March 19, 1996

Subject: Region 10 Questions & Answers #2: Title V Permit Development

From: Joan Cabreza,
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To: Region 10 State and Local Air Pollution Agencies

As discussed in the Memo of february 29, here are some additional questions and answers on Title V permit issues. This addresses a series of questions posed by OAPCA and NWAPA, so to a great extent the answers are slanted toward Washington, but we believe it may be useful to the rest of you as well. We will continue to issue additional lists as we feel it is necessary and useful.

We appreciate the opportunity to work with you on these permits. Please call Elizabeth Waddell (206/553-4303) or David Bray (206/553-4253) if there are more issues that you would like us to look into. Also, please let us know if you disagree with anything in this memo or if you have other suggestions for how to deal with these issues.

CC: State Attorneys General
Kirt Cox, OAQPS

Region 10 Questions and Answers #2: - Title V Permit Development
(Based on questions from OAPCA/NWAPA)

1a. WAC 173-401 is not in the WA SIP. Is WAC 173-401 federally enforceable and, if so, what mechanism makes it federally enforceable?

No, WAC 173-401 is not federally enforceable. EPA decided not to make provisions of approved State operating permit rules federally enforceable, but instead, will only enforce the provisions of the Act itself. For example, the Act specifically allows EPA and citizens to enforce the terms of issued permits and to enforce the Act's requirement for sources to have permits, to submit complete and timely permit applications, and to abide by the terms of their permits. EPA and citizens can also enforce the requirements for permitting authorities to not issue a permit if EPA objects, to notify affected states, to reopen permits, and to issue permits, permit revisions, and renewals in accordance with the EPA approved State rules. However, the provisions of WAC 173-401 which apply to sources or to the permitting authorities are not enforceable by EPA or by citizens under the Act.

b. Are the reporting requirements contained in the emergency provision section applicable requirements?

No. Chapter 401 requirements are required parts of the permit but are not "applicable requirements." The definition of "applicable requirement" doesn't include part 70 (i.e., Chapter 401) requirements. The part 70 rules often use the phrase "the source will comply with all applicable requirements and the requirements of this part," (emphasis added) clearly distinguishing between these two different kinds of requirements but also clearly requiring that both be addressed in the permit.

c. Are sections on IEUs not federally enforceable since they were the subject of interim approval of the WA AOP program?

These sections have the same standing as the rest of Chapter 401 and are not federally enforceable. Everything in WAC 173-401 was APPROVED for the interim period. Although EPA contends that the sections on IEUs must be amended, these sections, as they are written now, constitute the state's approved program.

2a. Federal enforceability: should the draft permit include a statement that state/locally enforceable requirements will immediately convert to federally-enforceable requirements upon incorporation into the WA SIP or by approval through 40 CFR Part 63 Subpart E?

Ultimately, this decision rests with the permitting authority. It would certainly avoid the need for many permit reopenings if permits were structured in this manner. Note that to ensure that the public has an adequate opportunity to comment on conditions that will become "automatically" enforceable upon EPA approval of state and local requirements, the permit must specifically identify those provisions for which the State is seeking EPA approval. The permit must also make clear that the existing federally-enforceable requirements will expire upon EPA approval of the new state-only requirement revision. This is also essential for the application of the EPA veto provision and citizen petition to the EPA Administrator, since State-only provisions would not normally be subject to these Title V requirements. For additional discussion of this issue, please refer to Section II.B.6. of White Paper Number 1 and Section II.B. of White Paper Number 2.

b. Are there other methods by which state/locally enforceable applicable requirements can become federally enforceable?

State/locally enforceable applicable requirements become federally enforceable after EPA publishes a federal register notice approving the requirement either through the SIP, 111(d), or 112(l). For example, upon request of the state, EPA can approve a specific RACT order or regulation into the SIP. That approval creates federal enforceability. Terms and conditions of new source review (NSR) permits issued pursuant to SIP-approved NSR rules are federally enforceable provided they are related to the control of criteria pollutants. Similarly, upon request, EPA can approve the State's NSR provisions under 112(l) making terms and conditions related to the control of hazardous air pollutants in permits issued under those provisions federally enforceable.

It is important to recognize that any term or condition in a NSR permit which relates to control of criteria pollutants is federally enforceable, even if the State or local rule which required that term or condition is not, in itself, a federally enforceable requirement. For example, if an agency has a sulfur dioxide emission limit which has not been approved into the SIP, but includes that limit in a NSR permit (either directly or by reference), then that limit becomes a federally enforceable requirement of the permit.

Note that NSPS and NESHAP requirements are ALREADY federally enforceable. The delegation process does not confer federal enforceability, rather it grants the State the authority to act in lieu of EPA.

