

NO_x BUDGET ENFORCEMENT



New York State
Department of Environmental Conservation

PROGRAM POLICY

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Abstract: 6 NYCRR Subpart 227-3 establishes a NO_x Emissions Budget and Allowance Program which will act as a mechanism to reduce NO_x emissions from budget sources during each control period in an economically efficient manner. Implementation of this Program will fulfill New York State's commitment, as outlined in the OTC NO_x MOU, for implementing the "Phase 2" NO_x emissions reductions.

This guidance provides that: (i) failure to submit an Account Certificate of Representation form by April 5, 1999, in violation of 6 NYCRR §227-3.12(e), will result in a penalty of \$10,000, plus a minimum of \$500 per day thereafter; (ii) failure to submit an emissions monitoring plan by April 5, 1999, in violation of 6 NYCRR §227-3.13(a)(2), will result in a penalty of \$10,000, plus a minimum of \$1,000 per day thereafter; (iii) failure to install emissions monitoring systems and meet all certification testing requirements by May 1, 1999, in violation of 6 NYCRR §227-3.13(a)(3), will result in a penalty of \$10,000, plus a minimum of \$500 per day thereafter; and (iv) failure to submit quarterly emissions and operations reports within thirty (30) days of the end of the calendar quarter, in violation of 6 NYCRR §227-3.15, will result in a penalty of \$10,000 plus a minimum of \$500 per day thereafter.

I. PURPOSE

The purpose of this guidance is to establish an enforcement strategy for ensuring compliance with certain elements of Subpart 227-3 which are critical to establishing the pre-2003 Nitrogen Oxides Emissions Budget and Allowance Program (the "Program"). This Program Policy shall terminate when all budget sources are in compliance with the referenced provisions of 6 NYCRR §§227-3.12 and 227-3.13.

As noted in the Civil Penalty Policy, the purpose of enforcement guidance is to assist Staff in efficiently and fairly deterring and punishing violations. The consistent implementation of this systematic statewide approach to assessing penalties for certain air violations will provide the regulated community with greater certainty regarding the Department's response to such violations and ensure a level playing field.

The Civil Penalty Policy provides that when violations occur, "it should be presumed that a penalty is warranted unless respondent documents compelling circumstances to the contrary." The penalty amounts suggested below should only be utilized when they will result in a fair resolution with an appropriate level of deterrence. As noted in the Civil Penalty Policy, "care must be taken, however, to avoid accepting a penalty which is too low to provide effective general and specific deterrence, or to adequately punish the violator, merely to promote prompt settlement." Individual circumstances may warrant assessment of higher penalties and this guidance will not preclude Staff from exercising its discretion to seek such penalties as appropriate. Exceptional circumstances with significant mitigating factors may, however, warrant a lower penalty than suggested in this guidance. In all circumstances Staff should continue to consider any variable factors that may be unique to a facility and Staff should endeavor to impose the appropriate sanction for the particular offense in accordance with the Civil Penalty Policy.

This Program Policy provides Staff with guidance and does not create any rights, duties, obligations or defenses for any other private party. It is to be used for settlement purposes only and is not designed to be used by Staff, violators, administrative law judges or courts in determining penalties at a hearing or trial. In accordance with the Civil Penalty Policy, however, penalties in "adjudicated cases must, on average and consistent with consideration of fairness, be significantly higher" than the amounts suggested below.

II. BACKGROUND

Subpart 227-3 implements the Program consistent with the principles of the September 27, 1994 Ozone Transport Commission Memorandum of Understanding (OTC NO_x MOU) regarding the control of NO_x emissions from large stationary sources. The Program is built on an agreement among the OTC states to limit the amount of NO_x emissions during the ozone season (May 1-Sept. 30). Each state has a specific tonnage of emissions that may be emitted by budget sources during the ozone season. This is known as the State NO_x Budget. State regulations assign specific portions of each State NO_x Budget to individual sources. Subpart 227-3, which became effective on March 5, 1999, is the New York State component of this interstate regulatory scheme. Subpart 227-3 will reduce NO_x emissions from large stationary sources characterized as fossil fuel fired boilers and indirect heat exchangers with a maximum rated heat input capacity of at least 250 million Btu/hour.

