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Title 40 —Protection of Environment

Chapter I —Environmental Protection Agency

Subchapter C —Air Programs

Part 77 Excess Emissions

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PART 77—EXCESS EMISSIONS

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

Source: 58 FR 3757, Jan. 11, 1993, unless otherwise noted.

§ 77.1 Purpose and scope.

- (a) This part sets forth the excess emissions offset planning and offset penalty requirements under section 411 of the Clean Air Act, 42 U.S.C. 7401, *et seq.*, as amended by Public Law 101-549 (November 15, 1990). These requirements shall apply to the owners and operators and, to the extent applicable, the designated representative of each affected unit and affected source under the Acid Rain Program.
- (b) Nothing in this part shall limit or otherwise affect the application of sections 112(r)(9), 113, 114, 120, 303, 304, or 306 of the Act, as amended. Any allowance deduction, excess emission penalty, or interest required under this part shall not affect the liability of the affected unit's and affected source's owners and operators for any additional fine, penalty, or assessment, or their obligation to comply with any other remedy, for the same violation, as ordered under the Act.

§ 77.2 General.

Part 72 of this chapter, including §§ 72.2 (definitions), 72.3 (measurements, abbreviations, and acronyms), 72.4 (Federal authority), 72.5 (State authority), 72.6 (applicability), 72.7 (new units exemption), 72.8 (retired units exemption), 72.9 (standard requirements), 72.10 (availability of information), and 72.11 (computation of time), shall apply to this part. The procedures for appeals of decisions of the Administrator under this part are contained in part 78 of this chapter.

§ 77.3 Offset plans for excess emissions of sulfur dioxide.

- (a) **Applicability.** The owners and operators of any affected source that has excess emissions of sulfur dioxide in any calendar year shall be liable to offset the amount of such excess emissions by an equal amount of allowances from the source's compliance account.
- (b) **Deadline.** Not later than 60 days after the end of any calendar year during which an affected source had excess emissions of sulfur dioxide (except for any increase in excess emissions under § 72.91(b) of this chapter), the designated representative for the source shall submit to the Administrator a complete proposed offset plan to offset those emissions. Each day after the 60-day deadline that the designated representative fails to submit a complete proposed offset plan shall be a separate violation of this part.
- (c) **Number of Plans.** The designated representative shall submit a proposed offset plan for each affected source with excess emissions of sulfur dioxide.
- (d) **Contents of plan.** A complete proposed offset plan shall include the following elements in a format prescribed by the Administrator for the source and for the calendar year for which the plan is submitted:
 - (1) Identification of the source.
 - (2) If the source had excess emissions for the calendar year prior to the year for which the plan is submitted, an explanation of how and why the excess emissions occurred for the year for which the plan is submitted and a description of any measures that were or will be taken to prevent excess emissions in the future.
 - (3) At the designated representative's option, the number of allowances to be deducted from the source's compliance account's to offset the excess emissions for the year for which the plan is submitted.
 - (4) At the designated representative's option, the serial numbers of the allowances that are to be deducted from the source's compliance account's.
 - (5) A statement either that allowances to offset the excess emissions are to be deducted immediately from the source's compliance account 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.

[58 FR 3757, Jan. 11, 1993, as amended at 62 FR 55487, Oct. 24, 1997; 70 FR 25337, May 12, 2005]

§ 77.4 Administrator's action on proposed offset plans.

- (a) **Determination of completeness.** The Administrator will determine whether the proposed offset plan is complete within 30 days of receipt by the Administrator. The offset plan shall be deemed complete if the Administrator fails to notify the designated representative to the contrary within 30 days of receipt or when the Administrator approves the offset plan and deducts allowances in accordance with paragraph (b)(1) of this section.
- (b) **Review of proposed offset plans.**

- (1) If the designated representative submits a complete proposed offset plan for immediate deduction, from the source's compliance account, 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.
- (2) Notwithstanding paragraph (b)(1) of this section, the Administrator may, in his or her discretion, require that the proposed offset plan under paragraph (b)(1) of this section be reviewed under paragraphs (c) through (k) of this section. The Administrator may exercise such discretion where he or she determines that review of the plan is necessary to ensure compliance with the emissions limitation and reduction goals or other purposes of title IV of the Act.
- (3) If the designated representative submits a complete proposed offset plan that does not meet the requirements of paragraph (b)(1) of this section, the Administrator will review the plan under paragraphs (c) through (k) of this section.

