

as stringent as any other applicable limitations and requirements contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the SIP, or that are otherwise "Federally enforceable" (e.g. standards established under sections 111 and 112 of the Act). North Carolina Regulation 15A NCAC 2Q.0306(c) requires that all emissions limitations, controls, and other requirements imposed by a permit issued pursuant to this Rule shall be at least as stringent as any other applicable requirement as defined under Rule .0103 (effective date of July 1, 1994). The definition of applicable requirement found in 15A NCAC 2Q.0103 includes among other things requirements in the North Carolina SIP. In addition, Regulation 15A NCAC 2Q.0306(c) requires that the permit shall not waive or make less stringent any limitation or requirement contained in applicable requirement. Both the FCDEA and the WNCRAPCB operating permit programs meet this requirement by a verbatim incorporation of the State's Regulation 15A NCAC 2Q.0306(b) into their regulations. Therefore, the third criteria for Federal enforceability is met.

The fourth criteria for a state or local agency to be able to issue FESOP or FELOP is that limitations, controls, and requirements in the operating permits are quantifiable, and otherwise enforceable as a practical matter. While a determination of what is practically enforceable will generally differ based on process type and emissions, North Carolina Regulation 15A NCAC 2Q.0306(d) requires that "Emissions limitations, controls, and requirements contained in permits issued pursuant to the Rule shall be permanent, quantifiable, and otherwise enforceable as a practical matter." Both the FCDEA and the WNCRAPCB operating permit programs meet this requirement by a verbatim incorporation of the State's Regulation 15A NCAC 2Q.0306(b) into their regulations. Therefore, the fourth criteria for Federal enforceability is met.

The fifth criteria for a state or local agency to be able to issue FESOP or FELOP is to provide EPA and the public with timely notice of the proposal and issuance of such permits, and to provide EPA, on a timely basis, with a copy of each proposed (or draft) and final permit intended to be Federally enforceable. This process also must provide for an opportunity for public comment on the permit applications prior to issuance of the final permit. North Carolina Regulation 15A NCAC

2Q.0306(a)(5) requires that any source which wishes to limit its potential to emit via a permit for PSD/NSR or title V purposes must go through an opportunity for public comment as well as public hearing. In addition, Regulation 15A NCAC 2Q.0306(a)(12) allows any owner or operator who requests that a draft permit go to public notice with an opportunity to request a public hearing to do so. EPA notes that any permit which has not gone through an opportunity for public comment and EPA review in the North Carolina, the FCDEA and the WNCRAPCB FESOP or FELOP programs will not be Federally enforceable. North Carolina Regulation 15A NCAC 2Q.0307(d) requires that there will be at least a 30 day public and EPA comment period prior to permit issuance. North Carolina Regulation 15A NCAC 2Q.0307(g) provides that the Director will send a copy of each draft permit when it sends EPA the notice of request for public comment for that permit. Finally, Regulation 15A NCAC 2Q.0307(g) provides that the State will send a copy of each final permit after the permit is issued. Both the FCDEA and the WNCRAPCB operating permit programs meet this requirement by a verbatim incorporation of the State's Regulations 15A NCAC 2Q.0306(a)(5), 15A NCAC 2Q.0306(a)(12), 15A NCAC 2Q.0307(d), 15A NCAC 2Q.0307(g) into their regulations. Therefore, the fifth criteria for Federal enforceability is met.

On June 28, 1989 (54 FR 27274), EPA published criteria for approving and incorporating into the SIP regulatory programs for the issuance of FESOP and FELOP. Permits issued pursuant to an operating permit program approved into the SIP as meeting these criteria may be considered Federally enforceable. EPA has encouraged states and local agencies to develop such FESOP and FELOP programs in conjunction with title V operating permits programs to enable sources to limit their potential to emit to below the title V applicability thresholds. (See the guidance document entitled, "Limitation of Potential to Emit with Respect to Title V Applicability Thresholds," dated September 18, 1992, from John Calcagni, Director, Air Quality Management Division, Office of Air Quality Planning and Standards (OAQPS), Office of Air and Radiation, U.S. EPA.) On November 3, 1993, the EPA announced in a guidance document entitled, "Approaches to Creating Federally Enforceable Emissions Limits," signed by John S. Seitz, Director, OAQPS, that this mechanism could be extended to create Federally enforceable limits for emissions of HAP if the program were

approved pursuant to section 112(l) of the Act.

In addition to requesting approval into the SIP, North Carolina, the FCDEA and the WNCRAPCB have also requested approval of their FESOP and FELOP programs under section 112(l) of the Act for the purpose of creating Federally enforceable limitations on the potential to emit of HAP. Approval under section 112(l) is necessary because the proposed SIP approval discussed above only extends to the control of criteria pollutants. Federally enforceable limits on criteria pollutants (i.e., VOC's or PM-10) may have the incidental effect of limiting certain HAP listed pursuant to section 112(b).<sup>1</sup> However, section 112 of the Act provides the underlying authority for controlling all HAP emissions.

EPA believes that the five approval criteria for approving FESOP programs into the SIP, as specified in the June 28, 1989, **Federal Register** document, are also appropriate for evaluating and approving the programs under section 112(l). The June 28, 1989, document does not address HAP because it was written prior to the 1990 amendments to section 112 not because it establishes requirements unique to criteria pollutants. Hence, the following five criteria are applicable to FESOP and FELOP approvals under section 112(l): (1) The program must be submitted to and approved by the EPA; (2) the program must impose a legal obligation on the operating permit holders to comply with the terms and conditions of the permit, and permits that do not conform with the June 28, 1989, criteria or the EPA's underlying regulations shall be deemed not Federally enforceable; (3) the program must contain terms and conditions that are at least as stringent as any requirements contained in the SIP, enforceable under the SIP, or any section 112 or other CAA requirement, and may not allow for the waiver of any CAA requirement; (4) permits issued under the program must contain conditions that are permanent, quantifiable, and enforceable as a practical matter; and (5) permits that are intended to be Federally enforceable must be issued subject to public participation and must be provided to the EPA in proposed form on a timely basis.

In addition to meeting the criteria in the June 28, 1989, document, a FESOP or FELOP program that addresses HAP must meet the statutory criteria for

<sup>1</sup> The EPA intends to issue guidance addressing the technical aspects of how these criteria pollutant limits may be recognized for purposes of limiting a source's potential to emit of HAP to below section 112 major source levels.