3a. What is the current status regarding IEUs?

As you know, a coalition of Washington industries has petitioned for judicial review of EPA's decision to require Washington to revise its IEU regulations as a condition of full approval. The State of Washington has intervened in the suit on the side of the industry coalition. The Ninth Circuit will hear arguments from both sides in early April and a decision is expected in June. If the Petitioners and the State win the lawsuit, then your current rule will be fully approved by EPA. If EPA prevails, then Washington will be required to revise the IEU portion of the regulation. Permits issued after Washington's rule is revised would need to conform to the new rule. Permits already issued would need to conform to the new rule when they are renewed or revised. In the meantime, the existing regulation is approved and you should be implementing it as it is now written.

b. Should IEUs be included in a draft permit or in the technical support document which accompanies the permit? If they need to be included in the draft permit, should they be included as a general list or with specific details?

All applicable requirements that apply to all IEUs must be identified and included in the permit (WAC 173-401-530(2)(b). In addition, any testing, monitoring, reporting, or recordkeeping that is specifically imposed by the applicable requirement must be included in the permit (WAC 173-401-530(2)(c).) IEUs subject to applicable requirements must themselves be described in the permit to the extent necessary to make the requirement enforceable against the subject sources. For example, the state opacity limit applies to all emission units. Therefore, the permit would only need to state that all emission units are subject to the state opacity standard. Each of the emission units subject to the standard would not need to be identified in the permit.

In some cases the IEU may need to be specifically described. For example, WAC 173-400-050 and 060 are generally applicable requirements that apply to two different classes of emission units. In these cases, the permit needs to provide enough information to identify the class of sources to which the standard applies.

c. Should all types of IEUs (IEUs with emissions less than threshold levels, categorically exempt, and exempt due to size or production rate) be treated the same in the permit?

The answer depends on what requirements the IEU in question is subject to. If categorically exempt IEUs are subject to applicable requirements, the requirement must be in the permit and the unit must be described in as much detail as necessary to impose the requirement. In many cases, no specific description will be necessary because the requirement applies to all emission units.

Since IEUs categorically exempt pursuant to WAC 173-532 may be left off the permit application, it makes sense to not specifically identify them in the permit except to the extent that information on the IEU is needed to determine the applicability of or to impose an applicable requirement. However, to the extent that you have information on these units, you may wish to list them in either the permit or the technical support document.

We recommend you list in the permit units that are IEUs based on emission thresholds (WAC 173-401-530(1)(a)) or based on size or production rate (WAC 173-401-530(1)(c)) since these units must be listed in the permit application and since this information is needed to determine if they are IEUs and that they remain IEUs. For the most part, simply listing the units should be adequate. In some cases, you may need to provide additional information about the units, especially if there is a risk that an inspector may not be able to distinguish between an IEU and a similar unit that is not an IEU. This is a judgement call.

You should cite WAC 173-401-530(6) as a requirement for units that are IEUs based on emissions levels. (Chapter 401 requires sources to amend their permits BEFORE an IEU can increase its emissions above the threshold amounts.)

d. If IEUs are listed in the permit, would they be subject to the general conditions and compliance assurance measures?

The permit must identify the applicable requirements that apply to IEUs at the source (WAC 173-530(2)(b).) The IEUs would be subject to the general conditions only to the extent that the general conditions are applicable requirements to the IEUs or if the general conditions are Part 70 (i.e., Chapter 401) requirements that apply to all emission units at a source. In other words, you should consult with your attorney or the State Attorney General to determine if and to what extent the general conditions apply to IEUs.

With respect to compliance assurance measures, remember that WAC 173-401-530(2)(c) specifically exempts IEUs from "gapfilling" testing, monitoring, reporting or recordkeeping requirements and WAC 173-401-530(2)(d) specifically exempts IEUs from the compliance certification requirement.

4. What are some practical means for determining who is a "Responsible Official?"

The definition is relatively detailed in the regulations. But in a practical sense, the question normally seems to be what organizational level must sign the application and compliance certifications, particularly given statements in the regulations such as "any other person who performs similar policy or decision making functions" and "responsible for the overall operation". In general, we have taken the position that the Responsible Official must at least have the authority to allocate funds to address an environmental problem.

5. What should the "Statement of basis" include? What is the role of the "Statement of Basis" in the process?

40 CFR § 70.7(a)(5) requires the permitting authority to provide to EPA (and others upon request) a statement setting forth the legal and factual basis for the draft permit conditions, including references to the applicable statutory or regulatory provisions. 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. A good example of the type of document that is, in effect, a "statement of basis" is the "Fact Sheet" that Ecology prepares for PSD permits.