(c) ***Supplemental information.***

- (1)
 - (i) Regardless of whether the proposed offset plan is complete under paragraph (a) of this section, the Administrator may require submission of any additional information that the Administrator determines is necessary to approve an offset plan.
 - (ii) Such supplemental information may include, but is not limited to:
 - (A) A description of the measures that are proposed to be taken to ensure that the source will have sufficient allowances to offset the excess emissions and to prevent excess emissions in future years;
 - (B) A schedule of compliance with appropriate increments of progress for the proposed measures; and
 - (C) A schedule for the submission of progress reports, and supporting documentation, describing actions taken and actions remaining to be taken under the schedule of compliance and any proposed adjustments to the schedule of compliance.
- (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.
 - (ii) If the designated representative fails to submit the supplemental information within the required time period, the Administrator may disapprove the proposed offset plan.

(d) ***Draft offset plan.***

- (1) After the Administrator receives a complete proposed offset plan and any supplemental information, the Administrator will prepare a draft offset plan that incorporates in whole, in part, or with changes or conditions as appropriate, the proposed offset plan or disapprove a draft offset plan for the affected source. Regardless of whether the Administrator required the submission of the

information set forth in paragraph (c)(1)(ii) of this section, the draft offset plan may include, among other requirements and conditions as determined to be appropriate by the Administrator, the submission of schedules of compliance, progress reports, and monitoring and other information.

- (2) The draft offset plan will be based on the information submitted by the designated representative for the affected source and other relevant information.
- (3) The Administrator will serve a copy of the draft offset plan and the statement of basis on the designated representative of the affected source.
- (4) The Administrator will provide a 30-day period for public comment, and opportunity to request a public hearing, on the draft offset plan or disapproval of a draft offset plan in accordance with the public notice required under paragraph (g)(1)(i)(A) of this section.

(e) **Offset plan administrative record.**

- (1) The Administrator will prepare an administrative record for an offset plan or disapproval of an offset plan. The administrative record will contain:
 - (i) The proposed offset plan and any supporting or supplemental information submitted by the designated representative;
 - (ii) The draft offset plan;
 - (iii) The statement of basis;
 - (iv) Copies of all documents relied on by the Administrator in approving or disapproving the draft offset plan (including any records of discussions or conferences with owners, operators or the designated representative of the source or interested persons regarding the draft offset plan) or, for any such documents that are readily available, a statement of their location;
 - (v) Copies of all written public comments submitted on the draft offset plan or disapproval of a draft offset plan;
 - (vi) The record of any public hearing on the draft offset plan or disapproval of a draft offset plan;
 - (vii) The offset plan approved by the Administrator; and
 - (viii) Any response to public comments submitted on the draft offset plan or disapproval of a draft offset plan, including any documents cited in the response and any other documents relied on by the Administrator or, for any such documents that are readily available, a statement of their location.
- (2) The Administrator will approve or disapprove an offset plan within 6 months of receipt of a complete proposed offset plan.

(f) **Statement of basis.**

- (1) The statement of basis will briefly set forth significant factual, legal, and policy considerations on which the Administrator relied in approving or disapproving the draft offset plan.
- (2) The statement of basis will include:
 - (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

- (ii) The name, address, and telephone and facsimile number of the EPA office processing the approval or disapproval of the offset plan.

(g) ***Opportunities for Public Comment on Draft Offset Plans*** –

(1) ***Generally.***

- (i) The Administrator will give public notice of the following:
 - (A) The draft offset plan or disapproval of a draft offset plan and the opportunity for public comment and to request a public hearing; and
 - (B) Date, time, location, and procedures for any scheduled hearing on the draft offset plan or the disapproval of a draft offset plan.
- (ii) Any public notice given under this section may be for the approval or disapproval of one or more draft offset plans.

(2) ***Methods.*** The Administrator will give the public notice required by this section by:

- (i) Serving written notice on the following persons (except to the extent any such person has waived his or her right to receive such notice):
 - (A) The designated representative;
 - (B) The air pollution control agencies of affected States; and
 - (C) Any interested person.
- (ii) Giving notice by publication in the FEDERAL REGISTER and 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.

(3) ***Contents.*** All public notices issued under this part will contain the following information:

- (i) Identification of the EPA office processing the approval or disapproval of the draft offset plan for which the notice is being given.
- (ii) Identification of the designated representative for the affected source.
- (iii) Identification of each affected source covered by the proposed offset plan.
- (iv) The amount of excess emissions that must be offset and the date on which the allowances are proposed to be deducted.
- (v) The address and office hours of a public location where the administrative record is available for public inspection and a statement that all information submitted by the designated representative and not protected as confidential pursuant to section 114(c) of the Act is available for public inspections as part of the administrative record.
- (vi) For public notice under paragraph (g)(1)(i)(A) of this section, a brief description of the public comment procedures, including:
 - (A) A 30-day public comment period beginning the date of publication of the notice or, in the case of an extension or reopening of the public comment period, such period as the Administrator deems appropriate;
 - (B) The address where public comments should be sent;

(C) Required formats and contents for public comment;

(D) An opportunity to request a public hearing to occur not earlier than 15 days after public notice is given and the location, date, time, and procedures of any scheduled public hearing; and

(E) Any other means by which the public may participate.

