

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 72, 74, and 78

[FRL-6930-9]

#### Acid Rain Program—Permits Rule Revision, Industrial Utility-Units Exemption

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to remove the provision for the industrial utility-units exemption in the regulations for the Acid Rain Program under title IV of the Clean Air Act (Act). 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 effects of acidic deposition (or acid rain) resulting from these emissions. In January 1993, EPA issued rules implementing the program, including the permits rule. In October 1997, EPA revised the permits rule in order to add, among other things, a provision establishing a limited exemption from the program for certain industrial boilers (referred to as "industrial utility-units"). One party filed a petition for review challenging the industrial utility-units exemption. On August 23, 2000, EPA and the petitioning party signed a settlement agreement addressing the exemption provision. Today, EPA is removing the industrial utility-units exemption based on a review of the record. This action is consistent with the August 23, 2000 settlement.

**DATES:** This rule is effective on May 10, 2001 without further notice, unless EPA receives adverse comment by April 16, 2001. If we receive such adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** *Comments:* If you submit any written comments on this proposed rule, the comments must reference Docket No. A-95-56 and must be submitted in duplicate to EPA's Air and Radiation Docket and Information Center (6102), 401 M Street, SW., Room M-1500, Washington, DC 20460.

*Docket.* Docket No. A-95-56, containing supporting information used in developing the direct final rule, is available for public inspection and copying between 8:30 a.m. and 5:30 p.m., Monday through Friday, at EPA's

Air and Radiation Docket and Information Center (6102), 401 M Street, SW., Room M-1500, Washington, DC 20460. EPA may charge a reasonable fee for copying.

#### FOR FURTHER INFORMATION CONTACT:

Dwight C. Alpern, at (202) 564-9151, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., (6204J), Washington, DC 20460; or the Acid Rain Hotline at (202) 564-9089.

**SUPPLEMENTARY INFORMATION:** EPA is publishing this rule as a direct final rule because we view this as a noncontroversial amendment and anticipate no adverse comment. The rule, which removes the provision for the industrial utility-units exemption, is consistent with a settlement signed by EPA and the only party that petitioned for review of the industrial utility-units exemption. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule revision if we receive any timely, adverse comments on today's direct final rule. Today's direct final rule will be effective on May 10, 2001 without further notice unless we receive adverse comment by April 16, 2001. If we receive such adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

The information in this preamble is organized as follows:

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  - E. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
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  - G. Executive Order 13132: Federalism
  - H. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments
  - I. National Technology Transfer and Advancement Act
  - J. Submission to Congress and the General Accounting Office

#### I. 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
NAICS Code: 221112, Fossil Fuel Electric Power Generation.	Electric service providers, boilers and turbines from a wide range of industries.

EPA does not intend this table to be exhaustive, but rather to provide 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, this action could potentially affect. This action could also affect other types of entities not listed in the table. To determine whether this action affects your facility, you should carefully examine the applicability criteria in §§ 72.6 and 76.1 and the exemptions in §§ 72.7 and 72.8 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 person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### II. Background

Under title IV of the Act, "utility units" are subject to sulfur dioxide (SO<sub>2</sub>) emission limitations (under sections 404, 405, 408, and 409) and must monitor SO<sub>2</sub>, NO<sub>x</sub>, carbon dioxide (CO<sub>2</sub>), and opacity (under section 412)<sup>1</sup>. On October 24, 1997, EPA issued a final rule establishing a limited exemption from most Acid Rain Program requirements for certain industrial boilers ("industrial utility-units") that are not cogeneration units and that generate small amounts of electricity for sale. See 62 FR 55460, 55462-55466 and 55478-55480 (October 24, 1997). A cogeneration unit is a unit that uses the same energy to produce sequentially both: Thermal energy (heat or steam) that is used for industrial, commercial, or heating or cooling purposes; and electricity.

Under the industrial utility-unit exemption in the existing rule, the owners or operators of an industrial utility-unit that is not a cogeneration unit and that meets several requirements specified in § 72.14 may apply for, and obtain from the permitting authority, an exemption from most Acid Rain Program requirements. First, the existing § 72.14 requires that the unit must have no owner or operator whose principal business is electricity

<sup>1</sup> See also section 821 of the Clean Air Act Amendments of 1990, 42 U.S.C. 7651k note (concerning monitoring of CO<sub>2</sub>).

sale, transmission, or distribution or that is a public utility subject to State or local utility regulation. Second, on or before March 23, 1993, the owners or operators of the unit must have entered into an interconnection agreement with a company whose principal business is electricity sale, transmission, or distribution or that is a public utility subject to State or local utility regulation. The agreement must require that the generator served by the unit produce electricity for sale only for incidental sales. Third, in 1985 and any year thereafter, the generator served by the unit must have actually produced electricity for sale only for incidental sales to the public utility. EPA defined "incidental sales" as annual sales not exceeding the lesser of 10 percent of the output capacity of the generator or 10 percent of the actual annual electric output of the generator. See 62 FR 55478.

