UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

AUG 15, 2001

Ms. Renu M. Chakrabarty
Office of Air Quality
West Virginia Department of Environmental Protection
7012 MacCorkle avenue, South East
Charleston, WV 25304

Dear Ms. Chakrabarty:

Thank you for your letter of May 3, 2001 in which you request information regarding implementation of the Emission Trading Program pursuant to 45 CSR28, "Air Pollutant Emissions Banking and Trading."

Program contacts from EPA's Office of Air and Radiation and Office of Enforcement and Compliance Assistance have worked with the Region to develop the following responses to your questions:

1) Does the permit need to be updated to reflect specific ERC generations or trades?

If a facility has (or will be issued) a title V permit and it wishes to participate in a SIP-approved EIP, its operating permit must include the provisions of the EIP that apply to it. If the source already has an effective permit that does not contain such provisions, the permit must be revised to include them; if the permit has not been issued, the source is required to notify the State of how such provisions will apply to it, either in its initial permit application or in an update to that application (if already submitted).

Once the permit includes terms and conditions necessary to implement the EIP (as described below), the source may typically make individual trades under the EIP without the need for future formal permit revisions. Most trading activity under such a permit would already be addressed and allowed by the specific terms and conditions of the permit and would not normally conflict with the permit. This is the principle expressed by section 70.6(a)(8) of the CFR, which states that permit revisions are not required for trading program changes that are "provided for" in the permit.

Generally, permit content will be largely dictated by the individual EIP provisions being implemented, and whether they address trading, use, generation, averaging, etc. However, it is critical that the permit identify the following, as a minimum:

- the specific emissions units subject to the EIP,
- the pollutants addressed by the EIP,
- the identification of the SIP requirements for which the EIP serves as an alternative method of compliance, and a statement that compliance with those SIP requirements will be determined using the EIP's compliance provisions;
- detailed compliance requirements, such as emission quantification protocols;
- the specific requirements of title V that apply to each unit, including, for example, monitoring, record keeping, reporting, and compliance certification;
- baseline emissions levels, allocations, and caps, where they must be defined for individual sources (whether the SIP or TIP includes them or not);
- requirements for submittal of notices of credit generation and use (for multi-source cap and trade EIPs), and credit tracking information (for open market trading and other EIPs);
- penalty and corrective action provisions;
- procedures for public disclosure of information; and
- notification requirements for FLMs in Class I areas, among others.

Many of these EIP (and title V) requirements applicable to a specific source will not change during the term of the permit, thus, few formal permit revisions will likely be triggered after you initially incorporate them into the permit. For example, the creation of new emissions credits, the usage of existing credits, or the trading of credits will not normally trigger formal permit revisions. Title V does not require the permit to contain a contemporaneous running total of credit balances held by a source. However, revisions may be needed when certain requirements change after the permit is issued. Some examples of circumstances that would trigger permit revision are:

- entry of a new emissions unit into the trading program,
- a change in an emissions quantification protocol or other compliance provision from what was specified in the permit,
- revisions required independently by applicable requirements or other requirements of title V; and
- trading transactions that are not allowed or that conflict with the permit.

Finally, concerning permit content, your EIP rule must require that sources subject to title V place a copy of any notices required by an EIP in the operating permit file, and make these notices available to the public.

2) Would ERC generations or trades be considered new "applicable requirements" for the source?

As described above, once the permit incorporates the provisions necessary to implement the trading program (as described above), the permit will include that applicable requirement and the permit can be said to "provide for that applicable requirement." When a source already has an operating permit and it decides to take part in a trading program that is not already provided for in the permit, permitting

authorities should require the previously-issued operating permit to either be reopened or revised to reflect the "new applicable requirements" of the trading program. Permit reopening under § 70.7(f) is required when a major source has a permit, there is 3 years or more left on the term of the permit, a new trading programs is promulgated (or approved by EPA), and the trading program applies to the source upon promulgation. For such sources, if less than 3 years is left on the permit term, the State may generally wait until renewal to update the permit. On the other hand, modifications under § 70.7(e) are required when a source has a permit, the new trading program is promulgated, and the source becomes subject to it some time after promulgation [in most cases, these will be significant modifications under § 70.7(e)(4)]. When a source needs a reopening or permit revision to incorporate a "new applicable requirement," and the new applicable requirement is not addressed or prohibited by the existing operating permit, a source may generally commence such activities prior to the finalization of any formal reopening or revision procedures. However, when significant modification procedures are required and the new activity or applicable requirement conflicts, or is prohibited by, the express terms and conditions of the effective permit, that permit must be revised prior to commencing operation of such activities or the permittee will be in violation of those permit terms and conditions prior to their revision.

3) Regarding interface with minor NSR: When a source decides to use this program to contravene a permit term , should the NSR permit be updated to avoid a SIP violation/ Would generation or use of ERC be considered a substantive requirement of an emission control rule? **Would it be programmatically more sound to update all minor NSR permits so that they may be streamlined into title V permits.**

The guidance provided in the EIP for title V sources is equally useful for non-title V permits, since it is designed to result in permits that clearly lay out the source's obligations and opportunities for use, generation, and trading for ERCs. We hope you would apply it to those other State permitting programs. To the extent that the minor NSR permit incorporates the applicable requirements of the EIP (as described above), in most cases, a permit revision would not be necessary for typical trades under those requirement.

4) As 45 CSR 28 is currently unapproved by EPA, would these permit updates simply be an interim issue until program approval? Or would the minor NSR program be viewed as an ongoing tracking mechanism for sources meeting SIP limits via various mechanism (even after EPA approval of 45 CFR28)? Further, would implementation of 45 SR28 prior to submittal to EPA jeopardize SIP approval? Would implementation of 45 CSR28 prior to SIP approval expose the agency to potential enforcement actions or litigation (for using a non- SIP mechanism to contravene SIP emission limits)?

Using credits to meet Clean Air Act requirements before the trading program allowing such a use is approved into the SIP is a violation of the requirement and potentially subject to enforcement and litigation.

5) **Regarding Existing Federally Approved Emission Monitoring and Quantification protocols. "Would an existing federally approved rule such as a new source performance standard per 40 CFR 60, or a national emission standard for hazardous air pollutants...be sufficient to meet the requirements of section 8.2s which does not specifically require that such protocols be "approved for the purpose of emission trading? Or ...require the protocol to be approved for the purpose of emissions trading?**

The NSPS or NESHAP protocols are federally approved to show compliance with a limit. However, it may not be designed to quantify emissions as is necessary for the trading program. Expanding the existing NSPS or NESHAP protocol, for example to add an activity level component to an emission rate protocol, may be an appropriate protocol for trading. The revised or amended NSPS or NESHAP protocol, however, should be subject of the Federal approval process of the trading program.

Should you have additional questions or comments regarding the implementation of the Emission Trading program in West Virginia, please do not hesitate to call me at (215) 814-2068.

Sincerely,

Linda Miller
Permits and Technical Assessment Branch

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