Unlike other pollutants, ozone is a secondary pollutant - not emitted directly but formed in the atmosphere by a variety of photochemical reactions involving NO_x in the presence of sunlight. Ozone at ground level causes throat irritation, congestion, chest pains, nausea and labored breathing. It aggravates respiratory conditions like chronic lung and heart diseases, allergies and asthma. Ozone damages the lungs and may contribute to lung disease. Implementation of the Program will, in concert with counterpart programs established by other OTC NO_x MOU signatory states, lower levels of ozone in New York State and will decrease the associated adverse public health and welfare effects.

Lower NO_x emissions will also have other real environmental benefits. Decreases in NO_x emissions will reduce acid deposition, nitrates in drinking water, excessive nitrogen loading to aquatic and terrestrial ecosystems, and ambient concentrations of nitrogen dioxide, particulate matter, and toxics. NO_x emissions reductions will also lessen regional haze and improve visibility.

Under the OTC NO_x MOU, the NO_x emissions reductions are to be accomplished by the establishment of a region-wide emissions cap and trade program. The trading aspect of the region-wide cap and trade program is based on the allocation and regulation of allowances for NO_x emissions. To assure the integrity and reliability of the cap and trade scheme, the Program contains important provisions governing, among other things, emissions monitoring, reporting and record keeping, compliance certification, permitting, and enforcement.

III. POLICY

The Clean Air Act requires the State to document progress towards, as well as attainment of, the National Ambient Air Quality Standard (NAAQS) for ozone. The State of New York is committed to timely complying with all applicable Clean Air Act requirements and enforcement of Subpart 227-3 is a key component in the State's efforts to comply.

Compiling and recording accurate data is a critical element of the Program. Budget sources which emit more than their allowance allocation will have to purchase allowances from other sources. Those that maintain a surplus of allowances may sell to other sources. Subpart 227-3 requirements include: submittal of an Authorized Account Representative (AAR) form; submittal of a Monitoring Plan to establish monitoring methodologies; completion of certification testing of monitoring equipment; and Quarterly Electronic Data Reporting(EDR). Subpart 227-3 requires the submittal of both the AAR form and the Monitoring Plan within 30 days of the effective date of the rule (March 5, 1999). Completion of certification testing is required by April 30, 1999. The certification application with the test results is due back within 45 days of the test. This latter requirement is embodied in the EPA guidance document referenced in the regulation.

The successful implementation of the Program is extremely important to achieving the goals of the Clean Air Act and fulfilling the Department's responsibility to carry out the environmental policy of the State. Accordingly, the following penalties will typically apply to emissions monitoring violations:

- Failure to submit an Account Certificate of Representation form by April 5, 1999, as required by 6 NYCRR §227-3.12(e), will subject a source to a penalty of \$10,000, plus a minimum penalty of \$500 per day thereafter;
- Failure to submit a complete Monitoring Plan by April 5, 1999, as required by 6 NYCRR §227-3.13(a)(2), will subject a source to a penalty of \$10,000. For each day thereafter, non-submittal will cause the source to incur a minimum penalty of \$1,000 per day;
- Failure to install, operate and meet all certification testing requirements by May 1, 1999, as required by 6 NYCRR §227-3.13(a)(3), will subject a source to a \$10,000 penalty, plus a minimum penalty of \$500 per day thereafter; and

- Failure to submit appropriate information regarding emissions and operations during a calendar quarter within thirty (30) days of the end of the calendar quarter, as required by 6 NYCRR §227-3.15, will subject a source to a \$10,000 penalty, plus a minimum penalty of \$500 per day thereafter.

Penalties must remove any economic benefit resulting from noncompliance and include a significant amount beyond recovery of such avoided costs which reflects the seriousness of the violation. Therefore, the economic benefit of violations, such as testing costs, must also be considered.

Budget sources are required to monitor and report ozone season NO_x emissions on an annual basis to ensure that NO_x emissions do not exceed allowances. Sources that exceed annual allowances will be severely penalized by the Department.

IV. RESPONSIBILITY

To ensure consistency across the state, case reports regarding NO_x Budget violations addressed by this guidance will typically be prepared by the Regional Air Pollution Control Engineer and expeditiously forwarded to the Regional Attorney for referral to the Air Enforcement Unit in the Office of General Counsel for administrative prosecution. Copies of all referrals should be provided to the Division of Air Resources, Bureau of Compliance Monitoring and Enforcement.