(4) **Extensions and Reopenings of the Public Comment Period.** On the Administrator's own motion, or on the request for any person, the Administrator may, at his or her discretion, extend or reopen the public comment period where he or she finds that doing so will contribute to the decision-making process by clarifying one or more significant issues affecting the draft offset plan or disapproval of a draft offset plan. Notice of any such extension or reopening will be given under paragraph (g)(1)(i)(A) of this section.

(h) **Public comments —**

(1) **General.** During the public comment period, any person may submit written comments on the draft offset plan or disapproval of a draft offset plan.

(2) **Form.**

(i) Comments shall be submitted in duplicate.

(ii) The submission shall clearly indicate the draft offset plan approval or disapproval to which the comments apply.

(iii) The submission shall clearly indicate the name of the commenter, his or her interest, and his or her affiliation, if any, to owners and operators of any unit covered by the proposed offset plan.

(3) **Contents.** Timely comments on any aspect of a draft offset plan or disapproval of a draft offset plan will be considered unless they concern issues that are not relevant, such as:

(i) The environmental effects of acid rain, acid deposition, sulfur dioxide, or nitrogen oxides generally; and

(ii) Offset plan approval procedures or actions on other proposed offset plans that are not relevant to approval or disapproval of the draft offset plan in question.

(4) Persons who do not wish to raise issues on the draft offset plan or denial of a draft offset plan, but who wish to be notified of any subsequent actions concerning such matter, may so indicate during the public comment period or at any other time. The Administrator will place their names on a list of interested persons.

(i) **Opportunity for Public Hearing.**

(1) During the public comment period, any person may request a public hearing. A request for a public hearing shall be made in writing and shall state the issues proposed to be raised in the hearing.

(2) On the Administrator's own motion or on the request of any person, the Administrator may, at his or her discretion, hold a public hearing whenever the Administrator finds that such a hearing will contribute to the decision-making process by clarifying one or more significant issues affecting the draft offset plan or disapproval of a draft offset plan. Public hearings will not be held on issues under paragraphs (h)(3) (i) and (ii) of this section.

(3) During a public hearing under this section, any person may submit oral or written comments concerning the draft offset plan or disapproval of a draft offset plan. The Administrator may set reasonable limits on the time allowed for oral statements and will require the submission of written summaries of each oral statement.

(4) The Administrator will assure that a record is made of the hearing.

(j) **Response to Comments.**

(1) The Administrator will consider comments on the draft offset plan or disapproval of a draft offset plan received during the public comment period and any public hearing. The Administrator is not required to consider comments otherwise received.

(2) In approving or disapproving an offset plan, the Administrator will:

(i) Identify any draft offset plan provision or portion of the statement of basis that has been changed and the reasons for the change; and

(ii) Briefly describe and respond to relevant comments under paragraph (j)(1) of this section.

(k) **Approval and Effective Date of Excess Emissions Offset Plans.**

(1) After the close of the public comment period, the Administrator will approve an offset plan requiring allowance deductions in an amount equal to the unit's tons of excess emissions or disapprove an offset plan. 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 source's compliance account of all allowances necessary to offset the excess emissions except to the extent the designated representative of the source demonstrates that such a deduction will interfere with electric reliability.

(3) Upon approval of the offset plan by the Administrator, the offset plan will be incorporated into the Acid Rain permit in accordance with § 72.84 (automatic permit amendment) and shall supersede any inconsistent provision of the permit.

[58 FR 3757, Jan. 11, 1993, as amended at 62 FR 55487, Oct. 24, 1997; 62 FR 66279, Dec. 18, 1997; 70 FR 25337, May 12, 2005]

§ 77.5 Deduction of allowances to offset excess emissions of sulfur dioxide.

(a) The Administrator will deduct allowances to offset excess emissions in accordance with the offset plan approved under § 77.4(b) (1) or (k) or in accordance with § 72.91(b) of this chapter.

(b) The designated representative shall hold enough allowances in the appropriate compliance account to cover the deductions to be made in accordance with paragraph (a) or paragraph (c) of this section.

- (c) If the designated representative does not submit a timely and complete proposed offset plan, or if the Administrator disapproves a proposed offset plan under § 77.4 (c) or (k), the Administrator will immediately deduct allowances allocated for the year after the year in which the source has excess emissions, from the source's compliance account on a first-in, first-out basis in accordance with § 73.35(c)(2) of this chapter, equal to the amount of the source's excess emissions of sulfur dioxide.

