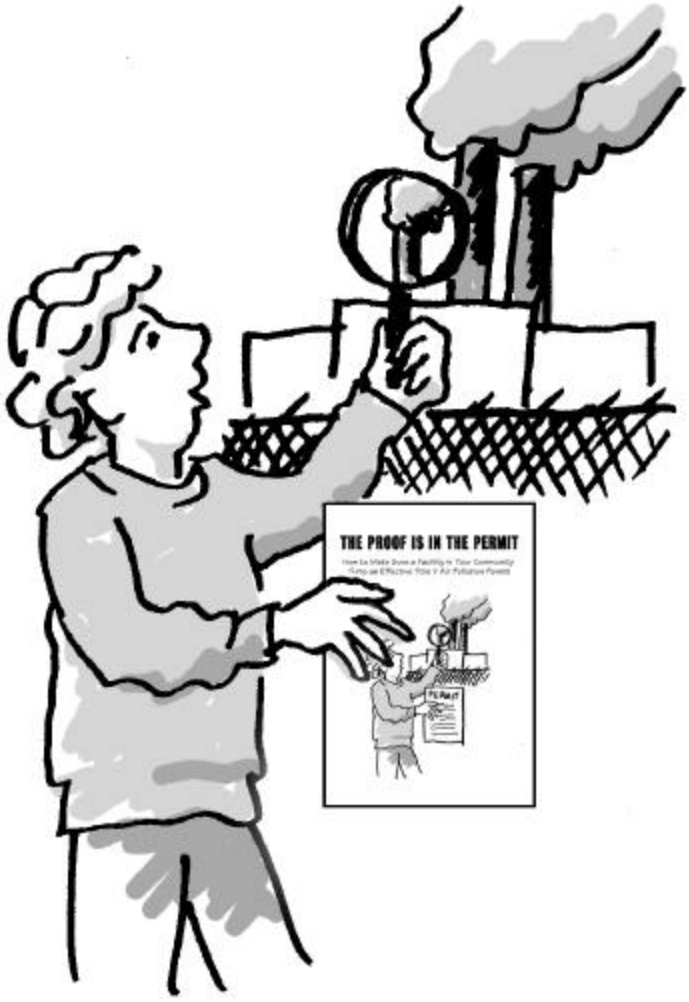
THE PROOF IS IN THE PERMIT

How to Make Sure a Facility in Your Community Gets an Effective Title V Air Pollution Permit



June 19, 2000

The Proof is in the Permit

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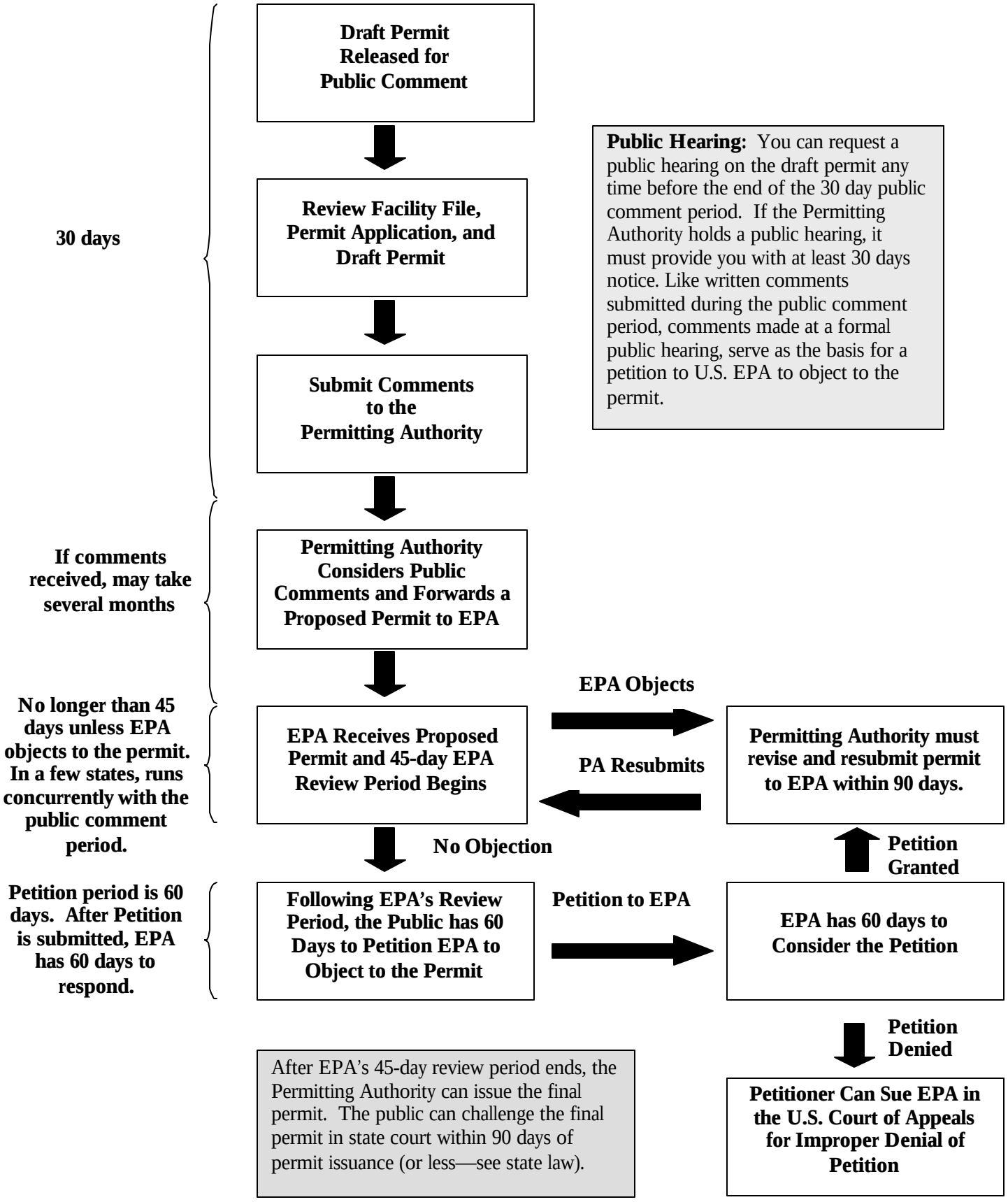
Public Participation in the Title V Permitting Process



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New York Public Interest Research Group (NYPIRG): NYPIRG is New York State's largest environmental and consumer organization. NYPIRG has played a central role in a wide range of environmental issues in New York State for more than two decades. These include air quality, water quality, lead poisoning, toxics, solid waste, hazardous waste, and pesticides. Websites: www.nypirg.org and www.titlev.org.

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Introduction

by Keri Powell, New York Public Interest Research Group (New York, NY)

If you are like most people, you are unsure of how to find out whether an industrial facility that pollutes the air in your community (such as a factory, power plant, or municipal waste incinerator) is complying with the Clean Air Act. Air quality requirements are numerous and complex. What requirements apply to the facility that you are concerned about? How do you find out if the facility is obeying the requirements?

In 1990, the United States Congress passed a law that is designed to help you answer these questions. Created as part of the Clean Air Act Amendments of 1990, this law requires all large sources of air pollution and many smaller sources of hazardous air pollutants to obtain a federally-required permit that applies to the day-to-day operation of the facility. This new operating permit program provides members of the public with a way to protect local air quality by helping make sure that air pollution sources are following the law. The program is commonly referred to as "the Title V program" (with "V" pronounced as "five") because the Clean Air Act Amendments of 1990 are organized into eleven "titles," and the requirements for the program are found in Title V of the amendments.

This handbook will help you ensure that a Title V permit issued to a facility in your community is as protective of human health and the environment as possible.

How does a Title V permit help the public determine which requirements apply to a facility?

A Title V permit includes every "federally-enforceable" air pollution requirement that applies to a particular facility. A federally-enforceable requirement stems from the Clean Air Act and can be enforced by the United States Environmental Protection Agency ("U.S. EPA") and by the public. This includes all federal and many state air quality laws that apply to a facility, since many state requirements merely implement the Clean Air Act. After a Title V permit is issued for a facility, a member of the public who wants to know which air pollution requirements apply to that facility can simply request to see the facility's Title V permit.

How does Title V help the public know whether a facility is obeying applicable requirements?

Title V requires officials at a facility to:

- **Keep track of pollution levels and whether pollution control equipment is being operated and maintained properly.** Title V requires each facility to conduct regular "monitoring activities" such as performing stack tests and inspections, measuring raw materials and fuel consumption, and keeping records of facility operating conditions and equipment maintenance. These monitoring activities must be designed to provide the public with a reasonable assurance that the facility is complying with all legal requirements. Monitoring results must be reported to the Permitting Authority, which is typically the state environmental agency, at least once every six months.

- **Sign on the dotted line.** Every 12 months, an official at each facility must sign a statement certifying whether the facility is in compliance with its permit. This statement is called a "compliance certification." The official may face a stiff fine--or even criminal charges--if he or she signs a false statement.

- **Inform the public.** Compliance certifications and monitoring reports must be sent to the Permitting Authority and then made available to the public.

A well-written permit makes it more likely that a facility that illegally pollutes the air will be caught. Even better, by alerting a facility to its Clean Air Act obligations, a well-written permit makes it less likely that the facility will violate requirements in the first place. The Clean Air Act allows members of the public and government regulators to take permit violators to court.

What are the characteristics of an effective Title V permit?

An effective Title V permit (1) clearly identifies the requirements that apply to the facility, (2) requires the facility to perform monitoring that assures the public that the facility is complying with permit conditions, and (3) provides the public with the ability to enforce permit conditions. If a permit is vague about what counts as a Clean Air Act violation, the public cannot rely upon the permit as an effective enforcement tool.

How can a member of the public participate in permit development?

The Clean Air Act provides extensive opportunities for the public to participate in the development of a Title V permit. Before a Permitting Authority can issue a final Title V permit to a facility, the Permitting Authority must release a draft permit for public review. In addition, the Permitting Authority must provide U.S. EPA with an opportunity to review and, if necessary, object to each proposed permit. Anyone who participates in the public comment period for a particular draft permit has the right to petition U.S. EPA to object to that permit. If U.S. EPA does not object to the permit, a petitioner has the right to take U.S. EPA to court for improperly denying the petition.

To help ensure that a particular facility receives an effective Title V permit, it is critical that you submit comments on the facility's draft permit during the public comment period. This handbook explains what to look for when you review a draft permit and how to shape your concerns into effective comments.

Why is it important to review and comment on a draft Title V permit?

If you have concerns about a facility, the importance of reviewing and commenting on the facility's draft Title V permit during the public comment period cannot be overstated. For a Title V permit to serve as an effective tool for enforcing Clean Air Act requirements, it must include all applicable requirements as well as sufficient pollution monitoring. In addition, a permit must be understandable by the public. If you participate in the public comment period for a draft permit, you can advocate for improvements in the draft permit. On the other hand, if you wait to get involved until after a final permit is issued, the only way to remedy a flaw in the permit is to convince the Permitting Authority to "reopen" the permit. Except in unusual circumstances, the Permitting Authority is unlikely to grant your request to reopen a permit, particularly when you had the opportunity to comment on the perceived flaw during the public comment period. Most likely, if you miss the public comment period you will have to wait until the permit is renewed (usually five years) to advocate for improvements.

> 🕮 **Reopen:** Permitting Authorities reopen permits to add new terms and correct mistakes. When a permit is reopened, the changes in the permit are subject to a 30-day public comment period. See page 12.

Do I need to be a lawyer or an engineer to review a draft Title V permit?

No. You do not need to be a lawyer or an air pollution engineer to review a draft Title V permit. The most important qualification is a desire to protect and improve air quality in your community.

Is it possible to prevent a facility from being built by objecting to issuance of a Title V permit?

Generally, no. In most cases, a facility is already operating by the time it receives a Title V permit. This is because under federal law, a new facility is not required to apply for a Title V permit until after it has been operating for twelve months (state law might allow for less time).[1] This is in contrast to a pre-construction permit, which a facility must obtain before beginning construction.

If an existing facility is covered by the Title V program, the facility must obtain a Title V permit in order to continue operating. Keep in mind that the objective of a Title V permit is not to impose additional emission limits and standards upon a facility. Rather, the objective is to provide the public, the Permitting Authority, and the facility with a way to assure that the facility is complying with existing air quality requirements. Because a Title V permit typically does not place new emission limits on a facility, the vast majority of facilities should have no problem obtaining a Title V permit. (When developing a facility's draft Title V permit, the Permitting Authority may discover that certain air quality requirements that apply to the facility have been overlooked in the past. In that case, these additional requirements will be included in the facility's Title V permit). See page 84 for information about why a facility's application for a Title V permit might be denied.

How is this handbook organized?

Part One of this handbook explains how to review a Title V permit. Part Two covers "special topics" that provide more detail on a few important issues. Finally, reference materials are available in the appendices.

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[1] An exception to this general rule occurs when a state merges its pre-construction permit program with its Title V program. Under a merged program, a facility must apply for a pre-construction/Title V permit prior to construction. Even so, issues that relate exclusively to the Title V portion of a merged permit are unlikely to hold up construction of a facility. This is because when problems arise that relate exclusively to the Title V portion of a merged permit, the Permitting Authority is usually allowed to go ahead and issue the pre-construction portion of the permit separately so that construction may begin.

Where can I locate the federal regulations that lay out the basic requirements of the Title V program?

The federal regulations that provide the basic requirements of the Title V program are found in 40 CFR Part 70, often referred to simply as "Part 70." Though Part 70 was written by U.S. EPA and not Congress, Part 70 requirements have the force of law. Permitting authorities must comply with Part 70. Part 70 is included in Part 3, Appendix A of this handbook and is also available on the Internet at www.epa.gov/oar/oaqps/permits/requirem.html.

How do I obtain government documents that relate to a specific facility or Title V permit?

As you read this handbook, you will learn about a variety of government documents that you may want to obtain as you prepare to review a facility's draft Title V permit. You may be able to obtain these documents by simply requesting them informally (by telephone or in person) from U.S. EPA or the Permitting Authority. If you are unsuccessful in obtaining government documents informally, you should file a formal written request under your state's open records law. Chapter One in Part Two of this handbook offers detailed advice explaining how to submit such a request. If you ask for a document informally and are told that it does not exist, you may want to confirm this by submitting a formal open records request.

Terminology:

The terms "law," "regulation," "statute," and "requirement" are used frequently in this handbook. Unless otherwise stated or made clear from context, the following definitions apply:

Law: the underlying source for any legally enforceable requirement. Can be a statute, regulation, administrative order, or judicial decree.

Statute: a law passed by the United States Congress, a state legislature, or a local government body.

Regulation: legal requirements developed by a state or federal government agency pursuant to powers delegated to the agency by a statute passed by elected representatives. Any valid regulation must have been subject to public notice and comment before final issuance.

Requirement: Any legally-enforceable condition that flows out of any provision of law.

Other terms are defined as necessary as they arise in the handbook.

Part One

How to Review a Title V Permit

by Keri Powell, New York Public Interest Research Group (New York, NY)

Chapter One

Recognizing the Problem

There are many reasons to be concerned about air pollution in your community. Air pollution may aggravate symptoms of asthma and related respiratory diseases. In addition, certain types of air pollutants are linked with cancer and other non-respiratory problems. Finally, air pollution leads to a variety of environmental problems, including global warming, acid rain, degradation of coastal waters, depletion of the ozone layer, damage to sculptures, buildings, and other historical landmarks, and reduced visibility.

Facilities that must get Title V permits emit pollutants that contribute to these air quality problems. Generally, when a facility owner applies for a Title V permit, he or she must indicate how much of each pollutant the facility releases into the air each year.

A. What pollutants are commonly listed in a Title V permit?

Sulfur dioxide (SO_2). SO_2 reacts with oxides of nitrogen (NO_x) and other substances in the air to form acid rain. Acid rain damages forests, makes lakes and streams unsuitable for most types of fish, and damages buildings, monuments, and cars. Also, high concentrations of SO_2 can cause breathing problems for people with asthma. Symptoms include wheezing, chest tightness, and shortness of breath. SO_2 emissions are transformed in the atmosphere into acidic particles. Long-term exposures to high concentrations of SO_2, in combination with high levels of particulate matter (discussed below), may lead to respiratory illness, weakening of the lungs' defenses, and aggravation of existing cardiovascular disease. People with cardiovascular disease or chronic lung disease, as well as children and the elderly, are most likely to suffer from health problems linked to elevated SO_2 levels.

Particulate Matter (PM)[2]. PM essentially consists of small particles of soot, wood smoke, and other compounds in solid or liquid droplet form. PM can cause respiratory problems, as well as damage to lung tissue and premature

[2] Sometimes you will see this pollutant listed as PM10 or PM2.5. The number refers to the size of particulate matter. PM10 refers to particulates that are 10 microns in diameter or smaller. PM2.5 refers to particulates that are 2.5 microns in diameter or smaller. The smaller the particulate, the more dangerous it is to human health. Until recently, U.S. EPA regulations applied to all particulates 10 microns in diameter or smaller as one group. Studies now show that the most serious health threat comes from particulates smaller than 2.5 microns in diameter.

death. PM can cause or worsen respiratory diseases and aggravate heart disease. PM reduces visibility, an issue that is of particular concern at national parks and other scenic areas.

Carbon Monoxide (CO). The main source of CO is automobile emissions, but CO is also released by woodstoves and by industrial sources such as boilers and waste incinerators. The health effects related to CO include visual impairment, reduced work capacity, reduced coordination, poor learning ability, and difficulty in performing complex tasks.

Volatile Organic Compounds (VOCs). VOCs combine with oxides of nitrogen (NO_x) in the presence of heat and sunlight to form ground-level ozone. Ground-level ozone damages lung tissue and can make it difficult to breathe. Children and people with asthma and other lung diseases are most susceptible to health problems caused by ground level ozone. When ozone levels are high, however, even healthy adults may suffer. In addition, some VOCs are hazardous in small quantities in the absence of any chemical reaction.

Nitrogen Oxides (NO_x). NO_x is linked to almost every air pollution problem. NO_x emissions result in the formation of ground-level ozone, acid rain, coastal water pollution, and reduced visibility. Because NO_x can travel very long distances after being released into the atmosphere, NO_x released in one state can cause environmental damage in another state.

Hazardous Air Pollutants (HAPs). The Clean Air Act regulates 188 hazardous air pollutants. Hazardous air pollutants are toxic in small quantities. Health problems related to hazardous air pollutants include cancer, respiratory irritation, nervous system problems, and birth defects. To find out about health issues related to a particular HAP, go to www.epa.gov/ttn/uatw/hapindex.html or contact U.S. EPA's Air Risk Information Support Center at (919) 541-0888.

With the exception of individual hazardous air pollutants, which are dangerous in very small quantities, each of the pollutants listed above are widely distributed across the country. The Clean Air Act refers to these pollutants as "criteria pollutants." EPA sets an air quality standard for each of these pollutants at a level that it considers safe for human health. A geographic area that meets or does better than the air quality standard is called an "attainment area." An area that does not meet the standard is called a "nonattainment area." You

> 🕮 **Criteria pollutants:** certain air pollutants that are widely distributed across the country. Their are six criteria pollutants (CO, PM, SO_2, NO_x, O_3, and lead).

can contact your Permitting Authority or U.S. EPA regional office for information about the attainment status of your area. See Appendix B for contact information. You can also obtain information on the Internet about the attainment status of your area by going to www.epa.gov/docs/epacfr40/find-aid.info/, clicking on "State Regulation References (1996, 1999)" and then selecting your area from the map.

> 🕮 **Nonattainment area:** a geographic area in which the level of a criteria air pollutant is higher than allowed under federal standards.

B. Is there an air pollution problem in my community?

Many people are not concerned about air quality in their community unless they can actually see the polluted air. Unfortunately, *clear* air is not necessarily *clean* air. In fact, many invisible air pollutants pose serious health risks.

More than half of all Americans live in places where the air is sometimes unhealthy to breathe. Surprisingly, air quality in places where people go to escape the dirt and grime of city life is sometimes worse than air quality in major U.S. cities. For example, a recent survey indicates that air quality at Great Smoky Mountains National Park is often worse than air quality in major U.S. cities.[3]

Several resources available on the Internet can help you assess air quality in your region. If you have access to the Internet, you can try the following websites:

- http://www.scorecard.org/ : This site, maintained by Environmental Defense, Inc. provides information about hazardous air pollutants according to zip code. It also provides information about criteria pollutants in each state. Be sure to check both hazardous air pollutants and criteria pollutants.

- http://www.epa.gov/airnow/: This site offers real-time ground-level ozone information for many parts of the country and health information about other air pollutants.

- http://www.epa.gov/cumulativeexposure/index.htm: Once you reach this site, click on "air" to reach U.S. EPA's assessment of estimated 1990 outdoor

[3] Jayne E. Mardock, et. al, "No Escape: A Midseason Look at Ozone in 1999," Clean Air Network, Clean Air Task Force, August 1999, p. 3.

concentrations of hazardous air pollutants across the continental United States.

Box 1.1: Criteria Pollutants and Hazardous Air Pollutants are Regulated Differently

As you review a Title V permit, it will be helpful for you to understand the difference between the way the Clean Air Act regulates criteria pollutants and the way it regulates hazardous air pollutants.

Criteria Pollutants: For each criteria pollutant, U.S. EPA and state governors identify non-attainment areas. For some pollutants (CO, PM, O_3), U.S. EPA then classifies the nonattainment areas. (For example, for ozone U.S. EPA uses the following classifications: "marginal," "moderate," "serious," "severe," or "extreme.") U.S. EPA also establishes deadlines by which these areas must be brought into compliance with federal air quality standards. Each state must submit a "state implementation plan" ("SIP") to U.S. EPA that demonstrates how the state will achieve or maintain air quality that satisfies federal standards. SIPs are primarily made up of state regulations. Once approved by U.S. EPA, a SIP requirement is federally enforceable (i.e., can be enforced by U.S. EPA and the public). Any SIP requirement that applies to a Title V facility must be included in the facility's permit. More information about SIPs is provided on page 38. Facilities that release large amounts of a criteria pollutant may be subject to "New Source Performance Standards" ("NSPS"). See page 42 for more information.

Hazardous Air Pollutants: The primary way that EPA regulates hazardous air pollutants is through implementation of federal "Maximum Available Control Technology" ("MACT") standards. Congress identified 189 hazardous air pollutants in the 1990 Clean Air Act. (One hazardous air pollutant has since been removed from the list.) U.S. EPA must identify categories of facilities that release these pollutants and establish MACT standards for each category. State and local environmental agencies may seek delegation from U.S. EPA of the authority to implement and administer MACT standards. For a state or locality to receive delegation, it must demonstrate that the state or local MACT requirements are just as stringent as the federal MACT requirements. Any MACT requirement that applies to a Title V facility must be included in the facility's Title V permit. Refer to Part Two, page 125 for more information.

Chapter Two

Preparing to Review a Permit

This chapter provides all the information that you need to get started reviewing a Title V permit. In particular, this chapter explains how to identify the Permitting Authority (see below), select a draft permit to review (p. 6), identify important deadlines (p. 13), and obtain all of the information that you need to review the draft permit (p. 24).

Step One in Preparing to Review a Permit: Identify the Permitting Authority

In this handbook, any agency that is authorized to issue Title V permits is referred to as "the Permitting Authority." The Permitting Authority is usually responsible for air quality in its jurisdiction, not just permits. A state agency may administer an operating permit program for the entire state or a local agency may run its own program upon agreement with the state.

A. How does a state or local government agency obtain U.S. EPA approval to run a permit program?

Under the Clean Air Act, each state was required to submit a proposed state Title V permitting program to the U.S. EPA for approval by November 15, 1993. The minimum elements of a state Title V program submittal are set out in the United States Code of Federal Regulations (CFR) as 40 CFR Part 70. See Appendix A for a full copy of Part 70. When U.S. EPA approves a Part 70 program, it is approving the relevant state or local laws and regulations, as well as the Permitting Authority's plan for administering the Title V program in the state or locality.

B. Have many state and local agencies submitted proposed permit programs to U.S. EPA for approval?

Yes. All states and many local agencies submitted a permit program to U.S. EPA for approval. Most state and local programs submitted to U.S. EPA for approval did not entirely satisfy the minimum federal requirements for a Title V program. As a result, U.S. EPA granted "interim approval" to most state Title V programs. Interim approval means that the state or local agency can go ahead and issue Title V permits, but the agency must correct certain flaws in its program prior to receiving full U.S. EPA approval. For any state

program that is currently operating under interim approval, interim approval extends until December 2001.

C. Do Indian Tribes run their own Title V permit programs?

Although Indian Tribes can run Title V programs, no Tribal program has been submitted to U.S. EPA. Until Tribal programs are approved, U.S. EPA is running the Title V program in Indian country. Title V permits for facilities located in Indian country are issued by U.S. EPA's Regional offices. The regulations for EPA-issued permits are found at 40 CFR Part 71 and on the Internet at www.epa.gov/oar/oaqps/permits.

D. How can I find out who issues Title V permits in my community?

Check Appendix A to find out who issues Title V permits in your community. Appendix B provides you with the website address for the state agency and who to contact for more information.

If a state or local agency is approved to issue Title V permits in your state, the program is operated under state and/or local laws and regulations. These laws and regulations must comply with 40 CFR Part 70. You need to obtain a copy of the state permit regulations for the Title V program.

Step Two in Preparing to Review a Permit: Select a Facility

The second step in getting involved in Title V is to identify a facility that you would like to focus upon. Keep in mind that not every facility is required to apply for a Title V permit. Most Title V applications will be from large industrial facilities like factories or power plants. If your region is failing to meet EPA's air quality standards, however, smaller facilities might be required to apply.

A. How do I find out which facilities in my community are covered by Title V?

To identify facilities in your community that are covered by the Title V program, you can get a list of Title V sources from the Permitting Authority. Some permitting authorities maintain a list of Title V facilities on the Internet. Appendix B provides relevant website addresses. If the information you need is

not on a website, or if you lack access to the Internet, then you can request this information from your state agency. A single phone call should work, but you may need to talk to a permit writer or someone at the agency who is familiar with the Title V program.

B. How does the Permitting Authority decide which facilities need to apply for a Title V permit?

The Clean Air Act lists the kinds of facilities that must get Title V permits. The criteria are complicated but are based on (1) the type of facility, (2) the facility's capacity to produce pollution, (3) the kind of pollutants produced at the facility, and (4) the severity of the air quality problems in the area where the facility is located. If the facility that you are interested in is already on the list of Title V sources maintained by the Permitting Authority, it is not necessary for you to grapple with the criteria for determining whether or not a facility is covered by the Title V program. If you would like more information about the criteria, refer to Appendix D of this handbook.

C. How do I decide which facility to focus on?

There is no formula for selecting a facility to focus on. You might want to consider one of the following approaches:

1. Start with a facility located near your community.

The list of Title V facilities you obtain from the Permitting Authority will probably include the address of each Title V applicant. Alternatively, you could make a list of who you think the biggest polluters are in your community, and then check to see if they are included on the Title V list.

2. Select a facility that causes a particularly large amount of pollution or that releases a pollutant that is of particular concern.

To determine which facilities cause the largest amount of pollution, try looking at the state emissions inventory. The emissions inventory lists every major air pollution source in the state, and breaks down emissions according to the type of pollutant emitted. Each state is required to put together an emissions inventory under Clean Air Act § 110(a)(2). You might be able to

download your state's emission inventory from the Internet. If not, you can contact the Permitting Authority for this information.

You also may want to examine facilities that release pollutants that are dangerous at low levels—usually classified as "Hazardous Air Pollutants" ("HAPs"). Hazardous air pollutants are usually suspected of causing cancer, and they are also associated with a number of other types of health effects. Facilities that release large amounts of HAPs must produce yearly reports called "Toxic Release Inventory" (TRI) reports. The results of these reports are available on the Internet at www.epa.gov/enviro/html/toxic_releases.html**.** Many facilities listed in the TRI database do not emit a large enough quantity of pollution to be eligible for Title V, however, so don't be surprised if many of the facilities that submit TRI data are not required to apply for a Title V permit. Also, some facilities emit hazardous air pollutants that are not reported to the TRI database.

Finally, U.S. EPA maintains a database of source-specific information called the "AIRS" database. AIRS, which stands for "Aerometric Information Retrieval Service," is maintained by U.S. EPA but relies upon data provided by state and local pollution control agencies. Some AIRS information is available on the Internet at www.epa.gov/airs/airs2.html. Sometimes this website will have useful information about air pollution from facilities located in your area. Unfortunately, some states agencies do not update this database regularly. Because of the unreliability of this database, you should not rely upon information available on the AIRS website as your sole source of information on pollution emissions.

3. Select a facility that has a history of violating air quality requirements.

The best way to find out which facilities have violated air quality requirements in the past is to request records from the Permitting Authority. Technically, state agencies are required to enter enforcement information into the AIRS database for facilities that release large amounts of pollution. You can ask the U.S. EPA Regional Office or your state air pollution control agency whether the AIRS database is a reliable source of information for facilities located in your state. If AIRS is reliable for your state, then you might be able to obtain useful information from U.S. EPA's AIRS*Data* website, described above. If you have difficulty accessing the Internet, or if the AIRS*Data* website is not helpful, you should consider requesting the actual AIRS enforcement

reports. In particular, you can ask to see the "FORM 620" reports from the AIRS database for all facilities in your state or community.

If AIRS is not a reliable source in your state, then ask your state agency what they recommend. If all else fails, you can examine individual facility files for inspection reports, community complaints, and notices of violation. You can also ask to see a list of all facilities that are operating under judicial consent decrees or administrative orders in your area.

4. Select a facility that has been the subject of community complaints.

There are several ways to go about obtaining information about community complaints. You might search back issues of your local paper for articles about air pollution problems. Or, you could contact environmental groups in your area and ask if they can help you identify potentially troublesome facilities. Finally, you could make a request to the Permitting Authority asking for a copy of any written public complaints submitted to the agency.

D. What do I do if the facility I am interested in does not appear on the Permitting Authority's list of Title V facilities?

If a facility that you are concerned about is not listed as a Title V facility, you can contact your Permitting Authority and ask about the facility. The facility might be too small to have to get a Title V permit. Also, the owner of a facility might avoid having to get a Title V permit by agreeing to get an enforceable "cap" that limits the amount of pollution the facility can emit. A "cap" might include a limitation upon the number of hours the facility is allowed to operate each day. A facility that agrees to a "cap" in order to avoid getting a Title V permit is called a "synthetic minor" source. The facility will receive a permit, but this permit is not a Title V permit. Sometimes these permits are called "Federally Enforceable State Operating Permits" ("FESOPs"). You can ask the Permitting Authority for a list of synthetic minor facilities. See Part Two, Chapter Four of this handbook for a more detailed discussion of this topic.

