Title V Task Force

Final Report to the Clean Air Act Advisory Committee

Title V Implementation Experience
April 2006

FINAL REPORT
TO THE CLEAN AIR ACT ADVISORY COMMITTEE ON
THE TITLE V IMPLEMENTATION EXPERIENCE

Prepared by:

The Title V Task Force

April 2006

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

MAR 29 2006

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Task Force on Title V Implementation Experience

FROM: for William T. Harnett Michael A. Ling
Director, Air Quality Policy Division (C504-01)

TO: Clean Air Act Advisory Committee (CAAAC) Permitting, NSR and Toxics Subcommittee

Please find enclosed the Final Report of the Task Force on Title V Implementation Experience. You formed the Task Force in May 2004 to review the implementation and performance of the operating permit program under title V of the 1990 Clean Air Act Amendments. The Task Force has compiled a substantial body of public testimony and written comments concerning what is working or not working in the title V permit program. Collectively, the Task Force members and EPA spent thousands of hours over the past two years on this effort. Included in the report are a number of recommendations for consideration by CAAAC and EPA. These recommendations and the discussion accompanying them are the culmination of a great amount of thoughtful deliberation about how the program can be better implemented. Consistent with your charge, the report reflects the core issues of concern to all stakeholder groups and all of their perspectives of how best to address them. The Task Force hopes that this work product will be very useful to both the CAAAC and to EPA.

EPA would like to express its gratitude to all members of the Task Force for their dedication to this project and the large amounts of time they devoted to its completion. EPA and the public at large are deeply indebted to all members of the Task Force for the careful translation of the public testimony into recommendations for the improvement of many areas of the title V program.

The Task Force would like me to pass along their thanks to the EPA staff for their hard work in facilitating this process as well as to recognize the efforts of EC/R Incorporated representatives for arranging our meetings and for their valiant efforts to prepare notes on our activities.

We entrust this report to your deliberation and seek your direction on how EPA should proceed to implement the Task Force's recommendations.

EXECUTIVE SUMMARY

In 2004, the Clean Air Act Advisory Committee (CAAAC) established the Task Force on Title V Implementation Experience ("Task Force") to report on stakeholder experience with implementation of the Title V operating permit program. The 18-member Task Force, which consisted of representatives from industry, environmental groups, and State and local agencies, used public meetings, written comments, and individual experience as resources to identify and evaluate the Title V program and develop recommendations. This report represents a compilation of the issues identified and includes summaries of Task Force discussions, key supporting stakeholder experience, conclusions, and recommendations. Since the report represents the perspectives of the various stakeholders there are some issues and recommendations with Task Force consensus, and others where the report notes the differences.

As background, the Clean Air Act of 1990 provided for the development of a national operating permitting system for major sources of air pollution. Under this new section (Title V), State and local air pollution control agencies would issue permits that would contain all of the requirements that were needed for a source to maintain compliance with State and Federal air pollution control regulations. Furthermore, the Title V permit would be directly enforceable by the permitting authority issuing the permit and EPA. It is also subject to the citizen suit provisions of the Act. From the beginning, implementation of Title V has been difficult and controversial. After 15 years, there are still significant issues associated with the operation of the program.

The Task Force identified a number of program benefits that were generally recognized across the spectrum of stakeholders. These include:

- Recording of applicable requirements in one document clarifies regulatory requirements for permitting agencies, the public, and facilities.
- Improved public participation at various stages of the permitting process.
- Improved communication between regulatory agencies and facilities has resulted in better permits and mutual understanding of compliance requirements.
- Establishment of a funding mechanism to provide resources to administer State permit programs.
- Improved source compliance assurance systems, driven by Responsible Official obligations and reporting of deviations and a strengthened penalty/enforcement mechanism.

In evaluating the Title V program, the Task Force categorized key issues into 19 different areas. For each topic the Task Force characterized the issue, developed recommendations, summarized Task Force discussions, and included supporting comments from public hearings and written testimony. The topics included in this report are:

- Program Overview Papers
  - Benefits
  - Costs
- Content Issues
  - Incorporation of Applicable Requirements
  - Insignificant Activities and Emission Units
  - Monitoring
  - Title I/Title V Interface
  - New Substantive Requirements
  - Permit Definitiveness
  - Compliance Certification
  - Startup, Shutdown, and Malfunction
  - Compliance Schedules
- Process Issues
  - EPA Review of Proposed Permits
  - Public Access to Documents
  - Public Hearings
  - Public Notice Throughout Process
  - Statement of Basis
  - Responses to Public Comments
  - Permit Revisions and Operational Flexibility
  - Appeals and Petitions

The Task Force developed an extensive list of recommendations. Although there were no external constraints on the scope of the recommendations of the Task Force, the members recognized that recommendations which could be implemented under current legislative/regulatory authority would be easier, and more timely, to implement. The recommendations are included in each topic area. Given the diverse views of the Task Force there is no consensus list of recommendations or conclusions, although the votes shown on each recommendation indicate the degree of consensus.

The Task Force believes that an EPA assessment and implementation of many of the recommendations will provide for an improved Title V operating permit program. A program that achieves program objectives in a more efficient manner will benefit all stakeholders.

1. INTRODUCTION

1.1 CHARGE TO THE CAAAC TASK FORCE ON TITLE V IMPLEMENTATION EXPERIENCE

The Permitting Subcommittee of the Clean Air Act Advisory Committee establishes the Task Force on Title V Implementation Experience, and charges it with this objective:

The Task Force will report to the committee on the experiences of stakeholders who have been working in the Title V permitting arena (*i.e.*, a "State of the Title V program" report). The report should reflect the perspectives of all stakeholder groups, and should reflect an effort to answer two questions:

1. How well is the Title V program performing?

For example, has it:

- Resulted in permits that clearly compile all a source's applicable requirements into a single document?
- Enabled sources, States, EPA, and the public to better understand the requirements that apply to a source?
- Enabled sources, States, EPA and the public to better know whether a source is meeting these requirements?
- Triggered actions that result in better compliance with the CAA?
- Allowed for better enforcement of CAA requirements?
- Improved citizen participation in air quality decisions by involving the public in the issuance of permits?
- Improved EPA's ability to implement and oversee CAA programs, including toxics, acid rain, etc?
- Enhanced governments' ability to do air quality planning?
- Ensured self-funding adequate to run effective programs?
- Resulted in better air quality?

2. What elements of the program are working well/poorly?

The answers to these questions should, to the maximum extent possible, reflect consideration of stakeholders' real world experience with the Title V program, and should include examples – good and bad – that illustrate this experience. Where possible, emphasis should be placed on actual examples, but in some cases, hypothetical examples may provide the best illustration.

When the Task Force has gathered sufficient information to characterize the various perspectives on Title V implementation experience, as described above, it may also elect to offer recommendations for improving the Title V program.
The report and any recommendations made should reflect the full range of stakeholder perspectives discussed. The Task Force may characterize consensus statements and recommendations as such, but where there is not consensus, the report should detail the full range of issues discussed and views expressed during the process.

In order to ensure that the discussions reflect sufficient depth, but also ensure a broad collection of stakeholder perspectives, the Subcommittee recommends that the Task Force conduct at least three full-day meetings, and have at least one meeting outside of the Washington D.C. area. The EPA will explore options for supporting the Subcommittee's work, such as providing transcripts and summaries of these meetings.

1.2 TITLE V TASK FORCE MEMBERS

State/local Permitting Agencies	
Rob Sliwinski and John Higgins	New York Department of Environmental Conservation (NY DEC)
Shelley Kaderly	Nebraska Department of Environmental Quality (NE DEQ)
Don van der Vaart	North Carolina Dept of Environmental Management (NC DEM)
Adan Schwartz	Bay Area Air Quality Management District (AQMD)
Bob Hodanbosi	Ohio Environmental Protection Agency (OH EPA)
Steve Hagle	Texas Council on Environmental Quality (TCEQ)
Environmental Advocacy Groups	
Karla Raettig and Kelly Haragan	Environmental Integrity Project
Marcie Keever	Our Children's Earth
Bob Palzer	Sierra Club
Verena Owen	Lake Co. (IL) Conservation Alliance
Keri Powell	New York Public Interest Research Group (NYPIRG)
Richard Van Frank	Improving Kids' Environment
Industry	
Shannon Broome	Air Permitting Forum
Lauren Freeman	Utility Air Regulatory Group (UARG)
Bernie Paul	Eli Lilly and Company
Bob Morehouse	ExxonMobil
Mike Wood	Weyerhaeuser Company
David Golden	Eastman Chemical

Support and Facilitation

EPA	
Bill Harnett, Michael Ling and Ray Vogel	Office of Air Quality Planning and Standards
Steve Hitte	Region IV
Callie Videtich	Region VIII
Padmini Singh	Office of General Counsel
Carol Holmes	Office of Enforcement and Compliance Assistance
EC/R Incorporated	
Graham Fitzsimons	
Shannon Cox	
Lesley Stobert	
Steve Edgerton	
Kathy Boyer	

1.3 TASK FORCE METHODOLOGY

Selection of Task Force members

The formation of the Task Force and a public solicitation of candidates was announced in a May 17, 2004 Federal Register (69 FR 27921). With a goal of creating a reasonably small and diverse group, the EPA selected an 18-member Task Force comprised of experienced representatives from industry, environmental advocates and State and local agency officials.

Public Testimony

The charge from the CAAAC Permitting Subcommittee instructed the Title V Task Force to issue a report that "should reflect the perspectives of all stakeholder groups." The subcommittee recommended that the Task Force conduct at least three full-day meetings, at least one of which should be outside the Washington, D.C. area.

Consistent with its charge, the Task Force held three public meetings at these locations:

June 25, 2004	Washington D.C.
September 14, 2004	Chicago, IL
February 7, 2005	San Francisco, CA

In addition, a public conference call on November 15, 2004 was held with environmental advocates, to obtain testimony from those who might be unable to afford travel to one of the public meetings. Also a public conference call on February 8, 2005 was held with State and local agencies, because the Task Force believed that the public meetings up to that point had underrepresented the views of State and local permitting agencies. Industry stakeholders presented their views by appearing in person at the public meetings or filing written comments; however, they were not provided a separate conference call. From the meetings and conference calls, testimony was received from 74 speakers, of

which 18 represented industry, 18 represented State and local agencies and 38 represented environmental advocacy groups.

Also, written comments were received until March 31, 2005. A total of 44 comment letters were received: 18 from industry, 13 from State and local agencies and 7 from environmental advocates. In addition, 34 studies and supporting documents were submitted to the docket.

Full text of the public testimony is available on www.epa.gov/caaac/titleV. The written comments are also available on www.epa.gov/caaac/titleV and on www.regulations.gov at docket (enter docket number OAR-2004-0075 into "advanced search"). In addition, sections of public testimony and written comments are liberally quoted or summarized in this report in many issue areas.

Identification of Issue Areas

In evaluating the input received, the Task Force divided the various comments into Issue Areas. (See Table 1.3-1). These Issue Areas are the ones of most interest to stakeholders and Task Force members. Therefore they don't necessarily reflect some of the original charge questions posed by the CAAAC. For example, there was very little input on items like air quality planning (one of the example CAAAC questions) so the Task Force did not focus on areas not highlighted by stakeholders. The goal of the Task Force was to cover a broad range of issues while giving meaningful treatment to each. This necessarily means that not every issue raised by stakeholders is reflected in the body of the report. The Task Force wishes to emphasize that its decision not to address in the body of the report a particular issue on which testimony was provided should not be interpreted as a decision that the issue is unimportant. Given our limited time, we attempted to prioritize the issues based on the degree of input received and the likelihood of having productive discussions within the Task Force.

Process for Developing Each Issue Area

Each Issue Area was taken on by small groups of Task Force members to frame the issues and sub-issues, to summarize the supporting information presented in the oral and written public comments and to suggest recommendations for consideration by the entire Task Force. Once issue papers were developed, face-to-face meetings were held to hear the viewpoints of each member of the Task Force, modify the framing of the issues or sub-issues within the topic if necessary, and discussing and voting on potential recommendations. Five face-to-face meetings were held from February 2005 to January 2006. In addition, the Task Force added days either before or after some public meetings to move its work forward. Finally, a large number of conference calls between the face-to-face meetings were held to discuss issue papers, to suggest and vote on recommendations and to discuss development of the report.

To ensure that all issues and potential recommendations were considered, we allowed anyone on the Task Force to suggest a recommendation and held discussions on all offered recommendations. In some cases, recommendations were modified to garner addi-

tional support and thus may represent a compromise position by some or all persons voting in favor of a recommendation. Even if a proposed recommendation did not receive a majority of votes from members of the Task Force, we have included it in the issue paper to provide a complete picture of the issues we discussed and people's viewpoints. Thus, the term "recommendation" is used for all proposed recommendations whether or not a recommendation received a majority of votes from the group. It was our desire not to eliminate viewpoints simply because they were not held by a majority of members. At the same time, the nomenclature of "recommendation" should not be read to indicate that every recommendation is endorsed by all of the Task Force. To draw conclusions on how strongly a recommendation has the support of all Task Force members, the reader is directed to review the voting for each recommendation and the Discussion section in the paper.

Where possible, we also included in the Discussion section of a paper an explanation of the deliberations so that the reader can understand why someone may have supported, opposed, or abstained from voting for a particular recommendation. For example, a vote against a recommendation may have been based on a particular phrase of concern in the recommendation, or it may have been against the recommendation as a whole. While we cannot recreate the entire discussion (and we doubt anyone would want to read it if we could), to the extent possible, the summary of the Task Force discussions in each paper is intended to help the reader understand what concerns and policies motivated particular votes. We also included an option to abstain from a particular vote as well as to offer clarifications of a vote. The clarification option allowed members of the Task Force to explain their votes, *e.g.*, how they interpreted a particular word or phrase in the recommendation, or why they abstained from voting for the recommendation. Finally, although Task Force members participated in discussions and voted with the intent of representing the viewpoint of the organization they were representing to the best of their ability, the votes themselves are to some degree personal votes in that the Task Force did not open its process to allow the organizations themselves to vote on recommendations.

The following areas were identified by the Task Force for the purpose of developing issue papers for further discussion. The order of this list is alphabetical and does not reflect any particular priority.

Table 1.3-1 Issue Areas identified by the Task Force

Topic
1. Compliance Certifications
2. Compliance Schedules
3. Definitiveness of Permit
4. Deviation Reporting*
5. EPA Review of Proposed Permits
6. Incorporation of Applicable Requirements
7. Insignificant Activities/ Emission Units
8. Monitoring
9. New Substantive Requirements
10. Permit Reopening, Revisions, Current and Operational Flexibility
11. Petitions and Appeals
12. Program Benefits
13. Program Costs
14. Public Access to Documents
15. Public Hearings
16. Public Notice throughout Process
17. Responses to Public Comments on Draft Permits
18. Startup, Shutdown, and Malfunction
19. Statement of Basis
20. Title I/Title V (SIP gap; *e.g.*, old NSR)

* No paper was ultimately developed on this issue.

1.4 REPORT STRUCTURE

As described in the Task Force Methodology section, this report represents a work product based on input received from four public meetings, two public conference calls to receive input, numerous written comments submitted, and extensive discussions at Task Force meetings from 2004-2006.

The report has been structured to achieve the following:

- To capture and summarize key input from multiple stakeholders on the Title V program as received in public hearing and written submittals.
- To capitalize on the experience of Task Force members to identify, characterize, and prioritize Title V issues.
- To develop recommendations to improve the Title V program. The recommendations go beyond the original charge to the Task Force (which focused on how the program is performing and elements of the program that are working well/poorly).

The main body of this report is organized by Issue Areas. The Task Force agreed to write an issue paper for each issue area in a standard format. Thus, each paper contains the topic, a brief Issue/Observation Description, Supporting Information, a Task Force Discussion Summary (based on meeting or conference call discussions), and, where possible, Recommendations. The issue papers were used by the Task Force to facilitate discussions but also evolved as a result of those discussions. The Supporting Information referenced above represents either a summary of public hearing input/written comments or direct quotes from the public meetings and written comments. Some papers include attachments with additional supporting information as well.

The report also includes a summary of the purpose of the Title V Operating Permit program. It is important in evaluating the Title V program to provide a frame of reference for the analysis. This section provides a brief overview of the legislative and regulatory history of the Title V program.

The final report includes all of the recommendations that were considered by the Task Force. So as to better represent the spectrum of viewpoints, the Task Force allowed its members broad latitude to offer recommendations. Members used the voting system to support, disagree with, or abstain from each recommendation, and could also offer alternate recommendations. As noted above, though time was devoted to discussion of each recommendation with the goal of moving towards consensus, each recommendation offered by a Task Force member was included in the report regardless of the degree of consensus behind it.

2. PURPOSE OF TITLE V OPERATING PERMIT PROGRAM

Almost 15 years after enactment, the purposes of the Title V program have been achieved to varying degrees. However, an assessment of these broader purposes is as relevant today as in 1990. On a facility-specific scale, Title V permits are living documents that should reflect changing conditions at a facility. Thus, issuance of a permit to a facility by no means ends the relevance of a broader "purposes" discussion to that facility. On a program-wide scale, this Report demonstrates that much about Title V remains unsettled and subject to debate in both the legal and policy arenas. Thus, even 15 years into implementation of the program, there is a need to explore and reconcile views regarding the program's fundamental purposes.

The Permitting Subcommittee charged this Task Force with evaluating what aspects of the Title V program are working well and what aspects are not working well. In addition, the Task Force was given the option of developing recommendations. In assessing what is or is not working well, each stakeholder (including each person who presented information to the Task Force and each Task Force member) brings to bear his or her view of what the program was intended to accomplish, *i.e.*, its purposes. The Report discusses purposes both because they were raised in testimony, and because understanding the Task Force members' views about purposes is helpful to understanding how they approached the question of what is or is not working well.

Aside from the law itself, the legislative history is a common source of information about the purposes of a program such at Title V. Reports prepared by the U.S. Senate and House of Representatives preceded the enactment of Title V in 1990 and speak to various themes that have echoed throughout the implementation of this program. In addition, extensive changes were made in conference to reconcile the House and Senate provisions so statements made contemporaneous with enactment are also important and perhaps more telling. Among the recited purposes are: consolidating all Clean Air Act requirements into one document, enhancing public participation in decisions about applicability of these requirements to major facilities, providing an opportunity to judicially challenge these decisions, enhancing the ability to enforce Clean Air Act requirements through among other things, compliance certifications, and providing certainty to permitted facilities regarding which regulatory obligations apply.

The Task Force participants, representing a broad spectrum of those involved with Title V implementation, shared a general consensus around the existence of these purposes, even when they disagreed about the means by which they should be addressed. In addition, the Task Force proceedings touched upon some purposes, the validity or interpretation of which is fundamentally disputed within the Task Force membership and among stakeholders. For example, while there was agreement that Title V was not intended to affect the stringency of requirements incorporated into the permit, there was disagreement over whether actions such as the addition of new monitoring or new compliance methods affect stringency, the discussion of which tended to focus on the relationship between the data used in setting a standard to the data used to enforce that standard and the compliance obligation that results. In a similar vein, there was agreement that Title V

was not intended to create new substantive requirements, but there were a range of views as to whether conditions such as enforceable parameter monitoring that are added to "assure compliance" create or are sometimes tantamount to creating new substantive requirements. These examples illustrate how a person's perspective on the purpose of Title V necessarily influence how one determines if and how the program is or is not working well.

Intended purposes aside, it is worth noting here the effects of Title V implementation that, whether intended or not, appear to have flowed inexorably from it. One example is a heightened impetus to resolve longstanding issues of interpreting Federal or SIP standards, sometimes through revision of the standard itself. Another example is the incentive to resolve longstanding compliance problems at facilities applying for a permit so that compliance can be certified and a schedule of compliance avoided. By raising the statutory profile of compliance through certifications, the Title V program can probably be credited with forcing resolution of issues that otherwise may have persisted in a State of stalemate (or perhaps acknowledged ignorance by all sides). A third example is an opportunity for the people living near a facility to find out more about it, even if they otherwise agree with the permitting requirements. The group did not reach resolution, however, on the issue of whether these accomplishments could have been achieved in a better, or more efficient, manner as we were not charged with this task.

A final observation that became clear through the Task Force discussions is that a fair portion of the disagreement that occurs over purposes of the Title V program stems from Title V's use of the capacious phrase "assure compliance" to describe the intended effect of the Title V program. Expansively interpreted, "assur[ing] compliance" could encompass every activity that follows the adoption of a substantive standard, including prescription of monitoring and other compliance terms, interpreting application of the requirement at a particular facility, as well as the methods and level of effort employed by the air agency to verify compliance and pursue legal enforcement options in instances of noncompliance.

Through the "assure compliance" phrase and other more specific provisions of Title V, a discussion has been joined regarding much of the panorama of activities that permitting agencies have been undertaking, a discussion which always revolves around the question of whether and to what degree an enhancement of these traditional activities is authorized or required. The breadth of issues open for debate as to manner and degree, the considerable overlap with activities that preceded Title V, and the vagueness of directives in the statute and, to a lesser extent, EPA's regulations, have resulted in considerable transaction costs to all participants in Title V process. This is evidenced by the long list of issues that have been negotiated and litigated on the national, State, and facility-specific levels. It is the sense of the Task Force that steps should be taken to stem the tide of transaction costs and to bring an increased level of certainty and stability to implementation of this program. To this end, the Task Force offers its recommendations to EPA (and in some cases directly to State permitting authorities) so that it may exercise its authority appropriately and that Title V may proceed along a straighter path of implementation.

3. PROGRAM OVERVIEW ISSUE AREAS

3.1 TOPIC: TITLE V PROGRAM BENEFITS

Issue/Observation Description

The Title V Task Force requested input on the benefits of the Title V program as part of the assessment of the program. Commenters identified a number of benefits of the program that are summarized in this paper.

Several commenters referenced the purpose of Title V based on the congressional record and EPA preambles to regulations. It was suggested that the program should be evaluated on the basis of the expected benefits and costs. A few key comments on the purpose of the Title V program are as follows:

- Include Federal regulatory requirements in one document. The document can consolidate duplicative and redundant requirements.
- Enable the source, States, EPA, and the public to better understand requirements to which the source is subject and whether the source is meeting those requirements.
- Increase public participation in the permitting process.
- Facilitate enforcement by providing a single reference for all of a major source's operating limits and requirements.
- Simplify procedures for a source to modify obligations.
- Establish a mechanism, *i.e.*, permit fees, to fund State/Local programs.
- Establish streamlined procedures to incorporate requirements without establishing substantive new requirements (*i.e.,* stringency) or costs.

The comments received and the Task Force discussion on benefits can be summarized as follows (detailed comments are in the Supporting Information section):

- The majority of commenters agreed that incorporating applicable requirements in one document is beneficial to regulatory agencies, the public, and sources. The benefit derives from the process of identifying and clarifying requirements and communicating with the public. Permitting authorities were better able to identify sources and requirements that had been missed in the past. Some permitting authorities that had previous operating permit programs stated that the Federal program provided little additional benefit and some commenters indicated that the permits are far too complex for the public to fully understand them.
- Improved public participation. Numerous commenters noted the improved opportunity to participate in, and influence, the permitting process. The process provides points in time for interested parties to communicate issues about a site to regulatory agencies where limited opportunities existed before. Participation includes the ability

for the public to participate in the process by commenting on permits, file administrative petitions with EPA, and appeal EPA's permitting decisions. While the public may only participate in a small number of permit review processes the Task Force heard numerous comments that the public's participation was a benefit of the Title V process by increasing public knowledge of regulated facilities.

- Improved working relationship and communications between regulatory agencies and facilities. Increased interaction has resulted in better permits and mutual understanding of compliance requirements.
- The mechanism to fund State permit programs was highlighted as an effective way to provide resources to administer the program.
- There was a diversity of comments on whether or not the Title V program has resulted in air quality and health benefits. Some indicated that companies have installed controls to reduce emissions below the major source threshold that triggers Title V permits and that the added focus on compliance has positively impacted environmental performance. Others suggested that sources that took enforceable limits were already below the major source threshold.
- Sources have generally strengthened their compliance assurance systems, driven by Responsible Official obligations and reporting of deviations. Title V also provides a strengthened penalty/enforcement mechanism. Some State representatives commented that compliance at facilities had improved through the identification of requirements missed in the past, increased accountability due to the compliance certification/reporting process, and self-auditing.

Discussion Summary

The Task Force discussions on benefits generally reinforced and supported the summary comments above. It was noted that commenters did not quantify benefits, while cost information was provided by many commenters. Task Force members recognized, however, that the program was not developed on a cost/benefit basis, so a direct comparison was not considered.

It was also noted that many comments were conditioned that either full benefits haven't been achieved (*i.e.*, barriers have been established that limit capturing full benefits) or that the benefits don't warrant the added regulatory burden to achieve them. There was also a discussion on whether or not Title V was the driver for some of the benefits. For example, some Task Force members believe the Title V program has resulted in air emission reductions; others believe that the emission reductions would and have been achieved as a result of other regulatory requirements since Title V was not designed as an emissions control program like an NSPS or MACT program.

It was also recognized that a number of the Task Force recommendations are intended to enhance the benefits of the program and that the authors of the various issue sections should highlight these benefits in evaluating the issues.

Recommendations

The Task Force had no recommendations for the Program Benefits section only. The recommendations incorporated in other sections of the report are generally designed to more efficiently/effectively improve the program, capture unrealized benefits, and improve program cost effectiveness. It was also suggested that the scope of the third cost recommendation, relating to case studies, include benefits derived.

Supporting Information

Congressional and Regulatory Intent of Title V Program:

1. "The congressional record for the Clean Air Act Amendments of 1990, Public Law 101-549, is comprised mainly of the Senate Report (No. 101-228), since it was the Senate bill that was passed. The following excerpts from the Senate Report are helpful in understanding Congress' intent for the creation of Title V permits:

   "The first benefit of the Title V permit program is that, like the CWA (Clean Water Act) program, it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations – ranging from emission controls and monitoring requirements to recordkeeping and reporting requirements – are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations."

   "Another benefit of the permit program – which will accrue to regulated sources – is the simplification and expediting of procedures for modifying a source's pollution control obligations."

   "….State permit programs must include permit fees designed to recoup the costs of the air pollution control program…The purpose of this requirement is to force sources of pollution to internalize that cost of such pollution including the costs incurred by the States in developing and implementing air pollution control programs. "

   "EPA should seek to minimize problems of processing the large numbers of initial permit applications. EPA and the States should develop streamlined procedures for handling large numbers of permits, particularly in the case of industries whose sources have comparable operations, through, for example, model or standardized permits. EPA should also develop streamlined procedures in cases where the permit simply incorporates without changing, existing requirements found in the SIP or in other provisions of the Act."

   "In some cases, permit applications will simply incorporate information necessary to satisfy the requirements of existing SIPs or other Act requirements. Preparation of the permit applications will not involve significant new costs.

> For example, this title does not independently require source-specific modeling or monitoring."
>
> "EPA should seek to develop administrative mechanisms to alleviate the burdens of permit renewals on sources preparing permit applications and on permitting authorities required to act such applications. EPA should also develop administrative mechanisms or guidance so that a source may, in the course of normal operation, make minor changes in production methods or products without the need to apply for a modified permit with each change."

The following quotations from the Final Rule (July 21, 1992; 57 FR 32250) were helpful to us in understanding EPA's perspective:

> "While Title V generally does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be followed, especially with respect to determining compliance with underlying applicable requirements. The program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act."
>
> "The Title V permit program will enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements. Increased source accountability and better enforcement should result. The program will also greatly strengthen EPA's ability to implement the Act and enhance air quality planning and control, in part, by providing the basis for better emission inventories."
>
> "Finally, an important benefit is that the permit program contained in these regulations will ensure that States have resources necessary to develop and administer the program effectively. In particular, the permit fees provisions of Title V will require sources to pay the cost of developing and implementing the permit program. To the extent the fees are based on actual emission levels, the fees will create an incentive for sources to reduce emissions."

[American Chemistry Council, 3/31, 2005; more detailed historical comments are included in the Air Permitting Forum comments dated 3/31/05]

Applicable Requirements – One Document:

1. "The basic idea of a single permit that includes all Federally applicable requirements, as well as monitoring, recordkeeping and reporting sufficient to assure compliance, is a goal towards which we should continue to work." [Kelly Haragan, Environmental Integrity Project, 3/25/05, p 4]

2. "Our member agencies' experience has been that consolidation of applicable requirements and compliance demonstration methodologies into a single document have clarified source obligations resulting in improved compliance." [Chuck Layman, CENSARA & CENRAP]

3. "Title V requires that all emission and monitoring requirements be in a single document, the permit, and be understandable to the public. This requirement has rarely been fulfilled." [R.M. Van Frank, Improving Kids Environment]

4. "One of the most fundamental benefits of the Title V permit is that it incorporates into one document all applicable air quality related requirements…. Folding all requirements into one document has provided sources the opportunity to more easily review their obligations and provide accurate reports of their compliance status…. This same benefit applies to the regulatory staff of our agency…. The public for the first time has the ability to quickly review the activities related to a particular source of interest by reading the Title V application and issued permit." [Doug Campbell, Iowa Department of Natural Resources, 2/7/05, p 1-3]

5. "The incorporation of all applicable requirements into one document gives the State, sources, and the public a clear picture of what is required of a source to maintain compliance with State and Federal air laws. In NJ, over 21,000 individual air permits have been grouped in 335 comprehensive permits for the 335 major sources of air pollution in the State." [William O'Sullivan, NJ DEP 2/28/05]

6. "I think one result of the Title V permit program here in San Diego was that it forced us to, at one time, look at all the permits that had been developed for various emission units at major sources over the years and make sure that the requirements were clear, that there was a clear reference to an applicable requirement, whether it be a Federal requirement, State or local, and also that all the permits and permit conditions were up to date…. I'm not sure, though, that that has resulted in a permit document that is less confusing and less cumbersome for applicants and for the general public." [Michael Lake, San Diego County APCD]

7. "The primary value of the Title V program is the Title V permit itself. The compilation of a source's Clean Air Act requirements into a single document serves two valuable purposes. First, it informs the source, the permitting authority, and the public of the requirements that apply to the facility. Second, it clarifies which requirements do not apply to the facility. Ideally, the permit will make the source's compliance obligations clear so that the source can focus its compliance management systems on applicable requirements." [Bernard Paul, Eli Lilly]

8. "Overall, Ohio EPA believes the national permitting strategy outlined in 40 CFR Part 70 is a worthwhile endeavor that provides (a) an identification of all Federal permit requirements in one document, (b) concise identification of all applicable rules and emission limitations…" [Robert Hodanbosi, Ohio EPA, 3/31/05]

9. "In theory, permit consolidation would be beneficial; in practice, there have been mixed results. Consolidation has resulted in more manageable permit programs in some cases. In New York State, for example, there were formerly 12,206 separate emission-point permits. Title V has whittled down that number to 498. Permit administration has generally been simplified. Detailed descriptions of operating conditions contained in permits allow regulated sources to consistently document compliance. Facility-wide requirements have been clarified. Uniformity of reporting, record-keeping time frames, testing and calibration schedules and averaging periods in permits has fostered consistency and fairness in regulatory treatment of sources. The Title V permits and their consolidated requirements are far more accessible to the regulated community. In addition, they help citizens understand the amount of pollutants allowed to be emitted under the regulations and the corresponding compliance assurance requirements. Other States have had different experiences, and note excessive permit length and increased complexity…In addition, permits have been made more accurate by deletion or revision of language in old permits that was ambiguous, inapplicable, outdated, or simply erroneous. Non-compliant units were discovered during the application process and were the subject of corrective actions." [Bob Hodanbosi, Ursula Kramer, STAPPA/ALAPCO, 3/31/05, p2]

10. "In general, we believe that the Title V program has provided benefits to areas that did not previously have an operating permit program. However, in California it has done little to improve air quality or add to the general public's awareness of air pollution requirements… TV program has not effectively served its stated purpose to make it easier for regulators and the public to have all applicable requirements in one clear document nor has it allowed for effective public participation. In some cases EPA staff has emphasized a single document with all applicable requirements. Including processes such as sandblasting or painting of architectural structures in the main body of a Title V permit is at odds with the goal of having a document that is understandable to the public, to the regulated community and to the regulators themselves. Such requirements detract from the focus on the primary function of the source. We recommend flexibility be allowed such that processes that are incidental to the function of the source could be included in a separate section of the permit. Likewise operations with only a small contribution to the emissions from the source could be segregated from the significant requirements." [Harry A. Krug, California Air Pollution Control Officer's Association, February 23, 2005, p1]

11. "However, there were already in existence at least 35 State or local permit programs across the country when the Title V program began. For instance, as I mentioned earlier, Ohio has had a permit to operate program since the early 1970s and it has worked fine. There are areas of the country where the Title V purposes may have been already met." [John Paul, Regional APCA]

Public Participation:

1. "A second major benefit of the Title V program is public participation in the permitting process. This is, you know, the one major area in air permitting where the public has a voice, can become involved, can participate, hopefully, in the ideal situation, in the development of the document that will put the requirements on the facility or at least put them into one place." [Lyman Welch, MidAtlantic Environmental Law Clinic]

2. "Public participation has been enhanced under the Title V program, with more prescriptive notice requirements. New York also makes a permit review report available, which contains… statements of basis…. New York also posts draft and final permits on the website along with permit review reports." [Matt Reis, New York Dept. of Environmental Conservation]

3. "The first example involves a group called the Chester Street Block Club Association, a grassroots community group located in West Oakland. Because the Title V renewal process is a public process provided for public participation, Chester Street was able to identify and resolve a problem with air pollution in their community…. Despite the fact that VOCs are subject to emission limits, when the plant's Title V permit was up for renewal, the Bay Area Air Quality Management District issued a draft permit that would have exempted the plant from complying with those limits. Chester Street participated in the permit renewal process; and its comments led the district to acknowledge that the exemption did not apply to the plant. As a result, any renewed permit would have placed limits on the plant's harmful VOC emissions. In this example, the Title V permit renewal process provided Chester Street with a forum where it could participate and challenge the improper exemption in the yeast plant's permit. And the result has been improved air quality for the residents of West Oakland." [Keri Bandics, Environmental Law and Justice Clinic]

4. "Experiences illustrate that public participation in the Title V permit process is helping to ensure that permits accurately reflect all limits that apply to air pollution sources." [Golden Gate University School of Law, Environmental Law and Justice Clinic, 3/18/05, p8]

5. "The public and environmental organizations have provided comments on less than 3 percent of the Title V permits. Public hearing has been requested for less than 2 percent of the Title V permits. This level of participation clearly can not be considered as extensive, but rather sporadic." [Mohsen Nazemi, South Coast Air Quality Management District, 2/7/05]

State Permit Fees:

1. "The last benefit of the Title V program topic that I will discuss today is the Title V fee. We feel that Congress was correct to include a funding mechanism when this program was conceived. Without this self-funding mechanism, there's no doubt that the department would not be able to fulfill its duties related to the Title V program and would not be reaping the benefits from the program." [Jeff Kitchens, Alabama Dept. of Environmental Management]

2. "Since Title V is a fee-funded program, it has provided additional resources to supplement general State funds and Federal funds. These additional resources have been utilized not only to oversee compliance of Title V facilities, but to bolster all aspects of the section's program, such as source monitoring, emission inventory, and planning. It has also shifted the financial burden of the permitting program, making facilities that emit more, and thus require more of the agency's time, pay higher permit fees." [Amy Mann, Delaware Department of Natural Resources]

3. "Another significant benefit of the Title V program is that it is designed to provide a dedicated source of funding that can not be impacted by changing priorities as reflected in legislative or congressional appropriations." [Doug Campbell, Iowa Department of Natural Resources, 2/7/05, p 1-3]

Air Quality Benefits:

1. "Other benefits realized of the Title V program are: emission reductions resulting from the installation of control equipment to reduce emissions below the major-source threshold." [Chuck Layman, CENSARA & CENRAP]

2. "I'll mention, also, that we've had some sources that were able to opt out of the Title V program by eliminating their potential to emit. I know this has been cited before as a source of emission reduction associated with the Title V program. I would note that our experience here in San Diego has been that in most cases facilities had actual emissions below the Title V threshold, and their opting out of the Title V program didn't result in any actual emission reductions. We had one case where a source installed emission controls and reduced their carbon-monoxide emissions by about 70 tons per year, but in all other cases, we haven't seen emission reductions that have resulted…. However, we've seen very little in the way of corresponding air-quality benefit." [Michael Lake, San Diego County Air Pollution Control District]

3. "Some of these reductions may only be on paper. We feel that actual emissions have also been reduced so the companies can avoid the Title V program. Some instances of these actual reductions include changing to lower VOC or HAP-content coating, installing control devices where they would not otherwise be required, and changing to lower sulfur-content fuels. Reductions in actual emissions may also be attributed to companies' desire to pay less in Title V commission fees, which in Alabama are di-

rectly linked to actual emissions." [Jeff Kitchens, Alabama Dept. of Environmental Management]

4. "Many sources are requesting that construction permits be modified in order to take limits to avoid applicability of either Title V or other regulatory programs. Fifty facilities that originally applied for Title V permits have since dropped out by taking voluntary limits, removing equipment, changing formulations, or rerouting equipment through controls such as they are no longer considered major sources." [Doug Campbell, Iowa Department of Natural Resources]

5. "… in SCAQMD although we have about 800 Title V sources, we have not experienced Title V sources installing air pollution control equipment or utilizing other air pollution control strategies to reduce their emissions solely in order to fall below the Title V thresholds and consequently be out of the Title V program. Some sources have requested and obtained facility caps to stay out of the program, but these are typically sources that had emissions that did not reach Title V thresholds anyway." [Mohsen Nazemi, South Coast Air Quality Management District, 2/7/05]

6. "Another benefit of the operating permit program has been that a significant number of major sources have voluntarily restricted their operating conditions, and, in some cases, installed pollution controls in order to reduce emissions and avoid Title V altogether. This development, which may not have been anticipated by the drafters of Title V, is similar to the environmental benefit that is achieved when sources install controls or take other limiting actions in order that their emissions not subject them to new source review requirements. A legitimate, documented facility choice to avoid Title V achieves reduced emissions—the ultimate goal for all of us." [Bob Hodanbosi, Ursula Kramer, STAPPA/ALAPCO 3/31/05]

Compliance/Enforcement:

1. "Title V has also resulted in better compliance by major sources. Sources better understand and pay attention to their permit requirements. The MDEQ has noted a downward trend in the number of significant air violations at major sources and attributes this to sources being required to certify compliance with all permit requirements." [G. Vinson Hellwig, Michigan DEQ, 2/28/05, p4-5]

2. "In particular, an example of how Title V has changed company practices is the shifting of more environmental responsibilities to operations personnel. In the past, it was common for environmental issues to be managed by the Environmental staff, allowing company officials to maintain their attention on the operational and business issues. The Title V program clearly shifted compliance accountability to the company executives. As a result, companies began to more fully integrate environmental compliance with day to day operations. Now most companies view environmental compliance as a key component of operating excellence and the responsibility of all of the people involved in a company's business, from the executives to the plant operators. For GPA members the changes brought about by the Title V operating per-

mits program caused the modification of existing company practices. Many companies have accommodated these changes by implementing a number of new processes all designed to heighten compliance assurance." [Gas Processors Association, 2/28/05, p3-4]

3. "…companies have discovered unfulfilled obligations… The result has been a general clean-up of a variety of outstanding or unrecognized issues which also limits the liability to sources from potential citizen suits or EPA enforcement action." [Doug Campbell, Iowa Department of Natural Resources, 2/7/05, p1-3]

4. "Obviously it's a critical enforcement tool when the regulators are unwilling or unable to enforce the law. It provides a Federally enforceable permit for citizens to take action to protect themselves and their communities." [B. Nilles, Sierra Club]

5. "On the whole, however, Title V has had a beneficial effect on enforcement. Appropriate civil penalties, criminal penalties, and citizen suits are now potential consequences of noncompliance. Inspections have been improved because of consolidation of requirements in one permit and compliance report "checklists." And some State and local permitting authorities have seen increases in compliance rates in complex operations subject to multiple requirements because of the consolidation of all requirements into one operating permit." [Robert Hodanbosi, Ursula Kramer, STAPPA/ALAPCO, 3/31/05]

3.2 TOPIC: TITLE V PROGRAM COSTS

Issue/Observation Description

Title V program costs have been identified as an issue by numerous commenters. In general the view is that program costs far exceed the estimate used in the decision-making process to develop the regulations. To a large degree this ties into the numerous other issues that the Task Force has identified (*i.e.,* those relating to streamlining the overall process).

The types of costs identified by commenters include:

- State/Local Regulatory Agencies: development of program and approval, ongoing program management, processing permit applications, modifications, and renewals, public hearings, and report reviews. The intent is for permit fees to offset costs related to the permit program.

- Industry: application development, permit negotiations, hardware/software, compliance assurance systems, ongoing permit management (*e.g.*, reporting, updates), modifications and renewals, added monitoring, and permit fees

- Citizen Group Participants: accessing and reviewing permits, including applications and supporting documents, FOIA requests

To provide some perspective on expected program costs, in June 1992 EPA published the Regulatory Impact Analysis for the operating permits regulations. The summary of annualized administrative costs for the first 5-year implementation cycle were projected as follows:

Table 3.2-1

Sector	$Million/Year
Industry	352
State/Local	160
EPA	14
Total	526

In addition, industry permit fees were expected to be $160 Million per year, offsetting State/Local program administrative costs.

For more significant facilities, the basis that resulted in the $352M cost to industry was summarized as follows:

Table 3.2-2

Source Type	Initial Burden	Recurring Burden	Facility Annualized Costs (5 year capital recovery at 10%)
Major Large Source	$54,945 (1221 hrs @ $45/hr)	$8,100 (180 hrs @ $45/hr)	$22,594
Major Small Source or Major Toxics-specific Permit	$30,150 (670 hrs @ $45/hr)	$3,420 (76 hrs @ $45/hr)	$11,373

The comments provided on this issue are summarized (detailed comments are in the Supporting Information section) as follows:

- Three commenters noted that the costs to State/Local regulatory authorities is significant. In particular, for agencies that already had permit programs Title V added cost with little added benefit. There is also a continuing concern with increasing paperwork requirements and the sufficiency of the current fees.
- Industry trade organizations and representatives provided detailed comments on how added Title V-related initial and ongoing costs significantly exceeded Agency cost estimates. Institutionalized higher costs, particularly given that Title V is an administrative program versus an emissions reduction/control program, directionally impacts competitiveness. While recognizing that the program was not established on a benefit to cost basis, the perspective from those commenters bearing most of the costs (regulated entities) is that the costs of the program far outweigh the benefits. The perspective is that it is possible to achieve the overall Title V program benefits at a cost significantly lower than the current costs, and recommendations focused on ideas to streamline the program and to avoid any program modifications that would further increase costs.
- Very few comments on cost were provided by citizen group participants. To the degree that costs (*e.g.*, copying, FOIA-related, time/travel to access documents) inhibit the ability to participate in the Title V process, they are a concern.

Discussion Summary

The Task Force discussions reiterated that program costs have been significantly higher than originally expected. It was noted by industry representatives that business competitiveness necessitates a constant focus on cost management in all aspects of a business, including environmental staff. It was also mentioned that resources dedicated to Title V program process are not available to work on pollution prevention opportunities.

Some Task Force members felt that program cost is not a significant issue when viewed in the context of cost as a percentage of a company's operating cost, and in many cases,

e.g., monitoring, companies often benefit from the additional information gained through the program. The view was also expressed that it is not unusual for government programs to exceed original cost estimates. A counter comment suggested that exceeding a budget should not be readily accepted; companies cut back expenditures for projects regularly to stay within a budget and perhaps the government should take this approach.

Several ideas were discussed relating to a recommendation relating to examining program cost. These included using information already available to the Agency that permitting authorities provide, and using a "six sigma" approach to analyze cost issues in a structured, prioritized manner. Three areas that were suggested that may provide the greatest potential to reduce the costs of the program include monitoring, permit revisions, and compliance certification process.

The Task Force discussed several recommendations related to cost and, recognizing that a number of other recommendations in the Task Force report would, if implemented, reduce cost and provide flexibility, discussed and voted on recommendations in three areas:

- Sharing of best, or effective, permitting practices across regulatory agencies in order to capture program benefits at lower costs. Two approaches suggested for consideration included: sharing of practices via websites or using STAPPA/ALAPCO or EPA workshops.
- Encourage EPA to consider costs and benefits in developing/implementing any future program changes (guidance or regulatory). Recognizing that Title V was not developed based on a cost/benefit basis, this may not necessitate a formal analysis. However, an analysis of costs and benefits would help provide some prioritization of progam changes. Task Force members also suggested that costs and benefits be considered within the writeup of the individual issue papers.
- Utilize case studies, including interested parties in the analysis, to develop recommendations to reduce costs or increase benefits. Task Force members felt that a case study analysis shouldn't focus on costs only, but should look to identify and expand benefits.

The Task Force also discussed permit fees, including whether the fees were sufficient and how fees are set in different States. One Task Force member noted that EPA already has the responsibility to audit State programs. No conclusions or recommendations evolved from the discussions on permit fees.

Recommendations

Recommendation #1

EPA and State/local regulatory authorities should facilitate the sharing of best practices related to permitting procedures (*e.g.*, use of electronic databases, streamlined permit revision procedures, public outreach) in order to capture program benefits at lower cost/burden levels.
In Favor (17)*: Broome, Golden, Powell, Freeman, Hagle, Palzer, Morehouse, Raettig, Hodanbosi, Wood, Keever, Schwartz, Paul, Sliwinski, Van Frank, Owen, Kaderly ***Opposed:*** ***Abstentions:*** ***Clarifications:***

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

EPA should incorporate considerations of costs and benefits in developing/ implementing any future program changes (guidance or regulatory).
In Favor (11): Broome, Golden, Freeman, Hagle, Morehouse, Hodanbosi, Wood, Schwartz, Paul, Sliwinski, Kaderly ***Opposed (6):*** Palzer, Powell, Raettig, Keever, Van Frank, Owen ***Abstentions:*** ***Clarifications:*** EPA may consider costs and benefits without a formal analysis.

Recommendation #3

EPA should conduct case-studies relying on interested parties and should review the written and oral comments provided to the Task Force to identify/assess the major benefit and cost elements of the Title V program. EPA should use its conclusions to develop recommendations to: 1) significantly reduce costs while maintaining key program benefits, and 2) expand benefits without increasing costs.
In Favor (11): Broome, Golden, Freeman, Hagle, Morehouse, Hodanbosi, Wood, Schwartz, Paul, Sliwinski, Kaderly ***Opposed (4):*** Palzer, Van Frank, Owen, Powell ***Abstentions (2):*** Raettig, Keever ***Clarifications:***

Supporting Information

State/Local Regulatory Agency Comments

1. "The Title V program has added significant complexity to our permitting program because we had to overlay it on top of SCAQMD's existing permitting program. To date the SCAQMD has spent more than 175,000 person hours and over $13 million to develop and implement the Title V permit program. Overall full implementation of the Title V program, including permitting, compliance, and support activities has cost the SCAQMD over 235,000 person hours and at a cost of about $18 million. While

the Title V program may have some benefits in parts of the nation, for the SCAQMD the Title V program has come at a significant draw on our resources and at an enormous cost with very little or no air quality benefit." [Barry R. Walterstein, South Coast Air Quality Management District, 3/31/05, p1]

2. "Similarly, the increasing costs and diminishing benefits of excessive Title V reporting of compliance-related data in the Air Facility Subsystem (AFS) should also be recognized and corrected. We are concerned that EPA currently plans to require that some partial compliance evaluations (PCEs) be inputted into the AFS system. This has been, to date, a voluntary activity. Data reporting may also be required every 60 days rather than on a quarterly basis. It also appears possible that several new data elements—high priority violator (HPV) violation discovery date, HPV Violation code, stack test pollutants, and air program subparts—may also be required. STAPPA and ALAPCO opposed all of these data requirements on the grounds that the cost of such additional time-consuming staff work that is necessitated by these data entry requirements vastly outweighs any possible benefits." [Robert Hodanbosi, Ursula Kramer, STAPPA/ALAPCO, 3/31/05, p5-6]

3. "As more air pollution control has been required and the technology for emission controls has become more complex, agency review has become more sophisticated and involved. Creating flexible, yet effective permits is time consuming. As a result, the $25/ton fee is insufficient to cover the costs of a comprehensive and effective Title V program. New Jersey has raised its fees to … roughly $90 per ton in 2004 dollars." [William O'Sullivan, NJDEP, 2/28/05, p10]

4. "So my challenge to the Task Force is to identify ways to simplify this program now before we get too far into the renewal of permits and generate even more paper that does little or nothing to control air pollution. I would ask you to please listen carefully to those people that offer suggestions for simplification. Please resist those that want to add even more requirements to this already burdened system, especially with regard to insignificant emissions units. As a local agency director that is dealing with a problem of limited resources and increasing demands, I want to have the option to direct our limited resources to tasks that produce the greatest return in reductions of air pollution."

   "Then the inclusion of periodic compliance reports, some of which are monthly, some of which are quarterly, and then some of which are then all repeated in the annual certification of compliance with every requirement in the permit. Add to this the generation of all these requirements, the agency obligation for inspections to insure that all the listed requirements are being met on an annual basis, the review of all the periodic reports that are submitted. RAPCA received last year 6,292 such reports. Then the requirements to keep the written records of all the data and make them available for public inspection. The increasing requirement to report all these inspections and report reviews into the Federal electronic database and suddenly you find that the Title V program is a multi headed monster. With regard to the reports that are filed the 6,292 I recognize that there are some agencies that will take these reports and simply file them away. One of the principles that we have and our local agency is that if an industry has to file a report, then we have an obligation to review that report and to record our review and make a determination with regard to that. We take it seriously

when we ask for reports, compliance reports, because we know that's something that we're going to have to review. So I'm personally very concerned with the time and resources being spent on this program and the lack of corresponding benefit."

"[T]here were already in existence at least 35 State or local permit programs across the country when the Title V program began. For instance, as I mentioned earlier, Ohio has had a permit to operate program since the early 1970s and it has worked fine. There are areas of the country where the Title V purposes may have been already met. That's my point in pointing out that there were permit to operate programs in areas that were working well. It may be that those purposes were already being met and for such areas the Title V program represents a significant amount of work with very little added value. In fact, it's our belief that for most of the country the Title V program has quickly become one for which the work involved greatly exceeds the value of the end product."

