

ENVIRONMENTAL PROTECTION AGENCY

[AD-FRL-6912-5]

Notice of Deficiency for Clean Air Act Operating Permits Program; Commonwealth of Kentucky**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of deficiency.

SUMMARY: Pursuant to its authority at 40 CFR 70.4(i)(1) and 70.10(b)(1), EPA is publishing this Notice of Deficiency for the Commonwealth of Kentucky's Clean Air Act Title V Operating Permits Program. The Notice of Deficiency is based upon EPA's finding that the Commonwealth's audit privilege and immunity law, KRS 224.01-040, unduly restricts Kentucky's ability to adequately administer and enforce the criminal enforcement, civil penalty and public access provisions of its Title V program, which has previously been granted interim approval status.

Therefore, Kentucky's Title V program no longer meets minimum federal requirements for program approval. Publication of this notice is a prerequisite for withdrawal of Kentucky's Title V program approval, but does not effect such a withdrawal. Withdrawal of interim program approval, if necessary, will be accomplished through subsequent rulemaking.

FOR FURTHER INFORMATION CONTACT: Kim Pierce, Title V Program Manager, Air, Pesticides & Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street S.W., Atlanta, Georgia 30303-8909, (404) 562-9124.

SUPPLEMENTARY INFORMATION:**I. Description of Action**

EPA is publishing a Notice of Deficiency for the Clean Air Act (CAA or Act) Title V program of the Commonwealth of Kentucky, which was granted interim approval on December 14, 1995. This document is being published to satisfy 40 CFR 70.4(i)(1) and 70.10(b)(1), which provide that EPA shall publish in the **Federal Register** a notice of any determination that a Title V permitting authority is not adequately administering or enforcing a 40 CFR part 70 program. The deficiency being noticed relates to Kentucky's audit privilege and immunity law, KRS 224.01-040, which places undue restrictions on the Commonwealth's ability to adequately administer and enforce its Title V program. Because of restrictions contained within

Kentucky's audit privilege and immunity law, the Natural Resources and Environmental Protection Cabinet (Cabinet) may, in some circumstances, be unable to: (1) Seek criminal remedies, including fines, (2) recover civil penalties for any violation, and (3) make available to the public all materials available to the Commonwealth that are relevant to a permit decision. Therefore, Kentucky's legal authority no longer meets the requirements of the Title V program and 40 CFR part 70.

Title V of the Act provides for the approval of state programs for the issuance of operating permits that incorporate the applicable requirements of the Act. To receive Title V program approval, a state permitting authority must submit a program to EPA that meets certain minimum criteria, and EPA must disapprove a program that fails, or withdraw an approved program that subsequently fails, to meet these criteria. These criteria include requirements that the state permitting authority have authority to "assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter." CAA 502(b)(5)(A). In addition, the state permitting authority must have authority "to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation, and provide appropriate criminal penalties." CAA 502(b)(5)(E). The state permitting authority must also have authority "to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title." CAA 502(b)(8). These requirements are echoed in the operating permit program approval regulations promulgated at 40 CFR part 70. See 40 CFR 70.4(b)(3)(i), 70.4(b)(3)(viii), 70.8(h)(2), and 70.11(a)-(b).

EPA interprets section 502(b)(5)(E) of the CAA to mean that to have adequate criminal enforcement authority, criminal fines must be recoverable against any person: (1) Who knowingly violates any applicable Title V requirement, any Title V permit condition, or any Title V fee or filing requirement; (2) against any person who knowingly makes any false material statement, representation, or certification in any Title V form, notice, or report required by a Title V permit; and (3) who knowingly renders inaccurate any required Title V monitoring device or method. 40 CFR 70.11(a)(3)(ii) and (iii). The Kentucky

audit privilege and immunity law provides that an environmental audit report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal, or administrative proceeding. KRS 224.01-040(3). To meet the requirements of an approvable part 70 program and the requirements of 40 CFR 70.11(a)(3)(ii) and (iii), Kentucky law must allow Cabinet officials an unfettered right to access evidence in criminal proceedings and to use evidence of criminal conduct contained in an audit to assess criminal fines and remedies. In addition, requirements contained in the Kentucky audit privilege and immunity law such as the private hearing prior to the use of an audit report and the need to establish probable cause with an independent source may significantly impede criminal investigations and prosecutions and further render Kentucky's criminal enforcement authority inadequate (letter dated January 12, 1998 from John H. Hankinson, Jr., Regional Administrator, EPA Region 4 to James E. Bickford, Secretary, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky). Because of these provisions in KRS 224.01-040, Kentucky no longer meets the requirements for Title V program approval. To have an approvable Title V program, any Kentucky audit privilege and immunity law must make the privilege outlined in the current law inapplicable to criminal proceedings and also must provide unfettered access to information in criminal proceedings.