If the facility you are interested in is not listed as a Title V source, or as a synthetic minor facility, there is a chance that the facility failed to file a Title V permit application and is in violation of the law. It is very difficult for the public to figure out whether a facility that is not listed as a Title V source by the

Permitting Authority is covered by the Title V program. If you have access to a technical expert, you may be able to calculate whether the facility's potential emissions would be large enough to require a Title V permit. Before doing so, however, determine whether the Permitting Authority ever sent the facility a written notification that it is required to apply for a Title V permit. To do this, simply request that the Permitting Authority provide you with any notice ever sent to the facility regarding the Title V program. If the facility received such a request and never responded, there is a strong chance that the facility is operating without a permit in violation of the Clean Air Act.

E. What do I do if a final permit has already been issued to the facility that I am interested in?

1. Request a copy of the final permit and any monitoring reports.

If you discover that a final permit has already been issued to the facility that you are most interested in, the first thing to do is request a copy of the permit. If the permit was issued more than six months ago, the facility was already required to submit reports of any required monitoring to the Permitting Authority. If you are not satisfied with the monitoring reports or if none have been submitted, you can also request access to any monitoring records that the facility is required to maintain under conditions of its permit. Once you file a request, the Permitting Authority must obtain the records from the facility.

2. Examine the monitoring reports to determine whether the facility is complying with its permit.

By examining the records maintained by the facility you should be able to determine whether the facility is violating its permit. Under the Clean Air Act, a member of the public can bring a lawsuit in federal court against a facility that is violating its permit.

3. Be alert for when the Permitting Authority renews, reopens, or makes significant changes to the permit.

When a permitting authority renews, reopens or make a significant change to a permit that has already been issued, you will have the opportunity to receive notice, review a draft, make comments, and request a public hearing, just as you do when a permit is first issued. If you live in a state that has nearly all of its permits issued, then you should already be thinking about how to get

involved with permit revisions, reopenings and renewals. Or, if you are interested in just one facility and it has already gotten its Title V permit, you'll need to understand your rights to participate in these proceedings. You can ask the Permitting Authority to put your name on a mailing list of persons who want to receive notice of permit revisions, reopenings and renewals for one or more facilities. Be aware that you may be the first person to ask your permitting authority to create this type of mailing list.

a. What kinds of permit revisions will I have a chance to comment on?

When a facility makes a change in its operations, it will generally need to apply for a revision to its title V permit. You will have a chance to review the most environmentally significant permit changes at a facility. These changes are called significant modifications. Your state's permitting regulations will define the type of revisions that fall into this category. The Permitting Authority must provide public notice of the draft permit revision. You will have a chance to look at the application for the revision and the draft permit plus a chance to comment and request a public hearing. When a facility makes changes that are less environmentally significant, you will not get prior notice of the permit revision or a chance to comment. These less significant changes at a facility are usually called minor modifications or administrative revisions.

When you comment on a draft permit revision, the Permitting Authority will consider your comments on the parts of the permit that are changing, not the parts that remain the same.

U.S. EPA is considering changes to 40 CFR Part 70 that would affect the public's ability to comment on certain types of permit revisions. You will have a chance to comment on these proposed changes to 40 CFR Part 70. The proposed regulation will be published in the Federal Register. If the requirements in Part 70 change, then States will be required to change their program requirements.

b. When do permitting authorities provide notice of permit renewals?

Title V permits must expire after 5 years. A few permits expire after a shorter term. Facilities must submit applications for renewal at least 6 months before their permits expire. Once the Permitting Authority has considered the renewal application, it will notify the public that the draft permit is available for public review and comment. Renewal is your chance to let the Permitting Authority know if the permit has not been doing a good job. If you think the

periodic monitoring has been inadequate, that some of the terms are too vague to be enforceable, etc. this is your opportunity to request changes. (You will learn about what to look for in a draft permit later in this handbook).

c. When and why do permits get reopened?

Permits get reopened when:

- Additional requirements become applicable to the facility and there are 3 years or more left before the permit expires;

- Additional requirements become applicable to the facility and the facility is an affected source under the acid rain program (this applies primarily to large power plants);

- The Permitting Authority or U.S. EPA finds that there is a material mistake in the permit or that part of the permit is based on inaccurate statements in the permit application; and

- The Permitting Authority or U.S. EPA finds that the permit needs to be changed so that it will assure that the facility is complying with all of the requirements that apply to it.

The most common situation for reopening a permit is when EPA issues a new standard, such as a MACT standard (Part Two, Chapter Five of this handbook), and the facility that is subject to the standard has been issued a permit within the last 2 years. In this case, the permit will be reopened so that the MACT standard can be added to the permit. If there is less than 3 years left before the permit must be renewed, then the MACT standard will get added at renewal. Of course, even before renewal, the facility will have to comply with the MACT standard because once a standard goes into effect, facilities that are subject to the standard must comply with it regardless of whether the standard has been incorporated into the permit.

Before a permit is reopened, the Permitting Authority must notify the facility that it intends to reopen the permit. When you comment on a draft of a reopened permit, the Permitting Authority will consider your comments on the parts of the permit that are being reopened, not the parts that remain the same.

d. How can I request that a permit be reopened?

If you believe that there are grounds for reopening a permit, you can bring this to the attention of the Permitting Authority in writing. If you don't get the results you want, you can notify U.S. EPA in writing. If U.S. EPA agrees with you, then the Permitting Authority will have to reopen the permit. If you notice a serious problem with a permit but you missed the public comment period, then consider whether the problem meets one of the four tests discussed on page 12 for when a permit should be reopened. For example, if the permit does not include enough monitoring (p. 32) or a permit term is not practicably enforceable (p. 30), you can make the argument that the permit must be reopened because it does not "assure compliance with the applicable requirements" (which is the fourth test listed above on the bulleted list). Here's another example: If you find that the permit is flawed because the facility did not include a term from its pre-construction permit in its application, you can argue that the permit should be reopened, based on the second test discussed above.

Step Three in Preparing to Review a Permit: Identify Important Deadlines

To participate effectively in the Title V program, you should understand what happens at each stage of the permitting process. Deadlines are extremely important in the process. ***If you miss the deadline for submitting comments on a draft, you will lose your right to challenge the final permit.*** This section begins with a brief overview of the various stages in the permitting process. The overview is followed by a detailed explanation of each stage.

A. What are the essential elements of the permitting process?

First, the facility owner is required to submit a permit application. Based upon information provided in the permit application, the Permitting Authority develops a "draft" permit. The draft permit is then released to the public for a 30-day "public comment period." Any public comments must be submitted to the Permitting Authority by the end of the 30-day period. This handbook is intended to help you develop effective comments during the 30-day public comment period.

During the public comment period, you can request a public hearing in addition to submitting written comments. Written comments must be considered by the Permitting Authority whether or not a public hearing is held. After weighing any public comments, the Permitting Authority will decide whether to make changes in the draft permit. Before a final permit is issued, the Permitting Authority must submit the draft permit to U.S. EPA for a 45-day review period. Note that in some states U.S. EPA's 45-day review period runs at the same time as the 30-day public comment period. You need to find out whether your state's regulations allow these review periods to overlap.

When the draft permit is submitted to U.S. EPA, it becomes a "proposed" permit. A proposed permit becomes final if U.S. EPA does not object to it. If U.S. EPA does nothing, the proposed permit will become final exactly as it was written by the Permitting Authority. If U.S. EPA rejects a proposed permit, the Permitting Authority must either (1) deny the permit, or (2) revise and resubmit the permit to U.S. EPA within 90 days of U.S. EPA's rejection notice. If the Permitting Authority misses the 90-day deadline, the Permitting Authority loses control over the permit. U.S. EPA is then required to either deny or rewrite the permit.

If U.S. EPA fails to reject a proposed permit, any member of the public *who submitted comments during the public comment period* may petition the U.S. EPA Administrator to reject the permit. Such a petition must be submitted within 60 days after U.S. EPA's 45-day review period ends. After receiving a petition, U.S. EPA has 60 days to respond.

If U.S. EPA denies a petition, the petitioner may bring a lawsuit against U.S. EPA challenging the denial in the federal Court of Appeals where the facility is located. Moreover, anyone who participated in the public comment period can challenge a final permit by bringing suit against the Permitting Authority in state court.[4]

B. When were Title V permit applications due for existing facilities?

Title V permit applications were due for existing facilities one year after the effective date of the Title V program approved for your area. The permit application deadline has passed for all but a handful of facilities. Turn to Appendix A to determine the effective date of your state or local Title V program. After the application deadline expires, any Title V facility operating

[4] If the permit is issued by an Indian Tribe, there may be an alternative way to challenge the permit.

without a permit application on file with the Permitting Authority is violating the Clean Air Act.

C. When is a new facility required to apply for a Title V permit?

Any new facility must apply for a Title V permit within 12 months after beginning to operate. Note that a new facility must comply with Clean Air Act requirements during the first 12 months of operation. Also, anyone who proposes to build a new facility is required to obtain a "preconstruction permit" before beginning construction.

D. What happens if a facility misses the permit application deadline or fails to submit a complete application before the deadline?

If a Title V permit applicant submits a complete application by the applicable deadline (established under state permit program regulations), the applicant receives a "permit application shield." This means that while the Permitting Authority is processing the permit application the facility may continue to operate. The permit application shield provides an exception to the general Clean Air Act rule that no facility that is covered by the Title V program may operate without a permit. If a facility owner fails to file a complete application by the application deadline, the facility is not protected by the permit application shield and is operating in violation of the Clean Air Act. But here's the catch: unless the Permitting Authority determines that an application is incomplete within 60 days after it is submitted by the applicant, the permit application is automatically deemed complete and the facility is protected by the permit application shield. If the Permitting Authority determines that an application is incomplete, it notifies the facility in writing and requests additional information.

Many facilities across the country failed to submit complete permit applications by the applicable deadline. Even though the vast majority of these facilities did submit applications, they are not protected by the permit application shield. In fact, once a facility misses the application deadline, it can never be protected by the permit application shield. As a practical matter, it probably does not matter that a facility is not protected by the permit application shield so long as it has now submitted a permit application. Permitting authorities are more likely to bring enforcement actions against facilities that entirely failed to file an application. Also, while the Clean Air Act authorizes "any person" to bring a lawsuit against a facility that misses the

application deadline, such a lawsuit would probably be unsuccessful against a facility that was simply late filing its application.

E. If a facility's permit application is deemed "complete," can the Permitting Authority still request additional information?

Yes. Even after an application is deemed complete, the Permitting Authority may request additional information if it is needed to process the application. The Permitting Authority must request such information in writing and set a reasonable deadline for the applicant to respond. If the applicant misses the deadline, the facility is no longer protected by the permit application shield.

F. How much time does the Permitting Authority have to consider a permit application?

Once the Title V program is in full swing (after the first 3 years of operation in your area), permitting authorities will be required to take final action on each permit application within 18 months after its submittal. (Final action refers to the Permitting Authority's decision to issue or deny a permit). The Clean Air Act makes an exception for the first three years of the program. To obtain U.S. EPA approval to administer a state or local permitting program, each Permitting Authority was required to submit a transition plan for processing permit applications submitted by existing facilities. Under the transition plan, most permitting authorities were required to take final action on all permit applications for existing facilities within three years after the effective date of the approved permitting program. Nearly every Permitting Authority has already missed the three year deadline.

G. How do I know when the public comment period begins for a permit that I am interested in?

Once the Permitting Authority develops a draft permit, the permit must be released for public comment. The Permitting Authority must give the public at least 30 days to submit comments on a draft permit.

The public comment period begins when the Permitting Authority publishes a public notice announcing that the draft permit is available for public review. According to federal regulation, the notice must be published in "a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice." 40 CFR § 70.7(h)(1).

Some permitting authorities publish a newspaper notice (usually in the legal notice section) *and* a notice in a state publication. The notice must include:

- name of the facility;
- name and address of the Permittee;
- name and address of the Permitting Authority;
- activities covered by the draft permit;
- any emissions change involved in the permit action;
- who to contact for more information;
- how to get a copy of the draft permit and supporting materials;
- how to submit comments;
- time/place of any hearing already scheduled, and
- how to request a hearing if a hearing isn't already scheduled.

See 40 CFR § 70.7(h)(2). A sample public notice is on the next page.

PUBLIC NOTICE
STATE OF WYOMING
Department of Environmental Quality / Division of Air Quality
Air Pollution Source
Proposed Operating Permit

Section 30(d)(ix) of the Wyoming Air Quality Standards and Regulations provides that, prior to final determination on an application for a Section 30 operating permit, opportunity be given for public comment and public hearing on the information submitted by the owner or operator and on the proposed draft permit. The regulation further requires that such information be made available to the public and that the public be allowed a period of thirty (30) days in which to submit comments. A public hearing will be conducted only if, in the opinion of the Administrator, sufficient interest is generated or if an aggrieved party requests a hearing within the 30 day public comment period.

Notice is hereby given that the State of Wyoming, Department of Environmental Quality, Division of Air Quality, proposes to issue an initial Section 30 operating permit to the following applicant for the Echo Springs Gas Plant in Carbon County, Wyoming:

Williams Field Services Company
P.O. Box 58900
Salt Lake City, Utah 84158

The Echo Springs Gas Plant is located in the South ½ of Section 1, Township 19 North, Range 93 West, Carbon County, Wyoming (approximately eight miles southeast of Wamsutter, Wyoming). The facility is involved in the extraction of natural gas liquids from gas received by pipeline and recompression of the residue gas for further transportation by pipeline. The pollutants of primary concern from this facility are nitrogen oxides (NOx), carbon monoxide (CO) and volatile organic compounds (VOCs). A copy of the permit draft, the application, all relevant supporting materials, and all other materials available to the Division that are relevant to the permit decision may be obtained by contacting Michael Stoll, Operating Permit Program Manager, Division of Air Quality, Department of Environmental Quality, 122 West 25th Street, Cheyenne, Wyoming 82002 at (307) 777-3784. Interested parties may examine these materials in the Division's Cheyenne office. Arrangements can be made with the Division to copy relevant materials, if necessary (a fee will be assessed for reproduction). In accordance with the Americans with Disabilities Act, special assistance or alternate formats will be made available upon request for individuals with disabilities.

Public comments must be received no later than March 2, 1998. Comments or requests for a hearing should be directed to Dan Olson, Administrator, Division of Air Quality, Department of Environmental Quality, 122 West 25th Street, Cheyenne, Wyoming, 82002. All comments received by the close of business on March 2, 1998 will be considered in arriving at a final determination on the issuance of this permit and will be retained on file in the Cheyenne office.

Each Permitting Authority creates its own format for public notices. Regardless of the format, all information listed on page 17 must be included in the notice. If the public notice for a draft permit that you are reviewing does not include all required information, make a note of the missing information.

You can identify and comment on problems with the public notice in any comments you submit during the public comment period on the draft permit.

In addition to publishing a notice as described above, federal regulations require the Permitting Authority to mail the public notice to any person who requests to be on a mailing list. If you already know which draft permits you wish to review, then you can request to be on a mailing list for notification when those draft permits are released for public comment. If you have not yet decided which draft permits you wish to review, or if you plan to review a large number of draft permits, then you can find out where your Permitting Authority publishes public notices. If the Permitting Authority publishes a weekly bulletin that notifies the public of permit actions, you should find out how to get a copy of the bulletin. You can also request to be placed on the mailing list for every Title V facility in your area.

Make sure that you know exactly when the deadline is for submitting public comments. Except in rare circumstances, if you miss the deadline for submitting comments you lose your right to petition U.S. EPA to veto the permit. In addition, you lose your right to challenge issuance of the permit in state and federal court. Because of the importance of the deadline, you should get proof when you submit your comments that they are submitted on time. If you hand deliver your comments, ask the person who accepts the comments to sign and date a statement that says that they received the comments prior to the end of the public comment period. If you send the comments by overnight mail, save the dated receipt. If you send your comments by regular mail, there is no guarantee that the Permitting Authority will receive them before the end of the comment period, and you will not have a record to rely upon.

Except in rare circumstances, if you miss the deadline for submitting comments you lose your right to petition U.S. EPA to object to the permit. You also lose your right to challenge a bad permit in state or federal court.

H. Will the Permitting Authority respond to my comments?

While federal regulations do not require the Permitting Authority to provide a written response to your comments, many state laws do require such a response. Even if the Permitting Authority does not modify the draft permit in response to your comments, your comments will form the basis for your petition to U.S. EPA requesting that the agency veto the permit.

If the Permitting Authority makes substantial changes to the draft permit after the public comment period and does not release the revised permit for a

new public comment period, you can argue that the public must be given a new opportunity to review the draft permit before the permit is submitted to U.S. EPA for review. Be aware that Part 70 does not explicitly require that the public or commenters be given a copy of or even notice of the proposed permit that is sent to U.S. EPA for review. You may be tipped off to substantial changes to the draft permit if the Permitting Authority provides you with a written response to your comments. Otherwise, you may want to ask U.S. EPA or the Permitting Authority for a copy of the proposed permit that was submitted to U.S. EPA for review.

I. If I want a public hearing on a draft permit, when and how do I request one?

If you want a public hearing, you must request it during the applicable public comment period. The procedure for requesting a public hearing varies according to state law. The Permitting Authority must provide information about how to request a public hearing in the public notice announcing the availability of the draft permit for public review.

40 CFR Part 70 says that the Permitting Authority must provide an "opportunity for public comment and a hearing on draft permits." Some states interpret this phrase as requiring the Permitting Authority to hold a public hearing whenever one is properly requested during a public comment period. Other states interpret this phrase more narrowly.

If you want a public hearing, your best strategy is to determine the relevant standard under state law. If state law requires you to satisfy a particular standard, make sure your request includes whatever facts, concerns, and arguments you have that show how you have met the standard. Be sure to assert that the Permitting Authority is required to hold a hearing because your comments satisfy the state law standard for when a public hearing is required. If the Permitting Authority denies your request for a public hearing, consider raising this issue with U.S. EPA. Under 40 CFR § 70.8(c)(3), the U.S. EPA Administrator has the authority to reject a proposed Title V permit if the Permitting Authority does not provide adequate procedures for public participation.

The deadline for requesting a hearing is usually the same as the deadline for submitting written comments. This information should be included in the public notice. If it is not, you can call the contact person listed in the public

notice and ask. The Permitting Authority must give notice of any public hearing at least 30 days in advance of the hearing.

J. When does U.S. EPA's review period begin and what does it involve?

When the Permitting Authority is satisfied with a draft permit, it must submit the draft permit to the regional U.S. EPA office for a 45-day review period. At the time the draft permit is submitted to U.S. EPA, it becomes a "proposed permit." Note that in some states U.S. EPA agreed to allow its 45-day review period to run at the same time as the 30-day public comment period. You need to find out whether your state's regulations allow these review periods to overlap.

During the 45-day review period, U.S. EPA must object to a proposed permit if the agency determines that the proposed permit does not comply with federal laws or regulations. In addition, U.S. EPA can choose to object to a proposed permit if the Permitting Authority does not provide U.S. EPA with sufficient supporting information to allow for meaningful U.S. EPA review or if the permitting authority fails to follow the right procedures for public participation. If U.S. EPA does not object to a permit, the Permitting Authority may issue it as a final permit.

While every permit must be submitted to U.S. EPA for the 45-day review period, U.S. EPA is not required to review every proposed permit. In fact, even if the U.S. EPA decides not to review a proposed permit, the Permitting Authority can issue it as a final permit at the end of the 45-day U.S. EPA review period. Each regional U.S. EPA office has its own policy on selecting permits to review, but U.S. EPA suggested a target of reviewing at least ten percent of all permits proposed for facilities in each of U.S. EPA's ten regions. U.S. EPA is most likely to review proposed permits for very large or controversial facilities. If you are interested, you can ask for a copy of the permit review policy from the U.S. EPA Regional Office in your area.

K. What happens if U.S. EPA objects to a permit?

If U.S. EPA chooses to object to a permit, it must give the Permitting Authority a written explanation for the objection, and give the Permitting Authority 90 days to submit a revised version of the proposed permit to U.S. EPA. If the Permitting Authority misses the 90-day deadline, U.S. EPA will either deny the permit, or develop a new permit for the facility independent of the state or local Permitting Authority.

L. When does a permit become final?

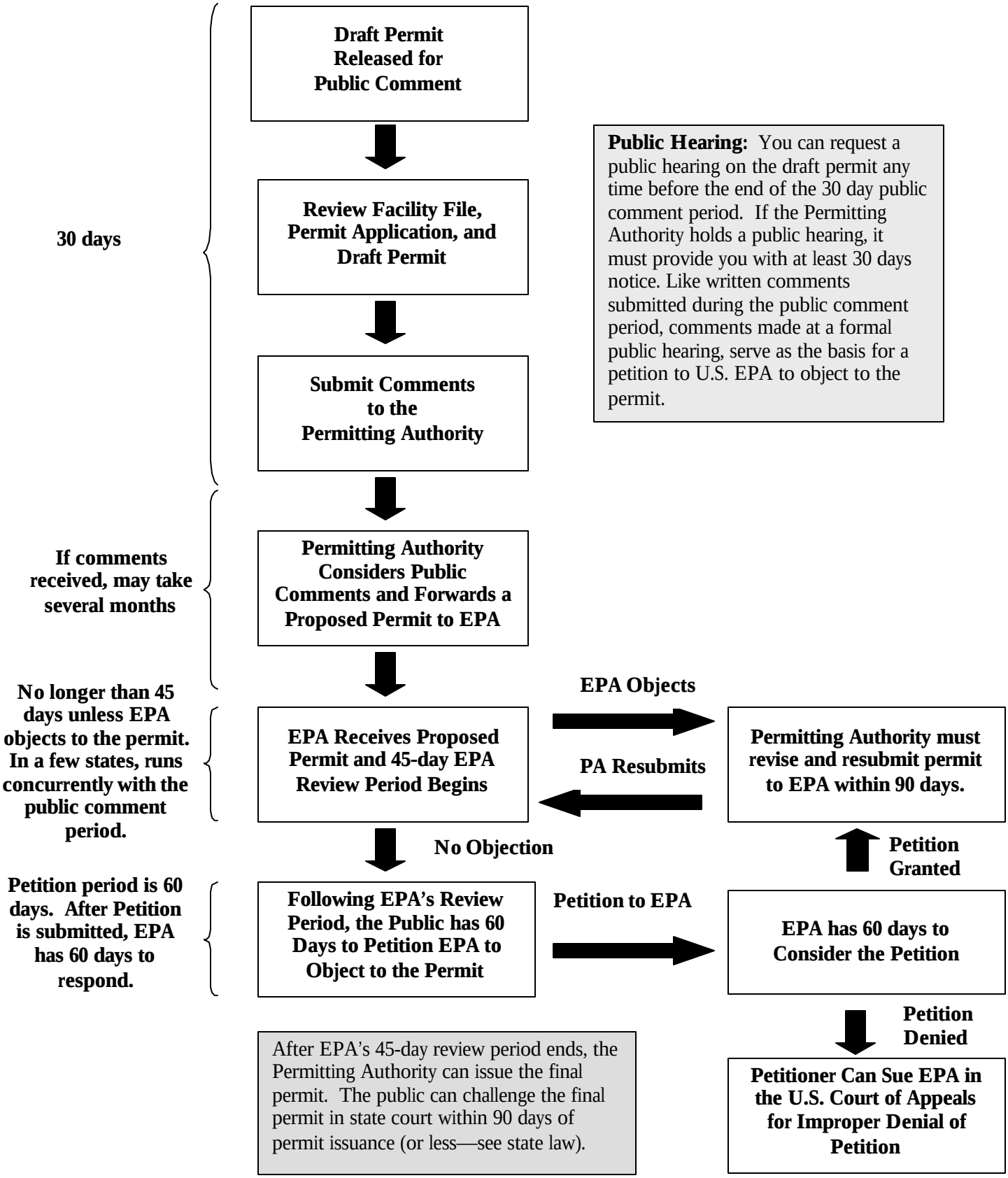
If U.S. EPA does not object to the proposed permit, the Permitting Authority may issue it as a final permit at the conclusion of U.S. EPA's 45-day review period. In some cases, U.S. EPA will waive its right to a full 45-day review period.

M. How can the public challenge a permit after it becomes final?

Even though a permit is final, opportunities to challenge the permit still remain. A low-cost option that does not require a lawyer is to petition the U.S. EPA Administrator to object to the permit. A petition to the Administrator must be submitted within 60 days after the end of U.S. EPA's review period. After you submit a petition, the Administrator has 60 days to respond. A detailed discussion of how to petition the Administrator to object to a permit begins on page 90 of this handbook.

In addition to petitioning the Administrator to object, once a permit becomes final any person who participated in the public comment period may sue the Permitting Authority in state court on the basis that the Permitting Authority issued a permit that violates the law. The deadline for challenging a permit in state court varies from state to state, but can be no later than 90 days after final action on the permit. Refer to Box 6.1 on page 93 for more information about state court remedies.

Chart 2.1: Public Participation in the Title V Permit Process



Step Four in Preparing to Review a Permit: Obtain All Necessary Information

As soon as possible after you select a draft permit to review, you should begin gathering information about the facility. Even before the release of the draft permit for public comment, you can ask the Permitting Authority for a copy of the facility's permit application as well as access to information about the facility that the Permitting Authority maintains in its files.

Once the public comment period begins, you should request a copy of the draft permit immediately. In some states, you can get draft permits on the Internet. If you do not already have the permit application when the comment period begins, don't forget to request it along with a copy of the draft permit. You should not be required to file a formal open records request for either the draft permit or the permit application once the public comment period begins. A phone call should be sufficient.

A. Why should I get a copy of a Title V permit application for a facility that I am interested in?

Information provided in a facility's permit application will help you develop effective comments on the facility's draft permit. Getting the application prior to the start of the public comment period will give you a head start in developing your comments on the draft permit. A discussion of helpful information that can be obtained from the permit application can be found on page 45.

B. What information should I look for when I review a facility file?

Agency files typically contain enforcement history—including records of inspections, official notices of violations, and administrative consent orders. In addition, they may contain reports that the facility has submitted, letters exchanged between the facility and the Permitting Authority, monitoring protocols and stack test results. By reviewing the file, you might discover that the facility has a pre-construction permit or that the facility has had trouble complying with a certain regulation. This will most certainly be relevant to your review of the draft permit. Don't be discouraged if you have a difficult time understanding the more technical reports and monitoring data.

The most important aspect of file review is to identify:

- the type of monitoring information that the facility is already submitting on a regular basis (for example: monthly reports of how much fuel is burned at the facility);
- any compliance schedules or consent orders (these mean that the facility has not been complying with its requirements and they will usually contain a list of milestones or remedial steps the facility must take);
- any permits issued to the facility other than the Title V permit, such as a construction permit (most prior permits are a source of requirements that must be incorporated into the Title V permit);
- any disputes over conditions included in the draft Title V permit (for example, you might find letters exchanged between the Permitting Authority and the applicant discussing permit conditions);
- any evidence that the facility is violating a legal requirement (monitoring reports might demonstrate a violation, or letters from the Permitting Authority to the applicant might discuss ways that the facility could bring the facility into compliance with the law).

The file might include letters and memoranda that identify problems at the facility and/or with the draft permit for you.

C. What do I do if I want to see lots of files?

If you plan to review a large number of Title V permits, you should go ahead and request access to all facility files that you might be interested in, including permit applications, inspection and monitoring reports, compliance plans and enforcement actions. In your request, explain that you will not be able to review all of these files at once, but would like to establish a schedule so that you can review the information at a reasonable pace. Make sure that you request "access" rather than "copies" of these documents! Typically, the agency will allow you to review the documents in permit files at their office. As you review the files, obtain a copy of any document that seems relevant.

D. How much will it cost to copy what I need?

Many permitting authorities require you to pay for the cost of photocopying draft permits and permit applications.[5] These fees range from $0.10 to $0.50 per page, with most states charging $0.25 per page. Many permitting authorities will waive fees for individuals or organizations that wish to use the information to benefit the public. See the sample open records request on page 99 for language that asks for a fee waiver.

E. What should I do if I run into problems with getting to see or copy files?

Document any problems that you have in obtaining a draft permit, a permit application, or any other supporting documentation necessary for you to effectively review a draft permit. A permit cannot be issued if the public is not provided a reasonable opportunity to review the draft permit. You can describe any problems that you encounter in the comments you submit during the public comment period.

If you are unable to resolve a problem with the Permitting Authority, ask your Regional U.S. EPA office for assistance.

[5] The Clean Air Act requires that permit fees be set at a level that covers the cost of running the Title V program. There is an open question as to whether the cost of photocopies are included under the cost of running the program. You may want to raise this issue with your state or local permitting authority.

Chapter Three

Common Problems in a Draft Title V Permit

This chapter provides an overview of common problems with Title V permits. This overview is meant only to give you an idea of what you might encounter when you review a draft permit. A detailed explanation of how to review a permit begins on page 35.

What are common problems in a draft Title V permit?

Though Congress created the Title V permitting program to increase facility compliance with air quality requirements, a poorly written permit could lead to the opposite result. Weak permits that slip through review by U.S. EPA and the public could protect permit holders from enforcement even as they continue to violate air quality laws. It is not unusual to identify the following problems in Title V permits:

- The permit misapplies an applicable requirement or improperly identifies a requirement as inapplicable. (p. 28).

- A permit condition is too vague to be enforceable. (p. 30).

- The permit leaves out requirements contained in permits issued prior to application for a Title V permit (e.g. state operating permits or pre-construction permits). (p. 31).

- The permit lacks monitoring and reporting requirements sufficient for the public and government regulators to determine whether the facility is in compliance. (p. 32).

- The permit limits the type of evidence members of the public and government regulators may rely upon to show that the facility is violating an air quality requirement. (p. 33).

- The permit improperly prevents the U.S. EPA and the public from enforcing certain requirements. (p. 34).

This list of potential problems with a Title V permit is not comprehensive. It is meant only to illustrate why it is important for people who are concerned

about air quality in their communities to get involved in the Title V program. The following discussion provides details on each of the problems listed above.

A. The permit misapplies an applicable requirement or improperly identifies a requirement as inapplicable.

Example:

A draft permit condition incorporates a SIP requirement by stating that "all perchloroethylene dry cleaners who generate 75,000 dollars per year in revenue must conduct a visual inspection of the dry cleaning system at least once a week for perceptible leaks."

The underlying SIP requirement also requires corrective action. ("Perceptible leaks shall be repaired within 24 hours of detection.") The corrective action portion of the requirement is not included in the draft permit.

At the very least, the misapplication of an applicable requirement misleads the public about how the requirement applies to the facility. In most cases, the misapplication of a requirement will make it difficult to enforce the requirement properly. This is because most Title V permits include a permit shield. In the example above, the public would have trouble enforcing the duty to repair leaks if the permit contained a shield.

1. What is a permit shield?

A permit shield is language in a permit that limits the rights of the public, U.S. EPA, and the Permitting Authority to sue a facility for violating an air quality law. If the permit contains a shield (and most permits do), then the facility is considered to be in compliance with any air quality requirement mentioned in permit so long as it complies with permit terms. The permit shield is not a problem if the permit correctly includes all the requirements that apply to a facility.