"The never ending search for the perfect permit is something which is especially troubling for our local agency. We draft a permit. It's reviewed by the State. That process there may take years. Then it's going to be reviewed by the region. Then it's going to be reviewed by the public. Then it's going to be reviewed by the company. Everyone has changes to it. It's very difficult to motivate people to write multi 100 page permits, get back hundreds of comments, make changes to those, and then repeat that process, repeat that process, repeat that process. That's very difficult. And as a local agency director I'm faced with this dilemma. Do I concentrate on having people who are satisfied with doing that? Or do I want people who say, "This is crazy. This is just paperwork. I want to control air pollution." There's a dilemma for us. You can hire people who would be very good at that, very good at details. Write it, write it, write it, write it. I would rather have people who can see the big picture, who are more aggressive in actual air pollution control, actually meeting with people, actually talking with complainants, actually looking at sources rather than spending time at their desks."

"Additionally, I'm concerned that we have this growing perception in the air pollution control field that somehow placing pages and pages of terms and conditions in permits equates to control of air pollution or the equally troubling perception that if an applicable rule is not included in the Title V permit, that it is somehow no longer enforceable. If this is true, how did we ever control air pollution before the Title V program? How was it that we made such significant gains in air quality from 1970 to 1990? I will say this. It was not by having 20 percent of our people sitting at their desks 40 hours a week writing permits, which average over 100 pages in length."

"Of the 39 full time personnel we have at RAPCA, 8 are assigned to the permit unit 6 permit reviewers, 1 permit clerk, and 1 supervisor. Remember, we're just a local agency. We're not the State. That's over 20 percent of our resources."

"The inclusion of insignificant emissions units. At the Wright Patterson site there are over 1,000 insignificant emissions units. Along with the applicable rules for each, these alone take up 25 pages in the Wright Patterson permit and by definition are insignificant. I talked to the permit writer before I came here about his experience with

that. He said it took him three weeks to sort out the insignificant emission units for this permit." [John Paul, Dayton, Ohio Air Pollution Control Agency]

Industry Comments

1. "In the regulatory impact analysis for the proposed Title V regulations, EPA estimated costs for the program to just over $100 million annually. In the final Title V rule, EPA estimated the costs of the program at over $526 million annually. For the 34,000 sources that EPA estimated would need Title V permits, this amounted to about $15,000 annually per permit. It is clear based on our experience that the average cost per source per year has been well over this figure."

   "The Alliance asked members to review typical Title V costs for their facilities. We looked at assembly plants as well as plants with other operations like casting, stamping, or metal parts manufacture. Comparing with EPA's approach of large major sources and small major sources, we would expect that the assembly and large casting plants would generally be considered large major sources and the stamping, component, small casting, and other non-assembly operations would be small major sources."

Table 3.2-3
Typical Auto Industry Title V Costs

Type of Plant	Large Plants Assembly/ Integrated or Large Casting	Small Plants (typically stamping, component, etc.)
Initial Application	Average Cumulative Cost: $167K	Average Cumulative Cost using Mode for Outside Legal Costs: $106K
Modification Costs	Average Cost per Administrative Amendment: $5K Average Cost per Minor Modification: $7.5K Average Cost per Significant Modification: $14K	Not enough modifications processed as yet to provide meaningful data for responding facilities
Additional Monitoring Equipment, Calibrations, Stack Tests, etc.	Most reported value $10K, Highest reported value $250K. Costs involved additional stack testing, additional interlocks and other monitoring equipment not required by applicable rules. Average cost: $28.5K/year	Ranged from $5K to $100K/year
Additional Ongoing Administrative Costs (monitoring observations, Recording data, data review, Reporting)	Average: $38K/year	Insufficient data
Fees	Average $60K/year	Average $20K/year
Total Ongoing Costs	**$148K**	**$25K to $125K**

"Conclusions:

- Costs for assembly plants from application to issuance were on the order of $170,000, as compared with EPA estimate of $55,000. Assembly plants are relatively straightforward to permit as compared with complex chemical plants so we believe that these costs represent the lower end of actual experience by industry. Costs for component and other plants from application to issuance were just over $100,000, as compared with EPA estimate of $30,000.
- Ongoing costs for assembly plants are on the order of $150K per year including fees (assuming one minor and one significant modification each year which we believe to be typical), and some plants experienced much higher ongoing costs approaching $300,000 annually. EPA's estimate by comparison was $8,100 per year plus fees for a large facility. Not counting the fees, EPA's estimate was one-tenth of our experienced costs for a large plant. For smaller facilities, the ongoing costs were more difficult to estimate. At least one small facility experienced ap-

proximately $100,000 additional monitoring recordkeeping and reporting costs, and all facilities experienced some increased costs. Regardless of the exact level of ongoing costs for small facilities, when questioned, facilities believed their costs exceeded the $3,420 EPA estimated.

- Permit fees are a significant expense at approximately $60K for assembly/integrated plants and $20K for smaller plants." [Alliance of Automobile Manufacturers, 3/31/05]

2. "The cost of implementing the Title V program greatly exceeds the cost estimates made by Congress and by EPA at the time the Part 70 rules were adopted. As a result, Lilly believes that EPA and State permitting authorities must be vigilant in implementing practices that are cost-effective and ensure the program costs do not exceed the administrative benefits of the program. Cost efficiency of Title V is particularly important because Title V is an administrative program and it is not designed to have a direct impact on emissions."

   "Below is a description of the some of the costs Lilly has incurred since 1994 in implementing the Title V program at our three largest facilities, two of which were issued their Title V permits in 2004."

Table 3.2-4

Task	Cost to implement
Developing and submitting Title V permit applications	$1.5 million [approximately $500,000 per site]
Maintaining the accuracy of the application and submitting updates to the permitting authority	~ $120,000
Working with the agency to develop a draft permit; commenting on draft permit	~ $240,000
Creating and implementing compliance management systems, including a comprehensive computer database system that provides a structure for day-to-day compliance and generating reports	~ $2.5 million
Title V gap-filling monitoring	~ $100,000
Developing and submitting quarterly compliance reports and annual certifications	~ $250,000
Maintaining the accuracy of the permit through permit amendments and modifications	~ $60,000
Payment of annual Title V permit fees [1994-2005]	~ $2.5 million
Total	**~ $7 million**

   "These figures only include the easy-to-determine costs of implementation. There is a significant hidden cost to implementing the program, namely in the form of the day-today actions of site production personnel (as opposed to site environmental staff) as

they take readings, record observations, and review information needed to identify deviations and compile reports."

"Lilly's cost for these three facilities has been approximately $233,000 per year, and most of this is for activities that occurred prior to obtaining the permits. In addition, this is an average cost per year. In many years, there was very little activity at our sites because the permit application was submitted but the agency was not actively reviewing the application or writing the permit. Our monitoring and reporting costs will go up. We have not yet attempted to quantify the cost of preparing applications for and obtaining permit revisions. We expect our ongoing costs, including permit fees, to be in the $200,000 to $500,000 per year range for each of these facilities."

"As these estimates illustrate, Title V has cost Lilly significantly more than the approximately $15,000 average cost per facility per year cited by EPA in the preamble to the final 1992 Title V rules. It is also significantly higher than the $9,700 per source estimate derived by EPA in a 2004 Information Collection Request renewal.[Information Collection Request for Part 70 Operating Permits Regulations, April 2004, EPA #1587.06]"

"Lilly is providing these estimates not just to show that Title V is a costly program, but to serve as a reminder that any recommendations of the Task Force should consider the cost of implementing that recommendation. Recommendations that reduce cost and improve efficiency of the program are welcome. Recommendations that will increase the cost or decrease efficiency should be considered in light of the already high cost of implementing what is mostly an administrative program." [Bernard Paul, Eli Lilly, 3/31/05]

3. "The implementation of the Title V program has resulted in costs that far exceed original estimates with no significant environmental benefit, along with significant delays in issuing permits and modifications. The net effect has been an inefficient use of capital and workforce resources."

   "EPA estimated the initial burden costs (interpreting regulations and generating data and information needed for the first permit application) as ranging between $30,000 and $55,000 for large sources. Council member companies report initial costs significantly higher at $35,000 to $3.3 million. Member companies' cost data did not include additional investments in computer hardware/software to manage the program."

   "More significant, and more important because it results in institutionalized higher costs, are the recurring costs of the program. For member companies, these typically include costs for a site Title V Coordinator, permit changes/corrections, added systems costs, report preparation, legal reviews, public notices and hearings, multi-level compliance tasks and management reviews of Title V compliance systems and issues. EPA estimated these annual costs at only $3,000 to $8,000 per facility. Member companies report costs in the range of $50,000 to $200,000, which is significantly higher than EPA's estimate."

   "The implications of the major understatement of costs on industry are significant. EPA estimated that the annualized costs to industry in the first five years as $352 mil-

lion. Extrapolating chemical industry experience to other industries, which is appropriate given other feedback we have received, suggests that the cost of the program is closer to $2-5 billion dollars per year. In a competitive business environment, companies need to find ways to offset these costs to maintain competitiveness."

"Clearly the program costs have far exceeded EPA's estimates and warrant action. The Title V program has had a minimal, if any, impact on air emissions, since Title V is not an emission reduction regulation. The Title V program has resulted primarily in a more visible set of requirements that are more accessible to the public and strengthened compliance assurance systems. This is an extremely costly program given that it has little to no emission reduction benefits associated with it."

Two structural changes suggested were:

> "1) Develop a "Write Your Own Permit" program (WYOP). This would involve EPA or a State establishing an electronic Title V template and then having the facility complete the template with the applicable rules, emission sources, and other requirements. The permits would continue to be subject to the same public notice requirements, and State permit engineers would continue to review the permits and include any required monitoring. The benefits of this approach include a more accurate permit, reduced effort on State permitting staff, and lower costs. New Jersey is one State that is piloting this program. In the pilot, NJDEP allows a facility to write its own permit with NJDEP oversight and input. The product is a better permit and more reasonable conditions and shorter turnaround for review/approval.
>
> 2) A more fundamental change that is consistent with the goal of Title V would be to modify the regulations to allow each site to prepare a list of applicable requirements by emission source, make the list available to the public, and certify compliance and report deviations on the prescribed time schedule. The document would be available for review by the public and State. The incorporation of new regulations or other changes to the permit would be noted and a revised list of applicable requirements would be made available in an expeditious manner. This approach would eliminate the customized general and specific conditions currently added into permits that dramatically ratchet up costs and the time required to complete permits. The result of this approach would be a significant cost savings for State permitting authorities and regulated entities, along with up-to-date facility requirements."

Other suggestions included:

- "Establish a national electronic permit template that would give States and facilities the ability to incorporate Federal regulations on a uniform basis while allowing for the data entry of relevant State regulations and facility process units."
- "Limit the conditions that States add to permits to those that are supported by regulatory authority, are directly related to the applicable standard, and are necessary to ensure reasonable compliance with the applicable standard."

- "Eliminate public notice for minor permit revisions."
- "Establish a simplified permit renewal process. Renewals should be automatic with a public notice period and with the incorporation of new requirements. Renewals could also be automatic at an earlier time. For example, §502(b)(9) of the statute already allows for certain permit revisions to be treated as a permit renewal if they comply with the requirements of the renewal section of the statute."
- "Annual certification reports should be "by exception" rather than a line-by-line, permit condition by permit condition affirmation of compliance status."
  [American Chemistry Council, March 31, 2005]

4. "…the startup costs of the program for sources required to submit permit applications quickly got out of control. EPA soon recognized that even at the application stage, this program was costing far more than either Congress or EPA had envisioned. EPA took action to alleviate the most immediate aspect of the problem, application costs by issuing White Paper No. 1. This White Paper clarified that extensive and costly emission inventories were not required by Title V."

   "In 1995, Chairman Dingell also expressed concern regarding the rising costs of this program:

   > In 1990, the Congress envisioned Title V as a modest tool for bringing some clarity to the world of stationary source regulations under the Federal and State clean air programs. While the goal of consolidated source requirements and eliminating duplicate and overlapping provisions is a good one, it may not be worth the billions of dollars that EPA seems to want the program to cost. (May 18, 1995 hearing)

   Since that hearing, the costs of this program have only increased. Permit issuance costs are in the hundreds of thousands of dollars for medium-sized industrial plants. Fees are upwards of $50,000 a year. Reporting, monitoring, and certification requirements are imposing significant costs. The Forum recognizes that some of these costs are necessary requirements to sustain even the most streamlined program. Nonetheless, any evaluation of how the Title V program is working involves two components:

   - First, is it achieving its intended purposes?
   - Second, what price are we as a country paying to achieve these goals and is it worth it?"

   "We encourage EPA to consider whether these costs are consistent with what was expected when the 1990 Amendments were enacted and when EPA issued the Title V rules. We also encourage EPA to consider whether the primary benefits of the Title V program could have been more cost-effectively achieved through a simple requirement for sources to submit an annual compliance certification through which they would list applicable requirements and certify their compliance. In other words, was there a better way? Was a comprehensive bureaucratic program truly necessary? Although it is impractical to eliminate the program in favor of a simple certification

requirement, EPA can ask what can be done to bring these costs in line with original expectations and make implementation changes that reduce costs going forward." [Charles Knauss/Shannon Broome, Air Permitting Forum, 3/31/05]

5. "Congress enacted Title V of the Clean Air Act in 1990 to achieve an objective that is straightforward and simple in principle – to consolidate and clarify in an operating permit applicable clean air requirements established under other Federal programs. Title V also authorizes adoption of certain requirements to assure compliance with applicable requirements."

   "Congress expected, and EPA predicted, that the costs sources would incur in preparing and obtaining permits would be modest. The costs that sources have actually incurred and still are incurring in obtaining initial permits vary greatly, but for all they have been substantial and for some in excess of several million dollars for a single facility. The ongoing costs of meeting Title V requirements by revising permits, undertaking new monitoring, submitting monitoring reports and compliance certifications, and renewing permits also will be far greater than Congress envisioned."

   "CAIP members recognize that there are limited benefits of assembling requirements in a single permit, but feel strongly that the associated costs greatly exceed the benefits. EPA and States should take steps to streamline permitting-related activities and reduce costs to the maximum extent possible." [Bill Lewis, Clean Air Implementation Project]

6. "In the preamble proposing the Title V rules, EPA anticipated that the Title V program would provide more efficient implementation of the Act, including improved enforcement, enhanced State air program resources, and a streamlined process for revising air pollution control requirements. Almost 14 years later, the Title V program has accomplished few of the stated goals of the program. Rather than improving efficiency and streamlining requirements, Title V has required an inordinate expenditure of time and resources on minutia, process, and paperwork, and has resulted in reinvention, rather than ministerial collection in a single document, of existing applicable requirements."

   "In Ohio, to date, over $146 million has been collected in Title V permit fees, for a program that has issued just under 700 final permits. That equates to roughly $210,000 per permit, not including the time and money spent by companies to prepare their permit applications and to comply with their permits. This also does not include the costs incurred in other contexts – for example, business lost by companies waiting for construction permits, the issuance of which was delayed by the fact that agency resources were focused on meeting Title V objectives. For a program that was intended to merely collect existing requirements, not to create new requirements, something has gone awry." [Jack R. Pounds, Ohio Chemistry Technology Council, Ohio Manufacturer's Association, Chamber of Commerce, 3/31/05]

7. "Regarding fees, this topic is of particular interest to CE because we have been subject to the highest fees in the nation, currently approximately $90/ton, for 10 years, paying over a $1 million annually for two facilities, which still have not been issued Title V operating permits, despite having submitted administratively complete applications 10 years ago. This is a serious failure of the program administration, which could greatly benefit from an adherence to the intent of the Title V program and a streamlining of the permit process." [Gary Helm, Conectiv Energy, 3/31/05]

8. "Our own experience at one of our component plants was that the initial application was $75,000. We had two modifications at about $15,000 per year. We added personnel for monitoring, which was another hundred thousand per year. The plant installed warning lights, interlocks, et cetera, at about $150,000 in capital costs -- But when we looked at our five-year annualized costs for two plants, basically they were well over $100,000 per year." [Debra Rowe, Alliance of Automobile Manufacturers]

9. "We did a quick check with a group of our members and found that their application and permit development costs, excluding permit fees, ranged from $50,000 to $650,000 per facility, with the average being about $250,000. These estimates do not take into account a more significant and generally hidden cost of the program; and that's the opportunity cost of delays in implementing plant changes that are needed to meet market requirements." [David Farabee, API]

10. "In the years since the Emissions Fee program was initiated, we have spent $635,000… We have not reduced our emissions by as much as one ton." [Wayne Penrod, Sunflower Electric Power Association]

Citizen Group Comments:

1. "In my viewpoint, there's absolutely no reasonable copy fee. I work in a lot of environmental justice communities and, if we have to start paying for copying charges, nobody would ever make any more comments on Title V. It's impossible." [Verena Owen, 6/25/05 Washington meeting]

2. "The cost of the FOIAs is prohibitive. And I don't think necessarily benefits the EPA. I will tell you the standard that I refer to is Kinko's. They're open 24 hours a day, 7 days a week. They pick up, they deliver, they do it while you stand there. And they do it for 7 cents a page. So if the EPA's got to charge me a quarter a page, or God forbid 50 cents a page, it's obviously deliberately obstructive. You're not supposed to be making a profit on this. I don't mind maybe helping you recoup your costs, but I do mind having it become fiscally impossible for us to do this; particularly while at the same time the EPA was not charging fees to the industry for all these construction permits that we were all running around working on. So the industry gets a big free ride, but I have to pay for my FOIAs. There's something wrong here." [Susan Zingle, Lake County Conservation Alliance, 9/15/04 Chicago meeting]

4. CONTENT ISSUES

4.1 TOPIC: INCORPORATION OF APPLICABLE REQUIREMENTS

Issue/Observation Description

One of the issues raised by the public, the regulated community and permitting authorities is the level of detail that must be included about applicable requirements in the Title V permit, particularly with respect to inclusion of complex Federal MACT standards. Some permitting authorities have been advised by EPA that the MACT rules cannot be incorporated by reference. Instead, the specific language from the rule must be included in the permit. In an attempt to avoid excluding an applicable requirement, some permitting authorities attach the entire MACT rule to the permit, which leads to permits with excessive length, undue complexity, and a drain of resources in permitting time and copying expense. In addition, some permitting authorities have incorporated MACT requirements by paraphrasing the rule in an attempt to simplify and clarify the applicable requirements. Permittees are concerned that such paraphrasing inappropriately and unintentionally constrains the flexibility and reduces the compliance options provided in the rule. The public and some regulatory representatives are concerned that paraphrasing MACT requirements could lead to the incorporation of incorrect requirements into a permit.

Another issue arises from the incorporation of minor or major new source permits into the Title V permits. Many States have a history of issuing construction permits dating back to the early 1970s. Many terms and conditions of these preconstruction permits became applicable requirements under Title V. Rather than incorporating each applicable term and condition from these preconstruction permits, some permitting authorities have simply referenced the preconstruction permits by number in the Title V permit without identifying which specific terms or conditions remain applicable. Older preconstruction permits are often difficult to locate, because of the length of time passed since the permits were issued.

Testimony and Comments Received

A large number of comments were received regarding the incorporation of applicable requirements.

With respect to the incorporation of Federally promulgated MACT standards, most commenters indicated that MACT requirements should be incorporated by citation to applicable requirements, although there was recognition that reference solely to a subpart might not be specific enough to identify the applicable requirements. Three commenters noted that in some cases a source may seek to clarify how a particular rule requirement applies to a particular unit but these commenters also endorsed a citation-based incorporation of MACT standards.

Commenters also recognized that inspectors and members of the public have an interest in understanding how a MACT standard applies to a particular facility. Commenters noted that informing the public and aiding inspectors are both worthwhile goals but objected to using the permit document itself to achieve them. They noted that the permit is a legally enforceable document with which the source must certify compliance; it is not an educational tool. Commenters suggested using documents that are not a part of the permit to achieve these goals, such as the statement of basis or an enforcement checklist that is developed during the permit issuance process. They noted that this approach would ensure that a high level description is available to the public regarding source obligations and would allow for guidance that an inspector could follow to review the facility operations.

The commenters also noted several problems associated with approaches that are not citation-based:

- *Lack of time and experience to "translate" a standard:* MACT standards are complex and apply to complex facilities. EPA technical experts have spent considerable time crafting MACT rule language, and it is not reasonable to expect a permit writer to translate or rephrase such a requirement and do so accurately without changing the meaning of the rule.
- *Workload for permittees and State permitting authorities:* Checking to make sure requirements have been accurately transferred to the permit when rewritten verbatim or when rephrased has been extremely resource intensive and has delayed permit issuance. Recreating the MACT in the permit has also been time consuming for State permitting authorities.
- *A risk of error which would create unintended conflicts between the requirements of the permit and the underlying rule*.
- *Enforcement risk*: When a permit conflicts with an underlying rule, sources risk enforcement jeopardy if they comply with the permit instead of the rule (or the rule instead of the permit).
- *Extremely lengthy permit that is not easily understood*: Even though the goal of putting detail into the permit is often to make it more easily understood, the shear bulk of the permit with every element of a MACT rule included can make the permit difficult to follow and understand. In addition, when a CFR or Federal Register section are added to the permit, it does little to aid understanding of the permit requirements and creates an extremely cumbersome document.

One commenter pointed to the Part 75 regulations as an example of how citation-based permit writing has worked in another context, noting that, like MACT standards, these rules (1) contain voluminous and complex regulations for emissions monitoring requirements for the Acid Rain and NO_x Budget Trading programs, (2) include multiple compliance options that can be used by an affected source at its option, and (3) have been subject to frequent revision (promulgated in 1993; revised in 1995, 1998, 1999, and 2002 to date). The commenter noted that virtually all permitting authorities use a citation approach to include Part 75 requirements in Title V permits and that no problems have been reported from use of the citation approach.

Numerous commenters indicated the need to protect the flexibility that is promulgated in underlying applicable requirements, like MACT standards, when including the standard in a Title V permit. Commenters indicated that the standards themselves provide procedures for changing among compliance options and included several examples of the types of flexibility and procedures provided for in the rules. Commenters also indicated that some permit writers were requiring selection of a compliance or monitoring option at permit issuance and that a permit revision was required to make any changes. They indicated that the requirement to implement both the MACT procedures and a separate Title V revision could negatively impact their operations. They also stated that the procedures associated with compliance options had been part of the MACT rulemaking and that limiting these options constituted a new substantive limit on their operations which was not allowed under Title V.

With respect to incorporation of requirements contained in preconstruction permits, oral testimony indicated that some States are using citations to incorporate applicable requirements from the permits. Commenters were concerned with this approach because, unlike promulgated rules where the documents can be readily obtained, the construction permits may not be available to the public. Thus, commenters recommended that applicable requirements embodied in construction permits be directly transferred into the Title V permit. The construction permit would still be cited as the authority for the term as required by 40 CFR 70.6(b), but the actual requirement would be reflected in the permit.

Overall, commenters favored a more streamlined method for incorporating applicable requirements that would preserve their compliance flexibility, but they did not object to utilizing other documents to enhance public awareness and facilitate compliance inspections.

Discussion

Incorporation of MACT and Other Rules: The Task Force spent considerable time discussing the best way to incorporate applicable requirements, with a particular focus on those contained in MACT standards and construction permits. MACT standards became a focus of discussion because they typically are the most recent and most voluminous standards incorporated into Title V permits. Not surprisingly, incorporation of MACT standards was the subject of much of the public input on this issue. The Task Force recognized, however, that the approach for including applicable rules in permits raises the same issues whether the rule is a MACT or an NSPS or any other rule-based standard. Some members of the Task Force indicated that this issue may not have been as important with NSPS simply because they are so much less detailed than the MACT standards and contain fewer references to other subparts than the MACT rules contain.

Industry, environmental group, and State representatives on the Task Force all raised concerns regarding the potential for paraphrasing a standard in a permit to change the regulatory requirements. One State representative, however, expressed a strong view that it was important for the State and the facility to agree on what a particular MACT means

at that facility. Others believed that it can be helpful to an understanding of the permit overall if the permitting authority provides a plain language explanation of the MACT requirements at a facility but thought that this explanation should be in a supporting document, such as the statement of basis, rather than in the permit itself. These members were concerned that paraphrasing in the permit could inadvertently create new legal obligations that do not exist in the rule (which could be either more or less stringent than the rule) and that making a rule understandable to interested parties is a different goal than ensuring that the permit is accurate.

Some Task Force members were also concerned about the extensive resources that are required to review every permit term containing translated MACT language to ensure that a purposeful or inadvertent change had not been inserted. They believed that such review is one reason permit issuance has been delayed. Since a significant number of MACT standards have recently been issued and will be incorporated into Title V permits for the first time, concern was expressed that continued paraphrasing of MACTs could result in worsening the problem of delayed issuance. These members viewed the simplification of incorporating MACTs and other standards in permit by using a high level citation-based approach as a potential streamlining method in States that have previously used the paraphrasing approach.

Incorporation of Construction Permit Requirements: The discussion on this topic was focused primarily on States that have used citations to construction (SIP) permits to establish the applicable requirement in Title V permits. The problem with this approach is that many of the older construction permits are not easily accessible to the public and in some cases are difficult to locate at all. Therefore, there was general agreement that the best approach is to include the currently applicable terms of construction permits directly into the Title V permit without using citations. Some Task Force members believed that citations should be allowed if the construction permits are readily available (which could be true with more recent construction permits).

Recommendations

Incorporation of MACT and Other Rules*:*

Recommendation #1

Citation Approach. Permitting authorities should use a citation approach to incorporate applicable requirements in MACT and other regulations into Title V permits.
In Favor (13)*: Broome, Palzer, Golden, Paul, Freeman, Hagle, Schwartz, Morehouse, Owen, Raettig, Hodanbosi, Wood, Van Frank ***Opposed (2)*:*** van der Vaart, Sliwinski ***Abstentions (3)*:*** Kaderly, Powell, Keever ***Clarifications:*** Within the citation approach, some members prefer a general citation and others a detailed citation. Task Force members voted for each sub-recommendation that they deemed acceptable (which may have been both).

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #1(a)

General Citation Approach. Permitting authorities should use general citations as an acceptable way for incorporating MACT and other rules as applicable requirements in Title V permits. A general citation example is:

> Source P001, Coke Oven Battery No. 1 – 40 CFR Subpart CCCCC (§§63.7280-63.7352), National Emission Standards for Hazardous Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks. This by-product coke oven battery with vertical flues was constructed prior to July 3, 2001 and is an existing affected source.

This approach provides for efficiencies in permit development and minimizes confusion without sacrificing enforceability since there is sufficient information to determine applicable requirements. This approach also ensures that the permitting authority does not inadvertently change the standard by rephrasing it or putting it into "plain English," which has led to alteration of MACT requirements in some Title V permits according to submitted comments.

In Favor (12): Broome, Golden, Paul, Kaderly, Freeman, Hagle, Schwartz, Morehouse, Hodanbosi, Wood, Van Frank, Palzer
Opposed (5): van der Vaart, Sliwinski, Powell, Keever, Raettig
Abstentions (1): Owen
Clarifications:

Recommendation #1(b*)*

Permitting authorities should use detailed citations as an acceptable way for incorporating MACT and other rules as applicable requirements in Title V permits. A detailed citation example is:

> **Pollutants:** Hazardous Air Pollutants regulated pursuant to Section 112 of the Clean Air Act.
>
> **Emission Unit:** Auto MACT (includes list of emission units covered)
>
> **Limitations:** On and after the compliance date(s) specified in 40 CFR § 63.3083, for emission units in the Auto MACT Emission Unit, the permittee shall comply with the applicable emission limitations, operating limitations and work practice standards of the National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks, 40 CFR Part 63, Subpart IIII. Please refer to the following sections of the rule:
>
> ***Emission limitations:*** 40 CFR § 63.3091 and 40 CFR § 63.3092.
> ***Operating limitations:*** 40 CFR § 63.3093.
> ***Work Practice Standards:*** 40 CFR § 63.3094.
>
> **Compliance Demonstration:** On and after the compliance date(s) specified in 40 CFR § 63.3083, for emission units in the Flexible Group Auto MACT, the permittee shall comply with the applicable compliance demonstration requirements of the National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks, 40 CFR Part 63, Subpart IIII. Please refer to the following sections of the rule:

(Recommendation continued on next page)

(Recommendation #1(b) continued)

> ***General Compliance Requirements:*** 40 CFR § 63.3100.
> ***Applicable Parts of the General Provisions:*** 40 CFR § 63.3101.
> ***Initial Compliance Demonstration and Performance Tests:*** 40 CFR §§ 63.3150-3152; 40 CFR §§ 63.3160-3161, 40 CFR §§ 63.3163-3168, 40 CFR §§ 63.3170-3171.
> ***Notifications:*** 40 CFR § 63.3110.
> ***Reports:*** 40 CFR § 63.3020.

Reference Test Methods, Recordkeeping and Monitoring: On and after the compliance date(s) specified in 40 CFR § 63.3083, for emission units in the Flexible Group Auto MACT, the permittee shall comply with the applicable requirements for reference test methods, recordkeeping and monitoring of the National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks, 40 CFR Part 63, Subpart IIII. Please refer to the following sections of the rule:

> ***Initial Compliance Demonstration and Performance Tests:*** 40 CFR §§ 63.3150-3152; 40 CFR §§ 63.3160-3161, 40 CFR §§ 63.3163-3168, 40 CFR §§ 63.3170-3171.
> ***Records:*** 40 CFR § 63.3130 and 40 CFR § 63.3131.

This detailed citation enhances understanding of the applicability of the rule by citing the particular portions of the rule directly applicable to the particular emission unit, but preserves compliance options that are available under the standard.

Although all of the MACT rules are readily accessible electronically, it is also recommended that the permitting authority make the rule available, upon request, for those who may not have electronic access.

Permitting authorities, the public or the permittee may desire a translation of the technical language in the rule so that they can better understand how the rule applies to the particular facility. This translation can be included as additional narrative in the Technical Support Document or Statement of Basis for the permit, but should not be included in the permit itself, because of the risk of inaccuracies that may inadvertently change applicable requirements. A citation approach does not preclude the source from requesting clarification <u>in the permit</u> of a particular provision of the rule that may be ambiguous. Such a clarification would be focused on a particular provision rather than expending resources to recast an entire MACT rule.

In Favor (14): Broome, Palzer, Golden, Paul, Freeman, Hagle, Schwartz, Morehouse, Owen, Raettig, Hodanbosi, Wood, Keever, Van Frank
Opposed (3): van der Vaart, Sliwinski, Powell
Abstentions (1): Kaderly
Clarifications: Powell clarifies that she would not oppose this approach if the permit specified which of the standard's options are applicable at permit issuance and then required notice if changes are made. Keever joins Powell's clarification.

Recommendation #2

Paraphrasing Approach. MACT and other rules should be incorporated into the Title V permit using a narrative approach that paraphrases the requirements and explains to the public and the permittee how the standard applies to the particular source. If several options are presented in a standard, the source should be required to State which are applicable at permit issuance and then provide notice if changes are made.

In Favor (3): van der Vaart, Sliwinski, Powell
Opposed (14): Broome, Palzer, Golden, Freeman, Hagle, Schwartz, Morehouse, Owen, Raettig, Hodanbosi, Wood, Keever, Kaderly, Van Frank
Abstentions (1): Paul
Clarifications:

Old Construction Permits: One of the larger obstacles that permitting authorities faced for the initial round of Title V permits was locating and incorporating all of the construction permits issued over 20 plus years into the Title V permit. Since nearly all of the initial Title V permits have been issued, and this problem has been addressed in one fashion or another, this issue may be of less importance.

Recommendation #3

Permitting authorities should incorporate currently applicable requirements from construction permits into the Title V permit by restating the terms of those permits in the Title V permit document. The source can request a permit shield (under Section 70.6(f)(1)(ii)) for nonapplicability of any terms of a construction permit not included in the Title V permit. The Title I/Title V Interface Paper contains discussion and recommendations on "cleaning up" obsolete construction permit terms. The only situation in which terms in a construction permit should be included in a Title V permit using a citation approach is if the construction permit is readily available to the public.

In Favor (16): Broome, Palzer, Golden, Freeman, Hagle, Schwartz, Morehouse, Paul, Owen, Hodanbosi, Wood, Keever, Kaderly, van der Vaart, Sliwinski, Van Frank
Opposed (2): Powell, Raettig
Abstentions:
Clarifications: Powell clarifies that she supports the first two sentences of this recommendation, but opposes the last sentence because she does not believe it is ever appropriate to use a citation approach for incorporating construction permit requirements into a Title V permit. Raettig joins Powell's clarification.

4.2 TOPIC: INSIGNIFICANT ACTIVITIES AND EMISSION UNITS

Issue/Observation Description

What This Paper Addresses: An issue repeatedly presented to the Title V Task Force is how small and insignificant activities and emission units should be treated in Title V permits. The debate revolves largely around the appropriate balance between the burden imposed on the program (via State agencies and regulated sources in terms of administrative costs, as well as associated monitoring, recordkeeping and reporting) for small and insignificant emission units and activities that have minor impacts in terms of air quality on the one hand and the statutory and regulatory provisions for including "all applicable requirements" in the permit and requiring monitoring and compliance certifications, on the other. The issue requires consideration of numerous factors including the pace at which permits have been issued and ongoing permit revision burdens, as well as the potential cumulative impact of insignificant units and activities.

Legal Requirements: In the development of the Title V program regulations, EPA recognized the need to provide an exemption for smaller emission units and lower emitting activities, noting that there are "levels below which there is no practical value in conducting an extensive review" in developing the permit. 57 *Fed. Reg.* 32273. While noting that the statute does not address insignificant units and activities, the Agency indicated that such "exemptions minimize unnecessary paperwork and reduce the need for sources to conduct analysis of all emissions regardless of the amount involved" and that "[s]uch a position is also supported by the *Alabama Power* decision." *Id.*

Thus, in the final Part 70 rules, EPA provided under 40 C.F.R. 70.5(c) that, "the Administrator may approve as part of a State program a list of insignificant activities and emissions levels which need not be included in permit applications." The rule adds, however, that "for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application." Moreover, "an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the schedule approved pursuant to [section] 70.9 of this part." 40 C.F.R. § 70.5(c). This section continues, noting that "the permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency" so long as certain prescribed elements are included. With respect to emissions-related information, however, the rule States that "a permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, *except where such units are exempted under this paragraph (c) of this section,"* such that emissions information is not required by the rules for IEUs.

The intent to simplify actions related to these units and activities was reiterated in a White Paper issued on July 10, 1995, relating to the Title V program, subsequently referred to as White Paper No. 1. *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995). Besides reiterating State flexibility in 40 C.F.R. § 70.5 to tailor the level of information required in the application to determine applicable requirements, White Paper No. 1 included a list of so-called "trivial activities" that

could be completely omitted from the application even if not included in a list of insignificant activities approved in the State's Part 70 program.

White Paper No. 2, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* (March 5, 1996), addressed in more detail the White Paper 1 insignificant activities and contained some indication of EPA's reinterpretation of its Part 70 rulesthat were addressed more fully in *Western States Petroleum Association (WSPA), et al., v. Environmental Protection Agency, et al.,* 87 F.3d 280 (9th Cir. 1996), and EPA's subsequent response. However, even White Paper No. 2, consistent with the policy stated in the Part 70 preamble, deferred to State discretion and addressed how Title V permits might be written in a generic manner with regard to insignificant activities subject to generally applicable SIP requirements and that it was possible to provide for no additional monitoring (beyond that provided in the applicable requirement itself).

In the operation of the Title V program, some States simply identified the insignificant emission units in the section of the permit that included requirements enforceable only by the State (the "State-only" side). This was done to provide an easier approach toward the modification and certification process (since certification was not required for State-only requirements) and to devote resources to the emission units with the greater air quality impact. Recently, Region 5 has identified the manner in which at least one State (Ohio) is deficient. It is Region 5's current position that all insignificant emission units must be in the Federally enforceable section of the permit (the "Federal side"), and must identify any applicable requirements. This means that the State must list all such units and the applicable regulatory requirements.

Testimony and Comments Received

Many comments were received on the issue of how to address insignificant emission units in the Title V permit. Most of these comments expressed concern about the level of resources being spent on insignificant units and activities and the resource drain that creates at the State agency and at a facility in terms of addressing and ensuring compliance by significant emission units. One local agency commenter noted the limited resources available and asked that he have the option to direct limited resources to tasks that produce the greatest return in reductions of air pollution, noting that resources being spent on insignificant activities were preventing inspectors from going out to the field to inspect significant sources for compliance. *See, e.g.,* Comments of John Paul at June 2004 Task Force Meeting, OAR-2004-0075-0083.

One commenter pointed out that as a typical profile of a source 75 percent of emissions come from 30 percent of the units at a plant while 25 percent of the emissions come from 70 percent of the units. He noted that "from an environmental standpoint, from a cost-effectiveness standpoint, it makes sense to spend the time, the effort on the 75 percent of those plant emissions. I'm not saying you ignore the other ones, but we're talking about not necessarily applying exactly the same criteria to the 30 percent of the sources as you are to the 70 percent of the sources." Comments of Scott Evans at September 2004 Task

Force Meeting. *See also* Comments of Wayne Penrod at June 2004 Task Force Meeting. Transcript at I-288.

Many commenters believed that insignificant units should be eliminated from the permit. *See* STAPPA/ALAPCO Comments, OAR-2004-0075-0048 ("there needs to be serious consideration of whether insignificant units should be included in Title V permits at all"). Concurring in the elimination of insignificant units, one commenter indicated that States that have a history of regulating the smallest sources of emissions will be at a competitive disadvantage with States that do nothing more than the bare minimum required under Title I of the Clean Air Act, and permitting authorities in such States will be burdened disproportionately with minutia, rather than being able to focus their Title V resources on significant emissions units. Comments of the OAR-2004-0075-0083 (Ohio Chamber). This commenter also noted that keeping insignificant emissions units out of Title V would not relieve insignificant sources from compliance obligations with respect to applicable State or Federal law requirements. Rather, it would remove them from the Title V program and would simply leave their regulation to the State, as was the case prior to Title V. *See also* Comments of Ohio EPA, OAR-2004-0075-0082.

On the other hand, in his oral statement to the Task Force, the NRDC representative stated that there should not even be an "insignificant activities" concept. If an emissions unit has an applicable requirement, then it should be on the Federal side of the permit, regardless of size or nature of emissions or type of applicable rule (*e.g.,* capacity). Noting that there is no provision allowing States to exclude insignificant units and activities from monitoring requirements, he stated that the "question is, is an emissions unit subject to a legal requirement under Federal law, or is it not? If it is, it should be in the permit …." He did note that the rules allow "different levels of requirements, … to reflect the fact that those units are different in some way than significant emission units." Comments of John Walke at June 2004 Task Force Meeting.

In sum, a number of commenters advocated complete elimination of insignificant units from Title V permits, while others believed this is not authorized. Among those advocating exclusion of insignificant units in the program, there was a belief that the current situation regarding insignificant units is causing resource allocation problems and monitoring burdens not commensurate with environmental impact. As noted above, others noted that the Title V permit is the only place that all insignificant units may be detailed at a facility so the public is aware of them and that numerous insignificant sources at a facility can collectively have a serious environmental impact. Still others pointed to the application (rather than the permit) as the most appropriate place to identify insignificant units.

Task Force Discussion

It was noted that insignificant units have imposed large costs on both State agencies and industrial sources, even though there are no required controls and compliance has not generally been an issue. The typical requirements for these types of units are generalized SIP limits, such as 20 percent opacity requirements, which small sources would not have the

capability of exceeding. Moreover, there are numerous SIP rules that address broad categories of sources but for which compliance by small units is a given. Often these generic requirements are included in general permit conditions and there is no reason to include them in Title V. Some Task Force members believed that expending time on these small sources in terms of verifying compliance with such limits was detracting from time to be spent on compliance assurance for larger units using control devices. These Task Force members also believed that much of the problem stemmed from legal interpretations by the EPA General Counsel's Office even though the program office had never intended for insignificant units to end up in Title V permits. In these members views, while the discussion back in 1991 when the rules were promulgated was focused on applications, commenters were requesting generally that a *de minimis* level be established and did not consider that a *de minimis* level in the application would not carry over to the permit.

In discussing whether the approaches taken in Ohio and White Paper No. 2 (allowing a simple statement that insignificant units shall comply with applicable requirements rather than a separate listing of units and revisions for those units), industry representatives on the Task Force stated that this approach was not being implemented uniformly and that it still could require the source to conduct a certification process for insignificant units each reporting period. They considered this process burdensome particularly given the low emissions from these units and the low likelihood of a violation.

Industry members of the Task Force also highlighted the permit revision burden associated with permits that include specific lists of insignificant units. For example, they were concerned about the practice in some States of listing the number of each type of unit present at the facility and whether a reduction or increase in the number of such units would require a permit revision.

Environmental group Task Force members expressed concerns that a plant with numerous insignificant units could have high emissions from those units when viewed collectively rather than individually. They also felt strongly that the requirement to include all applicable requirements in the permit was a mandate from which no *de minimis* exemption could be provided.

Recommendations

One area for improvement in the Title V program would be to simplify the treatment of insignificant emissions units. The administrative burden associated with permit updating and certifications for insignificant units subject to generic or minor NSR permitting requirements outweighs the environmental benefit associated with including them in the Title V permit. Without providing any permit shield for insignificant units:

Recommendation #1

EPA should either amend the rules or the applicable guidance so that States do not have to identify insignificant emissions units in the Title V permit, even if they are subject to generic rules (*e.g.*, opacity) or minor NSR permits and thereby eliminate the associated monitoring, recordkeeping, reporting, permit revision and certification requirements. The IEU exclusion would be for Title V purposes only and would not mean that the State would refrain from regulating, monitoring, or registering such units or activities, under its minor NSR or other programs. Current IEU lists would be reviewed for this purpose.

In Favor (12)*: Paul, Wood, Hodanbosi, Freeman, Hagle, Morehouse, Broome, Schwartz, Golden, van der Vaart, Sliwinski, Kaderly

Opposed (6)*: Palzer, Powell, Raettig, Keever, Owen, Van Frank

Abstentions:

Clarifications: Sliwinski clarifies that this would not apply to New York's higher tier of insignificant units *(i.e.*, exempt units) but that no certification would be required for this tier.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

Under the program as it currently stands, streamlining can be achieved by communicating that States are not required to include lists of insignificant units and activities in permits but can include a simple line item requiring compliance with applicable requirements for insignificant units and activities. Insignificant emission units and activities should be reviewed as appropriate at each renewal of the permit.

In Favor (18): Broome, Paul, Wood, Hodanbosi, Morehouse, Hagle, Freeman, Sliwinski, Schwartz, Powell, Raettig, Owen, Golden, Keever, van der Vaart, Van Frank, Kaderly, Palzer

Opposed:

Abstentions:

Clarifications: Powell, Raettig, Keever, Palzer, Van Frank and Owen support with clarification that they can obtain the list of insignificant units/activities for the source in the application.

Recommendation #3

To the extent EPA decides to exempt IEUs from inclusion in the Title V permit, a State that wants to take advantage of this opportunity should be required to resubmit its list of IEUs to EPA for approval. IEU lists should be subject to public review and comment.

In Favor (11): Powell, Raettig, Paul, Hodanbosi, Hagle, Keever, Owen, Schwartz, Sliwinski, Van Frank, Palzer

***Opposed (5)*:** Morehouse, Broome, van der Vaart, Kaderly, Wood

***Abstentions (2)*:** Golden, Freeman

(Clarification on next page)

(Clarification for Recommendation #3)

Clarifications: Palzer, Powell, Raettig, Keever, Van Frank, and Owen clarify that acceptance of this recommendation does not indicate agreement with the concept of exempting IEUs from the permit. Morehouse, Kaderly, Wood, and Broome oppose and Freeman and Golden abstain because these lists have already been through public and EPA review.

Related Topics: Permit Revisions

4.3 TOPIC: MONITORING

Issue/Observation Description

What this paper addresses: This paper discusses issues raised regarding the emissions monitoring requirements included in permits. The paper reflects two opposing views presented by commenters and Task Force members, some of whom believe that the monitoring included in permits often is not adequate to satisfy statutory requirements, and others of whom believe that the monitoring being added is not authorized by the statute and may unlawfully change compliance obligations.

Legal Requirements and Litigation: Title V includes provisions requiring that permits include monitoring and reporting requirements "to assure compliance" with permit terms and conditions and providing EPA authority to "prescribe procedures and methods for determining compliance and for monitoring" by rule.

> **(a) Conditions**. Each permit issued under this title shall include enforceable emission limitations and standards …a requirement that the permitee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan. . . .
>
> **(b) Monitoring and Analysis.** The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. . .
>
> **(c) Inspection, Entry, Monitoring, Certification, and Reporting.** Each permit issued under this title shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. …
>
> CAA § 504, 42 U.S.C. § 7661c.

EPA implemented Title V in 1992 with rules that require permits to include all monitoring and test methods required under applicable requirements, including the Compliance Assurance Monitoring (CAM) rule (codified at Part 64), and any other procedures and methods that may be promulgated by EPA under § 114(a)(3) (requiring "enhanced monitoring") or § 504(b). 40 C.F.R. § 70.6(a)(3)(i)(A). Additionally, where an applicable requirement does not require "periodic monitoring," the rules require specification of periodic monitoring. *Id.* § 70.6(a)(3)(i)(B) (the "periodic monitoring" rule). The rules also contain broader language mirroring the statutory provisions requiring that permits include monitoring requirements to assure compliance. *Id.* § 70.6(c)(1).

EPA promulgated the CAM rule in 1997. In the preamble to the CAM rule, EPA briefly addressed the relationship between CAM and "periodic monitoring" as follows:

> As noted in the 1993 [enhanced monitoring] proposal, because part 64 contains applicable monitoring requirements sufficient to demonstrate compliance with applicable emission limitations or standards, the part 70 periodic monitoring requirements will not apply to the emissions units and applicable requirements covered by part 64. This conclusion is equally applicable under the final part 64 rule.

62 Fed. Reg. 54904, col. 3 (emphasis added). EPA also pointed out that for units that must have "periodic monitoring" specified prior to implementation of CAM (*i.e.*, for those units that do not already have "periodic monitoring" and for which CAM would not become applicable until permit renewal), in many cases that "periodic monitoring" might serve as a basis, in whole or in part, for its future CAM plan. *Id.* As noted in the section below summarizing the Task Force's discussion, there was not consensus among Task Force members regarding the significance of these statements.

Since their promulgation, the Title V monitoring rules have been subject to several EPA interpretations and to litigation challenging those interpretations. In these cases, litigants have asked the court to determine the meaning of both the "periodic monitoring" rule and the broader language in § 70.6(c)(1), and to determine the consistency of the rules (as interpreted by EPA) with the statutory requirements. As of this date, three court opinions have been issued. In the first case, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") interpreted the "periodic monitoring" rule and vacated a 1998 EPA guidance document on periodic monitoring. *See Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In the second case, the D.C. Circuit held that EPA's CAM rule, in combination with the Title V monitoring rules, satisfies the statutory requirement for "enhanced monitoring." *Natural Resources Defense Council v. EPA*, 194 F.3d 130 (D.C. Cir. 1999) (upholding EPA's CAM rule).

In the third case, the D.C. Circuit vacated EPA's most recent interpretation of § 70.6(c) on procedural grounds. *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005) (*EIP v. EPA*). EPA set out that interpretation in January 2004. 69 Fed. Reg. 3202. In that action, EPA concluded that the Title V monitoring rules do not provide States with authority to supplement existing monitoring, except as set out in the Part 70 provisions requiring implementation of CAM (and any future rules EPA promulgates) and allowing specification of "periodic monitoring" where there is no such monitoring specified. According to EPA, any other improvements in monitoring should be accomplished by rulemaking.

Previously, EPA had interpreted the rules in several orders on petitions for objection on specific source's Title V permits as providing permitting agencies authority to supplement monitoring "as necessary … to assure compliance." *See, e.g., In the Matter of Pacificorp*, Petition No. VIII-00-01 (Nov. 16, 2000) at 19. The D.C. Circuit dismissed on jurisdictional grounds an attempt by industry to challenge that interpretation as inconsis-

tent with EPA's 1992 rulemaking record and the statute. *Utility Air Regulatory Group v. EPA,* 320 F.3d 272 (D.C. Cir. 2003) (concluding in part that sources can challenge the interpretation if it is applied to them in an individual permit proceeding). In *EIP v. EPA,* the D.C. Circuit concluded that EPA had not satisfied notice and comment requirements in its attempt to revise the *Pacificorp* interpretation because the Agency's rulemaking proposal did not include the interpretation EPA ultimately adopted. The Court did not reach the merits of any of EPA's interpretations.

Following vacatur of the 2004 action, EPA told the D.C. Circuit that it plans to complete a new rulemaking to interpret § 70.6(c) later in 2006. EPA has also stated that it expects to publish a rulemaking proposal in 2006 addressing when the "periodic monitoring" rule applies and what constitutes "periodic monitoring." Whatever interpretation of § 70.6(c) EPA ultimately adopts, that action likely will result in litigation either by environmental groups or industry. The D.C. Circuit is currently holding in abeyance an additional challenge to EPA's 1992 monitoring rules by both environmental groups and industry. *See Clean Air Implementation Project, et al. v. EPA,* Case No. 04-1243 (D.C. Cir).

Comments and Testimony Received

The Task Force received extensive comments, both oral and written, on issues related to the imposition of new or revised monitoring requirements. The Task Force notes that interpreting the testimony regarding monitoring is sometimes difficult, given the fact that the commenters do not have a common understanding of, or agreement regarding, the statutory and regulatory requirements. In addition, the comments and testimony presented to the Task Force were not limited to permits that are *currently* being issued, but instead covered permits issued under several different interpretations of the Title V monitoring rules. Nonetheless, the comments received confirmed that the specification, or lack of specification, (depending on the commenter's perspective) of new or revised emissions monitoring requirements in permits is a significant issue that needs to be resolved.

Environmental and public health groups commented that monitoring was very important to Title V permitting, and that the CAA requires States to impose supplemental monitoring where necessary to assure compliance. A number of these commenters noted that they believe EPA's 2004 monitoring rule unlawfully limited State's authority/responsibility to add monitoring to Title V permits. Environmental group representatives also stated that the monitoring being added to Title V permits is inadequate. Some environmental group representatives provided specific examples of monitoring included in Title V permits that they found to be inadequate, particularly opacity, particulate matter, flare, and startup, shutdown, malfunction monitoring. One environmental group representative criticized the CAM rule as failing to provide certainty regarding a facility's emissions.

