>18</sup> 61 FR 68365. Despite two opportunities to provide information on the alleged, potential, adverse effect of the exhaustion requirement, the commenters originally objecting to the requirement were apparently unable to identify any specific circumstances in the Acid Rain Program under which significant, adverse consequences would result from the requirement, much less provide any information on the likelihood of such circumstances arising. No such circumstances have been identified to EPA, and EPA is not aware of any, particularly in light of the ability of the Agency, under the proposal and today's rule, to expedite administrative appeals. EPA therefore rejects the commenters' claim concerning "disruptive effects" of the exhaustion requirement as speculative and unsupported.

Moreover, the Agency's general approach under the regulatory statutes that it administers is to require exhaustion of administrative remedies prior to judicial review. *See, e.g.*, 40 CFR 71.11(l)(4) (administrative appeal of final permit decision under title V of Clean Air Act); 40 CFR 124.19(f)(1) (administrative appeal of final permit decision under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (RCRA), Prevention of Significant Deterioration (PSD) program in the Clean Air Act, or Underground Injection Control (UCI) program in the Safe Drinking Water Act); and 40 CFR 124.60(g) (administrative appeal of final permit decision under National Pollutant Discharge Elimination System (NPDES)). Today's rule is consistent with that general approach.

Nevertheless, the Agency crafted the proposed rule for Acid Rain Program appeals to provide for flexibility to minimize delay, particularly if future

cases arise where delay will have a significant, adverse effect. Specifically, the proposal revised the existing rule to allow the Administrator, the Environmental Appeals Board, or the Presiding Officer (as appropriate) to set different, reasonable time periods (which could be shorter or longer than in the existing rule) for administrative-appeal-related filing by parties. For example, the 30-day period within which motions to intervene in part 78 appeals may be filed was changed to allow a different period to be set. As explained in the proposal, this approach gives the Agency "the ability to accelerate the appeals proceeding where delay due to the pending appeal will have significant, adverse consequences." 61 FR 68365. The commenters argued that the Agency might not always "share an affected source's interest in avoiding" such adverse consequences. However, the Agency's approach of allowing adjustment of the time periods gives the Agency the authority to accommodate the need for expeditious administrative appeal and gives the affected source the opportunity to show that expedition is necessary. Particularly in cases where such a showing is made, the Agency intends to make reasonable efforts to minimize the delay caused by the appeal. The Agency maintains that this approach reasonably balances, on one hand, the important role of the exhaustion requirement and, on the other, the commenter's generalized concern that appeals not cause undue delay.

The commenters failed to recommend any other approach but merely stated that the Agency had not considered limiting the applicability of the exhaustion requirement, foregoing the exhaustion requirement, or setting tighter time limits on procedural steps. However, in explaining the need for the exhaustion requirement (*see* 56 FR 63033, 58 FR 50104, and 61 FR 68365), the Agency rejected the notion of limiting or foregoing the requirement. Further, recognizing that the major purpose of providing flexibility in the time periods for filings is to expedite administrative appeals, EPA is modifying the proposal to provide that, with a few exceptions discussed below, the time periods involved may be shortened, but not lengthened.

One of the more important exceptions to that approach is the period for filing of administrative appeals.<sup>19</sup>

<sup>19</sup> A minor exception under today's rule is the period for curing defects in filings, which remains as 7 days subject to shortening or lengthening at the discretion of the Environmental Appeals Board or

Commenters raised concern that an Administrator's decision under the Acid Rain Program would remain "in limbo" during a period of uncertain duration for the filing of an administrative appeal. Today's rule reduces the standard period for appeal to 30 days from issuance of the Administrator's decision and establishes that as a fixed period that cannot be changed on a case-by-case basis. The Agency is concerned that a period shorter than 30 days would not provide enough time for preparation of a petition that fully addresses the issues on appeal, as required under § 78.3(c). *See, e.g.*, 40 CFR 78.3(c)(1) and (3) (requiring a list of material issues and a clear and concise brief supporting the petition). This standard appeal period is consistent with the 30-day time period for administrative appeal of other actions of the Administrator under the Clean Air Act and other statutes administered by EPA. *See, e.g.*, 40 CFR 71.11(l)(1) (administrative appeal of final permit decision under title V); 40 CFR 124.19(a) (administrative appeal of final permit decision under RCRA, PSD program, or UIC program); and 40 CFR 124.91(a)(1) (administrative appeal of final permit decision under NPDES). The reduced time period for filing appeals reduces the period of uncertainty on the status of the decision while still providing a reasonable opportunity for administrative appeal.<sup>20</sup>