For the permit shield to protect a facility from enforcement of a particular requirement, the requirement must be described in the permit as not applying to the facility. This determination must be included in the text of the permit or as an attachment. A facility cannot be excused from a requirement simply because it was overlooked by the Permitting Authority when the Title V permit was created. The Permitting Authority *may not* shield the facility with a generic statement that any requirement that is not included in the permit does not apply to the facility.

2. Why does Part 70 allow permit shields?

A Title V permit benefits the permitted facility by providing notice of all of the requirements that apply to the facility and what the facility must do to comply with those requirements. If a facility is not protected by a permit shield, then the facility can be sued for violating an applicable air quality requirement even if it is complying with the terms of the permit if it turns out that the terms of the requirement were incorporated incorrectly into the permit. Many permitting authorities choose to include a permit shield in Title V permits to provide facilities with certainty that if they comply with the terms of their permits, they are considered to be in compliance with the air quality requirements covered by the permit.

3. What should I look for when I review the permit shield language in a draft permit?

Here's an example of typical language in a Title V permit that creates a permit shield:

> Compliance with the terms of this permit shall be deemed compliance with applicable requirements as of the date of permit issuance provided that:
>
> 1. Such applicable requirements are included and are specifically identified in the permit; or
>
> 2. the Permitting Authority has determined in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determinations.

Note that the problems with the permit shield are not generally mistakes in how the permit shield language is drafted. The problems happen when the Permitting Authority (1) misapplies an applicable requirement, or (2) makes a mistake in deciding that a particular requirement does not apply to the facility. If the Permitting Authority misinterprets the effect of a statute or regulation as it applies to a facility and the permit includes a permit shield, the facility only needs to obey the terms of the permit, not the correct interpretation of the law, until the permit is reopened and corrected. Moreover, if the Permitting Authority mistakenly finds that a requirement is not applicable and excludes the requirement from the permit, the facility is shielded from enforcement related to the excluded requirement until the permit is reopened and corrected.

Since the permit shield applies only to air quality requirements that are specifically mentioned in the permit, the primary concern is whether the requirements that are included in the permit are applied correctly. Sometimes a particular regulation applies to facilities in a variety of ways. For some facilities the regulation might simply require the facility operator to calculate the facility's pollution levels, and keep them on file. Under the same regulation, another facility might be required to install additional pollution control equipment. As a result, a permit might identify the regulation as applicable to the facility, but exempt the facility from complying with the regulation's most stringent requirements. Even if it is later discovered that the regulation was applied incorrectly, the facility cannot be sued for failure to comply with the shielded regulation unless the permit is changed.

4. What can I do if a facility's permit has already been issued and I believe that it does not include all the requirements that apply to the facility?

If, after a permit is issued, the Permitting Authority recognizes that the permit does not ensure compliance with all applicable requirements, the Permitting Authority should "reopen" the permit and make necessary adjustments. If you believe that a permit is allowing a facility to violate air quality laws, you can bring this to the attention of the Permitting Authority. If that doesn't work, you can petition the EPA Administrator to reopen the permit. It may be difficult to persuade the Permitting Authority to reopen the permit. Thus, it is far better to identify problems with a permit *before* the permit becomes final.

A more detailed discussion of how to make sure that a draft permit correctly reflects the requirements of the underlying statute or regulation begins on page 65.

B. A permit condition is too vague to be enforceable.

Example:

A draft permit condition provides that "the incinerator must be maintained and inspected as suggested by the manufacturer's specifications."

A Title V permit cannot be relied upon as an effective enforcement tool if the permit is unclear about what counts as a permit violation. Whether a permit condition is enforceable is referred to as "practical enforceability." The

above condition is not enforceable because it does not identify the particular "manufacturer's specifications." Moreover, since the manufacturer's specifications are written only as suggestions to the operator, the facility could claim that certain aspects of the specifications are not necessary for one reason or another. For a permit condition to be enforceable, the permit must leave no doubt as to what the facility must do to comply with the condition.

This topic is discussed in more detail on page 69.

C. The permit leaves out requirements contained in a permit issued prior to issuance of the Title V permit (e.g. a pre-construction permit).

Example:

A coating facility uses coating lines to label plastic packaging. Several years ago, the facility obtained a pre-construction permit that allowed the installation of several new coating lines and a catalytic incinerator to control VOC emissions. The pre-construction permit, which was required under federal law, requires the facility to inspect the incinerator each week, and to continuously monitor the operating temperature of the incinerator to insure that it is functioning properly. The Title V permit says nothing about either of these requirements.

Many facilities are already subject to "pre-construction permits." Sometimes these are called "permits to install" or "new source review permits." Pre-construction permits are required under federal law, but are frequently issued by a state or local Permitting Authority. These permits are called "pre-construction" permits because they must be issued before a facility is initially constructed, or before a facility is modified in such a way that would increase air pollution. Many facilities do not have pre-construction permits because they were built before the law was passed, and they were never modified. If a facility does have a pre-construction permit, all conditions in the pre-construction permit must be specifically included in the Title V permit. If they are not and there is a shield in the permit, those conditions will no longer be enforceable unless the permit is reopened to add them or remove the shield.[6]

[6] Some states already issued state operating permits to existing facilities prior to the creation of the Title V program. These permits are somewhat similar to Title V permits but generally are not federally enforceable. Terms from these permits can be included in Title V permits but are identified as not federally enforceable. Be aware, however, that it is sometimes difficult to tell if a previously-issued permit is a state operating permit or a federally-required pre-construction permit. Terms from a facility's pre-construction permit or from a state operating permit program that is part of a SIP must be incorporated into the facility's Title V permit. In the state of Washington, U.S. EPA dealt with this problem by taking the position that all requirements included in a pre-existing state permit

D. The permit lacks monitoring and reporting requirements sufficient for the public and government regulators to determine whether the facility is in compliance.

Example:

A large commercial and residential complex operates four large boilers to generate heat and electricity. The boilers must comply with a requirement that limits opacity (the darkness of the smoke) to no greater than a six-minute average of 20%. Though the draft permit includes the opacity requirement, it does not require the facility to perform any stack testing or visual monitoring to assure compliance with the opacity limitation. The underlying regulation does not include any type of monitoring.

A Title V permit must require the permitted facility to perform monitoring and recordkeeping that is sufficient to provide a reasonable assurance that the facility is obeying the law. Monitoring requirements designed to demonstrate a facility's ongoing compliance with air quality requirements are referred to as "periodic monitoring." Unfortunately, some permits lack sufficient periodic monitoring. Instead, the permits are drafted with the emission limitations listed, but no way to determine whether the facility is complying with those limitations. When this happens, the Title V permit loses its effectiveness as a tool for monitoring a facility's compliance with air quality requirements.

Sometimes an applicable air quality requirement specifically identifies a monitoring method that the facility must use. For example, the applicable requirement might limit the percentage of sulfur contained in fuel oil burned at the facility. To show compliance with the limit, the underlying regulation might require the facility to test the sulfur content of every new fuel oil shipment and record the results in a log book. The sulfur limit and the monitoring or testing requirements included in the underlying regulation must be included in the facility's Title V permit.

Sometimes, the applicable air quality statute or regulation fails to identify an ongoing monitoring method. For example, consider a regulation that limits the percentage of sulfur in fuel but does not specify a monitoring method for demonstrating compliance. When the Permitting Authority develops a draft

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are considered federally enforceable and must be included in the Title V permit unless the Permitting Authority demonstrates otherwise. If you experience a similar problem in your state, you can propose the Washington approach to your Permitting Authority and your U.S. EPA regional office.

Title V permit that includes this requirement, it must add periodic monitoring to demonstrate compliance with the limit (e.g., the facility must measure the sulfur content of each fuel shipment and record the results in a permanently bound log book). This periodic monitoring requirement becomes an enforceable condition in the Title V permit.

This topic is discussed in more detail on page 72.

E. The permit limits the type of evidence that the public, U.S. EPA, and the Permitting Authority may rely upon to show that the facility is violating an air quality requirement.

Example:

A draft permit provides that "the monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined."

The above example improperly restricts the type of evidence that can be used to prove that the facility is violating an applicable requirement. Under the Clean Air Act, government regulators and members of the public may rely upon any "credible evidence" to demonstrate that a facility is violating an air quality requirement. This means that regulators and the public can rely upon other types of reliable data to prove a violation even when the Title V permit specifies a particular type of monitoring that a facility operator must perform.

At times, the specified monitoring method may not be as effective as other available methods for finding out whether a facility is complying with a requirement. In addition, it is often the case that the facility is already performing additional monitoring for other reasons (perhaps under a state-only requirement that does not need to be included in the Title V permit), and these additional monitoring methods indicate a violation even though monitoring methods required under the Title V permit indicate compliance. According to U.S. EPA and the courts, reliable evidence from alternative monitoring activities can be used in court to prove a violation in addition to data from required monitoring.

Though the rule on the use of all credible evidence is very clear, you may find language in a draft Title V permit that attempts to limit the evidence that can be used to show a violation of permit requirements. For example, a permit might state that "The monitoring methods specified in this permit are the sole

methods by which compliance with the associated limit is determined." Such language is illegal and must be deleted from Title V permits.

This topic is discussed in more detail on page 70.

F. The permit improperly prevents the U.S. EPA and the public from enforcing certain requirements.

Example:

A state regulation limits the sulfur content of fuel to 0.3%. The state regulation has been approved by U.S. EPA into the SIP, which makes it federally enforceable (i.e., enforceable by U.S. EPA and the public). The draft permit incorrectly identifies the sulfur limitation as a "state-only" requirement. (A state-only condition is not enforceable by U.S. EPA or the public).

Under federal law, a Title V permit must include every "federally enforceable" requirement that applies to the permitted facility. If a state Permitting Authority is responsible for issuing permits, the Permitting Authority has the option of including state requirements that are not federally enforceable ("state-only" requirements). Most state permitting authorities do include state-only requirements in the permits they issue. When state-only requirements are included, the Permitting Authority must identify those conditions as not federally enforceable. A mistake sometimes made in drafting Title V permits is to list requirements that are actually federally enforceable as "state-only" requirements. The practical result of such a mistake may be to prevent both U.S. EPA and the public from enforcing the misidentified requirement.

This topic is discussed in more detail on page 81.

Chapter Four

Suggested Strategy for Reviewing a Title V Permit

At this point you have selected a draft permit to review, and you have obtained background information about the facility that will help you during the review process. Perhaps you feel well prepared. Then you take a look at the draft permit and suddenly you feel overwhelmed. The draft permit is lengthy and complicated, with little explanation of permit conditions. The draft permit refers to equipment and processes that you have never heard of.

Don't panic. Though you may feel intimidated the first time you see a draft Title V permit, you will quickly discover that there are simple ways to improve the final permit. In doing so, you will make the permit a more useful tool for keeping track of whether a facility is complying with air quality requirements.

The key to successfully reviewing your first draft permit is to remain focused upon what you hope to achieve. In particular, you want the final Title V permit to:

- include all Clean Air Act requirements that apply to the facility (these are called "applicable requirements");
- clearly describe the monitoring and reporting activities required by law;
- require the facility to perform periodic monitoring that assures the facility's compliance with each permit requirement;
- include an enforceable plan and timetable for bringing the facility into compliance with air quality requirements if the facility is not in compliance at the time the permit is issued;
- require the facility to submit regular documentation to the permitting authority that demonstrates whether the facility is complying with its permit; and
- preserve your right to hold the facility owner or operator legally accountable for any violation of federal applicable requirements.

To effectively review a draft permit, you do not need to understand every permit condition. Certainly, an understanding of how the facility operates is helpful. But keep this thought in mind: some of the points you make in your comment letter may be off the mark. But if even a few of your comments hit

upon an actual problem with the draft permit, your comments could substantially improve the quality of the final permit. In addition, by submitting a comment letter about a draft permit that is of concern to you and others in your community, you provide the Permitting Authority and the U.S. EPA with an incentive to review the draft permit with your comments in mind. While considering your comments, they might notice additional problems with the draft permit that you didn't catch.

The permit review strategy suggested in this section is meant only as a way to get you started in reviewing your first draft permit. Because each Permitting Authority develops its own permit application form and permits, it is difficult to predict which issues you will find as you review draft permits. You might decide upon a different approach after becoming more familiar with Title V permits being issued in your area.

At the point that you are ready to review a draft permit, you should have copies of both the draft permit and the permit application. You also may have had the opportunity to review the facility file maintained by the Permitting Authority. If so, you should already possess a working knowledge of which air quality requirements are most significant at the facility, and what sort of monitoring reports are submitted to the Permitting Authority. Most importantly, you are probably aware of any known, ongoing compliance problems at the facility.

The review strategy described in this section involves the following steps:

(1) Identify the underlying source for any requirement mentioned in the permit application and draft permit. (p. 37).

(2) Review the permit application for helpful information. (p. 45).

(3) Review the statement of basis. (p. 53).

(4) Evaluate the adequacy of general conditions. (p. 54).

(5) Check to see if source-specific air quality requirements are correctly incorporated into the permit. (p. 62).

(6) Determine whether any federal requirements are incorrectly identified as "state-only" in the draft permit. (p. 81).

Each step is explained in detail below.

Step One in Reviewing a Draft Title V Permit: Identify and Locate the Underlying Source of Any Requirement Mentioned in the Permit Application or Draft Permit

Generally, a Title V permit does not create new air quality requirements. Instead, the Title V permit is designed to gather all federally enforceable air quality requirements into one permit so that it is easy to identify them. Every requirement included in a Title V permit must be based upon an existing law, regulation, or permit. This is what is meant by an "underlying source."

As you review a draft permit, you will need to refer to the underlying source for each permit condition. Therefore, your first task when reviewing a draft permit is to identify and locate the underlying source for each requirement listed in the permit application and draft permit. The next few pages provide basic information about who makes air quality requirements and how to locate them.

A. Where do air quality requirements listed in a Title V permit application or permit come from?

A Title V permit includes air quality requirements created by:

(1) U.S. EPA;
(2) state legislatures; and
(3) state and local environmental agencies.

1. Regulations adopted by the U.S. EPA

When Congress passed the Clean Air Act, it authorized U.S. EPA to develop regulations under the law. This is because Congress lacks both the time and the expertise to develop the highly specific requirements that are necessary to administer the law. For example, Congress told U.S. EPA that it must develop air quality standards sufficient to protect human health. It was then U.S. EPA's responsibility to determine what those standards should be. Unless U.S. EPA's regulations conflict with a statute passed by Congress, U.S. EPA's regulations have the force of law and can be enforced by a court.

2. State and local law

All air quality requirements aren't found in federal statutes and regulations. In fact, you will discover that the majority of requirements that apply to a facility are found in *state* statutes and regulations. This is because under the Clean Air Act, U.S. EPA sets air quality standards and the States are responsible for adopting air quality requirements that are at least as strict as the federal requirements.

U.S. EPA sets air quality standards for six criteria pollutants that are found in fairly large quantities all across the country. Every state must submit a plan for meeting or "attaining" these standards. This plan is known as the "State Implementation Plan," or just the "SIP." SIPs are collections of air regulations used by a State to reduce air pollution.

A state regulation does not become part of the SIP until the state submits the regulation for approval, and U.S. EPA approves it. Before a state regulation is approved by U.S. EPA, it is only enforceable by the state. This means that even though the regulation might be "in effect" (meaning that facilities that are covered by the regulation must comply with it), the U.S. EPA cannot enforce the requirement.[7] After being approved by the U.S. EPA, a state regulation is "federally-enforceable." This means that the regulation can be enforced in court by the state and federal government as well by the public under the citizen suit provision of the Clean Air Act.

B. Which requirements must be included in a Title V permit?

Under Title V, all "applicable requirements" must be included in a Title V permit. Applicable requirements are air quality limitations and standards developed by state and local governments and by the U.S. EPA to comply with the Clean Air Act. These requirements may be found in:

- U.S. EPA regulations;
- SIPs; and
- other federally-enforceable permits such as preconstruction permits.

[7] Regardless of whether the state regulation has been approved by U.S. EPA as part of the state's SIP, the regulation may be enforced by state authorities.

In addition to air quality requirements found in the Clean Air Act, U.S. EPA regulations, and SIPs, every state has its own set of air quality requirements that are not part of the SIP. In the context of the Title V program, these requirements are referred to as "state-only" requirements. State-only requirements cannot be enforced by the U.S. EPA. Furthermore, members of the public may run into difficulty trying to enforce state-only air quality requirements.[8] These requirements do not have to be included in a facility's Title V permit. However, the Permitting Authority may decide to include state-only requirements in Title V permits. If this is done, Part 70 requires that the state-only requirements be specifically identified in the permit as not federally-enforceable. Most approved Title V programs do include state-only requirements in Title V permits.

C. Complication: Mind the SIP-Gap.

As explained above, SIPs are primarily made up of state regulations. States regularly revise their air quality regulation, and this creates some confusion over which version of the regulation is included in the SIP. The difference between the SIP version of a regulation and the most recent version of that regulation is referred to as the "SIP-gap." Consider the following scenario:

February, 1979: A state agency creates an air quality regulation. The regulation applies to certain facilities in the state immediately, but it is not yet federally-enforceable.

June, 1979: The state submits the regulation to the U.S. EPA for inclusion in the state's SIP. U.S. EPA has not yet approved the regulation, so the regulation is still not federally-enforceable.

June, 1981: Two years after the regulation was submitted to the U.S. EPA by the state, U.S. EPA approves the regulation for inclusion in the SIP. The regulation is now federally enforceable.[9]

August, 1996: The state revises the regulation. The revisions include several new requirements designed to protect and improve air quality. While the original

[8] Some states have laws that allow citizens to enforce certain state laws in state court. These state "citizen suit" laws tend to be very restricted.

[9] It is not uncommon for U.S. EPA approval of a SIP submission to take up to five years.

regulation approved by the U.S. EPA in June of 1981 is still federally-enforceable as part of the SIP, the new requirements created by the 1996 revisions to the regulation are not part of the SIP and are not federally enforceable.

November, 1996: The state submits the revised regulation to U.S. EPA for inclusion into the SIP.

Present: U.S. EPA is still evaluating the revised regulation for approval and inclusion in the SIP. At the same time, the Permitting Authority is developing a Title V permit for a facility that is required to comply with the revised regulation.

The state includes state-only requirements in Title V permits. According to 40 CFR Part 70, a permit must identify any requirement that is not federally enforceable. How are the requirements of this regulation included in the Title V permit?

The short answer is that both the version of the regulation that is already in the SIP (the "SIP version") and the current version of the regulation are included in the Title V permit. Any condition required under the SIP version of the regulation remains federally enforceable, even though U.S. EPA is in the process of considering the new regulation for inclusion into the SIP and the state environmental agency no longer enforces the old SIP version of the regulation. U.S. EPA guidance advises that any condition that is required under the new version of the regulation that is not yet approved for inclusion in the SIP should be identified in the permit as a "state-only" requirement.[10]

In sum, the most recent version of a state regulation may not be the same as the version of the regulation that is part of your state's SIP. Therefore, it is important to examine the SIP status of any state regulation listed in a draft permit.

[10] EPA guidance does not create legal requirements. Such guidance is only meant to guide state, local and tribal permitting authorities in interpreting and applying the law. Your Permitting Authority may disagree with EPA's interpretation of the law. It is possible, therefore, that your permitting authority might place a state regulation that is not part of the SIP in the federally-enforceable section of a Title V permit.

D. How do I locate the complete text of a requirement I see mentioned in a permit or permit application?

1. How do I locate the Clean Air Act?

The Clean Air Act is available on the Internet at http://www.epa.gov/oar/oaq_caa.html.

You will almost never see a provision of the Clean Air Act cited in a Title V permit application or permit. If you do, the citation will be in one of two formats. The first format is simply to cite to the section of the Act, directly. So, for example, the section of the Clean Air Act that creates the Title V program starts at CAA § 501. The second way to cite to the Clean Air Act is to cite to the part of the United States Code where the Clean Air Act was published. So, if you were to cite to the first part of Title V of the Clean Air Act according to its location in the code, you would cite to 42 U.S.C. § 7661.

2. How do I locate a federal regulation?

When a federal agency develops a regulation, it must allow for a minimum public comment period for the proposed regulation. The public comment period starts on the day the proposed regulation is published in the Federal Register. The Federal Register is published every weekday and includes any proposed or final regulations developed by a federal administrative agency. After the public comment period ends and the agency decides upon a final version of the regulation, the final version is also published in the Federal Register.

Sometimes, a federal regulation will be identified by its Federal Register citation, which will look something like this: 56 FR 102984 (June 2, 1991). Each federal regulation has two Federal Register citations: one that refers to the proposed version of the regulation, and one that refers to the final version of the regulation.

Once each year, federal regulations that were published in the Federal Register over the course of the year are compiled into the Code of Federal Regulations ("CFR"). Most of the federal regulations that appear in Title V permit applications and draft permits have been around long enough to be published in the CFR. Therefore, most of the citations to federal regulations will appear in CFR format: 40 CFR § 51-xx.

You can access the Federal Register and the CFR at any law library. In addition, every federal regulation that is referred to in a Title V permit application or draft permit is most likely available on the Internet. The following websites should be helpful in locating federal regulations:

www.epa.gov/oar/oarregul.html: provides access to EPA regulations and guidance documents.
www.epa.gov/epacfr40: provides access to the full text of the CFR, by chapter, subchapter, and parts.

3. What federal regulations are mentioned frequently in Title V permit applications and permits?

There are several federal regulations that you should be aware of as you review your first draft permit. First, as explained above, 40 CFR Part 70 provides the minimum requirements for a U.S. EPA-approved state, local, or tribal Title V program. These regulations can be found in Appendix A and are also available at www.epa.gov/oar/oaqps/permits/requirem.html.[11] It is very important that you become familiar with Part 70 requirements. As you review your first permit application and draft permit, you might be surprised to find that Part 70 is rarely mentioned, if it is mentioned at all. Why? Because when a Permitting Authority requests U.S. EPA approval to issue Title V permits in its area, it must demonstrate that the relevant state, local, or tribal laws and regulations meet all of the requirements of Part 70. That means that state laws and regulations basically duplicate many Part 70 requirements. So, even though a particular permit requirement originated in Part 70, the regulation you generally see cited in a Title V permit application or permit is the duplicate state or local regulation.

40 CFR Part 60 contains "New Source Performance Standards" or "NSPS," which are federal standards that apply to new facilities. They are generally a lot stricter than requirements that apply to older facilities. Any facility that was built after the regulations were issued must comply with them. Many older facilities that have been substantially rebuilt also have to comply

[11] Note that 40 CFR Part 70 was amended by the Compliance Assurance Monitoring ("CAM") rule. See www.epa.gov/ttn/oarpg/t5pfpr.html. Furthermore, a lawsuit filed by the Natural Resources Defense Council and decided in October 1999 resulted in the court finding that part of the CAM rule violated the Clean Air Act. (The court found that while the Clean Air Act requires Title V permittees to indicate in their annual compliance certifications whether compliance with legal requirements was continuous or intermittent, the CAM rule only required Title V permittees indicate whether the data used to determine compliance were continuous or intermittent).

with these standards. In most states, 40 CFR Part 60 will be listed in a facility's permit application as an "applicable requirement" if NSPS applies. Some states have state regulations that duplicate 40 CFR Part 60 requirements. If this is true for your state, you will see a state regulation listed in the permit application rather than 40 CFR Part 60.

40 CFR Part 63 contains "Maximum Available Control Technology" ("MACT") standards that apply to facilities that emit hazardous air pollutants. To learn more about MACT standards, refer to Part Two, Chapter Five of this handbook. Like with NSPS, you usually will see 40 CFR Part 63 listed in a facility's permit application if MACT standards apply to the facility. If the facility is located in a state that duplicates MACT standards in state regulations, you will see a state regulation listed in the permit application rather than 40 CFR Part 63. 40 CFR Part 63 can be found on the Internet in PDF format at www.epa.gov/ttn/uatw/eparules.html.

Prior to the 1990 Clean Air Act Amendments, U.S. EPA issued regulations governing seven hazardous air pollutants. These regulations are published at 40 CFR Part 61.

All regulations mentioned above are available on the Internet at www.access.gpo.gov/nara/cfr/index.html.

4. How do I locate a state statute or regulation?

Any law library in your area will have a copy or your state's air quality laws and regulations. In addition, state regulations can often be accessed at larger public libraries and on the Internet. Most air quality requirements listed in a Title V permit are based upon state regulations. Appendix B provides the Title V website addresses for many state and local agencies.

Many state regulations are also part of the SIP. Even if it appears that the state regulation cited in a Title V permit is available on the Internet, it is important that you take a look at the version of the regulation that is in the SIP. This is because, as discussed above, the SIP version of a regulation may not be the most recent version. If a state regulation is available on the Internet, be aware that it may not be the SIP-approved version of the regulation.

Under the Clean Air Act, the U.S. EPA is required to compile an updated version of each state's SIP every three years.[12] The first compilation was due in 1995. A state SIP is a very large collection of materials, so it is somewhat impractical to request a full copy of your state's SIP. You have the right to review the contents of the SIP and it should not be difficult to arrange an appointment with someone at your U.S. EPA regional office so that you may do so. In addition, if you plan to review more than one draft permit you may want to request a copy of the state regulations that make up the SIP. If you are only reviewing one draft permit, you might request just a copy of the SIP regulations that are relevant to stationary sources of air pollution (e.g. power plants, factories). Be sure to get a copy of SIP provisions that apply to all facilities, such as generic SO_2 limits or opacity limits See Appendix B for who to contact at U.S. EPA for information about your state's SIP.

[12] CAA § 110(h).

Step Two in Reviewing a Draft Title V Permit: Review the Permit Application for Helpful Information

Your second task as you begin to review a draft permit is to review the permit application for helpful information. A Title V permit application must include a wide variety of information, including a description of activities that take place at a facility (such as painting, burning oil for heat or energy, or storing gasoline), descriptions of equipment and pollution control devices, citation and description of air quality requirements that apply to the facility, and whether the facility is currently complying with those requirements. A typical permit application is twenty pages or so without attachments. Attachments can be several hundred pages for a large facility. This handbook does not cover every type of information that you will find in a permit application. Instead, this handbook focuses on the application information that usually is the most helpful in reviewing a draft permit. If you would like to see a listing of all permit application requirements, see the applicable federal regulation, published at 40 CFR § 70.5. Your state Title V regulations should also include a description of permit application requirements.

A. Does every Permitting Authority use the same permit application?

No. State and local permitting authorities are allowed to develop their own unique application forms, so long as they meet the minimum requirements established by the U.S. EPA in 40 CFR § 70.5. Thus, permit application forms vary substantially from state to state. Some states require an applicant to submit the application electronically, others require paper applications, and others will accept either format. Some application forms are easy to understand, while others are complicated and may take substantial effort to unravel. Due to this variability, you may find some of the recommendations provided in this handbook difficult to apply. If that happens, you may want to investigate whether the application form used in your state complies with legal requirements. (See 40 CFR § 70.5).

B. What are the most important things to notice in the permit application?

As you review the application, you are pursuing two objectives. First, you want to identify information that will be helpful to you in understanding and reviewing the draft permit. Second, you want to make a note of any information that appears to be missing or incomplete. Under federal

regulations, a final Title V permit may not be issued for a facility if the permit application is incomplete. In your comments on the draft permit, you should note if any application information is missing or incomplete.

The following information found in a permit application is particularly important:

- the identification of the facility, description of facility processes (operating hours, type of fuel burned, etc.), type and quantity of pollutants emitted;
- the citation and description of all applicable requirements and a description of or reference to any applicable test method for determining compliance with each requirement.
- the certification of truthfulness by a "responsible official";
- the compliance certification (stating whether the facility is currently in compliance with air quality requirements); and
- the compliance plan (see p. 50).

C. Where in the permit application do I find information about the type and amount of pollution the facility releases?

Information about the type and amount of pollution the facility releases, as well as information about any pollution control equipment installed at the facility will be scattered throughout the application. You should begin your review of the application by quickly reading over all information and getting a feel for the facility. You probably will need to refer back to the permit application for this information as you review the draft permit since the draft permit does not duplicate all of the background information included in the permit application.

D. What might I learn by reviewing the requirements and applicable test methods that are identified in the permit application?

The Title V permit application must include the citation and description of every air quality requirement that applies to the facility and a description of or reference to any applicable test method for determining compliance with each requirement. See 40 CFR § 70.5(c)(4). You might want to write down the citation to each requirement that applies to the facility as you read through the permit application. Take note if any of these requirements are missing when you review the draft permit. There are several reasons why this might happen. The Permitting Authority may have decided that the facility is exempt from the

requirement. Another reason might be that Permitting Authority found that the requirement didn't actually apply to the facility or that the requirement was not an air quality requirement and did not need to be included in the Title V permit. Sometimes it is missing just because of an oversight. If a requirement that was listed in the permit application is missing from the draft permit, you should try to figure out whether the Permitting Authority was justified in leaving the requirement out of the permit. The best way to do this is to take a look at the underlying requirement and see if there is an obvious reason for why the facility would not need to comply with it. If you can't find a strong explanation for why the requirement is left out of the draft permit, consider including a statement in your comments such as:

> 74 DNR § 100.2(a) was listed in the permit application but not included in the draft permit. If this requirement applies to the facility, it must be included in the permit. If the Department of Ecology determined that this requirement does not apply to the facility, an explanation must be included in the statement of basis accompanying the permit.

In addition to finding that some requirements are left out of the draft permit, you might discover the reverse: a requirement might be included in a draft permit that was not mentioned in the original permit application. Sometimes, the requirement left out of the permit application is simply a generic requirement that does not require the facility operator to take any sort of immediate action. For example, consider the following requirement:

> No person shall operate any air contamination source sealed by the commissioner unless a modification has been made which enables such source to comply with all requirements applicable to the source.

It is highly unlikely that a facility that is applying for a Title V permit has been "sealed," which would mean that the facility had been forced to cease operations. A facility's failure to identify such a requirement in its permit application is relatively harmless.

On the other hand, if you find that the permit applicant left out a requirement mandates that the facility to install pollution control equipment, apply for an additional permit, or perform additional monitoring, you have reason to be concerned. If the applicant failed to list such a requirement in its permit application, it is possible that the facility was not aware that it was

subject to the requirement. The facility might be in violation of the requirement. If so, the draft and final permit must include an enforceable compliance schedule. In your comments, you might want to say something like the following:

> ECL § 8961(d)(1)(B), which requires that the facility install conservation vents, is included in the draft permit but was not listed in ABC Co.'s permit application. If ABC Co. is not in compliance with this requirement, a compliance schedule must be included in the permit. Otherwise, the permit must make it clear that ABC Co. has already installed conservation vents in conformance with ECL § 8961(d)(1)(B).

If you discover that a facility is violating an applicable requirement, you may be able to bring a "citizen suit" against the violator under the Clean Air Act. See Part Two, Chapter Three for more information.