Industry representatives commented that Title V does not allow permitting authorities to add monitoring to Title V permits, except where an applicable requirement lacks periodic monitoring. These comments stated that monitoring, other than periodic monitoring, must be addressed through the rulemaking process. Industry representatives also gener-

ally noted that too much monitoring was being included in Title V permits. A number of industry representatives cited the excessiveness of "periodic monitoring" that was being imposed for units that did not have ongoing periodic monitoring and several suggested criteria for determining the frequency/adequacy of this monitoring, which they believe is the only additional monitoring authorized under the regulations. Many industry representatives stated that new substantive monitoring requirements, such as imposition of parameter monitoring and operational restrictions that were not otherwise authorized and may not be a good indicator of compliance or noncompliance, were being added to permits. A few industry representatives made comments regarding the CAM rule.

A number of State/local regulatory agencies commented on the need for permitting authorities to be able to supplement monitoring through Title V permits where necessary to assure compliance. One local permitting authority commented that it believes case-by-case review of monitoring through permits is a poor approach. A number of States indicated that they had developed their own guidance or presumptive norms for monitoring. Several permitting agencies also commented that EPA should proceed to review and update NSPS monitoring where that was needed. A number of permitting agencies identified the lack of regulatory guidance regarding periodic monitoring as a problem. One State/local permitting association commented on implementation of the CAM rule.

More detailed identification of comments received, with citations to the docket, is provided in Attachment A.

Task Force Discussion

With that background, the Task Force agreed that it faced a number of hurdles to its stated task of identifying "what is and is not working in the real world with respect to monitoring under Title V," including a fundamental lack of agreement among Task Force members regarding:

- What Title V authorizes and requires with respect to inclusion of monitoring in permits;
- What the current Title V rules require and whether they satisfy the statutory requirements; and
- The means by which existing monitoring can or should be changed, or additional monitoring can or should be imposed under the Clear Air Act generally.

The Task Force's discussions regarding monitoring took place over the course of several meetings. To begin the discussion, the Task Force put aside the issue of authority to impose monitoring and began with a general discussion about the purpose of monitoring, and the specification of monitoring in operating permits. The Task Force generally agreed that one of the primary functions of monitoring is to assure compliance with emission standards. The Task Force identified a number of factors for consideration in deciding what monitoring might be appropriate, such as the size of the emissions unit, the variability of emissions, the cost of monitoring, and how far the unit's emissions are from the standard (*i.e.*, the unit's margin of compliance). Another Task Force member identi-

fied compliance history as a factor in determining the appropriate frequency of monitoring.

An industry Task Force member noted that another purpose of monitoring is to provide the support for establishment of emissions standards at a particular level (*e.g.*, to determine what is achievable in practice with a specific control technology). That Task Force member stated that, as a result, an additional factor to consider in choosing appropriate monitoring for assuring compliance with an emission standard, is the basis upon which the numerical emission limit was established, including the type and amount of monitoring data relied upon to establish the standard (*e.g.*, was it a few stack tests or continuous data), the variability in those data, and the assumptions made regarding operating conditions under which no data was collected.

One Task Force member suggested that the purpose of specifying monitoring in the permit is to reach a common understanding about the method by which a source demonstrates compliance. Another Task Force member responded that identifying specific monitoring in permits can be a problem because it makes it difficult to change that monitoring in the future.

One Task Force member noted that some of the issues regarding monitoring arise because the requirements do not advance with the technology. Another Task Force member stated that there should be a shift towards use of continuous monitoring where that technology exists. In response, the Task Force briefly discussed how EPA and State agencies might approach moving from older standards based on periodic monitoring methods (like stack tests) to continuous monitoring. One environmental group Task Force member said that there could be some leeway provided in exchange for using continuous monitoring methods, such as continuous opacity monitoring systems (or COMS) in lieu of periodic testing (*e.g.*, visible emissions readings with EPA Method 9). One State agency said that they would excuse some deviations in exchange for use of COMS to enforce visible emission standards.

An industry Task Force member explained her view that providing exceptions or other adjustments to emission standards might be necessary when changing monitoring methods in order to ensure that the change did not make the standard more stringent. She explained that many standards were and still are established based on a limited number of periodic stack tests performed under controlled conditions that were deemed to be "representative" of normal operation. The Task Force member went on to State that because of the limited nature of the testing, the data might not characterize the full realm of conditions that occur during normal operations over longer periods of time (*e.g.*, because of variability in source operation, fuel characteristics, or control device operation). For that reason, she stated, the standards also specified that the source determine compliance by repeating stack tests under the same conditions used to set the standard and in some cases, in between stack tests, by collecting other data to verify that the source was properly operating any control device required to meet the limit. She noted that in some cases continuous monitors (such as COMS) were later specified as a means of verifying proper control device operation in between stack tests by calculating and reporting "excess

emissions," but not as the compliance method. She stated that this is the model used in many New Source Performance Standards (NSPS), which the Clean Air Act requires to be achievable using the best demonstrated control technology available at the time the standard was established. She said that, in her view, because the standards were not set with continuous data, EPA or a State agency could not later specify continuous monitoring as the compliance method without considering data from that new method, which could reveal unavoidable variability that was not considered when the standard was set. She believed that if new data reveals such variability, EPA or a State agency would have to adjust the standard (*e.g.,* by providing some *de minimis* percent of time exception or a longer averaging time). According to this Task Force member, failure to consider the impact of the new monitoring method on the standard could result in a standard being unlawfully rendered unachievable with the technology upon which it was based. The Task Force member felt the question of whether a particular monitoring method was "sufficient to assure compliance," had to begin with the question "sufficient to assure compliance with what" -- a standard that has been demonstrated to be achievable only under specific conditions with specific technology, or a standard with no such restrictions.

An environmental Task Force member disagreed that requiring continuous monitoring would require agencies to re-examine standards. The Task Force member stated that the Clean Air Act requires continuous compliance with all standards regardless of the amount or type of data used to the set the standard. She stated that if a continuous monitoring technology, like COMS, is available (or later becomes available) to show whether the limit is being met at all times, permitting agencies should require that technology in order to show whether a source is in continuous compliance. With respect to existing standards, she suggested that if industry had not believed that continuous compliance with the standards was achievable, then they should have challenged the standards when EPA or the State agency promulgated them. An industry Task Force member responded that they had no way of knowing at the time EPA or a State agency set the standard whether or not it could be met at all times because there were no continuous data available to make that determination. She noted that, if the data had been available, those data presumably would have been used to set the standard.

Two Task Force members debated whether SIP standards also were based on assumptions regarding performance of specific technology and thus would be subject to the same arguments regarding the need to re-examine the standard. One State agency Task Force member stated that because SIP standards are promulgated to meet health-based National Ambient Air Quality Standards (NAAQS), they are not required to be achievable with any particular technology. An industry Task Force member disagreed, stating that SIP standards (even though promulgated to comply with a NAAQS) are always based on assumptions during the SIP planning process regarding the performance of available control technology and the cost of those controls relative to some other type of control measure being considered.

Task Force members then presented their opposing views regarding a permitting agency's authority under the Clean Air Act and regulations to impose new or different

monitoring in a Title V permit to assure compliance. An environmental group Task Force member explained her view that the statute specifically requires permitting agencies to add monitoring on a source-by-source basis whenever necessary to assure compliance. She believed that all compliance monitoring should be re-examined in the permitting process so that a permitting agency can consider the individual characteristics of the source (including such things as its proximity to sensitive populations) and update monitoring as new technologies become available.

Industry Task Force members disagreed stating that in their view the Clean Air Act specifies that monitoring requirements be determined through rulemaking (or State preconstruction permitting proceedings) considering factors such as cost, burden, and the data upon which the relevant emission standard is set. They also felt that allowing State agencies to re-examine monitoring for each individual source, and allowing citizen groups to seek additional monitoring in Title V permit proceedings, was inconsistent with judicial review procedures of the Clean Air Act requiring that any challenges to a final rule's adequacy be made within 60 days. They felt that citizens should participate in the rulemaking and preconstruction permitting proceedings that were designed to resolve issues, including the adequacy of monitoring, and should not be allowed a second chance to challenge that adequacy simply because the source is required under the Act to obtain an operating permit. They used the example of a final MACT rule, with respect to which a citizen might unsuccessfully challenge the adequacy of monitoring in court, and then assert the same arguments in the Title V permitting proceedings. One industry Task Force member felt that any issues regarding the need for source-specific monitoring could be dealt with in the relevant rulemaking, such that if there were legitimate source-specific monitoring issues the final rule could provide authority to examine those issues in the permit proceeding.

With respect to the adequacy of current monitoring, an industry Task Force member noted that EPA promulgated the Part 64 CAM rule specifically to address that issue and had done so in a way that did not require re-examination of the emission limits. She asserted that many of the issues regarding the adequacy of monitoring will be solved once CAM is implemented and that EPA and States should put their resources into ensuring proper and timely implementation of that rule rather than promulgating new rules or reopening old rules. Another Task Force member noted that CAM has gaps because it will not apply to all sources because of size cut-offs. The industry Task Force member responded that EPA had determined that such sources did not need the additional monitoring in the CAM rule because their emissions were either not significant or not sufficiently variable to require more than periodic testing.

Regarding the nature of monitoring under the CAM rule, several Task Force members stated that CAM monitoring is not compliance determination monitoring because it does not establish noncompliance. Industry Task Force members disagreed, noting that the D.C. Circuit had already determined that monitoring under CAM was sufficient to support the compliance certification requirements of the Clean Air Act. (The summary of a later discussion regarding the adequacy of the CAM rule appears below.)

The Task Force briefly discussed EPA's "credible evidence" rule. In response to one Task Force member's remark that industry should not be so reluctant to install continuous monitoring because companies could benefit from the information, an industry Task Force member suggested that industry likely would not be so reluctant to install continuous monitoring technology if they had assurances that the data would be used in a manner that they believed was fair (*i.e.,* would not be used in a manner inconsistent with their existing emission standards). She asserted that EPA also had created hurdles to development of new continuous monitoring technology when it promulgated the "credible evidence" rule.

Following that discussion, the Task Force developed and considered a variety of recommendations. The first recommendation considered the use of rulemaking to address any concerns regarding the adequacy of existing monitoring. In order to identify areas of consensus the Task Force divided the recommendation into several parts. The first parts (Recommendations #1(a) and #1(b)) dealt simply with the principle that EPA and States should be moving forward to address any issues through rulemaking. A vote in favor of these recommendations did not mean that the Task Force member felt that rulemakings were the only way to address monitoring adequacies. Similarly, a vote in favor did not mean that Task Force members agreed that monitoring requirements were inadequate or that the existing requirements for "enhanced monitoring" under CAM and the "periodic monitoring" rule were not sufficient to address those issues.

The second part of Recommendation #1 (Recommendations #1(c)(i) and (ii)) considered how to address concerns about the adequacy of monitoring prior to completion of any rulemakings. The votes on these recommendations generally followed the Task Force members' views as to whether the Clean Air Act provides authority to supplement monitoring in Title V permits and whether exercise of such authority (if it exists) makes sense from a policy perspective.

The third part of Recommendation #1 (Recommendations #1(d)(i) and (ii)) considered whether the permitting process could (or should) be used to supplement monitoring that had recently been addressed through rulemaking. The votes on these recommendations also generally followed the Task Force members' views as to the extent of authority provided under Title V to supplement monitoring permit-by-permit, the need for source-specific monitoring, and whether source specific monitoring negates finality in the rulemaking process.

Recommendation #2 considered the extent to which EPA should issue a SIP-call requiring States to address the adequacy of monitoring through rulemaking in the event that permitting agencies do not have authority to conduct permit-by-permit review and enhancement through Title V. The environmental group Task Force members voted in favor of this recommendation. Others opposed or abstained.

Recommendation #3 considered the factors EPA should address in its upcoming rulemaking proposal regarding when the "periodic monitoring" rule applies and what constitutes "periodic monitoring." Although the majority of Task Force members voted in favor of

the recommendation, members disagreed regarding several of the factors that permitting agencies should consider. Rather than oppose the entire recommendation, Task Force members noted their disagreement in the form of clarifications. Specifically, the environmental group Task Force members did not agree that permitting agencies must consider the data upon which the standard was set (*e.g.*, whether it was set with a few stack tests or with continuous emissions monitoring data). On the other hand industry Task Force members felt that any additional monitoring that was used for direct determination of compliance (rather than to ensure proper operation of a control device as occurs under the CAM rule) would have to be consistent with the test method currently specified (*e.g.*, specify a frequency for periodic performance of the existing test method).

Recommendation #4 considered the relationship between "periodic monitoring" and the CAM rule. Industry Task Force members expressed concern that State agencies did not understand that EPA had determined in the CAM rulemaking that the "periodic monitoring" requirement would no longer apply once CAM was implemented. One industry Task Force member cited EPA's statements in the preamble to the CAM rule, and the D.C. Circuit's decision upholding the CAM rule as sufficient to satisfy requirements for "enhanced monitoring" and compliance certifications, as evidence that the relationship between the two rules had been resolved in the CAM rulemaking.

One State agency Task Force member felt that such an issue could not be resolved through preamble statements that are not also reflected in the rules. He felt that CAM might or might not satisfy Title V monitoring requirements and that the rule did not speak to that issue. Although he agreed that CAM is sufficient to support a compliance certification, he also felt that EPA would allow almost anything to satisfy the compliance certification requirement. This Task Force member felt that the issue was whether CAM satisfied the requirement for monitoring "sufficient to assure compliance." In other words, his view of the issue was tied with the question of what Title V authorizes and requires in terms of new monitoring. Because he did not agree with the D.C. Circuit's determination that CAM is sufficient to assure compliance, he did not believe that CAM necessarily would satisfy the requirement for "periodic monitoring."

An industry Task Force member expressed the view that Congress could not have intended the general "to assure compliance" language in Title V to provide a more stringent standard for judging the adequacy of monitoring than the language in CAA § 114(a)(3), which specifically addressed the need for "enhanced monitoring." As a result, the member felt that if CAM satisfies "enhanced monitoring" as the D.C. Circuit held, it must also satisfy any requirement that might exist under Title V. She felt that the legislative history was clear that the goals of the requirement for "enhanced monitoring and compliance certifications" and of the Title V certification requirement were the same. The State agency Task Force member did not disagree regarding the legislative history, but he read the D.C. Circuit's decision as not finding that CAM satisfies that purpose, only that the CAM rule was not inconsistent with the discretion provided to EPA under *Chevron*. Environmental group Task Force members made clear that they also did not agree with the D.C. Circuit's opinion. They continued to believe that CAM is not sufficient "to assure compliance" and therefore would not satisfy Title V requirements.

Two additional recommendations were suggested, but the Task Force decided not to vote on them as recommendations. The first recommendation, which was offered by several environmental group representatives, would have stated that EPA had failed its responsibility under Title V by prohibiting case-by-case supplemental monitoring without developing an interim plan requiring monitoring sufficient to determine compliance while undertaking rulemaking, and without committing to review all underlying standards. They would have recommended that EPA's failure be remedied immediately. Industry Task Force members did not agree that EPA had failed to meets its obligation. They believed that EPA had met its statutory obligations by requiring "enhanced monitoring" under the CAM rule and "periodic monitoring" rule. They also noted that EPA had recently issued an advanced notice of proposed rulemaking to solicit comment on whether any additional rulemakings were warranted. Environmental group representatives did not believe the solicitation of comments was sufficient because EPA had only committed to review those regulations that received public comment, and did not intend to undertake its own review of monitoring in State and Federal rules. They felt that it was unrealistic for EPA to expect members of the public to review thousands of regulations in a matter of months and identify all of the areas that need additional monitoring. They stated that if EPA chooses to prohibit case-by-case supplemental monitoring, EPA is obligated to ensure that monitoring in underlying requirements is sufficient to assure compliance.

The second additional recommendation discussed by the Task Force addressed a specific issue that has occurred in initial Title V permitting when State agencies are exercising (or were exercising) authority under EPA's now-vacated "periodic monitoring" guidance, under EPA's *Pacificorp* interpretation of the Title V monitoring rules, or under the existing "periodic monitoring" rule. Specifically, some permitting agencies have uniformly required visible emissions observations either each day or for each shift (*e.g.*, every eight hours). Industry Task Force members felt that even if the permitting agency had authority to impose this monitoring (*e.g.*, under the existing "periodic monitoring" rule because there was no ongoing monitoring requirement in the underlying rule), such frequent visible emissions observations in many cases exceed what is necessary to reasonably assure compliance. As a result, they would have recommended that permitting agencies stop this practice for initial permit issuance and revisit any such monitoring requirements upon permit renewal (or modification at the request of the source). They would have recommended that permitting agencies reduce the frequency based on the results of monitoring to date (*e.g.*, reduce the frequency if there had been a series of normal visible emissions observations). The Task Force ultimately did not vote on this recommendation because of its focus on the practice of a few States and the likelihood that EPA's gap-filling rule will address the factors to be considered in establishing such monitoring, and these are already reflected in another recommendation.

Recommendations

Recommendation #1(a)

EPA should proceed expeditiously by rulemaking to address monitoring inadequacies that may exist in underlying Federal standards.

In Favor (17)*: Morehouse, Freeman, Van Frank, Palzer, Owen, Keever, Haragan, Powell, Schwartz, Golden, Paul, Hagle, Sliwinski, Broome, Wood, van der Vaart, Hodanbosi

Opposed:

Abstentions:

Clarifications:

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #1(b)

States should proceed expeditiously by rulemaking to address monitoring inadequacies that may exist in underlying SIP standards.

In Favor (15): Morehouse, Freeman, Palzer, Owen, Keever, Haragan, Powell, Schwartz, Paul, Hagle, Sliwinski, Broome, Wood, Golden, Hodanbosi

Opposed (2): van der Vaart, Van Frank

Abstentions:

Clarifications: Freeman, Golden, Broome, and Morehouse voted in favor of this recommendation with the understanding that there will be clarification that CAM satisfies periodic monitoring requirements. Van Frank was opposed to this recommendation on the basis that this activity cannot or will not be undertaken with the resources currently available to State and local permitting authorities.

Recommendation #1(c)(i)

Before any such rulemakings, permitting authorities would not have authority to supplement on a case-by-case basis, in the permit review process, monitoring in standards that already contain periodic monitoring requirements. States would proceed with gap-filling monitoring for standards that do not have periodic monitoring requirements, to the extent authorized by the rules and with compliance assurance monitoring.

In Favor (7): Morehouse, Freeman, Schwartz, Paul, Broome, Wood, Golden

Opposed (10): Palzer, Owen, Keever, Haragan, Powell, Hagle, van der Vaart, Van Frank, Sliwinski, Hodanbosi

Abstentions:

Clarifications: Freeman voted in favor of this recommendation with the understanding that periodic monitoring will be limited to a reasonable frequency for the specific reference method test.

Recommendation #1(c)(ii)

Before any such rulemakings, permitting authorities must conduct case-by-case reviews of all applicable requirements and supplement monitoring to assure compliance.
In Favor (6): Palzer, Owen, Keever, Haragan, Powell, Hagle ***Opposed (11):*** Broome, Morehouse, Freeman, Golden, Wood, van der Vaart, Paul, Van Frank, Schwartz, Sliwinski, Hodanbosi ***Abstentions:*** ***Clarifications:*** Hagle voted in favor of this recommendation but would change to the opposed position if the courts determine that case-by-case reviews are not required.

Recommendation #1(d)(i)

After a rulemaking, the rule would be a final indication of the monitoring required for a standard, and that may not be supplemented or changed in the permitting process. Anyone who objects to the monitoring in a final rule would be required to challenge that rule in the courts but not in individual permit proceedings.
In Favor (8): Broome, Morehouse, Freeman, Golden, Wood, van der Vaart, Paul, Sliwinski ***Opposed (7):*** Van Frank, Palzer, Owen, Keever, Haragan, Powell, Hodanbosi ***Abstentions (1):*** Hagle ***Clarifications:***

Recommendation #1(d)(ii)

After a rulemaking, provided such rulemaking expressly address the adequacy, pursuant to Title V, of monitoring in the underlying standard, that monitoring is presumptively adequate to meet Title V requirements, but must be supplemented on a case-by-case basis if necessary to assure compliance.
In Favor (7)*:** Palzer, Owen, Keever, Haragan, Powell, Hagle, Van Frank ***Opposed (10): Broome, Morehouse, Freeman, Golden, van der Vaart, Paul, Schwartz, Sliwinski, Wood, Hodanbosi ***Abstentions:*** ***Clarifications:***

Recommendation #2

Unless EPA lifts the 2004 prohibition on case-by-case supplemental monitoring, EPA must review the adequacy of monitoring in SIP rules and issue a SIP call for those that are inadequate. EPA should provide funding to the States for SIP revision costs.
In Favor (6): Palzer, Owen, Keever, Haragan, Powell, Van Frank ***Opposed (10)*:** Broome, Morehouse, Freeman, Golden, van der Vaart, Schwartz, Hagle, Sliwinski, Wood, Hodanbosi ***Abstentions (1):*** Paul ***Clarifications:***

Recommendation #3

EPA's rulemaking regarding gap-filling monitoring should promote consistency among permitting authorities and include consideration of several factors, such as cost, technical feasibility, monitoring currently in place at the unit, monitoring currently available or being used at similar units, the data upon which the standard was set, size of the unit/emissions levels, margin of compliance, compliance history, likelihood of a violation, and emissions variability.

In Favor (17): Broome, Morehouse, Freeman, Golden, van der Vaart, Schwartz, Hagle, Palzer, Owen, Keever, Haragan, Powell, Van Frank, Sliwinski, Paul, Wood, Hodanbosi

Opposed:

Abstentions:

***Clarifications*:** Haragan, Owen, Powell, Palzer, Van Frank, and Keever, who voted in favor of this recommendation, do not agree that the data upon which the standard was set should be included as a factor. Freeman, Broome, Morehouse, Golden, Wood, and Paul who voted in favor of this recommendation add that monitoring should be consistent with the existing test methods.

Recommendation #4

EPA's rulemaking should clarify the relationship between the CAM rule and periodic monitoring, such that CAM satisfies Periodic Monitoring.

In Favor (9): Freeman, Morehouse, Paul, Golden, Schwartz, Hagle, Broome, Wood, Hodanbosi

Opposed (8): Van Frank, Keever, Owen, Haragan, Powell, van der Vaart, Sliwinski, Palzer

Abstentions:

Clarifications:

Related Topics: New Substantive Requirements, Definitiveness of Permit

Attachment: Additional Comments

The Task Force notes that additional comments on monitoring have been submitted to EPA in response to its Advanced Notice of Proposed Rulemaking on Potentially Inadequate Monitoring and on Methods to Approve Such Monitoring (70 Fed. Reg. 7905).

Environmental Group Comments:

Environmental groups and commenters almost unanimously commented that monitoring was very important to Title V permitting and that what was being imposed is inadequate. (Galveston-Houston Assoc. for Smog Prevention (GHASP), OAR-2004-0075-0057; Our Children's Earth OAR-2004-0075-0025; J. Wilson, GHASP, Tr. 2-143; S. Zingle, Lake County Conservation Alliance, Tr. 3-055; D. Frederick Esq., Tr. 3-055; S. Gollwitzer, App. Voices, Tr. 3-105; M. Scanlan, Mid West Env. Adv., Tr. 3-181; D. Monk, OR Toxics Alliance, Tr. 3-220; R. Zars Esq., Tr. 3-254; Masters Community Board 1, HAG,

Tr. 3-268; R. Lin, Env. Law Justice Clinic, Tr. 4-248; J. Suttles, Tulane Env. Law Clinic, Tr. 3-210).

Several groups complained about EPA's January 2004 final action and one group specifically requested that EPA reverse its position. (NW Env. Defense Ctr. (NWEDC), OAR-2004-0022; J. Walke, NRDC, Tr. 1-111). Environmental commenters also asserted that Clean Air Act requires that States have the ability to impose new monitoring where necessary in the permitting authority's view to assure compliance. (Comments on Settlement, OAR-2004-0075-0078; K. Haragan, Environmental Integrity Project (EIP), Tr. 1-254).

One environmental group said that monitoring was being left out of initial permits on the assumption that it would be added during renewal, but that it was not being added. (NWEDC, OAR-2004-0022). One environmental commenter said that stack tests often are not done when they were required and that although they had been successful in getting additional monitoring added to permits in some instances, they had not been successful in getting continuous monitoring added. (L. Welch, Mid-Atlantic Environmental Law Center, Tr. 1-183, 206, 243).

One environmental commenter recommended that continuous particulate monitors be required. (Wilson, EIP, Tr. 2-103). Several environmental commenters said that COMS should be used to determine compliance instead of Method 9 if they are installed. (R. Ukeiley, GA Center of Law, Tr. 3-077; S. Prakash, WE ACT, Tr. 3-229; G. Hayes Esq., Tr. 4-196). Once environmental group also commented that there was not adequate monitoring to enforce startup exemptions. (R. Ukeiley, GA Center of Law, Tr. 3-070).

At least one environmental group complained that the CAM rule does not provide the public with knowledge or certainty that industry knows what its emissions are and delays imposition of monitoring until permit renewal. (J. Walke, NRDC, Tr. 1-111).

Industry Comments

A number of industry commenters described new monitoring or operational restrictions that had been included in permits as new substantive requirements without associated underlying applicable requirements. In some cases it was not clear which version of EPA's rules were in effect at the time the permit was issued. (Gas Processors Association (GPA), OAR-2004-0075-0016; American Chemistry Council (ACC), OAR-2004-0075-0049; American Forest & Paper Association (AF&PA), OAR-2005-0075-0053; D. Rowe, Alliance of Automobile Manufacturers (The Alliance), Tr. 4-56). In other cases, commenters specifically stated that they continued to have new monitoring terms imposed even after EPA concluded that its rules did not provide State permitting officials to impose new monitoring where there is already periodic monitoring in the underlying requirement. (Ohio Chemistry Technology Council (OCTC), Ohio Manufacturers' Association (OMA), and Ohio Chamber of Commerce (OCC), OAR-2004-0075-0083; National Petrochemical & Refiners Association, OAR-2004-0075-0046 and 0088; Utility Air Regulatory Group (UARG), OAR-2004-0075-0055; S. Murawski, Esq., Gardner, Carlton & Douglas, Tr. 2-024).

Numerous industry commenters asserted that imposition of new monitoring (other than the very limited gap-filling allowed under the "periodic monitoring" provision) was unlawful. (ACC, OAR-2004-0075-0049; OCTC, OMA, and OCC, OAR-2004-0075-0083; Clean Air Implementation Project (CAIP), OAR-2005-0052; UARG, OAR-2004-0075-0055; D. Bolt, Western States Petroleum Association (WSPA), Tr. 4-320).

A number of industry comments complained specifically about the imposition of new parameter monitoring and operational restrictions that were not a good indicator of compliance or noncompliance. (GPA, OAR-2004-0075-0016; ACC, OAR-2004-0075-0049; AF&PA, OAR-2005-0075-0053; T. Wyles, AF&PA, Tr. 4-36; The Alliance, OAR-2004-0075-0056; Air Permitting Forum, OAR-2004-0075-0074; B. Hermanson, ACC, Tr. 2-368; J. Admire, GPA, Tr. 4-161). One industry commenter provided citations to State permit appeal decisions in which the board found that the operational restrictions that had been imposed had no relationship to compliance. (OCTC, OMA, and OCC, OAR-2004-0075-0083).

On industry commenter provided examples of how addition of new monitoring was a major problem that often requires source to appeal their permits. (National Environmental Development Association's Clean Air Project (NEDA/CAP), OAR-2004-0075-54; L. Ritts, NEDA CAP, Tr. 4-185). Several commenters noted that each additional monitoring requirement can be very expensive. (S. Murawski, Esq., Tr. 2-024; A. Andrew, CASE Coalition, Tr. 2-191). As an example, one commenter noted that even a requirement to check equipment of visible emissions per shift is costly because it requires scheduling, observation, reporting and certification. (A. Andrew, CASE Coalition, Tr. 2-190). The commenter also complained that periodic monitoring was not being implemented consistently. (A. Andrew, CASE Coalition, Tr. 2-193)

Several industry commenters complained about the excessiveness of "periodic monitoring" that was being imposed for units that did not have ongoing periodic monitoring and several suggested criteria determining frequency. (American Petroleum Institute, OAR-2004-0075-0047; Eli Lilly and Company, OAR-2004-0050; CAIP, OAR-2005-0052; The Alliance, OAR-2004-0075-0056; CASE Coalition, OAR-2004-0075-0085; UARG, OAR-2004-0075-0055; D. Bolt, WSPA, Tr. 4-320; D. Kalina, RR Donnelley, Tr. 2-299).

An industry consultant commented that he had seen a number of permits where additional monitoring had been added even were periodic monitoring was already required and expressed the view that Congress did not intend monitoring to be the sole determination of compliance. (S. Evans, Clean Air Engineering (CAE), Tr. 2-114) . The consultant commented that appropriate monitoring can be very source specific and that monitoring between tests might be assured by operating the source under the same conditions as when the compliance test was performed. (S. Evans, CAE), Tr. 2-134).

Regarding the Compliance Assurance Monitoring (CAM) rule, one industry commenter complained that States were not allowing changes in the parameter monitor levels under CAM even when they were based on subsequent tests that demonstrated compliance. (T. Wyles, AF&PA, Tr. 4-35). Another industry commenter described unresolved issues with CAM applicability where MACTs regulated the same pollutant. D. Kalina, RR Donnelley, Tr. 2-299). An industry consultant felt that the CAM rule was working well and that, when implemented properly, it did provide a reasonable assurance of compliance. (S. Evans, CAE, Tr. 2-141).

State/ Local Permitting Agencies and Government Comments

One Federal government commenter stated that the program had created new monitoring for emissions sources that was not necessary. (Navy, OAR-2004-0051).

Several States complained about the lack of guidance on monitoring and the burdens that imposes on States. (M. Reis, New York State Department of Environmental Conservation (NYDEC), Tr. 4-114; L. Rector, NESCAUM, Tr. 4B-51; H. Abrams, Georgia Environmental Protection Division (GEPD), Tr. 4B-80; D. Campbell, Iowa Department of Natural Resources (IDNR), Tr. 4-75). One State commented that identifying "appropriate periodic monitoring" continues to be a "daunting task," but that it believes that the program results in environmental benefit. (Michigan Department of Environmental Quality (MDEQ), OAR-2004-0075-0021). Several States indicated that they had developed their own guidance on "periodic monitoring" given the lack of EPA guidance. (MDEQ, OAR-2004-0075-0021; H. Hollenbach, MDEQ, Tr. 4B-23; IDNR, OAR-2004-0075-0087; D. Campbell, IDNR, Tr. 4-79). One State said that they impose periodic monitoring when there was no monitoring requirement but that they did not otherwise add monitoring. (J. Kitchens, Alabama Department of Environmental Management (ADEM), Tr. 4B-76).

Several air pollution control agencies asked EPA to reintroduce gap-filling authority at least during the period that it would take to complete rule revisions and asked EPA to

provide criteria for periodic monitoring. (STAPPA/ALAPCO, OAR-2004-0075-0048; J. Abrams, GEPD, Tr. 4B-83). Another State supported EPA's moving forward with the steps outlined in the January 2004 final action, but also stated that EPA must promulgate or revise rules governing "adequate" monitoring and should provide national guidance regarding appropriate frequency for testing for various emissions units. (Ohio EPA, OAR-2004-0075-0082).

One State agency commented that case-by-case review and enhancement of monitoring was very resource intensive and contentious, and as a result was a poor approach. The agency also felt strongly that "gap-filling" monitoring should be imposed in Title V permits only in very limited circumstances and requested more EPA guidance and oversight. The agency felt that monitoring generally should be enhanced through rulemaking, starting with the NSPS. (Bay Area Air Quality Management District (BAAQMD), OAR-2004-0075-0089; P. Hess BAAQMD, Tr. 4-147, 4-156). The agency stated that the lack of monitoring in the NSPS generally was not a problem because the SIP included more stringent rules that do contain monitoring. (P. Hess, BAAQMD, Tr. 4-157).

One State indicated that it discovered through Title V permitting that a number of sources had not complied with monitoring requirements in preconstruction permits and that as a result monitoring was added through Title V and emissions were reduced. That same State indicated that it has addressed monitoring through a "presumptive norm schedule" (developed in cooperation with EPA Region 2) and that imposition of additional monitoring had resulted in more permit appeals than any other issue. The State indicated that there is too little monitoring and encouraged EPA to add requirements to Federal rules. (New Jersey Department of Environmental Protection (NJDEP), OAR-2004-0075-0017; W. O'Sullivan, NJDEP, Tr. 4B-38).

Regarding the Compliance Assurance Monitoring (CAM) rule, a group of air pollution control agencies thought that it was too early to tell if CAM would be successful in the long run, the group thought the approach would provide a reasonable, and in some cases superior, option for minimizing emissions. (STAPPA/ALAPCO, OAR-2004-0075-0048; J. Bradbent, STAPPA/ALAPCO, Tr. 4-95). One State complained that the CAM rule requirements were too ambiguous. (IDNR, OAR-2004-0075-0087). One agency expressed concern that CAM was being imposed based on a source's potential to emit rather than actual emissions, which did not allow them to focus on processes that have the most risk. (M. Lake, San Diego County Air Pollution Control District, Tr. 4B-135).

4.4 TOPIC: TITLE I/TITLE V INTERFACE

Issue/Observation Description

This topic addresses problems that have arisen in implementing the Title V program where the "applicable requirements" listed in the Title V permit may, for one reason or another, not reflect the current operations or requirements of the source. Title V requires permits to list all applicable requirements, many of which originate under the authority of Title I. This topic includes two basic types of Title I/Title V interface issues that were raised during the public comment period:

1. Updating SIP-based (major or minor NSR permits) using the Title V process. In this situation, a minor or major NSR permit contains terms established prior to construction, but those terms no longer represent current operations or the facility would otherwise like a particular term to be changed. The question is what process can be used to either ensure that the Title V permit reflects current operations or to change underlying SIP-based permit terms and whether streamlining can be achieved.
2. The so-called "SIP gap" occurs when a State has revised its State regulations, but EPA has not approved a matching revision to the SIP. Under such circumstances, EPA has required the State to continue to include the old SIP requirement in Title V permits, even though the requirement is no longer included in the State's regulations. In most cases, however, EPA has not objected (in writing or orally) to the State's request to revise its SIP, but has instead simply failed to act on the State's submission. States resist including provisions in the Title V permit that no longer apply under State law.

Supporting Information

1. Updating SIP-Based Permits

The Task Force received extensive testimony indicating that the incorporation of applicable requirements from construction permits and the process for updating those requirements is not working well. All commenters that spoke to this issue stated that EPA has imposed a 2-step process for updating previously-issued SIP permits and indicated that this practice has:

(1) imposed delays in permitting and permit revisions,
(2) required States and sources to spend resources doing the same tasks twice, and
(3) created enforcement exposure for sources when there is no substantive disagreement about applicable requirements and no environmental impact.

Commenters indicated that EPA's process is cumbersome and that early EPA efforts to address this issue have been largely unsuccessful in achieving streamlining.

Numerous people presented information at the public meetings explaining the problems related to updating older SIP-based permits. Several examples of obsolete, outdated or redundant permit terms were given and a desire was expressed to use a single process to

update these requirements at the request of the permitted facility. The identified concern focused on the need to undergo a 2-step (and in California, apparently, a 3-step) process to update permit terms. These examples were provided to the Task Force during testimony and in written comments. They illustrate the types of practical problems that have arisen in the implementation of the program. Please see the recommendations regarding how the Task Force believes these problems can be addressed.

Example Type 1 – Outdated Permit Requirements: Examples provided in testimony included situations where (1) the minor NSR permit lists equipment and associated limits for equipment that has been removed and the source seeks removal of the outdated terms, or (2) the minor NSR permit included requirements to operate a control device to meet permit limits but the source subsequently achieved the emission limits using pollution prevention (*i.e.*, low VOC coatings), and sought removal of the terms requiring it to operate the control device. In this latter case, energy savings and emission reductions would result from not operating the control device when it is not needed to meet emission limits.

Example Type 2 – Redundant Permit Requirements: One of the examples provided was a permit that imposed several redundant requirements all designed to achieve one emission limit, such as a requirement to operate an incinerator at a particular efficiency whenever the process is operating and a temperature limit. In this example, the source could have achieved the required destruction efficiency at a lower temperature than specified in the permit and wanted to change the permit to require it to comply with whatever temperature showed compliance during the most recent stack test rather than to specify a particular temperature value. By lowering the temperature, less energy would be needed to operate the control device. The source wanted to modify its requirements to retain only the permit term specifying the efficiency requirement (*e.g.*, 95% destruction). The source proposed to use the temperature showing compliance in the most recent stack test to show compliance but that temperature level would not be a separate limit in the permit.

Example Type 3 – State Operating Permits Reflect Change But the Construction Permit Has Not Been Updated: Another type of situation is where a State or local agency issued a construction permit but subsequently used a State-issued operating permit to embody the operating requirements. As operations changed over the years, the State would revise the State-only operating permit but not update the construction permit. In some cases, the State's operating permit program was a part of the SIP and in others, it was not. When the State begins implementing the Title V program, it realizes that the construction permit still reflects the old operations and EPA required the terms of the construction rather than the State operating permit to be included in the Title V permit because the construction permit had never been revised to eliminate the requirement. Whether or not EPA was correct in ignoring that the current State/local operating permit that no longer imposes the same requirements, additional costs and potential compliance certification issues arose. One of the examples provided in this category was a stack testing requirement on a combustion device for SO_2 that had been included in a construction permit. Subsequently, the State issued an operating permit to prohibit burning fuel oil. EPA required the local agency to include the stack testing requirement in the Title V permit even though it was

clear that the source could never exceed the SO_2 limit burning natural gas. EPA required that the construction permit be revised before the stack testing requirement could be eliminated. In the meantime, the source was forced to resume annual testing for SO_2 at a cost of $40,000 per year.

Example Type 4 – Incorrect Requirements: In some cases, mistakes were made in the original construction permit. One example was where Stage I vapor recovery was required for a unit not subject to that requirement. Another example was where an emission limit was established based on projected operating levels using an assumed emission factor. When the emission factor turned out to be incorrect, the source applied for a revision to the construction permit (before the Title V permit was issued). Due to backlogs in permit processing at the State level, the construction permit was not updated prior to issuance of the Title V permit and the Title V permit reflected the limit in the construction permit. The source was forced to submit deviation reports simply because the construction permit revision had not been processed.

In each of the above examples, commenters reported to the Task Force that the source was required to go through a 2-step process: first, to update the underlying permit and then an almost identical process to update the Title V permit. The practical effect of the 2-step process is that it often requires two public comment periods, review by two different permit writers at the State, and other redundant administrative steps. All of this redundancy results in significant delay in issuing a final Title V permit that reflects the source's applicable requirements. In the meantime, sources are faced with either complying with permit terms no longer relevant or reporting deviations from Title V permit requirements. Commenters noted that the procedure for using the Title V process to update old NSR permits outlined in White Paper No. 1 is not being followed by the States and some EPA regions. Some commenters believed that the States view it as an overly cumbersome process.

Discussion: In discussing this topic, Task Force members suggested that we explore the practices employed in Michigan and Illinois because these States have included language in their Title V permits that appears to authorize changes to underlying Title I requirements. In follow-up, we were able to contact Michigan, which includes two captions on the cover of its Title V permits (which Michigan calls the Renewable Operating Permit or "ROP"). The first references the Title V or ROP authority and the second references the fact that the ROP also constitutes a source-wide permit to install (*i.e.*, major or minor NSR construction permit). The original purpose of this approach was to allow consolidation of multiple minor or major NSR construction permits into a single construction permit during the Title V process (assuming no other changes were required). In discussing the issue with the Michigan Department of Environmental Quality (MDEQ) staff, however, it became clear that there is no reason a consolidated approach could not be used for processing changes that a source seeks to a construction permit simultaneously with the ROP. As the Task Force understands it, the consolidation of processing in Michigan is at the source's option but does not create any new authority for the agency to change permit limits absent a source modification request.

Consistent with feedback from other States, it seems that one of the primary obstacles to consolidating the processing of Title I and Title V permit changes is related to staffing at the State level. Historically, construction and operating permits have been processed by different groups in State regulatory agencies, hindering efforts to consolidate processing. In response, at least two States (of which the Task Force is aware) are taking steps to consolidate these groups (Michigan and Ohio) to allow for more efficient processing. MDEQ staff also indicated in this discussion that its program could allow a source the option to have either consolidated processing of a Title I and Title V change (which would generally mean a significant permit modification), or to use the current approach which would require a construction permit change first and then the applicable procedure for modifying the ROP (either a notice-only change under Section 70.4(b)(14), administrative amendment, minor modification, or significant modification depending on the nature of the action).

In Illinois, steps have also been taken to consolidate Title I and Title V permitting *procedures*. The Title V permit indicates on its face that it is both a Title V - Clean Air Act Permit Program (CAAPP) Permit and a Title I Permit. The State has used the Title V permit procedures to update/correct/revise old Title I permits for which applications for modification were pending or for which new changes were sought by the source at the same time that the Title V application was submitted. In the draft and final permit, Illinois EPA uses the following identifiers to indicate what changes are being made:

T1: Title I – identifies Title I conditions that have been carried over from an existing permit.
T1N: Title I New – identifies Title I conditions that are being established in this permit.
T1R: Title I Revised – identifies Title I conditions that have been carried over from an existing permit and subsequently revised in this permit.

To clarify, the new and revised terms are not created by the Illinois EPA without request from the source but result from the source's application or request for a change to the minor or major NSR permit terms or for a new construction project that requires a Title I permit.

Some members of the Task Force indicated that these methods have worked well in terms of eliminating redundant public comment periods (*i.e.*, one for the construction permit modification and one for the operating permit modification) and other redundant processing steps (*e.g.*, creation of terms in the construction permit and then transfer of those terms to the operating permit with another permit writer's review time) Illinois, while sources in Michigan have reported more difficulty in achieving combined processing of Title I and Title V changes to date. Michigan is making progress toward such an approach, however, and expects that sources will have the option of consolidated or separate processing in the near future.

In addition to the approaches in Illinois and Michigan, New York reported that it had done a "permit cleanup" in the process of initial permit issuance. Through this process, New York eliminated all of the existing Title I permits. One concern that was raised

about New York's process, however, was that the public notice did not identify that the underlying permits were being revised or updated. Similarly, Indiana included a term in its Title V permits indicating that all previously issued Title I permits were either included in the Title V permit or superseded by the Title V permit.

The Task Force discussed the use of White Paper No. 1's parallel processing approach which preserved procedures required under both Title I and Title V while seeking to eliminate redundant steps between the two. Specifically, we discussed that in White Paper No. 1 EPA found that the "public participation procedures for issuance of a part 70 permit satisfy any procedural requirements of Federal law associated with any NSR permit revision" and that this "parallel processing approach is also an excellent opportunity to minimize the administrative burden associated with such an exercise." EPA provided that by "conducting a simultaneous revision to the NSR permit, the permitting authority would be revising the "applicable NSR requirement" for purposes of determining what must be included in the part 70 permit." Thus, White Paper No. 1 seeks to capitalize on the process that will already occur in part 70 to simultaneously satisfy Title I procedural requirements when the source seeks a change to a minor or major NSR permit.

Most members of the Task Force believed that a lot of the problems identified by commenters could be alleviated by permitting authorities making more efficient use of White Paper No. 1. They also recognized however, that many State permit writers are reluctant to go back to physically revise a construction permit that they consider null and void. Nonetheless, they felt that wider use of White Paper No. 1 could be helpful and this resulted in Recommendation #1. In discussing Recommendation #1, there were no objections raised to its use except by some States who felt that its procedures could be cumbersome. There were some Task Force members who had not reviewed White Paper No. 1 since it was issued so long ago or had not seen it used in permits they reviewed. During the discussion, they cited this as a reason that they did not feel comfortable endorsing broader use of it at this time. Upon further review, these members indicated that they did not object to parallel processing *per se* but had concerns with those aspects of White Paper No. 1 that suggest a permitting authority can exclude certain NSR permit conditions from a Title V permit without providing notice of and an opportunity for comment on that decision. (*e.g.*, they object to White Paper No. 1 language indicating that preconstruction permit terms may be eliminated because they are "extraneous, out-dated, or otherwise environmentally insignificant and inappropriate for inclusion in a Federally-enforceable permit."). Industry members of the Task Force clarified that their view of Recommendation #1 was that it addressed only the parallel processing provisions of White Paper No. 1, which ensure that whatever process is required in the underlying SIP is satisfied and which dictate that the level of process that must be provided in Title V to qualify for such parallel processing.

On Recommendations #2(a) and #2(b), Task Force members tried to identify ways to streamline the process under the part 70 rules while preserving source flexibility. Option A addresses testimony that the Task Force received indicating that some States are not taking advantage of the flexibility in the part 70 rules to use administrative amendment

procedures to update the operating permit when a construction permit is issued. Testimony indicated that the States are not providing EPA review opportunity during the processing of the construction permit and if they did, an administrative amendment could be used to process the revision. Option B addresses the situation where a source has obtained a construction permit that qualifies as an off-permit change and recommends that States utilize these provisions of the part 70 rule to the maximum extent possible. Options C and D address the situation where the off-permit provisions are not available. In some situations, the source may have sufficient lead time for its construction to accommodate consolidated processing of the construction and operating permit modification while in others, construction needs to begin more quickly. These options indicate that the source should be able to choose between these two options as long as the requirements in the rule applicable to both programs are met. Some States are already using this approach but this recommendation would encourage other States to do so, to the extent consistent with their Title V program rules. While there was not disagreement that the rules allow these options, environmental group representatives explained their opposition to Recommendation #2(a) as rooted in their disagreement with the off-permit change provisions in the rules.

The Task Force members generally recognized that the interface of Title I and Title V permit processing presents an opportunity for streamlining the process and potential cost savings to both industry and State permitting authorities. Streamlining is most needed in States that have separate Title I and Title V programs. The recommendations we considered are directed at the timing of the change to the Title I permit terms.

Finally, it is worth noting that even though we did not offer recommendations on staffing issues, the Task Force members believed that at least part of the problem is emanating from the approach of separately staffing the construction and operating permit programs. Staff responsible for processing construction permits are unfamiliar with the processing requirements of the operating permit program and *vice versa*, making consolidation of processing difficult at best. There was a sense that, as States consolidate their construction and operating permit groups so that one person is responsible for a given source, parallel or combined processing will occur and this will be beneficial.

2. "SIP Gap"

This issue involves the timing lag between a State's adoption of a new rule under a SIP and EPA's approval of that rule to make it part of the SIP and Federally-enforceable under Title V. Oral testimony cited the huge backlog of SIP revisions at the EPA level, noting that some SIP revisions have been pending for many years and, in many instances, EPA has not conveyed in writing any objections to the State rule. Commenters noted that the extreme lag in timing causes problems for sources, inspectors and the public with respect to permitting.

Commenters noted that when a State changes its rules, EPA is requiring the old SIP rule to remain in the Title V permit. Often these requirements are in conflict with each other.

Therefore, this creates confusion for the agencies, source owners and public on what is an applicable requirement.

Example Type 5 – Conflicting or Duplicative Requirements: A State makes a change to an emission limit or reporting requirement in a regulation. EPA does not act on the State's request to revise its SIP to reflect the change that has already been made to the State regulation. There are two requirements on a source – one in the State-adopted program and another in the Federally-approved SIP. As it stands, the Title V permit must include the SIP requirement. States typically also include the State requirement as a "State-only" condition of the permit. In many States, a source must certify whether it is in compliance with both the SIP requirement and the State regulatory requirement. This adds unnecessarily to the complexity of the permit and can cause confusion for the source owner, the public and the regulatory agencies.

Discussion: The discussion on the SIP Gap issue revolved around ways that the SIP-approved process could be "frontloaded" to ensure that any problems with a SIP revision are identified early in the process by EPA. The Task Force members recognized that recommendations by this group are unlikely to provide relief but also noted that other groups have recently begun to look at ways to streamline and expedite the SIP revision process. Task Force members were concerned about sources being faced with conflicting State and Federal requirements and the compliance certification problems that such conflicts create. Although the Task Force was not able to develop comprehensive and concrete recommendations for EPA to implement to solve this problem, there was consensus that EPA should take steps to expedite SIP revisions and to ensure that sources are not faced with a choice of complying with *either* Federal law or State law.

The Task Force also discussed equivalency determinations under Section 70.6(a)(1)(iii). It was noted that EPA placed a provision in the regulations to allow a source to apply for an equivalent limit whereby the permit condition would stand in for a SIP provision if it meets an equivalency test and if the SIP allows for equivalency determinations. When EPA issued the original part 70 rules, however, the Agency did not provide any model language or any criteria to clearly indicate what a SIP would need to contain in order for a State to avail itself of this provision in the part 70 rules. Consequently, it has not been used to the knowledge of the Task Force members. The Task Force discussed the potential applicability of 70.6(a)(1)(iii) in a few situations that could alleviate the Title V problems rooted in the SIP backlog.

For example, where a new State rule is simply more stringent than a SIP rule and uses the same units of measure and test methods, equivalency determinations requested by a source could be straightforward. In the situation where a SIP rule requires equivalent or greater emission reductions but is different in form, the source can request that the permitting authority determine that the new rule is equivalent to the prior SIP rule. In the situation where a test method awaiting SIP approval has been developed and the source shows equivalency in its application, the permitting authority could also make an equivalency determination. In discussing Recommendation #5, some Task Force members indicated that, at that time, they were not familiar with the provision and the statements

EPA made regarding it when the part 70 rules were promulgated in 1992, which is not surprising given that the provision has not received any use since promulgation.

Environmental group representatives on the Task Force indicated that they consider 40 C.F.R. § 70.6(a)(1)(iii) to be illegal in that it authorizes the unlawful revision of underlying SIP requirements. They explained that because a State limit pending SIP approval has no Federal status as an applicable requirement, it cannot be used as a substitute for a preexisting applicable requirement. They stated that a State does not have "inherent authority" to "include at least as stringent" limits in Title V permits; they believe that it is EPA's role—not the State's— to determine whether a proposed SIP change would constitute backsliding from an existing SIP requirement.

