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THE PERMIT FEE PROGRAM OF TITLE V OF THE CLEAN AIR ACT OF 1990: DEVELOPING STATE FEE PROGRAMS

by
*Barry S. Read**

TITLE V of the Clean Air Act of 1990 ("Act") requires states to adopt programs for the issuance of operating permits for stationary sources of air pollutant emissions.¹ As a part of this permit program, states must require the owners or operators of sources subject to the permit requirement to pay a fee "sufficient to cover all reasonable direct and indirect costs to develop and administer the permit program requirements of this title."²

The Act gives the EPA and the states wide latitude in interpreting Title V and in designing and implementing permit fee programs. The Act also empowers states with authority to set the amount and determine the applicability of the fee permit programs. This paper addresses issues that the EPA and the states must address in attempting to establish a permit fee program under the Clean Air Act of 1990.

I. THE PERMIT AND EMISSION FEE PROGRAM OF THE CLEAN AIR ACT OF 1990

As part of the operating permit program for stationary sources of air pollution established in the Clean Air Act of 1990, section 502(b)(3) requires all sources subject to the permit requirement to pay an annual fee, or a fee paid on another periodic basis that is determined to be the equivalent of an an-

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1. Clean Air Act of 1990, § 502(d). This program is similar in intent to the National Pollutant Discharge Elimination Permit program under the Clean Water Act. Clean Water Act of 1977, § 402, 33 U.S.C. § 1342 (1982).

2. Clean Air Act of 1990, § 502(b)(3)(A).

nual fee, for the support of the operating permit program.³ The sources subject to the fee requirement are separated into five separate categories:

- a) major sources, defined for the purposes of Title V⁴ as (1) any stationary source or any group of stationary sources located within a contiguous area and under common control that emits more than 10 tons per year of any of the toxic chemicals listed in Section 301(b) of the Act or 25 tons per year of any combination of those chemicals,⁵ or (2) any source that emits or has the potential to emit more than 100 tons per year or more of any air pollutant;⁶
- b) any "affected source" subject to Title IV of the Act, pertaining to emissions of pollutants that are precursors to acid rain, which includes the 110 listed electric utility powerplants in section 404 of Title IV of the Act as well as other electric utility powerplants brought under the acid deposition control program;⁷
- c) any other source, including an area source, subject to standards or regulations under section 111, New Source Performance Standards ("NSPS") or section 112, National Emission Standards for Hazardous Air Pollutants ("NESHAP");⁸
- d) any source required to have a permit under Part C of Title I of the Act relating to prevention of significant deterioration or Part D of Title I relating to nonattainment areas;⁹ or
- e) any other source designated in regulations issued by the Administrator of the United States Environmental Protection Agency (EPA).¹⁰

The Act requires states to generate sufficient income through fees to cover all reasonable direct and indirect costs of developing and administering state permit programs. As enumerated in the Act, program costs include not only the costs of the initial permit, but also the ongoing costs of regulating air pollution. For example, program costs may consist of: reviewing and acting upon permit applications, implementing and enforcing permit requirements (not including court costs), monitoring both emissions and ambient air quality, preparing regulations or guidance for applicants and the agencies to follow in issuing permits and implementing permit requirements, modeling air quality, analyzing control options, demonstrating control techniques, preparing emission inventories, and tracking emissions.¹¹

Section 502(b) of the Act requires the amount of fees collected to be not less than twenty-five dollars per ton of each regulated pollutant emitted,

3. Clean Air Act of 1990, §§ 501(2), 502(a); Clean Air Act of 1990, § 301(a), 42 U.S.C. § 7602(a).

4. Clean Air Act of 1990, § 501(2).

5. Clean Air Act of 1990, § 301(a) and (b).

6. Clean Air Act of 1977, § 302, 42 U.S.C. § 7602; Clean Air Act of 1977, § 171, 42 U.S.C. § 7471.

7. Clean Air Act of 1990, § 404, Table A.

8. Clean Air Act of 1990, § 502(a); Clean Air Act of 1977, § 111, 42 U.S.C. § 7411; § 112, 42 U.S.C. § 7412.

9. Clean Air Act of 1990, § 502(a); Clean Air Act of 1977, §§ 160, 171; 42 U.S.C. §§ 7460, 7471.

10. Clean Air Act of 1990, § 502(a).

11. Clean Air Act of 1990, § 502(b)(3)(A)(i)-(vi).

when averaged over all of the facilities required to pay fees.¹² If a state agency determines that the costs of its permit program can be met by a fee system averaging less than twenty-five dollars per ton, the agency must demonstrate this conclusion to the U.S. Environmental Protection Agency. The Agency may approve a lower average fee if the Administrator is satisfied that the state agency can still recover the reasonable costs of the permit program.¹³