E. What is the purpose of the certification of truthfulness?

A facility official must certify that information provided in the application is true, accurate, and complete. The certification must be based on a "reasonable inquiry" into the truthfulness of the information and must contain language similar to the following:

TITLE V CERTIFICATION

I certify under penalty of law that, based on information and belief formed after reasonable inquiry, the statements and information in this document and all attachments are true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Responsible Official: Title:
Signature: Date:

Make sure that the application includes a certification of truthfulness and that it is signed by a "responsible official." In general, a responsible official is a person who has authority to make policy decisions for the company.[13] For example, a

[13] 40 CFR § 70.2 provides a lengthy regulatory definition for "responsible official." U.S. EPA's "White Paper for Streamlined Development of Part 70 Permit Applications," July 10, 1995, provides additional insight into who qualifies as a responsible official. (p. 24). You can access this "White Paper" at www.epa.gov/ttn/oarpg/t5wp.html. The White Paper is only a guidance document. It is not legally enforceable.

plant engineer usually does not qualify, but a plant manager usually meets the criteria. If you have any doubt that the person who signed the certification is a "responsible official" or that the language of the certification is adequate, you should include that concern in your comments.

F. What must be included in the initial compliance certification?

The compliance certification is separate from the certification of truthfulness, but should be attached to the application.

The compliance certification is one of the most important parts of a Title V permit application, because it tells the Permitting Authority and the public whether the applicant is currently violating any air quality requirements. Like the certification of truthfulness, the compliance certification must be signed by a responsible official. It must include:

- a statement that says whether the facility is currently complying with all air quality requirements;
- a statement of the methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods (the responsible official must consider all monitoring records maintained by the facility when certifying whether the facility is in compliance with applicable requirements);
- a schedule for submission of compliance certifications after the permit is issued (the facility must agree to submit a compliance certification to the Permitting Authority at least once every 12 months) (This statement is often pre-printed on the application form, and the applicant simply checks the box next to the statement);
- A statement indicating whether the source is complying with any enhanced monitoring and compliance certification requirements of the Clean Air Act (also usually next to a check-off box).

The format for the compliance certification varies tremendously from state to state. Some states require permit applicants to complete compliance certification forms that are separate from the primary application form. Others include a compliance certification section as part of the primary application form. It is also common to find that the various parts of the compliance certification are scattered throughout the permit application.

G. What can I do if I find that the initial compliance certification is inadequate?

The public has a right to know whether a facility that is scheduled to receive a Title V permit is in violation of any legal requirement. You are denied that right if a facility submits an inadequate compliance certification. Members of the public should feel confident that each Title V applicant has submitted a complete and reliable initial compliance certification as part of its permit application. If you believe that required compliance certification information is missing from a facility's permit application, you should make this point in your comments on the facility's draft permit.

H. What must be included in a compliance plan?

Every facility must submit a compliance plan, even if the facility is currently complying with all air quality requirements. The compliance plan includes five parts.

- The applicant must give the facility's compliance status. However, many states interpret this requirement as calling for the same information as is contained in the initial compliance certification and do not require that the information be repeated in the compliance plan.

- The applicant must promise to obey all the air quality requirements with which the applicant is currently complying. Most permit applications simply require the applicant to check off a box which contains a statement that the applicant will continue to comply with applicable air quality requirements.

- The applicant must promise to obey all the air quality requirements that will come into effect after the permit is issued.

- If the applicant is violating an applicable requirement at the time the permit application is submitted, it must describe and propose a schedule for when and how it will bring the facility into compliance with those requirements. If the compliance schedule proposed in the permit application is reasonable, it will form the basis for the schedule of compliance that is included in the permit, provided that the facility is still out of compliance as of the date of permit issuance. The compliance schedule in the permit must contain an enforceable sequence of measures that will result in full compliance. The schedule must require the applicant to submit progress reports at least every

6 months after the permit is issued. These reports are public information. This is your way of keeping track of whether the facility is meeting the schedule after the permit is issued. Neither a compliance plan nor a compliance schedule protects the applicant from being sued over the violation by the government or by the public through a citizen suit.[14] You may want to consider an enforcement action against the facility.

If it appears that the applicant is in compliance with all applicable requirements, then you simply need to make sure that all of the required statements listed above are included in the compliance plan that is submitted as part of the permit application.

I. How should I follow up if there is a compliance schedule in the permit application?

The existence of a compliance schedule in a facility's permit application or draft permit is a red flag that the facility has had difficulty complying with applicable air quality requirements in the past and is currently out of compliance.

Most applicants will have submitted their applications more than a year prior to issuance of the final permit. If a facility proposed a compliance schedule in its permit application, then you should find out if the applicant is still out of compliance at the time the draft permit is released for public comment. If so, an up-to-date compliance schedule must be incorporated into the final permit. When looking at the draft permit, you should consider whether the compliance schedule will bring the facility into compliance and whether the time allowed is reasonable.

Sometimes, the compliance schedule in the application simply refers to an administrative consent order (an enforcement agreement between the Permitting Authority and the facility that typically includes milestones for bringing the facility into compliance) or a consent decree (an agreement between the Permitting Authority and a facility that is out of compliance, which has been approved by a court). If the application refers to such an order, make sure that you get a copy from the Permitting Authority.

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[14] If the compliance plan is based upon a judicially approved consent order that resulted from an enforcement action in state or federal court (as opposed to an administrative enforcement action), you are barred from bringing your own citizen suit against the facility for the same violation. See CAA § 304. In such cases, you still have the right to intervene in the lawsuit against the facility.

When reviewing a compliance schedule, keep the following in mind. First, a compliance schedule in a Title V permit must never be interpreted as granting the facility permission to operate in violation of an applicable requirement. *See* 40 CFR § 70.5(c)(8)(iii)(C). The underlying requirement must be included in the draft permit even if a compliance schedule is in place. Second, the compliance schedule must resemble and "be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." See 40 CFR § 70.5(c)(8)(iii)(C). If the applicable consent decree or administrative order does not seem likely to lead to compliance within a reasonable period of time, the compliance schedule in the Title V permit must be made stronger than the consent decree or administrative order. ***The compliance schedule may not be used to shield a facility from an applicable requirement.***

Box 4.1: Important note on applications:

Some states require applicants to "correct" their initial application before the draft permit is released for public comment. For example, if the application left out requirements that apply to the applicant's facility, the applicant may be required to revise the application to include these requirements. For the purpose of permit review, it is helpful to know what the applicant said in the initial application. Therefore, you should make sure that you have a copy of the original application submitted by the applicant, not just the revised version that accompanies the draft permit. The Permitting Authority must provide you with the original permit application if you request it.

Step Three in Reviewing a Draft Permit: Review the Statement of Basis

Under 40 CFR § 70.7(a)(5) "the Permitting Authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The Permitting Authority shall send this statement to U.S. EPA and to any other person who requests it." This statement is frequently referred to as the "statement of basis." Every Permitting Authority interprets the requirement for a statement of basis differently. Some permitting authorities include extensive information in the statement of basis, while others hardly include any information at all. Though some permitting authorities call the statement a "statement of basis," most do not. You might see it called a "permit description" or an "introduction." Regardless of what it is called, each Title V permit must be accompanied by a document that satisfies § 70.7(a)(5). When you request a copy of a draft permit and permit application, you should also request a copy of the Permitting Authority's statement of basis.

If the draft permit lacks a statement of basis, you can argue that it violates Part 70 requirements. Also, you can argue that the lack of a statement of basis makes public participation during the public comment period difficult because the public is not provided with the Permitting Authority's rationale for permit conditions. As one U.S. EPA staff member notes:

> In essence, this statement is an explanation of why the permit contains the provisions that it does and why it does not contain other provisions that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the Permitting Authority in drafting the permit.[15]

If the permit that you are reviewing *does* include a statement of basis, then you should consider whether the statement is complete. In general, if you need more information in order to evaluate conditions included in the draft permit, you can argue that this information must be included in the statement of basis.

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[15] Joan Cabreza, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development, March 19, 1996.

A primary purpose of the statement of basis is to provide an explanation of the Permitting Authority's periodic monitoring decisions, especially if a facility is required to perform less monitoring than one would normally expect to be required. It may be that less monitoring is needed because the facility is burning a "clean fuel" that makes a violation of the requirement highly unlikely. Or, a recent stack test might demonstrate that the facility's pollution levels are substantially below the limits contained in the permit. Under these circumstances, the Permitting Authority may decide that the facility need not be burdened with excessive monitoring requirements. If this is the case, the statement of basis must include the Permitting Authority's rationale for applying less strict monitoring requirements. (A discussion of how you can evaluate whether monitoring requirements included in the draft permit are adequate begins on page 72).

Step Four in Reviewing a Draft Permit: Review General Conditions

A. What is a general condition?

A general condition is a condition that is included in every Title V permit, no matter what type of facility is being permitted. Most permits group these conditions in a separate section of the permit. If you review more than one draft permit developed by the same Permitting Authority, you will probably discover that the general conditions for each draft permit are nearly identical. Once you develop comments on the general conditions for one draft permit, you can rely upon those comments when developing comments on other draft permits developed by the same Permitting Authority.

There are three different types of general conditions. They are:

- general conditions required under 40 CFR Part 70;
- optional general conditions under 40 CFR Part 70;
- general conditions that have been approved by U.S. EPA for inclusion into the SIP for the state where the facility is located.

Each of these types of general conditions are discussed below.

B. What general conditions are required by 40 CFR Part 70?

The following checklist will help you make sure that a draft permit includes all required general conditions.[16] In most cases, the Permitting Authority is not required to phrase general conditions exactly as they are phrased in Part 70. If the language varies significantly, however, look closely to make sure that the substance of the condition is the same as required under Part 70. If a general condition is misstated or missing in the draft permit, you can argue in your comments that the draft permit violates federal requirements and must be revised.

The checklist provides the relevant 40 CFR Part 70 citation for each general condition. In all likelihood, the draft permit will not provide this citation. Instead, you should see the citation to the relevant state permitting regulation. State and local regulations often duplicate the language of Part 70.

☐ **Permit term:** The permit term shall not exceed 5 years. § 70.6(a)(2).

☐ **Severability Clause:** In the event of challenge to any portion of the permit, the rest of the permit remains valid. § 70.6(a)(5).

☐ **Duty to comply:** The permittee must comply with all conditions of the permit. Noncompliance constitutes a violation of the Act and is grounds for enforcement; permit termination, revocation and reissuance, or modification; or for denial of permit renewal. § 70.6(a)(6)(i).

☐ **Halting/reducing activity not a defense:** It shall not be a defense in an enforcement action that it would have been necessary to halt or reduce activity in order to comply. § 70.6(a)(6)(ii).

☐ **Reopening for cause:** The permit term may be modified, revoked, reopened, or terminated for cause. Filing of request for permit action by permittee does not stay any permit condition. § 70.6(a)(6)(iii).

☐ **Reopening for cause:** The permit shall be reopened and revised if:
-additional requirements become applicable and more than three years remain on the term of the permit;
-additional acid rain requirements become applicable to the source;
-the permit contains a material mistake or inaccurate statements were made in establishing terms or conditions of the permit; or
-the permit must be revised or revoked to assure compliance with applicable requirements. § 70.7(f).

[16] The checklist is a modified version of the checklist developed by U.S. EPA Region 9 as part of its *Title V Permit Review Guidelines*, developed for use by U.S. EPA Title V permit reviewers.

☐ **Property rights:** The permit does not convey any property rights of any sort, or any exclusive privilege. § 70.6(a)(6)(iv).

☐ **Duty to provide information:** The permittee shall furnish to the Permitting Authority, within a reasonable time, any information that the Permitting Authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. The permittee shall also furnish copies of records required to be kept under the terms of the permit. § 70.6(a)(6)(v).

☐ **Confidential information:** For information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality. § 70.6(a)(6)(v).

☐ **Payment of fees:** Source must pay fees consistent with fee schedule. § 70.6(a)(7).

☐ **Emissions trading:** No permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.§ 70.6(a)(8).

☐ **Certification of all documents:** Any application form, report, or compliance certification submitted pursuant to Part 70 shall contain certification by a responsible official. The certification shall state that, based on information and belief formed after reasonable inquiry, the statement and information in the document are true, accurate and complete. § 70.5(d).

☐ **Compliance certification:** Source must certify compliance, at least annually with the terms and conditions of the permit. The certification must include the identification of each term or condition of the permit that is the basis for certification, the compliance status, whether compliance was continuous or intermittent, and the method used for determining compliance. Compliance certifications must be submitted to the Administrator as well as to the permitting authority. § 70.6(c)(5). [Note: Check to see that it is clear that the compliance certification covers every term and condition of the permit. The permit must not be ambiguous on this point].

☐ **Inspection and entry:** Upon presentation of proper credentials, the permittee shall allow the permitting authority or authorized representative to:
-enter the facility;
-access and copy records that must be kept under the conditions of the permit;
-inspect facilities, equipment, practices, or operations regulated or required under the permit; and
-sample and monitor at reasonable times for substances or parameters for the purpose of assuring compliance with the applicable requirements. § 70.6(c)(2).

☐ **Schedule of compliance.** § 70.6(c)(3).

- **Permittee will continue to comply:** For requirements with which the source is in compliance, the permit shall contain a statement that the source will continue to comply. § 70.5(c)(8)(iii)(A).

- **Permittee will comply with future requirements:** For requirements that will become effective during the term of the permit, the permit shall contain a statement that the source will meet such requirements on a timely basis. § 70.5(c)(8)(iii)(B).

- **Source not in compliance:** [Note: This provision is not necessary if source is in compliance. Check the compliance certification in the source's application to see if it is out of compliance and needs a schedule of compliance in the permit.] If the source is not in compliance at the time of permit issuance, the permit must contain:
  - A schedule of measures leading to compliance [§ 70.5(c)(8)(iii)(C)]; and
  - A schedule for submission of certified progress reports at least every 6 months. [§ 70.5(c)(8)(iv)].

☐ **Records of required monitoring**. § 70.6(a)(3)(ii)(A). Where applicable the permit shall require records of required monitoring information that include the following:
1. The date, place, and time of sampling or measurement;
2. The date the analyses were performed;
3. The company that performed the analyses;
4. The analytical techniques or methods used;
5. The results of such analyses; and
6. The operating conditions as existing at the time of sampling or measurement.

☐ **Record retention:** Records of all required monitoring date and support information must be retained for at least 5 years. § 70.6(a)(3)(ii)(B).

☐ **Reports of required monitoring:** Reports of all required monitoring must be submitted at least every six months. Reports shall identify all instances of deviations from permit requirements and must be certified by a responsible official. § 70.6(a)(3)(iii)(A). [Note: Make sure that the draft permit is absolutely clear about what monitoring requirements must be covered in the 6 month monitoring reports. It is better to resolve any ambiguity at the outset, rather than waiting for a dispute to arise over reporting requirements six months later].

☐ **Prompt reporting of deviations:** The permittee shall promptly report deviations from permit requirements, including those attributable to upset conditions as defined in the permit, including the probable cause of the deviation and any corrective actions or preventative measures taken. [Note: The Permitting Authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements. § 70.6(a)(3)(iii)(B). Pay careful attention to how the draft permit defines prompt. The Permitting Authority has broad discretion in

> deciding how quickly a deviation must be reported. But the definition of "prompt" must be reasonable. If you notice that the draft permit allows the facility to delay reporting a deviation for a very long time, you can argue that this long delay is unreasonable and violates Part 70 requirements].

C. What additional general conditions are optional under 40 CFR Part 70?

40 CFR Part 70 describes two additional permit conditions that the Permitting Authority may include in its permits. These conditions are not required under federal law, though they may be required under state law in some states. The first is the "Permit Shield," which was described above on page 28. The second optional condition is the "Emergency Defense."

The emergency defense provides that if a violation occurs due to an emergency, the violator can defend itself against any resulting enforcement action (by the state or federal government or by the public) by asserting that the violation was unavoidable. For the defense to be valid, the violator must demonstrate that an emergency actually occurred at the facility.[17] Based upon

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[17] Note that the emergency defense only applies to technology-based emission limits (such as MACT standards) and not health-based standards. Differentiating between technology-based limits and health-based limits is somewhat difficult and goes beyond the scope of this handbook. The issue is apparently confusing for the government and the public alike, but U.S. EPA provides the following definition of "technology-based standards":

> By technology based standards, EPA means those standards, the stringency of which are based on determinations of what is technologically feasible, considering relevant factors. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic air pollutants does not change their character as technology-based standards.

See 59 FR 45530, 45559 n. 7 (August 31, 1995). U.S. EPA's Region 10 explains that:

> SIP requirements, such as an opacity limit or grain loading standard, are health-based standards, not technology-based standards because they are proposed by state and approved by EPA for the purposes of maintaining the NAAQS, which are health-based standards. Examples of technology-based emission limits include best available control technology standards, lowest achievable emission rate standards, maximum achievable control technology standards under 40 CFR part 63, and new source performance standards under 40 CFR part 60.

See Memorandum from Joan Cabreza, "Region 10 Questions and Answers #2: Title V Permit Development," Mar. 19, 1996, p. 6. For purposes of reviewing a draft Title V permit, it is not necessary for you to be able to distinguish between a technologically-based and a health-based emission limit. Instead, you should just make sure that the emergency defense or other excuse provision is limited to excusing technologically-based emission limits.

the language of 40 CFR § 70.6(g), an emergency defense condition in a permit will look something like the following:

Emergency Defense:

1. Definition: An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

2. Effect of an emergency: An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the following conditions are met.

   (a) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:
   (1) An emergency occurred and that the Permittee can identify the cause(s) of the emergency;
   (2) The permitted facility was at the time being properly operated;
   (3) During the period of the emergency the Permittee took all reasonable steps to minimize levels of emissions that exceeded the emissions standards or other requirements in the permit; and
   (4) The Permittee submitted notice of the emergency to the Director within 2 working days of the time when emission limitations were exceeded due to an emergency. This notice shall contain a description of the emergency, any steps taken to mitigate emissions, and corrective action taken.

   b. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an emergency has the burden of proof. This provision is in addition to any emergency or upset provision contained in any applicable requirement.

If you come across a permit condition that provides for an emergency defense, read the language carefully to determine if it varies from 40 CFR § 70.6(g). A condition that provides for an emergency defense should mimic the language of 40 CFR § 70.6(g) virtually word for word. If the language is different, it may expand the application of the emergency defense and make it more difficult to enforce emission limits and standards included in the permit.

D. What should I look for when reviewing a general condition that is based upon a SIP requirement?

In addition to general conditions required under 40 CFR Part 70, draft permits contain additional general conditions that are specific to a state's statutes or regulations. These requirements will show up in nearly every permit in your state in exactly the same way, but they are unique to your state. As explained on page 38, state requirements are federally-enforceable so long as they have been approved by the U.S. EPA as part of the SIP. Every applicable SIP requirement must be included in a facility's Title V permit.

1. Is the condition actually based upon the statute or regulation cited in the draft permit?

The first thing to do when evaluating a state-specific general condition is to check to see whether the condition is actually based on the statute or regulation cited in the draft permit. (A Title V permit must include a citation to the underlying statute or regulation that supports each permit condition). If you find significant differences when you compare the language of the actual requirement to the permit condition, you should mention this discrepancy in your comments.

2. Is it necessary to add details to the permit about how the requirement applies to the facility?

You should also consider whether it is appropriate for the requirement to be included in the permit as a general condition, or if more details are necessary to understand exactly how the requirement applies to the facility covered by the permit. A "general condition" should apply to every facility in just about the same way. Here's an example of a general condition that is based on a SIP requirement:

> No person shall burn, cause, suffer, allow, or permit the burning in an open fire of garbage, rubbish for salvage, or rubbish generated by industrial or commercial activities.

Every facility located in the state where this SIP requirement applies, regardless of the type of facility, must comply with it. There is no need to tailor this requirement to each facility being permitted; nor is it necessary to require a facility to perform ongoing monitoring to demonstrate compliance with the requirement.

By contrast, consider the following condition:

> Maintenance of Equipment
> Any person who owns or operates an air contamination source which is equipped with an emission control device shall operate such device and keep it in a satisfactory state of maintenance and repair in accordance with ordinary and necessary practices, standards and procedures, inclusive of manufacturer's specifications, required to operate such a device effectively.

This condition does not apply to every facility in the same way. What qualifies as sufficient maintenance will vary depending on the type of control device used at a particular facility. Thus, the permit must identify the control device and define the meaning of "ordinary and necessary practices, standards and procedures, inclusive of the manufacturer's specifications, required to operate such a device effectively." Since a member of the public cannot easily obtain the manufacturer's specifications for the emission control device (particularly since the permit does not identify the emission control device that this condition refers to), it is not good enough for the permit to just refer to the manufacturer's specifications. For this condition to be enforceable, the specifications must be included in the permit.

If application of the requirement depends upon the particular characteristics of the permitted facility, you should evaluate the condition based upon the discussion of "source-specific" requirements in "Step Five," below.

Box 4.2: Excess Emissions Provisions that Apply During Periods of Startup, Shutdown, Malfunction, or Maintenance

Many SIPs allow the Permitting Authority to excuse violations of emission limitations that occur during startup, shutdown or maintenance of equipment. The Permitting Authority may also excuse violations that occur during equipment malfunction. Regulatory provisions that allow a Permitting Authority to excuse a facility that violates emission limitations are sometimes referred to as "excess emissions provisions." Though this type of provision is not mentioned in 40 CFR part 70, an applicable federal regulation (such as a MACT regulation) might include an excess emissions provision that applies only to a violation of that particular regulation.

It is proper for a Permitting Authority to include an excess emissions provision in a Title V permit if it is based on a U.S. EPA-approved SIP or a federal regulation. A Permitting Authority is *not* allowed to include an excess emissions provision in a Title V permit if there is no federally enforceable law or regulation that provides the basis for the provision.

If you discover an excess emissions provision in a draft Title V permit, you should review it carefully to ensure that the permit does not allow the facility to take advantage of the provision unless legally entitled to do so. Refer to Chapter Six in Part Two of this handbook for a more detailed discussion of what to look for when reviewing an excess emissions provision.

Step Five in Reviewing a Draft Permit: Check to See if Source-Specific Air Quality Requirements Are Correctly Applied to the Facility

A. What are source-specific air quality requirements?

"Source-specific" air quality requirements only apply to certain kinds of facilities and equipment. A common source-specific requirement is a limitation on smoke emissions. This type of limitation is called an "opacity" limitation. Large factories and power plants are usually required to install a "continuous opacity monitoring system" ("COMS") on each smokestack to monitor smoke emissions. Because this requirement does not apply to all Title V facilities, it is referred to as "source-specific."

B. Why is it important to review source-specific air quality requirements?

Well-written source-specific air quality requirements are at the heart of an effective Title V permit. In fact, it was largely the confusion over which source-specific requirements apply to each facility that prompted Congress to adopt the Title V program. Source-specific permit conditions relate to important pollution control issues such as how much pollution a facility can release and what kind of pollution control equipment must be installed. If the permit does a poor job of applying source-specific requirements to the permitted facility, it may be difficult for you to know whether the facility is complying with these requirements. Thus, review of source-specific requirements is often the most important aspect of reviewing a permit.

C. How are source-specific requirements organized in a Title V permit?

Source-specific requirements are typically located immediately after general permit conditions. You will find two types of source-specific requirements in a Title V permit. These are:

1. Requirements that apply to the entire facility.

Requirements that apply to the entire facility are typically included in a Title V permit as "source-wide," "site level," or "facility-specific" conditions. This handbook uses the term "source-wide." Opacity limitations are often listed as source-wide permit conditions.

2. Requirements that apply to only particular parts of the facility.

Some air quality requirements only apply to particular types of equipment or fuel used at a facility. For example, a facility that operates a small boiler might be required to perform a boiler tune-up once each year.

Requirements that only apply to particular types of equipment are typically referred to in Title V permits as "emission unit level" conditions. This is because Title V permits usually group similar types of equipment into "emission units." For example, in the case of a facility with three medium-sized boilers and two large boilers, it is likely that the Title V permit will group the

three medium-sized boilers into one emission unit, and the two large boilers into a second emission unit.

Grouping equipment into emission units is helpful in developing a Title V permit because similar types of equipment are typically covered by identical requirements. By grouping similar types of equipment into emission units, the Permitting Authority avoids stating the same conditions over and over again in the Title V permit.

D. How is a source-specific air quality requirement typically incorporated into a Title V permit?

A Title V permit must include every applicable air quality requirement. In addition, the permit must include monitoring, recordkeeping, and reporting conditions that are sufficient to assure that the facility is complying with each requirement. Thus, one air quality requirement might result in four or more permit conditions. For example, an air quality requirement found in a SIP might state the following:

> The sulfur content of fuel oil may not exceed 0.3%.

A Title V permit might incorporate this requirement into a Title V permit with the following permit conditions:

> Condition 1: The sulfur content of the fuel oil burned at this facility may not exceed 0.3 percent.
>
> Condition 2: The Permittee must test the sulfur content of fuel oil upon its delivery to the facility. *(This is the monitoring requirement).*
>
> Condition 3: A record of the sulfur content of each shipment of fuel oil must be kept in a log book on-site. *(This is the recordkeeping requirement*).
>
> Condition 4: A report of the results of sulfur testing must be submitted to the Commissioner every 6 months following issuance of a final permit. *(This is the reporting requirement*).

Each of these four permit conditions is based upon the same underlying air quality requirement.

When you review a draft Title V permit, be aware that the various permit conditions associated with a single air quality requirement (as above) may not be in the same place in the draft permit. Some permitting

authorities divide monitoring, recordkeeping, and reporting requirements into separate sections of the permit. If you find that this is the case for a draft permit that you are reviewing, you may want to take the time to create a "working document" for yourself that compiles all the conditions that relate to each requirement (as in the example above).

E. How do I make sure that source-specific conditions are adequate?

When reviewing a source-specific permit condition, you should ask the following questions:

- Does the draft permit condition correctly reflect the requirements of the underlying statute or regulation?
- Is the draft permit condition "practicably enforceable"?
- Is the draft permit condition accompanied by sufficient "periodic monitoring"?
- Does the draft permit include adequate recordkeeping and reporting so that you will know the results of any required monitoring on a timely basis?

The following discussion will assist you in answering these questions.

1. Does the permit condition correctly reflect the requirements of the underlying statute or regulation?

Like general conditions, each source-specific condition should include a citation to the statute or regulation that provides the basis for the condition. The first step in reviewing a source-specific condition is to compare the language of each condition to the language of the requirement. You might find that the underlying requirement does not support the permit condition. Consider the following example:

A draft permit states:

> Condition 97: Exemption from opacity limits.
> Excess smoke emissions from periods of start up and emergency may be exempted if it is shown that the exceedences were not preventable.

The underlying regulation that is identified in the draft permit as the basis for this permit condition states the following:

> Compliance with the opacity standard may be determined by:
> (1) conducting observations in accordance with Reference Method 9;
> (2) evaluating Continuous Opacity Monitoring System (COMS) records and reports; and/or
> (3) considering any other credible evidence.

In this case, it is clear that the underlying regulation (which does not allow for any exemptions) does not support the permit condition. A Title V permit cannot be used to modify the requirements that apply to a facility. While the permit should include any additional monitoring that is necessary to show that the facility is complying with a requirement, the requirement itself cannot be changed in the draft permit.

Another problem that you might identify by comparing the permit condition to the underlying requirement is that part of the underlying requirement is left out of the draft permit. Sometimes there is a good reason for part of a requirement to be left out. It is always possible, however, that the Permitting Authority overlooked a requirement or incorrectly determined that a particular requirement does not apply to the facility covered by the draft permit. See the discussion on page 28 for more information on this topic.

Every applicable requirement must be included in a facility's Title V permit, even if it doesn't appear that the facility operator needs to take any additional action to comply with the requirement. For example, if the relevant requirement provides that the facility operator must calculate emissions and keep those calculations on file at the facility for a minimum of five years, that requirement belongs in the Title V permit. If a requirement provides that the facility must place a label on each of its storage containers, that requirement must be included as well, even if it appears that the facility already labeled the containers. If it looks like a relevant requirement is left out of a permit that you are reviewing, you can note this possible omission in your public comments.

When you are feeling pretty confident about your ability to compare draft permit conditions to the underlying laws and regulations cited in the draft permit, you can move on to comparing the requirements in your state's SIP to the conditions in the permit. In some states, the requirements in the SIP are basically the same as current state regulations. Unfortunately, as discussed on page 39, in many states the requirements in the SIP are found in out-dated state regulations. These requirements are still federally-enforceable and must be included in Title V permits, but they are sometimes difficult to locate. You can contact your Permitting Authority to find out what air quality regulations are

part of your state's SIP. If the SIP requirements are different from the most current state regulations, then you can ask your Permitting Authority to provide you with a copy of the regulations that are included in the SIP. Sometimes a Permitting Authority will neglect to include all relevant SIP requirements in a Title V permit. Thus, when you review a Title V permit, you might want to scan the SIP regulations to make sure that no relevant requirement is left out.

If two or more very similar requirements apply to a facility, these requirements might be merged into one permit condition in the draft permit. This is called "streamlining." Refer to Box 4.3 for more information on this topic.

Box 4.3: Streamlining Permit Conditions

It often happens that a facility must comply with two or more very similar requirements. For example, a facility might be subject to the following two requirements:

Requirement #1: No person shall cause or allow any air contamination source to emit any material having an opacity equal to or greater than 20 percent (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity.

Requirement #2: No person shall operate a stationary combustion installation which emits smoke the shade or appearance of which is equal to or greater than:
(1) 40 percent opacity for any time period, or
(2) 20 percent opacity, for a period of three or more minutes during any continuous 60 minute period.

Requirements #1 and #2 are both in the SIP. The Permitting Authority could place both requirements in the permit separately. If it were to do this, it would also need to include monitoring with each condition. The Permitting Authority might decide that including each requirement in the permit as a separate condition would result in too much confusion. The solution? Streamlining.

Streamlining involves merging two or more requirements into one permit condition so that both (or all) requirements are met by complying with the streamlined requirement. If you see this being done in a draft permit that you are reviewing, evaluate the streamlined condition carefully. It can be difficult to merge multiple requirements in a way that assures that the facility is always complying with each merged requirement. In the example above, Requirement #2 at first appears to be the least strict requirement since it allows opacity emissions of up to 40%. However, notice that while Requirement #2 never allows emissions to exceed 40% opacity, Requirement #1 allows one six-minute period per hour of emissions that average 57% opacity. In addition, notice that Requirement #2 says "any time" while requirement #1 says "six-minute average." That means that under Requirement #1 there is no upper limit on opacity emissions during a six-minute period, so long as the average opacity over the course of six minutes does not exceed 57%. So, a facility could be violating Requirement #2 even though it is in compliance with Requirement #1.

Continued on the next page

Box 4.3 *(continued from previous page)*

In some cases, a new condition must be developed that provides for compliance with all the multiple requirements. In all cases the streamlined requirements must be listed in the permit.