Subject to the concern expressed above, industry and permitting authority representatives stated that States generally are making rules more, rather than less, stringent. Thus, these Task Force members considered equivalency determinations under 40 C.F.R. §70.6(a)(1)(iii) to be a potentially viable option. They agreed, however, that in instances where a limit is relaxed, the equivalency determination approach would not be a viable option because the new limit would not be at least equivalent to the prior one. As noted above, the Task Force members supporting this approach were concerned that there is no EPA model SIP language that would allow such determinations. These members explained that model language would be useful because it would encourage uniformity across States and allows a State to be sure that its rule language will be approved if they promulgate it. Several Task Force members also wanted EPA to consider whether there is a way that existing SIPs can be considered to provide inherent authority to create equivalent limits in the Title V permit issuance process when requested in a permit or permit revision application.

Recommendations

1. Updating and Revising NSR Permits

Recommendation #1

When requested by the permittee, States should make better use of White Paper No. 1's procedures for parallel processing of construction permit revisions with the operating permit process during initial issuance, revision and renewal.

In Favor (12)*: Broome, Sliwinski, Golden, van der Vaart, Kaderly, Wood, Morehouse, Freeman, Hagle, Paul, Schwartz, Hodanbosi

Opposed (6)*: Powell, Raettig, Owen, Keever, Palzer, Van Frank

Abstentions:

Clarifications: Powell, Raettig, Keever, Palzer and Owen clarify that the general concept of processing NSR and Title V permits simultaneously is not objectionable, so long as the process satisfies the SIP and part 70 requirements for public notice and comment. They oppose this recommendation because they object to certain statements in White Paper #1 as referenced in the discussion section of this paper.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2(a)

After the initial permit is issued, to address the concern of revising terms in existing construction permits, part 70 provides several options for sources that can be chosen based on the need to implement the change or begin construction. While all of these options are already available under part 70, the State and regulated industry's familiarity with these options appears to be low. New York is one State that has taken the approach of allowing the source to obtain either a construction permit, followed by a Title V modification or a combined construction/Title V modification.

Option A: Permitting authorities should allow sources to use an administrative amendment to incorporate the terms of a preconstruction permit into the Title V permit in accordance with Section 70.7(d)(1)(v). This will require permitting authorities to provide notice to EPA and affected States (if any) of the construction permit action to allow them the required Title V objection period and to verify that any compliance terms required under Section 70.6 of the rules have been included in the preconstruction permit.

Option B: In States that allow for changes to be made pursuant to Section 70.4(b)(14), qualifying construction permits (not Title I modifications and that do not cause a violation of an existing permit term), permitting authorities should allow sources to implement the construction permit change.

Option C: When requested by the source, permitting authorities should provide for consolidated processing of the construction permit and the Title V permit modification. In most cases, this will require a significant permit modification. When there is sufficient lead time for a project, it makes sense to consolidate processing so that the source can complete construction and begin immediate operation.

Option D: The current practice in many States is to process the construction permit issuance/modification and then to use the applicable Title V permit modification procedure to incorporate the new terms and delete no longer applicable terms from the Title V permit. This will either be a minor or a significant modification under the Title V rules. This option should remain available because some sources will want to obtain a construction permit quickly to move a project forward but may have time to process the operating permit change. In addition, in some cases, the exact operating permit terms will not be known before construction begins. Thus, this option can be a viable one but can be more cumbersome when a significant Title V modification is required. Therefore, permitting authorities should ensure that Options A through C are available and that sources and permit writers are aware of the requirements to qualify for such procedures.

In Favor (12): Broome, Sliwinski, Golden, Paul, Kaderly, Schwartz, Morehouse, Wood, van der Vaart, Hodanbosi, Freeman, Hagle
Opposed (6): Powell, Owen, Keever, Raettig, Palzer, Van Frank
Abstentions:

(Clarification on next page)

(Clarification for Recommendation #2(a))

Clarifications: van der Vaart clarifies that his support of Option A is based on the availability of the permit shield under 70.7(d)(1)(v) and (d)(4). Powell, Owen, Keever, and Raettig oppose Options B and D because they believe all Federally-enforceable construction permits authorizing new units or modifications to existing units are Title I modifications that must be processed under significant modification procedures; contrary to that view, Options B and D suggest such changes could be processed "off-permit" or as minor modifications. Likewise, while they do not oppose consolidated processing, they oppose Option C's suggestion that some construction permits be processed as minor modifications, *i.e.*, without notice and opportunity for comment. They explain that Federal regulations governing minor and major NSR permits require such public participation opportunities. Broome clarifies that the State would comply with whatever provisions for processing Title I permits are approved in the SIP and therefore these options are all within the scope of both existing Title V and SIP rules and that EPA's promulgated interpretation is that minor NSR permits are not Title I modifications.

Recommendation #2(b)

Under any of the above options, once the construction permit terms have been incorporated into the Title V permit, the Title V permit can list the applicable requirement as the Title I rules and the requirement can reside only in the Title V permit. Retaining Title I as the underlying applicable requirement would allow changes to those terms to be processed through minor permit modification procedures because there will continue to be an underlying applicable requirement serving as the basis for the permit terms (assuming they otherwise meet the minor modification gatekeepers in Section 70.7(e)).

In Favor (12): Broome, Sliwinski, Golden, Paul, Kaderly, Schwartz, Morehouse, Wood, van der Vaart, Hodanbosi, Hagle, Freeman

Opposed (6): Powell, Raettig, Owen, Keever, Palzer, Van Frank

Abstentions:

Clarifications: Hodanbosi and Hagle clarify this should be an option but States may choose to maintain the effectiveness of construction permits, such that they could remain enforceable documents. Powell clarifies that she does not believe Title I specific enough to serve as a citation for the underlying applicable requirement, and is concerned that this recommendation would allow revision of case-by-case emission limits in preconstruction permits without public notice and comment. Freeman, Wood, and Broome clarify that the fact that the underlying Title I permit is voided does not mean that the substance of the terms created in Title I are governed by Title V procedures (*i.e.*, the substance of Title I terms are not subject to EPA objection).

2. "SIP Gap"

Recognizing that the SIP approval backlog is beyond the capability of this Task Force to solve, the Task Force believes that the following measures could improve the current situation and help to reduce the adverse effects the backlog is having on Title V implementation

Recommendation #3

Early EPA Involvement in SIP Rule Development. A process in which EPA is able to act *in a timely manner* on new State and local agency regulatory provisions that are pending SIP approval needs to be developed. States and local agencies need to develop communication plans with EPA Regional Offices. In these plans, State and local agencies must commit to including EPA in their rule development process, including stakeholder groups, to facilitate EPA input on approvability issues. In turn, EPA must commit to providing States with timely comments during the pre-proposal and proposal stage of regulatory development to avoid States' adopting provisions that EPA considers "unapprovable." Both States and EPA must commit adequate resources to implement this process.

In Favor (18): Broome, Palzer, Golden, Sliwinski, Paul, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Wood, Keever, van der Vaart, Kaderly, Powell, Hodanbosi, Van Frank
Opposed:
***Abstentions*:**
Clarifications:

Recommendation #4:

Expiration of Conditions Upon Approval of New SIP Provisions. Even with timely review and approval procedures there will be some inevitable lag time in the approval process. Moreover, it is unlikely that EPA will "catch up" with the backlog any time in the near future. With continual processing of Title V operating permits, there will be permits issued or renewed between the time a State or local agency implements a regulation and EPA approves that regulation for inclusion in the SIP. To address this situation, permit conditions with the old regulatory provisions could be written to expire upon EPA's approval of the new regulatory provisions. The SIP provisions pending SIP approval would also include a statement that they become Federally enforceable and replace the prior SIP provision upon the effective date of any EPA SIP approval of that provision. This would allow the new regulatory requirements to be included in the permit without a permit revision.

In Favor (18): Broome, Palzer, Golden, Sliwinski, Paul, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Wood, Keever, van der Vaart, Kaderly, Powell, Hodanbosi, Van Frank
Opposed:
Abstentions:
Clarifications:

Recommendation #5

Utilize Equivalency Determination Authority When There Is a SIP Rule Pending Approval. States should utilize whenever possible the flexibility provided by Section 70.6(a)(1)(iii), under which a State may choose to adopt a SIP provision that would authorize sources to meet either the SIP limit or an equivalent limit to be formulated in the permit process. This provision of the rules could be used to include only the limit that is included in the rule pending SIP approval, as long as the new rule is equivalent or more stringent in terms of emission reduction as the old rule. In general, SIP rules are becoming more stringent. Sometimes they are revised to provide additional flexibility but for the most part, are equivalent to prior rules in terms of emission reductions. One potential impediment to this approach is that the part 70 rules require that the SIP provide authority for equivalency determinations. EPA should recognize States' inherent authority to interpret their SIPs and include "at least as stringent" limits in Title V permits. If this is not possible so that a SIP revision is required to provide the authority for implementing Section 70.6(a)(1)(iii), EPA should develop standard SIP language that it would deem approvable to provide a State with the general authority to adopt equivalent limits in Title V permits when requested by the source. This would allow States to submit a "model" SIP revision that could then be adopted and approved quickly by EPA (see SIP backlog issue above).

In Favor (12): Broome, Golden, Sliwinski, Paul, Freeman, Hagle, Schwartz, Morehouse, Wood, van der Vaart, Hodanbosi, Kaderly

Opposed (6): Powell, Raettig, Owen, Keever, Palzer, Van Frank

Abstentions:

Clarifications: Freeman and Broome clarify that the discussion of this recommendation was limited to situations where the source requested the inclusion of the equivalent term in the Federally-enforceable section of the permit.

Related Topics: Title V Costs; Compliance Certification

4.5 TOPIC: NEW SUBSTANTIVE REQUIREMENTS AND DEVELOPMENT OF OPERATIONAL RESTRICTIONS

Issue/Observation Description

A concern that was raised repeatedly at the public meetings and in written comments to the Task Force was that some States are creating new substantive limits on source operations in Title V permits, which commenters stated was beyond the authority granted by Title V. The concern includes both converting monitoring ranges into "never to be exceeded" limits in the permit as well as creating new or changing existing emission limits (*e.g.*, adding a 4 lb/hr limit or changing 5 lb/hr to 4 lb/hr). Commenters who raised these concerns considered such permit conditions to be new substantive limits that are not authorized by Title V.

- *Conversion of Monitoring Into Limits:* In the process of including monitoring parameters in permits, a few permitting authorities have taken the additional step of requiring sources either to *comply* with monitoring ranges or to be considered in violation of their permit. Through this practice, these States are making monitoring parameters separately enforceable limits. If an emission unit operates outside a set monitoring range, it is automatically in violation of the permit, even if its emissions are compliant. This practice has created significant controversy, in particular as to whether certifying to "compliance with the terms and conditions of the permit" refers to the monitoring conditions as limits or as a requirement to do the monitoring and to respond if atypical situations occur. Industry objected to the practice of converting monitoring parameters into enforceable limits in all cases, but particularly when no correlation had been established between the ranges and the applicable emission limit.
- *Revisiting Previously Established Limits or Creating New Source Limits:* The second way that this issue was raised in testimony and written comments involved where a permit writer tried to change a limit that was in an applicable requirement or tried to create a wholly new emissions limit on a unit. Based on the information presented to the Task Force, this situation seemed to be more limited and hopefully not a systemic issue. While it was recognized that this is a problem when it does occur, the Task Force did not take up specific recommendations in this regard except to recognize that Title V does not authorize the creation of new emission limits.

Supporting Information

Relevant Regulatory Provisions: Several portions of the Part 70 rules are relevant. Section 70.1 provides that "Title V does not impose substantive new requirements" but that "it does require ... that certain procedural measures be adopted especially with respect to compliance." 40 CFR § 70.1(b).

Section 70.6 governs permit content and provides in relevant part:

(a) *Standard permit requirements.* Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.

(i) The permit shall 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.

(3) *Monitoring and related recordkeeping and reporting requirements.* (i) Each permit shall contain the following requirements with respect to monitoring:

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

The general approach in the CAM rule is to establish indicators of good operation of air pollution control devices and to require corrective action when those indicators are out of the "normal" range. Provided that the source responds to indicators that are out of range, deviation from indicator ranges is not a violation of the permit (but it may indicate a violation of the emission limit depending on the particular facts). The reader is referred to the CAM rule as a whole for additional insight into the "indicator monitoring" approach established by that rule. The CAM approach is codified only for units subject to CAM, which are those units with uncontrolled potential emissions exceeding major

source thresholds. It is worth noting that the majority of emission units included in Title V permits are not subject to CAM.

Comments Received: There were numerous comments received by the Task Force addressing this group of issues.

In terms of written submittals to the Task Force, several commenters objected to the practice in a few States of "hard-wiring" parametric monitoring ranges into permits. In these situations, the permitting authority either takes manufacturer recommended parameters (like pressure drop on a cartridge filter) or parameters that occurred during a compliant stack test (like voltage, current, or total power for an electrostatic precipitator) (Alliance of Automobile Manufacturers OAR-2004-0056, Ohio Chemistry Technology Council, Manufacturers' Association, and Chamber of Commerce OAR-2004-0075) and make those values permit limits. If the facility operates outside of those ranges, it is considered in violation of its permit, whether or not a violation of the applicable regulatory requirement has occurred. Some commenters noted this practice with respect to Compliance Assurance Monitoring (CAM) or MACT rules and others indicated that it also occurs for other applicable requirements, like SIP rules and construction permits. (API OAR-2004-0047, AF&PA OAR-2004-0053, Utility Air Regulatory Group OAR-2004-0055, Alliance of Automobile Manufacturers OAR-2004-0056, APF OAR-2004-0074, Ohio Chemistry Technology Council, Manufacturers' Association, and Chamber of Commerce OAR-2004-0075.)

The commenters also stated that converting monitoring into never-to-be-exceeded limits is contrary to Title V's direction not to create new substantive requirements. It *assumes* a violation when a source exceeds a monitored parameter even though the source could well be in compliance with emission limits. Two of these commenters also noted that this practice has been ruled unauthorized under the Title V program by the Environmental Review Appeals Commission (ERAC) in Ohio except where the parametric limits are directly correlated by the permitting authority to the applicable emissions limitation. (APF OAR-2004-0074, Ohio Chemistry Technology Council, Manufacturers' Association, and Chamber of Commerce OAR-2004-0075). The decision by the panel of administrative law judges in the Ohio permit adjudication did not hold use of monitoring as permit restrictions illegal *per se* but required that any such restrictions correlate directly to the emission limit so that any violation of the operational restriction also resulted in an exceedance of the emission limit. If this cannot be done, ERAC held, no restriction can be imposed. The decision also found that it was the permitting authority's burden to show the correlation, not the source's obligation to show that it did not correlate. Another Task Force member noted that the decision found that it was the *permitting authority's* burden to show the correlation, not the source's obligation to show that it did *not* correlate. She stated that, while not agreeing that the monitoring could be converted to enforceable limits, the Ohio judges believed that the permitting authority had to demonstrate that the operational restrictions were equivalent to the emission limit and that the permitting authority could not shift the burden to create such restrictions limits to the source.

There were also several oral comments addressing this topic offered during the public meetings. *See, e.g.*, Statements of Debra Rowe, Alliance of Automobile Manufacturers, transcript at 4-56; Steve Murawski, transcript at 2-026; Scott Evans, Clean Air Engineering, transcript at 2-113 and 2-123. Because the comments on this topic were quite extensive, we have included additional excerpts (but not all of the comments) in the attachment to this paper.

Discussion

The Task Force discussed this issue for the first time during the discussion of the paper on the Definitiveness of the Permit in Section 4.6 of this report. Several industry Task Force members expressed concern at the practice of including monitoring parameters as hard and fast limits when those parameters had not been or could not be correlated with applicable emission limits. Other members of the Task Force raised objections to including new parameters in the permit even if they could be correlated due to their view that such new monitoring requirements must be developed through rulemaking.[1]

Task Force members and commenters were concerned that the practice of taking conditions observed during stack tests and converting them to operational restrictions effectively allows Title V to create new substantive limits because source tests are conducted with a margin of compliance and under specified operating conditions. Even if a parameter can be correlated to an emission level, if the source is over-complying (*e.g.*, by achieving a 95% capture when the rule only requires 90%), setting the parameter based on that level effectively confiscates the compliance margin and penalizes the source that goes beyond compliance. One Task Force member observed that this creates the wrong incentive in terms of testing and compliance because it rewards those that operate right at the brink of compliance and penalizes those who have a wide margin.

A State agency Task Force member stated that when he sets operational restrictions compliance margins influence how operational restrictions have been set in those States that use them and the degree of monitoring to be put in the Title V permit. He explained that in his State, when the margin is wide, say 10% of the compliance level, the level of the operational restriction is set appropriately and is not set at the 10% of compliance level. This Task Force member indicated his view that it is important for the monitoring to be separately enforceable because that allows the source to certify compliance. He recognized also, however, that this could have the effect of making emission limits more stringent or imposing large testing costs to develop a correlation between a parameter and a limit. He also noted that in the interest of streamlining under § 70.6(a)(3) some facili-

[1] One difference between this issue and that presented in the paper on the Definitiveness of the Permit in Section 4.6 of this report is related to the accuracy of the monitoring parameters. It was stated by one member that in his state (where restrictions are being imposed), facilities that have been asked to accept new substantive limit and new monitoring may request a less accurate, and possibly more restrictive permit restriction in lieu of a more expensive but more accurate monitoring method. Other members of the Task Force explained that a permittee may always agree to a permit term but that does not mean that there is authority to create even the monitoring. It was recognized that the topic in this paper is not the monitoring *per se* but the conversion of monitoring into never to be exceeded limits, whether or not they correlate to the underlying emission standards.

ties being asked to accept such operational restrictions may opt to take a single limit for multiple restrictions even if it means taking a more stringent value.

In response, another Task Force member noted that Title V does not authorize create of new limits regardless of the factors that a State may take into account to make such new limits more reasonable in a particular case. This member also stated that even when there is a correlation with a limit and the parameter could be set right at the limit, there is an additional problem in that there are now two permit terms and potentially two violations – one of the emission limit and another of the newly created monitoring limit (as compared with the situation where a regulation did specified the monitoring parameter as a separately enforceable parameter).

Still another Task Force member noted that on the issue of permit writers simply adjusting limits that this could go both ways, more or less stringent and that it was important to ensure that Title V was not changing regulatory limits.

At this point in the discussion, it was suggested that this topic warranted a separate paper, which was subsequently developed and discussed by the Task Force.

In its subsequent deliberations, the Task Force discussed several potential recommendations. We revisited the concern of making emission limits more stringent and the need to ensure that Title V permits do not change emission limits by imposing new obligations. The Task Force also discussed the relationship of this issue with the CAM requirements, and noted that making monitoring ranges enforceable is different than the CAM approach which uses monitoring as indicators that can trigger corrective action. It was suggested by some members of the Task Force that this might be a more fruitful way to proceed.

The Task Force members discussed the idea of relying on CAM for development of monitoring terms rather than creating operational restrictions for the purpose of "assuring compliance." It was also recognized, however, that CAM only applies to large emission units. Without agreeing to the idea of creating separately enforceable limits, the Task Force did agree that any monitoring that would be made enforceable needs to be based on adequate technical data so that it does not create a new, more stringent limit on the source. One Task Force member noted that the costs of parametric monitoring are far less than the cost of continuous monitors and stated his view that Title V would authorize the imposition of continuous monitoring requirements notwithstanding the monitoring in existing rules. Industry Task Force members disagreed that Title V would authorize a State to impose continuous monitoring absent satisfaction of rulemaking requirements under the Clean Air Act. It was reemphasized by these members that the topic of this paper is not related to the authority to impose monitoring but rather, to the extent that a particular monitoring term is authorized, whether it can also be converted into a limit on source operations.

The Task Force also discussed that sources should not be considered to be in violation of two limits in such cases since the operational restriction derives from an emission limit (*i.e.,* you cannot have two violations, one for violating the emission limit and one for

violating the operational restriction). The Task Force spent considerable time discussing one example offered in the testimony. This involved an electrostatic precipitator for which the State had imposed voltage and current ranges as enforceable limits based on the ranges that were observed during a compliant stack test. The industry representatives pointed out that voltage and current do not correlate to emissions from a furnace and even if they did, if the source has a compliance margin, such an approach would essentially confiscate that margin.

The Task Force discussed that in the initial round of Title V permits, some States imposed operational restrictions and sources that did not appeal those provisions would likely seek to have them removed upon renewal. Some industry representatives on the Task Force explained their view that terms which were unauthorized at the time the permit was issued should be removed upon renewal. The Task Force also discussed that with CAM becoming effective upon renewal, permitting authorities should be mindful not to continue previous operational restrictions that a source may have accepted[2] but should instead replace those limits with the requirement to have a CAM plan and meet CAM requirements. Environmental group representatives on the Task Force stated that they do not agree with the CAM rule and therefore could not vote for a recommendation along those lines.

Several Task Force members noted that adding such limits (or even monitoring beyond CAM) to a permit goes beyond statutory authority. They stated that while some read the statute to authorize permitting authorities to revise case-by-case emission limits through the addition of monitoring, the statute explicitly States that this is to be accomplished by rulemaking. They believed that the rulemaking requirement was intended to assure that monitoring did not change standards (*i.e.*, make them more stringent).

Recommendations

Recommendation #1

Based on the principle that Title V does not authorize imposition of any new or more restrictive emission limitations, any permit terms not in underlying emission standards:

(1) should be based on the CAM rule and the CAM submission by the facility or developed with the agreement of the facility after consultation, or

(2) must be based on adequate technical data to ensure that they do not result in operational restrictions that limit emissions more than the underlying requirement.

In Favor (12)*: Hodanbosi, Kaderly, Schwartz, Sliwinski, Hagle, Broome, Morehouse, Wood, Golden, Paul, van der Vaart, Freeman
Opposed (6)*: Powell, Raettig, Owen, Van Frank, Palzer, Keever
Abstentions:

(Clarification on next page)

[2] It was explained that a source might have accepted a limit, not because it agreed with that limit, but due to an assessment of the costs of an appeal and the degree to which the limit would impact its operations. One Task Force members stated that monitoring strategies can be more or less expensive, and that parametric monitoring can represent a lower cost monitoring method than some other available methods, Another member noted that cost does not determine whether or not the methods are authorized in the first place.

(Clarification for Recommendation #1)

Clarifications: Powell clarifies that while she agrees with using adequate technical data for monitoring, she opposes the CAM rule, believing sources must monitor directly their emissions whenever possible, and when not possible use parametric monitoring. Owen, Van Frank, Palzer, and Keever join Powell's clarification.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

Based on the principle that Title V does not authorize imposition of any new or more restrictive emission limitations, in situations where parameter monitoring has not been correlated with the emission limit, such parameter monitoring conditions must not be treated as separately enforceable conditions from the emission limitations, but only as indicators of a potential compliance issue.

In Favor (11): Hodanbosi, Kaderly, Schwartz, Sliwinski, Hagle, Broome, Morehouse, Wood, Golden, Paul, Freeman

Opposed (7): van der Vaart, Powell, Raettig, Owen, Van Frank, Palzer, Keever

Abstentions:

Clarifications: Powell clarifies that her opposition is not to correlating monitoring with limits but is based on the view that direct emission or determinative parametric monitoring is required by Title V. Owen, Van Frank, Palzer, and Keever join Powell's clarification.

Recommendation #3

Regardless of whether there is authority for new conditions, because CAM meets enhanced monitoring requirements, development of CAM plans for Title V renewals should replace any operational restrictions that were included in the initial Title V permit for the corresponding emission limits and units.

In Favor (11): Hodanbosi, Kaderly, Schwartz, Sliwinski, Hagle, Broome, Morehouse, Wood, Golden, Paul, Freeman

Opposed (7): van der Vaart, Powell, Raettig, Owen, Van Frank, Palzer, Keever

Abstentions:

Clarifications: Powell opposes this recommendation because she disagrees with the premise of the recommendation that the CAM rule's approach is sufficient to assure compliance. Owen, Van Frank, Palzer, and Keever join Powell's clarification.

Related Topics: Monitoring, Definitiveness of the Permit

Attachment: Relevant Excerpts Re: New Substantive Requirements

Provided below are excerpts typical of the comments submitted to the Task Force on this issue. Because there were extensive comments submitted by several persons, all are not listed here but these are representative of the comments made.

Written Statements to the Task Force

From the Air Permitting Forum Comments:

A. Title V Was Intended to Compile Substantive Requirements Created Under Other Substantive Titles of the Act, Not to Create or Authorize EPA and States to create New Substantive Limits on Plant Operations.

Much of the debate on the 1990 Amendments focused on substantive provisions of the Act, like the Acid Rain program in Title IV and the new hazardous air pollutant program in Title III of the Amendments. With respect to the Title V program, however, there are several indications in the legislative history of the 1990 Amendments of what Title V was intended to accomplish:

- First and foremost, to gather and recite in one place the obligations imposed by the Act on a source, contrasted with the pre-1990 system under which some requirements were in the SIP, others in construction permits, others in State operating permits, and others in regulations like NESHAPs and NSPS.[i]
- To promote uniformity of enforcement across the country by standardizing the information base and applying similar requirements to similar sources.[ii]
- To consolidate duplicative and redundant requirements, thereby streamlining permitting.[iii]

During the House debate on H.R. 3030's pre-conference version the program, the operating permit program was considered "potentially H.R. 3030's most important *procedural* reform."[iv] The most extensive comments on the purpose of the Title V program were provided by Representative Bilirakis. He clarifies the importance of streamlining requirements while at the same time ensuring that Title V creates no new substantive requirements on sources:

> The creation of the new permit program in Title V provides an opportunity and an obligation for EPA to harmonize the substantive provisions of the other titles in this complex legislation. . . . ***EPA must make every effort to harmonize and prevent unproductive duplication among those titles***. ***The permit provisions of*** Title V ***provide a focus for this harmonization, although*** Title V ***does not change, and gives EPA no authority to modify, the substantive provisions of these other titles***.
>
> ***Title V creates no new substantive emission control requirements***. ***Nothing in the permitting title should be read to increase the stringency of any control requirement*** nor to delay or accelerate the effectiveness of such requirements, except as expressly provided in titles I, III, and IV.
>
> The administration proposed this comprehensive permit title—there was no such title in the original House and Senate bills, H.R. 3030 and the predecessors to S. 1630—to create a permit program that will serve the

> following three purposes: First, to provide a more comprehensive inventory of the emission sources of pollutants controlled under this Act; second, to facilitate enforcement by providing a single reference for all of a major source's operating limits and requirements under the Clean Air Act; and third, to institute a system of permit fees that would support the States in carrying out the issuance and renewal of permits. ***To the degree these purposes can be realized without unnecessary delay and paperwork, EPA and the States are encouraged to make full use of the mechanisms provided in this and other titles of this act—such as those related to modifications and the use of general permits***. These provisions should be used to the maximum degree possible, consistent with emission control requirements, particularly to ease the burden on small businesses.
>
> 136 Cong. Rec. E3673 (Extension of Remarks) (Nov. 2, 1990) (emphasis added).

As one of the Conferees for the House, Representative Bilirakis provided important insights for EPA as to how the program should be administered to facilitate compliance. He also clarified that Title V does not authorize EPA or States to create or change through the operating permit the substantive requirements of the Act, including anything that would increase the stringency of the substantive limits in other provisions of the Act.[v]

When EPA adopted its regulations to implement Title V, it also recognized several of these goals of the program, through adoption of implementation principles. EPA stated that it viewed the Title V program as a tool to aid effective implementation of the Act and to enhance the Agency's ability to enforce the Act and sought, among other things, to facilitate use of market-based incentives, allow flexibility in State programs and source permits, minimize redundancy in SIPs and permit programs, and promote simple and streamlined regulation. 56 *Fed. Reg.* 21712, 21715 (1991). In the final Part 70 rules, EPA further explained that enhancing the productive capacity of the nation is an important concept that is part of the goal of aiding effective implementation of the Act.[vi]

In the preamble to the proposed Part 70 rules, EPA explained that it was "proposing that *only those provisions of a permit identified as being required under the Act or necessary for its implementation will be Federally enforceable* [and that to] promote this result further, EPA …[proposed] to require an explicit statement of the regulatory basis for all Title V permit conditions." 56 *Fed. Reg.* 21729. EPA went on to indicate its belief that Congress did not intend "Title V to be a forum for the State to establish any additional requirements that would become Federally enforceable [as] … [t]he primary purpose of the Title V permitting program is to assure that subject sources comply with all requirements of the Act." *Id.* Reflecting this philosophy, both the proposed and final Part 70 rule included the statement that "Title V does not impose substantive new requirements."[vii]

Thus, the Title V program is an *administrative tool* to compile and recite the substantive requirements that apply to an industrial facility in a single document. This concept

represents an improvement over the prior system under which requirements were found in a variety of locations. Calling the program "administrative" does not mean that it is unimportant. It simply means that it is not substantive. It does not create new emission limits and any requirements imposed through it, as explained by Rep. Bilirakis, cannot act to create such limits.

III. Creation of New Substantive Requirements

A. Converting Monitoring Requirements into Operational Limits.

As documented in Section I of these comments, Congress did not authorize EPA or the States to impose limits that would alter underlying emission control requirements or to create new substantive limits on operations in the Title V permit. Title V was intended and is limited to the recordation of applicable requirements that find their origin in the substantive titles of the Clean Air Act, most notably Title I.

A problematic practice in a few States is the transformation of monitoring parameters into "never-to-be-exceeded limits" in the Title V permit. For example, a source may be required to monitor the pH on a scrubber or the temperature on a thermal oxidizer in an underlying applicable requirement like an NSPS or a minor NSR permit. In Ohio and North Carolina at least, these monitoring requirements are being changed into limits on the source's operation. The typical approach is to take whatever values are monitored during a performance test and make those permit limits. Thus, if a plant is outside the pH range that occurred during a scrubber performance test, the source is in violation of its permit even if it did not violate the emissions limit that is applicable to the unit. Ohio EPA's premise is that the conditions during a performance test are replicated in normal operation and that compliance with those conditions will necessarily mean compliance during other periods of operation. This approach ignores other factors that may influence compliance such as throughput, weather, and the compliance margin during the performance test. It also ignores EPA's own determinations during the debates over the enhanced monitoring rule that it is not possible to correlate parameters during performance tests directly to emissions, but that such parameters should be used as *indicators* of the performance of the control device that trigger investigation and corrective action provisions, as needed.

The Ohio EPA refers to these limits as "operational restrictions" and imposes them on every emission unit with a control device. Several permitted facilities have appealed their Title V permits to the State's Environmental Review Appeals Commission (ERAC) on the ground that such operational restrictions are not authorized. Of the dozens of appeals pending two of those cases have been decided in favor of the permittee, most notably a challenge by General Electric Company to limits on the voltage and current of an electrostatic precipitator. This decision was issued on March 1, 2005. *General Electric Lighting v. Jones*, ERAC Case No. 185017 (March 1, 2005).[viii]

The ERAC found that Ohio EPA was not authorized to impose operational restrictions on a plant unless they are "*actually … designed to assure compliance with the underlying applicable requirement* (in this case mass emissions limitations)" and that "the inclusion

of any operational restriction which can[not] be *demonstrated to directly relate to the enforceability of an existing applicable requirement* and [not to] alter that underlying requirement" is not lawful. *General Electric Lighting* at 17 (emphasis in original). The Commission also concluded that "the basis for an operational restriction must be more than the fact that a permittee operated a piece of equipment at certain levels during testing, especially when the data demonstrate that no direct correlation exists between the required parameters, in this instance kilovolts, milliamps and emissions, and assuring compliance." *Id.* The Commission made a factual finding that the operational restrictions imposed on the GE plant actually forced the facility to increase its emissions to stay in compliance. Facility personnel testified that when one portion of the ESP went out of the required operational ranges, it shut that portion down for a period of time. The facility could comply with the emissions limit and operational ranges using just two sections of the ESP. This meant that the terms included by Ohio EPA forced emissions to be increased deliberately (although still compliant with the emission limit) to avoid a violation of the limits on the voltage and current. This conclusively showed that it makes no sense to presume that parameters occurring during a stack test are necessarily indicative of compliant conditions with emission limits and may in fact be environmentally counterproductive.

More generally, it is important to understand that even if a parameter *could* be correlated to compliance (which it cannot in many cases), it is impossible to determine the full range of parametric values indicating compliance unless the source violates its emission limit. To perform this type of analysis during a compliance test, a source would need to operate for some period of time above and below the compliance level in the applicable rule to evaluate and set the operating conditions representing compliance. Under EPA's February 2003 Interim Stack Testing Guidance, a source could be subject to enforcement for operating in this manner. If the permit has already been issued, the source would also need to report a Title V deviation. This puts the facility in the position of either violating emission limits or subjecting itself to a narrow operating parameter range that is more stringent than the applicable limit.

The practice of creating new applicable requirements, as Ohio EPA and some other States have done, requires a strong statement from the Task Force that such actions are inappropriate and poor policy for several reasons:

- They are inconsistent with congressional intent that Title V not create new substantive requirements.
- They restrict the operation of sources to arbitrarily set conditions that do not relate directly with compliance.
- They create new violations when no emission limits have been exceeded, leading to enforcement risk for facilities that are compliant with emission limits.

As shown in the General Electric case, they can actually lead to increased emissions.

Oral Statements to the Task Force

Presentation of Debra Rowe (DaimlerChrysler Corporation on behalf of the Alliance of Automobile Manufacturers)

MS. ROWE: This is an example of the -- one experience with new substantive requirements being applied in the Title V. Considering hourly and annual emission limit on emissions from the electrostatic precipitator. The source tests the electrostatic precipitator; it passes. During the test the source records, as requested by the State, the voltage and current readings that occurred. The facility then finds that the ranges of voltage and current during the stack test had become enforceable limits in the Title V permit; that it must not only monitor but must comply with. This creates a restriction on the plant's operation of its electrostatic precipitator that isn't even related to compliance. Stack tests are done when the unit is operating under specified conditions. Those conditions may or may not exist in regular operation. For example, the load might be lowered because a plant is not as busy. In addition, the weather can have an effect. But by imposing particular voltage or current requirements, the unit is now restricted. Additionally, the margin of compliance during the stack test is not even considered. What if the source tested at 50 percent of its operating level, yet we encountered an automatic requirement to make whatever was happening during the stack test an enforceable limit? This creates a phantom violation, if you will, you know, for basically a sound operation operating within its margin of compliance.

…

We think the Task Force should endorse the approach taken by some States; it's based on the CAM rule. If there is a parameter that is indicative of good operation of a unit or control, then going outside that range would trigger an investigation, if needed; and, if needed, corrective action. Unless the range be definitively correlated to the emissions level, which in most cases is simply not possible, it should not be a permit violation. This makes much more sense because it focuses on a properly operated control advice rather than trying to replicate a condition that occurred on a single day in a year that may not exist on another day that the source is operating.

MR. VAN DER VAART: Thanks very much. I had a quick question on the ESP example; and I mean it's just a good example. You're talking about being given monitoring requirements that were really commensurate with a specific stack test. And then all of a sudden those became sort of requirements across the load spectrum. And your point is, "Gee, that's all of a sudden the case." My question is how did you certify compliance during those periods that you're so confident that these -- the same parameters are not relevant?

MS. ROWE: Well, until you have another stack test -- I mean, that's the one sample in time, if you will, to relate the loads and probably demonstrate -- and this is not an example out of my company; it's from one of the other companies -- but it's an example that demonstrates the -- you know, there's a margin of compliance as well in there.

MR. VAN DER VAART: No, I understand that.

MS. ROWE: Right. So to artificially tie those parameters –

MR. VAN DER VAART: But when you certify compliance, you're certifying based on something.

MS. ROWE: Right. Based on the confidence in the original stack test until it's redone.

MR. VAN DER VAART: Okay. But then that stack test was only specific to a certain set of operating conditions. So you're using that same test the way to your benefit where you would prohibit or you would omit the fact that the agency is using it against you. Is that –

MS. ROWE: Well, if the parameter's set at 50 percent of what -- you know -- you've got, say, a 50-percent compliance margin and the parameter artificially sets a new limit that's half of what the original underlying permit limits.

MR. VAN DER VAART: That's another good question. I'm essentially saying just the specificity of the test works both ways. It is only relevant for both compliance purposes as well as for that, right?

MS. ROWE: Right.

MR. VAN DER VAART: Okay.

MS. ROWE: If there's an absolute correlation, it might make sense, Don, if it shows an absolute correlation and it's at a compliance level. Otherwise, our suggestion is that it triggers an investigation, if you will, and perhaps corrective action.

MR. VAN DER VAART: Sure.

MS. ROWE: But it shouldn't be an automatic violation. It may not be a violation of –

MR. VAN DER VAART: But you're willing to use it to certify compliance. You're not putting any kind of trigger events –

MS. ROWE: We're relying on our original stack test, yeah.

MR. VAN DER VAART: Okay.

Presentation of David Farabee (American Petroleum Institute)

MR. VAN DER VAART: What I'm saying is, once I -- once you have got a permit that you are actually following -- and I recognize there's lots of details -- but let's say we got to the point where you understand what monitoring is required and you're doing it. Would you be willing to base your compliance status, be it yea or nay, on those monitoring requirements that you agreed to?

MR. FARABEE: That's not a question that we can answer across the board. The answer to that is going to vary by facility. It's going to vary by permitting authority and will -- potentially be very different, depending on the exact details of what's in there. What I will say, generally, is that we are not of the opinion that the Title V process should be used as a vehicle for imposing new monitoring requirements -- new applicable requirements. It's the repository for incorporating what's already out there.

Presentation of Scott Evans (Clean Air Engineering)

MS. BROOME: Hi. Just a quick question, following up on some of the stuff you were saying about the O2 analyzer and that they somehow converted that into a measurement of the NOx emissions. As I understood what you were saying, for this permit -- and I don't want you to name the company or anything, but it sounded like they were saying, "Okay, if you have a number on your O2 analyzer that's below or above X" -- I'm not sure what the relative direction would be.

MR. EVANS: It's 3 percent in this case.

MS. BROOME: Okay. That you would have a violation of your permit? They were saying that?

MR. EVANS: Yeah, absolutely. I guess that's indicative of a larger problem of taking parameter monitoring and treating it as, in effect, surrogate direct monitoring.

MS. BROOME: So in your response to Mr. van der Vaart's question, you were not intending to say that it was appropriate to define compliance with a tool like an O2 monitor?

MR. EVANS: Oh, no. No, no, no.

MS. BROOME: You were not trying to say that? That wasn't what you meant by denied [*sic*] compliance?

MR. EVANS: No.

MS. BROOME: Because I think that that was where his question was leading. His card's up. I'll let him respond.

…

MS. BROOME: So you would not suggest that the parameters should be enforceable.

MR. EVANS: I would not suggest -- not –

MS. BROOME: Limits. That you violate your permit if you exceed a parameter. You're not suggesting that, right?

MR. EVANS: Let me qualify it a little bit. If you had very strong correlation data correlating that parameter with your direct emissions --

MS. BROOME: But only that.

MR. EVANS: (Continuing) -- then I would say that's fair. In the absence of any kind of correlation like that, then it's not reasonable to say that this parameter means that you are out of compliance with the underlying standard. It raises questions is all it does. It says, well, we need to look at this. Something is going on here where this parameter is being –

MS. BROOME: But you wouldn't say that the parameter was enforceable. Then the emission limit is what you just said.

MR. EVANS: I believe the -- yeah.

MS. BROOME: Okay.

MR. EVANS: The emission limits are what --

MS. BROOME: Okay.

MR. EVANS: Are you exceeding that emission limit –

MS. BROOME: I just wanted to make sure –

MR. EVANS: Yes, that's the bottom line.

MS. BROOME: (Continuing) -- how you were treating this. Thanks.

…

MS. HOLMES: Exactly. If you had a sense, you could use whatever temperature accommodation with respect to time, as long as you know what you -- you would have to stay in a certain temperature parameter or time retention parameter. But I understand for expense and convenience sometimes what you want to do is set up the parameters that you monitor instead. So let's say we know that as long as you stay between 800 and 900 degrees -- well, that's too low -- l,500 and 1,600 degree and three-second retention time, that there is no way you're going to be busting your emission limit. My problem is when you go below that by, say, 50 degrees, I have no idea what your emissions are. I had the burden of proving the case, but you have all the information. So in my mind that's setting up some kind of presumption that when you're outside the parameter, you have to rebut and show that "well, I was using four seconds for that day," or, "I was at 50 percent capacity," or something. It helps out because then all I know is you're outside of the parameter that we know is compliance, but I can't prove noncompliance because I don't have the information because the only thing we tested was within that parameter range.

MR. EVANS: Certainly one of the things when we're developing parameter ranges with our clients, I really encourage them to push their process as close to noncompliance as possible. One of the problems we have with doing that is -- and this has come up on more than one occasion -- they would like to push their process all the way to noncompliance when they're doing a parameter to really see where that line is; you know, "At what point do we cross over?" But they're afraid if they do, they'll have to report that, and then they'll get fined. So they're very leery about pushing their process to that point. Because they would like to know, too. I mean, in many cases they would like to know, "At what point am I, in fact, out of compliance?" But they won't quite go to that limit in a lot of cases because of fear of having to report a noncompliance. In some cases, like an oxidizer, a thermal catalytic oxidizer, the engineering calculations for that are reasonably simple. If you know what's going in and you know what it takes to destroy those particular compounds, I think you could probably come up with a reasonable idea of whether or not you're in compliance below those limits. It gets fuzzier with more complex processes and complex parameters; the O2 and NOx, NOx seems like a simple thing, but there are so many factors that go into the relationship between oxygen and NOx formation that it turns out to be an extremely site-specific issue. So if you are a little bit under on your NOx, and you don't have that data, you don't have a clue as to whether you're in or out. I don't think, without that data, you'd be able to make a definitive determination in some cases as to whether you're in or out.

…

MS. FREEMAN: I'm glad Don asked that question, because listening to Carol's question, which sounded to me getting very close to CAM, if that's a control device parameter, wouldn't CAM require -- I mean, I know this issue -- probably remember we struggled with in CAM, what you do if you go outside a parameter and you don't know whether you're in compliance or out of compliance with emission limit. All you know is your control device is not within parameter.

MR. EVANS: Right.

Views of Task Force Member van der Vaart: *As* shown in the questioning, Mr. van der Vaart who represented the State of North Carolina on the Task Force, does not agree with many of the comments submitted to the Task Force regarding this issue. He states that he does not believe any permitting authority especially wants to add new requirements to a permit. However, the problem is how is a permit written that can be used to determine the compliance status of a facility? In his view, this is best accomplished by adding monitoring sufficient to assure compliance.

He states that as for the footnote regarding the legislative history relative to the NPDES and Title V programs cited in the Air Permitting Forum comments are largely taken out of context, and that they actually reveal, when considered in their context, the opposite point. He views the reference on page 353 as saying that the workloads will actually be similar to that under the Clean Water Act CWA (the number of sources under CAA would be smaller, but the number of emission points would be larger than the CWA) and that would indicate that the two programs are again comparable. He also cites to page 347 indicating that Congress is again saying that the essence they were seeking to extract from the NPDES program and include in the Title V permit program was the enforcement component and that they go on to recognize the need for a compliance certification similar to NPDES. He further notes that Congress laments that under the CAA (pre-Title V), "there is no ready way to identify the extent of a source's compliance and noncompliance."

Finally, he argues that NPDES doesn't actually add substantive requirements. Both programs provide a framework for the enforcement of other requirements under the CWA. If you could find something, anything, to the effect that NPDES *does* add substantive requirements I would like to see it. Thus, he does not believe that the Legislative History of Title V is equivocal about the similarities between the NPDES and Title V programs relying in part on the second sentence of the Summary of the Senate report: "Title V of the bill imposes a Federal requirement that major sources of air pollution, and certain other sources of air pollution, obtain operating permits. Modeled after the permitting, provisions of the Clean Water Act, this requirement will substantially strengthen enforcement of the Clean Air Act."

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[i] See, *e.g.*, Senate Debates on S. 1630, Jan. 24, 1990, A Legislative History of the Clean Air Act Amendments of 1990, Vol. IV (statement of Senator Chafee):

> The permits will serve the very useful function of gathering and reciting in one place—the permit document itself—all of the duties imposed by the Clean Air Act upon the source that holds the

> permit. This would clearly be an improvement over the present system, where both the source and EPA must search through numerous provisions of State implementation plans and regulations to assemble a complete list of requirements that apply to any particular plant." (p. 4858)

[ii] See, *e.g.*, Senate Debate on S. 1630, Mar. 20, 1990, A Legislative History of the Clean Air Act Amendments of 1990, Vol. IV [136 Cong. Rec. S2715 (Mar. 20, 1990)] (Statement of Senator Baucus).(p. 5811).

[iii] See Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Commerce, U.S. House of Representatives, 104th Congress, 1st Sess., on Title V Permits, May 18, 1995

> In 1990, the Congress envisioned Title V as a modest tool for bringing some clarity to the world of stationary source regulations under the Federal and State clean air programs. While the goal of consolidated source requirements and eliminating duplicate and overlapping provisions is a good one, it may not be worth the billions of dollars that EPA seems to want the program to cost. Statement by Chairman Dingell at 31

Although Chairman Dingell's statements were made after passage of the 1990 Amendments in reference to the implementation of the program, his views as to what was intended at the time of enactment are relevant given his central role in the Conference Committee.

See also, Statement of Representative Bilirakis, 136 Cong. Rec. E3675 (Extension of Remarks) (Nov. 2, 1990) ("EPA must avoid duplication between the SIP and permit processes.")

[vi] Clean Air Facts, May 3, 1990, reprinted in A Legislative History of the Clean Air Act Amendments of 1990, Vol. II (House Debate on H.R. 3030 May 17, 1990).

[v] Some parties have provided statements to the Task Force indicating that Congress intended the Title V program to be implemented just like the NPDES program under the Clean Water Act. While there are several references in the legislative history to the NPDES program, nothing indicates that Title V was intended to create substantive requirements like the NPDES program. Indeed, the differences between water and air pollution sources were specifically noted. See S. Rep. No. 101-228: Clean Air Act Amendments of 1989, Report of the Committee on Environment and Public Works United States Senate at 353 (S. 1630), Dec 20, 1989. Moreover, EPA specifically considered the relationship between Title V and the NPDES program in its Part 70 rulemaking. The Agency concluded that there are "significant dissimilarities" between the two programs and concluded that "NPDES precedent should not be presumed binding for purposes of decisions made in the implementation process for the Title V program." 57 Fed. Reg. 32250, 32260 (1992).

[vi] 57 Fed. Reg. 32260.

[vii] 40 CFR § 70.1(b) and proposed 40 CFR § 70.1(c). See also Response to Comments on the 40 CFR Part 70 Rulemaking, EPA Docket No. A-90-33, V-C-1 (June 1992) at 6-25 ("Title V is designed not to rewrite the Act's requirements but to enforce them.")

[viii] See also D.P. & L. v. Jones, ERAC Case No. 574950, (August 21, 2003).

4.6 TOPIC: DEFINITIVENESS OF PERMIT

Issue/Observation Description

This paper addresses the relationship between the permit, the permit shield, and the source's compliance status as defined through the compliance certification. In particular, the compliance certification requires the responsible official to identify "methods or other means used by the owner or operator for determining the compliance status" with each term and condition of the permit (40 CFR 70.6(c)(5)(iii)(B)).[3] The rule specifies that the "methods or other means" shall include "as a minimum" those specified in the permit. This implies that information other than that required by the permit can be used to determine the compliance status of the source. At the same time, the permit shield under 40 CFR Part 70.6(f)(1)(i), while optional, provides an enforcement shield for any applicable requirement included in the permit only if the permittee complies with the terms and conditions for that requirement in the permit. This raises the question of whether the permit should be definitive. While there was discussion in response to testimony on the certainty that Title V might offer, discussions by the Task Force ultimately focused on the particular case of a permit that offers the permit shield.

Legal Requirements

Relevant Regulatory Provisions: Several portions of the Part 70 rules are relevant. Section 70.1 provides that "Title V does not impose substantive new requirements" but that "it does require ... that certain procedural measures be adopted especially with respect to compliance." 40 CFR § 70.1(b).

Section 70.6 governs permit content and provides in relevant part:

(a) *Standard permit requirements.* Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.

(i) The permit shall 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.

(3) *Monitoring and related recordkeeping and reporting requirements.* (i) Each permit shall contain the following requirements with respect to monitoring:

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act.

[3] Even the meaning of the "compliance status" has been the subject of discussion in part due to the evolving regulatory terms for compliance certifications under Title V.

(B) Where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(c) *Compliance requirements.* All part 70 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. . . .

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(i) The frequency (not less than annually …) of submissions of compliance certifications;

(ii) In accordance with §70.6(a)(3) of this part, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;

(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which com-

pliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and

(D) Such other facts as the permitting authority may require to determine the compliance status of the source.

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority.

(6) Such other provisions as the permitting authority may require.

(f) *Permit shield.* (1) Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part 70 permit that does not expressly State that a permit shield exists shall be presumed not to provide such a shield.

Comments Received

In response to questions from Task Force members some testimony addressed the issue of certifying to "compliance status." There was a divergence of views as to whether Title V (which requires certification of "continuous" or "intermittent" compliance) allows sources to certify to "intermittent" compliance for periods during which compliance status is unknown, or whether a source must consider any period of unknown automatically to be noncompliance. Some excerpts from the testimony on this topic are provided in the attachment.

Other Information

Some additional background comes from the final report of the 1990 amendments (Sen. Rep. No. 101-549, at 347 (1990)):

> The first benefit of the Title V permit program is that, like the CWA program, it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations -- ranging from emissions controls and monitoring requirements to recordkeeping and reporting requirements -- are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations... As a result, there is no ready way to identify the extent of a source's *compliance* and *noncompliance*.
> [Emphasis added.]

Task Force Discussion

The Task Force's initial discussions of the issue centered around the impact of EPA's "Credible Evidence" rule (CE) (62 Fed. Reg. 8314), periodic monitoring under Part 70, and the Compliance Assurance Monitoring (CAM) rule (62 *Fed. Reg.* 54900) on the ability of sources, permitting agencies, and the public to rely on the monitoring in the permit as providing the definitive definition of a source's compliance status. Although Task Force members agreed as a goal that the permit should define compliance, members also recognized that it was unlikely that the Task Force would reach agreement on any issues involving the CE, Part 70 monitoring, and CAM rules given the differing views on those rules. (Some of those views are set out in the paper on Monitoring in Section 4.3 of this report).

