

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[FRL-6934-5]

RIN 2060-AJ04

State and Federal Operating Permits Programs: Amendments to the Compliance Certification

Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct Final Rule, removal of amendments

SUMMARY: We, EPA, received adverse comment, on the direct final action published on March 1, 2001 (66 FR 12872) to amend the State Operating Permits Program and the Federal Operating Permits Program. We had stated in that direct final action that, if we received adverse comment by April 2, 2001, we would publish a timely withdrawal in the Federal Register. We, however, did not publish the withdrawal prior to the April 30, 2001, the effective date of the direct final rule. In this action, we are removing the amendments that were published in the March 1, 2001 direct final rule. We will address the adverse comment in a subsequent final action based on the parallel proposal also published on March 1, 2001 (66 FR 12916). We have determined that there is good cause for making this rule final without notice and comment procedures because under the terms of the March 1, 2001 direct final action, no amendment to the State and Federal Operating Permits Programs should have occurred. Thus, notice and comment are contrary to the public interest and unnecessary. We find that this constitutes good cause under 5 U.S.C. §§ 553(b)(B) and 553(d).

DATES: This action is effective [date of publication].

ADDRESSES: Docket No. A-91-52, containing information relevant to the direct final action being withdrawn, is available for public inspection between 8:00 a.m. and 5:30 p.m., Monday through Friday (except for Federal holidays) at the following address: Air and Radiation Docket and Information Center (6102), US Environmental Protection Agency, 401 M Street, SW., Room 1500, Washington, DC 20460 or by phoning the Air Docket Office at (202) 260-7548. Refer to Docket No. A-91-52. The Docket Office may charge a reasonable fee for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Peter Westlin, Environmental Protection Agency, Office Air Quality Planning and Standards, at 919/541-1058, e-mail: westlin.peter@epa.gov, facsimile 919/541-1039.

SUPPLEMENTARY INFORMATION: On October 22, 1997 (62 FR 54900), we published the final part 64, Compliance Assurance Monitoring (CAM) rule, and revisions to parts 70 and 71, the State and Federal Operating Permits Programs. Part 64 included procedures, design specifications, and performance criteria intended to satisfy, in part, the enhanced monitoring requirements of the Clean Air Act ("the Act"). The revisions to parts 70 and 71 included language to Secs. 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B) specifying the minimum information necessary for the compliance certification required of responsible officials. Subsequent to that publication, the Natural Resources Defense Council, Inc. (NRDC) and the Appalachian Power Company et al. (industry) filed petitions with the United States Court of Appeals for the District of Columbia Circuit (Court) challenging several aspects of the CAM rule. In particular, the NRDC argued that the parts 70 and 71 revisions were inconsistent with the Act's explicit requirement that compliance certifications indicate whether compliance is continuous or intermittent. On October 29, 1999, the Court issued its decision (see docket A- 91-52, item VIII-A-1) *Natural Resources Defense Council v. EPA*, 194 F.3d 130 (D.C. Cir. 1999) and agreed

with NRDC that EPA's removal from parts 70 and 71 of the explicit requirement that compliance certifications address whether compliance is continuous or intermittent revisions ran contrary to the statutory requirement that each source must certify "whether compliance is continuous or intermittent * * *"

On March 1, 2001, we published a direct final action (66 FR 12872) and a parallel proposal (66 FR 12916) to amend the State Operating Permits Program and the Federal Operating Permits Program to effect the direction expressed in the remand. We stated in the direct final action that if we received adverse comment by April 2, 2001, we would publish a withdrawal in the Federal Register informing you that this direct final rule will not take effect. We received several adverse comments and, therefore, took steps to withdraw the direct final action. The withdrawal action, however, was not published prior to April 30, 2001, the date upon which the direct final rule amending Parts 70 and 71 took effect.

Because we received several adverse comments on the amendments to the State and Federal Operating Permits Programs, the direct final rule effecting those amendments, by its terms, should not have become effective. We, therefore, are hereby removing those amendments in today's action.

This removal action is simply a ministerial correction of the prior direct final rulemaking, which by its terms should not have become effective because several parties commented adversely on the amendments to the State and Federal Operating Permits Programs. Therefore, we are invoking the good cause exception under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B) because we believe that notice-and-comment rulemaking of this removal action is contrary to the public interest and unnecessary. This removal action merely restores the regulatory text that existed prior to the direct final rule. We stated in the March 1, 2001 direct final action that should adverse comment be received,

the rule would not take effect. The rule took effect because we did not publish a timely withdrawal in the Federal Register prior to the rule's effective date. It would be contrary to the public interest to keep that final rule in effect when it should not have taken effect since adverse comment was received.

Additionally, further notice-and-comment on this action is unnecessary because we are merely restoring the regulatory text that existed prior to the final rule. For the same reasons, we believe there is good cause for this removal to become effective upon publication. We will address all public comments in a subsequent final action on the parallel proposed rule amendment.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments does not apply to this action. 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.) or sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect

State and Federal Operating Permits Programs: Amendments to the Compliance Certification Requirements - Page 5 of 5

Energy Supply, Distribution, or Use because it is not a significant regulatory action under Executive Order 12866. This notice does not have any federalism implications under Executive Order 13132.

The Paper Reduction Act, the Unfunded Mandates Reform Act, and the National Technology Transfer and Advancement Act do not apply here. The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of [date of publication]. EPA will submit 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 United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Dated: _____

Christine Todd Whitman
Administrator