Fortunately, it is not your responsibility to come up with a way to streamline conditions. Instead, ask yourself whether any streamlining that occurs in the draft permit is appropriate. If you figure out a way that a facility could violate one of the underlying requirements but *not* violate the streamlined condition, the streamlined condition is not acceptable. A streamlined condition must assure that the permitted facility complies with *every* requirement that forms the basis for the condition.

U.S. EPA guidance on appropriate strategies for streamlining permit conditions is found in "White Paper #2." A White Paper is U.S. EPA guidance interpreting regulatory requirements. White Papers and other U.S. EPA guidance documents are not legally enforceable, but courts often rely upon such guidance documents when interpreting laws or regulations. White Paper #2 can be found on the Internet at www.epa.gov/ttn/oarpg/t5wp.html.

It is possible that some requirements that apply to the facility will be left out of the draft permit altogether. However, don't feel obligated to review every existing air quality regulation to determine whether a requirement is left out of a draft permit. Such a strategy would probably be time-consuming and frustrating. Determining which requirements apply to a facility is a complex task—that's why Congress created the Title V program. When you review your first Title V permit, you might want to narrow your focus to making sure that the laws and regulations that are identified in the draft permit or the permit application are correctly applied to the facility. The information provided below should help you do this.

If you notice that a requirement is entirely left out of a draft permit and is not discussed in the statement of basis, you should note this omission in your comments. Even if you are incorrect, it won't hurt to point out the confusion. If you choose to review more than one draft permit, you will start becoming familiar with what sort of requirements should be included in each draft permit and you are more likely to notice when a relevant requirement is omitted.

Remember that if the Permitting Authority leaves a requirement out of the permit without stating explicitly that the requirement does not apply, the permit shield does not cover that requirement. In other words, if you later discover that the requirement applies to the facility, the permit shield will not stop you from taking the facility to court if you have evidence of a violation. In addition, you can petition the Permitting Authority or the U.S. EPA to reopen the permit and add the omitted requirement.

2. Is each permit condition "practicably enforceable"?

To be practicably enforceable, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it *possible* to determine whether the facility is complying with the condition.

In general, a permit condition is practicably enforceable if it is written so that it is possible to tell if the facility is complying with the condition by inspecting the facility or the facility's records.

Box 4.4 (below) highlights permit terms that may lead to practical enforceability problems.

Box 4.4: Permit Terms that Create Problems with Practical Enforceability

(*from* U.S. EPA Region 9's Draft Permit Review Guidance, Mar. 31, 1999)

"normally": as in "The permittee shall normally inspect the unit daily." "Normally" is subject to interpretation. The permit should require more specific language.

"as soon as possible," "promptly": as in " The permittee shall take corrective action as soon as possible." An outer time limit must be set instead of leaving the condition open-ended.

"Significant": as in "The permittee shall take corrective action if parameters are significantly out of range." "Significant" must be defined -- the permit should assign an outer acceptable limit.

"Should" or **"May"**: as in "The permittee should inspect daily." Both of these terms indicate that the condition is up to the preference of the permittee, and is not required. Ask for "must" or "shall" for all required permit terms.

"As suggested by the manufacturer's specifications": Specific numbers must be incorporated into the permit rather than a reference to a document that may not include clear requirements.

"Take reasonable precautions": The permit must identify the minimum activities that constitute reasonable precautions."

"Use best engineering practices": Best engineering practices must be specified in the permit.

In addition to looking for the terms identified in Box 4.4, you should ask the following questions when evaluating the practical enforceability of a permit condition:

a. Does the draft permit condition create unclear interpretations of requirements?

As discussed above, if you can't tell exactly what the facility must do to comply with a condition, the condition is not practicably enforceable. Permit conditions that allow the Director of the Permitting Authority to exercise discretion are problematic because such conditions do not provide clear requirements. For example, a condition might say "The reference test method is EPA Method 5 or other method approved by the Director," or "The source shall maintain adequate records, as determined by the Director." If you see this language, you should look at the underlying requirement and see if it allows the Director to exercise such discretion. If it doesn't, then the discretionary language must be deleted from the permit. Even if the underlying requirement allows the Director to exercise discretion (and many requirements do), it is still necessary for the permit condition to be written so that it is enforceable as a practical matter. It would be acceptable for the permit to either (1) list the options allowed by the Director, or (2) specify exactly what the facility must do to comply with the requirement.

b. Does the draft permit condition exempt or excuse violations?.

A facility must comply with air quality requirements *at all times*, unless the underlying requirement specifically allows certain types of exemptions or excuses (and even then you might want to investigate whether the exemption or excuse should have been allowed in the first place. See Box 4.2 on "Excess Emission Provisions that Apply During Periods of Startup/Shutdown, Malfunction and Maintenance").

c. Does the draft permit limit the type of information that can be used to show that the facility is violating the applicable requirement?

The Permitting Authority and the public may rely upon any "credible evidence" to prove that a facility is violating its permit, even if the evidence is not the result of monitoring specifically required under the permit.[18] Similarly, a facility can use any credible evidence to demonstrate that it is not violating an applicable requirement. For example, members of the public could rely upon "fence line monitoring" to demonstrate the likelihood of a permit violation. ("Fence line monitoring" refers to when members of the public stand just over

[18] See U.S. EPA's Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), and the Compliance Assurance Monitoring Rule, 62 FR 54899 (Oct. 22, 1999).

the property line of the facility and keep track of smoke emissions, or other information that indicates a problem at a facility).

Draft permits sometimes contain language that limits the type of evidence that can be used to show that a facility is violating a permit requirement. This type of language is not allowed and your comments should point out that this language must be deleted. Sometimes this language can be very subtle ("Compliance is demonstrated by Method 9 testing") while at other times it can be blatant ("The monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined.") Box 4.5 provides additional examples of language that unacceptably limits the use of credible evidence.

Box 4.5: Unacceptable Credible Evidence-Limiting Language

(*from* U.S. EPA Region 9's Draft Permit Review Guidance, Mar. 31, 1999)

"The monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined."

"Reference test method results supercede parametric monitoring data."

"The permittee is considered to be in compliance if less than 5% of any CEM monitored emission limit averaging periods exceeds the associated emission limit"

"Excess emissions that are unavoidable are not violations of permit terms."

"Compliance with this provision will be demonstrated by . . . (a certain type of monitoring)"

"A 'deviation from permit requirements' shall not include any incidents whose duration is less than 24 hours from the time of discovery by the permittee."

d. Is each permit condition written so that it is understandable by the public?

For a permit to be enforceable, it must be understandable by members of the public and the permittee. It is generally the case that prior to the Title V program, members of the public were rarely involved in reviewing a draft permit and relying upon the final permit to monitor a facility's compliance with applicable requirements. Because of this, many permits were written in language that the general public cannot easily understand.

You should review the permit to make sure that it is enforceable by the Permitting Authority, the public, and the U.S. EPA. If all or part of a draft permit is written in a way that cannot be understood by the public, this ability to enforce the permit may be jeopardized. You can raise this issue in your comments on the draft permit.

3. Is the draft permit condition accompanied by sufficient "periodic monitoring"?

a What is "periodic monitoring"?

In addition to gathering all requirements that apply to a facility into one document, the Title V program is meant to enable the public, U.S. EPA, and the Permitting Authority to know whether the facility is complying with those requirements. To achieve that goal, every Title V permit must include adequate "periodic monitoring." What this means is that the permit must require the facility to perform monitoring, recordkeeping and reporting so that it can assure the Permitting Authority and the public that it is complying with its permit.[19] ***Ensuring that a draft Title V permit includes adequate periodic monitoring is the most important aspect of permit review.***

b. *Why is it important for a Title V permit to include good periodic monitoring?*

If the permit contains good periodic monitoring, the facility can be held accountable if it violates applicable air quality requirements. Without adequate periodic monitoring, it is likely to be impossible for a member of the public to determine whether a facility is violating an air quality requirement. Also, good periodic monitoring will provide the facility with information necessary to identify and minimize compliance problems.

[19] The requirement for periodic monitoring is rooted in Clean Air Act § 504, which requires that permits contain "conditions as are necessary to assure compliance." 40 CFR Part 70 adds detail to this requirement. 40 CFR § 70.6(a)(3) requires "monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance" and § 70.6(c)(1) requires all Part 70 permits to contain "testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit."

c. How is periodic monitoring different from practical enforceability?

"Periodic monitoring" is different from "practical enforceability" because while a permit condition is practicably enforceable so long as it is *possible* to monitor the facility's compliance with the condition, periodic monitoring sets out exactly what type of monitoring must be done.

d. Where do periodic monitoring requirements come from?

Sometimes, the underlying statute or regulation explicitly requires a facility to perform a particular kind of monitoring. Any monitoring that is specifically required must be included in the draft permit. However, many air quality statutes and regulations do not identify a monitoring method. And, even when a monitoring method is specified, there is often no indication of how often the monitoring must be performed. Many statutes and regulations require a facility to perform an initial test to demonstrate compliance, but never require any additional monitoring.

U.S. EPA issued detailed guidance on periodic monitoring in 1998. The guidance suggested that permitting authorities should review the monitoring required by each underlying applicable requirement to determine if the monitoring was sufficient to assure compliance with the requirement. For example, the permitting authority would review a SIP rule to determine if the rule contained sufficient monitoring to determine whether the facility was complying with the SIP rule. If the monitoring in the SIP rule did not meet this standard, additional monitoring would be added to the permit.

The validity of U.S. EPA's guidance was challenged by several industry groups, and the guidance was invalidated (set aside) by the U.S. Court of Appeals (D.C. Circuit) in a decision dated April 14, 2000. The court held that U.S. EPA's guidance and the regulation on which the guidance was based (40 CFR § 70.6(a)(3)(i)(B)) could not be used as a basis for requiring additional monitoring unless the applicable requirement "requires no periodic testing, specifies no frequency, or requires only a one-time test."

Under the court's ruling, if the underlying State or federal standard requires a facility to perform a specific type of testing or monitoring from time to time (yearly, monthly, weekly, daily, hourly), then this satisfies the periodic monitoring requirement of § 70.6(a)(3)(i)(B).

If an underlying requirement (1) has no periodic testing or monitoring, (2) does not mention how frequently testing or monitoring should be done, or (3) requires just a one-time test, then periodic monitoring should be added to the permit (except in rare situations monitoring is unnecessary to assure compliance and this is explained in the statement of basis).

e. What kind of periodic monitoring might a facility be required to perform?

The most obvious type of pollution monitoring is the direct measurement of smokestack emissions. Sometimes, a facility is equipped with continuous emissions monitoring systems ("CEMS") or continuous opacity monitoring systems ("COMS"). As their name implies, these systems directly measure smokestack emissions on a continuous basis. While continuous monitoring is one of the best ways to assure a facility's compliance with an emission limitation, installation of CEMS and COMS may be expensive compared to frequent manual monitoring. If a facility already has CEMS and COMS, these systems should be identified in the facility's permit. The permit must require regular reporting of continuous monitoring data. A facility that has a history of violating pollution limitations will probably be required to submit more frequent monitoring reports to the Permitting Authority than a facility that has a strong record of compliance.

If a facility lacks CEMS and COMS, the facility may be required to install these systems. However, the Permitting Authority may decide that some other type of monitoring is sufficient to assure the facility's compliance with applicable requirements. For example, the Permitting Authority may decide that an annual stack test combined with recordkeeping of the type and amount of fuel the facility burns is sufficient periodic monitoring to support a particular permit condition.

Periodic monitoring must be included with all types of permit conditions, not just those that directly limit pollution levels. For example, a draft permit is likely to include conditions that require regular equipment maintenance and particular work practices. For these types of conditions, regular recordkeeping is usually necessary to satisfy the periodic monitoring requirement. For example, consider the following requirement:

> No owner or operator of a facility shall store in open containers spent or fresh VOC and/or solvents to be used for surface preparation, cleanup, or coating removal.

As written, the above requirement lacks any sort of monitoring, recordkeeping, or reporting obligations. Thus, "periodic monitoring" must be added to the Title V permit to assure that the facility complies with this requirement. If you discover that a draft permit lacks periodic monitoring to assure compliance with such a requirement, or that the periodic monitoring included in the draft permit is insufficient, you should point this out in your comments. You may want to suggest an appropriate periodic monitoring regime. For example, to assure compliance with the above requirement you might suggest a permit term that requires a daily inspection of the facility to ensure that solvents are stored in closed containers. In addition, you could recommend a permit term requiring that the results of the inspection be recorded on a daily inspection report. Finally, you can point out that as required by 40 CFR Part 70, the permit must require that reports of any required monitoring be submitted to the Permitting Authority at least once every six months.

f. Is the Permitting Authority required to include periodic monitoring in a Title V permit?

Yes. While the Permitting Authority is under no obligation to incorporate the periodic monitoring that you suggest, the Permitting Authority has an absolute obligation to include periodic monitoring in a Title V permit that is sufficient to assure that the facility is complying with all applicable requirements. If the Permitting Authority does not do this, you have a strong basis for petitioning U.S. EPA to object to the permit. In fact, most of U.S. EPA's objections during its 45-day review period have involved proposed permits that lacked adequate periodic monitoring. Refer to page 86 for information about how to petition U.S. EPA to object to a permit.

g. What do I look for when I review periodic monitoring in a draft permit?

(1) Does the draft permit contain periodic monitoring?

First, determine whether each permit condition includes periodic monitoring. Often, when an underlying statute or regulation fails to specify a particular monitoring requirement, no monitoring is included in the draft permit to assure compliance with that requirement. The complete absence of periodic monitoring to assure compliance with a particular requirement is a red flag that periodic monitoring may not be adequate! If you notice this problem,

you should bring this to the attention of the Permitting Authority in any comments that you submit during the public comment period.

If it is highly unlikely that a facility will violate a particular requirement, it may not be necessary to require the facility to perform periodic monitoring to assure compliance with that requirement. For example, if a facility only burns natural gas, it is highly unlikely that the facility will violate opacity requirements. Therefore, though opacity limitations must be included in the facility's permit, there may not be any periodic monitoring associated with these limits. (Note that if the facility is allowed to burn fuel oil as a backup to natural gas, periodic monitoring must be included in the draft permit).

If the Permitting Authority decides not to include periodic monitoring to support a particular requirement, *the rationale for this determination must be included in the statement of basis.* The Permitting Authority may not leave out periodic monitoring without explanation. If you notice that a permit condition is not supported by periodic monitoring, you should note this in any comments your submit during the public comment period. Also, if the Permitting Authority provides an explanation for the lack of periodic monitoring that you are not satisfied with, you can note your disagreement in your comments.

(2) What factors should I consider when reviewing periodic monitoring?

Periodic monitoring requirements are established by each permitting authority on a case-by-case basis where the underlying requirement did not include adequate monitoring. Though a Title V permit must include the minimum amount of periodic monitoring required by 40 CFR Part 70, the Permitting Authority possesses a large degree of discretion over the frequency and type of monitoring that a facility is required to perform. This is an issue on which the public can influence a critical part of the permit.

Evaluating the adequacy of proposed periodic monitoring where the underlying applicable requirement does not contain periodic monitoring may be difficult if you lack technical knowledge. One shortcut is to ask for final copies of Title V permits for similar sources from other states.[20] You can then compare the periodic monitoring required under those permits to the draft permit that you are reviewing. If you choose this approach, you probably

[20] It probably won't be that helpful to compare permits for similar facilities in the same state, because the Permitting Authority probably uses the same periodic monitoring for similar facilities.

should look for draft and final permits on the Internet--particularly in light of the limited time that you have to review a permit. Refer to Appendix B for a list of state and local agency Title V websites.

In addition to looking at permits for similar facilities, you should ask yourself the following questions when the underlying requirement does not include periodic testing and monitoring:

- *Does the facility use a pollution control device to comply with the limit?* If such a device is used and it would prevent a violation if it were functioning properly, the best option may be to monitor the equipment for proper operation.

- *How much are the facility's emissions likely to vary over the course of the permit term?* A facility that uses paints that release VOCs would not need to monitor the VOC content of its paints frequently if it uses the same set of paints throughout the year. A facility that changes operations frequently depending on demand would require more frequent monitoring to provide a reasonable assurance that the facility is complying with permit requirements.

- *What is the likelihood that the facility will violate the requirement?* You can look at the facility's prior stack tests and inspection reports to find out how close the facility came to violating the requirement. You can usually assume that any facility that burns oil or coal has a high potential to violate opacity standards.

Keep in mind that periodic monitoring can include a mix of monitoring techniques. For example, a facility's permit might require daily or weekly inspections of pollution control equipment in addition to a stack test every few months. Also, instead of requiring a facility to monitor pollution coming from its smokestack, a permit might allow a facility to monitor some other aspect of its operations instead. This type of monitoring is called "surrogate" (e.g. substitute) monitoring. Surrogate monitoring is allowed when (1) monitoring of actual emissions is very expensive and/or impractical, and (2) surrogate monitoring is adequate to assure compliance with the underlying applicable requirement. For example, a permit condition might limit the amount of SO2 that a facility can release each hour. Instead of requiring the facility to directly monitor the amount of SO2 that comes out of its smokestack, the permit might require the facility to keep track of the sulfur content of fuel burned and the amount burned each hour. If you find surrogate monitoring in a draft permit, make sure that the permit's statement of basis includes an explanation

of the relationship between the surrogate monitoring and the facility's compliance with the actual limit. In this example, the statement of basis would need to explain why a limit on the amount of fuel the facility burns each hour shows compliance with the SO2 limit.

4. Does the draft permit require the facility to submit reports of required monitoring on a timely basis?

One of the most important things to look for when reviewing a draft Title V permit is whether the facility is required to submit regular monitoring reports to the Permitting Authority. If the draft permit lacks adequate reporting requirements, it will be difficult for you to monitor the facility's compliance with permit conditions.

40 CFR § 70.6(a)(3)(iii)(A) provides that a permitted facility submit "reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with § 70.5(d) of this part." Once a monitoring report or a compliance certification is submitted to the Permitting Authority, it must be made available to the public.[21] By reviewing these documents, you can determine whether a permitted facility is complying with the terms of its permit.

40 CFR § 70.6(a)(3)(iii)(A) does not spell out the specific contents of a six-month monitoring report. Thus, you may discover that while a draft permit includes a general condition requiring the facility to submit monitoring reports every six months, the draft permit does not indicate what must be included in these reports. This is where you are most likely to encounter problems. If the final permit is vague regarding the contents of these documents, you may end up with very little useful information when those documents are submitted.

Though there is no set standard by which the adequacy of these reports may be evaluated, it is clear that the reports must inform the public of monitoring results and confirm that the facility is actually performing all

[21] In addition to reviewing reports submitted to the Permitting Authority, you have the right to review certain monitoring records that are kept at the facility. Under 40 CFR § 70.6(a)(3)(ii), all records of monitoring required under a facility's Title V permit must be kept at the facility for a minimum of five years. (This is a separate requirement from the requirement that the facility submit a report of required monitoring at least once every six months). You should be able to obtain access to these documents through an informal request to the permitting authority or under your state's open records law.

monitoring required under its permit. You should make every effort to clarify the required contents of monitoring reports before the final permit is issued.

What to look out for:

First, locate the general condition in the draft permit that requires the facility to submit monitoring reports every six months and make sure that this general condition satisfies 40 CFR § 70.6(a)(3)(iii)(A).

Second, look for language in the draft permit that might conflict with the requirement that the facility submit a report of any required monitoring at least every six months. Particularly in situations where the Permitting Authority simply copies a regulatory or statutory requirement into a draft permit, the draft permit may indicate that reporting is required only upon request by the agency. For example, a permit condition might look something like the following:

> Condition 54: No person shall operate a stationary combustion installation which emits smoke that equals or exceeds 20 percent opacity for a period of three or more minutes during any continuous 60-minute period.
>
> Parameter monitored: opacity
> Monitoring type: EPA Method 9
> Reporting Requirements: UPON REQUEST BY REGULATORY AGENCY

If you find this flaw in a draft permit, you should point it out in any comments that you submit during the public comment period. A permit condition such as the one above causes confusion over what must be included in the facility's six-month monitoring report. The facility could argue that the monitoring required under this condition does not need to be included in the six-month monitoring report because it specifically states that reporting is only due upon request. Under Title V, the facility must submit a report of any required monitoring at least every six months. At the very least, the permit condition above should state that reporting is required "every six months and upon request by regulatory agency." If you have reason to believe that the facility might violate a permit condition, you can ask for more frequent reporting in your comments.

5. Does the draft permit require the facility to certify whether it is in compliance with all permit requirements at least once each year?

As discussed on page 56, every Title V permit must include a general condition that provides that the facility must certify compliance with permit requirements at least once each year. See 40 CFR § 70.6(c)(5). Under Part 70, the facility is required to certify compliance with *all* permit conditions, not just those that are accompanied by periodic monitoring. This is important because there are many permit conditions for which compliance cannot be monitored very easily. For example, most Title V permits will include a generic condition stating that if the facility is modified in a major way, the facility must obtain a special preconstruction permit. The compliance certification is the best way to assure that the facility is complying with conditions such as these.

Look for language in the draft permit that might limit the facility's obligation to certify compliance with all permit conditions. For example, the draft permit might single out certain draft permit requirements as subject to the compliance certification requirement, creating doubts as to whether the compliance certification applies to the remaining requirements. When you review compliance certification requirements in a draft permit, imagine what the compliance certification will look like based upon the permit language. You should request additional permit terms in your comments if there is any ambiguity over the compliance certification.

Your Permitting Authority may have developed a compliance certification form for the facility to fill out each year. This form may or may not be attached to the draft permit. Check with the Permitting Authority to see whether such a form exists. (40 CFR Part 70 does not require the Permitting Authority to develop such a form). If a compliance certification form has been developed for the facility, obtain a copy and review it carefully in conjunction with the draft permit. Remember that the annual compliance certification is one of the most important aspects of the Title V permitting program. If you have any doubt as to the adequacy of compliance certification requirements in a draft permit, it is essential that you raise the issue in your comments on the draft permit. If you don't raise the issue during the public comment period (either in your written comments or in comments at a public hearing), you lose your right to raise this issue in a petition to U.S. EPA or in a court challenge to the final permit.

Step Six in Reviewing a Draft Permit: Check to See Whether Any Federal Requirements Are Incorrectly Identified as State Only Requirements

Sometimes, a Permitting Authority will misidentify a federally enforceable requirement as being enforceable only by the State. The confusion usually involves whether or not a particular requirement is included in the state's SIP.

Permitting Authorities are not required to include state-only requirements in their Title V permits, but most do. Usually, the Permitting Authority places "state-only" conditions in a separate section of the permit. Some permitting authorities simply include a statement next to particular permit conditions indicating that those conditions are only enforceable by the state.

If the Permitting Authority incorrectly identifies a federally-enforceable requirement as state-only, it may be difficult for U.S. EPA or the public to enforce the misidentified requirement. When reviewing a draft permit, you should review any condition that is identified as state-only to see if it is actually in the SIP. Remember that even though the requirements in the SIP might be based upon out-dated state regulations, they are still federally enforceable until they are removed from the SIP.

Chapter Five

Submitting Comments on a Draft Title V Permit

If possible, try to leave plenty of time to compose your comments. For each problem that you identify in the draft permit, you should discuss the problem by (1) describing the problem, (2) identifying the rule that governs the issue, (3) explaining how the rule applies to the problem, and (4) concluding with how the draft permit must be modified to comply with the rule.
In addition, keep the tips provided below in mind when composing your comments.

A. Tips on how to write an effective comment letter

- **Be specific.** For example, rather than making a generic statement that the draft permit lacks adequate periodic monitoring, identify draft permit conditions that need additional periodic monitoring. If possible, provide a periodic monitoring suggestion. The best way to come up with a good periodic monitoring suggestion is to examine a Title V permit for a similar facility located in another state, or even for a similar facility located in another part of your state. If you do not have time to track down such a permit, then be as specific as possible about why the periodic monitoring in the draft permit is inadequate (e.g. "The only periodic monitoring required under Condition 32.1 is a yearly stack test. A yearly stack test is insufficient to assure the facility's compliance with the applicable requirement. Condition 32.1 must be modified to include regular periodic monitoring in addition to a yearly stack test").

- **Use "must" whenever appropriate.** If you believe that a requirement mandates a certain change in the draft permit, use "must" rather than "should." For example, you can say that "[The Permitting Authority] must require periodic monitoring to support this condition." Only use "should" when you are quite certain that the Permitting Authority has discretion over whether or not to heed your advice.

- **Use declarative sentences rather than questions.** Often, you will lack information that is necessary for determining whether a particular requirement applies to a facility, or whether a certain type of monitoring will assure that the facility is complying with the law. If you need to know the answer to a question in order to make your argument, then argue in the

alternative. For example, you might say "If this requirement does apply to the Midtown Medical Center's medical waste incinerator, it must be supplemented with periodic monitoring. If this requirement does not apply to Midtown Medical Center's medical waste incinerator, it must be deleted from the draft permit."

- **Cite statutes and regulations.** Whenever possible, cite a statute or regulation to support your argument. It also helps to cite to U.S. EPA guidance on an issue. U.S. EPA guidance is not legally enforceable, but it is usually given a lot of weight by permitting authorities and courts. If all else fails, make your argument based upon common sense about what the program is meant to accomplish. It may be that there is a statute, regulation or guidance on the topic, but you have not been able to locate it. Your comments are still valid even if you do not cite to a law that proves your point.

- **Attach supporting documentation, if necessary.** Feel free to attach supporting documentation to your comments. If you want the supporting documentation to be considered part of your comments, you must say so in the body of your comments.

- **Mention any potential problem with the draft permit.** Include everything that you believe might be a problem in the draft permit, even if you haven't had time to develop your argument in any detail. If you later decide to submit a petition to U.S. EPA regarding its decision not to object to the permit, your petition may only cover problems that you identified in your original comments (unless a new issue arises that you could not have known about during the public comment period).

- **Consider requesting a public hearing.** If a public hearing has not been scheduled, consider whether to request one in your written comments. If there is any chance that you might challenge the final permit in state court, you want to take advantage of every opportunity for public comment offered by the Permitting Authority. If you don't at least ask for a public hearing, a state court could determine that you gave up your rights to take the Permitting Authority to court.

B. When is it reasonable to argue that a facility should be denied a Title V permit and shut down?

If it appears that a facility is unable or unwilling to comply with applicable requirements, it is reasonable to argue that a facility should be denied a Title V permit and shut down.

Particularly when reviewing a permit for a facility that has a history of persistent air quality violations, consider whether the Title V permit "assures compliance by the source with all applicable requirements" as mandated by 40 CFR § 70.1(b). Federal law is clear that a Title V permit may be issued only if "[t]he conditions of the permit provide for compliance with all applicable requirements." 40 CFR § 70.7(a)(iv). If the facility is a long-standing violator and has not made any significant changes to its equipment or operations to solve the problem, you can make a strong argument that a Title V permit cannot be issued to the facility because the permit cannot assure that the facility will comply with the law.

C. What kind of response to my comments should I expect to receive from the Permitting Authority?

Federal regulations do not require the Permitting Authority to provide a written response to your comments, but many state laws require such a response. Ask your Permitting Authority if you aren't sure whether to expect a written response to your comments.

If your state law does not require the Permitting Authority to provide you with a written response to your comments, the Permitting Authority may forward a proposed permit to U.S. EPA for review without notifying you and without preparing a written response to your comments. Thus, you need to maintain steady contact with your U.S. EPA regional office and the Permitting Authority in order to be certain of when the Permitting Authority forwards a proposed permit to U.S. EPA for review.

D. If the permit is revised following the public comment period, will I get a chance to comment on the revised permit?

Possibly. If the Permitting Authority makes substantial changes to the draft permit after the public comment period and does not release the revised permit for a new public comment period, you can argue that the public must be given a new opportunity to review the draft permit before the permit is

submitted to U.S EPA for review. The best way to know whether the Permitting Authority made substantial changes to the draft permit following the public comment period is to request a copy of the "proposed" permit that the Permitting Authority sent to U.S. EPA for review. You can request a copy of the proposed permit from either U.S. EPA or the Permitting Authority.

E. What do I do if the Permitting Authority does not revise the permit in light of my comments?

Try not to be discouraged if many of the issues you raised in your comments remain unresolved when the proposed permit is forwarded to U.S. EPA. The Permitting Authority might be waiting to see how U.S. EPA responds to your comments. In general, the Permitting Authority can rely upon the fact that if U.S. EPA sees a problem with a proposed permit, U.S. EPA will give the Permitting Authority a chance to resolve the problem before the Administrator formally objects to the permit.

Once you get a response from the Permitting Authority (or once you discover that the proposed permit has been forwarded to the U.S. EPA), you should focus on getting U.S. EPA to object to the proposed permit if you think that the permit does not comply with legal requirements. A petition requesting that U.S. EPA object to a proposed permit must be based on comments filed with the Permitting Authority during the public comment period. U.S. EPA objections are covered in the next chapter.

Chapter Six

U.S. EPA Objection to a Title V Permit

A key feature of the Title V program is that the U.S. EPA Administrator has the authority (and sometimes the obligation) to object to a permit. The importance of U.S. EPA's oversight role is emphasized by the Clean Air Act mandate that every permit be subject to a 45-day U.S. EPA review period before it is finalized.

If you comment on a draft permit during the relevant public comment period and end up dissatisfied with the proposed permit that the Permitting Authority sends to U.S. EPA, you can ask the Administrator to object to the permit. This chapter explains why the Administrator might object to a permit, what happens after an objection, and how you can play a role in the process.

> 🕮 A permit is called a **draft permit** once it is released for the required 30-day public comment period. A draft permit becomes a **proposed permit** when it is forwarded to U.S. EPA for U.S. EPA's 45-day review period. Note that in some states U.S. EPA's 45-day review period runs at the same time as the 30-day public comment period.

A. When can the U.S. EPA Administrator object to a permit?

The U.S. EPA Administrator can object to a Title V permit at two points. First, the Administrator may object to a proposed permit during U.S. EPA's 45-day review period. Second, the Administrator can object to a Title V permit in response to a public petition received within 60 days after the end of the 45-day review period. (It is important for keep track of when U.S. EPA receives the proposed permit because you need to know when the 60-day period for petitioning U.S. EPA begins and ends.)

B. Is the U.S. EPA Administrator ever required to object to a proposed Title V permit?

Yes. 40 CFR § 70.8(c)(1) provides that:

> The [U.S. EPA] Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.

1. How might a proposed permit not be "in compliance with applicable requirements"?

A proposed permit violates an applicable requirement if the applicable requirement is improperly left out of the permit or if the applicable requirement is incorrectly described or applied in the permit. "Applicable requirements" are substantive requirements that are designed to achieve or maintain air quality standards under the Clean Air Act. For example, an applicable requirement might limit the amount of particulates that a facility is allowed to release into the air. Applicable requirements include SIP requirements (typically found in state statute or regulation) as well as air quality requirements mandated by federal regulations. "State-only" requirements (requirements in a state statute or regulation that are not part of the SIP) are not "applicable requirements." The U.S. EPA Administrator cannot object to a proposed permit on the basis that it does not comply with a state-only requirement.