The Task Force then moved its discussion to the question of whether the permit should be definitive in cases where a shield is included. One Task Force member argued that, to be definitive while not establishing a new substantive requirement, the monitoring included in the permit must be limited to the compliance method specified in the underlying requirement (with specification of frequency as necessary under the "periodic monitoring" rule) and CAM. As an extreme, one State agency Task Force member stated that the permitting authority could require continuous emissions monitoring systems (CEMS) wherever technically feasible or, in the alternative could require frequent reference test methods, to ensure that the results could be relied on in determining the source's compliance status, and thereby give credence to the permit shield.[4] However, one member noted that the expense of CEMS or frequent stack tests may not be justified as long as alternative monitoring is available. For example, in some cases, parameter monitoring can be correlated to the actual emission rate and can be very accurate. However, industry representatives have argued that if this correlation over-predicts their emission rate, compliance with a given parameter value may constitute a new substantive requirement (*see* Task Force Paper on New Substantive Requirements in Section 4.5 of this report). Industry Task Force members also stated their disagreement with the premise that a State could require CEMS or broadly increase stack test frequency.

According to one Task Force member, the CE/CAM/part 70 interface presents the permitting authority with a dilemma in cases where the permit shield is extended to the facility. He posed the question of whether CEMS should be included for all applicable requirements,[5] thereby establishing a firm foundation for the permit shield and blunting the facility's argument that a new substantive requirement is being added, or whether parametric methods should be employed at the possible expense of being able to enforce on the basis of this lesser form of monitoring, thereby defeating the purpose of the permit and destroying the shield.

[4] Some on the Task Force stated that the addition of CEMS was clearly anticipated by Congress when it noted in Section 504(b) that CEMS were not always required for monitoring under Title V. There was not agreement regarding the meaning of Congress reference to CEMS in the statute and others pointed out that Congress specifically required rulemaking in that provision.

[5] The addition of such monitoring would need to be consistent with the EPA's umbrella monitoring policy (62 FR 3202) (*See* the Task Force Paper on Monitoring in Section 4.3 of this report.)

One State agency Task Force member said that industry representatives outside the Task Force have argued that CEMS are cost-prohibitive, even if they were authorized. However, they also maintain that while the lesser level of (parametric) monitoring (if authorized) can be used to establish compliance, they should also be able to use information gathered outside their permit to establish compliance in cases when the parametric monitoring indicates a violation. One Task Force member noted that while this view makes sense for cases where a permit shield is not extended, since no specific predicate of compliance with the terms and conditions of the permit exist in this case, it leads to a conflict when the shield is sought. This Task Force member found it difficult to believe that Congress intended permittees to shield themselves from enforcement for requirements under the CAA based on compliance *with the terms and conditions of the permit*, and also shielded them when they used other information, not vetted through the Title V process, to establish compliance whenever permit-defined monitoring showed non-compliance.

While several members of the Task Force were interested in the concept of an absolute permit shield that would prevent use of credible evidence, these members also recognized that the likelihood of EPA moving to such an approach may be low. Given that, and their view that the rules may limit the imposition of new monitoring or compliance methods, they expressed concern regarding any recommendations that would implicitly agree to the creation of monitoring and restrictions in the permit. They were concerned that even if the source were willing to agree to the new compliance method in order to obtain a shield, such recommendations could be taken without the premise that an absolute shield exists. This would represent an enforcement risk many would be unwilling to take without a clearer statement from the EPA on their current interpretation of the permit shield.

Following that discussion, the Task Force reviewed and voted on several recommendations.

Recommendations

Recommendation #1

The EPA should recognize that the Credible Evidence Rule (rule, preamble and guidance) has raised questions about the relationship between the permit, the permit shield, and the compliance certification. This has resulted in confusion among permitting agencies, sources and the public.

In Favor (9)*: Sliwinski, van der Vaart, Broome, Wood, Hagle, Freeman, Paul, Hodanbosi, Golden

Opposed (6)*: Raettig, Van Frank, Owen, Powell, Keever, Palzer

Abstentions (1)*: Morehouse

Clarifications: Broome, Golden, Wood, Paul, and Freeman clarify that because the Court of Appeals never ruled on the substance of the credible evidence rule, there remain questions about its overall legality and that the problem goes beyond confusion. They further clarify that the recommendation should not be interpreted simply as a request for additional guidance, which they do not believe would resolve the real issue.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

The EPA should recognize that the phrase "at a minimum" in 40 CFR 70.6(c)(5)(iii)(B) when referring to the methods and means required under 70.6(a)(3) information used to determine the compliance status undermines the purpose of the permit shield to the extent it suggests that additional information must be considered in compliance certifications.

In Favor (4): Sliwinski, van der Vaart, Hodanbosi, Golden
Opposed (6): Raettig, Van Frank, Owen, Powell, Keever, Palzer
Abstentions (6): Broome, Freeman, Hagle, Morehouse, Paul, Wood
Clarifications:

Recommendation #3

EPA should pursue rulemaking to propose the following change in 70.6(c)(5)(iii)(B):

> (B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. <u>In cases where the permit is shield under 70.6(f)(1)(i) is included in the permit, the basis of the compliance certification shall be the results of monitoring under 70.6(a)(3).</u>

In favor (3): Sliwinski, van der Vaart, Hodanbosi
Opposed (11): Broome, Wood, Raeittig, Van Frank, Freeman, Owen, Powell, Keever, Hagle, Paul, Palzer
Abstentions (2): Morehouse, Golden
Clarifications: Broome and Freeman oppose based on substantive concerns as well as because they do not believe the Task Force should promote specific regulatory language. Golden clarifies that he is in favor of achieving the general goal of definitiveness in the permit, but due to the complexity of the issue, he is unsure that the proposed language addresses all of the issues and does not want to promote exact regulatory language.

Related Topics: Monitoring, New Substantive Requirements

Attachment

Presentation of Scott Evans (Clean Air Engineering)

MS. BROOME: Hi. Just a quick question, following up on some of the stuff you were saying about the O2 analyzer and that they somehow converted that into a measurement of the NOx emissions. As I understood what you were saying, for this permit -- and I don't want you to name the company or anything, but it sounded like they were saying, "Okay, if you have a number on your O2 analyzer that's below or above X" -- I'm not sure what the relative direction would be.

MR. EVANS: It's 3 percent in this case.

MS. BROOME: Okay. That you would have a violation of your permit? They were saying that?

MR. EVANS: Yeah, absolutely. I guess that's indicative of a larger problem of taking parameter monitoring and treating it as, in effect, surrogate direct monitoring.

MS. BROOME: So in your response to Mr. van der Vaart's question, you were not intending to say that it was appropriate to define compliance with a tool like an O2 monitor?

MR. EVANS: Oh, no. No, no, no.

MS. BROOME: You were not trying to say that? That wasn't what you meant by denied compliance?

MR. EVANS: No.

MS. BROOME: Because I think that that was where his question was leading. His card's up. I'll let him respond.

MR. EVANS: Do you want to respond before I --

MR. VAN DER VAART: Yeah. I mean, the question that I've got, I totally agree that if you're not happy with an oxygen monitor being used to define your NOx emissions to the point of determining compliance, I don't think anybody would argue that that's inappropriate. I think the question that comes up --

MR. EVANS: The State did in this case.

MR. VAN DER VAART: But what they should come back and say, "Okay, look, we don't like that, but what can we do?" So here is the question. The question is it's not whether oxygen monitoring is the right answer. The question is, "Look, we both know that we need to define compliance. How do you want to do it?"

MR. EVANS: And actually, we did come up with a solution there. I think it involves talking and education on both sides. And one of the things I can't stress enough for folks going through this is to talk to your permit writers and the State agency people a lot. But it actually had to -- we had to come to an understanding of what parameter monitoring was all about. And parameter monitoring is not a substitute for a direct determination of compliance. Parameter monitoring is intended to determine whether or not a process is operating within its normal parameters, and that makes the assumption that you've defined that while you're operating within those normal parameters, that you are in compliance. And the parameter monitor is just to check to say, "Yeah, the process is operating that same way, so we can be reasonably certain that we're still in compliance." It's not intended to mean if you're 3.1 O2, then you've violated your NOx, your NOx requirements. That's the problem.

MS. BROOME: So you would not suggest that the parameters should be enforceable.

MR. EVANS: I would not suggest -- not --

MS. BROOME: Limits. That you violate your permit if you exceed a parameter. You're not suggesting that, right?

MR. EVANS: Let me qualify it a little bit. If you had very strong correlation data correlating that parameter with your direct emissions --

MS. BROOME: But only that.

MR. EVANS: (Continuing) -- then I would say that's fair. In the absence of any kind of correlation like that, then it's not reasonable to say that this parameter means that you are out of compliance with the underlying standard. It raises questions is all it does. It says, well, we need to look at this. Something is going on here where this parameter is being --

MS. BROOME: But you wouldn't say that the parameter was enforceable. Then the emission limit is what you just said.

MR. EVANS: I believe the -- yeah.

MS. BROOME: Okay.

MR. EVANS: The emission limits are what --

MS. BROOME: Okay.

MR. EVANS: Are you exceeding that emission limit --

MS. BROOME: I just wanted to make sure --

MR. EVANS: Yes, that's the bottom line.

MS. BROOME: (Continuing) -- how you were treating this. Thanks.

…

MS. HOLMES: Exactly. If you had a sense, you could use whatever temperature accommodation with respect to time, as long as you know what you -- you would have to stay in a certain temperature parameter or time retention parameter. But I understand for expense and convenience sometimes what you want to do is set up the parameters that you monitor instead. So let's say we know that as long as you stay between 800 and 900 degrees -- well, that's too low -- l,500 and 1,600 degree and three-second retention time, that there is no way you're going to be busting your emission limit. My problem is when you go below that by, say, 50 degrees, I have no idea what your emissions are. I had the burden of proving the case, but you have all the information. So in my mind that's setting up some kind of presumption that when you're outside the parameter, you have to rebut and show that "well, I was using four seconds for that day," or, "I was at 50 percent capacity," or something. It helps out because then all I know is you're outside of the parameter that we know is compliance, but I can't prove noncompliance because I don't have the information because the only thing we tested was within that parameter range.

MR. EVANS: Certainly one of the things when we're developing parameter ranges with our clients, I really encourage them to push their process as close to noncompliance as possible. One of the problems we have with doing that is -- and this has come up on more than one occasion -- they would like to push their process all the way to noncompliance when they're doing a parameter to really see where that line is; you know, "At what point do we cross over?" But they're afraid if they do, they'll have to report that, and then they'll get fined. So they're very leery about pushing their process to that point. Because they would like to know, too. I mean, in many cases they would like to know, "At what point am I, in fact, out of compliance?" But they won't quite go to that limit in a lot of cases because of fear of having to report a noncompliance. In some cases, like an oxidizer, a thermal catalytic oxidizer, the engineering calculations for that are reasonably simple. If you know what's going in and you know what it takes to destroy those particu-

lar compounds, I think you could probably come up with a reasonable idea of whether or not you're in compliance below those limits. It gets fuzzier with more complex processes and complex parameters; the O2 and NOx, NOx seems like a simple thing, but there are so many factors that go into the relationship between oxygen and NOx formation that it turns out to be an extremely site-specific issue. So if you are a little bit under on your NOx, and you don't have that data, you don't have a clue as to whether you're in or out. I don't think, without that data, you'd be able to make a definitive determination in some cases as to whether you're in or out.

…
MS. FREEMAN: I'm glad Don asked that question, because listening to Carol's question, which sounded to me getting very close to CAM, if that's a control device parameter, wouldn't CAM require -- I mean, I know this issue -- probably remember we struggled with in CAM, what you do if you go outside a parameter and you don't know whether you're in compliance or out of compliance with emission limit. All you know is your control device is not within parameter.
MR. EVANS: Right.

Presentation of Debra Rowe (DaimlerChrysler Corporation on behalf of the Alliance of Automobile Manufacturers)

MS. ROWE: This is an example of the -- one experience with new substantive requirements being applied in the Title V. Considering hourly and annual emission limit on emissions from the electrostatic precipitator. The source tests the electrostatic precipitator; it passes. During the test the source records, as requested by the State, the voltage and current readings that occurred. The facility then finds that the ranges of voltage and current during the stack test had become enforceable limits in the Title V permit; that it must not only monitor but must comply with. This creates a restriction on the plant's operation of its electrostatic precipitator that isn't even related to compliance. Stack tests are done when the unit is operating under specified conditions. Those conditions may or may not exist in regular operation. For example, the load might be lowered because a plant is not as busy. In addition, the weather can have an effect. But by imposing particular voltage or current requirements, the unit is now restricted. Additionally, the margin of compliance during the stack test is not even considered. What if the source tested at 50 percent of its operating level, yet we encountered an automatic requirement to make whatever was happening during the stack test an enforceable limit? This creates a phantom violation, if you will, you know, for basically a sound operation operating within its margin of compliance.
…

We think the Task Force should endorse the approach taken by some States; it's based on the CAM rule. If there is a parameter that is indicative of good operation of a unit or control, then going outside that range would trigger an investigation, if needed; and, if needed, corrective action. Unless the range be definitively correlated to the emissions level, which in most cases is simply not possible, it should not be a permit violation. This makes much more sense because it focuses on a properly operated control advice rather

than trying to replicate a condition that occurred on a single day in a year that may not exist on another day that the source is operating.

MR. VAN DER VAART: Thanks very much. I had a quick question on the ESP example; and I mean it's just a good example. You're talking about being given monitoring requirements that were really commensurate with a specific stack test. And then all of a sudden those became sort of requirements across the load spectrum. And your point is, "Gee, that's all of a sudden the case." My question is how did you certify compliance during those periods that you're so confident that these -- the same parameters are not relevant?

MS. ROWE: Well, until you have another stack test -- I mean, that's the one sample in time, if you will, to relate the loads and probably demonstrate -- and this is not an example out of my company; it's from one of the other companies -- but it's an example that demonstrates the -- you know, there's a margin of compliance as well in there.

MR. VAN DER VAART: No, I understand that.

MS. ROWE: Right. So to artificially tie those parameters –

MR. VAN DER VAART: But when you certify compliance, you're certifying based on something.

MS. ROWE: Right. Based on the confidence in the original stack test until it's redone.

MR. VAN DER VAART: Okay. But then that stack test was only specific to a certain set of operating conditions. So you're using that same test the way to your benefit where you would prohibit or you would omit the fact that the agency is using it against you. Is that –

MS. ROWE: Well, if the parameter's set at 50 percent of what -- you know -- you've got, say, a 50-percent compliance margin and the parameter artificially sets a new limit that's half of what the original underlying permit limits.

MR. VAN DER VAART: That's another good question. I'm essentially saying just the specificity of the test works both ways. It is only relevant for both compliance purposes as well as for that, right?

MS. ROWE: Right.

MR. VAN DER VAART: Okay.

MS. ROWE: If there's an absolute correlation, it might make sense, Don, if it shows an absolute correlation and it's at a compliance level. Otherwise, our suggestion is that it triggers an investigation, if you will, and perhaps corrective action.

MR. VAN DER VAART: Sure.

MS. ROWE: But it shouldn't be an automatic violation. It may not be a violation of –

MR. VAN DER VAART: But you're willing to use it to certify compliance. You're not putting any kind of trigger events –

MS. ROWE: We're relying on our original stack test, yeah.

MR. VAN DER VAART: Okay.

Presentation of Kathy Andria (American Bottom Conservancy)

MR. VAN DER VAART: Well, I think industry does want -- I think everybody wants that. But in terms of being able to look at the permit, I know that sometimes it's a daunting task. Would you like to be able to look at the compliance certification and see whether or not they're -- whether they're in compliance or whether there were periods of noncompliance.

MS. ANDRIA: I would very much like to do that. We're already seeing a whole bunch of things. I mean, we've got people who are saying they're in compliance and people at -- who at hearings are saying they're in compliance when it's very clear that they're not. So I am very interested to see them sign their own names to something saying, "I am in compliance. My company is in compliance, and I am responsible," because then we have something to go after them for.

Presentation of Tammy Wyles (Georgia Pacific)

MS. WYLES: Related to that, too, there are some States -- and this kind of gets over into the area of the CAM rule -- the Compliance Assurance Monitoring rule -- which is really a companion rule to Title V -- but there are some States that are hard-wiring the parametric values that we use to demonstrate compliance under the CAM rule while that rule allows us to be reset in subsequent tests as long as we can demonstrate compliance. This, again, is just adding burden to both the manufacturing operation and to the agency that's having to process multiple revisions. And it really just does not, I don't think, provide any additional environmental benefit.

…

MR. VAN DER VAART: Well, what I'm saying is -- what I'm saying is, if I tell you -- I mean, I realize there's a lot of language out there floating around, some of it old, made new again for some reason. But what I'm saying is, let's say I can guarantee you a shield, okay? So really, really everybody tells you that as long as you do what's in the permit you will be deemed in compliance with the Clean Air Act. Would that -- given that, would you be then willing to base your compliance and noncompliance on the monitoring results that the permit specifies?

MS. WYLES (Ga. Pacific): I think we would, but I think, you know, again, within our own company we still advise our responsible officials to go beyond that.

MR. VAN DER VAART: This isn't a happy world. I'm taking you away. This is happy land. I've taken you into this sort of quasi-amorphous world we live in. So all I'm saying is if you did have that certainty –

MS. WYLES: Yes, yes.

MR. VAN DER VAART: -- would you then be willing?

MS. WYLES: Yes, I think so.

MR. VAN DER VAART: Okay. Thanks.

Presentation of Lyman Welch (Mid-Atlantic Environmental Law Center)

MR. VAN DER VAART: Generally speaking, you'd like to be able to look at the monitoring requirements and determine whether they're in compliance or not, based on the results. Is that what I'm hearing or not?

MR. WELCH: Yes, I would like it to work similar to the Clean Water Act Discharge Monitoring Report where a facility might report, here's our limit of seven and we were over that at 50, but with a little asterisk saying at the bottom, here's an explanation, you know. Our line froze up this day and that's why this one-time thing occurred. I would like to see the same type of procedure work in the air situation.

Presentation of Bruce Nilles (Sierra Club)

MR. VAN DER VAART: One question I did have, and you really didn't touch on it, but the compliance certification. I presume you believe you need to certify both compliance and noncompliance. Do you think Title V obligates the permit to contain methods for determining compliance so that they can make that certification?

MR. NILLES: Absolutely. As we read Title V, it says the whole purpose is to take the underlying construction Title I obligations and wrap around the monitoring reporting and recordkeeping obligations so that you can actually, at the end of the stay, in short, continue its compliance. And how else do we tell the citizens that we have any certainty that that smokestack at the end of their driveway is meeting its clean air obligations, unless we have that information.

Presentation of Robert Ukeiley (Georgia Center of Law in the Public Interest)

MR. VAN DER VAART: Sorry. To get back to this burden of proof issue, you know, at some point, I mean, we have to recognize that the permit is of some value because if we just go on with this burden of proof, then some could argue why do I need to monitor at all. In your case, my understanding was that you didn't feel the permit was definitive enough in terms of defining when startup ended and that what you really wanted was a better definition of startup and then monitoring pursuant to that definition. Do you see -- do you agree with that or would you just –

MR. UKEILEY: I agree that that's what I think that the permit should have. It should have a clear -- exactly. It should have a clearer definition of when startup ends and monitoring to determine the definition provided in the permit.

MR. VAN DER VAART: Do you -- what do you think about the issue of just throwing up our hands and saying, well, at the end of day we can still force the permittee to bear the burden, would their opinion of that -- would the facilities' opinion of that not be, well, why do I even have this permit? In other words, can there be some value attached to the permit that you would agree with, as long as it was definitive and well written and the monitoring was pursuant to the definitive nature that we just discussed?

MR. UKEILEY: I'm not sure I'm totally understanding your question.

MR. VAN DER VAART: I guess what I'm saying is, is does the monitoring have value or does ultimately do you believe that the monitoring is only a secondary importance

because we can always dump the entire burden of proof back on the facility outside of that monitoring, or would you rather have the monitoring be definitive so that everybody can look to it and decide what the compliance status is?

MR. UKEILEY: I would rather have the monitoring be definitive.

MR. VAN DER VAART: Thanks.

Presentation of Steve Murawski (Gardner, Carton, & Douglas)

MR. VAN DER VAART: It's your belief that Title V, under the certification, requires you to certify both periods of noncompliance and compliance?

MR. MURAWSKI (Garden, Cutter and Douglas): That's correct.

Presentation of Chuck Layman (CENSARA and CENRAP)

MR. VAN DER VAART: Thanks, Chuck. A couple of comments that resonated. First of all, on the SIP amendment thing, you know, when you read the preamble of Part 7 -- it's on the background -- certainly sounded to us that Title V was anticipated to actually provide a sort of site-specific SIP amendment mechanism. And I don't think that's really taken place. Personally, I think the EPA is loath to tie their hands to that kind of process. But they like the give-me-what-you've-got-and-I'll-let-you-know type of SIP revision mechanism. In addition, during the initial Title V, we found -- just like you, I think -- a great wealth of compliance definition and compliance issues raised just simply going through the rigors of having to prepare those initial Title V's. In that context, I've got two short questions, which is, one, do you believe, when Congress asked the permittee to certify his or her compliance status, that they wanted both compliance and instances of noncompliance to be certified too?

MR. LAYMAN: Now, you're making me think back.

MR. VAN DER VAART: It's just your opinion.

MR. LAYMAN: I mean, I'd have to go back and really read it. But it was always my understanding that you were certifying those areas that you were in compliance and you were also certifying, at least by negative implication, that you were out of compliance with those other areas.

MR. VAN DER VAART: To follow that up, do you think that the permit should form the basis of these compliance certifications; or do you believe that information not contemplated in the permit should be included as well?

MR. LAYMAN: My personal belief is that it's always worried me that the permit has been viewed as the single enforceable document in these situations, because that's one reason these permits have to get so complex and complicated. I would like to see some recognition that you can go outside the permit. But at the same time I understand the need for that permit. It's really a conundrum. It really is. I can argue with myself around in circles on that.

Presentation of John Metzger (3M)

MR. VAN DER VAART: I would echo what Dave said. It's great to have you come all the way here and help us out. We like the 3M facility we have in North Carolina. But the one question I've got, very simple; you do believe that the certification requires both certification of noncompliance and compliance?

MR. METZGER: Absolutely.

MR. VAN DER VAART: Thanks very much.

MR. METZGER: Absolutely. And we think that we would like to see there be more uniformity around this from permitting authority to permitting authority. In some cases we see very great detail guidance or requirements on the part of the permitting authority as to how

MS. BROOME: Thanks. Mr. Metzger, I just have a quick follow-up on the compliance certification comment you made. If you have a situation where you're not sure what your compliance status is -- for example, an incinerator where there is indicator monitoring of a temperature that was during a performance test, but you drop a few degrees -- you were not suggesting that you're required to certify noncompliance unless that temperature limit is a requirement; correct?

MR. METZGER: That is correct. I mean, we think that in a lot of cases there's not good definition around these terms of deviation, noncompliance, violation, and so forth. And even in cases we've seen where attempts have been made to clarify that, that it's -- has often remained confusing. In our compliance certifications, we try to approach those from the standpoint of maximum disclosure of information. So that in some cases we will believe that something does not represent -- I mean, you fill in whatever term you like; violation, noncompliance, deviation, excursion, whatever. But in any case we want to make sure that if any sort of departure whatsoever from the permit has occurred, that as a minimum that that information is reported in the permit. And, of course, we'll take a position in our submittal as far as what we believe is a significance and how we're attending to that and so forth.

MS. BROOME: Or if you don't know, you may just say you don't know. And you're not suggesting that you should be forced to characterize that as noncompliance.

MR. METZGER: Oh, absolutely not.

Presentation of John Walke (Natural Resources Defense Council)

MR. VAN DER VAART: On the other side, doesn't that hurt the parties, because now third parties can't actually definitively know whether, as you said, a facility is in compliance, because there's always an unknown quantity or unknown information, never accessible to third parties, and, in fact, now they're barred from using the monitoring data which is available to them to determine compliance.

MR. WALKE: The last point is not true.

MR. VAN DER VAART: It is if you assume that the monitoring condition in the permit is not definitive.

MR. WALKE: You can use it.

MR. VAN DER VAART: You can try to use it, but then the industry is going to use the same argument that you want to use, which is, hey, I've got credible evidence saying I wasn't.

MR. WALKE: That's fine. I'm happy to take that situation. It's not third parties from the public who are objecting to the use of credible evidence, because it creates this uncertainty and chaos.

MR. VAN DER VAART: But it should. I don't care if it is or not. What I'm saying is, by opening that door, the other door opens, so now the whole definitiveness, which we all really have heard is important and would be a great asset, seems to be diffused because of the fact that there may always be a hidden piece of data or series of monitoring data that may contradict and be relevant to determine whether you're in compliance. To me, it just seems like there's a problem on both sides.

MR. WALKE: I agree that the situation exists on both sides, but I don't think it's a problem. I don't mean to be flip here, but that's life. There is no clarity of definitiveness in any area of the law when it comes to proof of violation.

MR. VAN DER VAART: But then you do get to the final question, which is, why are we doing this permit program anyway, when, in fact, the final determination of what's compliance or not, is very well hidden within the confines of the facility and inaccessible to anyone, on a practical basis. So what's the purpose of the permitting program?

MR. WALKE: The three-part purpose that I laid out is still my view. The question of credible evidence is one of ultimate proof of what's admissible before a court. That shouldn't be confused with how -- whether or not the public benefits from requiring industry to consider that additional information or whether better and more accurate monitoring is a good thing. … We've got sufficiency monitoring just having been eliminated; CAM being feckless in the extreme; terms being written into the permits to ensure that the compliance certifications are meaningless, so people don't actually have to say whether they are in compliance or not. …

Presentation of David Farabee (American Petroleum Institute)

MR. VAN DER VAART: What I'm saying is, once I -- once you have got a permit that you are actually following -- and I recognize there's lots of details -- but let's say we got to the point where you understand what monitoring is required and you're doing it. Would you be willing to base your compliance status, be it yea or nay, on those monitoring requirements that you agreed to?

MR. FARABEE: That's not a question that we can answer across the board. The answer to that is going to vary by facility. It's going to vary by permitting authority and will -- potentially be very different, depending on the exact details of what's in there. What I will say, generally, is that we are not of the opinion that the Title V process should be used as a vehicle for imposing new monitoring requirements -- new applicable requirements. It's the repository for incorporating what's already out there.

4.7 TOPIC: COMPLIANCE CERTIFICATION FORMS

Issue/Observation Description

What this Paper Addresses: Compliance certifications are a core part of the Title V program. The information received by the Task Force indicates that they have increased company management awareness about compliance with air pollution control requirements and spurred more widespread implementation of compliance management systems. An issue that has been raised and discussed at length by the Task Force, however, is the appropriate format for compliance certifications. The debate is largely over how much detail is necessary and/or beneficial in a compliance certification. This topic addresses the appropriate format and content for a Title V compliance certification.

A typical "short form" compliance certification requires the source to: (1) provide an overall certification statement of continuous compliance with permit requirements, (2) specifically list deviations from permit requirements during the reporting period, and (3) include or attach required details on those deviations. (See Exhibit A). A typical "long form" requires the Title V facility to: (1) list or reference each permit condition, (2) specify its compliance status for each permit condition, and (3) separately describe the method used for determining the compliance status for each condition. The long forms are often modeled on the form that EPA has put on its website for part 71 certifications. (See Exhibit B). There are, in addition, a number of certification forms in use that fall somewhere between a long and short form. Yet another option for a compliance certification form, raised by a Task Force member, is to use the permit itself as the compliance certification form with an added column for indicating compliance status. Specific information regarding noncompliance would be attached, as with the short form.

Legal Requirements: Title V requires each facility to submit an annual compliance certification signed by a responsible official. 42 U.S.C. § 7661(c). Section 114 of the Act specifies the requirements for such certifications. 42 U.S.C. §7414. The governing regulations for compliance certifications are found in §70.6(c) of the Title V rules. These regulations have undergone some changes since initial issuance in 1992 but currently list the requirements for certifications as follows:

(iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

> (A) The identification of each term or condition of the permit that is the basis of the certification;
>
> (B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;
>
> (C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the

method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and

(D) Such other facts as the permitting authority may require to determine the compliance status of the source.

Compliance certifications must be submitted at least on an annual basis. 40 CFR §70.6(c)(5). The regulations State that the permittee may "cross-reference the permit or previous reports, as applicable" in the identification of applicable information. The statute does not address cross-referencing.

Supporting Information: Comments Received

Comments regarding the usefulness of certifications:

A number of commenters noted that the annual compliance certification is a valuable tool for increasing management awareness of environmental issues. Some commenters also noted that the compliance certification is an effective tool for assuring compliance.

- "The fact that it's a plant manager or a vice president of EH&S that has to sign these puts a lot more attention on air issues than there had been in the past, without a doubt. I've talked to many, many more VPs and plant managers after Title V than I ever did before, because in the past it was always, you know, it's the environmental guy that handles that, and he'll answer all your questions. The effective way to implement Title V, and the way that I think it's being done at facilities that are doing well in meeting their Title V commitments, it integrates compliance with day-to-day operations. Compliance is not something that's handled by the environmental department and it's separate from what goes on day to day at the plant. I think, at least in the clients that I'm working with, compliance is seen as an obligation of the people that run the plant on a day-to-day basis far more than it had been in the past." (Clean Air Eng. at transcript pp. 2-111 to 2-112).
- "The awareness level within our organization, I think, has increased incredibly in terms of what the compliance requirements for air permits need to be…. It's also resulted in much better documentation of compliance. … in terms of maintenance, in terms of documentation, of other operating parameters, monitoring requirements, et cetera, I think it is really, again heightened that awareness and made our operations perform better and has put that focus on demonstrating compliance …" (RR Donnelley at transcript p. 2-295).
- "The annual compliance certification has proved to be an effective tool for assuring compliance with air quality requirements. Requiring industry to annually conduct a comprehensive review of the facility's compliance status has achieved its purpose. CENSARA State and local agencies support annual compliance certification as a

valuable means of assuring continual compliance with air quality requirements." (CENSARA at transcript p. 4-9).

- "As for the annual compliance certification, we believe that they will come into their own as an important tool for enforcing Title V requirements. They have elevated facility accountability to the corporate officer level. Annual statement of compliance signed under penalty of perjury have appeared to spur internal compliance reviews and have led to increased operator training and improvements in facility recordkeeping practices …" (BAAQMD, p. 96).
- "Title V has also resulted in better compliance by major sources. Sources better understand and pay attention to their permit requirements. Michigan has noted a downward trend in the number of significant air violations at major sources and attributes this to sources being required to certify compliance with all permit requirements." (MDEQ at transcript p. 4B-11).

Several State and local agency representatives observed that they are not finding many significant, previously unknown non-compliance issues in compliance certifications. Several stated that much reported noncompliance involves missed data collection, failure to keep records, and other similar issues. Some of these States also noted that violations, including shutdowns, malfunctions and excess emissions, were also identified.

- "[W]here we already have a strong enforcement program, Title V compliance certification of reports have not resulted in significant improved compliance." (South Coast AQMD at transcript at 4-218).
- "What we see the majority of deviations for are primarily record keeping, missed records, some opportunities where they were to do some type of opacity reading that was not done. Things along that nature. We do occasionally see reports of emission violations, which we definitely follow up on as a violation." (Michigan DEQ at transcript 4B-13).
- "We'll, I think we're probably seeing a mixture of all types of deviations and excursions reported. However, it seems like a lot of them, a lot of the deviations reports coming in, could be record keeping and monitoring types of situations, where it may not be a violation, but where they just had a deviation from some permit requirement." (Alabama DEM at transcript p. 70).
- "Our States feel that the annual Title V compliance certifications have not yet proved themselves to be a very useful compliance tool. We recognize their value to the public in that they provide an annual snapshot of a facility's compliance, and they also put the onus on the facility that at least once a year they review all of the applicable requirements; however, it has been our experience that they haven't yielded any new compliance issues or compliance actions." (NESCAUM at transcript p. 4B-50).
- "With the issuance of Title V permits we now have had a couple of years of compliance certifications and deviation reporting from the Title V permitted sources. And that has really resulted in few surprises and no substantive noncompliance with emission standards. The deviations that we see being reported are relatively minor in na-

ture, would have been known by the district, most likely without Title V; and if they are associated with equipment breakdowns, we had three Title –V-breakdown reporting requirements in existence in our program already. An I should mention, also, that the stationary sources that are required to have Title V permits are already inspected by our agency anywhere from two to four times a year. Those inspections include reviewing records the facilities are required to complete and maintain, and that gives us a good indication of any noncompliance concerns associated with the facility separate from any deviation reporting we see." (San Diego County APCD at transcript p. 4B-134).

- "The way Georgia is set up, we have a permitting group, and we have a compliance group. And I'm head of the permitting group, and the compliance group is the one that receives all our reports and does the inspections based on the permit. And from listening to them and working very closely with them, the deviations that I generally hear about have to do with record-keeping violations or deviations. That's generally what we hear. And then, again, they often usually have some shutdown malfunction, excess emissions, that will occur and get reported. But from what I have heard, the majority of them do have to do with the record keeping and reporting." (Georgia EPD at transcript p. 4B-91).
- "[I]t is not surprising that most violations reported are not associated with emissions measurements. This reflects more on the lack of testing, than on compliance with emission limits." (New Jersey DEP OAR-2004-0075-0017 at p. 4).

Some industry commenters indicated that the compliance certification process had raised awareness regarding environmental issues in their organizations. Comments by RR Donnelley p. 2-295; 3M p. 2-45; OAR-2004-0075 at 3 (GPA). In response to a question from the Task Force, one trade association representative indicated that the compliance certification had not changed whether or not companies in his association complied with air regulations. He noted that compliance is the starting point for their companies, both before the Title V program and afterward, and that noncompliance with any environmental statute could shut their doors. Thus, while certifying compliance is a requirement of Title V, it is not the reason that companies in his organization are in compliance with Clean Air Act obligations. (With our industry, that's [compliance] really the starting point. We know that you need documentation for that. But, perhaps, you've gone too far. Our best engineers should be doing pollution prevention in the plant and we're taking our best engineers to fill out these compliance forms. The longer we fill them out the bigger the forms get. That's our concern." (American Forest and Paper Association at transcript p. 1-228).

A Task Force member noted in response to a commenter that, "companies like ours have a very clear compliance obligation, have always had that obligation … So it's always been a focus. I think what Title V has provided is more of a structured environment where the plant manager sign off and certification, which I think strengthens the overall compliance certification process. And I can speak for a number of the companies that I'm aware of that we have very rigid compliance assurance systems and Title V has helped to drive that by the responsibilities we have, but I wouldn't want to say that in the

base case there's been a change in compliance, but it strengthens the compliance assurance process and I think you can probably see that in a number of companies." (Morehouse at transcript p. 1-232).

Comments regarding the form of certifications:

Commenters noted that a wide variety of compliance certification forms are currently in use. AFPA, p. 29-30, NYDEC p.114, 3M 2-65. It is unclear the extent to which States require that sources use a specific form.

Many written comments were filed by local permitting authorities and industry strongly supporting the use of a short form certification, which does not require the individual identification of permit terms and conditions. *See* OAR-2004-0075-0017 (NJDEP), OAR-2004-0075-0021 (MDEQ), OAR-2004-0075-0046 (NPRA), OAR-2004-0075-0047 (API), OAR-2004-0075-0048 (STAPPA/ALAPCO), OAR-2004-0075-0049 (ACC), OAR-2004-0075-0052 (CAIP), OAR-2004-0075-0053 (AFPA), OAR-2004-0075-0055 (UARG), OAR-2004-0075-0056 (AAM), OAR-2004-0075-0074 (APF), OAR-2004-0075-0082 (ODAPC), OAR-2004-0075-0083 (OCTC, OMA, OCC), OAR-2004-0075-0085 (CASE).

- Commenters stated that the short form meets the core legal requirement to certify continuous or intermittent compliance with permit requirements. They stated that the long form requires a source to reState the permit in a different format, which is extremely time-consuming.
- The long form does not add any assurance of compliance because facilities develop their own systems for making their certifications, and those do not rely on EPA's "long form," noting that the long form simply adds another layer of burden.
- The long form does not make the certification any more enforceable. The responsible official for a plant must certify compliance and the consequences for a false certification are the same, regardless of what form is used.
- The long form can actually obscure compliance information. If a deviation is reported on a form that is 100 or more pages, it may be difficult to find. If a deviation is reported on a form that States the facility was in compliance except for the following deviations, it will stand out. It will get the responsible official's attention, as well as the permitting authority's attention. It will prompt a dialogue, a response.
- The permit should serve as the reference point for identification of requirements and methods of determining compliance status.
- As implemented, the long form's information on method of compliance simply uses a cite to the permit or a catch phrase like "records review" or "recordkeeping" or "monitoring" or "N/A." It adds nothing to enforcement staff or the public's review of the certification.
- Periodic compliance and deviation reports submitted by sources contain more timely and useful details about compliance issues for permitting authorities and the public.

This reduces the importance of the compliance certification being a highly detailed document.

- Commenters noted that EPA staff has indicated in public forums that the "long form" is not legally required. Nonetheless, it was reported that many EPA regional offices are indicating to States that a line-by-line form is strongly preferred, if not required.
- The New York State Department of Environmental Conservation (NYSDEC), in contrast, commented that it believes, according to the regulations, "that you really need to certify compliance on a line-by-line basis, because you need to indicate how you determine that you are in compliance." (NYSDEC at transcript p. 4-123) NYSDEC also noted that it found the longer form useful because it allowed the identification of problems at a greater level of detail. (NYSDEC at transcript p. 4-124) On the other hand, the Michigan Department of Environmental Quality commented that it was able to convince Region 5 that a short form is both legal and appropriate and that there had been conflicting messages from EPA between the Regional and Headquarters offices regarding the need for the long form. (MDEQ at transcript p. 4B-14).

One industry commenter noted, the long form "goes a bit too far, that that turns into an exercise for both the company and also for the permitting authorities that is just more resource-intensive than what is justified by what is going on" but was willing to accept a "line-by-line certification of certain key things, such as the emissions standards." (3M at transcript p. 2-065).

Similar to the written comments, during the public hearings, several commenters objected to the use of the long form certification questioning its value particularly in light of the additional workload it mandates.

- "The first comment I would like to make is with regard to the compliance certifications themselves. In some States our facilities are required to go -- well, actually, in most States -- are required to go through every condition of the Title V permit and insert some type of comment. And I would encourage the agencies, the State, and EPA to allow for a simple certification where we know the exceptions, as opposed to going through a line-by-line certification when there are no issues." (AFPA at transcript p. 4-30).
- "A point on certifications. And we've had some issues here with the length of those. We believe that these should be streamlined, focused on deviations, violations, and provide sufficient detail on the deviations. We don't think it's useful for compliance certifications to repeat applicable requirements for source operations where there is no problem. We find that the front line certifications get too detailed for our sources where there are no problems; that the real problems get buried in the certification." (New Jersey DEP at transcript p. 4B-31).

Members of environmental groups and citizen comments raised the benefits of a more detailed and inclusive certification:

- "[T]he one [compliance certification] that I looked at it did go line for line and you could match it up with the permit and refer to the number in the permit where the term was, so it was very easy to go through. … I think it is useful to have it be the line by line …" (Women's Voices for the Earth at transcript p. 3-167).
- "The same thing to a different degree is true with the compliance certification where I'm sure you all are aware you're getting these squirrelly reports that just talk about whether something is – what are the terms – in periodic compliance … it's very difficult to determine from those if they do not say yes, we're in compliance, but no we're, you know in partial compliance. When were you not in compliance? … Most of the reports, the deviation reports are not listed or attached to those [compliance certifications]. … So it's just very hard ultimately for citizens to come down, look at a document, determine what the law is, pick up the compliance reports to determine whether a source is in compliance or not." (Zars at transcript p. 3-257 to 258).

Finally, there were a number of comments regarding the use of electronic compliance tools and on uniformity regarding compliance certification forms. A representative from Valero refining discussed electronic compliance demonstration tools and noted that their usefulness for tracking facility compliance. He emphasized that such tools must maintain the relationship between the verification activity and the compliance obligation in the permit. He noted that Valero would be happy to share information regarding their tool and what they have learned. (Valero at transcript p. 4-335).

Similarly, the Bay Area Air Quality Management District noted: "[i]t would be very useful if EPA could develop software tools that could be used nationally and adopted by State and local agencies to enhance the accuracy and comprehensiveness of compliance reporting – tools similar to that that is being used in Texas and in New York." (BAAQMD at transcript p. 4-149).

Likewise, 3M stated: "we would like to see there be more uniformity around this from permitting authority to permitting authority. In some case we see very great detail guidance or requirements on the part of the permitting authority as to how this is to be done. In other cases they're totally silent. We think that more uniformity would be helpful." (3M at transcript p. 2-055).

Discussion: How much Information Should be Required in a Compliance Certification?

1. How should applicable requirements be identified?

A central issue is how compliance certifications should identify "each term or condition that is the basis of the certification." In the "long" form each term is identified either by description or number, or both. In the "short" form the permit itself is generally referenced.

Some Task Force members view the ability to cross-reference the permit specifically provided in the rules as clearly contemplating a short form that would reference the permit as the basis for the certification. Other Task Force members raised concerns about the "short" form certification's failure to specifically identify the terms and conditions for which it certifies compliance. These Task Force members believe the short form certification does not adequately identify the terms and conditions for which compliance is being certified, particularly:

1. where the underlying permit itself uses extensive incorporation by reference and does not, on its face, include each applicable requirement and its associated monitoring,
2. where the permit allows for alternate operating scenarios or compliance options, or
3. where there are some terms included in the permit which are not actually appropriate for source certification.

These Task Force members stated that if a Title V permit itself makes extensive use of incorporation by reference and the compliance certification merely references that permit, it is not clear with which conditions the source is certifying compliance, which arguably could result in less accountability for the owner or operator who signs the certification. For example, Texas Title V permits incorporate by reference the conditions of applicable New Source Review (NSR) Permits. Those NSR permits in turn incorporate certain unspecified information from the NSR permit applications. When the compliance certification merely states that the source is certifying compliance with the Title V permit, it is not clear for which conditions compliance is being certified. Some Task Force members believe that such ambiguity regarding the requirements with which a source is certifying compliance is unacceptable under Title V and that, if the permit itself is not clear regarding a source's obligations, the source must specifically identify the requirements with which it is certifying compliance in the compliance certification form.

Likewise, if a permit allows the source several options for compliance with a specific requirement, and the compliance certifications merely references the whole permit, some Task Force members raised a concern that it would not be not clear which option to source chose (with which associated monitoring method) making it almost impossible for the public to track and review compliance certifications for their accuracy.

In response, other Task Force members noted that where an underlying NSR permit uses extensive incorporation by reference, the long forms currently in use merely require listing that permit condition in the Title V permit, which would not necessarily add clarity regarding the requirements with which the source was certifying compliance. Thus, they believed this concern was best addressed through a discussion of the appropriate permit content for applicable requirements rather than the format of the certification. These Task Force members also expressed concerns over the substantial burden of recreating the permit in a compliance certification, citing EPA's decision to allow cross-referencing of the permit as a basis for certification to permit requirements.

Some Task Force members, while not opposed to specifically cross-referencing Title V permit conditions by number in the compliance certification as long as the permit itself

clearly identifies all permit terms and conditions, remain opposed to the generic cross-referencing found in many short forms.

2. How should the method used to determine compliance be identified?

With the "long" form, the method used to determine compliance is specifically identified for each applicable requirement, either as a citation or in a summary fashion. For example, State forms either provide for listing the permit condition that is the method of compliance or a code (RR for records review, RK for recordkeeping, PM for parameter monitor, CEM for continuous emissions monitor, *etc.*). With the "short" form, however, the form includes a general statement that, for the terms for which the source is certifying continuous compliance (and thus not providing a line-by-line certification), the compliance determination is based on the monitoring, reporting and/or recordkeeping methods required by the Title V permit.

Some Task Force members expressed concern that the "short" form cannot adequately identify the method used to determine compliance where the permit itself does not, on its face, clearly identify the monitoring method required for each permit requirement, or where the permit provides for alternative compliance options. Likewise, where the source is permitted to rely on information other than the monitoring, reporting or recordkeeping required in the permit for determining compliance, the concern was raised that the short form does not adequately identify that information.

Other Task Force members believe that the monitoring references provided in the long form provide little insight into what was actually done anyway and balancing that against the burdens associated led them to the conclusion that the long form should not be used, particularly when the rules allow for cross referencing the permit. These Task Force members also stated that in their experience, while a certification may not specify the modes of operation authorized by the permit during the reporting period, such information is typically available in detailed reports that are submitted under the permit and many substantive requirements (*e.g.*, periodic MACT compliance reports). They viewed adding this information to the certification as an additional layer of reporting that is not necessary, since the information has already been submitted and certified for accuracy. In response, some Task Force members noted that other reports are often not easily accessible by the public and that one of the purposes of Title V was to consolidate this information for easy access.

Discussion also arose regarding whether or not sources should be required to use only the monitoring or reporting methods required by the permit in making a compliance/noncompliance certification. [This topic is discussed in more detail in the paper regarding Definitiveness of the Permit in Section 4.6 of this report]. It was recognized that where the permit specifies a particular method of compliance and the source does rely on different information to support its certification of continuous compliance, additional explanation regarding the method used for certifying compliance should be included in the certification form. The Task Force discussed whether a variation on the "short" form could be developed that would include information relied upon by the

source to make the certification that is not specified in the permit. The Task Force also discussed the extent to which alternative compliance options need to be separately listed in the certification form.

A related issue was raised regarding how sources identify the method of determining compliance for the monitoring, recordkeeping and reporting provisions of the Title V permit. Some Task Force members believe sources should not be required to identify a method for determining compliance with these requirements. Under this approach, the permittee would be required to identify the method of determining compliance only for the permit terms for which the permit specifies a method and that the permit should be cross-referenced for this purpose as provided in the rules. Other Task Force members suggested using generic language in the certification to indicate, for example, that compliance with all recordkeeping and reporting provisions in the permit was determined by record review.

3. What does/should continuous versus intermittent compliance mean and how should it be identified in the form?

Title V requires that sources identify whether they were in continuous or intermittent compliance during the certification period. Rather than indicating whether their compliance was continuous or intermittent, EPA's rules initially allowed sources to indicate whether the monitoring data was continuous or intermittent. The D.C. Circuit found these rules inconsistent with the statute. *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999). In June 2003, EPA changed its rules to require sources to specifically identify whether their compliance was continuous or intermittent. As a result of these changes, some States have rules that are inconsistent with the current Federal rules. Questions remain regarding whether local permitting authorities are requiring compliance certifications to identify whether compliance was continuous or intermittent and how "continuous" and "intermittent" compliance are being defined.

4. How should deviations and possible exceptions from compliance be identified?

In the "long" form, the compliance status – either continuous or intermittent - for each permit term must be individually stated on the form. With the "short" form, for all permit terms and conditions for which compliance is continuous, there is a general statement that the source was in continuous compliance. For permit terms for which the source experienced deviations, there is a specific listing of those terms and the deviations are identified. Some permitting authorities rely on Section 70.6(c)(5)'s statement that sources may cross reference the permit and previously submitted reports and, therefore, do not require facilities to include specific information regarding deviations previously reported to the permitting authority. Instead, facilities are allowed to simply reference that previous report.

Some Task Force members believe that complete information regarding all deviations should be included in the compliance certification. Those members feel that requiring the public and/or agency staff to go back through old files to find deviation reports, which

may have since been updated or corrected, is unreasonable. Other Task Force members believe this is a data management issue rather than a compliance certification issue, particularly given that the rules allow for cross-referencing.

One commenter noted "at least one opportunity for information to fall through the cracks" in the compliance certification process. The Portland Cement Association stated: "some States have indicated that deviations—such as an incident of excess emissions—that have been previously reported to the State need not be re-submitted when the semi-annual certifications are filed. A problem can arise if the same semi-annual certifications prepared for the State are sent to EPA. If individually reported deviations are not included in those certifications, then EPA is not notified of these incidents." *See* OAR-2004-0075-0037 at 2 (Portland Cement Ass'n). Some Task Force members believe that the referencing of previous reports is clearly allowed by the rules (40 CFR § 70.6(c)(5)) and the rule contemplates the compliance certification being submitted to EPA. As long as the certification is submitted, these Task Force members believe that the requirement has been met.

Recommendations

It was generally agreed among the members of the Task Force that compliance certifications are a valuable component of the Title V program and have increased management awareness regarding environmental enforcement issues. With respect to the optimal content and format of the compliance certification, two potential recommendations emerged from the discussions of the Task Force after considering the extensive public comments on the issue and these are noted below with identification of the supporters of each position. While there were divergent views in this area, there were areas of agreement that we also note below.

Recommendation #1

Most of the Task Force endorsed an approach akin to the "short form" certification, believing that a line-by-line listing of permit requirements is not required and imposes burdens without additional compliance benefit. Under this approach, the compliance certification form would include a statement that the source was in continuous compliance with permit terms and conditions with the exception of noted deviations and periods of intermittent compliance. Although the permittee would cross-reference the permit for methods of compliance, in situations where the permit specifies a particular monitoring method but the permittee is relying on different monitoring, testing or other evidence to support its certification of compliance, that reliance should be specifically identified in the certification and briefly explained. An example of such a case would be where the permit requires continuous temperature records to verify compliance with a minimum temperature requirement. If the chart recorder data was not recorded for one hour during the reporting period because it ran out of ink, and the source relies on the facts that the data before and after the hour shows temperature above the requirement minimum and that the alarm system which sounds if temperature falls below setpoint was functioning and did not alarm during the hour, these two items would be noted as the data upon which the source relies for certifying continuous compliance with the minimum temperature requirement.

(Voting on next page.)