From the time a decision is issued until the expiration of the appeal period, there is necessarily some uncertainty about the status of the decision: the parties will not know for certain whether the decision will be final until the expiration of the appeal period. However, this uncertainty is tempered by the fact, admitted by the commenters, that the vast majority of decisions under the Acid Rain Program have not been, and probably will not be, appealed. Further, the limitations on the presenting of new evidence and on the raising of new issues during an administrative appeal of a decision for which there was an opportunity to comment will encourage parties interested in a decision to submit comments. As a result, parties' positions will probably be known when the decision is issued and the likelihood of appeal can then be evaluated.

the Presiding Officer. This will minimize the likelihood of a filing being permanently excluded for purely technical reasons. The Agency is confident that flexibility concerning this limited type of procedural deadline can be implemented in a way that will not result in unnecessary delay of proceedings.

<sup>20</sup> For similar reasons, the period for appealing a proposed decision of a Presiding Officer to the Environmental Appeals Board is fixed at 30 days under § 78.20(a).

provides a second opportunity for agency review of an adjudicative decision, for which an opportunity for administrative review was already provided. In contrast, the issue here is whether there should be an *initial* opportunity for EPA to review its decisions on Acid Rain matters before the decisions may be appealed to the courts.

<sup>18</sup> EPA did not "acknowledge" that there would be cases of "significant, adverse consequences" due to delay pending appeal or that any such cases would be likely to occur. Instead, EPA provided procedures that could address such cases (regardless of their likelihood) if they arose.

The commenters also suggested that a decision should be considered operative during the period between the date the decision is issued and the expiration of the appeal period (i.e., 30 days under today's rule) unless and until a petition for administrative appeal is filed with the Environmental Appeals Board. Prior to today's rule revisions, part 78 provided that a decision was operative from the date of issuance and throughout the administrative appeal period, except to the extent the decision was stayed by the Environmental Appeals Board or the Presiding Officer designated by the Board. 40 CFR 78.7(a). While today's rule makes a decision inoperative once a timely petition for administrative appeal is filed, the status of the decision prior to appeal or the running of the period for filing an appeal is unchanged. The decision itself (e.g., the approval or denial of an Acid Rain permit or permit revision or of a petition under part 75) may specify the date on which the decision is effective. Unless the decision itself specifies an effective date that is different than the date on which the decision is actually issued, the decision is operative on the issuance date unless and until the filing of a timely petition for administrative appeal in accordance with part 78. For example, with regard to a decision concerning the transfer of allowances to or from an Allowance Tracking System Account, the requirement in the existing rule that the Administrator implement, within 5 business days of receipt, an allowance transfer request that he or she determines to be properly submitted (40 CFR 73.52 and 73.53) is unchanged in the December 27, 1996 proposal and today's rule. In principle, if the transfer were appealed under part 78, the Administrator could take action to render the transfer inoperative pending appeal. However, appeal in such circumstances is highly unlikely since an allowance transfer must be authorized by the designated representative of the party transferring the allowances. See 42 U.S.C. 7651b(b).

For the reasons discussed here and in the September 24, 1993 and December 27, 1996 proposals, the December 27, 1996 revisions are adopted as modified above.

## IX. 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 final 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

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, before promulgating a proposed or final 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 205 generally requires that, before promulgating a rule for which a written statement must be prepared, EPA identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least

burdensome alternative if the Administrator explains why that alternative was not adopted. Finally, section 203 requires that, before establishing any regulatory requirements that may significantly or uniquely affect small governments, EPA must have developed a small government agency plan. The plan must provide for notifying any potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Because this final 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.