If the U.S. EPA Administrator determines that a proposed permit does not comply with legal requirements, he or she must object to the proposed permit.

2. What does 40 CFR § 70.8(c)(1) mean when it says that the U.S. EPA Administrator will object to a proposed permit if it is not in compliance with "the requirements of this part"?

By "the requirements of this part," 40 CFR § 70.8(c)(1) is referring to the requirements of 40 CFR Part 70. Part 70 requirements are distinct from applicable requirements in that they are primarily procedural—they do not establish specific emission standards or limitations.

An example of a Part 70 requirement that sometimes leads to an objection by the U.S. EPA Administrator is 40 CFR § 70.6(a)(1), which mandates that a Title V permit "assure compliance with all applicable requirements." 40 CFR § 70.6(a)(1) does not, by itself, require a facility to comply with any sort of emission standard or limitation. If no underlying applicable requirement applies to a particular facility (which of course, is highly unlikely) 40 CFR § 70.6(a)(1) is irrelevant. If an applicable requirement does apply to a facility and the facility's proposed permit lacks monitoring, recordkeeping, and reporting that is sufficient to "assure compliance" with that requirement, the Administrator must object to the proposed permit.

C. Are there circumstances in which the U.S. EPA Administrator is not required to object to a proposed permit, but may object if he or she chooses to do so?

Yes. There are a few circumstances in which the U.S. EPA Administrator may object to a proposed permit even though he or she has not determined that the proposed permit violates applicable requirements or the requirements of Part 70. 40 CFR § 70.9(c)(3) provides that:

> Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:
> (i) Comply with paragraphs (a) [requiring the Permitting Authority to transmit the proposed permit, the permit application, and other information needed to effectively review the proposed permit] or (b) [requiring the Permitting Authority to give notice of the proposed permit to any affected state] of this section;
> (ii) Submit any information necessary to review adequately the proposed permit; or
> (iii) Process the permit under the procedures approved to meet § 70.7(h) of this part [governing public participation] except for minor permit modifications.

As a member of the public, it is unlikely that you will know whether U.S. EPA has a reason to object to a proposed permit based upon § 70.9(c)(3)(i) or § 70.9(c)(3)(ii). As for whether the Permitting Authority follows the required procedures for public participation, U.S. EPA might not be aware of a problem unless you bring it to the agency's attention. As discussed earlier in this handbook, if you believe that the Permitting Authority is not complying with the public participation requirements of 40 CFR § 70.7(h), you should describe the problem in any comments that you submit during the relevant public comment period. If the Permitting Authority does not take action to remedy the problem after being notified, you can raise these issues with U.S. EPA through the petition process as discussed below.

D. On what basis is the Administrator most likely to object to a proposed permit?

The most common reason for the Administrator to object to a proposed permit is that it lacks sufficient periodic monitoring to assure compliance with applicable requirements. The Administrator has also objected to a proposed

permit because it did not include applicable New Source Review requirements and New Source Performance Standards.

E. What happens if the Administrator objects to a proposed permit?

A permit cannot be issued if U.S. EPA objects to it within the 45-day U.S. EPA review period. If U.S. EPA chooses to object to a permit, it must give the Permitting Authority a written explanation for the objection that identifies the terms or conditions that need to be changed or added to the permit. U.S. EPA must allow the Permitting Authority 90 days to submit a revised version of the proposed permit. If the Permitting Authority misses the 90 day deadline, U.S. EPA will either deny the permit, or develop a new permit for the facility independent of the state or local Permitting Authority.

F. Is it common for the Administrator to object to a proposed Title V permit?

It has been relatively uncommon for the Administrator to object to a permit. But the Title V program is still new and members of the public have not yet asked the agency to object to many permits. U.S. EPA is under pressure from state and local permitting authorities to restrict the number of objections that it makes to proposed Title V permits. Thus, U.S. EPA tries to resolve any problems with a permit without resorting to a formal objection. The Administrator is unlikely to formally object to a proposed Title V permit unless U.S. EPA and the Permitting Authority fail to reach an agreement on permit terms prior to the end of U.S. EPA's 45-day review period.

G. Do my comments on a draft Title V permit increase the likelihood that U.S. EPA will object to a proposed Title V permit?

Yes. When the Permitting Authority forwards a proposed permit to U.S. EPA for review, it also forwards its response to any public comments. As you might remember from earlier in this handbook, U.S EPA does not actually review every proposed permit. Because U.S. EPA is more likely to review a proposed permit that generated public comment during the public comment period, public comments increase the likelihood that U.S. EPA will object to a proposed permit. Once the Permitting Authority forwards a proposed permit to U.S. EPA for review, you might want to contact the Chief of Permitting[22] at your U.S. EPA regional office to find out if he or she has a copy of your

[22] Staff titles and division names vary among the ten U.S. EPA regional offices.

comments. If not, provide a copy. This way, you can be certain that U.S. EPA is aware of your interest in the proposed permit.

H. What can I do if the U.S. EPA Administrator fails to object to a proposed permit that I believe violates legal requirements?

If U.S. EPA fails to object to a proposed permit that you believe is legally defective, you have the right to petition U.S. EPA to reconsider its failure to object to the permit so long as your petition is based upon comments that you submitted to the Permitting Authority during the public comment period. ***You have no right to petition U.S. EPA to object to a permit if you failed to submit comments on the draft permit during the applicable public comment period.*** The only exceptions to this rule are (1) when you can demonstrate that it was impracticable for you to raise your objection within the public comment period, or (2) when grounds for your objection arose after the public comment period. Exceptions will be rare.

There are several reasons for you to file a petition with U.S. EPA. First, it is possible that U.S. EPA did not actually review the proposed permit during the review period, and therefore was not aware of any problems with the permit. Second, even if the proposed permit was reviewed, U.S. EPA might rethink its position on the permit in light of your petition. Third, you should file a petition if there is any chance that you might want to take advantage of your right to sue U.S. EPA in federal court for failing to object to the proposed permit.

I. What is the procedure for petitioning U.S. EPA to object to a permit?

At the close of EPA's 45-day review period, any person who submitted comments during the relevant public comment period (either in written form or at a public hearing) has a right to petition U.S. EPA to reconsider its decision not to object to the permit. You have *sixty days* from the end of U.S. EPA's 45-day review period to file your petition.

The most difficult aspect of the petition process is knowing when to submit the petition. Unfortunately, federal law does not require U.S. EPA to announce the end of the U.S. EPA review period, and it does not specifically require the state Permitting Authority to notify the public when the proposed permit is submitted to U.S. EPA for review. In a few states, EPA's 45-day review period starts at the beginning of the 30-day public comment period. If

you are interested in petitioning U.S. EPA to reject a permit, you should contact U.S. EPA and your Permitting Authority frequently to monitor their progress in processing the permit. Ask when U.S. EPA's 45-day review period will end.

After you submit a petition, the U.S. EPA Administrator has 60 days to respond.

J. What issues should I include in my petition to U.S. EPA?

You generally are not allowed to raise issues in your petition that you failed to mention in the comments you submitted to the Permitting Authority during the public comment period. However, so long as you at least brought up the issue in your public comments, you can expand upon the issue in your petition. For example, you might submit a comment during the comment period similar to the following:

> The Environmental Protection Division must determine whether Apollo Corp. is required to comply with new source performance standards ("NSPS"). If these standards apply to ABC Corp, they must be incorporated into the permit.

After the public comment period ends, you may uncover particular facts about Apollo Corp. that indicates that NSPS requirements, in fact, apply to the facility. If you raised the NSPS issue in your comments on the draft permit as suggested above, you could include these newly discovered facts in a petition to U.S. EPA.

The only exception to the rule that the issues raised in your petition must have been included in your public comments is when you can demonstrate that it wasn't reasonable to expect you to raise a particular objection during the public comment period. For example, if the final permit is so drastically different from the draft permit that you could not have anticipated the new issue, you will most likely be allowed to include these new issues in your petition to U.S. EPA.

There may be some issues that you choose not to include in your petition to U.S. EPA even though you included them in comments that you submitted during the public comment period. The Permitting Authority has a tremendous amount of discretion as to the content of a permit. Thus, when deciding what to include in comments that you make during the public

comment period, it makes sense to include anything that might positively influence the way the Permitting Authority exercises its discretion. Some of the recommendations that you make to the Permitting Authority may be entirely within the Permitting Authority's discretion. For example, some of your comments might relate to state-only requirements. U.S. EPA cannot object to a proposed permit on the basis that it does not assure compliance with a state-only requirement. Thus, it won't do much good to include such comments in your petition to U.S. EPA.

K. Do I need a lawyer to petition the U.S. EPA Administrator to object to a permit?

No. It is not necessary to retain a lawyer to petition U.S. EPA to object to a permit. Petitioning U.S. EPA is fairly simple, particularly since the issues you raise in your petition must be based upon the comments that you submitted to the Permitting Authority during the public comment period.

Though you aren't required to retain a lawyer to petition U.S. EPA to object to a permit, a lawyer may be helpful. If U.S. EPA denies your petition and you decide to bring a lawsuit against U.S. EPA challenging this denial, your petition forms part of the "record" that serves as the basis for your lawsuit. A lawyer can assist you in making sure that your petition adequately covers critical issues. A petition signed by a lawyer also suggests that you may file a lawsuit against U.S. EPA if your petition is denied.

L. Where do I send my petition?

You must send a copy of your petition to the Permitting Authority and the applicant, as well as to the U.S. EPA Administrator at 401 M Street, S.W., Washington, D.C. 20460. It is also a good idea to send your petition to the Regional U.S. EPA Administrator for the region in which the permit applicant's facility is located.

M. What happens if U.S. EPA grants my petition and objects to the permit?

If U.S. EPA grants your petition, then the Permitting Authority must revise and resubmit a proposed permit to U.S. EPA for review just as it would have been required to do if U.S. EPA objected to the permit during the 45-day review period.

N. What can I do if the Administrator denies my petition?

If the Administrator denies your petition, the denial must be accompanied by a statement of the reasons for the denial. The Administrator cannot arbitrarily deny a petition. Nevertheless, the Administrator has a lot of discretion over whether to make a determination that a permit violates applicable requirements or the requirements of Part 70. If you believe that your petition was improperly denied, you can sue U.S. EPA in the federal Court of Appeals. Refer to Chapter Three in Part Two of this handbook for introductory information on citizen enforcement of the Clean Air Act.

Box 6.1: Taking the Permitting Authority to State Court

Unless U.S. EPA objects, the Permitting Authority will issue a final permit at the end of U.S. EPA's 45-day review period. Once a permit becomes final, any person who participated in the public comment period may sue the Permitting Authority in state court on the basis that the Permitting Authority issued a permit that violates the law. Most people who challenge the decisions of state environmental agencies in court decide to get a lawyer.

A lawsuit brought in state court challenging a Title V permit must be filed by a deadline that begins when the permit becomes a final permit. The deadline will be no later than 90 days after final action on the permit. The time limit may be even shorter depending upon the law in your state. In most cases, U.S. EPA will not have responded to your petition before the state appeal deadline runs out. If this is the case, you will need to decide whether you want to bear the expense of filing an appeal in state court. If U.S. EPA accepts your petition after you file in state court, you can then consider dropping the case.

Part Two

Special Topics

Chapter One

How to Gain Access to Government Documents That Relate to a Title V Facility

by Keri Powell, New York Public Interest Research Group (New York, NY)

The most effective way to review a draft Title V permit is to get as much information about the permit applicant as possible. The type of information that might be helpful to you as you review a draft permit is discussed in Part One of this handbook (page 31). Most of this information is contained in documents that are held by the Permitting Authority. This chapter discusses how to obtain these documents.

Is the Permitting Authority required to provide the public with access to documents that are relevant to the development of a Title V permit?

Yes. Except in very unusual circumstances, all documents that relate to the development of a Title V permit must be made public. In fact, in order for a state to receive U.S. EPA approval to issue Title V permits the state must demonstrate that it will "[m]ake available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the [Clean Air] Act." See 40 CFR § 70.4(b)(3)(viii). Furthermore, 40 CFR § 70.7(h)(2) requires that the public notice announcing the availability of a draft permit for public comment include information about how members of the public can obtain "copies of the permit draft, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permitting decision."

What is the procedure for obtaining access to documents that are relevant to the development of a Title V permit?

It never hurts to just call up the Permitting Authority and ask for the documents that you need. If you are unsure of which documents contain the information you need, you may be able to find an employee at the Permitting Authority to explain which documents will be most helpful to you. Ask to speak to one of the Title V permit writers. If the Permitting Authority is confident that the documents you are requesting are meant to be public, you may be able to avoid the delay involved in making a formal request for documents. Since 40 CFR Part 70 is clear on what information should be made available to the public, there is generally no good reason for a permitting authority to require a formal written request under the State's open records act, unless you request a document provided by the facility and the permitting authority has not decided if it should be withheld because it is confidential business information. This is discussed in more detail below. If the Permitting Authority will not provide you with the necessary documents informally, you will need to submit a written request for the documents under your state's open records act.

Most state open records acts are posted on the Internet. (See www.misouri.edu/~foiwww/citelist.html for statutory citations and Internet links). Typically, state open record acts are modeled after the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552. In general, a state open records act provides the public with access to any document that is in the possession of a state agency or that is being held by someone else for the state agency. The information requested must be available in an existing document--open record acts never require the government to create a new document in response to an information request. Also, open record acts protect certain types of documents, and sometimes even portions of certain types of documents, from disclosure. For example, the government is not required to turn over information that could disrupt an ongoing enforcement action.

Submitting a formal request for documents is not difficult. Usually, all you need to do is the following:

(1) Contact the Permitting Authority and ask for the name and address of the open records law officer. This is the person to whom you should address your request. You may be allowed to fax or email your request.

(2) When you write the letter:

- **Cite to the law.** State that you are requesting documents pursuant to your state open records act. Use the proper statutory name of the law and provide the citation.

- **Be clear about the documents that you want, but don't make your request too narrow.** If you are interested in a document that you know exists, request that document with as much specificity as possible. If you do not know whether a document exists, then try to find out from the Permitting Authority whether it exists before making your request. If that doesn't work you can simply request "any and all documents" that relate to the topic you are interested in. Provide as much detail as possible, but don't make your request so narrow that you exclude closely related documents that might be helpful.

- **Request that copying fees be waived.** If you are requesting the information on behalf of a not-for-profit organization, or if you are using the information to benefit the public (which you definitely are if you are reviewing a Title V permit), then consider requesting a fee waiver. You must refer directly to your state law to find out whether fee waivers are available in your state.

- **Limit copying costs.** Whether or not you request a fee waiver, if copying costs are an issue consider including a statement that if the cost of copies exceeds a particular dollar amount, you wish to be contacted before the copies are made.

- **Consider requesting a chance to review the files before making copies.** If you expect that the documents you are requesting are lengthy and it is possible for you to visit the agency and review the documents (rather than having them

copied and sent to you), then you should request access to the documents, with the opportunity to copy documents if necessary. If you select this option, then consider requesting certain dates to visit the agency and review the files. Ask the records officer to contact you as soon as possible to schedule an appointment for you to review the documents.

- **Request electronically-stored information.** Don't forget that you can request copies of electronic mail and other documents that are only stored in electronic format. The definition of "document" or "record" is generally quite broad and will probably include documents that are only stored electronically.

- **CC your request to the relevant government employee.** Though you should address your document request to the designated records officer, it helps to send a copy to the person at the agency who knows where the record can be found, if you know who that person is. A records officer must respond to information requests on a wide variety of topics. Therefore, you should not assume that the records officer will know exactly who has access to the information that you request. If you CC the correct person on the letter that you send to the records officer, your information request may be processed more quickly.

(3) If possible, it is a good idea to send your request certified mail and save the receipt. That way, if you have trouble getting the information in a timely manner you will have documentation of when the agency received your request.

(4) Follow up your request with a phone call to the records officer.

A sample document request is included on page 29.

What do I do if the Permitting Authority denies my request, or does not respond to my request in a timely manner?

If the Permitting Authority denies your document request, make sure you understand the reason(s) and ask that the Permitting Authority tell you the specific provision of state law that the agency is relying on. If you disagree with the Permitting Authority's interpretation of the law, or if you believe that the law conflicts with the public availability of documents under 40 CFR Part 70, ask to speak to a supervisor. If that doesn't work, notify the Regional Office of U.S. EPA and ask them to intervene.

Your state open records law probably gives you the right to file an appeal with some kind of state review board or individual if your request for documents is denied. Furthermore, if the agency does not respond to your request within a reasonable amount of time, you may be able to treat it as denied and go ahead and file an appeal. Refer to your state law for more information.

One resource that is available to the public is the Freedom of Information Clearinghouse which is a project of Ralph Nader's Center for Study of Responsive Law. They provide technical and legal assistance to individuals and public interest groups who

seek access to information held by government agencies. You can contact them at P.O. Box 19367, Washington, D.C. 20036. Phone: (202) 588-7790.

What do I do if the Permitting Authority claims that some of the information I request is confidential?

If the Permitting Authority concludes that information you requested is confidential, you should be provided with a written explanation. If you believe that the information should not be treated as confidential, you can appeal the confidentiality determination in accordance with the procedures outlined in your state open records law.

Permitting authorities must release Title V permit applications, compliance plans, permits, and monitoring and compliance certification reports, except for information entitled to confidential treatment under section 114(c) of the Clean Air Act.

Section 114(c) says that any of the records, sampling, reports, and certifications that U.S. EPA has obtained from a regulated facility shall be made available to the public except if U.S. EPA determined that the information "would divulge methods or processes entitled to protection as trade secrets . . .." Note that this protection does not apply to emissions data or to Title V permits themselves. The federal government's general regulations on what qualifies for confidential treatment are found at 40 CFR Part 2.

The Permitting Authority will follow state procedures in determining whether information *claimed* as confidential business information qualifies for protection, using a definition that is no broader than the federal definition.

What can I do to get quick access to facility documents after the comment period has already begun for the facility's draft Title V permit?

Because it may take a fair amount of time for the Permitting Authority to respond to an information request, a state open records act may not be a reliable method for obtaining information about a facility after the public comment period for the draft permit begins. If you know that you want to review a facility's draft Title V permit well in advance of the start of the public comment period, then you probably have time to mail a written request to the agency and wait for the agency to process the request. If you only become aware of the start of the public comment period upon seeing the Permitting Authority's public notice, then you probably cannot afford to wait for the agency to process your open records request. After all, the public comment period only lasts for thirty days, and chances are that some of that time elapsed before you were aware that the public comment period had begun.

If the public comment period has already begun for the draft permit that you are reviewing, you should demand immediate access to all documents containing information relied upon by the Permitting Authority in developing the draft permit. The Permitting Authority should not be able to shorten your review period by making you wait for the response to an open records request. Any issues related to confidential business information or one of the other exemptions found in the state's open records law should have been resolved before the start of the public comment period. If the Permitting Authority does not produce these documents in a timely manner, you should request an extension of the

public comment period. If the Permitting Authority does not agree, you should contact your U.S. EPA regional office and ask them to intervene. Point out that the Permitting Authority's interpretation of the availability of records leads to the illogical result that while the public notice informs the public of how they can obtain the necessary information, the information may not be made available to the requestor until near the close of the public comment period, or possibly even after the public comment period ends. If all else fails, you can argue in your comments on the draft permit (or at a public hearing, if one is held) that the permit must be denied because the Permitting Authority did not provide a reasonable opportunity for public comment. See 40 CFR § 70.7(h) (requiring "adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit."). Similarly, you can petition U.S. EPA to object to the permit if the public is not provided with a reasonable opportunity to participate during the public comment period.

Sample Information Request

Trufalla Tree Trust, Inc.
9 Barbaloot Street, 3rd Floor
New York, New York 10007

June 2, 2001

CERTIFIED MAIL
Mr. Scott Chantland
Freedom of Information Officer
New York State Department of Environmental Conservation
50 Wolf Road
Room 602
Albany, New York 12233-1016

Dear Mr. Chantland:

In accordance with the New York Freedom of Information Law, Article 6 of the Public Officers Law, Trufalla Tree Trust requests access, for review and copying, to the following documents pertaining to Winter Corp., 65 Industrial Ave., Permit I.D. 75-S2005, located in New York, New York:

Any documents, memorandum, letters, reports, requests, and/or data, including information maintained only in electronic format such as electronic mail, pertaining to:

- a copy of the above facility's Clean Air Act Title V permit application;
- all existing air permits for the above facility;
- documentation regarding emissions or compliance monitoring for the above facility from the past three years;
- documentation of any existing compliance plans, schedules of compliance, and compliance certifications; and
- documentation regarding inspections, fines, and enforcement actions taken against the above facility.

If there are any fees imposed for searching and copying this information, please inform me of that fact before complying with this request. However, please note that I am seeking this information as a staff person of a 501(c)(3) non-profit, public interest organization. The records I am requesting are essential to the investigation we are conducting. Since this information will primarily benefit the public, I hope you will decide to waive all fees associated with this request.

I would appreciate it if you would process this request as quickly as possible. The Freedom of Information law requires that you make the records I have requested available or furnish a written denial within five business days of the time you receive this request. If you choose to deny access to the records that I have requested, I would like to know specifically what is being denied and the legal basis, under paragraph 2 of section 87 of the Public Officers Law, for such denial.

Thank you for your time and effort. I look forward to your prompt reply.

Sincerely,

Elena Bennett
Staff Scientist, Trufalla Tree Trust

CC: Keiko Nishimura, Region 2 Permit Administrato

Chapter Two

Title V and Environmental Justice

By Anjali Mathur, Earth Day Coalition (Cleveland, Ohio)

I. Introduction

What is environmental justice?

The United States Environmental Protection Agency (U.S. EPA) defines environmental justice (EJ) as:

> the fair treatment and meaningful involvement of all people regardless of race, color, natural origin, or income with respect to the development, implementation and enforcement of environmental law, regulations and policies. Fair treatment means that no groups of people, including racial, ethnic or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

(Final Guidance for Incorporating Environmental Justice Concerns in U.S. EPA's NEPA Compliance Analyses, April 1998).

As documented in government-initiated studies and in a groundbreaking study by the United Church of Christ Commission on Racial Justice in 1987, communities of color across the United States bear more than their fair share of environmental pollution. Proponents of environmental justice emphasize that these distressed communities should not be forced to choose between no jobs and no development on the one hand, and low paying and risky jobs and pollution on the other. To achieve environmental justice, residents of low-income and minority communities must be included in government decision-making processes that affect their health, their environment, and their quality of life. Permit proceedings under Title V of the Clean Air Act provide one such opportunity for community involvement.

How does Title V relate to environmental justice?

Since many Title V facilities are located in minority and low-income communities, a well-designed Title V program can help improve air quality in these neighborhoods.

The Title V program provides a framework in which facilities that illegally pollute the air are brought to the attention of government agencies and the public. Before a Title V permit can be issued to a facility, the Clean Air Act requires the Permitting Authority (usually a state or local environmental agency) to provide the public with an opportunity to comment on a draft version of the permit. In addition, the Clean Air Act allows members of the public to request a public hearing

so that they can voice their concerns about the draft permit to government regulators (and sometimes to the permit applicant).

By participating in the public comment period, neighborhood residents can make sure that a Title V permit issued to a facility in their community (1) includes all applicable air quality requirements, and (2) requires regular monitoring, recordkeeping, and reporting designed to assure that the facility complies with those requirements.

In addition to the type of comments discussed in Part One of this handbook (e.g., insufficient monitoring), public comments on a draft permit sometimes include comments that are based in part upon government policies and statutes designed to address civil rights and environmental justice concerns.

What existing government policies and statutes address environmental justice concerns?

In 1994, President Clinton issued an Executive Order 12898 requiring federal agencies to address the environmental justice impacts of government policies and activities. In response, U.S. EPA developed policies to address environmental justice concerns. While the Executive Order has significant ramifications, people outside of the government may not enforce the Executive Order in court.

Some environmental justice claims have been brought in court under Title VI of the Civil Rights Act of 1964 (Title VI). Any person may bring a lawsuit to enforce his or her civil rights under Title VI. Because environmental justice claims under Title VI are relatively new, the usefulness of Title VI as a tool for achieving environmental justice is yet to be determined.

The Executive Order and Title VI are discussed in more detail below.

The Executive Order and Title VI: Yes, they are different.

It is important to appreciate the difference between Title VI and the Executive Order. (Note: Title VI of the Civil Rights Act is different from Title V of the Clean Air Act which is the focus of this handbook). First, Title VI is a statute and has established procedures for filing administrative complaints with U.S. EPA or other agencies. More information about the process for filing a Title VI complaint is available at http://www.epa.gov/civilrights/extcom.htm. Title VI can be enforced by the public in court. Unlike Title VI, the Executive Order cannot be enforced in court. The fact that the Executive Order cannot be enforced in court does not mean that environmental justice arguments based upon the Executive Order should not be included in comments on a draft Title V permit. Instead, it means that an allegation that an agency is violating the Executive Order is more of a political argument than a legal argument that could be made in court.

Second, the circumstances under which Title VI applies are somewhat different from the circumstances under which the Executive Order applies. Title VI prohibits recipients of federal financial assistance (such as state permitting agencies) from discriminating on the basis of race, color

or national origin. The Executive Order applies specifically to low-income and minority communities, providing that:

> [E]ach federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

A claim under Title VI must be supported by demographic data demonstrating that the affected community may suffer from discrimination based upon race, color, or national origin. By contrast, any argument alleging that a government agency is not complying with the Executive Order must be supported by demographic data on the minority or income status of community residents.

Finally, the Executive Order offers one benefit that Title VI does not: the Executive Order mandates that every Federal agency ensure that public documents, notices and hearings are concise, understandable and readily accessible to the public. Translations may also be requested if your community is a mostly non-English speaking one.

The relationship between existing laws and government policies that relate to environmental justice concerns and the Title V program is still being established. At this time, it appears that most permitting authorities may not be familiar with and may not consider environmental justice concerns in relation to Title V permitting procedures. Nevertheless, a number of environmental and public health groups are working to promote environmental justice in the context of Title V by applying existing government policies and laws.

What information does the Title V program make available to the public that can be helpful to community residents?

A facility covered by the Title V program is required to get a permit that identifies all applicable air quality requirements and requires the facility to monitor its compliance with these requirements. At least every six months, the facility must submit monitoring reports to the permitting authority. These reports are available to the public. A community resident can examine a facility's Title V permit and monitoring reports to find out if the facility is complying with permit requirements. As the rest of this handbook suggests, there is no need to have an engineering or a law degree to carry out such an examination.

Title V requires that information about an air pollution source be made available to the public. A good Title V program will fulfill this mandate by requiring the information to be kept in one accessible place and in an understandable format.

What environmental justice issues might arise when a Title V permit is being developed for a facility located in a low-income or minority community?

The most important environmental justice concern relating to the development of a Title V permit is that the permit ensure the facility is complying with air quality laws. In this respect, a

permit being developed for a facility located in a low-income or minority community is no different from a Title V permit developed for a facility located in any other area.

An environmental justice issue might also arise when a Title V permit is proposed for a facility with a history of chronic air quality violations. Under the Clean Air Act, a Title V permit must assure the facility's compliance with all applicable air quality requirements. In the case of a chronic violator, it is doubtful that the facility's Title V permit will assure compliance unless it contains a credible compliance schedule or the facility has made some structural or operational change that addresses the specific pollution problem. It can be argued that an environmental justice claim arises when a Permitting Authority issues a Title V permit to a chronic violator located in a low-income or minority community.

It is important that you alert the Permitting Authority and U.S. EPA to any environmental justice concerns that you might have about a facility. In part, this is because if environmental justice is an issue, the Permitting Authority and U.S. EPA might be more inclined to give serious consideration to problems that you identify with the draft permit. In addition, as discussed below, it is possible that you can find support for your environmental justice arguments under existing government policies and laws.

II. Case Studies

Case Study #1: Raising Environmental Justice Concerns at a Public Hearing on a Draft Title V Permit

Earth Day Coalition (EDC) is a non-profit environmental education and advocacy group based in Cleveland, Ohio. When a Title V permit was proposed in July 1999 for a power plant located in a predominantly low-income and minority community in Cleveland, EDC and concerned community residents argued that the Permitting Authority did not sufficiently publicize the public hearing. As a result of the inadequate public notice, EDC had only ten days to research the details of the draft Title V permit and to determine if the community where the facility was located qualified as an "environmental justice" community under U.S. EPA Region 5's interim environmental justice guidelines. It was a difficult, if not an impossible challenge, to comprehend U.S. EPA Region 5's interim environmental justice guidance in this short period and to prepare credible testimonies on the environmental justice implications of the Title V permit. EDC also struggled with doing demographic analysis and demonstrating disproportionate existing environmental and health burdens due to lack of both resources and time. EDC referred to other Title V and environmental justice cases in the country such as the Detroit Edison Company, Conners Creek Power Plant case in Michigan.

At the public hearing, EDC requested that the permitting authority improve opportunities for public participation in Title V permit proceedings by:

- extending the public comment period for the draft permit to provide community residents with a more realistic opportunity to participate in the process;

- creating a mailing list of concerned residents and organizations for future hearings (EDC pointed out that it costs about $70 to subscribe to the Permitting Authority's publication of the hearing schedule. EDC asserted that no one should be expected to pay to access this information); and

- announcing future public hearings on the radio and TV.

EDC also described the results of a survey of hundred residents that it undertook as part of U.S. EPA's EMPACT initiative. The targeted communities were low-income and minority neighborhoods in Cleveland including two neighborhoods affected in this Title V case. The results of this survey indicated that:

- the average inner city resident is unaware of the link between human health and the environment (< 15% cited awareness);

- the crush of daily events makes this issue unlikely to rise to the level of functioning awareness without an extraordinary communication effort;

- the electronic media (TV and radio) are the major channels of daily information entering the households (> 85% cited these as one of their primary information sources.

See Northeast Ohio EMPACT Communications WorkGroup, *Environmental Monitoring for Public Access and Community Tracking, Population Communications Characteristics and Outreach Strategy Report*, Jan. 7 1999.

EDC then presented city-wide, county-wide and state-wide health information and discussed environmental health concerns based on local studies. EDC concluded by asserting that government infrastructure needs to evolve toward broader inclusion and community revitalization for promoting long-term environmental justice.

After taking time to reflect upon the public hearing, EDC reached the following conclusions:

(1) Many people attending the hearing were not familiar with Title V or the concept of environmental justice. To avoid this problem, the Permitting Authority should give a presentation on Title V and environmental justice at the start of each public hearing.

(2) Agency staff members who conducted the hearing were not particularly well-informed and were therefore unable to respond effectively to questions from the public. To avoid this problem, members of the public who request a public hearing should specifically ask the Permitting Authority to send someone to the hearing who is familiar with environmental justice issues and who can answer specific questions about the draft permit.

(3) At the end of a hearing, the staff conducting the hearing was unable to give clear responses to community queries such as: a) the immediate next steps in the Title V and environmental justice

process for both community groups and the Permitting Authority; b) where commenters' testimonies would be sent; and c) when commenters should expect to hear from the permitting authority. To avoid this problem, members of the public who request a public hearing should tell the Permitting Authority in advance that they expect for this information to be provided at the hearing.

