

approved but in subsequent years as well.

Section 105(c)(1) of the Act provides that "No agency shall receive any grant under this section during any fiscal year when its expenditures of nonfederal funds for recurrent expenditures for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year." The MOE regulations implementing this provision state that: "To receive funds under section 105, an agency must expend annually for recurrent section 105 program expenditures an amount of nonfederal funds at least equal to such expenditures during the preceding fiscal year." 40 CFR 35.120.

Because the regulations describe the term "recurrent expenditures for air pollution control programs," as "recurrent section 105 program expenditures," EPA believes a reasonable interpretation of the MOE provisions is that they require states to maintain only their effort associated with activities that are included within the section 105 grant program.

Because many of the activities previously funded through section 105 program grants are now included within the Title V permit fee program and permit program activity costs are no longer allowable costs under the section 105 program, expenditures for permit activities are no longer "recurrent section 105 program expenditures" for which the MOE level must be maintained. A new MOE level should be calculated that reflects the expenditures associated with the remaining section 105 activities.

B. Cost-sharing Requirements

1. *Maximum Federal share.* Prior to the 1990 Amendments, EPA was authorized to award Section 105 program grants that, depending upon the purposes of the grants and recipients' identities, provided up to one-half to three-quarters of the approved program costs. Distinctions were made among types of recipients and between cost-sharing requirements for planning, developing, establishing, and improving programs and maintaining programs. The 1990 Amendments eliminated the distinctions between the types of recipients and activities along with the varying Federal funding percentages associated with each. Instead all funded activity is now termed as 'implementation' which is now defined in this rulemaking to encompass virtually every type of program activity.

The Amendments revised section 105(a) to authorize grant awards up to

three-fifths (60 percent) of the costs of "implementing" the air programs.

Section 105 (a)(1)(A) defines "implementing" as "any activity related to the planning, developing, establishing, carrying-out, improving, or maintaining of such programs."

The 1990 Amendments further provided that air pollution control agencies contributing less than two-fifths (40 percent) of the approved program costs had 3 years from the date of enactment (November 15, 1990) to meet the required nonfederal minimum or face a reduction in their EPA funding. Section 105 (a)(1)(B) of the Act. The change in the cost-share requirement was phased-in to prevent the disruption of affected grantee's current air program operations.

This rulemaking revises the current regulations by deleting the existing regulations at 40 CFR 35.205 and inserting new provisions for a uniform cost-sharing requirement for all program activities and a 3-year phase-in period. The statutory definition of the term "implementing" has been included in the new definitions section at 40 CFR 35.201.

2. *Waiver of cost-sharing requirement.* In accordance with section 105(c)(1) EPA has determined that an exemption from the cost-sharing requirement is appropriate in certain very limited circumstances because of increased expenditures experienced by states as a result of the transfer of resources to the Title V permit program.

In the 1980's, many states enacted operating permit programs as part of their air pollution control programs. The costs of these state permit programs were allowable under section 105 grants and many states used the permit fees they collected to satisfy the cost-sharing requirement of the section 105 grant program. The 1990 Amendments, however, added Title V to the Act. Title V requires all states to establish operating permit programs supported by permit fees. Many activities previously funded through section 105 grants are now required to be included and funded through the Title V permit fee programs. In order to obtain a permit, sources of pollution must pay to the state an annual fee that is sufficient to cover all the costs of the permitting program. (Section 502(b)(3)(A)). Title V and EPA regulations require that any such permit fees collected be utilized solely to cover the costs of the permit programs. (Section 502(b)(3)(C)(iii) and 40 CFR 70.9(d)).

Some states assumed the fees collected under Title V could be used to pay a portion or all of the 40 percent cost-share for their section 105 grant,

like the fees under previous state permit programs. Other states without previously existing permit programs also planned to use Title V fees in lieu of state general revenues and other sources to meet the cost-share requirement. Relying on the assumption that Title V fees could be used for cost-sharing, some state legislatures did not authorize and appropriate funds sufficient to meet the cost-share requirements beyond the funds anticipated from the fees.

However, Title V permit fees cannot be used to meet the cost-sharing requirements of section 105 program grants. In order to qualify for cost-sharing, costs incurred by a grantee must be allowable under its grant with EPA. (40 CFR 31.24(a)). A grantee may not count costs that are not part of its grant program. Because Title V requires that the permit program be funded solely from the fees collected, and that the fees collected be used only for that purpose, Title V permit program costs cannot be funded from a section 105 grant. As a result, the permit program cost are not allowable section 105 grant costs and, therefore, the costs and the fees used to pay them cannot be used to meet the section 105 cost-sharing requirements.

Because the Title V fees cannot be used for cost-sharing, some state and local agencies have indicated that they will not be able to meet the 40 percent cost-sharing obligation once their Title V programs are approved. As a result, some states need additional time to identify other sources of funds or obtain additional funds from their legislatures. If a state cannot meet its cost-share it would either be ineligible for a section 105 award or would have its grant award reduced as a result. Section 105 grants fund a large portion of state air pollution control programs. Without grant support some states have indicated an inability to fulfill responsibilities under the Act and would not be able to meet all of the statutory deadlines. Consequently, states would risk the imposition of severe growth sanctions.

To prevent significant shortfalls in near-term funding, states requested relief from the cost-sharing requirements. The EPA has noted three regulatory and administrative remedies that would help provide states relief and additional time to secure the necessary funding support: deferral of cost-sharing to the end of the budget period; use of revenue generated from fees during program development for cost-sharing; and promulgation of this rule to provide a temporary waiver of the cost-sharing requirement.