For the reasons discussed in detail here and in the proposal (61 FR 68340), the final rule 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 final rule 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 final 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 final rule increases the annual unadjusted basic allowances for one unit by 2,312 allowances. In a future action, the Agency will act on the other allowance revisions in the proposal. Sections 403(a) and 405(a)(3) of the Act set a nationwide cap on annual allowance allocations. Because of the requirement to adhere to the cap, the increase of allowances under this final rule (if not offset by the other allowance revisions when they are finalized) would eventually necessitate an equal decrease in the total annual allocations of all other units. The small decrease (i.e., 2,312 allowances out of an annual

nationwide cap of about 8.95 million allowances or about 0.026 percent) would be spread among all other units, and so the effect on any one unit would be insignificant. Moreover, EPA is not, in today's rule, adjusting the allocations of the other units to account for this small allowance increase.

### C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this final rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and has assigned OMB control number 2060-0258.

The only additional information required by this collection of information is data concerning industrial utility-units that exercise the option of applying for the industrial utility-units exemption established by today's rule. If granted, the industrial utility-units exemption exempts the unit from most requirements of the Acid Rain Program, e.g., allowance, monitoring, and annual compliance requirements. The requirements from which qualified industrial utility-units will be exempt are significantly more burdensome than the information collection requirements for obtaining the exemption.<sup>21</sup> An industrial utility-unit seeking the exemption must meet the information collection requirements, which involve submission of information that is necessary, and will be used, for determining whether the unit qualifies and will continue to qualify for the exemption.

The additional information collection increases the estimated burden, as compared to the burden under the existing rule, by an average of 24 hours per response for an estimated 15 one-time 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,

<sup>21</sup> Because the information collection burden on industrial utility-units in the absence of this new exemption was not included in the ICR for the existing rule, the effect of removing such burden through the new exemption is not included in the ICR for today's rule. Consequently, the ICR for today's rule shows an increase in burden even though exempt industrial utility-units will actually experience a significant net reduction in the burden imposed on them by the Acid Rain Program. In addition, as discussed in this preamble, today's rule includes other revisions that will reduce somewhat the burden of the program on units that are not exempt. Because the burden reduction for non-exempt units is small relative to the total burden of the program, the reduction is not reflected in the ICR for today's rule.

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. EPA is amending the table in 40 CFR part 9 of currently approved ICR control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

### D. Regulatory Flexibility

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 final rulemaking under section 553 of the Administrative Procedure Act, must prepare and make available for public comment a final 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 final 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 rule, would not have a significant, adverse impact on small entities. 58 FR 3649. Today's final revisions are not significant enough to change the overall economic impact addressed in the January 11, 1993 preamble. Moreover, as discussed in this preamble, today's rule has the net effect of reducing the burden of the Acid Rain regulations on regulated entities, including small entities. For example, the rule makes it less burdensome to obtain new units and retired units exemptions from the Acid Rain Program. Further, the rule increases the allowances for one unit, which increase will have an insignificant effect on other units' allowance allocations.

For the reasons discussed above, EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has determined that this rule will not have a significant, economic

impact on a substantial number of small entities.

### E. 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).

### F. Miscellaneous

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

### List of Subjects in 40 CFR Parts 9, 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 dioxide.

Dated: October 6, 1997.

**Carol M. Browner,**  
*Administrator.*

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

### PART 9—[AMENDED]

1. The authority citation for part 9 continues to read as follows:

**Authority:** 7 U.S.C. 135, *et seq.*, 136-136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601-2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251, *et seq.*, 1311, 1313d, 1314, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971-1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-1, 300j-2, 300j-3, 300j-4, 300j-9, 1857, *et seq.*, 6901-6992k, 7401-7671q, 7542, 9601-9657, 11023, 11048.

### § 9.1 [Amended]

2. Section 9.1 is amended by adding to the table under Permits Regulation in the column "40 CFR Citation", after the entry for "72.7-72.10", the entry "72.14" and adding to the table, as the corresponding entry in the column "OMB Control No.", the entry "2060-0258".

**PART 72—[AMENDED]**

3. 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]**

4. 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".

5. 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.

\* \* \* \* \*

*Affected States* means any affected States 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 exempt 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 associations, 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 where such meaning is clear from the context.

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

\* \* \* \* \*

6. Section 72.6 is amended by adding paragraph (b)(9) and revising paragraphs (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.

\* \* \* \* \*

7. 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 (f)(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 during the entire year (except for any period before the unit commenced commercial operation) 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 total 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 (d) of this section) and nongaseous fuel with an annual average sulfur content of 0.05 percent or less by weight (as determined under paragraph (d) 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 under subpart B of part 73 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 meets 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 (f) of this section.