EDC sent a letter to the Permitting Authority requesting that the agency take action to avoid the problems identified above at future hearings.

As of the date of this publication, nine months have elapsed since the public hearing. EDC and community residents continue to await the Permitting Authority's response to their comments on the draft permit.

Case Study #2: U.S. EPA Administrator Carol Browner Objects to a Title V Permit in Response to a Public Petition

A few years ago, the Shintech Corporation of Japan planned to build a $700 million PVC plant in Convent, LA. Residents of the largely low income and minority community in which the plant was to be built were divided over whether to oppose construction of the plant. There was strong opposition to the project based on the existing environmental and health burdens from other facilities in that part of Louisiana.

Opponents to the construction of the facility enlisted the help of the Tulane Environmental Law Clinic (TELC) and Rev. Jesse Jackson, who brought national attention to this cause. Community residents who favored building the facility had Governor Mike Foster on their side. Opponents challenged the construction on two fronts. They filed a complaint with the U.S. EPA Office of Civil Rights under Title VI, which resulted in a year-long investigation and the publication of several demographic analyses. More information on the case is available at http://www.epa.gov/civilrights/investig.htm.

In addition to filing a Title VI complaint, citizens voiced their opposition to the project using the procedures of the Title V program.

Louisiana's permitting program is a "merged program," which means that the Permitting Authority considers the preconstruction permit and the Title V operating permit at the same time. The State of Louisiana's Department of Environmental Quality (LDEQ) proposed to issue a preconstruction and an operating permit. Community members from both camps submitted comments and attended the public hearing on these permits. Without making changes, LDEQ submitted a proposed Title V permit to U.S. EPA's regional office for review. U.S. EPA did not object to the permit. The TELC then used one of the unique public participation features of Title V; it filed a petition asking the U.S. EPA Administrator to object to the permit. U.S. EPA Headquarters then got involved in evaluating the adequacy of the permit. Although U.S. EPA disagreed with most of the technical arguments made by TELC, the agency did find enough problems with the permit (including problems that TELC had not identified) to object to it. U.S. EPA sent the permit back to the Permitting Authority for revision.

Most of the problems that served as the basis for U.S. EPA's objection related to the preconstruction permit and the Permitting Authority's decision regarding what type of pollution control technology the facility would be required to install. U.S. EPA did not identify any of the Title VI issues raised in the petition as a basis for the Administrator's objection. Nevertheless, in a speech to the Congressional Black Caucus Environmental Justice Forum in Washington DC, U.S. EPA Administrator Carol Browner said that Shintech's Title V permit was reopened because the local residents convinced her through their petitions that concerns about disproportionate environmental hazards resulting from this facility needed attention. Browner advised the LDEQ to conduct further public hearings that would be attended by national environmental justice leaders and national U.S. EPA officials.

The Shintech case is often cited as the most watched and significant environmental justice victory. But this case is also significant because even though U.S. EPA did not accept the community's environmental justice objections, the publicity and public sentiment about the environmental justice issues caused U.S. EPA to go over the permit carefully. This led to the discovery of several serious problems with the preconstruction (PSD) part of the permit.

In light of the Shintech experience, corporations are much more likely to address community concerns, especially in low income and minority communities. In addition, the attention give to environmental justice in the Shintech case highlights the need for U.S. EPA Guidelines to address environmental justice issues effectively.

Shintech is now planning to build a smaller facility in Plaquemine, 40 miles upriver from Convent outside of Baton Rouge. Shintech is holding public hearings in Plaquemine to assess community interests and needs.

Demographics of Plaquemine, where Shintech is now planning to site the PVC facility, indicate that it is more affluent than Convent and less African American. But, Plaquemine is much more African American and much poorer than the majority of communities in the country. This raises the question of whether the composition of the affected community should be compared to state or national demographics when assessing the environmental justice implications of a new facility.

III. How To Get Your Community Effectively Involved in the Title V Permitting Process

Your community will be in a better position to address environmental justice issues associated with Title V permits if you have established a relationship with the Permitting Authority and your Region's U.S. EPA office before a draft permit is released for public comment. Make your concerns known, and let both agencies know how they can communicate effectively with members of your community. Write a letter or hold a meeting with the Permitting Authority and the U.S. EPA to explain your community's information needs and the best way to provide this information to community residents. For example, you can identify specific television and radio stations that are most watched or heard, and the local newspaper or community-based publications that are read most widely in your community. This will keep residents abreast of upcoming public comment periods and public hearings. It is not uncommon to find that a community is totally unaware of a

hearing held in their neighborhood because the state agency sent notices only to those on their mailing lists. Get on the mailing list of the Permitting Authority and of your Region's U.S. EPA office. If no mailing list exists, urge your Regional and State air agencies to get one started within at least one or two mile radius of the community of concern. If you know of particular Title V facilities that your community is concerned about, you can ask to be on a mailing list to receive notices of upcoming permit actions, such as the public comment period for a draft Title V permit.

Ask the Permitting Authority and your Region's U.S. EPA office if they have a community involvement plan or communications strategy. If not, urge them to develop one to host regular community meetings. This is a sure way of educating yourself and the community about the programs and policies of the Permitting Authority and U.S. EPA. Also, at these sessions, feel free to ask these agencies to follow up public meetings with training workshops and seminars on community concerns. Ask them to provide telephone hotlines. Make sure that no matter which U.S. EPA Region you are in, resources are effectively utilized to have the community involvement plan cover environmental justice and community-based environmental protection, lists of key community groups and their concerns. Suggest that the community involvement plan include information on activities where the community can participate with defined timelines and techniques (fact sheets, update letters, flyers, meetings). Also, encourage the Permitting Authority and your Regional U.S. EPA staff to participate in your civic and community activities.

Make sure that all concerned stakeholders, including grassroots and community organizations, homeowner and resident organizations, civic groups, environmental and public health organizations, indigenous people, religious groups, business and trade organizations and media/press, express their concerns to the Permitting Authority and U.S. EPA's Regional office.

If you have been notified about a draft Title V permit for a facility that is of concern to your community, a public hearing is a good place to express your views and present your environmental justice case. Make sure that you are aware of the date for submitting comments on a draft permit and the deadline for requesting a public hearing for a facility you are interested in. Comments made at a public hearings become part of the official administrative record, so make sure that you prepare testimony. Do not hesitate to speak out at or before the hearing about your lack of resources to conduct a demographic analysis. Ask the environmental justice coordinator in your Region's U.S. EPA office for resources to be made available to the community such as a GIS document (Geographic Information System--provides maps and tables) indicating the demographics of your neighborhood. Before the hearing, you should ask the Permitting Authority conducting the hearing, to make a brief presentation on the agency's framework for Title V and environmental justice. Also request as many visual aids as possible. Make sure that the meetings are held in places accessible by public transportation so most of your community can attend. Encourage people from the affected community to attend and testify. Places such as a public library, local church, community center or a school are good neutral locations.

At the end of a public hearing, make sure to ask about the next steps in the Title V and environmental justice process for both the Permitting Authority and concerned members of the community. You are entitled to answers to your questions. Make sure you have a contact person and phone number for your follow-up activities. Ask the permitting authority when they will get in

touch with you next. Make your concerns widely known and visible. You can send copies of your testimony to your federal, state and local elected officials and key community leaders.

IV. U.S. EPA's National Environmental Justice Guidelines

National guidelines to address environmental justice and Title VI issues are currently being drafted and are expected to be made publicly available in 2000. In the meantime, some of U.S. EPA's Regional offices (Regions 2,4,5,6 and 8) have developed interim environmental justice guidelines. U.S. EPA regional offices will provide copies of these guidelines upon request. You can use the Internet to find a contact name, telephone number and e-mail address from your Region's U.S. EPA homepage to make such a request. Your Region's U.S. EPA homepage can be accessed from the National U.S. EPA's home page at www.epa.gov. You can also call the national Environmental Justice Hotline at 1-800-962-6215.

It is important to note that even where a Region has adopted interim environmental justice guidelines, local permitting authorities are not required to implement them. They are, however, encouraged to consider them. In U.S. EPA Regions that have adopted interim guidelines, concerned members of the public should urge their Permitting Authority to take the guidelines into consideration. You should urge U.S. EPA's environmental justice coordinator in your Region to incorporate the national guidelines, when released, into your region's environmental justice policies.

The National or Regional guidelines may provide you with useful ideas for developing your community's strategy to better address EJ issues. The guidelines may, for example:

- contain a useful definition of "minority or low-income community;"
- suggest a range of options for the Permitting Authority to communicate effectively with environmental justice communities;
- contain protocols used by the U.S. EPA that the Permitting Authority should consider;
- support a request that U.S. EPA provide you with assistance to perform a demographic analysis of your community;
- provide ideas on how to suggest to the Permitting Authority that it measure potential disproportionate impacts of its proposed actions;
- suggest a menu of methods for developing special permit conditions that take disproportionate effects into account (e.g. enhanced monitoring, risk reduction);
- support closer communication and coordination between the Permitting Authority and U.S. EPA's Regional and National environmental justice offices;
- emphasize that enforcement personnel should enhance public outreach at all stages of an enforcement action and that enforcement personnel should be provided with effective tools for doing so;
- provide you with ideas on how to get your community involved in Supplemental Environmental Projects that are a part of the remedial action in an enforcement case.

V. Conclusion

As the struggle continues for a more environmentally just America, it is good to remember that voices are often heard where citizens are politically active.

Chapter Three

Citizen Enforcement of the Clean Air Act

By Marc Chytilo, Esq., Law Office of Marc Chytilo (Santa Barbara, CA)

The Clean Air Act, like many federal environmental laws, includes provisions giving citizens the ability to sue to enforce many of the Act's most important requirements. Congress recognized that government officials charged with law enforcement responsibilities may not always be in a position to use their enforcement authority as aggressively as may be warranted and understood that U.S. EPA may itself at times fail to perform its duties. "Citizen suits" – lawsuits filed by citizens to enforce provisions of the law – are important enforcement tools that Congress built into the law. Congress viewed citizen suits as such an important enforcement mechanism that it included within the Clean Air Act a provision that enables lawyers who win citizen suit cases to recover "attorneys fees" – the cost of their time billed at the market rate – from those who violate the Act. Lawsuits may be filed against three types of entities – the facility; the state permitting authority; and U.S. EPA. These lawsuits may seek to accomplish different types of outcomes. When a facility is currently violating their permit, the court may issue an injunction directing it to comply with the permit. Fines and penalties may be imposed by the court upon a facility for repeated past permit violations. Other actions may be brought to force U.S. EPA to act upon a proposed state program by certain deadlines or for U.S. EPA to take action against states that are not implementing or enforcing their Title V program effectively. Lawsuits may also be brought to stop a state from approving improper permits or ignoring their procedures for permit review.

Lawsuits Against Facilities

Title V claims against facilities will generally involve either operating without a permit or operating in violation of a permit requirement. Once Title V permits are issued, it is likely that claims related to failure to comply with the terms of a permit will be the most common form of Title V citizen suit litigation against facilities. There may also be claims against facilities in cases where the source either failed to apply for a Title V permit or failed to obtain one before the applicable deadlines. Most existing sources are required to have submitted an application for a state-issued Title V permit within 12 months after the state's permit program becomes effective, i.e., following U.S. EPA's partial, interim or complete program approval. These dates are provided in Appendix A of the Part 70 regulations. In addition, a claim could arise when a permit holder revises the manner in which it is operating its facility without having received a permit modification authorizing it to do so.

Citizen suits can be used to require a facility to comply with any "standard, limitation, or schedule established under any permit issued pursuant to Title V or under any applicable State implementation plan approved by U.S. EPA, any permit term or condition, and any requirement to obtain a permit as a condition of operations." Clean Air Act § 304(f)(4). A claim may be brought if the source is violating a permit term, condition, or other limitation, or is operating under a variance that is not specifically authorized by U.S. EPA. In these cases, the plaintiff may request both an order stopping the improper releases

as well as monetary fines for the permit violations. While fines are paid into the US Treasury to assist U.S. EPA in other enforcement cases, the Act also provides that up to $100,000 of the fines may be used for "beneficial mitigation projects" proposed by the parties and approved by EPA and the court. CAA § 304 (g)(2). While the Clean Air Act does not specify what qualifies as an adequate beneficial mitigation project, any such project must be consistent with the Act and enhance public health or the environment.

When it comes to proving that permit provisions have been violated, courts have strict rules about the evidence that can be used to demonstrate illegal actions. Fortunately, the Clean Air Act allows the use of "any credible evidence" of a permit violation to support an enforcement action, rather than only the U.S. EPA-approved test methods. This is very important, since emissions testing protocols for stationary sources can be so specific and complex that, if allegations regarding violation of specific testing protocols were required, citizens suits would require expensive technical experts to prove the violation. Nevertheless, it is important to examine carefully the source, accuracy, reliability and credibility of the evidence of the violation. It is the heart of your enforcement action.

Citizen suits are allowed against facilities only when U.S. EPA and the permitting authority are not themselves pursuing a civil or criminal enforcement action for the same violation. You have to advise these agencies that you plan to pursue a claim by filing a "60-day notice." Before filing an action, make sure no agency is already pursuing a judicial enforcement action for the same violation. However, a citizen suit may proceed even if an agency is pursuing an administrative action for the same violation.

CAA § 113(f) authorizes rewards to individuals when information or services provided to U.S. EPA leads to a criminal conviction or a civil penalty for violations of the Act. You could provide that information through a 60-day notice. In order to qualify, you only need ask U.S. EPA to be considered for a reward if they accept and prevail in the case. For more details, see 59 Federal Register page 22776, May 3, 1994.

Lawsuits Against Permitting Authorities

Suits may also be brought to challenge the issuance of Title V permits if the Title V permit is defective or if the permitting authority fails to act on the permit application within eighteen months of the time it is deemed complete. CAA § 503(c). Although these suits may be brought by citizens, they are generally not referred to as "citizen suits." These claims would be brought against the "permitting authority," (the term generally used to describe the state or local agency that has been authorized by U.S. EPA to issue Title V permits).

A permit may be defective for any number of reasons. It may not incorporate all of the pre-existing requirements that govern the source. It may not adequately describe required monitoring methods or other federally required elements. Review 40 C.F.R. Parts 70.5 and 70.6**,** which describe the required elements of permits and applications. A proposed Title V permit may be challenged if the administrative process governing issuance of permits has not been properly followed or if the permit is flawed or inadequate. In these cases, the court is asked to invalidate the defective permit.

Title V requires that any approved state program include opportunities for persons who submitted comments on draft permits to gain access to state court for review of decisions by permitting authorities to issue permits. CAA § 502(b)(6). The deadline for filing a state court action will be no longer than 90 days after the permit action, possibly less. U.S. EPA's regulations provide that state court is the exclusive means for judicial review of the terms and conditions of permits (40 C.F.R. Part 70.4(b)(3)(xii)); however, the Act clearly allows judicial review of U.S. EPA's denial of a citizen petition seeking a U.S. EPA objection to a proposed permit. CAA § 505(b)(2). It is important to review the state permitting authority's rules and regulations for the permit program, as it may set different timelines or requirements for appeals. A citizen suit challenge might need to be filed in state court at the same time as the petition seeking U.S. EPA's objection to permit issuance under CAA § 505(b), discussed below.

State permitting authorities may also be sued for failing to implement their own programs. They may fail to take action within specified timelines, for not carrying out the program or mis-applying their own standards and requirements on a programmatic level. U.S. EPA's regulations provide state court review as one means to gain judicial review of cases involving state permitting agency failure to take final action within the time limits imposed by the state program. 40 C.F.R. Part 70.4(b)(3)(xi). Federal court review may also be possible if the state is not implementing its own program, but the state cannot be compelled to adopt a program involuntarily. If a state is unwilling to adopt a Title V permitting program, the proper action is against U.S. EPA to seek imposition of sanctions and the implementation of a federal program.

With the exception of review of state-issued permits, which must be reviewed in state court, plaintiffs may choose to file their Title V enforcement case in either state or federal court. The rules of procedure are complex, and a suit filed in state court can get moved to federal court and visa versa. There may be distinct advantages in being in either state or federal court, depending on the applicable law and the circumstances of your case. In certain cases, you may want to file in both state and federal court.

Lawsuits Against U.S. EPA

Since U.S. EPA has a number of responsibilities under Title V, there are a number of opportunities for potential legal action.

As programs are being developed by each state, U.S. EPA is required to act (approve or disapprove) upon permitting authority program submittals no later than 12 months after receipt. If U.S. EPA delays action beyond that time, a lawsuit may be brought to force the agency to act on the submittal. If the state is unable to or refuses to submit an adequate program, U.S. EPA has the authority to impose certain penalties upon the state, called "sanctions" and described at CAA § 179(b). Highway sanctions involve withholding federal funding for most highway projects. The offset sanction imposes a higher ratio of offsets upon major new or modified sources. While sanctions may be imposed by U.S. EPA any time after the program is rejected or the submittal deadline missed, U.S. EPA is <u>required</u> to impose sanctions 18 months after the program is rejected or a deadline is missed. If the state still refuses to act, U.S. EPA is <u>required</u> to develop and implement a federal Title V program 24 months after the program is rejected or deadline missed. CAA § 502(d). If U.S.

EPA fails to impose sanctions after 18 months or does not have a federal plan in place after 24 months, a citizens suit may be brought under CAA § 304 to force U.S. EPA to act.

Even after a state's program is approved, U.S. EPA may determine that the state is not adequately implementing or enforcing their program. 40 C.F.R. Part 70.10(c)(1). Once U.S. EPA makes this determination, the "sanctions clocks" described above begin to run. The sanctions may be imposed at any time after this determination, but must be imposed after 18 months. If the state does not respond, the federal permitting program must be imposed 24 months after the determination. CAA § 502(i).

Once a permitting authority's permit program is approved, U.S. EPA has various duties of review of individual permits. U.S. EPA's failure to fulfill these duties may also give rise to a lawsuit against U.S. EPA forcing them to act properly.

Before issuing a permit, each permitting authority must provide a copy of the proposed permit to U.S. EPA. U.S. EPA has a 45 day period to review the proposed permit and object if it determines that the permit does not comply with the requirements of the Clean Air Act. CAA § 505(b)(1). The permitting authority must revise the permit to respond to U.S. EPA's objections within 90 days, or else U.S. EPA assumes the responsibility to issue or deny the permit. CAA § 505(c).

If U.S. EPA does not object to a permit within the 45 day period, any person who previously submitted comments to the permitting authority on that permit may petition U.S. EPA to object to the permit during the 60 days following the end of U.S. EPA's 45 day objection period. CAA § 505(b)(2). U.S. EPA then has 60 days to act on the petition, but if the permitting authority has already issued the permit, the permit remains valid during the period of U.S. EPA's review of the petition. If U.S. EPA denies the petition, a suit may be filed seeking review of U.S. EPA's action**.** This case is heard before the federal Court of Appeals under CAA § 307. As noted earlier, the deadline for a state court legal challenge to the same permit may expire during this period. Thus, the lawsuit may have to be filed before the U.S. EPA petition review is complete.

Both § 304 and § 307 of the Act authorize suits against U.S. EPA. The more common § 304 actions – referred to as "citizen suits" – are brought in federal district court to challenge violations of an existing permit condition, including a Title V permit, to challenge a state's failure to implement SIP requirements, and actions against facilities who are operating without permits. Lawsuits may be brought under § 304 against EPA when EPA has failed to meet one of the many deadlines or "mandatory duties" outlined in the Act. Citizens may also challenge the content of new regulations or the substance of an action taken by EPA under CAA § 307; however these lawsuits are typically more complex and technical, and EPA enjoys an advantage when the court evaluates the appropriateness of EPA action.

Exhaustion of Administrative Remedies

Before filing a lawsuit in which you are challenging a decision of a public agency, you must have "exhausted your administrative remedies." "Administrative remedies" refer to the opportunities for public comment, hearings and administrative (non-judicial) appeal to the

permitting agency and/or U.S. EPA. "Exhaustion" refers to the requirement that any available review process, such as the petition process and any appeals that may be authorized under the state program, must be used. Further, every issue raised in a lawsuit must have first been brought before the agency involved through comments and in any administrative appeals. Courts don't want to take action against an agency unless you have made every reasonable attempt to get the agency to do what you want and the agency has failed to do so. You must have already identified the thrust and nature of your legal issues in your written and/or oral comments on the project. Courts are not receptive to challenges based on brand-new issues. The agency is supposed to have an opportunity to consider your issue by your previous comments, and only after they ignored or inadequately addressed your issues may you go to court. Thus, it is important to raise any possible issue during the comment phase which you might want to later litigate, and to use all available appeals processes.

60-Day Notices

The Clean Air Act requires that a citizen file a letter notifying the source and certain governmental agencies regarding the basis for any legal challenge. This letter must be sent by certified mail to specific parties at least 60 days before the lawsuit may be filed. Review the requirements at 40 C.F.R. Part 54. Serving the notice letter and complaint on corporations requires identifying the corporate "agent for service of process" whose name and address is registered with your state's Secretary of State. It may take you a couple of weeks to obtain this information, although many states are now posting this information on the web.

Standing

In order to bring an action before a court, a plaintiff must establish that he or she has "standing" – an interest in the outcome of the action. Recent Supreme Court decisions have limited the ability of community groups and individuals to litigate other environmental issues on behalf of the general public, although there have been no Clean Air Act decisions on these issues. Courts have ruled that community groups or individual plaintiffs must suffer an actual or imminent injury caused by the defendant's actions, that will be redressed (alleviated) by the court's action. This area of law is currently in a state of flux. Either the plaintiff community group must suffer some injury to itself or its members, or a representative individual member of the group who is adversely affected must be a party to meet the injury requirement. The courts have ruled that other environmental laws like the Clean Water Act don't provide opportunity for the injured members of the public to have their injuries remedied by simple payment of penalties into the US Treasury, particularly when the violation has since stopped. The Clean Air Act is different since it allows up to $100,000 of any penalties to be used for "beneficial mitigation projects" to improve air quality for individuals that have been injured by the illegal emissions. Regardless, in crafting a legal action, attention must be paid to these specific elements to ensure a viable case.

A related issue has also been recently addressed by the Supreme Court, again interpreting environmental statutes other than the Clean Air Act. The Court has ruled that citizen enforcement actions seeking to enforce permit conditions under the Clean Water Act and public disclosure requirements under the Emergency Planning and Community Right To Know Act (EPCRA) must be based on current, on-going violations, not past violations that

had been corrected before the lawsuit was filed. Since a citizen enforcement action must be preceded by a 60 day notice, this new interpretation could prevent many enforcement cases from proceeding if the source simply stops the offending emissions after receiving the notice letter. There is considerable doubt, however, whether the recent Supreme Court decision affects Clean Air Act issues, as the Act provides that citizens suits may be brought for a past violation "if there is evidence that the alleged violation has been repeated." CAA § 304(a)(1) & (3). Congress clearly intended to permit citizen suit enforcement actions for repeated past violations.

About Lawyers

Lawsuits enforcing environmental laws are very different from most cases heard by Federal judges. Many of the legal issues associated with these kinds of cases have not yet been conclusively decided by the courts. When the legal issues are well defined, your case is more certain and its outcome more predictable. When the case involves novel issues, the outcome is far less certain. As a result several appeals may be required before the case is finally resolved. Always ask your lawyer for a realistic assessment of the strengths and weaknesses of the case before deciding to pursue litigation.

While it is possible to represent yourself in court without an attorney, called "pro se," this is not recommended for Clean Air Act enforcement cases. A minor slip-up can doom your case, and you will be unaware of many opportunities that you have as a litigant.

It is preferable to work with an attorney who is experienced in the type of case you are pursuing. A good attorney can certainly litigate a Clean Air Act case without previous experience with the Clean Air Act, but even a good lawyer without experience in these types of cases will have to spend a lot of extra time learning the body of law. It is preferable to find a lawyer who is familiar with the Clean Air Act to represent you.

Both the statute and the subject matter are technical and complex, so Clean Air Act cases generally will take a considerable amount of time to develop and litigate. You can help by being well organized with extra copies of all relevant documents neatly assembled and summarized in binders or files. You will find working with most attorneys easier if you are familiar with the administrative processes that led to the permit decision or violation and have a command of the potential legal and factual issues. If you have good facts and demonstrate that you can help make your case as straightforward as possible for the attorney, he or she will be more inclined to take your case.

You and your attorney should agree on a written fee arrangement. Some attorneys will take on cases "pro bono" (for free) as part of their legal practice or if they work for a public interest law firm that does not ordinarily charge their clients. Attorneys in private practice may offer a discounted rate to non-profit, public interest groups, but will expect to recover their full fee if they win the case and recover their attorneys' fees from the defendant, as the Act allows. Others may charge you their regular hourly rates or even a flat rate. You will probably be expected to pay the "costs" of your case, which covers the legal filing fees, the costs of preparing and copying the "administrative record", expert witness fees, any discovery and deposition expenses, and may also include the lawyers' long-distance phone charges, fax, postage, copying expenses, etc. Whatever the arrangement with your

attorney, make sure you understand what are your and the attorney's responsibilities. A written contract is typical. You should ask for estimates of the time and expenses, the attorney's judgment on the probability of success, whether they will promise to represent you on appeal if necessary, etc.

Every attorney has a different style and approach, and some may work better for you than others. Unfortunately, there are not a large number of attorneys experienced in Clean Air Act enforcement actions, and those that are doing them are typically quite busy. Filing even a single case may take enormous resources, but after you prevail, the agencies will likely give your perspective greater credence in future proceedings. Most importantly, one successful lawsuit may achieve substantial environmental benefits.

Chapter Four

Why Didn't That Factory Apply for a Title V Permit? How a Facility Can Avoid Title V and Other Requirements

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This section covers limits on a facility's "potential to emit," one of the more complex and technical issues you will be faced with when reviewing a Title V permit. You will notice several types of potential to emit limits when reviewing a permit. First, you may find that a facility you are interested in does not have to apply for a Title V permit because it accepted a potential to emit limit on the total amount of pollution it may release. Second, you might find a facility that is required to apply for a Title V permit, but that relies upon such a limit to avoid particular legal requirements, such as those that cover facilities that release large amounts of hazardous air pollutants (these requirements are known as "Maximum Achievable Control Technology" standards or "MACT" standards) and requirements that cover new or modified facilities that release large amounts of criteria pollutants (New Source Review).

There are specific ways a factory or power plant can accept regulatory restrictions on how they operate, what they burn (fuel), raw materials they use, how much of a product they produce, or how many hours they operate the factory. If a factory limits the hours of operation and the amount of a finished product that is produced, the factory will ultimately be limiting the pollution that comes out of the smokestacks. Therefore, by accepting enforceable restrictions or conditions that will limit emissions to levels below the thresholds of Title V, the facility will not be subject to Title V requirements. This is known as limiting a facility's potential to emit (PTE).

In this section, you will learn how to evaluate this kind of limit. In particular, you will learn how a limit must be written and when a facility is allowed to rely upon such a limit to avoid legal requirements.

I. Avoiding the Requirement to Apply for a Title V Permit

As discussed earlier in this handbook, a facility must apply for a Title V permit if it is capable of polluting the air in amounts equal to or greater than levels set out in the Clean Air Act.[1] See Appendix D. Such facilities are called "major sources." Whether a facility is a "major source" does not depend upon how much the facility *actually* pollutes the air. Instead, it depends upon how much the facility *could* pollute the air if it operated at its maximum capacity. The amount of pollution a facility could cause is referred to as the facility's "potential to emit" (PTE). A facility's PTE is the amount of air pollution it would cause if it operated 24 hours each day, every day of the week. Since most facilities don't

[1] Facilities are also required to apply for a Title V permit if they are eligible for certain MACT standards or are subject to New Source Performance Standards. USEPA's policy on which of these facilities must apply for a permit is currently in flux. USEPA has "deferred" eligibility for several different categories of facilities.

operate all of the time, a facility's actual emissions are usually much less than its potential emissions. Nevertheless, so long as a facility's PTE is above the level set in the Clean Air Act, the facility is covered by the Title V program.[2]

Lots of facilities in the United States are capable of polluting the air at levels that qualify them for the Title V program. If a facility will never actually cause pollution above Title V threshold levels, however, it can ask the Permitting Authority for a *potential to emit limit* on the total amount of air pollution it is allowed to release. This potential to emit limit is set below the level at which a facility is required to apply for a Title V permit. Once the PTE limit is in place, the facility is no longer required to apply for a Title V permit. A facility that avoids the Title V program by accepting a potential to emit limit on the amount of air pollution it may release is referred to as a "synthetic minor" [source]. It is referred to by this name because instead of being a "major source" subject to Title V, the Permitting Authority's regulatory action has turned it into a "minor source."[3]

A. *What should I look for when evaluating a PTE limit that excuses a facility from the Title V program?*

For a facility to rely upon a pollution limit to avoid the Title V program, the limit must be practicably enforceable, meaning that it must be possible to know in a timely manner whether the facility is complying with the limit (this is discussed in detail below). U.S. EPA has also required that a limit be federally enforceable in order to avoid the Title V program, i.e., the public and U.S. EPA must be able to enforce the limit in court. However, two recent court decisions questioned federal enforceability as a requirement for PTE limitations. U.S. EPA is in the process of amending its regulations to address these court decisions.

B. *Is federal enforceability a necessary requirement?*

As discussed above, U.S. EPA regulations for Clean Air Act Titles I, III, and V required that any limitation on a facility's potential to emit could only be considered if it was federally enforceable. But, three recent decisions by the U.S. Court of Appeals for the D.C. Circuit disagreed with U.S. EPA rules requiring federal enforceability."[4]

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[2] USEPA regulations define "potential to emit" as:

> "the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation is enforceable by the Administrator." See 40 C.F.R. § 70.2.

[3] Facilities that do not have even the potential to emit air pollution in major amounts are often referred to as "natural minor" sources.

[4] In the first case, National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995), the court dealt with the potential to emit definition under the Title III air toxics program. In the second decision, Chemical Manufacturers Ass'n v. EPA, 70 F.3d 637 (D.C. Cir. 1995), the court remanded the definition of potential to emit under the PSD and NSR programs to USEPA. The third decision, Clean Air Implementation Project v. EPA, No.92-1303 (D.C. Cir, June 28, 1996), dealt with the potential to emit definition under Title V of the Act.

The U.S. Court of Appeals for the D.C. Circuit did not agree with U.S. EPA's exclusive federal enforceability requirement. The court held that U.S. EPA had not adequately justified why it should not consider emission reductions due to state and local controls when limiting a source's potential to emit. This would allow a facility to limit its potential to emit by complying with any permit or enforceable limit on such facility's operations. U.S. EPA is currently in the process of conducting rulemaking in response to the recent court decisions.