[58 FR 3757, Jan. 11, 1993, as amended at 70 FR 25337, May 12, 2005]

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

(a)

- (1) If excess emissions of sulfur dioxide occur at the affected source or nitrogen oxide occur at an affected unit during any year, the owners and operators respectively of the affected source and the affected units at the source or of the affected unit shall pay, without demand, an excess emissions penalty, as calculated under paragraph (b) of this section.
- (2) If one or more affected units governed by an approved NO_x averaging plan under § 76.11 of this chapter fail (after applying § 76.11(d)(1)(ii)(C) of this chapter) to meet their respective alternative contemporaneous emission limitations or annual heat input limits, then excess emissions of nitrogen oxides occur during the year at each such unit. The sum of the excess emissions of nitrogen oxides of such units shall equal the amount determined under § 76.13(b) of this chapter. The owners and operators of such units shall pay an excess emissions penalty, as calculated under paragraph (b) of this section using the sum of the excess emissions of nitrogen oxides of such units.
- (3) Except as otherwise provided in this paragraph (a)(3), payment under paragraphs (a) (1) or (2) of this section shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that the process of recordation set forth in § 73.34(a) of this chapter is completed or by July 1 of the year after the year in which the excess emissions occurred, whichever date is earlier. Payment under paragraph (a)(1) of this section for any increase in excess emissions of sulfur dioxide determined after adjustments made under § 72.91(b) of this chapter shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that process set forth in § 72.91(b) of this chapter is completed.

(b) **Penalty formula.**

- (1) The following formulas shall be used to determine the excess emissions penalty:

Penalty for excess emissions of sulfur dioxide = \$2000/ton × annual adjustment factor × tons of excess emissions of sulfur dioxide.

Penalty for excess emissions of nitrogen oxides = \$2000/ton × annual adjustment factor × tons of excess emissions of nitrogen oxides.

- (i) The annual adjustment factor will be calculated as follows:

$$\text{Annual adjustment factor} = 1 + \{[\text{CPI}(\text{year}) - \text{CPI}(1990)] / \text{CPI}(1990)\}$$

where:

- (A) "CPI(year)" is the Consumer Price Index as defined in § 72.2 of this chapter and "year" is the year in which the source or unit as appropriate had excess emissions.
- (B) "CPI(1990)" is the Consumer Price Index for 1990, as defined in § 72.2 of this chapter.
- (ii) The Administrator will publish the annual adjustment factor in the FEDERAL REGISTER by October 15 of each year beginning in 1995.
- (2) The penalty may be rounded to the nearest dollar after completing the calculation in paragraph (b)(1)(i) of this section.
- (3) The penalty for excess emissions of sulfur dioxide shall be paid separately from the payment for excess emissions of nitrogen oxides. Each payment shall be accompanied by a document, in a format prescribed by the Administrator, indicating the source or unit as appropriate for which the payment is made, whether the payment is for excess emissions of sulfur dioxide or nitrogen oxides, the number of tons of excess emissions, the penalty amount, and the check or money order number of the payment.
- (c) If an excess emissions penalty due under this part is not paid on or before the applicable deadline under paragraph (a) of this section, the penalty shall be subject to interest charges in accordance with the Debt Collection Act (31 U.S.C. 3717). Interest shall begin to accrue on the date on which the Administrator mails, to the designated representative of the source or unit as appropriate with excess emissions, a demand notice for the payment.
- (d)
 - (1) Except for wire transfers made in accordance with paragraph (d)(2) of this section, payments of penalties shall be made by money order, cashier's check, certified check, or U.S. Treasury check made payable to the "U.S. EPA."
 - (2) Payments made under paragraph (c)(1) of this section shall be mailed to the following address, unless the Administrator has notified the designated representative of a different address: U.S. EPA: Headquarters Accounting Operations Branch, Acid Rain Excess Emissions Penalties, P.O. Box 952491, St. Louis, MO 63195-2491.
 - (3) Payments of penalties of \$25,000 or more may be made by wire transfer to the U.S. Treasury at the Federal Reserve Bank of New York.
- (e) If the Administrator determines that overpayment has been made, he or she will refund the overpayment without interest, as promptly as administratively possible.
- (f) Excess emissions in any year resulting directly from an order issued in that year under section 110(f) of the Act shall not be subject to the penalty payment requirements of this section; *provided* that the designated representative of any source or unit as appropriate subject to such order shall advise the Administrator within 30 days of issuance of the order that the order will result in such excess emissions.

[58 FR 3757, Jan. 11, 1993, as amended at 60 FR 17131, Apr. 4, 1995; 62 FR 55487, Oct. 24, 1997; 70 FR 25337, May 12, 2005]