(3) After receipt of the statement under paragraph (b)(2) of this section,

the permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under paragraphs (a), (b)(1), (d), and (f) 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 under subpart B of part 73 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 (f) 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) or this section 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 section. Within 5 business days of receiving a statement in accordance with paragraph (c)(1)(i) of this section, the Administrator shall either deduct the allowances under paragraph (c)(1)(i)(C) of this section or notify the owners and operators that there are insufficient allowances to make such deductions. 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. After notification by the Administrator under the third sentence of paragraph (c)(1)(ii) of this section, the permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under paragraphs (a), (c)(1), (d), and (f) of this section.

(d) 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 using a method of determining sulfur content that provides information with reasonable precision, reliability, accessibility, and timeliness:

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

(2) 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:

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

Where:

$\%S_{\text{annual}}$ =annual average sulfur content of the fuel burned during the year by the unit, 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.

(3) 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 (d)(2) 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.

(e)(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 (a), (d), (e)(2), and (f) of this section in lieu of the requirements set forth in the written exemption. The permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under this paragraph (e)(1) and paragraphs (a), (d), (e)(2), and (f) of this section.

(2) If a utility unit under paragraph (e)(1) of this section is allocated one or more allowances under subpart B of part 73 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 June 31, 1998 and, if the Administrator is not the permitting authority, a copy shall be submitted to the Administrator.

(f) Special Provisions. (1) The owners and operators and, to the extent applicable, the designated

representative of a unit exempt under this section shall:

(i) Comply with the requirements of paragraph (a) of this section for all periods for which the unit is exempt under this section; and

(ii) 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 or for fuel delivered to the unit continuously by pipeline, the type of fuel, the sulfur content, 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 paragraphs (b), (c), or (e) 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 25 MWe;

(B) The date on which the unit burns any coal or coal-derived fuel except for coal-derived gaseous fuel with a total 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 (d) of this section) or for nongaseous fuel burned at the unit exceeds 0.05 percent by weight (as determined under paragraph (d) 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 first 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 first date on which the unit is no longer exempt.

8. Section 72.8 is revised to read as follows:

**§ 72.8 Retired units exemption.**

(a) This section applies to any affected unit (except for an opt-in source) that is permanently retired.

(b)(1) Any affected unit (except for an opt-in source) 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 is 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 part), or, if no designated representative has been authorized, a certifying official of each owner 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.

(3) After receipt of the notice under paragraph (b)(2) of this section, the permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under paragraphs (b)(1) and (d) of this section.

(c) A 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. The permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under this paragraph (c) and paragraph (d) of this section.

(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 on which the unit is first to resume operation.

(3) 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.

(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 paragraph (b) or (c) 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 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 first date on which the unit resumes operation.

#### § 72.9 [Amended]

9. 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 to the extent that part 75 provides for a 3-year period for recordkeeping, the 3-year period 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]

10. 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).

11. Section 72.14 is added to read as follows:

#### § 72.14 Industrial utility-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, division or 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 or a successor agreement under paragraph (d)(4)(ii) 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 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. 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, division or 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 and any successor agreement under paragraph (d)(4)(ii) 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 each 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 and any successor agreement under paragraph (d)(4)(ii) 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 paragraph (a)(2) of this section or any successor agreement under paragraph (d)(4)(ii) of this section;

(8) A statement that each generator 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 or any successor agreement under paragraph (d)(4)(ii) 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) of this section 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.

(5) After issuance of the exemption under paragraphs (c)(1) and (2) of this section, the permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under paragraphs (c)(1)(i) and (d) 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 owners and operators bear the burden of proof that the requirements 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 and any successor agreement under paragraph (d)(4)(ii) 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 or any successor agreement under paragraph (d)(4)(ii) 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, division or 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 or a successor agreement under paragraph (d)(4)(ii) 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 or a successor agreement under paragraph (d)(4)(ii) of this section where such sale is not required under that interconnection agreement or related power purchase agreement or successor 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 or a successor agreement under paragraph (d)(4)(ii) 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, no successor agreement under paragraph (d)(4)(ii) of this section is in effect, 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) A "successor agreement" is an agreement that:

(A) Modifies, replaces or supersedes the interconnection agreement or related power purchase agreement under paragraph (a)(2) of this section;

(B) Is between the owners and operators of the unit and a person that is contractually obligated to sell electricity to the owners and operators of the unit and either 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; and

(C) Requires the generator served by the unit to produce electricity for sale to the person under paragraph (d)(4)(ii)(B) of this section and only for incidental electricity sales, such that the total amount of electricity that such generator is required to produce for sale under the interconnection agreement or related power purchase agreement (to the extent they are still in effect) and the successor agreement shall not exceed the total amount of electricity that such generator was required to produce for sale under the interconnection agreement or related power purchase agreement under paragraph (a)(2) of this section.