After the fee schedule is set, the Act contemplates periodic review by the state agency to determine if the fees are still adequate to cover the state program operating costs for the permit fee program.¹⁴ In any case, the amount of the fee will increase each year by the percentage increase in the Consumer Price Index.¹⁵

The fee program applies to each ton of a "regulated pollutant" emitted from a source.¹⁶ Emissions of a single regulated pollutant from any source in excess of 4,000 tons are not, however, included when calculating the fee for that facility.¹⁷ Under Title V, a "regulated pollutant" consists of a volatile organic compound, a pollutant regulated under section 111 or 112 of the Act, or each pollutant subject to a promulgated national ambient air quality standard ("NAAQS"), except carbon monoxide.¹⁸

Title V also provides that the Administrator may collect reasonable fees from sources within a state if the Administrator determines that the state is not adequately administering or enforcing the permit program.¹⁹ A source refusing to pay the fees is liable for an additional fifty percent penalty.²⁰ The EPA is to put penalties collected into a special fund available to support the EPA's administration of the permit program.²¹

II. STATE OPERATING FEE PROGRAMS

Fee requirements for air quality permits are not original to the Clean Air Act of 1990. Under section 110(a)(2)(K) of the Clean Air Act of 1977, states were directed to include provisions in state implementation plans (SIPs) for operating fees sufficient to cover the costs of processing and enforcing SIP permits.²² In determining the adequacy of individual SIPs, however, the EPA rarely enforced this provision. As of early 1987, only thirty-

12. Clean Air Act of 1990, § 502(b)(3)(B)(i).

13. Clean Air Act of 1990, § 502(b)(3)(B)(iv).

14. Clean Air Act of 1990, § 502(b)(3)(B)(v).

15. Clean Air Act of 1990, § 502(b)(3)(B)(v).

16. Clean Air Act of 1990, § 502(b)(3)(B)(ii).

17. Clean Air Act of 1990, § 502(b)(3)(B)(iii).

18. Clean Air Act of 1990, § 502(b)(3)(B)(ii).

19. Clean Air Act of 1990, § 502(b)(3)(c)(i).

20. Clean Air Act of 1990, § 502(b)(3)(c)(ii).

21. Clean Air Act of 1990, § 502(b)(3)(C)(Iii).

22. Clean Air Act of 1977, § 110(a)(2)(K) 42 U.S.C. § 7410(a)(a)(K) ". . . require[s] the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover— (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) . . . the reasonable costs . . . of implementing and enforcing the terms and conditions of any such permit"

one states and twenty-six local air pollution control agencies collected fees from applicants and permit holders.²³

A variety of reasons are offered to explain the reluctance of state agencies to require applicants and permit holders to pay fees. Many public agencies consider the issuance of permits to qualified applicants a public service for which reimbursement is inappropriate. Other agencies have not implemented a fee program because statutory fee limitations would make the revenue generated through fees insignificant when compared to the administrative cost of the entire permit program.²⁴

Further disincentives to the implementation of state permit fee programs are statutory provisions that require some state agencies to place all funds received into the state's general operating fund.²⁵ In such cases, the statutory requirements do not earmark the fees for the air quality agency's programs. Instead, they are available for any state purpose. At present, approximately one-half of the thirty-one states that collect fees and approximately seventy percent of the local districts retain funds collected in the form of fees in special accounts.²⁶ In states that do not restrict the establishment of dedicated funds,²⁷ the prospect that an agency's legislative appropriation might be reduced by an amount equal to the fees collected may reduce the agency's incentive to establish and implement a fee system.