For some permit terms, such as generally applicable requirements, very little explanation will be required because the basis for determining the applicability of the requirement to the source in question is straightforward--all emission units at all sources are subject to these generally applicable requirements. In other cases, more detail will be required. For example, if a facility has a storage vessel for petroleum liquids, the statement should contain a discussion of the relevant facts for determining

whether the emission unit is subject to NSPS Subpart K, Ka or Kb, such as date of construction, storage capacity, pressure, and if relevant, the method chosen by the facility for complying with the work practice requirements.

6. Is "technology-based emission limits" an EPA term? If so, how is it defined and what are some programs with these limits?

In the August 1995 proposed revisions to part 70, EPA has clarified that "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).

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.

7. Limits: Can conditions in the AOP be used to establish emission limits or plant-wide emission limits to "gap-fill" for past NSR deficiencies? For instance, can a permit condition define an alternative emission limit which applies during start-up for a pollutant which is limited by a NOC condition?

The answer to this question is complicated and depends upon the type and extent of the "past NSR deficiencies" that need to be addressed. As was indicated in the previous question and answer package, the AOP cannot be used to change the terms and conditions of previously issued NSR permits or to establish new terms and conditions that are required to be established in the NSR permit process. However, the AOP can be used to clarify the terms of previously issued permits and, as with any other applicable requirement, can and must be used to "gap-fill" where the applicable requirement needs to be made enforceable as a practical matter. The following examples illustrate some of the issues involved:

a. The NOC process must be used to establish new limits or to revise existing limits in a previous NOC for new sources or modifications subject to the NSR rules. If, for example, a NOC failed to establish a BACT emission limit for a particular pollutant, such BACT emission limit cannot be established in an AOP. Similarly, if a NOC established an emission limit which must be met at all times, an alternative emission limit for periods of startup cannot be established in an AOP. The reason for this is that the NSR rules, and not the AOP rules, set forth the substantive and procedural requirements which apply to the establishment of NOC conditions. For example, there is no BACT requirement in the AOP rules. Neither is there any opportunity for the Federal Land Manager to address Class I area impacts for PSD sources or modifications. Nor is there any requirement to ensure that ambient air quality standards, PSD increments and/or visibility requirements will be protected under an alternative emission limit. The legal authority to establish or revise emission limits or other conditions relating to the construction or modification of a stationary source resides only in the NSR rules. Note that the permitting authority can propose emission limits or other conditions in a NOC and concurrently propose to include those same limits or conditions in an AOP (thereby using one public notice process to cover both actions). However, the AOP cannot include those limits until such time as the NOC is actually issued and becomes effective.

b. If previous NOCs were vague as to the exact amounts of pollutants that are allowed to be emitted (e.g., permit terms which simply require the source to construct in accordance with the applications), then the AOP can include emission limits or terms and conditions that expressly represent what was implicitly established in the NOCs. For example, a new source may have been permitted to emit at its maximum physical capacity in accordance with its physical and operational design and in compliance with all applicable federal, state, and local emission standards that applied at the time of NOC approval. However, the NOC did not explicitly state the allowable level of emissions. The AOP may, at the permitting authority's discretion, include emission limits that represent the emissions (both short-term and/or annual) that were actually permitted by the NOC. EPA does not consider this to be either the establishment of a new emission limit nor "gap-filling," but rather the clarification of the limits established in the previous NOCs.

8. Does the list of 112(r) substances need to be included in the permit as an applicable requirement and if so, what terms and conditions would be needed to assure compliance?

No, the list of 112(r) substances is not an applicable requirement. The regulations implementing the requirements of 112(r) will be applicable requirements that need to be included in the permit. The June 24, 1994 guidance on 112(r) should provide information on this and other 112(r) issues.

9. Do Washington air pollution control authorities have the authority to enforce any Title III requirements including the list of Section 112(r) substances.

The Washington air agencies have the authority (under the Washington statute that allows you to regulate all air contaminants) and obligation (under Title V) to ADOPT Title III requirements. After the agency has adopted a requirement (either as a regulation or through incorporation by reference), then the agency has the authority to enforce that requirement.

The Washington air agencies have the authority under the Washington statute to regulate all air contaminants including anything listed under Section 112(r) that is an air contaminant.

10. Should WAC 173-400-107 reporting requirements be included as applicable requirements?

The entire requirement is an applicable requirement since it is part of the SIP and must therefore be included in the permit in its entirety. In any case, it seems likely that an agency would want the entire requirement in the permit so that the source is on notice as to what it needs to do.