(iii) 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 first date on which the unit is no longer exempt.

(iv) 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 first date on which the unit is no longer exempt.

12. 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 and at least one other unit, which are located in two or more of the contiguous 48 States or the District of Columbia, each have a utility system that is a subsidiary of the same company; and

(ii) The designated representative for the units under paragraph (e)(1)(i) of this section submits a NO<sub>x</sub> averaging plan under § 76.11 of this chapter that covers such units and is approved by the permitting authority, *provided* that the approved plan remains 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).

13. 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.

\* \* \* \* \*

**§ 72.25 [Amended]**

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

15. 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.

**§ 72.31 [Amended]**

16. 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 for an opt-in source)".

17. 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.

18. 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.

\* \* \* \* \*

**§ 72.40 [Amended]**

19. Section 72.40 is amended by:

a. Removing from paragraph (a)(2) the words "applicable 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, or 76.7 of this chapter";

b. Removing from paragraph (a)(2) the words "section 407 of the Act 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<sub>x</sub> averaging plan contained in part 76 of this chapter" and adding, in their place, the words "a NO<sub>x</sub> 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]**

20. 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]**

21. 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]**

22. Section 72.44 is amended by:

a. Removing from paragraphs (g)(1)(i) and (2) the words "proposed permit revision" and adding, in their place, the words "requested permit modification";

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

c. Removing from paragraph (g)(2)(iii) the words "December 21" and adding, in their place, the words "December 31"; and

d. 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]**

23. 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".

24. 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.

(1) Notwithstanding the provisions of part 71 of this chapter, the provisions of subparts C, D, E, F, and H of this part and of parts 74, 76, and 78 of this chapter shall govern the following requirements 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; administrative record; public notice and comment and public hearings on draft permits; response to comments on draft permits; issuance and effectiveness 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 shall apply to Acid Rain permit applications and permits.

(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.

25. 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.

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

**§ 72.65 Public notice of opportunities of 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<sub>x</sub> 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.

\* \* \* \* \*

27. 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 the air pollution control agencies of affected States and any interested person. The

Administrator will also give notice in the **Federal Register**.

\* \* \* \* \*

28. 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 approval of State operating permit programs and 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 part 74, 76, or 78 of this chapter is inconsistent with the requirements of part 70 of this chapter, this part and parts 74, 76, and 78 of this chapter shall take precedence and shall govern the issuance, denial, revision, reopening, renewal, and appeal of the Acid Rain portion of an operating permit.

29. 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. Before accepting or

rejecting all or a portion of a State Acid Rain Program, the Administrator will provide notice and opportunity for public comment on such acceptance or rejection.

(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.

30. 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 (b)(1)(ix) and (x) as paragraphs (b)(1)(vii) and (viii) respectively;

d. Redesignating paragraph (b)(1)(xii) as paragraph (b)(1)(ix);

e. Redesignating paragraph (b)(1)(xiv) as paragraph (b)(1)(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 nonacceptance or 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 newspaper 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<sub>x</sub> 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.* 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 proposed 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 section. 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(b)(6) of this chapter shall be ground for filing an appeal.

(6) *Industrial Utility-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.

31. 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) A State, to the extent that it is responsible

under paragraph (a) of this section as of December 31, 1997 (or such later date as the Administrator may establish) for administering and enforcing Acid Rain permits, shall:

(i) On or before December 31, 1997, 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.

(ii) On or before January 1, 1999, for each unit subject to an Acid Rain NO<sub>x</sub> emissions limitation, amend the Acid Rain permit under § 72.83 and add any NO<sub>x</sub> early election plan that was approved by the Administrator under § 76.8 of this chapter and has not been terminated and reopen the Acid Rain permit and add any other 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.

(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.