In states where the statutes establishing an air quality permit program do not authorize the permitting agency to collect fees, or require such fees to go into the general revenue fund, changes will have to be made in those statutes to conform to the requirements of Title V of the Clean Air Act of 1990. Where the lack of authority is based on statutory provisions, the obstacles to adoption of an operating permit fee program under Title V may be readily surmounted by administrative and legislative action. That is, states can adopt legislation specifically authorizing the air quality agency to establish an operating permit and fee program. Where the absence of a fee program is based on state constitutional prohibitions, however, the obstacles facing a state air agency in developing a program that complies with Title V will be more serious.

From the date of enactment of Section 502(d) of the Clean Air Act of 1990, states have three years to submit a permit program to the Administrator that meets the requirements of Title V, including an operating fee program.²⁸ During this three year period, each state will craft its own permit fee schedule, either revising an existing program or developing a new one. A review of existing state fee requirements reveals a wide variance in methods that states use in structuring an operating fee program while satisfying the criteria of Section 502(b)(3) of the Clean Air Act.

The most prevalent state fee is a filing fee, collected when an applicant

23. H.R. REP. NO. 490, 101st Cong., 2d Sess., at 343 (1990).

24. *Id.*

25. See GA. CODE ANN. § 12-9-9(d) (Harrison 1987).

26. H.R. REP. NO. 490, 101st Cong., 2d Sess., at 345 (1990).

27. See OR. REV. STAT. § 468.065(6) (1987).

28. Clean Air Act of 1990, § 502(d).

files the application for a permit to construct or operate with the air quality agency. Such fees in many states are only nominal sums, which have no apparent relationship to the cost of processing, reviewing, or evaluating the permit application, not to mention the cost of monitoring compliance with the permit after issuance.²⁹ Other states set the filing fee at a more than nominal flat amount to recover at least a portion of the cost of reviewing a standard permit.³⁰

The most sophisticated programs provide a menu of permit review services and related costs.³¹ In Kentucky, for example, applicants supplement an initial permit filing fee (\$975 for a permit to construct and \$600 for a permit to operate) by additional fees to cover other services performed by the air quality agency. These services and the approximate amount for each fee include: reviewing air quality analyses (\$50 to \$150); performing air quality analyses (\$100 to \$1,840); conducting "BACT/LAER" technology analyses under the new source review programs of the Clean Air Act such as prevention of significant deterioration or nonattainment programs (\$225); arranging for public hearings as part of a required public participation program for consideration of the permit application (\$670); and reviewing the impact of emissions of toxic pollutants from a facility (based on the number of toxic pollutants, not to exceed \$10,000).³²

Few states implement fee programs that include annual fees or fees collected on some ongoing basis throughout the life of a permit, as contemplated by Title V. Some states collect fees from permittees whenever they perform inspections or other compliance activities at the permitted facility.³³ Often, states collect fees on a one-time basis upon issuance of the permit³⁴ or as a flat annual amount,³⁵ without reflecting the actual cost of compliance activities. Under these programs, the payment of fees does not support the implementation of a state's permit program on an ongoing basis.

Only a few states actually base fees on the quantity of pollutants emitted from the permitted facility. The Minnesota Air Pollution Control Agency regulations provide for an annual flat fee paid by each permitted source based on whether the source is a major source emitting more than 100 tons of pollutant per year or a minor source emitting less than 100 tons of pollutant per year.³⁶ Minnesota also imposes an annual surcharge based on five

29. See CONN. GEN. STAT. § 22a-175(a)(1989) [\$50 fee]; HAWAII ADMIN. RULES § 11-60-44 (1986) [\$50 fee].

30. See IND. ADMIN. CODE tit. 326, r. 2-1-7 (1989) [\$500 application evaluation fee]; 50 ME. DEPT. OF ENV. PROT. RULES, § 2 (1984) [\$250 processing fee]; 15 N.C. ADMIN. CODE tit. 15, r. 2D.0609 (1990) [permit application processing fees of \$50 to \$400].

31. See CAL. HEALTH & SAFETY CODE §§ 41512, 41512.5, and 42311 (West 1986); 340 OR. ADMIN. R. 20-165 (1990).

32. 401 KY. ADMIN. REG. 50:036 (1990).