(Voting for Recommendation #1)

In Favor (10)*: Schwartz, Hodanbosi, Hagle, Kaderly, Broome, Freeman, Paul, Morehouse, Wood, Golden
Opposed (4)*: Keever, Owen, Palzer, Powell
Abstentions:
Clarifications

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

Others on the Task Force believed that more detail than is included in the short form is needed in the compliance certification to assure source accountability and the enforceability of the certification. These members viewed at least one of the following options as acceptable (some members accepting any, while others accepting only one or two):

1. The use of a form that allows sources to use some cross-referencing to identify the permit term or condition to which compliance was certified. Cross-referencing would only be allowed where the permit itself clearly numbers or letters each specific permit term or condition, clearly identifies required monitoring, and does not itself include cross-referencing beyond detailed citations to publicly accessible regulations. The compliance certification could then cite to the number of a permit condition, or possibly the numbers for a group of conditions, and note the compliance status for that permit condition and the method used for determining compliance. In the case of permit conditions that are not specifically numbered or lettered, the form would use text to identify the requirement for which the permittee is certifying.
2. Use of the long form.
3. Use of the permit itself as the compliance certification form with spaces included to identify whether compliance with each condition was continuous or intermittent and information regarding deviations attached.

In Favor of This Range of Approaches (8): Sliwinski, van der Vaart, Haragan, Keever, Palzer, Owen, Powell, Van Frank
Opposed (10): Schwartz, Hodanbosi, Hagle, Kaderly, Broome, Freeman, Paul, Morehouse, Wood, Golden
Abstentions:
Clarifications: van der Vaart favors Option 2 but believes Option 3 is also supportable. Haragan and Owen favor Option 3. Powell, Palzer, and Van Frank favor Options 1 and 3.

Recommendation #3

Where the permit specifies a particular monitoring or compliance method and the source is relying on other information, that information should be separately specified on the certification form.
In Favor (18): Sliwinski, van der Vaart, Haragan, Keever, Palzer, Owen, Powell, Van Frank, Schwartz, Hodanbosi, Hagle, Kaderly, Broome, Freeman, Paul, Morehouse, Wood, Golden ***Opposed:*** ***Abstentions:*** ***Clarifications:***

Recommendation #4

Where a permit term does not impose an affirmative obligation on the source, the form should not require a compliance certification; *e.g.,* where the permit states that it does not convey property rights or that the permitting authority is to undertake some activity such as provide public notice of a revision.
In Favor (18): Sliwinski, van der Vaart, Haragan, Keever, Palzer, Owen, Powell, Van Frank, Schwartz, Hodanbosi, Hagle, Kaderly, Broome, Freeman, Paul, Morehouse, Wood, Golden ***Opposed:*** ***Abstentions:*** ***Clarifications:***

Recommendation #5

All forms should provide space for the permittee to provide additional explanation regarding its compliance status and any deviations identified during the reporting period.
In Favor (18): Sliwinski, van der Vaart, Haragan, Keever, Palzer, Owen, Powell, Van Frank, Schwartz, Hodanbosi, Hagle, Kaderly, Broome, Freeman, Paul, Morehouse, Wood, Golden ***Opposed:*** ***Abstentions:*** ***Clarifications:***

Related Topics: Definitiveness of the Permit; Incorporation of Applicable Requirements

Attachment: Exhibits A & B—Compliance Certification Forms

Exhibit A

Title V Task Force Paper on Compliance Certification Forms

Short Form

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION

RENEWABLE OPERATING PERMIT
REPORT CERTIFICATION

Authorized by 1994 P.A. 451, as amended. Failure to provide this information may result in civil and/or criminal penalties.

Reports submitted pursuant to R 336.1213 (Rule 213), subrules (3)(c) and/or (4)(c), of Michigan's Renewable Operating Permit (ROP) program must be certified by a responsible official. Additional information regarding the reports and documentation listed below must be kept on file for at least 5 years, as specified in Rule 213(3)(b)(ii), and be made available to the Department of Environmental Quality, Air Quality Division upon request.

Source Name _____ County _____

Source Address _____ City _____

AQD Source ID (SRN) _____ ROP No. _____ ROP Section No. _____

Please check the appropriate box(es):

☐ **Annual Compliance Certification (Pursuant to Rule 213(4)(c))**

Reporting period (provide inclusive dates): From _____ To _____

☐ 1. During the entire reporting period, this source was in compliance with **ALL** terms and conditions contained in the ROP, each term and condition of which is identified and included by this reference. The method(s) used to determine compliance is/are the method(s) specified in the ROP.

☐ 2. During the entire reporting period this source was in compliance with all terms and conditions contained in the ROP, each term and condition of which is identified and included by this reference, **EXCEPT** for the deviations identified on the enclosed deviation report(s). The method used to determine compliance for each term and condition is the method specified in the ROP, unless otherwise indicated and described on the enclosed deviation report(s).

☐ **Semi-Annual (or More Frequent) Report Certification (Pursuant to Rule 213(3)(c))**

Reporting period (provide inclusive dates): From _____ To _____

☐ 1. During the entire reporting period, **ALL** monitoring and associated recordkeeping requirements in the ROP were met and no deviations from these requirements or any other terms or conditions occurred.

☐ 2. During the entire reporting period, all monitoring and associated recordkeeping requirements in the ROP were met and no deviations from these requirements or any other terms or conditions occurred, **EXCEPT** for the deviations identified on the enclosed deviation report(s).

☐ **Other Report Certification**

Reporting period (provide inclusive dates): From _____ To _____

Additional monitoring reports or other applicable documents required by the ROP are attached as described:

_____

_____

_____

I certify that, based on information and belief formed after reasonable inquiry, the statements and information in this report and the supporting enclosures are true, accurate and complete

Name of Responsible Official (print or type) Title Phone Number

Signature of Responsible Official Date

* Photocopy this form as needed. EQP 5736 (Rev 11-04)

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION

RENEWABLE OPERATING PERMIT
DEVIATION REPORT

Authorized by 1994 P.A. 451, as amended. Failure to provide this information may result in civil and/or criminal penalties.

This form may be submitted in conjunction with the Renewable Operating Permit Report Certification form (EQP 5736) to report deviations from all general conditions and special conditions in the Renewable Operating Permit (ROP) for which deviations required to be reported by R 336.1213 (Rule 213) subrule (3)(c) have occurred. Additional information regarding the reports and documentation listed below must be kept on file for at least 5 years, as specified in Rule 213(3)(b)(ii), and be made available to the Department of Environmental Quality, Air Quality Division, upon request. Items 1 - 8 must be completed for all deviations being reported.

Source Name ______________________ County ____________

Source Address ______________________ City ____________

AQD Source ID (SRN) ________ ROP No. ____________ ROP Section No. ______

ROP Section Contact ______________________ Contact Phone No. ____________

Reporting Period (provide inclusive dates): From ____________ to ____________

Report Type: ☐ Annual ☐ Semi Annual ☐ Other (Describe) ____________

1. Group or Source Wide ID	2. Condition No.	3. Date(s) of Occurrence	4. Previously reported ? ☐Yes ☐ No If Yes, Date	5. Duration of Deviation
6. Method Used to Determine Compliance Status (if different from method specified in ROP)			7. Description of Deviation	
8. Reason for Deviation and Description of Corrective Action Taken				

1. Group or Source Wide ID	2. Condition No.	3. Date(s) of Occurrence	4. Previously reported ? ☐Yes ☐ No If Yes, Date	5. Duration of Deviation
6. Method Used to Determine Compliance Status (if different from method specified in ROP)			7. Description of Deviation	
8. Reason for Deviation and Description of Corrective Action Taken				

1. Group or Source Wide ID	2. Condition No.	3. Date(s) of Occurrence	4. Previously reported ? ☐Yes ☐ No If Yes, Date	5. Duration of Deviation
6. Method Used to Determine Compliance Status (if different from method specified in ROP)			7. Description of Deviation	
8. Reason for Deviation and Description of Corrective Action Taken				

*Photocopy this form as needed. Page ___ of ___ EQP 5737 (11/04)

Exhibit B

Title V Task Force Paper on Compliance Certification Forms

Long Form

TITLE V ANNUAL COMPLIANCE CERTIFICATION REPORT
NORTH DAKOTA DEPARTMENT OF HEALTH
DIVISION OF AIR QUALITY
SFN52738 (10-02)

PART 1. General Information:

Name of Company and Facility: XYZ Oilseeds Processing (Cass County Facility)

Facility Location: Cass Co. North Dakota

Reporting Period: January 2003 - December 2003 Permit No.: T5-G81005

Person Completing Form: _____ Title: _____

Phone No.: _____ Mailing Address: _____

PART 2. Compliance Status of Monitored Emission Units (Emission units listed under Monitoring Requirements and Conditions (Cond.) section of the permit: Complete for each emission unit for which monitoring, recordkeeping and reporting is required (use additional sheets if necessary):

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
1-Receiving Pit	Particulate &	1.1 lb/hr	3	ID - O&M Data	4.B.1	5 & 6	Yes
	Opacity	20%		ID - VE Observations	4.B.2	5 & 6	Yes
2-Receiving Pit	Particulate &	1.1 lb/hr	3	ID - O&M Data	4.B.1	5 & 6	Yes
	Opacity	20%		ID - VE Observations	4.B.2	5 & 6	Yes
11-Prep Scale	Particulate &	1.7 lb/hr Total (11-15)	3	ID - O&M Data	4.B.1	5 & 6	Yes
	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
11A-Seed Cov.	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
12-Scalpers	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
13-Decort.	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
15-Hull Scale	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
16-Aspirators	Particulate &	1.2 lb/hr	3	ID - O&M Data	4.B.1	5 & 6	Yes
	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes
17-Aspirators	Particulate &	1.2 lb/hr	3	ID - O&M Data	4.B.1	5 & 6	Yes
	Opacity	20%	3	ID - VE Observations	4.B.2	5 & 6	Yes

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
25A-Conditioner	Particulate & Opacity	7.5 lb/hr 20%	3	ID - RM 9 VE Evaluations	4.B.8	5 & 6	Yes
25B-Conditioner	Particulate & Opacity	7.5 lb/hr 20%	3	ID - RM 9 VE Evaluations	4.B.8	5 & 6	Yes
26-Flakers	Particulate & Opacity	1.6 lb/hr 20%	3 3	ID - O&M Data ID - VE Observations	4.B.1 4.B.2	5 & 6 5 & 6	Yes Yes
43-Boiler	NO_x SO_2 Particulate & Opacity	20.3 lb/hr 16.8 lb/hr 19.7 lb/hr 20%	3 3 3	ID - Emissions Test Data ID - Sulfur Analysis (Hulls): Fuel Type CD - Recordkeeping (Gas): Fuel Type ID - O&M Data CD - COMS Data	4.B.3 4.B.6 4.B.4 4.B.1 4.B.5	5 & 6 5 & 6 5 & 6 5 & 6 5 & 6	Yes Yes Yes Yes Yes
44-Boiler	NO_x CO SO_2 Particulate Opacity	7.0 lb/hr 1.8 lb/hr 3 lb/10^6 BTU 0.486 lb/10^6 BTU 20%	3 3 3 3 3	ID - Emissions Test Data ID - Emissions Test Data CD - Recordkeeping - Fuel Type CD - Recordkeeping - Fuel Type CD - Recordkeeping - Fuel Type	4.B.3 4.B.3 4.B.4 4.B.4 4.B.4	5 & 6 5 & 6 5 & 6 5 & 6 5 & 6	Yes Yes Yes Yes Yes
48-Extraction & Refining	Mineral Oil Scrubber	See EUI49	3	ID - O&M Data	4.B.1	5 & 6	Yes
49-Plant Wide Hexane Bubble	Hexane	475 Metric Ton/ rolling 12-mo.	3	ID - Emissions Calculation	4.B.7	5 & 6	Yes

***CD = Continuous Data:** The results of monitoring, including the results of instrumental or noninstrumental monitoring, emission calculations, manual sampling procedures, recordkeeping procedures, or any other form of information collection procedure that is designed to serve as monitoring on a continuous basis, provided: (1) the number of data records generated is equivalent to the number of averaging periods for the permit term and condition over the reporting period of the compliance certification, (2) the data have the same averaging period as the permit term and condition, and (3) the data are in the same units as the permit term and condition, or correlated directly with that permit term and condition.

****ID = Intermittent Data:** Data which are not continuous data.

*****Except for those permit deviations listed in the semi-annual monitoring/permit deviation reports for the reporting period.

PART 3. Compliance Status of Facility Wide and General Conditions:

For the reporting period, the facility was in compliance with the Facility Wide and General Conditions listed in the permit, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports.

Yes, to the above statement ☐ No, to the above statement ☐

PART 4. Other Permit Terms and Conditions:

For the reporting period, the facility was in compliance with all other permit terms and conditions listed in the permit not addressed in Parts 2 and 3 of this report, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports.

Yes, to the above statement ☐ No, to the above statement ☐

PART 5. Certification of Truth, Accuracy and Completeness:

I certify that, based on information and belief formed after reasonable inquiry, the statements and information contained in this report are true, accurate and complete.

Print Name of Responsible Official	Title
Signature of Responsible Official	Date

Note: Also, submit with this report: the Semi-Annual Monitoring/Permit Deviation Report (SFN 52737) for the period from July 1 - December 31.

Send this report to:

ND Department of Health
Division of Air Quality
1200 Missouri Avenue
Box 5520
Bismarck, ND 58506-5520

TITLE V ANNUAL COMPLIANCE CERTIFICATION REPORT
NORTH DAKOTA DEPARTMENT OF HEALTH
DIVISION OF AIR QUALITY
SFN52738 (10-02)

PART 1. General Information:

Name of Corporation and Facility: ABC Pipeline Corporation (McKenzie Co. Compressor Station)

Facility Location: McKenzie Co., North Dakota

Reporting Period: January 2003 - December 2003 Permit No.: T5-081019

Person Completing Form: _____ Title: _____

Phone No.: _____ Mailing Address: _____

PART 2. Compliance Status of Monitored Emission Units (Emission units listed under Monitoring Requirements and Conditions (Cond.) section of the permit: Complete for each emission unit for which monitoring, recordkeeping and reporting is required (use additional sheets if necessary):

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
C-510100 Engine	NOx	14.4 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	CO	6.0 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	Opacity	20%	4	CD - Recordkeeping: Type of fuel	5.B.2	6 & 7	Yes
C-510200 Engine	NO_x	14.4 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	CO	6.0 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	Opacity	20%	4	CD - Recordkeeping: Type of fuel	5.B.2	6 & 7	Yes
C-510300 Engine	NOx	2.9 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	CO	2.9 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	Opacity	20%	4	CD - Recordkeeping: Type of fuel	5.B.2	6 & 7	Yes
C-510400 Engine	NOx	2.9 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	CO	2.9 lb/hr	4	ID - Emissions Test Data	5.B.1	6 & 7	Yes
	Opacity	20%	4	CD - Recordkeeping: Type of fuel	5.B.2	6 & 7	Yes
C-510500 Engine	NO_x	19.4 lb/hr	4	ID - CAM Data	5.B.5	6 & 7	Yes
				ID - Emissions Test Data	5.B.1	6 & 7	Yes
	CO	19.4 lb/hr	4	ID - CAM Data	5.B.5	6 & 7	Yes
				ID - Emissions Test Data	5.B.1	6 & 7	Yes
	Opacity	20%	4	CD - Recordkeeping: Type of fuel	5.B.2	6 & 7	Yes

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
S-510900 Flare	SO_2	5570 lb/hr	4	ID - Parameter Monitoring: SO_2 Calc. (H_2S content & volume of gas flared)	5.B.3	6 & 7	Yes
	Opacity	20%	4	ID - RM 9 VE Evaluation	5.B.4	6 & 7	Yes

***CD = Continuous Data:** The results of monitoring, including the results of instrumental or noninstrumental monitoring, emission calculations, manual sampling procedures, recordkeeping procedures, or any other form of information collection procedure that is designed to serve as monitoring on a continuous basis, provided: (1) the number of data records generated is equivalent to the number of averaging periods for the permit term and condition over the reporting period of the compliance certification, (2) the data have the same averaging period as the permit term and condition, and (3) the data are in the same units as the permit term and condition, or correlated directly with that permit term and condition.

****ID = Intermittent Data:** Data which are not continuous data.

*****Except for those permit deviations listed in the semi-annual monitoring/permit deviation reports for the reporting period.

PART 3. Compliance Status of Facility Wide and General Conditions:

For the reporting period, the facility was in compliance with the Facility Wide and General Conditions listed in the permit, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports.

Yes, to the above statement ☐ No, to the above statement ☐

PART 4. Other Permit Terms and Conditions:

For the reporting period, the facility was in compliance with all other permit terms and conditions listed in the permit not addressed in Parts 2 and 3 of this report, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports.

Yes, to the above statement ☐ No, to the above statement ☐

PART 5. Certification of Truth, Accuracy and Completeness:

I certify that, based on information and belief formed after reasonable inquiry, the statements and information contained in this report are true, accurate and complete.

Print Name of Responsible Official _____ Title _____

Signature of Responsible Official _____ Date _____

Note: Also, submit with this report: the Semi-Annual Monitoring/Permit Deviation Report (SFN 52737) for the period from July 1 - December 31.

Send this report to:

ND Department of Health
Division of Air Quality
1200 Missouri Avenue
Box 5520
Bismarck, ND 58506-5520

TITLE V ANNUAL COMPLIANCE CERTIFICATION REPORT
NORTH DAKOTA DEPARTMENT OF HEALTH
DIVISION OF AIR QUALITY
SFN52738 (10-02)

PART 1. General Information:

Name or Company and Facility: MNO Electric Utility Company (Mercer County Station)

Facility Location: Mercer County, North Dakota

Reporting Period: January 2003 - December 2003 Permit No.: T5-F84011

Person Completing Form: _____ Title: _____

Phone No.: _____ Mailing Address: _____

PART 2. Compliance Status of Monitored Emission Units (Emission units listed under Monitoring Requirements and Conditions (Cond.) section of the permit: Complete for each emission unit for which monitoring, recordkeeping and reporting is required (use additional sheets if necessary):

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
1-Boiler	Particulate	0.10 lb/10^6 BTU & 445 lb/hr	5	ID - O&M Data ID - Emissions Test Data	7.B.7 7.B.8	8 & 9 8 & 9	Yes Yes
	SO_2	1.2 lb/10^6 BTU & 5,335 lb/hr	5	CD - CEM Data	7.B.1,3&4	8 & 9	Yes Yes
	NO_x	3,910 lb/hr	5	CD - CEM Data	7.B.1,3&4	8 & 9	Yes
	CO_2	NA	-	CD - CEM Data	7.B.1,3&4	8 & 9	Yes
	Opacity	20%	5	CD - CEM Data ID - O&M Data	7.B.1,2,3&4 7.B.7	8 & 9 8 & 9	Yes Yes
	Flow	NA	-	CD - Flow Monitor Data	7.B.1,3&4	8 & 9	Yes
2-Aux Boiler	Particulate	0.40 lb/10^6 BTU & 2.9 lb/hr	5	CD - Recordkeeping & Type of Fuel	7.B.5	8 & 9	Yes Yes
	SO_2	3 lb/10^6 BTU & 102.6 lb/hr	5	CD - Recordkeeping & Type of Fuel	7.B.5	8 & 9	Yes Yes
	NO_x	31.8 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	Opacity	20%	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	Hrs of Oper & Gal Fuel Used	NA	-	ID - Recordkeeping: Log Hrs of Oper & Gallons of No. 2 Oil Combusted	7.B.10	8 & 9	Yes

Emission Unit (EUI)	Contaminant/ Parameter Monitored	Emission/ Parameter Limit	Emission/ Parameter Limit Cond. No.	Method of Compliance/CD* or ID**	Monitoring Cond. No.	Recordkeeping & Reporting Cond. Nos.	Comply Yes*** or No
3-Heating Boiler	Particulate	0.53 lb/10^6 BTU & 0.33 lb/hr	5	CD - Recordkeeping & Type of Fuel	7.B.5	8 & 9	Yes
	SO_2	3 lb/10^6 BTU & 15.6 lb/hr	5	CD - Recordkeeping & Type of Fuel	7.B.5	8 & 9	Yes
	NO_x	4.4 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	Opacity	20%	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	Hrs of Oper	NA	-	ID - Recordkeeping: Log Hrs of Oper	7.B.10	8 & 9	Yes
4-Emergency Generator Engine	Particulate	2.6 lb/hr	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	SO_2	1.7 lb/hr	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	NO_x	35.6 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	Opacity	20%	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	Hrs of Oper	NA	-	ID - Recordkeeping: Log Hrs of Oper	7.B.10	8 & 9	Yes
5-Emergency Fire Pump Engine	Particulate	1.0 lb/hr	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	SO_2	0.94 lb/hr	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	NO_x	14.1 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	Opacity	20%	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	Hrs of Oper	NA	-	ID - Recordkeeping: Log Hrs of Oper	7.B.10	8 & 9	Yes
6-Scrubber Emergency Generator Engine	NO_x	33.9 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	CO	8.8 lb/hr	5	ID - Emissions Test Data	7.B.6	8 & 9	Yes
	Opacity	20%	5	CD - Recordkeeping: Type of Fuel	7.B.5	8 & 9	Yes
	Hrs of Oper	NA	-	ID - Recordkeeping: Log Hrs of Oper	7.B.10	8 & 9	Yes
M1-Live Storage Building	Particulate & Opacity	2.85 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M2-Transfer House	Particulate & Opacity	1.42 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M3-N. Distribution Building	Particulate & Opacity	5.66 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M4-S. Distribution Building	Particulate & Opacity	4.87 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M5-Lime Storage Silo	Particulate & Opacity	33.52 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M6-Recycle Fly Ash Silo	Particulate & Opacity	50.82 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M7-Fly Ash Silo	Particulate & Opacity	33.31 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M8-Lime Storage Silo: Water Trmt	Particulate & Opacity	19.18 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes
M9-Lime Unloading	Particulate & Opacity	5.7 lb/hr 20%	5	ID - O&M Data ID - VE Observations	7.B.7 7.B.9	8 & 9 8 & 9	Yes Yes

Note: Some permits have an additional condition requiring the submission of test reports within 60 days of test data.

***CD = Continuous Data:** The results of monitoring, including the results of instrumental or noninstrumental monitoring, emission calculations, manual sampling procedures, recordkeeping procedures, or any other form of information collection procedure that is designed to serve as monitoring on a continuous basis, provided: (1) the number of data records generated is equivalent to the number of averaging periods for the permit term and condition over the reporting period of the compliance certification, (2) the data have the same averaging period as the permit term and condition, and (3) the data are in the same units as the permit term and condition, or correlated directly with that permit term and condition.

****ID = Intermittent Data:** Data which are not continuous data.

*****Except for those permit deviations listed in the semi-annual monitoring/permit deviation reports for the reporting period.

PART 3. Compliance Status of Facility Wide and General Conditions:
For the reporting period, the facility was in compliance with the Facility Wide and General Conditions listed in the permit, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports. Yes, to the above statement ☐ No, to the above statement ☐

PART 4. Other Permit Terms and Conditions:
For the reporting period, the facility was in compliance with all other permit terms and conditions listed in the permit not addressed in Parts 2 and 3 of this report, except for those permit deviations listed in the semi-annual monitoring/permit deviation reports. Yes, to the above statement ☐ No, to the above statement ☐

PART 5. Certification of Truth, Accuracy and Completeness:

I certify that, based on information and belief formed after reasonable inquiry, the statements and information contained in this report are true, accurate and complete.

Print Name of Responsible Official _____ Title _____

Signature of Responsible Official _____ Date _____

Note: Also, submit with this report: the Semi-Annual Monitoring/Permit Deviation Report (SFN 52737) for the period from July 1 - December 31.

Send this report to:

ND Department of Health
Division of Air Quality
1200 Missouri Avenue
Box 5520
Bismarck, ND 58506-5520

4.8 TOPIC: STARTUP, SHUTDOWN, AND MALFUNCTION

Issue Observation/Description

The Task Force received testimony and comments raising the issue of whether startup, shutdown, malfunction (SSM) defenses, both in State implementation plans and in Federal regulations, create enforcement and compliance problems. This paper discusses those concerns and how they may or may not be addressed through Title V.

Statutes/Regulations/Guidance

Title V: Title V of the Clean Air Act (CAA or the Act) requires that State permitting programs have adequate authority to "assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act." 42 U.S.C. § 7661a(b)(4). In addition, "each permit issued …shall include enforceable emission limitations and standards … and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable State implementation plan." 42 U.S.C. § 7661c(a).

EPA's Part 70 rules include an emergency provision that states:

> (g) *Emergency provision* –
>
> (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 a defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.
>
> (3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:
>
> (i) An emergency occurred and that the permittee can identify the causes(s) of the emergency;
>
> (ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section [regarding prompt reporting of deviations]. This notice must contain an adequate description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

40 C.F.R.§ 70.6(g).

State Implementation Plans: The CAA requires State Implementation Plans (SIPs) to provide for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) through enforceable emission limits. 42 U.S.C. § 7410(a)(2). EPA is prohibited from approving a SIP that would interfere with attainment or any other applicable requirement of the Act. 42 U.S.C. §§ 7410(k)(3), (l). In affirming EPA's denial of one State's request for a SIP revision to include an SSM provision, the 6th Circuit affirmed EPA's determination that "SIPS cannot provide broad exclusions from compliance with emission limitations during SSM periods." *Michigan Manufacturers Association v. Browner, et al.*, 230 F.3d 181,185 (6th Cir. 2000). (Affirming EPA's determination that automatic exemptions "jeopardize ambient air quality … because the rules excuse compliance from applicable emission limitations and provide no means for the State to enforce the NAAQS.")

Under EPA's SIP policy, regarding excess emissions during SSM, States may provide affirmative defenses to penalties for violations caused by periods of excess emissions due to malfunctions, startup, or shutdown, but may not provide "automatic" exemptions for emissions in excess of emission limits. According to EPA's policy, "because excess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards, EPA views all excess emissions as violations of the applicable emission limitation." In addition to affirming States' ability to exercise enforcement discretion, EPA's policy allows states (1) to craft limited affirmative defenses to penalties for violations during SSM periods, and (2) in limited circumstances to build into a source-specific or source-category-specific emission standard provisions meeting certain criteria which State that the otherwise applicable emission limitations do not apply during narrowly defined startup and shutdown periods.[6]

[6] EPA's SIP policy is set out in the following series of documents: Memorandum from Kathleen Bennett, Assistant Administrator for Air, Noise and Radiation, "Policy on Excess Emissions During Startup and Shutdown" (Sept. 28, 1982); Memorandum from Kathleen Bennett, EPA Assistant Administrator for Air,

EPA's policy outlines the conditions of the limited permissible affirmative defense to penalties for malfunctions. The affirmative defense may only apply where: (1) the excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator, (2) the excess emissions did not stem from any activity that could have been foreseen and avoided or planned for and could not have been avoided by better operation and maintenance practices, (3) air pollution controls and processes were maintained and operated in a manner consistent with good practice for minimizing emissions, (4) repairs were made quickly (including the use of off-shift labor and overtime if necessary), (5) the amount and duration of the excess emission was minimized to the maximum extent practicable, (6) all possible steps were taken to minimize the impact on ambient air quality, (7) all emission monitoring systems were kept in operation if at all possible, (8) the owner or operator's actions in response to the excess emissions were documented by "properly signed, contemporaneous operating logs, or other relevant evidence," (9) the emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance, and (10) the owner/operator promptly notified the regulatory agency. EPA 1999 SIP Policy, Attachment at 3-4.

Further, the policy clarifies those circumstances where the affirmative defense may not apply. It may not apply to "bar EPA's or citizen's ability to enforce applicable requirements." It cannot apply to "SIP provisions that derive from Federally promulgated performance standards or emission limits, such as new source performance standards (NSPS) and national emissions standards for hazardous air pollutants (NESHAPS)," which already provide SSM exemptions where EPA deemed them appropriate,[7] and it cannot apply "for areas and pollutants where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."

With respect to startup and shutdown exemptions, EPA's policy notes:

> In general, startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design, and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.

EPA 1999 SIP Policy, Attachment at 5.

Noise and Radiation, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (February 15, 1983); Memorandum from Steven Herman, EPA Asst. Administrator for Enforcement and Compliance Assurance, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20, 1999) (EPA 1999 SIP Policy); Memorandum from Eric Schaeffer, Director Office of Regulatory Enforcement, "Re-Issuance of Clarification – State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown. (Dec. 5, 2001).

[7] Because NSPS and NESHAPs are "technology-based" standards, they are statutorily required to take into account technological limitations during SSM periods.

EPA's policy does allow States to adopt general affirmative defense provisions to penalties for excess emissions caused by startup and shutdown subject to the following limitations: (1) the periods of excess emissions were short and infrequent, and could not have been prevented through careful planning and design, (2) the periods of excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance, (3) if caused by bypass, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage, (4) the facility was operated at all times consistent with good practice for minimizing emissions, (5) the frequency, duration, and impact on ambient air quality was minimized, (6) all monitoring systems were kept in operation if possible, and the owner or operator actions during the period of excess emissions were documented in "properly signed, contemporaneous operating logs, or other relevant evidence," and (7) the owner or operate promptly notified the appropriate regulatory agency. EPA 1999 Policy, Attachment at 6-7.

In addition, EPA's policy allows States, in limited circumstances, to create narrowly-tailored SIP revisions for certain source categories that take technological limitations into account and provide that otherwise applicable emission limitations do not apply during narrowly defined startup and shutdown periods. Such SIP revisions must (1) be limited to "specific, narrowly-defined source categories using specific control strategies," (2) show that use of the control strategy is "technologically infeasible during startup or shutdown," (3) ensure that operation in startup or shutdown modes are minimized to the maximum extent practicable, (4) analyze potential worst-case emissions during exempt periods, (5) take all possible steps to minimize the impact on ambient air quality, (6) require that the facility be operated at all times in a manner consistent with good practice for minimizing emissions and that best efforts have been used regarding planning, design, and operating procedures to meet the otherwise applicable emission limitation, and (7) require the owner or operator to document actions during startup and shutdown periods in "properly signed, contemporaneous operating logs, or other relevant evidence." EPA 1999 Policy, Attachment at 6.

In December 2001, EPA issued a memorandum clarifying that its 1999 Policy:

> was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly, the Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups, and shutdowns that reflect approved SIP provisions, including opacity provisions, or to alter the emergency defense provisions at 40 C.F.R. §70.6(g). Existing SIP rules and 40 C.F.R. §70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. . . . [I]t is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the Guidance and the statutory principles on which the Guidance is based.

Memorandum from Eric Schaeffer, Director Office of Regulatory Enforcement, "Re-Issuance of Clarification – State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown (Dec. 5, 2001).

***National Emission Standards for Hazardous Air Pollutants*:** Section 112 of the CAA requires EPA to set initial emission standards for hazardous air pollutants that "require the maximum degree of reduction in emissions of the hazardous air pollutants … achievable for new or existing sources" taking into consideration costs and any non-air quality health and environmental impacts and energy requirements. 42 U.S.C. § 7412(d)(2). Once initial standards are set, EPA is required to review such standards within eight years of promulgation to ensure they provide an ample margin of safety to protect public health. *Id.* § 7412(f)(2).

The Act requires that numerical standards be set whenever it is feasible to promulgate and enforce such standards. *Id.* § 7412(h)(4). If it is not feasible, EPA may promulgate a "design, equipment, work practice, or operational standard," or some combination thereof, in lieu of a numerical standard. *Id.* § 7412(h)(1).

EPA's regulations governing NESHAPS State that sources must operate during startup, shutdown and malfunction "in a manner consistent with safety and good air pollution control practices for minimizing emissions" and that "the general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices." 40 C.F.R. § 63. 6(e)(1)(i). The rules require sources to develop a startup, shutdown, malfunction plan and to operate the source in compliance with that plan during startups, shutdowns and malfunctions. *Id.*.§ 63.6(e)(3).

New Source Performance Standards (NSPS): Section 111 of the CAA requires EPA to set standards of performance for new stationary sources that "reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). If it is not feasible to prescribe or enforce a standard or performance, EPA may instead promulgate a "design, equipment, work practice or operational standard, or combination thereof." *Id.* § 7411(h).

EPA's regulations governing NSPS require that sources conduct "performance tests" under prescribed representative conditions. The regulations also provide that "operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard." 40 C.F.R. § 60.8(c). Sources using continuous emission monitoring systems still must report "excess emissions" (as defined in the individual subpart) that

occur during SSM periods. *Id.* § 60.7(c). Because such NSPS "excess emissions" reports may include data for periods during which emission limitations do not apply, it should be noted that the term is used differently in the NSPS than under EPA's SIP Policy. Such monitoring data may be used to determine whether the source is in compliance with the "general duty" to maintain and operate any affected facility including associated air pollution control equipment "in a manner consistent with good air pollution control practice for minimizing emissions," which applies at all times, including during SSM periods. *Id.* § 60.11(d).

Summary of Comments Received

The majority of comments received were from environmental group representatives who felt that inclusion of SSM provisions or defenses in permits undermined the ability of Title V permits to assure compliance. The comments went both to the existence of such provisions in underlying rules and to the manner in which the provisions are incorporated (or not incorporated) into permits.

With respect to the existence of SSM provisions, several commenters objected to issuance of permits with SSM provisions that are not consistent with EPA's 1999 policy on future SIP approvals. With respect to incorporation of SSM provisions and the Part 70 "emergency defense," several commenters asserted that permits often are not clear regarding the applicability of such provisions or defenses to specific permit terms or conditions. For example, permits provide an emergency defense for technology-based standards, but many fail to identify which of the standards in the permit are technology-based. In other cases, existing SSM provisions are not reflected in the permit at all, or are incorporated through SSM plans that are not part of the permit. These commenters generally suggested that sources be prohibited from relying on SSM provisions or defenses that are not spelled out in the permit, even if they exist in underlying rule of permit. Finally, several commenters asserted that permits do not adequately define the scope of SSM provisions (*e.g.*, clearly define what constitutes SSM), or place the burden on the source to prove that the provision applies to a specific event (*e.g.*, prove that there was a malfunction).

A more complete summary of comments received is provided as an attachment.

Task Force Discussion

Although the Task Force identified a number of potential discussion items related to SSM provisions and the Part 70 emergency defense, the Task Force focused on the degree to which the Title V permitting process could or should be used to provide more specificity to existing SSM provisions. Task Force members' view on that issue generally mirrored their view on whether permitting officials have authority to alter existing requirements (*e.g.*, requirements in SIPs, NSPS, MACT, PSD/NSR permits) in the Title V permitting process.

Those who felt that Title V requires a permitting authority to include additional requirements if necessary to assure compliance supported development of new permit terms to define how any SSM provisions would apply to specific sources. Those Task Force members pointed out that most SSM provisions rely on very general definitions or specify only best practices. These Task Force members believe that provisions are not practically enforceable because without specificity as to what constitutes a startup, shutdown or malfunction, it is difficult to determine whether an SSM provision applies in a given situation or whether the source violated the emission limit. One Task Force member pointed out that the definitions may even clearly indicate when a startup, shutdown, or malfunction period begins or ends.

Those who felt that Title V does not provide that authority believed that while sources could agree to comply with more precise definitions, permitting officials could not impose new or different definitions through Title V without changing the underlying requirement. Those Task Force members pointed out that because a determination of what constitutes SSM often is very event specific, any attempt to define SSM up front in more detail could result in elimination of the exception for legitimate SSM events that were not anticipated in the permitting process, thus resulting in a more stringent emission standard.

Given the differing views on the existence of authority, the Task Force's discussion generally focused on practical and policy considerations associated with using Title V permits to define SSM. Several Task Force members strongly believed that providing more specific definitions of SSM would be very difficult as a practical matter and that was the reason why the existing definitions are so general (*i.e.*, if they could have been defined more precisely they would have been). One Task Force member stated that permitting officials must already have developed standards by which they review and evaluate SSM reports to determine whether the exceptions apply, and that those standards could be verbalized in permits. The Task Force did not agree on whether the standards currently used for such review were sufficiently objective to incorporate into permits.

Several Task Force members noted that startup and shutdown events are different from malfunction events in that they can be planned better and that more is known about emissions during those events, which would allow a permitting authority to include these emission in a permit. The Task Force briefly discussed the degree to which startup and shutdown might be defined for specific categories of sources, like combustion turbines and boilers, but did not reach consensus on whether one definition would be sufficient for all sources in a category or even whether a precise definition (*e.g.*, "x" number of hours) could be developed that would cover all possible startup scenarios for a single source.

One Task Force member noted that the Texas Commission on Environmental Quality has historically refused to define SSM activities by permit, but is moving towards permitting such events because it is developing a rule that may remove existing affirmative defenses. The Task Force member believed that the process would be time-consuming. Another Task Force member noted that attempts by other States to define events like startup and shutdown in preconstruction permits was now resulting in multiple requests for permit

revisions because the sources were discovering that the definitions were too narrow and they were unable to comply with the terms all of the time.

One Task Force member suggested that better explanations by permitting officials of the purpose of SSM provisions, and better explanations as to how they apply in the context of specific rules might help address some of the public's concerns.

The Task Force also briefly discussed the possibility of providing more precise requirements for a source to respond to events that it has reported as malfunctions. One Industry Task Force member pointed out that it is difficult to define the best course of action to address problems that may not be anticipated. That member noted that same issue has made the Part 63 SSM plan provisions controversial

Given the differing perspectives, the Task Force did not reach consensus on many recommendations. One recommendation that did get support from all members was that Title V permits should be clear about which emission limits are subject to the Part 70 emergency defense (see Recommendation #3). The Task Force did not agree, however, on how broadly that defense should be applied under EPA's rules (see Recommendation #4).

During discussion many Task Force members voting in favor of Recommendation #3 stated that they did not believe that a failure to be clear about applicability of the defense would prevent the source from asserting it, only that permit writers should strive to avoid such disputes by reflecting applicability in the permit. The Task Force similarly agreed that to prevent disputes, a permitting authority should draft permits to include all available SSM provisions and affirmative defenses and make their applicability clear. However, because the Task Force members did not agree on the consequences of failure to reflect such provisions in the permit, the Task Force was not able to agree on the wording of a specific recommendation.

Two recommendations (Recommendations #1 and #5) that permits be used to provide more specificity for vague terms got strong support from environmental group Task Force members, but did not get the support of the majority of the Task Force. One recommendation that such issues be addressed only through rulemaking (Recommendation #2) did receive support from the majority of the Task Force, but did not receive the support of any environmental group Task Force members.

State Implementation Plan (SIP) related issues were discussed by the Task Force but did not result in specific recommendations. One Task Force member explained that emissions inventories used to develop SIPs often do not include the excess emissions that result from SSM. Emissions inventories often are based on steady-State operation and do not account for higher emissions that occur when operating outside those steady-State conditions. Since SIP development work is done using these emissions inventories, emissions of SSM are generally not included in the air quality analyses that are used by permitting authorities to determine how to attain or maintain compliance with the national ambient air quality standards and other air quality goals. He was concerned that

this could result in incomplete and/or inaccurate assessments of air quality impacts. Although several Task Force members agreed this was an issue, the Task Force generally agreed that it was a SIP development/emissions inventory issue and not a Title V issue.

Recommendations

Recommendation #1

Where the applicable requirements use vague terms (*e.g.*, "minimize emissions during SSM events"), the Title V permit should include conditions sufficient to verify how that applies to the source.

In Favor (8)*: Palzer, Powell, Owen, Keever, Raettig, Sliwinski, Kaderly, Van Frank
Opposed (10)*: Paul, Wood, Hodanbosi, Morehouse, Hagle, Freeman, Schwartz, van der Vaart, Golden, Broome
Abstentions:
Clarifications:

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

To the extent EPA or a State believes a rule inadequately describes the applicability of SSM provisions, the rule should be revised rather than addressing this in case-by-case permit proceedings.

In Favor (11): Broome, Paul, Hodanbosi, Wood, Morehouse, Hagle, Freeman, Schwartz, van der Vaart, Kaderly, Golden
Opposed (7): Sliwinski, Palzer, Powell, Owen, Keever, Raettig, Van Frank
Abstentions:
Clarifications: Sliwinski opposes based on "rather than." Kaderly joins in Sliwinski's clarification.

Recommendation #3

Title V permits should be clear as to which limits are subject to the part 70 emergency defense (*e.g.*, under the current rule, technology based limits).

In Favor (18): Broome, Freeman, Hagle, Hodanbosi, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, van der Vaart, Wood, Kaderly, Golden, Van Frank
Opposed:
Abstentions:
Clarifications: Freeman and Broome clarify that a permit's failure to be clear on applicability would not prevent a source from asserting the defense.

Recommendation #4

The emergency defense should cover all limits in the Title V permit that are based on being achieved through the application of technology.
In Favor (9): Broome, Paul, Wood, Freeman, van der Vaart, Hodanbosi, Sliwinski, Morehouse, Golden ***Opposed (5):*** Schwartz, Powell, Keever, Palzer, Van Frank ***Abstentions (4):*** Hagle, Raettig, Owen, Kaderly ***Clarifications:*** Schwartz opposes in that he views this as a new substantive requirement which Title V was not to create.

Recommendation #5

Where a permit includes an affirmative defense for startups and shutdowns, or the emission limits do not apply during those events, the permit should define what constitutes startup and shutdown if it is anticipated that emissions during such events would exceed the limits in the relevant standard.
In Favor (6): Powell, Owen, Keever, Raettig, Van Frank, Palzer ***Opposed (12):*** van der Vaart, Hagle, Broome, Sliwinski, Paul, Wood, Hodanbosi, Morehouse, Freeman, Schwartz, Kaderly, Golden ***Abstentions:*** ***Clarifications*:** Schwartz, Sliwinski, and Kaderly clarify that it should be done where practical.

Related Topics: Monitoring, Definitiveness Of Permit, New Substantive Requirements/Definitiveness Of Permit

Attachment

Oral Testimony

Environmental Law and Policy Center: "And my personal experience was with the start-up, shutdown, malfunction provisions, which at the State level here in Illinois are not consistent with EPA guidance, and they are not consistent with the goals of the program. The permit must be consistent with EPA's guidance. I think that's basic. EPA writes this guidance for a reason. There are lengthy memos laying out the requirements for start-up, shutdown, and malfunction, and then what has happened in Illinois is a very boiled-down, limited provision instead. …

In addition, consistent with this provision, the State has issued draft Title V permits that are also explicitly contrary to the EPA guidance. Now, I realize I'm getting into the realm of the requirements that the Title V permit be consistent with the State implementation plan, which it is, and the requirement that the Title V permits be consistent with EPA regulations and guidance. And again, this is where the problem lies. We've ended up with a State implementation plan that's not consistent with EPA objectives, and as a commenter on a permit, I then get told, "Well, but this is consistent with our SIP." And I'm saying, looking at EPA guidance, saying, "That can't be possible because this SIP shouldn't be allowed." So I am left without recourse, even though I've

identified something that is a problem. So, allow me, then, to comment on these permits that we then saw."

ELPC also gave an example of a Title V permit that included "a condition that authorized continued operation in violation of applicable requirements, just on its face inconsistent with EPA guidance."

New Jersey Dept. of Env. Protection: "Startup, shutdown, malfunctions, we think the reporting of these is very important, and we include our affirmative defense reporting as a requirement in our operating permit. This involves reporting any exceedances during these situations and what actions are taken to address those exceedances and prevent or minimize them in the future."

Reed Zars: "Another sort of point on trying to make the Title V permits a bit more clearer or open or available to a lay people is to explain in the permit why, for example, an emergency defense may be available. As I understand it, emergency defense is only available against a technology-based limit, but often you'll just see a Title V permit that just has emergency and it lists the statutory and regulatory language, and does it apply, does it not, to which emission in here, which ones are technology based, which ones are SIP or health based or ambient based? You don't know. There's no description. There isn't even a statement in there that says this only applies to the technology base or the technology based emission points on this facility are X, Y, and Z, to which this defense applies. …

for example, let's look at the NSPS. Well, the startup is defined as the putting into operation of an affected facility, I think, or something like that, and even with that very limited definition, one could through the Title V program require a source to describe what it was doing during that time and demonstrate why all of that period -- and I agree with the woman before me where you can get hours or you can get days of alleged startup. Why all that time is necessary to put that facility into operation? Same thing with a shutdown. You have a very dry definition, you know, the cessation of the operation of an affected facility. I think that's almost verbatim out of the NSPS. Well, explain all of the times -- all of the periods of time and why it was necessary to cease the operation of that facility. That would -- not messing around with anything, I'm not putting a time limit on it, not rewriting any regulation, I'm just asking you to fully justify your characterization of that startup or that shutdown. I think that would be very helpful. For malfunction is probably the -- we'd have a real mine field here or a gold mine because there are requirements, qualitative requirements to establish what a malfunction is, and you shall clearly State and provide the reasons for or justification why this is a malfunction, why it's out of your control, did it meet all the elements of being an unanticipated event. So it meets all of the requirements of the malfunction defense. That would be a huge boost forward. So those are sort of off the top of my head ways in which I think within your Title V purview and within the law you could still get much better report and much better ability of citizens to analyze the validity of those claims. …

The previous speaker talked about exceptions and startup, shutdown, malfunction. I agree with her in part and I also agree with the questioners there that part of your problem is the underlying regulation. There are many that are, I think, very outdated now but do set out almost a blanket startup, shutdown, malfunction. I have been in involved in litigation over those for years. I think what is very important that all Title V permits should have, and I haven't seen one yet that says this clearly, to the extent that there are exceptions, they are listed in the permit. So it's not just the limits, but the exceptions to those permits, and then a very clear statement that us lawyers are used to seeing about no other exception shall be allowed or implied. That's always the way I interpreted Title V permits, but every time you go out and push on enforcing one of these permits, with no exception I would say over the last five years that I have been enforcing these, the company will come back and claim others that were supposedly intended or were somehow found another underlying regulation. And I think that's just sort of hide the ball game that the Title V program was meant to eliminate. And it happened to a large degree, and I've never found a Title V permit I could say, look, no, no, you may have startup, shutdown, malfunction, but you don't have load change or you don't have bad fuel quality or high ash hopper or some other excuse, I'm not going to take it, it's not there. So I think that would really help on the citizen enforcement side."

Mid-Atlantic Environmental Law Center: "Language in the Title V permits is often vague and unclear on what's required to be a malfunction or an upset. Any lawyer representing a facility, if you try and say there's a violation, they'll say, there's an upset or there's a malfunction. It would be good -- this is an area that you should really take a look at, making an improvement, putting the burden, making clear that the burden is on the facility to demonstrate that. Whether you actually allow a malfunction or an upset, you know, especially when you have a dozen of these events happening over months and months, after a period of time, there's a problem there. It's not just a one-time occurrence."

George Hays: "What I'm saying is that if you have a provision in a Title V permit that -- and there are alleged defenses that come with that -- then those defenses ought to be specified in the permit. Otherwise -- because sources have the opportunity to look at those permits and make a claim. For instance, if they assert there's a particular type of malfunction defense or whatever, there's a draft permit that's issued. They have the opportunity to look at that. And if they don't stand up and say, "Hey, there's a malfunction defense that you forgot to include in here," and then the permit goes final; then after that they want to assert that malfunction defense, I think that's a violation of the permitting scheme."

California Communities Against Toxics: "I think that the lack of clarity -- again, it eviscerates the enforceability of the Title V permit when a facility could just pull out its startup, shutdown and malfunction plan and say, well, see here, it was included by reference in the Title V permit and we're in compliance with it. … when the startup, shutdown, malfunction plans are just referenced in the Title V permit, it essentially eviscerates the public's ability or the citizens surrounding the facility's ability to effectively enforce against a facility that is out of compliance with the plan or out of compliance with what should be a reasonable plan. …

Often the plans are just reference in the Title V permit. They're not even included in the permit, much less is the public made aware of the conditions of the startup, shutdown and malfunction plan. It will just simply say there's a plan referred to it and that the requirements of that plan are included in the Title V permit. And then there was also an issue earlier in the Bush administration where you were able to make changes to the plan without public comment, and that obviously is not -- we're going to rely upon a startup, shutdown and malfunction plan to show that we're in continued compliance with the Clean Air Act, but you can make changes to the plan anytime you want without oversight by the public. So that's all very problematic."

Don Van der Vaart: "But where this really plays out now, and you're absolutely right, is in Title V, because we have a certain number of companies, one utility, who says, "We don't have excess emissions. They're malfunctions." And so in other words they've used it to define their compliance status. And I guess my point is, is that even in those States that have SIPs that you think are inconsistent with these guidance memos, I think you've looked to find that they're not even following the rules themselves. In other words, they're not even going through the steps to get to the point they can certify compliance because I've got a malfunction. So the guidance isn't all that terrible. I know you've got this issue of the violation versus just the enforcement exemption, but you also need to look at I don't think they're even following the rules that are there."

Kelly Haragan: "While Illinois's provision is vague -- that is a huge problem -- there is other States where it's flat-out clearly illegal, too. I think to just realize there is this big problem and say, "Well, we've discovered it through Title V. It's been brought to the forefront. It's not a Title V issue. It's a SIP issue," that defeats the purpose of Title V. Title V is supposed to raise these issues so we can address them, not to just push them to the sideline. So I think it is a really important issue, and thanks for raising it."

MR. SCHWARTZ: That was going to be a follow-up question. If you thought it would be helpful if the permit at least specified that the burden has to be carried by the facility, and I think you just answered that yes, that would be helpful.

MR. UKEILEY: Yes

Galveston-Houston Association for Smog Prevention: "First is the lack of correct or consistent rules governing startup, shutdown, upset and maintenance processes are very relevant to Title V because they help really set the framework in which compliance is determined and emission reports are generated. I spend an awful lot of time looking at emissions inventory data and annual emission reports, various things like that from companies. And the definitions and the presence or absence of rules governing those particular procedures are critical to how one makes sense of annual emission reports and emission statements."

Written comments

Galveston-Houston Association for Smog Prevention: expressed concern that routine startup, shutdown, and maintenance emissions are not included in air pollution permits in Texas. It appears that the policies of the permitting agency, as noted in guidance documents available on the Texas Commission on Environmental Quality's website, effectively authorize an unknown and unquantifiable amount of air pollution during these routine operations. (0057 p. 8)

New Jersey: commented that, for exceedances due to start up/shutdown or malfunctions, the permit should require reporting, including a description of the exceedance or event, and actions taken to correct the problem and prevent recurrence. New Jersey noted that as sources are better controlled, emissions associated with start up, shutdown, and malfunctions may represent the majority of emissions so reporting of the incident and the requirement to minimize such incidents are increasingly important. (0017, p.4)

The Portland Cement Association suggested that startup-shutdown reporting requirements distinguish between units for which startup-shutdown is routine and those for which the process is more significant and anomalous. The reporting requirements for routine startups and shutdowns should be less stringent. (0037, p.2)

4.9 TOPIC: COMPLIANCE SCHEDULES

Issue/Observation Description

What this paper addresses: This paper discusses concerns raised by commenters and Task Force members regarding what constitutes a "determination of noncompliance" sufficient to require inclusion of a compliance schedule in a permit. It also addresses questions raised regarding permitting authorities' obligation to investigate and resolve allegations of noncompliance before it issues a Title V permit.