EPA also interprets section 502(b)(5)(E) of the CAA to mean that to have adequate civil penalty authority, Kentucky must retain full authority to assess civil penalties for any violation, including violations of (1) Any applicable requirement; (2) any permit condition; (3) any fee or filing requirement; (4) any duty to allow or carry out inspection, entry, or monitoring activities; and (5) any regulation or orders issued by the Commonwealth. 40 CFR 70.11(a)(3)(i). Kentucky's audit privilege and immunity law provides immunity from all civil penalties if certain conditions are met. However, to meet the requirements of an approvable part 70 program and the requirements of 40 CFR 70.11(a)(3)(i), Kentucky must retain the ability to collect penalties based on economic gain from noncompliance when it is significant (letter dated July 12, 1996 from John H. Hankinson, Jr., Regional Administrator, EPA Region 4 to James E. Bickford, Secretary, Natural Resources and Environmental

Protection Cabinet, Commonwealth of Kentucky). The concept of economic benefit relates to any economic gain a violator may have realized as a result of noncompliance regardless of when these gains occur. Although correspondence from Kentucky to EPA addresses the benefit that might accrue after discovery and disclosure (letter dated February 12, 1997 from James E. Bickford, Secretary, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky to John H. Hankinson, Jr., Regional Administrator, EPA Region 4), the relevant time frame for determining economic benefit is the entire period of noncompliance including prior to discovery and disclosure (e.g., facility operates for two years without installing required air emissions control equipment). Because KRS 224.01-040 precludes the Cabinet from recouping economic benefit when the conditions of KRS 224.01-040 are met, Kentucky lacks the legal authority to recover a penalty for "every violation" and therefore no longer meets the requirements for Title V program approval. In subsequent correspondence between Kentucky and EPA, including a letter dated March 27, 1997 from Glenda J. Curry, General Counsel, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky to John H. Hankinson, Jr., Regional Administrator, EPA Region 4; and a letter dated January 12, 1998 from John H. Hankinson, Jr., Regional Administrator, EPA Region 4 to James E. Bickford, Secretary, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky, these issues were discussed and EPA urged Kentucky to remedy them. To date, Kentucky has not effected these changes. To have an approvable Title V program, any Kentucky audit privilege and immunity law must restore full civil penalty authority to the Title V program by allowing for the collection of civil penalties where violations result in significant economic benefit to the violator as a consequence of its noncompliance with Title V.

EPA interprets section 502(b)(8) of the CAA to mean that to have adequate public access authority, Kentucky must assure that the public have access to certain information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in 40 CFR 70.4(b)(3)(viii), and all other materials available to the permitting authority that are relevant to the permit decision. Kentucky's audit privilege and immunity law provides that documents, communications, data, reports, or other information required to

be collected, developed, maintained, reported, or made available to a regulatory agency pursuant to this law or any other Federal, state or local law shall not be privileged. KRS 224.01-040(6). This language potentially limits public access to information and renders Kentucky's legal authority to ensure public access to certain information inadequate. Therefore Kentucky no longer meets the requirements for Title V program approval. To meet the requirements of an approvable part 70 program and the requirements of 40 CFR 70.4(b)(3)(viii) and 40 CFR 70.8(h)(2), any Kentucky audit privilege and immunity law must provide that documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or made available to a regulatory agency or any other person shall not be privileged. This issue was discussed in a letter, dated January 12, 1998 from John H. Hankinson, Jr., Regional Administrator, EPA Region 4 to James E. Bickford, Secretary, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky, and EPA urged Kentucky in that letter to correct it. To date, Kentucky has not effected these changes. To have an approvable Title V program any Kentucky audit privilege and immunity law must provide the public with access to information available to the Commonwealth that is relevant to a Title V permit decision.

40 CFR 70.4(k), 70.10(b) and 70.10(c) provide that EPA may withdraw a 40 CFR part 70 program approval, in whole or in part, whenever the permitting authority's legal authority no longer meets the requirements of Part 70 and the permitting authority fails to take corrective action. 40 CFR 70.10(b) sets forth the procedures for program withdrawal, and requires as a prerequisite to withdrawal that the permitting authority be notified of any finding of deficiency by the Administrator and that the document be published in the **Federal Register**. Today's document satisfies this requirement and constitutes a finding of program deficiency. If Kentucky has not taken significant action to assure adequate administration and enforcement of the program within 90 days after publication of this notice of deficiency, and has not corrected the above-identified deficiencies by June 2, 2001, then EPA will take action to withdraw Kentucky's Title V program approval, and may apply any of the sanctions specified in section 179(b) of

the Act. 40 CFR 70.4(k) and 70.10(b)(2)-(4).

This notice of deficiency is not itself a proposal to withdraw Kentucky's Title V program approval. Consistent with 40 CFR 70.10(b)(2), EPA will wait 90 days to determine whether the Commonwealth has taken significant action to correct the above-identified deficiencies. Consistent with 40 CFR 70.4(i)(1) and 70.10(b)(4), EPA will wait until June 2, 2001 to determine whether Kentucky has corrected the deficiencies. Any proposal to withdraw approval of Kentucky's Title V program will occur after June 2, 2001.

II. Administrative Requirements

As noted above, publication of this Notice of Deficiency does not effect a withdrawal of the Commonwealth of Kentucky's Title V program. Program withdrawal, if necessary, will be accomplished through a subsequent notice-and-comment rulemaking. This action does not: (1) Impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4); (2) require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993) or Executive Order 13084 (63 FR 27655, May 10, 1998); or (3) involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). The Office of Management and Budget has exempted this action from review under Executive Order 12866 (58 FR 51735, October 4, 1993). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Furthermore, this action does not contain any information collections subject to Office of Management and Budget approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). And because this action is a Notice of Deficiency and does not constitute a rule, Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks does not apply. For the same reason, Executive Order 13132: Federalism and section 112(d) of the National Technology Transfer Advancement Act of 1995 do not apply.

Dated: November 29, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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