33. See CAL. HEALTH & SAFETY CODE § 41512.5 (West 1986); MINN. R. 7002.0100(4b) (1990); N.H. CODE ADMIN. R. 701.01 (1987); N.C. ADMIN. CODE tit. 15, R. 2D.0609(b) (1990).

34. ARK. STAT. ANN. § 82-1918 (1987); 12 GA. CODE ANN. § 12-9-9(a) (Harrison 1987).

35. See 5 COLO. CODE REGS. § VI.D (1990).

36. MINN. R. 7002.0100(5)(A) (1990).

categories reflecting increasing levels of potential emissions.³⁷ The California State Air Resources Board regulations also authorize local districts to collect annual fees based on the quantity of emissions from individual sources within the district and five emission categories: twenty-five to forty-nine tons per year, fifty to ninety-nine tons, 100-499 tons, 500-999 tons, and 1,000 tons or more.³⁸

Finally, some state fee programs differentiate between several types of emissions when calculating fee amounts. The California Air Control Board regulations impose a separate fee program applicable to sources emitting more than 1,000 tons per year of either sulfur oxides or nitrogen oxides.³⁹ Revenues from this fee program support acid deposition research and monitoring.⁴⁰

III. UNRESOLVED ISSUES IN THE DEVELOPMENT OF PERMIT FEE PROGRAMS

Viewed in the context of existing state fee programs, implementation of the fee requirement of section 501(b)(3) of the Clean Air Act of 1990 raises several unanswered questions. The first and most important question focuses on how to interpret the requirement in section 502(b)(3)(B)(i) that state fee programs collect from all sources at least twenty-five dollars per ton of each regulated pollutant.⁴¹ The simplest and most straightforward way for states to implement this requirement is to fashion a state fee program to assess fees on an emissions basis. Under this approach, the agency would estimate the total cost of administering the permit program for a given year, and divide that cost by the estimated total number of tons of regulated pollutants emitted in that forthcoming year. Thus, states could easily compare their state program with the twenty-five dollar per ton criteria required by section 502(b)(3)(B)(i).

This approach, however, presents two shortcomings. First and most obvious, it requires states to revise completely their existing state fee programs, none of which currently operate on an emissions basis. Second, the emissions based approach produces inequitable results. Basing the fee on emissions does not adequately reflect the fact that different sources place different requirements on the permit system. New sources entail extensive agency expense in processing the permit application, conducting air quality modeling, performing initial compliance testing, holding public hearings, and completing other aspects of the permit application process. Other sources may require more frequent compliance monitoring or pose a more substantial threat to health and the environment due to the nature of the pollutants

37. MINN. R. 7002.0100(5)(b) (1990).

38. CAL. HEALTH & SAFETY CODE § 90704(a) (West 1986).

39. CAL. HEALTH & SAFETY CODE § 90600 (West 1986).

40. CAL. HEALTH & SAFETY CODE § 90600 (West 1986).

41. The state fee program must "result in the collection, in the aggregate, from all sources subject to [the permit requirement], of an amount not less than \$25 per ton of each regulated pollutant, or other such amount as the Administrator may determine adequately reflects the cost of the program." Clean Air Act of 1990, § 502(b)(3)(B)(i).

emitted or the location and character of the source. A fee based on a flat sum per ton of pollutant emitted would not recognize these variations.

A state agency could use an emission fee program as an emission tax. Resource economists have discussed emissions taxes for decades. The theory behind these taxes is that the owner or operator of a source will attempt to avoid the emission tax by abating pollution up to the point where the marginal costs of control equal the tax. At an emission tax level of twenty-five dollars per ton, a source would reduce emissions as long as the cost of reduction is less than twenty-five dollars per ton. When the cost of pollution control technology exceeds that amount, the source would pay the tax rather than reduce emissions. An emission control tax would result in two benefits. First, the tax would add a market mechanism to influence emission reductions in addition to the regulatory mechanism entailed in the permit program. Second, the tax would result in a more efficient allocation of pollution control costs because firms with lower abatement costs would reduce pollution more than firms with higher costs.⁴²

Although Title V established the benchmark for evaluating the adequacy of a state fee program through an emission fee, the Act does not indicate that Congress intended to create an emission tax program. In stating the purpose of the fee system and the uses contemplated for the funds, Congress only discussed the fee system as a way of paying for a specific program - the operating permit program created in Title V.⁴³ The Act does not, however, prevent a state from establishing a permit program and subsequently going beyond the requirements of Title V to create an emission fee program.