Legal Requirements: Title V requires a "responsible official" to include in a source's permit application a compliance plan and certification of the source's compliance status with respect to applicable requirements, and requires permitting authorities to include a schedule of compliance in the final permit for any applicable requirement with which the source will not be in compliance at permit issuance.

Specifically, under CAA § 503(b)(1), each permit application must include:

> a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

Each "compliance plan" and "application for a permit" must be "signed by a responsible official who shall certify the accuracy of the information submitted." *Id.* § 503(b)(3).

CAA § 504(a) further requires that each permit include, among other things, "enforceable emission limitations and standards, [and] a schedule of compliance." CAA § 501(3) defines "schedule of compliance" as "a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition."

At issuance, Title V permits must include all applicable requirements. For applicable requirements promulgated after issuance of a permit, permitting authorities may delay inclusion of new applicable requirements until permit renewal if the permit has less than three years left to renewal. *Id.* § 502(b)(9). At issuance, a permitting authority may (but is not required to) make a determination that some requirements are "not applicable." *Id.* § 504(f). In such case, the permit must include this determination or a "concise summary thereof." *Id.*

EPA's implementing regulations provide that if a source is in compliance with an applicable requirement, the permit application must include a statement that the source will continue to comply. 40 C.F.R. §70.5(c)(8). If the source is not in compliance with a particular requirement, the source must provide in its permit application a description of how it will come into compliance, and a compliance schedule that includes, among other

things, "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance." *Id.* § 70.5(c)(8). The final permit must include a schedule of compliance "consistent with" the source's compliance plan. *Id.* § 70.6(c)(3). (The text of EPA's regulations are provided in the attachment to this paper.) EPA's regulations also make clear that a permit application "may not omit information needed to determine the applicability of, or to impose, any applicable requirement . . .," § 70.8(c), and must contain a certification by a responsible official of "truth, accuracy, and completeness . . . based on information and belief formed after reasonable inquiry." *Id.* § 70.8(d).

In anticipation of the burdens associated with certifying compliance during initial permitting for sources that may have faced hundreds of applicability questions during their years of operation, EPA issued guidance making clear that "[c]ompanies are not Federally required to reconsider previous applicability determinations [such as assessment of compliance with NSR permitting requirements] as part of their inquiry in preparing part 70 permit applications." See White Paper for Streamlined Development of Part 70 Permit Applications (July 10, 1995) at 25. With respect to enforcement, EPA's regulations make clear that without a determination of "non-applicability" expressed in a permit, no permit shield is granted for failure to comply with a requirement following permit issuance. 40 C.F.R. § 70.6(f)(2). And, no permit term can shield a source from liability for a violation that occurred prior to or at the time of permit issuance. § 70.6(f)(3)(ii).

In the face of the statutory and regulatory provisions, questions have arisen in the implementation of Title V regarding the extent to which permitting authorities are required to make final applicability determinations in the Title V permit proceeding, particularly with respect to the application of new source review (NSR) permitting requirements to activities that occurred at sources prior to (and in some cases decades prior to) submission of the permit application. Questions also have arisen regarding the extent to which permitting authorities are required to include compliance schedules to address allegations of noncompliance (including Notices of violation or NOVs) that are disputed by the source or otherwise have not been administratively or judicially resolved.

Only one court has been asked to address these issues. In that case, which arose in the context of appeal of EPA's denial of petitions by the New York Public Interest Group (NYPIRG) for objection to Title V permits issued to two New York power plants, NYPIRG argued that a permitting authority is required to include a compliance schedule in a permit if it finds that the source is violating a requirement as of the date of permit issuance, *e.g.*, by issuing an NOV, and that including a compliance schedule in a permit does not prevent the State agency from also pursuing a citizen suit against the source to seek penalties for the source's violations. The United States Court of Appeals for the Second Circuit held that where a State had issued an NOV for alleged noncompliance with PSD permitting requirements, and followed up that NOV with the filing of a complaint in United States District Court, the petitioners had made "a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V review process." See New York Public Interest Research Group, Inc. v. Johnson, 427 F.3d 172 (2nd Cir.

2005). The Court did not determine whether a compliance schedule was required "when the permitting authority has not yet determined those limits [to be] applicable. . . ."

In that case, EPA and New York argued that though they have the authority to address compliance problems by including a compliance schedule in a Title V permit, they are not required to do so. They argued that CAA § 113 (and similar SIP provisions) provides them with discretion to determine the best forum in which to resolve compliance disputes. Their position was that outstanding NOVs do not require the agencies to include a compliance schedule in permits because they are a first step in the enforcement process and do not themselves establish noncompliance.

In addition, the source Intervenor (and an industry group seeking amici status) argued that requiring inclusion of a compliance schedule to address disputed allegations of noncompliance violates the source owner/operator's rights to due process, including an evidentiary hearing and judicial review prior to imposition of remedial measures. It argued that, absent the source's certification of noncompliance or concession of applicability, permitting authorities may not include a compliance schedule in permits until a final decision resolving the allegations of noncompliance or applicability has been reached in formal judicial or administrative proceedings.

In its written decision, the Court did not mention or distinguish the case law cited by EPA, the source intervenor, and the permitting authority holding that NOVs are not final determinations. A petition for rehearing en banc by the source intervenor on that and other issues was still outstanding when this report was being finalized. The Court also did not address the content of the required compliance schedule

Summary of Comments

Several citizen commenters and a representative from a State attorney general's office complained that permitting authorities were not including compliance schedules in permits to address alleged repeated noncompliance, or alleged noncompliance that occurred between submission of the permit application and issuance of the permit. Several commenters stated that sources never certify noncompliance and that permitting authorities tended to take sources' certifications at face value without any investigation. Several commenters suggested that failure to include a compliance schedule might constitute a determination of compliance that would shield a source from traditional enforcement mechanisms.

One industry group commenter disagreed with the suggestion that States have legal authority to impose compliance schedules to address disputed allegations of noncompliance or applicability, and with the policy implications of doing so. Specifically, the group stated that, absent a certification of noncompliance, permitting authorities may not include a compliance schedule in permits until a final decision resolving the allegations of noncompliance has been reached in a formal judicial or administrative proceedings allowing a source the right to appeal the determination. The commenter also stated that

including disputed compliance schedules would delay Title V permits, subject them to appeal, and impede the program

Several permitting authorities stated that they included compliance schedules for non-compliance, but that where allegations were disputed they referred the issue to their enforcement office for resolution.

A more detailed summary of comments is provided in the attachment.

Task Force Discussion

The Task Force discussion began with one Task Force member proposing a recommendation that would require permitting authorities to evaluate compliance when they receive permit applications and develop compliance schedules to remedy any problems. Industry Task Force representatives responded that this recommendation raises due process issues because the permitting authority would be making unilateral determinations about compliance without allowing a source the opportunity to defend itself. According to these members, the permitting authority does not have this ability outside the Title V process and Title V does not vest the permitting authorities with that power.

An environmental group representative noted that a source has the ability to challenge a permit's compliance schedule and have that part of the permit stayed, thereby affording the source due process. Environmental group representatives also asserted that nothing in Title V prohibits a State from staying a compliance schedule while it is being challenged, and that if a State does not provide for such a stay, any due process concern arises out of the State's procedures, not out of Title V's compliance schedule requirement. That representative also stated that a compliance schedule is not "enforcement" because it does not apply penalties for past violations, but instead assures that future source operations will comply with all applicable requirements.

Industry representatives disagreed, stating that not every State provides a source with a process to stay a permit condition and, in any event, that differences in the legal standard for review and burden of proof in the permit appeals process prevent it from satisfying due process requirements. Industry representatives also pointed out that even without imposition of penalties for alleged past violations, a compliance schedule could impose significant costs (*e.g.*, for installation of new controls) or subject the source to penalties for failure to meet the schedule, before the issue of applicability or noncompliance had been adjudicated.

The discussion then turned to the type of information a State should or must review to determine whether to include a compliance schedule in the permit. Environmental group members stated that when a permitting authority issues a Title V permit, it is responsible for determining which requirements apply to a source and whether the source is in compliance with those requirements. To fulfill that duty, environmental group members stated that a permitting authority must consider and address any evidence that a source is

operating in violation of an applicable requirement, including citizen complaints, deviation reports, and Notices of Violation as well as any settlement and consent decrees.

Industry and State agency members disagreed, again stating that permitting authorities would be making unilateral enforcement decisions. In addition, one industry Task Force member stated that deviation reports and excess emission reports do not necessarily demonstrate noncompliance and permitting authorities should educate the public about the meaning of such reports.

The discussion then turned to the different categories of compliance disputes. Industry Task Force members noted that applicability determinations for a particular source are often highly contentious and litigation involving these determinations can take years. Several Task Force members stated that it is inappropriate for permitting authorities to make a finding of noncompliance based on ongoing litigation regarding applicability determinations. With respect to the other category of potential noncompliance, alleged violations of applicable requirements, industry Task Force members reiterated their position that a State may not require a compliance schedule without a final determination of noncompliance by an agency or court and that Notices of Violation are not such determinations and do not afford sources with an opportunity to challenge their content.

The Task Force discussed the current regulatory structure. The Task Force members generally agreed that the current regulations did not require a change—though, as discussed above, Task Force members did not agree on the meaning of those regulations.

The Task Force also discussed logistical issues raised by compliance schedules. A State agency member noted that when a permitting authority includes a compliance schedule in a permit, it must document the background and justifications for including the compliance schedule, which can take as much effort and time as bringing a court action against the source. Because of the work and time required, permitting authorities sometimes delay issuing the permit to allow the source to resolve the problems instead of issuing a permit with a compliance schedule.

Although the topic of compliance schedules generated extensive discussion, the Task Force concluded that the topic raised legal issues that could not be readily resolved by the Task Force. Thus, the Task Force does not offer any recommendations on this issue.

Related Topics: Statement of Basis, Compliance Certifications

Attachment: Text of EPA Regulations

§ 70.5(c)(8) The State program under this part shall provide for a standard application form or forms. . . .An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required . . . The permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below:

> (8) A compliance plan for all Part 70 sources that contains all the following:
> (i) A description of the compliance status of the source with respect to all applicable requirements.
> (ii) A description as follows:
> (A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.
> (B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.
> (C) For requirements for which the source is not in compliance at the time or permit issuance, a narrative description of how the source will achieve compliance with such requirements.
> (iii) A compliance schedule as follows:
> (A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.
> (B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.
> (C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.
> (iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

§70.6(c) Compliance requirements. All part 70 permits shall contain the following elements with respect to compliance:
. . .
(3) A schedule of compliance consistent with §70.5(c)(8) of this part.
(4) Progress reports consistent with the applicable schedule of compliance and §70.5(c)(8) of this part to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:
(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and
(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted. . . .

Attachment: Testimony and Comments Received

The following testimony was received from the public either in direct testimony or in response to questions from the Task Force.

MR. WELCH: Another area that I've seen also has to do with compliance. We see that often times there are facilities that seem to be in violation, repeatedly. They may have ongoing violations, yet when it comes time to issue the permit, there's no requirement to address the problem of the facility. The facility may have put in an application five years before, and certified that we are in compliance with all applicable requirements in 1995. When it comes to 2004, and it's time to put out a draft permit, they may have had violations that have happened in the interim, and it's difficult to address that. Often we will raise the idea of here are several violations that have occurred. What's the facility doing to correct this problem? And more times than not, there is no compliance schedule that's put into the permit to address the problem. It's kind of left up to the company's good will to fix the problem. . . . .What Delaware has told us is that they do not want to issue a permit to a facility that's in violation, and they deal with violations as an enforcement matter, rather than a permitting matter. So I think my on the ground experience is that often times the permit issuance is held up or delayed internally because of a violation issue, and so the permit is not issued. Or, we have had permits that have been issued, but recognize that there have been violations and the facility has agreed to develop a plan to address the problem, but the plan hasn't been developed at the time the permit is issued, or it's not made an enforceable requirement in part of the permit. We would object to that. (L. Welch MAELC, Transcript 1-206)

HARLEY: I want to give you an example -- and I'm going to come back to it a couple times in my remarks -- we reviewed the permit application that was put in by a large industrial facility for its Title V permit, and the rote compliance certification was signed by a responsible official. I went and I met with the group that I represented in that case, and one of the women, I think she may actually be testifying this evening, Ellen Rendulich from the Citizens Against Ruining the Environment group who lived on a bluff overlooking the industrial facility said, "I don't know how this facility can be in compli-

ance because it's constantly putting out black smoke." And so we FOIA'ed for the records, and we got back the excess emission reports from this facility, and do you know that consistently on a quarterly basis, like clockwork, ten days after the quarter they would be submitting reports certified under penalties of perjury to the Illinois EPA detailing hundreds of excess emissions from their facility. And yet somehow there was a compliance certification in the application. The permit itself identified no outstanding compliance issues. The only compliance issues that were addressed in the permit application -- in the draft permit were on a going-forward basis; no compliance schedule. And this is -- it's that juggernaut. It's that application macro, get the thing out the door, as opposed to let's take a look to see if there are excess emission reports within this agency that we should be considering, sitting in this agency that we should be considering in determining whether or not we can issue an adequate Title V permit that includes a compliance schedule that gets this facility on a road to actually being in compliance with permit requirements. Over and over again in my dealings with citizen groups, I find that they are the ones, through their hard work, who are asking these kinds of questions. (Harley, Chicago, ELC, Transcript 2-271)

URBASZEWSKI: Ultimately we hope that the Title V process will result in compliance schedules for the problems that we've identified, if we ever get an answer, and that eventually at the end of this process we'll get something that is a good permit that ensures that all the provisions are being met and the public's health is being protected, which is what the Title V permit is supposed to be. It's what it's supposed to do. (Urbaszewski, A. Lung Assoc., Transcript 2-324)

NILLES: As I mentioned, the 22 coal-burning power plants in Illinois still don't have their Title V permits. This is a particular concern, because six of them are either in or surrounding Chicago. We know from a series of studies, Harvard study, that those are causing direct, identifiable, quantifiable health effects today in Illinois. We also know they are regularly violating their opacity standard. Of course, one of the critical parts of Title V is that they include a compliance schedule to bring an end to ongoing violations. In the absence of those Title V permits, there is no compliance schedule, and those facilities for the last 18 months, which is what we have data for, continue to violate their opacity standard, which obviously means more fine particle pollution in the greater Chicago area. (B. Nilles, Sierra Club, 2-073)

ANN ALEXANDER: But we think that's important groundwork for the fact that the -- this comprehensive nature of Title V clearly encompasses, we believe, the NSR and NSPS programs, which of course are applicable requirements under the Clean Air Act, to the extent the facility has performed modifications that trigger those requirements. Notwithstanding that, IEPA has specifically declined to address the NSR and NSPS requirements in the Title V permitting process. Essentially what they have done in these Title V permits for the coal facilities that we've looked at is take at face value these applicants' blanket representation that they were in compliance. The applicants said they were; that was taken, essentially put in the permit with the statement that NSR and NSPS did not comply. We believe that at minimum what the agency should have done in this context rather than just taking the representations at face value should have been to first request a

list of capital projects that were performed at the applicant's facilities under -- during the relevant time period; and secondly, request information concerning the cost and the purpose and the timing of these projects, whatever is necessary to determine whether the projects constituted major modifications that triggered the NSR and NSPS programs. It has really been very clear since the 7th Circuit decision in WEPCO what type of information is relevant to an NSR applicability determination. We believe there's no reason that that information should not have been requested in the Title V permitting process, and a lot of reasons that it should. Now, to the extent any major modifications were found to have occurred based on such information that IEPA should have requested, the agency should have required a compliance plan for meeting the NSR and NSPS more stringent standards. (A. Alexander, Transcript 2-392)

Q: MR. SCHWARTZ: My question goes to one of your statements, the statement that enforcement authorities are not as effective as Title V authorities to gather information about NSR violations. I think I -- if I fairly restated that. I've usually had a different point of view on that. So I'm going to ask you to expand on that statement. But first I want to make the observation that -- and this does tend to be fact-specific, so generalizations are hazardous. But the problem I have seen is that when you -- for instance, when you want to put a compliance schedule in a Title V permit based on a perceived violation, you essentially have to put your case together in the record to support that permit issuance. And -- because you're going to be defending that when they appeal it. And that can take a lot of work as well. And it also tends to hold up issuance of the Title V permit. And so what you're doing is you're holding up the issuance of this permit, which is going to be a useful compliance tool for at least for other reasons, and you're holding it up to try to resolve this violation. And so there's -- you know, there's a cost benefit to be examined there. But anyway, if you could expand on your thoughts about enforcement authorities versus Title V authorities. (A. Schwartz, Transcript 2-397)

A: ANN ALEXANDER: Well, I mean, let me just say that my remarks about the effectiveness are based on observations of what's been happening in Illinois and in Region 5, which is that it just has not been smooth or efficient or effective to gather the necessary information through 114. Whether or not that's universal or whether or not it has to be, I think, you know, is arguable. That would certainly be open for discussion. I think what's important to bring it back to is that this -- this is the law. The law does require that all applicable requirements be incorporated into the permit. And our concern beyond the fact that that's the law and we need it -- believe it needs to be complied with, is there is emerging evidence or statements, I should say, in recent court decisions that it may even be problematic if a compliance schedule has not been imposed in the context of Title V permitting, if then enforcement is prosecuted independently. We believe that -- what really should happen is that these tracks should be going in tandem. I'm not suggesting that, you know, the regions no longer send out 114 requests, I'm suggesting that this is not sufficient and that both things should be happening. And yes, it may create some delays, but we don't think that essentially these important compliance assurance requirements should be sacrificed on the altar of speed. I mean, notwithstanding our frustration with the pace of this permitting, we think that that requirement is central enough that it just has to happen. (Alexander, IL Attorney General, 2-397)

Q: MS. BROOME: Okay. So let's -- okay. So there's been no determination of non-compliance. And without any formal determination of noncompliance, you would agree that there's no basis for a compliance schedule; right? . . .

A: ANN ALEXANDER: There's no basis because they haven't looked for a basis. The company said we're in compliance, and they said we believe you.

Q: MS. BROOME: Let's take your premise and assume that they were to put a compliance schedule in the permit. Are you aware that permit terms are not stayed and so that they might put in that you have to install the BACT or LAER or whatever, and a company could be forced to be installing these controls while it was in the appeal process on the permit, and that that would be a different approach than has typically been taken under any kind of enforcement regime?

A: ANN ALEXANDER: Well, I think it's an argument for expediting the permit -- the appeal process. But again, I come back to the fact that the requirements -- that it really is required to be encompassed in Title V. And our concern is that enforcement might even be jeopardized if it's not put in there.

Q: MS. BROOME: How so?

A: ANN ALEXANDER: Well, what I'm saying is there have been suggestions in Court decisions that it could be problematic if a requirement is not put in the Title V permit.

Q: MS. BROOME: Okay. I would just submit to you that the regulations are absolutely clear that there is no permit shield for things that occurred prior to the issuance of the Title V permit. So there would be no shield. There just wouldn't be. And --

A: ANN ALEXANDER: I hope the Courts are wrong. (Alexander, IL Attorney General, Transcript 2-410)

LIN: Secondly, the use of the compliance schedule requirement. In the clinic's experience, facilities rarely if ever identify noncompliance in their permit applications. As a result, facilities often repeatedly violate the Clean Air Act, often at the same source and without a compliance schedule. For instance, Our Children's Earth, upon reviewing the permit application for the Tesoro refinery near Martinez, discovered there is a significant question as to whether certain sources at the facility are complying with the Clean Air Act. According to air district records, in the past two years the refinery has experienced numerous violations, hundreds of episodes, seven serious incidents, and even two fires in one month. Three of these seven incidents involved the same boiler, which failed last year on July 4th and on October 30th and on January 12th of this year. Each time, the boiler emitted a black plume of coke particulates, other pollutants, and steam. Each instance prompted emergency warnings to neighboring community. In the past two years, this same boiler is responsible for at least 13 violations and 20 other episodes. According to a recent news report, as of a week ago, children at the nearby elementary school were still unable to play outdoors for recess since the January 12 incident. Without compliance schedules, such problems will continue to plague communities and further burden communities that are already overburdened by pollution. (Roger Lin, Env. Law and Justice Clinic, 4-247)

Q: MR. SCHWARTZ: I think this question is probably for Roger. I work for the air district that is not putting scheduled compliance in its permits at the appropriate frequency. And I was wondering, when you're reviewing records about violations and you had mentioned a situation where there's been multiple violations at a particular unit over a period of time, what kind of information are you looking at? Are you looking at information that lets you know about the causes of those violations or how the events occurred? Or, if not, would more information be helpful to you in deciding whether a schedule of compliance is appropriate?

A: MR. LIN: I personally go over the information from Our Children's Earth petition -- the Tesoro refinery. And I don't know from where Our Children's Earth originally got that information. But maybe Marcie Keever would.

Q: R. SCHWARTZ: Well, not so much from where, but my question goes to the kind of information you're looking at and whether it indicated, for instance, the causes of the violations.

A: MS. KEEVER: Well, I can answer that.[PARTIES TALKING OVER EACH OTHER.]

Q: MS. KEEVER: I think we have had information from the air district, which, I think you know because we call you up and say, "Hey, Adan, give us all your records; we want everything." And then we decide what we've going to give back. We're looking at episodes and the notices of violations and things that are an issue to the refineries by the air district and all the air district's records, depending on what isn't a trade secret -- all those issues. But I think that it would be -- when we bring those issues up to the air district and say, "It seems as though there's a pattern of violations here at this facility. They've had this many problems at this boiler." And it kind of comes back and the air district brings it back to us and says that's not a pattern. So maybe we need more information from you about what the air district would consider a pattern and would require a schedule of compliance. And I guess we talked about that earlier, but that's usually the way it goes. And correct me if I'm wrong, Roger. (Roger Lin, Env. Law and Justice Clinic, Transcript 4-254

Q: MS. KEEVER: Thanks for calling us, Heidi. I had a question. You mentioned something about some permits were still not issued because of enforcement actions, and I'm wondering how your State deals with enforcement or compliance problems when also having to deal with issuing Title V permits?

A: MS. HOLLENBACH: We have a scheduled compliance in the appendix of the permit that we use when a company is not in compliance with the terms and conditions of permit. That works in most cases, however, we do have -- these remaining four have major enforcement issues ongoing, enforcement actions. And as far as I understand, there is not an agreement yet, necessarily, on the corrective action. Although, I think there are two that are going out. One's going out for public comments in the very near future; and one they will probably include a scheduled compliance in the permit without the company having submitted it and to try and enforce the permit through that way. (Heidi Hollenbach, Michigan DEQ, Transcript 4B-22)

Q: MS. KEEVER: Thanks. This is Marcie Keever with Our Children's Earth. I think I asked the same question of Michigan. I'm wondering how you deal with enforcement or compliance problems when issuing either new Title V permits or renewals to facilities in New Jersey?

A: MR. O'SULLIVAN: Much the same as Michigan, where we already have a -- what we call a consent decree, which would have a compliance schedule in it. We would incorporate that into the operating permit as an operating permit compliance schedule and a reverted consent decree. The problem comes when a source operation -- we found this with our initial operating permits -- finds a noncompliance late in the process, where they haven't corrected the problem during the time that we're evaluating the operating permit. And we don't have an enforcement action to incorporate into the permit by reference. In those cases, we try to work out with our enforcement program a compliance schedule. And if they are able to negotiate a compliance schedule with the facility, we would incorporate that prior to the final permit. If timing isn't right, then, like Michigan, we are trying to put in a more generic compliance schedule, that's basically a schedule to get a more detailed schedule while the enforcement of program works out all the details, which as you know sometimes these take considerable time to do. (Bill O'Sullivan, New Jersey Dept. of Env. Protection, Transcript 4B-43)

The following written comments were received:

UTILITY AIR REGULATORY GROUP: An issue that has recently been raised in the context of citizen petitions for objection to Title V permits is the inclusion of compliance schedules in Title V permits to address applicability and compliance issues in cases where the permitting authority (or a citizen) and the permittee disagree. Some citizen groups have asserted that permitting authorities are required to resolve all applicability and compliance issues (including issues as to past compliance with PSD and NSR permitting requirements) in the Title V proceeding rather than proceeding through other means, such initiation of an enforcement action.

UARG disagrees not only with the suggestion that States have the legal authority to impose compliance schedules when the responsible official has not certified noncompliance,[footnote 2 omitted] but also with the policy implications of such a result. Requiring permitting authorities to create the record necessary to resolve complicated disputes regarding applicability and compliance would overwhelm an already overburdened permitting system. Permitting authorities cannot simply resolve issues in the permit without creating a legal and factual record to support the determination, or the permit would not withstand appeal. Including disputed compliance schedules in permits also would force permittees that are subject to them to appeal and seek a stay of their permit, thus further impeding implementation of the program. Compliance schedules should be limited to issues that have been resolved, either by a responsible official's certification of noncompliance, or through some other final action such as a formal applicability determination that is subject to judicial appeal or an enforcement action. Once the issue is resolved, if there are any new terms or remedial measures to be added, the permit can be reopened. (Comments of the Utility Air Regulatory Group, OAR-2004-0075-55)

5. PROCESS ISSUES

5.1 TOPIC: EPA REVIEW OF PROPOSED PERMITS

Issue/Observation Description

The Clean Air Act (Title 42, Chapter 85, Section 7661d) and implementing regulations (40 CFR 70.8) outline the procedure relating to EPA review of Title V permits (including permit modifications or renewals). In summary, permitting authorities are to provide to EPA a copy of each proposed permit. If EPA determines that the permit contains provisions that are not in compliance with applicable requirements then EPA will object to its issuance. If EPA has an objection, then EPA is obligated to respond within 45 days after receiving a copy of the proposed permit by providing a statement of the reasons for the objection and by sending a copy of the objection to the applicant. There are additional provisions relating to the obligations of permitting authorities to address the objections raised by EPA (*e.g.*, revise and submit a proposed permit in response to the objection within 90 days from the date of the objection).

Comments received by the Task Force from the public meetings and written submissions raised several issues relating to EPA review of proposed permits, which were discussed in more detail by the Task Force (see Discussion Summary section). Representative verbal and written comments are included in the Supporting Information section. The issues raised included:

- Concurrent v. sequential EPA permit reviews: Should EPA review permits on a concurrent or sequential basis, and when is sequential review needed?
- Permit changes during the review process: How do we ensure stakeholders understand what changes have been made by permitting authorities and EPA during the review process?
- Informing stakeholders of the review schedule and permit version in review: How are stakeholders informed on the review schedule and the permit version in review?
- HQ EPA permit review policy/guidance: Should there be a more formal HQ permit review policy, including metrics?

Discussion Summary

Concurrent v. sequential EPA permit reviews: This issue relates to the timing for EPA's review of a permit. If the State forwards the permit to EPA at the time it issues the public notice, the 45-day EPA review period runs "concurrently" with the public notice period and typically ends 15 days after the typical 30-day public comment period ends. If the State forwards the permit to EPA after the 30-day public comment period ends, the EPA review period is "sequential" and ends 45 days after the public comment period is completed. A number of comments during testimony were provided on this issue. Some commenters were concerned that conducting the EPA review sequentially adds time to the process in situations where there has been no change to the permit (and generally no

comments) and this can delay permit modifications. Other commenters expressed the view that the Part 70 regulations actually require sequential review rather than concurrent. The Task Force discussed the current processes permitting agencies and EPA use to review permits and whether concurrent or sequential review is preferable. Concurrent, or parallel, reviews by permitting authorities and EPA take place in some States, and sequential reviews takes place in others. In some cases the process is a parallel review, but if significant comments are received then the EPA 45 day review is added on at the end of the public notice period (sequential review).

Some Task Force members commented that the advantage of the concurrent review is that permits are issued more quickly. This is particularly important in a State (*e.g.,* Louisiana) that has a combined construction and operating permit program; delays in issuing or modifying permits directly translate to delays in project construction. Some Task Force members indicated that the determination of what is "significant", and would result in a sequential review, can be left to the permitting authority and that would allow them to determine what is germane to the permit. These Task Force members noted that often comments do not address issues relevant to the Title V process (*e.g.,* they may simply object to the presence of the plant in the area but not indicate any problem with the permit or any issue that can be addressed through the Title V process).

A problem cited with concurrent review by some Task Force members included defining what is "significant" with regards to when a review should become concurrent (with the concern being potential abuse in that a State might not consider any comment significant). Some Task Force members indicated they were not opposed to some form of concurrent review, except that if there were any comments (as opposed to significant comments), the process should become sequential. One Task Force member indicated the view that concurrent review is not legal and cited this as one basis for opposing the recommendation regarding concurrent v. sequential review. All of the environmental group representatives on the Task Force stated that sequential review is the process by which permitting agencies have to review Title V permits. Some of those Task Force members stated that concurrent review is the exception not the rule. Some Task Force members recognize that concurrent review of permits is acceptable when there are no public comments on a Title V permit. However, these same Task Force members indicated that if there is any public interest in a Title V permit or any public comments on that Title V permit that the review process is required to be sequential. They were concerned that a member of the public may not learn that the permitting authority did not consider his or her comment "significant" or "germane" and thus did not convert the process into a "sequential" one until after the opportunity to petition EPA to object to the permit has expired. In addition, they pointed out that reverting to sequential review after any comments are received also assures that EPA will always have an opportunity to consider public comments when reviewing a permit.

The Task Force generally agreed that a concurrent review is appropriate if no comments are received during the public comment period, or if the only comment received was from the permittee. The industry representatives on the Task Force could not foresee a situation where sequential review would be advantageous for a permittee because signifi-

cant issues will either be resolved or appealed and they are not generally relying on EPA objections to permit issuance to obtain any changes they believe are needed to the permit. Thus, they did not view providing EPA with additional review time as impacting the content of the permit in response to the permittee's comments.

The Task Force also discussed whether the review process should be different for permit modifications and renewals versus the initial permit issuance. Some Task Force members asserted that for modifications, the determination of germane could be based on comments made that are related to the change versus already existing terms; this necessitates that modifications are easily identified in draft permits. The process for renewals should be similar to the one for initial permits. Other Task Force members stated that the permitting authority should not assume that comments on the entire permit are not germane to the process as the entire permit is reviewed at renewal.

Permit changes during the review process: The Task Force discussed how, relative to permit review and public notice, changes that occur during the review process should be handled. Statements made by individual Task Force members included:

- If changes that occur after the draft stage are extensive or substantive, or would loosen a requirement, they may warrant a new public notice and review period.
- Changes that result in a more stringent requirement should trigger an interaction with the regulated facility, although this may be problematic given that Title V is not intended to add substantive new requirements.
- It was also recognized that starting a new public notice and review period can delay the permit issuance. In some cases the public and facility may be better served by having the permit issued; in others, a delay resulting in an improved permit may better serve the regulated entity and the public.
- The absence of indications of what has changed in a permit (no redline/strikeout version or no summary memo) makes it difficult to understand what has changed. One Task Force member commented that documentation of changes is a problem in Illinois, citing as an example 22 proposed permits, comprising 3000 pages, with no indication what the changes were.
- One approach to helping stakeholders better understand changes is to maintain a readily available redline/strikeout version of the permit that was originally issued for public comment. Some agencies (*e.g.*, Bay Area) do this already on a selected basis.
- In some cases changes are explained in a Technical Support Document or in the statement of basis. While it was acknowledged that these changes are not always explained well, one Task Force member said Indiana did a good job identifying changes in its Technical Support Documents. Nebraska usually does a summary of changes.
- Due to resource, time, and other constraints, it may be impractical for all States to create redline/strikeout versions for all permits. For example, in New York, the software used to create and maintain their electronic database of permits cannot do redline/strikeout, and reprogramming plus a separate database would be required.

Informing stakeholders on the review schedule and permit version in review: The Task Force discussed the need for stakeholders to be informed of the availability of the draft permit for review and the overall schedule. Stakeholders indicated that they often didn't have access to the draft permit, weren't informed of the review schedule on a timely basis, and often didn't receive the permit for review until late in the comment period. The Task Force discussed several ideas, including:

- It would be helpful for EPA to post the permit it receives from the permitting agency on its website within a few working days in a readily accessible location.
- If EPA receives a revised version of a permit, the revised version should also be posted within a few days. As part of this the permitting agency should submit a list of the changes included in the revised version. If the changes are significant then the Agencies should consider resetting the clock for the review period.
- EPA should also communicate (*e.g.*, posting on a website) the deadlines for submission of comments to the permitting agency (whether concurrent or sequential review) and the due date for petitions.
- Example data elements that EPA could include on a website include: facility name, city and State location, permit, date public comment period ends, date of hearing (if held), date EPA review period ends, date petition period begins, date petition period ends.

Specific recommendations on this issue are included in the Public Notice Throughout the Process topic write-up.

HQ EPA permit review policy/guidance: The Task Force had some discussions on the degree to which EPA Regional offices are nationally consistent in the quantity and quality of permit reviews. There was a comment that an EPA objection can have an impact on the quality of permits by setting precedent and providing some degree of national consistency. One Task Force member suggested that EPA headquarters create guidance for permit reviews, including the percentage of permits that should be reviewed, the substance of the comments given to the permitting agencies, review prioritization (*e.g.*, permits with public comment, controversial facilities, large facilities, or facilities with many grandfathered units) and when objections are appropriate. Others felt that EPA HQ should not become more prescriptive and place more burden on regional authorities.

Communications between EPA and permitting authorities during the review process: The Task Force discussed how EPA and permitting authorities interact during the review process. Communications generally occur by phone, email, or written document and may reference other documents to be reviewed. Issues/potential issues are discussed and the permitting authority will often make the change. If a change is not made then EPA will make an official comment for the record (which needs to be accessible to interested parties) and may formally object to the permit. There was general agreement that earlier EPA input (*i.e.*, during the public notice period) is preferred. In the discussion it was noted that it may be impractical to require every communication be documented since regional office and State agency personnel have ongoing working relationships and conversations, and it would not be productive to artificially restrict these conversations by imposing a documentation process. At the same time, it is important for stakeholders to be able to understand why a particular provision of the permit was changed. Some Task Force members noted that often a permit term would be changed by the State, and the permitting authority would indicate that EPA had required it to be changed but no substantive explanation of the reason for the change could be provided.

It was not clear how the results of agency discussions are communicated and recorded for the other stakeholders. The Task Force had no recommendations on this aspect of the review except that there should be an explanation of changes to the permit that were made at EPA's request. The Task Force does have recommendations relating to responding to draft permits (See Response to Public Comments on Draft Permits in Section 5.6 of this report).

Recommendations

Recommendation #1

Concurrent v. Sequential Permit Reviews: EPA's review period should generally run concurrently with the public comment period. The concurrent review should become sequential if a significant comment germane to the Title V proposed permit is received from someone other than the permittee. It is up to the discretion of the permitting authority to make this determination. EPA will have at least 15 days after the close of the comment period for its review.
In Favor (12)*: Kaderly, Freeman, Broome, Wood, Schwartz, Morehouse, Sliwinski, Hodanbosi, Paul, van der Vaart, Hagle, Golden ***Opposed (6)*:*** Powell, Raettig, Van Frank, Palzer, Keever, Owen ***Abstentions:*** ***Clarifications:*** Owen and Keever oppose because they disagree with the premise of the recommendation that the review period should be concurrent.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Related Topics: Public Access to Documents, Response to Public Comments on Draft Permits, Public Notice throughout Process

Supporting Information

Concurrent v. Sequential EPA Permit Reviews

1. "The Clean Air Act provides this 45 day review period for the EPA. We recommend that EPA revise the Part 70 regulations to minimize the impact that EPA's review period has on the time it takes to finalize a proposed permit modification. Indiana's program already establishes that EPA's review period runs concurrent with the 30 day public review period. EPA staff have cooperated with requests for expedited review so that permit modifications could be issued without unnecessarily delaying changes that are driven by a business need. However, the rule should be clarified so that minor changes to a permit in response to public comments do not delay the issuance of that permit for an additional 45 days." [Thomas W. Easterly, Indiana Department of Environmental Management, 3/1/05, p3]

2. "EPA Region 5 routinely reviews the MDEQ's Title V permits during the 30 day public comment period and provides comments during this period. We believe that it is more efficient for the EPA to comment during the public comment period so all comments can be considered at the same time. Therefore, we would recommend that the EPA's review time run concurrently with the public comment period to streamline the permit review process. If no comments are received, no further EPA review would be needed beyond the initial period. However, if comments are received and changes are made to the permit, an additional review period could be provided for the EPA." [G. Vinson Hellwig, Michigan DEQ, 2/28/05, p 3]

3. "Some substantial delays in permitting have also been attributed to the public review process. We believe that EPA regions that allow for concurrent public (30-day) and EPA (45-day) review help expedite the process and this should continue where possible." [Robert Hodanbosi, Ursula Kramer, STAPPA/ALAPCO, 3/31/05]

4. "Concurrent permitting. We're not sure how many States do it. But it seems to mean that the public comment period and the 45-day EPA review period start at the same time. So if we catch something, we only have a very small window to let the EPA know, and by the time we're done, nobody knows which version of which permit the regulations are in that we're talking about. I understand that that process may be approved, but we strongly discourage it." [S Zingle, Lake County Conservation Alliance]

5. Bernie Paul: "I have two questions. One deals with your concern about the concurrent permit review, the overlapping public comment period, and the EPA 45-day review period. I'm familiar with this in a couple other jurisdictions, and it's my understanding that if there are any public comments received, whether from the source or from the general public, that that sort of presses the pause button on the EPA 45-day review period, and that pause button isn't pressed again to restart it until the agency has addressed those comments. Is that how the process works in Illinois?"

Verena Owen: " … IEPA ... had straight concurrent permitting. Now we have a gentleman's agreement ... there's nothing in writing -- that the minute they get a public comment, we will have sequential permitting. But this is only since the beginning of this year."

Bernie Paul: "I know in Indiana they have the Memorandum of Understanding between the IDEM and EPA that put that in effect. So I think that Illinois had a similar document." [During S. Zingle, Lake County Conservation Alliance comments]

EPA Permit Reviews

1. "The other thing I'd like to address briefly is public and EPA participation in this process. As I understand it, EPA has, in large part, stopped reviewing Title V permits and I think that is terrible unless the public comments on the permit. Then EPA will look at it. There used to be requirements that [EPA] review a certain percentage of the permits that came in front of them… It's impossible for EPA to know what's going on in State programs unless they're looking at individual permits. That also makes citizen participation that much more important. There's no one else there to catch problems with permits." [Kelly Haragan, Environmental Integrity Project, Washington D.C. testimony]

Comment Documentation

1. "Hearings are held upon request, although such requests have not been common in Michigan. Information regarding the date by which the EPA must receive petitions is outlined on the permit webpage. All relevant comments received during the public comment or the EPA review periods and any changes made to the permit to address those comments are documented in the Staff Report before the permit becomes final. … The MDEQ provides Internet access to all formal permit development documents - including draft, proposed, and final permits, as well as the Staff Reports -and maintains all final Title V permits on our website." [G. Vinson Hellwig, Michigan DEQ, 2/28/05]

5.2 TOPIC: PUBLIC ACCESS TO DOCUMENTS

Issue Observation/Description

What this paper addresses: One of the issues raised at the Task Force is the difficulty or ease with which the public can obtain documents during the Title V permit review and comment process. The comments received primarily focused on the ability of the public to obtain the documents relevant to the Title V permit comment process in a timely manner.

Additional issues raised in testimony and by Task Force members included the following:

- How can potential abuses of the confidential business or trade secrets exemptions from open records laws, which may result in agencies illegally withholding public information, be prevented? If so, are there practices and procedures that could prevent potential abuses from occurring?
- How can electronic access to permit and compliance documents be improved?
- Which documents should be made available electronically? For those that should, is it feasible to do so and can electronic access be improved cost-effectively? Are other programs already addressing these issues?
- Are copying costs for permit and compliance documents preventing the public from fully participating in Title V? Should agencies be allowed to charge for such documents and, if so, what should the limit for such charges be? Should non-profits be exempted from copying costs for one copy of each document?
- Are permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and permits made publicly available as required by the statute? Are there other locations where such documents could be made generally accessible to members of the public? If not, where/how should such documents be maintained?
- Can agencies provide copies of revised permits in redline/strikeout so that the public can track permit changes?
- Can or should EPA develop an online clearinghouse for Title V permits searchable by industry type? What would the costs be?
- Are State/Federal open records laws adequate to allow the public to obtain relevant permitting/enforcement documents in a sufficiently timely manner to participate in the Title V process?
- How much, if any, incorporation by reference of construction permit terms is acceptable in a Title V permit when the construction permit is not available to the public? [Note that this topic is addressed in detail in Incorporation of Applicable Requirements in Section 4.1 of this report.]

Supporting Information

Statutory/Regulatory Background:

Section 503(e) of the Clean Air Act states the following regarding document availability:

> (e) Copies; Availability.- A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this title, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 114(c) (trade secrets) of this Act, the applicant or permittee may submit such information separately. The requirements of section 114(c) shall apply to such information. CAA § 503(e) [42 U.S.C. § 7661b]

Title V regulations also indicate what documents should be made available to the public:

> **(h) Public participation.** Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:
> …….
>> (2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom *interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in Sec. 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision*; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled). 40 C.F.R § 70.7(h)(2) (emphasis added).

40 C.F.R. § 70.4(b)(3)(viii) states that in the initial Title V program submission the State shall submit a legal opinion from the Attorney General of the State or attorney for the local air pollution control agency that includes, among other things, a demonstration of adequate legal authority to carry out the following:

(viii) Make available to the public *any permit application, compliance plan, permit, and monitoring and compliance, certification report pursuant to section 503(e) of the Act,* except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 115(c) of the Act.

Testimony and Comments Received

Some of the testimony that the Task Force heard included the following:

- The documents necessary to review the permits are unavailable. (K. Andria, ABC; Harley, Chicago ELC; K. Haragan, EIP; Prakash, WE ACT; Suttles, Tulane Env. Law Clinic)
- Documents (including all or part of the Title V application and other documents from the list below) are withheld from the public because of confidential business information or trade secrets issues. (K. Andria, ABC; S. Zingle, Lake County Conservation Alliance)
- The public has to use State FOIA or public records laws to obtain documents (including the permit). (S. Zingle, Lake County Conservation Alliance; L. Welch, MAEL)
- The document gathering process can take up the entire Title V comment period. (D. Masters, NAG)
- Copying costs for documents are high, many agencies do not provide for fee waivers. (L. Welch, MAEL; Verena Owen, Lake County Conservation Alliance)
- Commenters have to travel, sometimes for hours, to obtain documents from their agency. (S. Gollwitzer, App. Voices)
- Document files are unorganized and documents, especially old State permits, are lost or microfiche is too old to view. This is complicated by a facility with multiple Title V permits. (K. Andria, ABC)
- The documents that the public needs to review in order to comment on a Title V permit should be available online and/or at the agency on a computer and/or available on CD-ROM. (K. Andria, ABC; L. Welch, MAEL; K. Haragan, EIP; S. Zingle, Lake County Conservation Alliance; Gorman, Women's Voices for the Earth)
- Online access to documents shouldn't stop the agency from making hard copy documents available at the agency and/or placing those documents at a local library or community center. (K. Haragan, EIP; Suttles, Tulane Env Law Clinic; Harley, Chicago ELC; S. Zingle, Lake County Conservation Alliance)
- Interested parties should be notified of a Title V permit issuance in as many meaningful ways as possible. (L. Welch, MAEL)

Discussion

The Task Force focused its discussion on the ability of the public to obtain documents from the State or local permitting authority when a person is interested in commenting on or reviewing a Title V permit. The discussion included the public's ability to obtain the documents necessary for review of the Title V permit, the cost of obtaining the documents, and the speed at which the documents could be obtained given a 30-day comment period on the Title V permit. In addition, the Task Force discussed the availability of documents online or electronically including what categories of documents should be made available online or electronically.

Obtaining Documents Requested, Costs and Timing for Obtaining Documents: The Task Force discussed what the State and local agencies represented on the Task Force (and a few other States) charge for copying documents. A number of Task Force members noted their experience that copying charges among State and local permitting authorities vary widely and this was verified through an informal poll of members of the Task Force. Amounts ranged from 10 cents a page to 1 to 2 dollars a page, with some States providing a certain number of copies without any charge at all (ranging from 10 to 400 pages) and others charging for all the copies once the pages exceeded a certain page number. Task Force members discussed whether the public was able to obtain a fee waiver for copying Title V documents. Some Task Force members stated that the Title V programs is supposed to fund itself and that the Title V fees should cover the cost of providing free copies of relevant documents to the public when it is in the public interest. Other Task Force members expressed concerns about a fee waiver being granted to other government agencies, or members of the public taking advantage of a fee waiver to ask for a larger amount of documents than they otherwise would request. Many Task Force members shared how the document review and copying process worked in a number of States. The results of this informal survey are as follows:

Table 5.2-1

State/Local	Copying Charge	Other comments
New York	$0.25/page	Retains documents forever.
Nebraska	$0.10/page plus sales tax for more than 10 pages	State statute requires a response to a written document request within 4 business days. Nebraska retains documents for five years on-site, and then permit documents are stored off-site for 99 years.
Texas	Free for the first 50 pages and $0.10/page thereafter. Texas statute allows for fee reduction or waiver of fees if the government determines that the waiver or reduction is in the public interest because providing the copy of the information primarily benefits the general public.	Texas retains documents forever.
Bay Area Air Quality Management District (San Francisco, CA)	The first 49 pages are free. If more than 49 pages are requested the charge is $0.10/page, including the first 49 pages. The public can request a fee waiver.	State statute requires a response to a document request within 10 days.
Illinois	The first 400 pages are free. If more than 400 pages are requested, charge is $0.25/page, including the first 400 pages. The State offers fee waivers in some instances.	

Many State or local permitting authorities do not charge the public for emailing copies of documents or providing documents electronically (*i.e.*, on CD-ROM). The Task Force recognized that the cost to the public for copying Title V documents could become extremely high especially given the length of Title V permits and applications. The availability of fee waiver procedures to members of the public was generally seen as a good idea, but the availability of such a waiver varies from State to State and could possibly delay the release of documents. The discussion focused on the States or locals that have placed documents online and at a minimum, the online availability of the Title V permit, public notice, and Statement of Basis was considered a best practice. The discussion of the State and local agencies which place Title V documents online are mentioned below:

- Texas – Online Permit Database
    - Texas makes Title V permits, public notices, and information on emission events available online. Some emission data (whole facility numbers) are also available

as well as some old permits, although these are more difficult to locate. Texas also has a compliance rating system online.

- Bay Area Air Quality Management District (San Francisco)
  - Available documents online include Title V permits, public notices, statements of basis, responses to comments, and (some) compliance certifications.
- Georgia
  - The web site has a list of facilities with downloadable documents. Each source listed has a pdf version of the Title V permit, the Statement of Basis (Narrative), and Public Notice. For draft Title V permits a summary of the Application and the application itself are online (zip files converting to Word Perfect). For issued Title V permits, the majority have the application available online.

The Task Force also discussed that in some States copying charges are set by State statute, so the permitting authority may have no ability to make changes to copying charges. State statutes also vary widely regarding fee waivers. With respect to the testimony received regarding the need to submit a records or FOIA request for documents in some States, this was also discussed as potentially being a function of State law. One Task Force member, in response to a commenters concern about the FOIA process in Delaware, stated that even though there is a FOIA process, it is a simple one. Delaware Department of Natural Resources can email electronic documents if it receives an email identifying the document requested. The Task Force member noted that this process seemed to be a good one, rather than being a sound basis for objection to the FOIA process. This Task Force member noted that Delaware's process has improved since the early years of the Title V program.

Types of Documents that Should be Available for Title V Permit Review and Online Availability of Documents: The Task Force discussed which Title V documents are appropriate to make publicly available for review during the Title V process and which documents are appropriate to make publicly available online. There was general agreement among Task Force members that online access to some Title V documents is a good practice and that the Title V Permit, Public Notice/Public Hearing Notice and Statement of Basis should be available online. There was also general agreement that online access has the potential to save the public and the permitting authority money by allowing the public to print their own copies of documents and reducing the burden on the permitting authority to provide paper copies. It was also generally recognized that permitting authorities would need to evaluate both the cost savings from reduced copying and the expense of creating an online database and maintaining it in an accurate and complete manner. This is one reason that some Task Force members sought a more measured approach to on-line database creation.

Task Force members representing environmental groups proposed a list of the types of documents that they assert should be made publicly available to those interested in commenting on or reviewing a Title V permit. The proposed list is provided below. List of types of documents that the environmental group Task Force members stated they would like made publicly available for Title V commenters and reviewers:

- All Title V Permits (draft, proposed, previously issued final and renewal permits) preferably with changes highlighted using redline/strikeout or some other format
- Public Notice/Public Hearing Notice
- Statement of Basis/Technical Support Document for the permit from initial issuance and renewal
- Title V Permit Application (excluding genuine confidential business information/trade secrets)
- Permitting Agency Response to Public and Facility Comments on Draft/Proposed Permits
- Other Comments on Title V Permit – EPA, Facility, etc.
- Compliance Certifications and Deviation Reporting
- Semi-Annual Monitoring Reporting
- Other Monitoring Reporting (*i.e.*, CEMs or COMs)
- Old permits (NSR, PSD, State permits to operate)
- Compliance History documents
    - Notices of Violation
    - Episodes
    - Incidents
    - Upsets
    - Complaints (with confidential information excluded)
    - Inspection Reports
    - Source Test Results
- Emissions Data and/or Inventory
- Any documents cited in the Title V permit but not included in the permit, *e.g.,* Emergency Response Plans
- Startup, Shutdown and Malfunction Plans

The environmental group members of the Task Force stated that these documents should be made as publicly available as possible – online, electronically, agency document repository, near facility (library, community center, etc.) – either electronic or paper form. Some Task Force members noted that the lack of funding can hinder placing documents online.