### III. Rule Revision

After the issuance of the October 24, 1997 rule, one commenter filed a petition for review of the rule. On August 23, 2000, EPA and the commenter signed a settlement addressing the issues raised by the petition for review.

The commenter's units were among the 15 units that, according to EPA estimates in the October 24, 1997 rule, might qualify for the industrial utility-unit exemption. See 62 FR 55463 n.7. In connection with the petition for review, this party has raised significant questions as to whether industrial utility-units that are covered by the exemption provided in § 72.14 are actually "utility units" and would otherwise be subject to the Acid Rain Program. If such industrial utility-units would not otherwise be subject to the Acid Rain Program, then their owners or operators would not need to apply and qualify for an exemption under § 72.14. Indeed, there might not be any purpose for retaining § 72.14. In the rulemaking in which EPA proposed and then adopted § 72.14, these questions concerning whether industrial utility-units were "utility units" were not raised or addressed in any comprehensive way. Instead, the comments on the proposal and EPA's analysis of the comments focused on the details of what requirements an industrial utility-unit would have to meet in order to qualify for an exemption from most Acid Rain Program requirements. See 62 FR 55463-55466.

Under these circumstances, EPA concludes that the adoption of § 72.14 was premature. EPA believes that the

underlying questions concerning whether industrial utility-units are actually "utility units" and would otherwise be subject to the Acid Rain Program should be fully addressed before an exemption for such units is implemented. Consequently, today's rule provides that § 72.14 in the October 24, 1997 rule is vacated, all references to § 72.14 in the parts 72-78 of the regulations (40 CFR parts 72-78) implementing the Acid Rain Program under title IV of the Clean Air Act are removed, and the portion of the preamble of the December 27, 1996 proposed rule addressing § 72.14 (i.e., section I.B.4 at 61 FR 68344-68347) and of the October 24, 1997 rule addressing § 72.14 (i.e., section II.B.3 of the preamble of the October 24, 1997 rule (62 FR 55462-55466)) is no longer valid and should not be regarded as representing EPA's views.

This will provide EPA an opportunity to consider comments that industrial-utility units (as defined in § 72.14) are not affected utility units under title IV of the Act and therefore do not need an exemption from requirements of title IV. Further, EPA will not take any further action on the provisions of § 72.14 in the December 27, 1996 proposed rule or the portion of the preamble of the December 27, 1996 rule addressing § 72.14 (i.e., section I.B.4 of the preamble of the December 27, 1996 rule (61 FR 68344-68347)) without first promulgating a new notice of proposed rulemaking that proposes such action and without first providing a new opportunity for public comment on any such new notice. EPA notes that today's rule is consistent with the August 23, 2000 settlement.

### IV. Administrative Requirements

#### A. Executive Order 12866: Regulatory Impacts Analysis

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether a 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.

It has been determined that today's final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and, therefore, is not subject to OMB review.

#### B. Regulatory Flexibility Act: Small Entity Impacts

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), Public Law 104-121, generally requires the agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant, economic impact on a substantial number of small entities. Such entities include small businesses, small organizations, and small governmental jurisdictions.

Today's final rule will not significantly change the regulatory burden or economic impact of the existing Acid Rain regulations on any parties. When EPA promulgated the industrial utility-units exemption provision, EPA concluded that the provision would not change the overall economic impact of the Acid Rain regulations and would not have a significant economic impact on a substantial number of small entities. 62 FR 55474. EPA anticipated that the exemption would cover about 15 units with 4 owners, who were unlikely to be small entities. See 62 FR 55463 n. 7. Today's final rule vacates the industrial utility-units exemption provision and similarly will not change the overall economic impact of the Acid Rain regulations and will not have a significant economic impact on a substantial number of small entities.

For these reasons, I certify that today's final rule will not have a significant, economic impact on a substantial number of small entities.

#### C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 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, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule with "Federal mandates" that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to 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 publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying 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 regulatory requirements.

The EPA has determined that today's final rule does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector in any one year. Today's final rule will not significantly change the regulatory burden or economic impact of the existing Acid Rain regulations on any parties. When EPA promulgated the industrial utility-units exemption provision, EPA concluded that the provision would not change the overall economic impact of the Acid Rain regulations and would not have a significant economic impact on a substantial number of small entities. 62 FR 55474. EPA anticipated that the exemption would cover about 15 units with 4 owners, who were unlikely to be State, local, or tribal governments. See 62 FR 55463 n. 7. Today's final rule vacates the industrial utility-units

exemption provision and similarly will not change the overall economic impact of the Acid Rain regulations. Accordingly, little or no additional costs to State, local, or tribal governments in aggregate, or to the private sector, will result from the final rule. Because today's 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. Similarly, EPA has determined that today's rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's final rule is not subject to the requirements of sections 202, 203, or 205 of the UMRA.