Although a fee system based on the quantity of emissions from a source would facilitate the evaluation of the program, the language of Title V clearly leaves open the possibility of other types of fee programs.⁴⁴ Translating another fee system based on costs per service into terms comparable with the twenty-five dollar per ton criterion, however, would be complex. Most difficult would be finding a way to incorporate fees for one-time services, such as consideration of a permit application, with reimbursement for recurring expenses like compliance testing. Although a fee system based on the cost of services rendered, such as the Kentucky system described above,⁴⁵ may adequately recover all of the costs associated with the permit program in a given year, the system would not adequately express those costs in terms of the dollars spent per ton of emissions. The amount of fees collected under a fee-for-service system would vary depending on the number of new permit applications received, the number of compliance inspections performed, and other services rendered, but would not vary with the quantity of pollutants emitted. Any mathematical relationship between the fees collected under

42. See generally Congressional Research Service, Serial No. 5, 95th Cong., 1st Sess. (1977), POLLUTION TAXES, EFFLUENT CHARGES, AND OTHER ALTERNATIVES FOR POLLUTION CONTROL.

43. Clean Air Act of 1990, § 502(b)(3)(A).

44. Clean Air Act of 1990, § 502(b)(3)(B).

45. 401 KY. ADMIN. REG. 50:036 (1990).

this system and the twenty-five dollar per ton criterion would be entirely fortuitous.

In addition to these broad questions regarding state fee programs under the criteria established by the Clean Air Act, a number of specific questions also remain unresolved. For example, the Act does not specify whether the twenty-five dollar per ton figure applies to actual emissions or to potential or permitted emissions.⁴⁶ Since other provisions of the Act provide for enhanced monitoring of actual emissions,⁴⁷ possibly the twenty-five dollar per ton figure should be expressed in these same terms. Frequently, however, state agencies prefer to use permitted emissions when quantifying emissions because the permitted emissions are available in agency records without the difficulty and uncertainty of performing actual emission measurements.

The permit fee program in Title V presents another complication in the Section 502(b)(3)(B)(ii) definition of "regulated pollutant", which includes both a volatile organic compound (VOC) and each pollutant regulated under section 111 or section 112.⁴⁸ The complication arises because the new source and hazardous air pollutant standards include emission limits for specific organic compounds that also are volatile organic compounds. For instance, Subparts Y, BB, and FF of 40 CFR Part 61 contains standards for emissions of benzene, a volatile organic compound.⁴⁹ When the general category of VOC's and a particular regulated VOC overlap, it is not clear which regulated pollutant should be the basis of the source's calculation of its emission fee. Similarly, the statutory language is unclear whether the 4,000 ton emission cap should be based on emissions of total VOC's or on emissions of the individual regulated VOC's.

IV. CONCLUSION

The permit fee program in Title V of the Clean Air Act of 1990 will have a major impact on both the permitted facilities and state agencies which regulate them. For example, the emission-based program contemplated by Congress is inconsistent with the service-based orientation of many sophisticated state fee programs. As a result, the state air quality agencies and the EPA must resolve many difficult issues to accomplish the dual goal of financing the permit program adequately and treating state agencies and permittees equitably.

The resolution of these issues of resources and equity will largely determine whether the national operating permit program established by the Clean Air Act of 1990 results in an improved air quality control system, or only serves to increase the expense and inefficiency of the current system. If the permit fee programs are carefully constructed, they promise to result in

46. Clean Air Act of 1990, § 502(b)(3)(B)(i).

47. See Clean Air Act of 1990, § 412.

48. Clean Air Act of 1990, § 502(b)(3)(B)(ii).

49. 40 C.F.R. Part 60 §§ 61.270, 61.300, and 61.340 (1990).

better administration by the state agencies and lower emissions by permittees. If the fee system is inequitable or inadequate, however, the result will be higher costs with few benefits in lower emissions or increased efficiency.