32. 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 to the extent that a State permitting authority is not 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 and to the extent 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 to the extent that they are 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)(2)(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, and except to the extent that, 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 to the extent that they

are 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, and except to the extent that, 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 with such requirements; *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 amend

under § 72.83 the Acid Rain permit and add any NO<sub>x</sub> early election plan that was approved under § 76.8 of this chapter and has not been terminated and reopen the Acid Rain permit for Phase II and add any other 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.

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

**§ 72.80 General.**

(a) This 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) Notwithstanding the operating permit revision procedures specified in parts 70 and 71 of this chapter, the provisions of this subpart shall govern 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.

\* \* \* \* \*

34. Section 72.81 is amended by: removing from paragraph (c)(1)(ii) the words "and § 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).

35. 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 sources are 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.

36. 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<sub>x</sub> early election plan that was approved by the Administrator under § 76.8 of this chapter;

(13) The addition of an exemption for which the requirements have been met under § 72.7 or § 72.8 or which was approved by the permitting authority under § 72.14; and

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

(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 under paragraph (a)(3), (a)(4), (a)(12), or (a)(13) of this section at least 30 days after providing notice to the designated representative of the amendment and without providing any other 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. 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.

37. 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 an inaccurate statement was made in establishing the emissions standards or other terms or conditions of the permit, unless the mistake or statement is corrected in accordance with § 72.83; 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)(1) 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.

\* \* \* \* \*

38. 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 paragraph (b)(3) the words "unit efficiency measures" and adding, in their place, the words "improved unit efficiency measures";

f. Removing from paragraph (b)(4) introductory text, the word "units's" and adding, in its place, the word "unit's";

g. Removing from the formula in paragraph (b)(4) introductory text, the word "heat" and adding, in its place, the word "heat";

h. 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

i. 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 paragraph (b)(5) of this section 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 paragraph (b)(5) of this section shall equal the amount under paragraph (b)(5)(ii)(B) of this section, *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 section 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.

\* \* \* \* \*

39. 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]**

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

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

41. Section 73.10 is amended by revising the section heading and adding paragraph (b)(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 Louisiana, Rodemacher 2 are 20,774.

\* \* \* \* \*

42. 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.

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$$\text{Refinery Allowances} = \text{the lesser of} \left[ \begin{array}{l} \text{Allowances Requested} \times \frac{35,000}{\text{Total Allowances Requested}} \\ \text{or} \\ 1,500 \end{array} \right]$$

BILLING CODE 6560-50-C

\* \* \* \* \*

**PART 74—[AMENDED]**

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

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

**§ 74.2 [Amended]**

44. 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]**

45. 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]**

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

**PART 77—[AMENDED]**

47. The authority citation continues to read as follows:

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

48. 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 sulfur 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.

49. 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) through (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.

\* \* \* \* \*

50. 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<sub>x</sub> 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]**

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

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

52. 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;

\* \* \* \* \*

**§ 78.3 [Amended]**

53. Section 78.3 is amended by:

a. Removing from paragraph (b)(1) the words “60 days” and adding, in their place, the words “30 days”;

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 § 78.1(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.

**§ 78.4 [Amended]**

54. 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.”.

55. 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”.

**§ 78.5 [Amended]**

**§ 78.7 [Removed and reserved]**

8056. Section 78.7 is removed and reserved.

**§ 78.11 [Amended]**

57. 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 shorter, reasonable period established by the Administrator when giving notice)”.

**§ 78.12 [Amended]**

58. 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]**

59. 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 shorter, reasonable period established by the Presiding Officer)”; and removing from paragraph (c)(1) the words “Rule 408 of”.

**§ 78.15 [Amended]**

60. 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 shorter, reasonable period established by the Presiding Officer)”; and removing the last sentence from paragraph (c).

**§ 78.16 [Amended]**

61. 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 shorter, reasonable period established by the Presiding Officer)”.

**§ 78.17 [Amended]**

62. Section 78.17 is amended by: removing the words “45 days” and adding, in their place, the words “45 days (or other shorter, 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]**

63. 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 words “unless:”.

**§ 78.20 [Amended]**

64. Section 78.20 is amended by: removing from paragraph (b) the words “30 days” and adding, in their place, the words “45 days (or other shorter, reasonable period established by the Environmental Appeals Board)”.

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