#### D. Paperwork Reduction Act

Today's final revisions to part 72 will not impose any new information collection burden subject to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). OMB has previously approved the information collection requirements contained in the permits rule, 40 CFR part 72, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* See OMB Control Number 2060-0258 (Acid Rain Program ICR No. 1633.12).

Today's final rule vacates the industrial utility-units exemption and thus any information required to qualify and apply for the exemption. Any units otherwise qualifying for the exemption that are covered by the Acid Rain Program will have the same information requirements as any other units subject to the Acid Rain Program. Those requirements were previously approved.

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, 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.

Copies of the previously approved ICR may be obtained from Sandy

Farmer, Collection Strategies Division; U.S. Environmental Protection Agency (28822); 1200 Pennsylvania Ave., NW, Washington, DC 20460 or by calling (202) 260-2740. Include the ICR and/or OMB number in any correspondence.

#### E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885 (April 23, 1997) applies to any rule that, EPA determines, (1) is "economically significant" as defined under Executive Order 12866 and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's final rule is not subject to Executive Order 13045 because it is not "economically significant" as defined under Executive Order 12866. Further, the Agency does not have reason to believe that the environmental health risks or safety risks addressed by this action present a disproportionate risk to children.

#### F. Executive Order 12898: Environmental Justice

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

Today's final rule vacates the industrial utility-units exemption provision. Neither the industrial utility-units exemption provision nor the vacating of the provision has disproportionately high and adverse human health or environmental effects on minorities and low-income populations.

#### G. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255 (August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct

effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Today’s final rule vacates the industrial utility-units exemption provision. Neither the provision nor the vacating of the provision has any federalism implications. This action will not have substantial direct effects on the States, on the relationship between the national governments and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to today’s final rule.

#### *H. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments*

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the

preamble to the rule, a description of the extent of EPA’s prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments “to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.”

Today’s final rule vacates the industrial utility-units exemption provision. Neither the industrial utility-units exemption provision nor the vacating of the provision significantly or uniquely affects the communities of Indian tribal governments or imposes any direct compliance costs on those communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this action.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus

standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today’s final rule does not involve any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### *J. Submission to Congress and the General Accounting Office*

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. EPA will submit a report containing today’s final 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. Today’s final rule is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Parts 72, 74, and 78**

Environmental protection, Acid rain program, Administrative practice and procedure, Air pollution control, Electric utilities, Permits, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: January 3, 2001.

**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 72—[AMENDED]**

1. The authority citation for part 72 continues to read as follows:

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

**§ 72.6 [Amended]**

2. Section 72.6 is amended in paragraph (b)(9) by revising the words “§ 72.7, § 72.8, or § 72.14” wherever they occur to read “§ 72.7 or § 72.8”.

**§ 72.9 [Amended]**

3. Section 72.9 is amended in paragraph (c)(6) by revising the words “§§ 72.7, 72.8, or 72.14” to read “§ 72.7 or § 72.8”; paragraph (g)(1) by revising the words “§ 72.7, § 72.8, or § 72.14” by to read “§ 72.7 or § 72.8”; and in paragraph (h) by revising the words “§ 72.7, § 72.8, or § 72.14” to read “§ 72.7 or § 72.8”.

**§ 72.14 [Removed]**

4. Section 72.14 is removed.

**§ 72.70 [Amended]**

5. Section 72.70 is amended in paragraph (b) by removing the words “or for issuing exemptions under § 72.14”.

**§ 72.72 [Amended]**

6. Section 72.72 is amended by removing paragraph (b)(6).

**§ 72.83 [Amended]**

7. Section 72.83 is amended in paragraph (a)(13) by removing the words “or which was approved by the permitting authority under § 72.14”.

**PART 74—[AMENDED]**

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

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

**§ 74.2 [Amended]**

2. Section 74.2 is amended by revising the words “§ 72.7, § 72.8, or § 72.14” to read “§ 72.7 or § 72.8”.

**PART 78—[AMENDED]**

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

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

**§ 78.1 [Amended]**

2. Section 78.1 is amended by removing and reserving paragraph (b)(1)(v).

**§ 78.12 [Amended]**

3. Section 78.12 is amended by removing from paragraph (a)(2), after the words “an Acid Rain permit”, the words “or an exemption under § 72.14 of this chapter”.

[FR Doc. 01-721 Filed 2-28-01; 8:45 am]

**BILLING CODE 6560-50-U**