The D.C. Circuit vacated the federal enforceability requirement for Titles I and V, but it did not vacate it for Title III. Thus, in federal PSD programs (implementing 40 CFR 52.21), some of which are delegated to the state to implement, federal enforceability is no longer required to avoid PSD requirements. But, as a practical matter, the court decision did not affect the individual state rules implementing these programs that have been incorporated into U.S. EPA-approved SIPs and Title V programs. Usually, federal enforceability is still required to create "synthetic minor" new and modified sources.[5] Because most of the state programs still include federal enforceability in their PTE definition, U.S. EPA's original definition of PTE remains important.[6]

C. *How do I make sure that a limit is practicably enforceable?*

To be practicably enforceable, a limit must state:

a. what the actual limit is,
b. how the limit relates to the amount of pollution being released (e.g. if the limit is on the amount of fuel used each day, how does that relate to the amount of sulfur dioxide released by the facility?)
b. how the facility shows that it is complying with the limit;
c. when and how often the facility is required to measure compliance with the limit; and
d. when and in what form the facility reports the results of any monitoring to the Permitting Authority. This is important because once reports are given to the Permitting Authority, they must be made available to the public. You may have trouble getting records that have not been submitted to the Permitting Authority.

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[5] *See*, Memorandum, *Interim Policy on Federal Enforceability of Limitations on Potential to Emit*, from John S. Seitz and Robert I. Van Heuvelen to EPA Regional Offices (January 22, 1996).

[6] In January 1995, before the court opinions, U.S. EPA issued a "Transition Policy" for Title V and Title III purposes. Pursuant to the Transition Policy, U.S. EPA stated that for its purposes it would consider a source to be a "minor source" even if the source did not have PTE limits if the source's actual emissions had remained below 50 percent of the applicable major source threshhold since January 1994 (as demonstrated by adequate records). U.S. EPA also stated that it would honor state-only enforceable PTE limits, even where the regulations or SIP required federal enforceability. While U.S. EPA plans to continue to honor state-only enforceable limits until the PTE rulemaking is complete, the provision allowing a source without any PTE limits to avoid major source status is due to expire in December 2000. See Memorandum, Third Extension of January 25, 1995 Potential to Emit Transition Policy, from John S. Seitz and Eric V. Schaeffer (Dec. 20, 1999).

A facility can include permit conditions that will limit or "cap" its emissions to levels below the thresholds of Title V. To appropriately limit potential to emit, all permits must contain a production or operational limitation in addition to the emission limitation.[7] A production limitation is a restriction on how much of a final product a facility produces. An operational limitation is a restriction on how many hours a facility operates or how much raw material a facility uses. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions that specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level.

Also, to be practicably enforceable the "averaging time" of the limit must be over the shortest practical time period. The averaging time or duration is the length of time or duration over which compliance is measured. For example, consider a facility, that accepts a limit upon the amount of fuel that it burns as a way to ensure that its SO_2 emissions stay below the Title V level. If the limit is on how much fuel the facility can burn each day, the monitoring must take place daily. By looking at the facility's daily records, you can know immediately whether the facility was complying with the limit on the previous day. Such a limit is practicably enforceable. If the limit is annual, however, you cannot know whether the facility is complying with the limit until the end of each year. This limit is not practicably enforceable.

It is not uncommon to see a limit that is based upon a "12-month average, rolled monthly." In the example provided in the paragraph above, that would mean that at the end of each month, the facility would total the amount of fuel used in the previous 12 months. This "rolled" standard is clearly better than a straight annual average because you can know from month to month whether the facility is complying with the limit. An annual limit rolled monthly is probably acceptable for the purpose of allowing a facility to avoid Title V requirements because Title V eligibility is determined based upon the amount of pollution that can be caused by a facility each year. If the limit relates to whether a facility must comply with MACT standards (discussed in the next section), you will need to look to the language of the particular MACT standard that is being avoided. It may be that you need a shorter averaging time to assure compliance, such as a monthly limit rolled daily.

D. *How does a facility become subject to a PTE limit that excuses it from the Title V program?*

U.S. EPA identified several available approaches for creating federally enforceable limits on potential to emit. These include (1) non-Title V federally enforceable state operating permit programs (FESOPs), (2) exclusionary or prohibitory rules that create federally enforceable restrictions applicable to many sources, (3) general permits that could be included in a State Implementation Plan (SIP) in order to create potential to emit limits for groups of sources, (4) pre-construction permits ("New Source Review" or NSR), and (5) Title V permits.

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[7] *See*, Memorandum, *Guidance on Limiting Potential to Emit in New Source Permitting*, from Terrell E. Hunt and John S. Seitz to EPA Regional Offices (June 13, 1989).

One method of achieving federal enforceability for state and local regulations is to attain EPA approval of a state's own operating permit program, thus creating a "federally enforceable state operating permit program" (FESOP). The program must: (a) be approved into the SIP, (b) impose legal obligations to conform to the permit limitations, (c) provide for limits that are enforceable as a practical matter, (d) be issued in a process that provides for review and an opportunity for comment by the public and by U.S. EPA, and (e) ensure that there is no relaxation of otherwise applicable federal requirements.[8]

Another mechanism for creating federally enforceable restrictions is through general restrictions on many sources within a single category, known as "prohibitory" or "exclusionary" rules, which may be included in a SIP. In order to be a valid constraint on a source's potential to emit, an exclusionary rule must be practicably enforceable, adopted with adequate opportunity for public comment, and incorporated into the SIP.[9] State and local permitting authorities can adopt general rules limiting the potential to emit of smaller facilities, thus allowing these facilities to avoid "major source" requirements. The general rule will place emissions limitations on such smaller sources and ensure compliance with the established limit through recordkeeping and reporting requirements.

A third approach for creating federally enforceable restrictions is through a general permit, which is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. A general permit provides for conditions limiting potential to emit in a one-time permitting process. Though generally considered part of a Title V permit program, state and local agencies can also submit a general permit program as part of its SIP. Furthermore, general permits included within a SIP-approved FESOP can also create potential to emit limits for groups of sources.[10]

Another type of case-by-case permit is a pre-construction permit. Many states are using their existing NSR programs to limit a source's potential to emit so as to allow sources to legally avoid being considered major sources for Title V purposes.[11] USEPA has taken the position that minor NSR permits issued under programs that have already been approved into a SIP are federally enforceable. Thus, USEPA allows the use of federally enforceable minor NSR permits to limit a source's potential to emit provided that the scope of a state's program allows for this and that the minor NSR permits are in fact enforceable as a practical matter.[12] But note that it is not acceptable for a source to use a major NSR permit to create a limit to avoid Title V applicability. All sources with a major NSR permit are Title V sources regardless of there actual or potential emissions. Furthermore, once a source accepts a limit on its PTE, increasing its operations above these limits may trigger major NSR requirements.

Facilities may also limit their potential to emit through the Title V permitting process. Many states are using Title V permits to create various, federally enforceable

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[8] *See*, Memorandum, *Options for Limiting Potential to Emit* at 3.
[9] *See id.* at 4.
[10] *See id.* at 4.
[11] *See id.* at 5.
[12] *See*, Letter from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Jason Grumet, Executive Director, Northeast States for Coordinated Air Use Management (November 2, 1994).

emission limitations. For example, if a facility is above certain threshold emission levels for either criteria or hazardous air pollutants, that facility could limit its potential to emit to below that level of emissions for purposes of prospectively avoiding future MACT compliance dates. That facility would use a Title V permit to establish federally enforceable limitations, thus ensuring the facility is not considered a major source for hazardous or other air pollutants.

E. *How to identify and track potential to emit violations*

You may find that a facility you are interested in does not have to apply for a TitleV permit because it accepted a potential to emit limit on the total amount of pollution it may release or has agreed to comply with a limit in order to avoid compliance with a more stringent requirement, such as MACT, NSR, or Prevention of Significant Deterioration (PSD). However, you need to be aware that a few facilities may try to get around these limits. For example, a facility may burn more fuel or use more raw materials than would be contained in its permit or operate an additional shift when the source was restricted in operating hours.

You can track violations of these production or operational limits. Facilities have recordkeeping requirements that they must follow, thereby allowing citizens to verify a source's compliance with its limit. In many circumstances, operating logs are kept in which hours of operation are recorded. These logs may be available for inspection by citizens (ask the Permitting Authority). The failure to comply with a PTE limit may result in a notice of violation for failure to get a Title V permit or comply with MACT or PSD/NSR requirements.

II. Avoiding MACT Standards

Section 112 of the Clean Air Act provides for regulation of hazardous air pollutants, and distinguishes between "major sources" and "area sources" of such pollutants. Section 112 of the Clean Air Act defines a "major source" as:

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

MACT standards apply to many major sources of hazardous air pollutants. But, lesser or no controls may be required of area sources in a particular industry. U.S. EPA issued a guidance document clarifying when a major source of hazardous air pollutants can obtain federally enforceable limits on its potential to emit to avoid applicability of major source requirements.[13]

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[13] *See*, Memorandum, *Potential to Emit for MACT Standards – Guidance on Timing Issues*, by John S. Seitz to EPA Regional Offices (May 16, 1995). Only MACT is addressed in this section. But note that a facility that relies upon a limit to avoid particular legal requirements, such as MACT standards, can rely on this same limit to avoid other legal requirements that would otherwise require, such as NSR and PSD.

U.S. EPA's guidance document states that "facilities may switch to area source status at any time until the 'first compliance date' of the standard."[14] The "first compliance date" is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement in the applicable MACT standard. Moreover, U.S. EPA provides that "sources should not be allowed to avoid compliance with a standard after the compliance date, even through a reduction in potential to emit.[15] It is U.S. EPA's belief that once a source is required to install controls or take other measures to comply with a MACT standard, it should not be able to substitute different controls or measures as a method of bringing the source below the major facility threshold.[16] U.S. EPA refers to this as the o*nce in, always in* policy. A "once in, always in" policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.[17] It is important to point out, that under the *once in, always in* policy, a source may be major for one MACT standard, but an area source for a subsequent MACT standard.

But, you should look very carefully for facilities that are exempting themselves from MACT regulations by taking "voluntary restrictions on their potential to emit." For example, consider a facility that accepts a throughput limit to avoid applicability of the gasoline MACT standard without any explanation in either the draft permit or any supporting documentation of what that limit is. In fact, the draft permit never refers to the MACT standard at all. The only information in the draft permit that appears to relate to the MACT standard is the description of facility processes, which states that the facility is "willing" to accept a throughput limit. Simply saying that a facility is willing to accept a limit is not the same as creating the limit. Thus, it would appear that this facility does not have an enforceable limit on its potential to emit and is therefore eligible for the particular MACT standard. The only way that this facility would not be subject to this standard is if it can demonstrate that an actual federally enforceable limit on its potential to emit applied to the facility prior to the first compliance date of the MACT standard.

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[14] *See id.* at 5.
[15] *See id.* at 5.
[16] *See id.* at 5.
[17] *See id.* at 9. Example: A facility has potential emissions of 100 tons/year. After compliance with the applicable MACT standard, which requires a 99 percent emissions reduction, the facility's total potential emissions would be 1 ton/year. Under EPA's guidance memo, that facility could not subsequently operate with emissions exceeding the maximum achievable control technology emission level. The facility could not avoid continued applicability of the MACT standard by obtaining "area source" status through limitations on emissions up to the 10/25 tons/year major source thresholds.

Limits on potential to emit to avoid applicability of MACT standards must be federally enforceable. A voluntary limit is insufficient to avoid applicability of the rule. All requirements contained in the MACT standard must be included in the facility's permit unless the facility can demonstrate that it received a federally enforceable limit on potential to emit prior to the first compliance date.

Chapter Five

Controlling Emissions of Hazardous Air Pollutants with the Clean Air Act Requirements

by Alexander J. Sagady, Environmental Consultant (East Lansing, MI)

Citizens dealing with Clean Air Act operating permit for major industrial facilities will inevitably have to address emissions of hazardous air pollutants (HAPs). Under the Federal Clean Air Act, Maximum Achievable Control Technology (MACT) standards published by the U.S. EPA control emissions of HAPs from major industrial sources.

MACT standards originated in the 1990 Clean Air Act amendments. Prior to the 1990 amendments, U.S. EPA had issued only a handful of regulations covering specific hazardous pollutants under the 1977 amendment to the Clean Air Act.

Under the 1977 amendments, U.S. EPA was to develop National Emission Standards for Hazardous Air Pollutants (NESHAP) that were "health-based" standards. The NESHAP standards were intended to protect public health with a margin of safety. However, certain pollutants that are cancer-causing agents do not necessarily display a health effects threshold for detrimental exposures. As a result of the difficulty U.S. EPA had with writing standards under the original NESHAP statutory provisions, only a few were finally issued.

The 1990 Clean Air Act amendments changed the entire approach to regulating HAPs. Congress established a list of 189 HAPs that were subject to emission control regulations; it also defined a major source of HAPs as one that emits or has the potential to emit 10 tons or more of any single HAP or 25 tons per year or more of any combination of HAPs.

Under Section 112 of the Act, U.S. EPA was then mandated to develop stringent technology-based emission regulations applicable to several industrial categories. Section 129 of the Act provided additional requirements for solid waste combustion units, like municipal waste incinerators, because of special concerns about the toxic emissions from these units, such as chlorinated dibenzo-dioxins/furans and mercury.

The Congressional action first established a list of HAPs to be regulated. The primary focus was then on determining the level of available emission control performance for the best and near best controlled facilities in order to set new emission standards. Health-based considerations could still enter the decision-making, but only after a baseline level of performance based on emission control technology considerations was established.

Under the 1990 amendments, MACT standards were intended to strictly control emissions of HAPs. New sources of HAPs had the most stringent requirements:

> The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent that the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator." (CAA Section 112(d)(3))

For existing sources of HAPs, MACT emission standards:

> "...shall not be less stringent, and may be more stringent than:
>
> (A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information) ..... for categories and subcategories with 30 or more sources, or
>
> (B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) .... the category or subcategories with fewer than 30 sources."

These provisions are known as the "MACT floor" in the decision-making process. The Administrator can also set standards more stringent than the MACT floor, where such standards:

> Shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources.

The Administrator is mandated to also consider available methods to limit emissions through process changes, substitution of materials, enclosure of systems, and through design, equipment, work practice or operational standards, or a combination of all of these techniques.

In general, an existing source that is subject to a MACT standard must comply with that standard within three years after it is issued.

Some MACT standard-setting decisions by U.S. EPA have already been controversial. In mid-1999, the DC Circuit of Appeals remanded U.S. EPA's MACT decision on medical waste incinerators back to the agency for better justification after a challenge by the Sierra Club and the Natural Resources Defense Council.

The 1990 amendments put the U.S. EPA on a deadline to issue MACT standards with different sets of rules due in 1992, 1994, 1997, and 2000. However, U.S. EPA will not meet this deadline for the vast majority of needed industrial categories for which a MACT standard is required.

Anticipating delays, Congress added the so-called "MACT hammer" provision. This provision states that if U.S. EPA fails to issue a standard for a category of sources within 18

months of the statutory deadline, each source in that category must apply to the State for a permit in which the State determines MACT on a case-by-case basis.

There is another situation in which states may have to decide MACT on a case-by-case basis. The 112(g) program (named for section 112(g) of the Clean Air Act) applies when HAP sources that are not yet subject to a MACT standard (or not yet on the list of source categories for which U.S. EPA will develop a MACT standard) seek to construct or reconstruct a major source. (The rule does not apply to modifications). The program applies whether the source is a green field source or adding a new unit, provided the PTE of the new source or unit meets or exceeds 10 tons per year of any one HAP, or 25 tons per year of combined HAPs. Sources subject to the rule need a "notice of MACT approval," which is a pre-construction permit. Most states have adopted 112(g) programs, and it is their responsibility to decide case-by-case MACT. The MACT determination of a state has no binding effect on other states, but by definition, other states cannot adopt a less stringent MACT for the same type of facility. (They can adopt a more stringent MACT for the same type of facility). Prior to making a MACT determination, state and local agencies generally investigate the MACT determinations made by other states.

Clean air advocates concerned with operating permits and toxic emission controls must become aware of the MACT setting process because of interactions with the issuance of operating permits.

State case-by-case MACT determinations set standards which can then become the norm for many years. Citizen advocacy and technical comments in the setting of case by case MACT standards may result in more stringent HAP emission controls.

For operating permits involving MACT standards already issued by U.S. EPA, citizens should ensure that all applicable regulatory provisions of the MACT are in place in the proposed operating permit, including the relevant provisions from the "general provisions" of 40 CFR Part 63. Information about completed, proposed, and upcoming MACT standards is available on the Internet at www.epa.gov/ttn/uatw/eparules.html. In addition to numerical limitations on emissions, MACT standards will also generally require certain mandatory work practices, operator training, emission and operational parameter monitoring and other detailed requirements that should be specified in the operating permit provisions.

Refer to page 122 for information about how a facility can avoid a MACT standard by obtaining an enforceable limitation on its potential to emit HAPs.

Chapter Six

"Unavoidable" Violations of Emission Limits

by Keri Powell, New York Public Interest Research Group (New York, NY)

Many Title V permits include a provision that allows the Permitting Authority to excuse permit violations that are considered "unavoidable." Violations that are typically considered "unavoidable" are those that occur because of an emergency or because of an unforeseeable equipment malfunction. Sometimes, violations that occur during startup, shutdown, or maintenance of equipment are considered to be unavoidable. These provisions are referred to by a variety of different names, including, among others, "Unavoidable Noncompliance and Violations," "Malfunction/Upset," and "Affirmative Defenses." For purposes of this discussion, these provisions are referred to as "excess emissions provisions."

Excess emissions provisions come in many forms. They are all based upon the idea that under certain conditions, a facility cannot avoid violating air quality requirements. Some excess emissions provisions prevent the Permitting Authority from penalizing a facility for unavoidable violations. This type of provision is called an "affirmative defense." Under an affirmative defense, once the facility presents evidence that the defense applies, it is up to the Permitting Authority (or the citizen suit plaintiff) to demonstrate that the defense does not apply. Other excess emissions provisions simply provide the Permitting Authority with discretion over whether to bring an enforcement action when it determines that a violation was "unavoidable." Under this type of discretionary excess emissions provision, the Permitting Authority is authorized to bring an enforcement action even if the violation was unavoidable.

Just like everything else in a Title V permit, an excess emissions provision must be derived from some pre-existing applicable requirement. Excess emissions provisions in Title V permits are usually derived from State Implementation Plans (SIPs) (See Part One, page 38) and certain federal regulations (usually a MACT or NSPS regulation, see Part One, page 42). It is proper for the Permitting Authority to include an excess emissions provision in a Title V permit if it is based on a U.S. EPA-approved SIP rule or a federal regulation. A Permitting Authority is *not* allowed to include an excess emissions provision in a Title V permit if there is no federally-enforceable statute or regulation that provides the basis for such a provision.

If you see an excess emissions provision in a Title V permit, the provision may be based on a federal regulation or a U.S. EPA-approved SIP and therefore properly included in the permit. Nevertheless, it is important to make sure that the Title V permit does not expand the scope of the provision, and that the permit includes sufficient monitoring, recordkeeping, and reporting requirements to ensure that the provision is not applied improperly. This section discusses these issues in detail.

What are the steps in reviewing an excess emissions provision in a Title V permit?

Your objective is to make sure that the facility does not take advantage of an excess emissions provision unless it is entitled to do so. In general, you will need to ask the following questions as you review the provision:

1. Is the provision allowed by a federally-approved air quality regulation (SIP) or a federal regulation?

2. If the provision is allowed, does it excuse more than the underlying regulation intended to be excused? In other words, does it enlarge the excess emissions provision?

3. Does the permit need additional terms to ensure that the facility can be held accountable for violations when the excess emissions provision does not apply?

Each of these questions is covered in detail below. But first, you need to know how to recognize an excess emissions provision.

What does an excess emissions provision look like?

As a preliminary matter, you need to be able to recognize an excess emissions provision when you see one. You are likely to see the following types of excess emissions provisions in a Title V permit:

- **Emergency Defense:** One kind of excess emissions provision is the "emergency defense," discussed in Part One of this handbook (page 58). The emergency defense is explicitly allowed under the federal regulation governing the Title V program. See 40 CFR § 70.6(g). (Appendix A of this handbook). Though a Permitting Authority is not required to include an emergency defense in its Title V permits, it has the option to do so. If the Permitting Authority incorporates an emergency defense into a Title V permit, it may not expand the emergency defense beyond that allowed under § 70.6(g). Carefully examine any difference between § 70.6(g) and permit language.

- **Startup/Shutdown and Malfunction provisions under Federal Regulations:** It is not uncommon for an NSPS or MACT regulation to excuse violations that occur during startup/shutdown or malfunction of equipment. If the regulation containing the startup/shutdown or malfunction provision is applicable to the facility, the Permitting Authority is allowed to include the provision in the permit. An example such a provision in a federal regulation can be found at 40 CFR § 63.6(f), which provides that "The nonopacity emission standards set forth in this part shall apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart." § 63.6(f) requires the regulated facility to develop a startup/shutdown/malfunction "plan." This plan is incorporated into the Title V permit by reference.

- **Startup/Shutdown, Maintenance, Upset, or Malfunction Provisions in a SIP:** The U.S. EPA has approved of a wide variety of excess emissions provisions as part of SIPs. It is particularly important to review an excess emissions provision derived from a SIP because many were approved long ago and it may be necessary to add language to the permit that clarifies the scope of the provision. The following is an example of a SIP-approved excess emissions provision (This provision is provided only as an example. It should not be considered a "model" to be replicated.):

> Unavoidable excess emissions. Excess emissions determined to be unavoidable under the procedures and criteria in [state regulation] shall be excused and not subject to penalty.
>
> (1) The permittee shall have the burden of proving [to the Permitting Authority] that excess emissions were unavoidable. This demonstration shall be a condition to obtaining relief under (2), (3) or (4).
>
> (2) Excess emissions due to startup or shutdown conditions shall be considered unavoidable provided the source reports as required under [state regulation] and adequately demonstrates that the excess emissions could not have been prevented through careful planning and design and if a bypass of control equipment occurs, such that bypass is necessary to prevent loss of life, personal injury, or severe property damage.
>
> (3) Excess emissions due to scheduled maintenance shall be considered unavoidable if the source reports as required under [state regulation] and adequately demonstrates that the excess emissions could not have been avoided through reasonable design, better scheduling for maintenance or through better operation and maintenance practices.
>
> (4) Excess emissions due to upsets shall be considered unavoidable provided the source reports as required under [state regulation] and adequately demonstrates that:
>
> (a) The event was not caused by poor or inadequate design, operation, maintenance, or any other reasonably preventable condition;
>
> (b) The event was not of a recurring pattern indicative of inadequate design, operation, or maintenance; and
>
> (c) The operator took immediate and appropriate corrective action in a manner consistent with good air pollution control practice for minimizing emissions during the event, taking into account the total emissions impact of the corrective action, including slowing or shutting down the emission unit as necessary to minimize emissions, when the operator knew or should have known that an emission standard or permit condition was being exceeded.

How do I know whether an excess emissions provision in a Title V permit is based upon a federal regulation or a U.S. EPA-approved SIP?

Under 40 CFR § 70.6(a)(1)(i), the permit must "specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based." Refer to page 37 in

Part One of this handbook for information about how to locate state and federal air quality regulations.

If the underlying source is a federal regulation, then you know that the particular excess emissions provision has been approved by U.S. EPA. As long as the language in the permit is the same as the language in the regulation, the Permitting Authority is allowed to include it in the permit.

If the underlying source is a state regulation, you need to determine whether the state regulation has been approved by U.S. EPA into the SIP (See Part One, page 43). If the state regulation has been approved by U.S. EPA and is part of the SIP, the Permitting Authority is allowed to include the provision in the permit.

How do I make sure that the Title V permit does not expand the scope of the excess emissions provision?

To ensure that the Title V permit does not improperly expand the type of violations that can be excused, you need to determine whether the language of the permit is more lenient than the language in the applicable regulation. The Permitting Authority may not use a Title V permit to expand the types of violations that may be excused under the excess emissions provision. If you notice any differences between the terms in the draft permit and the language of the underlying regulation, think carefully about the potential impact of these differences. Even if you aren't sure about the implications of the different terms, you may want to note the discrepancy in your comments.

Examples of improper attempts to expand the scope of an excess emissions provision include, but are not limited to, the following:

- The excess emissions provision in the underlying air regulation only applies to violations that occur due to an equipment "malfunction," but the permit applies the provision to startup/shutdown and/or maintenance situations. (Many facilities allege that it is impossible for them to comply with air quality limitations during startup/shutdown and maintenance activities. Nevertheless, if the provision in the underlying regulation only applies during malfunction situations, the Title V permit cannot be used to expand the excess emissions provision to cover violations that occur during startup/shutdown or maintenance).

- The excess emissions provision in the underlying regulation only applies to "nonopacity" violations, but the permit applies the provision to opacity violations.

- The excess emissions provision in the underlying regulation simply allows the Permitting Authority to excuse a violation under particular circumstances, but the permit provides that certain types of violations are automatically exempt from enforcement.

How do I know if additional permit terms are needed to ensure that the facility can be held accountable for violations when the excess emissions provision does not apply?

In general, if an excess emissions provision is derived from a federal regulation that was adopted after 1990, it probably is not necessary to supplement the provision with additional permit terms. Note that many of the excess emissions provisions found in SIPs were approved long ago and leave a lot of room for varying interpretations. Thus, it may be necessary to add terms to the permit to assure that the excess emissions provision is applied correctly. In evaluating the adequacy of an excess emissions provision, ask yourself the following questions:

Does the permit require the facility to submit reports of excess emissions as required by the relevant air quality regulations or Part 70?

Often, an underlying requirement will require that the facility submit a report, called a deviation report, when the facility deviates from a regulatory standard. Generally, the underlying requirement establishes the content of this report and when it must be submitted. If applicable to a particular facility, these requirements must be included in that facility's Title V permit. In addition, every Title V facility is subject to 40 CFR § 70.6(a)(3)(iii)(B), which requires:

> Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

Title V permits typically include permit terms based on this regulation. The Title V permit must define what "prompt" means in as specific terms as possible. Otherwise, the requirement of prompt reporting is unenforceable. The definition must be reasonable.

As you review the excess emissions provision in a draft permit, ask yourself if you can monitor whether or not the facility has exceeded air pollution limits on a timely basis. If not, the draft permit needs to be revised.

The public cannot know whether an excess emissions provision is applied properly if there is no written record of when and why a violation is excused. Consider a provision that states:

> In the event that emissions of air contaminants in excess of any emission standard . . . occur due to a malfunction, the facility owner and/or operator shall report such malfunction by telephone to the commissioner's representative as soon as possible during normal working hours, but in any event not later than two working days after becoming aware that the malfunction occurred. Within 30 days thereafter, when requested in writing by the commissioner's representative, the facility owner and/or operator shall submit a written report to the commissioner's representative describing

> the malfunction, the corrective action taken, identification of air contaminants, and an estimate of the emission rates.

Under the above excess emissions provision, the facility is required to submit a written report about the occurrence only "if requested in writing by the commissioner's representative." If the commissioner's representative elects not to make this request, there will be no report of the malfunction. It is essential that the facility provide written reports to the Permitting Authority whenever a violation is excused under an excess emissions provision.

Are all of the relevant terms defined in the permit?

Sometimes, a permit lacks definitions of essential terms. The lack of definitions may make it easier for a facility to claim that it is protected by the excess emissions provision. Key terms such as "unavoidable," "upset," "emergency," and "malfunction" need to be defined if they appear in an excess emissions provision. If you notice that key terms are not defined in a draft permit, you may want to locate plausible definitions and specifically recommend them in your comments. You may find a satisfactory definition in state regulations.

Does the permit ensure that the excess emissions provision will be applied in a manner consistent with federal law?

In the case of an excess emissions provision found in a SIP, it is important to make sure that the provision cannot be interpreted in a way that violates federal law. The only U.S. EPA guidance that discusses limitations upon excess emissions provisions in SIPs is a set of three U.S. EPA memoranda. The first two were released in 1982 and 1983. The third, which clarifies the first two, was released in September 1999. All three memoranda are included in Appendix E. The viewpoints expressed in the memoranda are not the "law," but they are U.S. EPA's interpretation of the law. Since Congress delegated the job of Clean Air Act regulation to U.S. EPA, opinions expressed by the agency are often given quite a bit of weight when a court decides how the law should be interpreted and applied.

When you review a SIP-based excess emissions provision in a draft Title V permit, you should read over the U.S. EPA memoranda in Appendix E. Make a note of any limitations on SIP-based excess emissions provisions that are mentioned in the memos but not mentioned in the draft permit. In your comments, you can argue that these limitations must be added in order for the permit to assure compliance with applicable requirements. Particularly notable limitations include the following:

(1) All periods of excess emissions must be considered violations. Any provision that allows for an automatic exemption for excess emissions is prohibited. This means that if it is not clear whether the excess emissions provision creates an exemption, you should expect the Permitting Authority to clarify in the permit that there is no automatic exemption for excess emissions.

(2) While a state may choose not to impose a penalty on a facility that violates a requirement due to unavoidable circumstances, this decision may not bar U.S.

EPA's or citizens' ability to enforce applicable requirements. Ask that the permit state that the excess emissions provision does not affect your right or U.S. EPA's right to bring an enforcement action for permit violations when the State chooses not to impose a penalty.

(3) In general, because excess emissions that occur during periods of startup and shutdown are reasonably foreseeable, they should not be excused. If the Permitting Authority determines that it is impossible for a certain group of facilities to comply on a consistent basis with air quality requirements during periods of startup and shutdown, this should be addressed through a narrowly-tailored SIP revision that takes into account the impacts on air quality caused by the inclusion of such a provision in the SIP. (In other words, a blanket excess emissions provision that applies to all facilities in the state the same way is inadequate).

(4) Affirmative defenses to claims for injunctive relief are not allowed. (Injunctive relief is when the violator is required by a court to stop illegally polluting the air. While an excess emissions provision can protect a violator from being subject to monetary penalties, U.S. EPA or the public may still get a court-ordered injunction).

See U.S. EPA's policy memorandum, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown*, Sept. 20, 1999 (in Appendix E of this handbook). The 1999 memorandum also includes a long list of requirements that a SIP-based excess emissions provision must meet in order for it to be approved by U.S. EPA. You can review this list and compare it to any excess emissions provision that is included in a Title V permit.

What is the legal basis for arguing that the Permitting Authority must add terms to a permit to assure that the excess emissions provision is applied properly?

The permit must assure compliance with all applicable requirements. In this case, the applicable requirement includes the excess emissions provision. If you think that additional permit terms are needed to prevent misapplication of the excess emissions provision, you can argue that 40 CFR Part 70 requires them. In particular, § 70.6(a)(1) provides that each Title V permit must include "[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." In addition, remember that § 70.6(a)(3)(B) provides that:

> Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), [the draft permit must include] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.

If a permit includes a vague excess emissions provision that could be interpreted in a way that violates federal law, or one that lacks adequate monitoring, recordkeeping, and reporting requirements to assure that the facility is complying with permit terms, you can argue that under Part 70, the permit may not be issued as drafted.