40 CFR Part 70

[AD-FRL-5305-5]

Clean Air Act Final Full Approval of Operating Permits Programs in Oregon

AGENCY: Environmental Protection

Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is promulgating full approval of the operating permits program submitted by the Oregon Department of Environmental Quality (ODEQ) and Lane Regional Air Pollution Authority (LRAPA) for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

DATES: This action will be effective on November 27, 1995, unless adverse or critical comments are received by October 30, 1995. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESSES: Copies of Oregon's submittal and other supporting information used in developing the final full approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: David C. Bray, U.S. Environmental Protection Agency, 1200 Sixth Avenue, AT–082, Seattle, Washington 98101, (206) 553–4253.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the Clean Air Act Amendments of 1990 (sections 501-507 of the Clean Air Act ("the Act")), and implementing regulations at 40 Code of Federal Regulations (CFR) part 70 (part 70), require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within one year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to two years. If EPA has not fully approved a program by two years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

On September 14, 1994, EPA proposed interim approval of the operating permits programs for ODEQ and LRAPA, provided certain proposed revisions to Oregon rules were adopted and submitted to EPA as a program revision prior to EPA's statutory deadline for acting on the State's submittal. In the alternative, EPA proposed disapproval of the Oregon programs if the proposed revisions were not adopted and submitted prior to the statutory deadline. See 59 FR 47105 (Sept. 14, 1994). The State adopted and submitted the revisions necessary to address the proposed disapproval items and, on December 2, 1994, EPA published final interim approval of the operating permits programs for ODEQ and LRAPA which identified two remaining deficiencies in Oregon's enforcement authorities. See 59 FR 68120 (December 2, 1994).

EPA received a letter from ODEQ on June 30, 1995 addressing the two interim approval issues identified in the December 1994 Federal Register notice. EPA has reviewed the submittal and has determined that the Oregon programs now qualify for full approval. Accordingly, EPA is taking final action to promulgate full approval of the operating permits programs for ODEQ and LRAPA.

II. Final Action and Implications

A. Resolution of Interim Approval Issues

1. Upset/Bypass as a Defense to Criminal Liability

ORS 468.959 provides an affirmative defense to criminal liability for violations that result from an "upset" or a "bypass," as those terms are defined in the Oregon statute. In the December 2, 1994, Federal Register notice, EPA stated that in order to receive full approval, Oregon must demonstrate to EPA's satisfaction that ORS 468.959 is consistent with 40 CFR 70.6(g). That section establishes an affirmative defense to violations of technologybased standards due to an "emergency" provided certain specified procedures are met. EPA went on to state that the affirmative defense under ORS 468.959 appeared to be broader than the affirmative defense under 40 CFR 70.6(g) and therefore precluded full approval. See 59 FR 61827.

In response to this issue, ODEQ submitted an opinion letter from the Oregon Attorney General describing the legislative history of ORS 468.959 and opining that ORS 468.959 did not interfere with the enforcement requirements of part 70 (see Letter from Oregon Assistant Attorney General, Shelley McIntyre, to Phil Millam, May

22, 1995). The opinion letter notes that Oregon has enacted a regulation corresponding to the emergency provision of 40 CFR 70.6(g). See OAR 340–28–1430(1). The opinion letter states that ORS 468.959 is a completely different provision, which was patterned after the upset/bypass provisions under the Federal Clean Water Act and was enacted to provide two very narrow affirmative defenses to criminal liability under all of Oregon's environmental statutes for violations that the legislature considered either unavoidable or necessary to prevent more serious injury or damage.

After further consideration of the relationship between the emergency provision of 40 CFR 70.6(g) and the enforcement requirements of 40 CFR 70.11, EPA agrees with the Oregon Attorney General that the appropriate question is whether ORS 468.959 impermissibly interferes with the enforcement requirements of 40 CFR 70.11. Based on EPA's review of ORS 468.959 and the Attorney General's opinion letter, EPA believes that the affirmative defense to criminal liability available in Oregon for violations due to an upset or bypass does not unduly interfere with the State's enforcement authorities required under 40 CFR

ORS 468.959 allows a source to assert an affirmative defense to violations resulting from an "upset". An upset is defined under this statute as an exceptional and unexpected occurrence in which there is an unintentional and temporary violation because of factors beyond the reasonable control of the violator and is not caused by operational error, improperly designed facilities, lack of preventive maintenance or careless or improper operation. See ORS 468.959(2)(b). By defining an upset as an "unintentional" violation, Oregon has greatly limited the scope of that affirmative defense. The class of violations that would be "unintentional" and yet "knowing," so as to subject the violator to criminal liability, should be extremely narrow. Compare ORS 161.090(7) (definition of "intentionally") with ORS 161.090(8) (definition of "knowingly").

In addition, the procedural requirements a source must meet in Oregon in order to be excused from criminal liability for violations due to upsets are substantially equivalent to the procedural requirements a source must meet to establish the affirmative defense of emergency under 40 CFR 70.6(g). EPA believes that these procedural safeguards further minimize the likelihood that ORS 468.959 will