There was significant disagreement among Task Force members regarding providing all of the listed documents to the public. Some Task Force members asserted that documents like Emissions Data and/or Inventory, Emergency Response Plans and Startup, Shutdown and Malfunction Plans should not be made part of the public record for a Title V permit review because they believe the documents are either not related to whether the Title V permit contains the appropriate terms, may create confidential business information or security issues, or the information in the documents is already reflected in other

documents in the record. Other Task Force members stated that open records laws allow for the release of such documents if requested by the public and also stated that the documents discussed can be extremely relevant to the Title V permit in that such documents indicate whether the terms of the Title V permit are correct. This was disputed by some Task Force members because Title V lists the specific documents to be made available in connection with a proposed permit and only requires the permitting authority to provide the contact information for someone who can provide the required documents (whatever they may be). Thus, some Task Force members felt that the fact that information might be available under open record laws does not mean that it has to be made available in the context of release of a draft permit.

Some Task Force members stated that Title V regulations only require documents that are "relevant to the permit decision" to be made publicly available and stated that this is different than any document that is relevant to the facility. Other Task Force members stated that what is "relevant to the permitting decision" depends on what the permitting authority relies on in its decision and usually includes a majority of the documents listed above.

Other Task Force members described the difficulty in ensuring protection of legitimate trade secret or confidential business information (CBI) submitted in a Title V application and noted that in the past CBI that was supposed to be protected by State agencies was inadvertently included in the public file. On the other hand, some Task Force members cited instances where a source claims the whole application, or even parts of the Title V permit, are confidential business information. Other members described the policy of requiring a facility to submit two versions of a document, one with CBI information and one without, to the permitting authority so as to expedite public release of documents without waiting for a CBI determination. Finally, other Task Force members described how the State or local permitting authority will address CBI issues in Title V documents before publicly noticing a Title V permit.

The Task Force also discussed the issues surrounding placing many of the listed documents online. Environmental group representatives pointed out that State and local agencies are already doing so many things on line and many are already placing Title V documents online that moving towards increasing document accessibility online is the next logical step. Other Task Force members objected to the concept of creating a database requirement that would necessitate the scanning of large documents that might include odd-size pages (*e.g.*, permit applications), that would impose continual updating requirements, or that could contain mistakes, thereby creating the appearance that a source is violating Clean Air Act requirements when that may not be true. These Task Force members stated that creating a database requirement for Title V would impose larger costs on the program far beyond anything that was contemplated under Title V. Another concern expressed by some industry Task Force members regarding providing Notices of Violation to the public was that NOVs can be incorrect, later withdrawn, or challenged and they remained concerned that the NOV would be on the website but nothing related to its validity would be (or invalidity as the case may be).

State and industry representatives as well as EPA also cited concerns regarding security by putting risk management plans under CAA Section 112(r) online. The same concerns were raised regarding startup, shutdown and malfunction (SSM) plans. In addition, industry representatives on the Task Force raised concerns about SSM plan availability more generally given recent revisions to the Section 112 rules as well as the need to maintain these as "living documents" that change as the plant updates its operations. These members of the Task Force were concerned about continually needing to update the "current" version available to the public and resources that would require. Finally, some Task Force members mentioned that some permitting agencies have a difficult time locating old NSR/PSD permits due to the passage of time.

Other Task Force members raised the concern that the costs of placing so many documents online is not justified when most Title V permits receive no comments. These Task Force members pointed to South Coast Air Quality Management District (California) testimony before the Task Force that less than 3% of permits receive any comments and that in their experience, there are very few instances in which anyone but the permittee comments on the draft permit. They noted that this was particularly relevant in light of the fact that SCAQMD had even held public meetings to encourage interest in permits but still received only a very low level of participation. One Task Force member noted that in his experience, members of the public rely on and are comfortable with the State agency ensuring that permits are accurate and complete and he suggested that this may be a reason that there are few instances in which persons other than the permittee comment on a permit.

Other Task Force members pointed out that the SCAQMD has approximately 700 sources with Title V permits and receiving comments on less than 3% is more significant than it seems initially. Also, SCAQMD now has a list of all Title V sources online with downloadable permit fact sheets for some facilities which is an improvement from the lack of facility information SCAQMD made available online in the past. Further, one Task Force member pointed to the Bay Area Air Quality Management District's (California) web site as a good example of online access to Title V documents which has improved and evolved over time.

At the same time, Task Force members recognized that there needs to be a system for people who do seek to review permit documents to obtain copies of them in a timely and cost-effective manner. Some State and local agencies appear to be handling this well while others appear to be having difficulty. There was agreement that the documents listed in the statute should be made available when requested and that the draft and issued Title V permits should be available online. In addition, the statement of basis is another document that all Task Force members felt could be available online.

Recommendations

Recommendation #1

EPA should encourage Permitting Authorities to facilitate access to the documents relevant to the Title V permit decision, *e.g.*, by making the draft permit and statement of basis, public notice and public hearing notice, where applicable, available online, by digital media, and locally (*i.e.*, a repository near the facility/community impacted) in an accessible format (*e.g.,* PDF), which can also reduce copying and document review costs to commenters and permitting authorities.

In Favor (17)*: Broome, Wood, Hagle, Freeman, Morehouse, Palzer, Raettig, Powell, Keever, Van Frank, Sliwinski, Kaderly, Owen, Schwartz, Paul, Hodanbosi, Golden
Opposed:
Abstentions:
Clarifications:

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #1(a)

In addition to the documents listed under Recommendation #1, the Title V application should also be available online and via digital media.

In Favor (6): Palzer, Raettig, Powell, Keever, Van Frank, Owen
Opposed (10): Kaderly, Hagle, Wood, Freeman, Broome, Morehouse, Paul, Schwartz, Hodanbosi, Golden
Abstentions (1): Sliwinski
Clarifications: Paul is opposed because of concerns about the potential release of CBI versions of the application.

Recommendation #2

EPA should encourage Permitting Authorities to waive or reduce the copying costs/fees for all relevant documents necessary to review a Title V permit when the release of documents would be in the public interest. Waiver of the fee is in the public interest if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of commercial benefit or use by government agencies.

In Favor (7): Powell, Keever, Raettig, Owen, Palzer, Van Frank, Golden
Opposed (9): Broome, Freeman, Schwartz, Paul, Sliwinski, Morehouse, Hodanbosi, Wood, Hagle
Abstentions (1): Kaderly
Clarifications: Freeman opposes as drafted. Paul is opposed because he thinks there should be a limit to how much paper a person could have free of charge. Hodanbosi is opposed because, in many cases, State law sets the fee for copying and this cannot be changed or modified by the permitting agency. Hagle is opposed because his agency does not control what to charge or when to charge for documents, State law governs.

Recommendation #3

The permitting authority should maintain a central file (exclusive of claimed CBI) for each Title V permit, and in that file, it should maintain all relevant documents to the Title V permit decision, and should ensure that the file remains complete.

In Favor (17): Palzer, Raettig, Powell, Keever, Van Frank, Owen, Kaderly, Hagle, Wood, Freeman, Broome, Morehouse, Schwartz, Paul, Sliwinski, Hodanbosi, Golden
Opposed:
Abstentions:
Clarifications: Schwartz clarifies that alternatives to a "central" filing system should be acceptable if public access is not hindered.

Recommendation #3(a)

If someone requests to review the file and the complete file is not available at the beginning of the public comment period or becomes unavailable during the comment period, the comment period should be extended to allow the required 30-day review period.

In Favor (9): Palzer, Raettig, Powell, Keever, Van Frank, Owen, Kaderly, Sliwinski, Hodanbosi
Opposed (7): Broome, Freeman, Morehouse, Wood, Schwartz, Paul, Golden
Abstentions (1): Hagle
Clarifications: Some of those opposing felt that it isn't appropriate to extend a comment period without an indication that the deficiency in this particular hard copy file actually impeded the public's development of comments. Schwartz joins this clarification and additionally clarifies that his opposition is also based on the potential for disagreement about what constitutes "relevant" documents. Hodanbosi makes the same clarifications.

Recommendation #4

The Task Force encourages all EPA Regions to develop an online database for Title V permits and other supporting documents in the Region, potentially following the example of Region 9 (see http://www.epa.gov/region09/air/permit/ - sorted by State and permitting authority and then alphabetically) and Region 5 (see http://www.epa.gov/region5/air/permits/epermits.htm sorted by SIC code or alphabetically).

In Favor (9): Powell, Keever, Raettig, Owen, Palzer, Van Frank, Schwartz, Kaderly, Hodanbosi
Opposed (8): Broome, Freeman, Paul, Sliwinski, Morehouse, Wood, Golden, Hagle
Abstentions:
Clarifications: Kaderly clarifies that she is in favor only if it doesn't increase the burden on the State. Some of those opposing were concerned about costs and creation of redundant databases (if States are already providing online access to documents). Wood and Golden join this clarification. Sliwinski joins this clarification and also states that if there are redundant databases that EPA's database may not be kept as up-to-date as the State's which could create confusion.

Related Topics: Statement of Basis, Incorporation of Applicable Requirements, Public Hearings, Permit Content, EPA Review of Proposed Permits

5.3 TOPIC: PUBLIC HEARINGS

Issue Observation/Description:

What This Paper Addresses: This issue involves the process for providing and conducting public hearings on Title V permits. Hearings provide an important opportunity for a member of the public to participate in and potentially influence a draft permit.

Legal Requirements: Clean Air Act Section 502(b)(6) requires EPA's Title V regulations to establish the minimum elements of a State permit program. Section 502(b)(6) lists one of these elements as "adequate, streamlined, and reasonable procedures … for public notice, including offering an opportunity for public comment and a hearing."

EPA implements this statutory requirement in 40 CFR § 70.7(h), which provides:

> Public participation. Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.
>
> …
>
> Timing. The permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.

In the preamble to the proposed Part 70 regulations, EPA explained that public hearings could be implemented in an informal manner as an "open meeting for concerned parties to express their concerns." 56 Fed. Reg. 21743 (1991). *See also* Response to Comments on the 40 CFR part 70 Rulemaking, A-90-33, V-C-1 (June 1992). In addition, the Response to Comments on the final part 70 rule explains EPA's view of its final rule as not requiring a hearing every time one is requested because it "would be unduly burdensome on States, permitting authorities and sources." Response to Comments at 7-29. EPA clarified that States would not have "unfettered discretion as to whether a hearing should be held" but gave as an example of appropriate hearing criteria that hearings could be held only "when material issues have been raised" and stated that a hearing would not be required if the request for a hearing raised "only irrelevant issues or facts." *Id.* at 7-30.

Supporting Information: Comments Received

Testimony before the Task Force revealed that permitting authorities are interpreting the requirement that there be an "opportunity" for a hearing in a variety of ways. In some States, a hearing is held upon request. In other States, the permitting authority will hold a hearing only if the requester makes some kind of a threshold showing. Various types of threshold tests appear to be in place, including a "critical mass" standard, a "ten or more individuals requesting" standard, a "significant public interest" standard, a "relevant comment" standard, a "meaningful and informed participation" standard, an "adequate

justification" standard, and a "significant comments that are directly determined to warrant a public hearing" standard.

Numerous environmental group commenters criticized their State's refusal to hold hearings upon request. Many of these commenters stated that it was unclear what standard their permitting authority was applying when deciding whether to hold a hearing. One environmental group commenter reported that because her permitting authority applied an ambiguous "significant public interest" test, she found herself spending much of the 30-day public comment period organizing people to request a hearing. She stated, "[t]hey have never made public nor perhaps do they even have any objective criteria for what constitutes sufficient interest. Thus, community groups with scarce human and financial resources go into a frenzy of activity trying to get better community members, elected officials to the DEC asking for such a hearing. Sometimes they say yes, other times no. The time and resources spent on getting DEC to agree to a hearing would be better spent analyzing the permit, educating community members about the permit and the Title V process and preparing comments." (Marian Feinberg, Better Bronx.)

Several permitting authorities testified that they employed threshold requirements for deciding whether to hold a hearing, either in terms of critical mass or significant comment, before going to the expense of a hearing. One permitting authority representative stated that he thought the policy of giving permitting authorities discretion to deny a request for a hearing was working well. Some industry commenters noted that where hearings had been held on their permits, no one attended the hearing, except the facility and the State agency.

Several environmental group commenters reported that public hearings have been helpful in organizing and educating communities about major emission sources. One environmental group commenter explained, "[t]he Title V permit and the hearing process definitely helps make the regulations, which are very complicated, make the regulations clearer and more transparent for the general public." (Melissa Scanlan, Midwest Environmental Advocates.) Another environmental group commenter stated, "I think that both the agency and our organization learned a lot about the Title V program by going through that process. There were many people when we had a public hearing on this. Many people came out to speak, to talk about the problems of air pollution and the impact on them from this facility, and by having the Title V program involvement, I think it was helpful." (Lyman Welch, Mid-Atlantic Environmental Law Center.) One environmental group commenter explained, "[w]e view the public hearing as the most important opportunity to ask questions because when we ask questions in a public comment in written form, we never get any answers." (Kathy Andria, American Bottoms Council.) A permitting authority representative testified, "if there is an environmental justice issue related to the facility, people want to have a hearing. They want to have a meeting. They want to know. They want to express their concerns. Very seldom is there a resolution of the issue at the hearing; however, the issues are placed on the table. And it gives the permitting agency -- us -- and whoever else is in attendance, namely, the facility and the regional office, a good sense of what the issues are at the facility." (Peter Hess, Bay Area AQMD.)

Several commenters testified that they sometimes felt that their hearing testimony and written comments are not worthwhile because the permit is already a *fait accompli* by the time they have an opportunity to participate in the process. One commenter thought this situation could be improved by soliciting public comment at an earlier point in the permit proceeding.

A few commenters voiced support for the practice of State agencies holding information sessions prior to a permit hearing, while others noted that notwithstanding information sessions, they were not seeing much interest in hearings. For example, the South Coast AQMD indicated that it frequently initiated information sessions on permits since it was not receiving either public comments or requests for public hearings on permits. This commenter noted they had very sporadic participation and that hearings were requested for less than 2% of permits. (Mohsen Nazemi, South Coast AQMD; also Bill O'Sullivan, New Jersey DEP.)

One environmental group commenter explained that she hosted her own information session prior to a public hearing so that members of the public would have an opportunity to ask questions about a permit prior to testifying at the hearing. She stated, "the public hearing by itself with people just showing up probably would not have been too informative because you are just listening to the three-minute testimony. But we were able to use the Title V permit as an educational tool with the community prior to the hearing to show them what the permit limits were, and then they were able to use that to inform their testimony and it led to a large turnout at the hearing." (Melissa Scanlan, Midwest Environmental Advocates.) A permitting authority representative explained that his agency holds "workshops to educate the public on how to comment and inform them of the Title V permit process." (Peter Hess, Bay Area AQMD.) But one environmental group commenter criticized his local permitting authority for holding an information session and then using that session to justify denying a request for a public hearing.

Commenters raised the issue of hearings being scheduled for inconvenient times or places. One commenter explained that it isn't appropriate to hold a hearing at the location of the facility when most of the people concerned about the facility reside and work in a larger community some distance away. Two commenters complained about hearings being scheduled on or near public holidays, or at the same time as an important local government meeting.

A few commenters raised issues regarding the conduct of public hearings. One environmental group commenter testified: "We've requested hearings and then we go into a room. Those hearings are not published. No one else knows about them. They have never published, to the best of my knowledge, publicly published the hearing was ongoing, and that's at the county level." (Bob Hall, Nevada Environmental Coalition.) A State agency representative complained about "verbal abuse and theatrics at public hearings" that "divert attention away from the important issues surrounding the permit and take up valuable time, which makes it difficult for other community members to submit comments to the record." (Amy Mann, Delaware DNR.) One environmental group commenter spoke highly of her State agency's conduct of a hearing: "Jim Ross, who was

an acting permit manager, said: 'And now some comments on tonight's hearing. We are here to provide you with information and, perhaps more importantly, to listen to your comments and concerns. Your comments can and do often affect the content of the permit or even the final action that is to be taken on the application. So please make your concerns known to us.' That's exactly right. Couldn't have said it better. Now all we have to do is make sure that they mean it." (Susan Zingle, Lake County Conservation Alliance.)

Two permitting authority representatives testified that issues are sometimes raised at a public hearing that cannot be addressed through Title V, such as requests for more stringent regulations for a facility. (Peter Hess, Bay Area AQMD; Heidi Hollenbach, Michigan DEQ.) However, one permitting authority representative testified that it was useful for issues pertaining to a facility to be raised at a hearing, even if they cannot be addressed through the Title V process: "Some of those issues [raised at a hearing] cannot be resolved in the Title V [process] -- they're outside the Federal enforceability, like odor nuisance or something like that. But at least they're brought to the attention; and it can be addressed elsewhere." (Peter Hess, Bay Area AQMD.)

Task Force Discussion

The Task Force began by discussing testimony indicating that some permitting authorities were denying hearing requests inappropriately, and that permitting authorities are applying a wide range of standards applied for determining when a hearing request should be granted. Environmental group representatives took the position that a hearing should be granted upon request. They explained that if someone requests a hearing and the permitting authority believes that a hearing is unnecessary, the permitting authority should contact the requestor and find out whether an alternative, such as an individual meeting, would satisfy the requester's needs. If the requester continues to want a hearing, however, they thought that a hearing should be held. They emphasized that public hearings are important because many people find it difficult and intimidating to craft written comments, but are much more comfortable speaking at a hearing.

Several Task Force members criticized the practice employed by at least a couple permitting authorities of deciding whether to grant a hearing request based on whether significant written comments have already been submitted. They pointed to testimony that it is difficult to prepare detailed written comments sufficient to justify their request for a hearing while simultaneously undertaking public outreach to notify people of their opportunity to request a hearing. In addition, they stated that it makes no sense to require people who wish to have the opportunity to present testimony orally to first identify their issues in writing. An environmental group representative reported that one State that employs the "significant written comments" test has a history of denying hearing requests despite the submission of detailed and relevant written comments. According to that Task Force member, the permitting authority justified these denials either by declaring that the comments were not "significant" or by concluding that the group requesting the hearing had already expressed their concerns adequately in writing, and thus, there was no need for a hearing. The member stated that the permitting authority's approach con-

fronted the public with a Catch-22: if they don't submit detailed written comments, their hearing request may be denied on the basis that their concerns are insignificant, but if they do submit such comments, their request might be denied on the basis that they already presented their views adequately.

A permitting authority representative from a State that utilizes a "significant comments" standard noted that this standard was in the State's regulations prior to adoption of the Title V program, and agreed that this test may not be well suited for Title V. There was general agreement among permitting authority representatives on the Task Force that many States were applying tests that pre-dated Title V and have not been tailored to the suit Title V program.

Regarding testimony critical of North Carolina for denying hearing requests, a permitting authority representative from that State (who is a member of this Task Force) confirmed that North Carolina has denied certain hearing requests. He stated that the requester had made identical comments with respect to other draft permits and that the State had already responded to those comments. He also stated that the same requester had sought hearings on many other draft permits, that the requester did not live near or around the subject facilities, and that previous hearings held upon this person's request were often not attended by anyone, notwithstanding newspaper notice. He explained that in light of this experience, the State had concluded that the expense of a hearing was not warranted and was not in the public's interest.

Permitting authority and industry representatives generally took the position that a permitting authority should have discretion to deny a hearing request. One permitting authority reported that he has held a hearing upon request where no one attended. Environmental group representatives reported that they had never heard of this happening in their State, and that they doubted that most groups would risk their credibility by requesting a hearing and then not attending it. One environmental group representative reported that her State regularly denied her group's hearing requests even though the State was well aware that the group was very effective at generating high attendance at hearings. Environmental group representatives took the position that while there may be some groups who would request a hearing without attending, there was no evidence that this was a common practice, and a concern that this may happen on occasion does not warrant restricting others' ability to testify at a public hearing.

One environmental group representative suggested that a permitting authority may be partially responsible for low attendance at a hearing. She stated that the timing and location of a hearing could prevent people from attending even if they made the hearing request. She described specific experiences where hearings had been held at night in places far away from where most people lived. She said that this had happened repeatedly and that she was beginning to think that the permitting authority was intentionally making it difficult to attend hearings. Permitting authority representatives responded that they saw no reason why a permitting authority could not work with a requester to make sure that hearings were scheduled at convenient times and places. They stated that they frequently hold hearings at night so that people who work during the day can attend.

Several permitting authority representatives indicated that they should have the ability to deny a hearing request when the issues raised do not relate to Title V. They noted that it is common for people to raise issues at hearings that cannot be addressed through Title V, such as odor, nuisance, other statutes, or the stringency of a Clean Air Act requirement. They reported that people attending hearings often become frustrated when they are told that their concerns cannot be addressed through Title V. One industry representative described a hearing at which several hundred people showed up, but testified about concerns that had nothing to do with Title V. An environmental group representative replied that often the Title V hearing is the only opportunity for concerned citizens to voice their concerns about a facility publicly. This member suggested that even if some of the testimony raises issues that cannot be addressed through Title V, a hearing serves the useful purpose of alerting a permitting authority to public concerns that they may be able to addressed in other ways.

Some permitting authority representatives reported that they employ thresholds to determine whether a hearing is warranted because putting on hearings can be expensive but they were clear that in making decisions about whether to grant a hearing in a given case, cost was not used as a factor or a basis for denying a hearing. Among the costs cited were the cost of a hearing examiner and a person to record testimony, as well as the cost of staff overtime and hearing room rental.

Several Task Force members noted that a person's view regarding issues raised with respect to public hearings depends in large part on what they consider to be the purpose of a public hearing. Several industry representatives indicated that they viewed a public hearing as a vehicle for ensuring that a Title V permit is written properly and noted EPA's statements in the part 70 rules. One industry representative expressed the view that it is not the permitting authority's role to go out and try to generate public interest in a hearing. Environmental group representatives agreed that ensuring that a permit is written properly is the primary purpose of a Title V hearing, but explained that they also view a Title V hearing as an important vehicle for facilitating a better public understanding of the facility being permitted and the purpose of a Title V permit. In addition, they view a Title V hearing as a way for the public to communicate their concerns about a facility to the permitting authority and to the source, itself. Environmental group representatives expressed the view that it is often useful to the public and the permitting authority for people to come together to comment on a permit at a public hearing, especially where community members previously have expressed concern about the source being permitted. Thus, these Task Force members thought that permitting authorities should play an active role in educating the public about their opportunity for a hearing and publicizing hearings when they are held (beyond just publishing notice of the hearing in the legal section of a newspaper).

With respect to Recommendation #1, Task Force members thought that much of the public confusion about what a Title V permit is and what issues are relevant to the Title V process could be addressed by the permitting authority holding an information session prior to a public hearing. Task Force members recognized that in some States, members

of the public have the opportunity to ask questions of the permitting authority at a hearing, but in most States, the public hearing consists only of members of the public standing up and providing oral testimony on the record. While permitting authority representatives almost always attend such hearings, they often do not speak at them.

Some permitting authority representatives on the Task Force indicated that they frequently hold an information session prior to a public hearing, generally on the same evening. An environmental group representative reported that while she viewed information sessions as useful, she had heard that people sometimes get frustrated when the permitting authority does not make it clear that statements made at the information session are not included in the administrative record. This member also reported that people are sometimes frustrated when the information session goes on too long, and people have to leave before they have a chance to testify at the hearing. A permitting authority representative reported that his State addresses this concern by strictly limiting the information session to a relatively short period (*e.g.*, 45 minutes), and clearly informing people ahead of time that the first 45 minutes would be the information session. He also explained that if people have to leave the hearing before getting to testify, they can write their comments down on a card that is provided to them at the hearing. Some Task Force members suggested that it might be helpful to have the information session on a different night, so that the hearing would not run too late.

Also with respect to Recommendation #1, Task Force members discussed whether a permitting authority can hold an information session without also holding a hearing. Task Force members agreed that there may be circumstances where the public is interested in an information session, but there is no public interest in a hearing. However, several members were concerned that a permitting authority may hold an information session in lieu of a hearing –*i.e.*, the permitting authority would use the fact that it held an information session as a reason for denying a public request for a hearing. One environmental group representative explained that this had happened in her State. Other members of the Task Force noted that EPA actually contemplated when it issued the part 70 rules that information sessions would satisfy the public hearing requirement of Title V. They stated that the point is for interested persons to have an opportunity to learn about the permit and express their concerns. These Task Force members believed that there is no reason that a State could not use an informal process like this to meet its opportunity for hearing requirement.

Other Task Force members responded that regardless of the formality of a hearing, the important difference between a "public hearing" and an "information session" is that a public hearing provides an opportunity to submit oral comments into the administrative record, while statements made at an "information session" are typically excluded from the record. They noted that while testimony suggested that some States were holding on-the-record hearings that also involved an opportunity for the public to ask questions of the permitting authority (and get an oral response at the hearing), the vast majority of States do not include statements made at these more informal sessions in the administrative record. They further stated that the statute's requirement that the public be given an "opportunity for a hearing" clearly contemplates that such hearing would be on the re-

cord, and that insofar as EPA had previously stated that a public hearing could be informal, the agency could not have meant that statements made at such a hearing could be excluded from the record. Other Task Force members quoted EPA's statements in the Response to Comments on the part 70 rules that "an open meeting for concerned parties to express their concerns can meet the requirements for a public hearing" and that "[i]f a transcript of the hearing is not available, a summary of the comments received at the hearing" is sufficient if it is placed in the public record. They read these statements as clear indication that part 70 does not require a public hearing to be on the record. RTC at 7-30. In any event, the Task Force generally agreed that it would be inappropriate to deny a hearing request merely because the permitting authority had held an information session.

With respect to Recommendations #2 and #3, permitting authority and industry representatives felt strongly that States should have discretion to deny a hearing request. One permitting authority representative explained that he believed that a hearing should be held only where the requester resides in an area affected by the source. Other Task Force members expressed the view that a permitting authority should be able to deny a hearing request where the issues being raised were not relevant to the Title V permit. Environmental group representatives explained that under circumstances where a permitting authority thinks that a hearing request is not justified, the permitting authority should contact the requester and see if they can reach agreement on the need for a hearing rather than just denying the hearing request. They expressed the view that it should be possible to address most hearing requests in this manner. At a minimum, environmental group representatives thought that the presumption should be that a hearing is held upon request.

Insofar as a State applies some kind of a standard to decide whether to hold a hearing, environmental group representatives felt strongly that the standard should be unambiguous, communicated to the public, and applied consistently. Task Force members had varying opinions regarding the kind of standard that might be acceptable (or that would be unacceptable). Without endorsing use of a "significant public interest" test, environmental group representatives explained that if such a test is employed, the State should make it clear what the requester must do to satisfy the test, *e.g.*, specify the number of people that needed to make a request. One environmental group representative explained that her State will hold a hearing if an elected official makes the request, and that this approach works fairly well for her organization.

Environmental group representatives also stated that if a permitting authority applies a relevant comment test, that test should be applied liberally such that any relevant comment would be sufficient. They explained that a standard requiring a comment to be "significant" lends itself to abuse, because it may lead the permitting authority to deny a hearing whenever it disagrees with the comments and thus believes that the comments will not affect the content of the final permit. Environmental group representatives also pointed out that there may be important issues that the public commenter considers to be germane to the permit proceeding, but that the permitting authority believes are not. For example, environmental group representatives indicated that there had been some dis-

putes about whether environmental justice concerns were relevant to Title V proceedings. Thus, environmental group representatives suggested that where a State employs some kind of relevance standard, that standard should include comments that are arguably relevant, even if the permitting authority does not itself view those concerns as relevant. Other Task Force members noted that State agencies are well situated to determine what comments are relevant to the Title V permit, focusing on whether the permit reflects the applicable requirements in underlying rules since Title V does not itself create new emission limits.

Recommendations

Recommendation #1

As a best practice, when a public hearing is requested, a permitting authority should offer the requester the opportunity for an informational session prior to any hearing. The fact that an information session has been or will be held should not be used as a basis for denying a hearing request. If a permitting authority intends to hold both an information session and a hearing, information about both events should be included in a single notice.

In Favor (17)*: Broome, Paul, Wood, Hodanbosi, Powell, Raettig, Owen, Morehouse, Hagle, Sliwinski, Schwartz, Freeman, Kaderly, Keever, Van Frank, Golden, Palzer

Opposed:

Abstentions:

Clarifications: Broome clarifies that she supports EPA's statements in issuing part 70 that informal meetings can constitute a hearing but that an information session should not be the *sole* reason for denying a hearing request.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

In general, a hearing should be granted upon request. If a State applies a standard to decide whether to hold a hearing, the State should make it clear exactly how a person would satisfy that standard. If the State requires a person to identify relevant concerns in support of a hearing request, the State should hold a hearing if the requestor identifies at least one issue that is arguably germane to the Title V proceeding. If a State chooses to utilize a "significant public interest" test, the State should establish clear guidelines for what satisfies that standard, *e.g.*, a request by a public interest organization or by a certain number of individuals.

In Favor (9): Owen, Raettig, Van Frank, Powell, Keever, Kaderly, Hodanbosi, Palzer, Sliwinski

Opposed (8): Hagle, Schwartz, Broome, Paul, Freeman, Wood, Morehouse, Golden

Abstentions:

(Clarification on next page)

(Clarification for Recommendation #2)

Clarifications: A vote in favor of this recommendation does not imply support for the sample standards articulated in the recommendation. Opposition to this recommendation does not imply opposition to a State having a standard that the public can understand, that the State articulate that standard publicly, and that the State apply that standard consistently.

Recommendation #3

States should retain discretion provided under part 70 to decide whether or not to hold public hearings based on factors such as whether significant and germane issues relevant to whether the Title V permit contains the appropriate terms and conditions have been raised.

In Favor (12): Broome, Schwartz, Hagle, Hodanbosi, Freeman, Morehouse, Wood, Kaderly, Paul, van der Vaart, Sliwinski, Golden

Opposed (6): Powell, Raettig, Owen, Van Frank, Keever, Palzer

Abstentions:

Clarifications: Powell, Keever, Palzer, and Raettig clarify that they view the phrase "significant and germane" to be too vague to serve as a useful standard, and that a vague standard can lead to inconsistent and arbitrary denials of public hearing requests. Schwartz clarifies that if a State chooses to utilize a standard, the State should establish clear guidelines for how the standard is met.

Recommendation #4

EPA should ensure that any test used by a State to decide whether to grant a hearing request is public, unambiguous, reasonable, consistent with the purposes of Title V, and applied in a consistent, non-arbitrary manner.

In Favor (9): Powell, Palzer, Keever, Van Frank, Owen, Schwartz, Hodanbosi, Raettig, Sliwinski

Opposed (7): Broome, Morehouse, Golden, Wood, Freeman, Paul, Hagle

Abstentions:

Clarifications: Broome and Golden oppose because they view a general reasonableness standard as sufficient and that this is already embodied in the rules so that no further steps are required. Freeman opposes because the mechanism by which EPA would ensure these criteria are met is unclear and she would not support prescriptive regulations.

Recommendation #5

As a best practice, in determining the time and location of any hearing, the permitting agency should take into account the ability of interested persons to attend. For example, the permitting agency could contact the person who requested the hearing and the source to determine a convenient time and place.

In Favor (18): Schwartz, Paul, Palzer, Keever, Sliwinski, Morehouse, Wood, Freeman, Broome, Owen, Powell, Raettig, Hodanbosi, Kaderly, Hagle, Van Frank, Keever, Golden

Opposed:

Abstentions:

Clarifications: Powell, Van Frank, Palzer, and Keever clarify that the time and place of the hearing should be selected based on what is convenient to the members of the general public who wish to participate. Hagle and Broome clarify that the ability of interested persons to attend should be one heavily weighted factor, but State resources, travel restrictions, and other factors must also be considered.

Recommendation #6

If a citizen petition under CAA §505(b)(2) demonstrates that a permitting authority arbitrarily denied the petitioner's request for a hearing, EPA should object to issuance of the permit.

In Favor (10): Powell, Palzer, Keever, Van Frank, Owen, Schwartz, Hodanbosi, Raettig, Sliwinski, Hagle

Opposed (1): Morehouse

Abstentions (5): Freeman, Paul, Wood, Broome, Golden

Clarifications: Opposition and abstentions are based in part on the suggestion that States are arbitrarily denying hearings (which these members do not believe is the case), and it is unclear what the standard would be for a demonstration that a denial was arbitrary. Powell clarifies that whether a decision is arbitrary depends on the facts of each particular case. She also clarifies that EPA should interpret the term "arbitrary" consistent with the well-established meaning set forth in case law (*i.e.*, when a State fails to provide a reasoned explanation, or when its explanation (a) relies on a factor that the State should not have considered, (b) runs counter to the evidence before the State, (c) fails to consider a relevant factor, or (d) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.)

Related Topics: Public Notice

Attachment: Relevant Testimony

Information sessions

Heather Abrams, Georgia EPD: Especially if someone is requesting us to have a public hearing, which is different than our question-and-answer, we go ahead and we'll have a meeting to do the question-and-answer well in advance of holding a hearing, and we contact those individuals that have requested the hearing to make sure that they're involved.

Melissa Scanlan, Midwest Environmental Advocates: I think the public hearing by itself with people just showing up probably would not have been too informative because you are just listening to the three-minute testimony. But we were able to use the Title V permit as an educational tool with the community prior to the hearing to show them what the permit limits were, and then they were able to use that to inform their testimony and it led to a large turnout at the hearing. So I think it's the combination of having the Title V process available but also having nonprofit serving as that intermediary bridge role to help use Title V as a way to educate people about what the permit terms are and what that means for public health in the community.

Location of hearing

MS. KADERLY: And just one other quick question. When they hold hearings, do they hold hearings in your area, where the facility may be located, or are they held in Springfield? I wasn't quite sure.

Kathy Andria, American Bottoms Council: For the most part they're in our area. One interesting one, we've got a pool of gasoline petroleum products under the Hartford area from the refineries, and there was a public hearing that was scheduled to be there, and it had to be moved because they said the building could explode that night. So we've got challenges to that. Then they had one that they combined two power plants. One was in a southern Illinois community, one was up in the Alton area, and they held it in between, halfway in between, which was totally unacceptable because neither community -- I mean, it was a wide area. I mean, it made sense, I guess, but it was not convenient to the community participants.

Location/Timing of hearing

Marian Feinberg, Better Bronx: So then we're left with a situation of really asking for there to be mandates and part of the Title V program and saying, well, if we're giving this power to the State to do this, then the State has to fulfill these mandates. And one of them really needs to be a broad public notification in sufficient time and starting with some of the things that the State does in order to evade public participation. For example, you know, in one situation where they persistently set up public hearings five days, ten days before Christmas, for example, when -- and the fact that community members still come out 150 or 200 people to respond to something even at that time is a real tribute to the level of interest. And one might wonder if it weren't five days before Christmas how many people might have been able to come out. So we feel like sometimes it's not only carelessness but deliberate in terms of trying to keep down the numbers of people who can come out or who can comment.

Susan Zingle, Lake County Conservation Alliance: One of the things that they did during the construction permit phase, they would schedule the hearings on the night that the village board meets. So local officials who need to know what's going on or may have questions to ask are denied that opportunity. We raised all kinds of grief. And when they did the Title V permits, they did it again. They have scheduled hearings on religious holidays. So the church across the street has 400 cars in the parking lot, and two or three of us are sitting over at the Title V hearing. Those people want to know. They should be

both places. And at some point -- those kinds of things have happened often enough that it's -- it's not an accident. At the very least they are just simply refusing to look at the outside elements if not deliberately scheduling around them. Scheduling in meeting rooms that don't have air conditioning in the middle of August. Ah, come on, you know. What does it take?

Avram Friedman, Canary Coalition: When the first four power plant Title V permits came up for review in 2002, the DAQ did grant two hearings that combined permits of two plants at each. The hearing for the Belluse Creek and Dan River facilities were held in Rockingham Community College. The hearing for the Roxboro and Mayo plants were in Roxboro Community College. For those of you who may not be familiar with the geography of North Carolina, these are remote sparsely populated regions that are, to say the least, inconvenient to get to, especially on a weekday or working night. The hearings were minimally publicized beforehand in the local newspapers of the hearing venue despite the fact that the emissions from these plants affect hundreds of thousands of people in large urban areas downwind of the facilities. Speakers who traveled up to four hours to be heard were granted three minutes to comment on the content of both 40-odd page documents. Experiencing this set of circumstances can only leave the impression that the hearings are viewed by DAQ officials as a mere formality rather than as a meaningful part of the decision-making process. Important issues were raised of great public concern to the public. For instance, it was brought to light that the Roxboro and Mayo Power plants were being licensed to incinerate toxic wastes such as used oils, solvents, ethylene glycol, waste ammonia citric acid boiler cleaning solution, and coal fly ash mixture from the nearby Cogentrics plant if there was no follow up to comments or any indication that comments had influenced either the terms of a particular permit or general policy by the DAQ. There's a prevailing and sinking feeling that participants have wasted valuable time in researching the issues, preparing a statement, and traveling long distances to deliver them, that written comments will be filed and forgotten to no avail, that the public's interest is not being served.

MR. SCHWARTZ: You mentioned a couple of public hearings that were granted and that did occur, and I could be mistaken, but it sounded like they were held in the community near where the facility was.

Avram Friedman, Canary Coalition: That's correct.

MR. SCHWARTZ: And I was wondering what -- yet you sounded critical of that, and I wondered what exactly was wrong with that and what other -- what you would propose instead as far as a location for a public hearing.

Avram Friedman, Canary Coalition: Well, I think for anything that pollutes to the extent of a coal burning power plant that's owned by a public utility, you have to look downwind and look at the major urban areas that are affected by the emissions. For instance, Winston-Salem, Greensboro, Raleigh or Durham would have been a much more appropriate place for those hearings to be held.

Conduct of hearing

Bob Hall, Nevada Environmental Coalition: We have had some public hearings and -- well, first, let me put it this way. I shouldn't say public hearings. We've requested hearings and then we go into a room. Those hearings are not published. No one else knows about them. They have never published, to the best of my knowledge, publicly published the hearing was ongoing, and that's at the county level.

Amy Mann, Delaware DNR: The public's frustration has also manifested itself in the form of verbal abuse and theatrics at public hearings. These inflammatory comments and actions divert attention away from the important issues surrounding the permit and take up valuable time, which makes it difficult for other community members to submit comments to the record. The agency recognizes the importance of public review in the Title V process and is simply suggesting that measures be taken to provide the public with guidance that would enable communities to more clearly articulate concerns on any given permit without resorting to unproductive, canned objections.

Susan Zingle, Lake County Conservation Alliance: Jim Ross, who was an acting permit manager, said: And now some comments on tonight's hearing. We are here to provide you with information and, perhaps more importantly, to listen to your comments and concerns. Your comments can and do often affect the content of the permit or even the final action that is to be taken on the application. So please make your concerns known to us. That's exactly right. Couldn't have said it better. Now all we have to do is make sure that they mean it.

Agency consideration of comments made at a hearing

Bob Hall, Nevada Environmental Council: We from time to time both on this and Title V have requested hearings. It's a waste of time. Our comments are documented. When I say they're excruciatingly documented, we have a group of people that are technical experts that either worked for the agencies or they worked for sources of air pollution or something like that where they have the technical experience. We put those in single-spaced documents that total 20, 40, sometimes 60 pages of single-spaced detailed as to why that site should not be permitted and we don't even get a reply.

Standard for holding a hearing/hearing request rejections

Scott Gollwitzer, Appalachian Voices: In North Carolina, the public notice net is cast in very narrow geographic range. The circumstance generally results in no one, other than our organization, requesting a public hearing. This allows the director of DAQ to impermissibly use a critical mass standard to determining whether to hold a public hearing. DAQ's track record during our Stack Watch campaign is abysmal. Between May 13, 2003 and September 16, 2004, 76 out of roughly 80 requests for public hearings were summarily denied. Better public notice protocols as outlined above will help eliminate the director's use of this critical mass standard. If DAQ refuses to approve the public notification protocols, at a minimum they should periodically check the public's pulse by holding some public hearings on permits for large facilities and heavily populated areas.

Gollwitzer: Second, we need more public hearings in North Carolina. In North Carolina, the public notice net is cast in very narrow geographic range. The circumstance generally results in no one, other than our organization, requesting a public hearing. This allows the director of DAQ to impermissibly use a critical mass standard to determining whether to hold a public hearing. DAQ's track record during our Stack Watch campaign is abysmal. Between May 13, 2003 and September 16, 2004, 76 out of roughly 80 requests for public hearings were summarily denied. Better public notice protocols as outlined above will help eliminate the director's use of this critical mass standard. If DAQ refuses to approve the public notification protocols, at a minimum they should periodically check the public's pulse by holding some public hearings on permits for large facilities and heavily populated areas.

MR. PALZER: I would like to let you know something that we do in the State of Oregon and see what you think how it would satisfy your request for making it easier to be able to get a hearing held when you have issues even though you don't have this, what you call, critical mass. In our State whenever there's a request by ten individuals or an organization representing ten individuals, the State is obligated to grant a hearing. What do you think of that idea?

Gollwitzer: I'd probably defer any particular answer at this time, although I do like the idea. I think that would go at least in one direction to kill this critical mass standard that is currently being used by the North Carolina Division of Air Quality. And I would certainly be happy to address that as well in my written comments.

Avram Friedman, Canary Coalition: Aside from the documentation of the permit itself, the administration of the Title V process is deeply flawed in North Carolina in several ways. Although in the past it was promised by the State agency that public hearings would be part of the review process of all Title V permits for utility owned coal burning power plants, the DAQ has not followed through. Public hearings were denied for the Buck Steam Station, the Allen Steam Station, the Cliffside Steam Station, the Riverbend Steam Station and others citing, quote, lack of significant public interest, unquote, despite written requests by multiple organizations who represent thousands of affected citizens throughout the State.

Bill O'Sullivan, New Jersey DEP: We don't get much public interest in our permits. When there's a request for a public hearing, we generally honor that request. I don't think we've ever turned down a request for a public hearing, but we don't get many of them. When we get a request to accept public commentary, we do that as well. We don't believe that there should be the need to reissue a public notice if there's a request to extend the comment period.

Marian Feinberg, Better Bronx: And we would like very much to have public hearings be made mandatory following a simple request as is done in many other States but not in New York.

Feinberg: Second, failure to respond to community requests for a Title V hearing. The New York State DEC responds to requests for public hearing by saying well, we'll see if there's sufficient interest. They have never made public nor perhaps do they even have any objective criteria for what constitutes sufficient interest. Thus, community groups with scarce human and financial resources go into a frenzy of activity trying to get better

community members, elected officials to the DEC asking for such a hearing. Sometimes they say yes, other times no. The time and resources spent on getting DEC to agree to a hearing would be better spent analyzing the permit, educating community members about the permit and the Title V process and preparing comments.

MS. KADERLY: Shelley Kaderly with the State of Nebraska. I was wondering whether you were provided a reason why you were denied a request for public hearing.

M. Boyd, CARE: Yes. It's in my response. Basically they said that the information I was seeking wasn't relevant, that the NOV wasn't relevant to the -- to my comment basically, that it wasn't relevant to the -- that I could have still -- they still provided me -- they claim they still provided me enough information to provide both meaningful and informed participation, my position being that they provided me an opportunity for maybe meaningful at a stretch, but they didn't give me informed participation because they didn't provide me the records.

Alexandra Gorman, Women's Voices for the Earth: It's [our State agency is] also very amenable to public hearings on Title V permits. We've requested those a few times in the past and they have always granted those. So that has been -- not been a problem in my experience with Title V.

MS. POWELL: You said that Louisiana has denied requests for public hearings and I wondered what kind of standard Louisiana is applying in deciding whether a hearing is warranted.

John Suttles, Tulane Environmental Law Clinic: Well, I'm not sure. I can give you a fairly recent example of one that really rankled a lot of members of a community group that represents about 2,000 people. ExxonMobil had applied for what they call a Clean Air Act commitment permit that was 14 Title V sources -- there were 12 Title V sources they were rolling into a single permit and they announced that there was going to be a town hall informational meeting. And at the meeting they were specifically asked -- DEQ was present and Exxon's PR department was present -- and they were specifically asked do you propose this in lieu of a public hearing, because we would object if you do. We don't have the information we need to make adequate comments and we're not prepared to participate in a public hearing at this time. We're just seeing these permits for the first time. We were assured that was not the case. We filed written comments on behalf of one of our member groups, and the members -- some of the individual members and the group itself requested a public hearing. It was denied, and one of the reasons for the denial was that there had been this town hall meeting. So it's hard to say -- that was under the prior administration. And the current administration seems to be trying harder to engage the public a bit more. But I can't say what standard the old administration operated under. But it shouldn't be -- this type of thing should not be at the whim of an administration. There should be more of a consistent rule that the public can have some faith be applied across the board.

John Suttles, Tulane Environmental Law Clinic: Finally, regulatory agencies must respect citizens' right to public hearings. In Louisiana there are many people affected by air pollution who lack the formal education and training to provide meaningful written comments, yet they're deeply concerned about their health, their family's health and the well-being of their community. Nevertheless, regulatory agencies often refuse to hold

public hearings by stating that the Clean Air Act merely requires an opportunity to request a hearing, it does not guarantee a right to a public hearing. To be effective in Louisiana, however, regulators must -- they cannot take such a dismissive approach to public involvement in permitting decisions.

Deborah Masters, Community Board 1, NAG: Another Title V permit, Diamond Asphalt, we call this company DAC. The company proposes to reopen adjacent to the sewage treatment plant, also in the heaviest industry area two blocks from an EJ community. It will produce one-third of New York City's asphalt. DEC did not attend the public information meeting. There was no transcript. 35 community members made educated statements based on a careful reading of the air permit. Ten politicians or their representatives also asked educated questions and made informed statements. Yet we were not granted a public hearing.

Peter Hess, Bay Area AQMD: I'd like to conclude my remarks by touching on an area that we think is working very well within the Title V program. And that is the manner in which a decision is made to hold public hearings for proposed permit actions. A public hearing can be a useful way to solicit comments on a proposed permit; but effective hearings can be very resource-intensive because of the required extensive outreach and need to be held in community locations during after-work hours. Currently in the Bay Area, we even hold workshops to educate the public on how to comment and inform them of the Title V permit process. The current regulations -- giving the permitting agency discretion to deny a request for a public hearing if public interest is limited or adequate justification is not otherwise provided -- is appropriate. Again, we believe this approach is working very well.

Keri Bandics, Environmental Law and Justice Clinic: Our experience in the past has been that when a facility is, I think, clearly a problem in the community, like the Red Star Yeast facility or the refinery, that hearings are -- the air district just goes ahead and holds a hearing. But when that's not the case and the community -- maybe a single member of community or a public community member -- asks for a hearing, the standard is a lot higher; and public hearings haven't been granted as a matter of course in the Bay Area.

MS. OWEN: Going back to the hearing, I'm a little bit confused that the public has to submit significant comments first and then have a hearing. Is there an additional public-comment period after the hearing, or why do you hold a hearing after you receive comments?

Jeff Kitchens, Alabama DEM: Well, we feel like if we can -- if the public has comments and submits those comments during public-comment period, and we can adequately address those concerns, we see no need to hold a public hearing. Let me clarify a little bit. In their comments, they have to specifically request a public hearing. It's just not -- we don't do it if we receive a large number of comments. The commenters (sic) have to specifically request a public hearing.

MS. OWEN: How many hearings have you had?

Kitchens: Well For Title V permits?

MS. OWEN: Yeah, the last year or two.

Kitchens: Well I can't remember any.

Jeff Kitchens, Alabama DEM: We hold public hearings when we receive significant comments that are directly determined warrant a public hearing.

Susan Zingle, Lake County Conservation Alliance: The one thing I will praise the [Illinois] EPA on, that they are generous with their public hearings. During the peaker-plant process they just made a blanket decision that they were going to have hearings on all of them. And although that's dwindled somewhat now that the crisis is over, normally if we want a hearing, we get one without any kind of fuss. And I would encourage everybody else it take that model.

Value of public hearings

Genasci, NW District Assoc. Health & Env: Overall we value Title V. We've been through two hearings, two Title V hearings with the foundry. The most important thing for us has been the public hearing requirement. This has given us a chance to really get public awareness in the whole neighborhood. And also we feel that there's a very strong right to know need for the neighborhood. The people who suffer from this kind of pollution need to know what it is they're breathing and they can go to the hearings. And we have had excellent expert testimony there as well as the neighbors.

Peter Hess, Bay Area AQMD: Well, here on the Left Coast, people are very active in the permitting. And we see, on the major facilities and the controversial facilities that are facilities close to neighborhoods. And if there is an environmental justice issue related to the facility, people want to have a hearing. They want to have a meeting. They want to know. They want to express their concerns. Very seldom is there a resolution of the issue at the hearing; however, the issues are placed on the table. And it gives the permitting agency -- us -- and whoever else is in attendance, namely, the facility and the regional office, a good sense of what the issues are at the facility. Some of those issues cannot be resolved in the Title V issue -- they're outside the Federal enforceability, like odor nuisance or something like that. But at least they're brought to the attention; and it can be addressed elsewhere.

Melissa Scanlan, Midwest Environmental Advocates: From a community activist perspective, there are also significant benefits from this program. I have helped several community groups comment on Title V permits, and it's been a good process to educate the public about what's really going on with the facility in their neighborhood. In La Crosse, Wisconsin, just as one example, over 50 people showed up to testify on a Title V permit for the French Island incinerator, which is a municipal waste incinerator. The Title V permit and the hearing process definitely helps make the regulations, which are very complicated, make the regulations clearer and more transparent for the general public.

Lyman Welch, Mid-Atlantic Environmental Law Center: I think that both the agency and our organization learned a lot about the Title V program by going through that process. There were many people when we had a public hearing on this. Many people came out to speak, to talk about the problems of air pollution and the impact on them from this facility, and by having the Title V program involvement, I think it was helpful. One of the things that came out of this process is that Delaware is now looking at developing new laws to reduce pollution from power plants, because they found that existing laws were not actually

able to reduce the pollution that was coming out of coal-fired power plants, and that new laws were required. So, when the public came to complain, one of Delaware's responses is, well, we can't do much under current law, but we're taking a look at new laws to actually accomplish pollution reduction. So, it helped us participate in the process, and one of the problems is that here is part of Title V, and there isn't a lot as far as a coal-fired power plant and there's not a lot of legal requirements that actually can be used to reduce the pollution from that kind of facility. Hopefully, Delaware is now serious about actually trying to reduce the air pollution through new requirements. We'll see if that actually comes to pass, but that's what they said in response to comments on that.

Kathy Andria, American Bottoms Council: We view the public hearing as the most important opportunity to ask questions because when we ask questions in a public comment and written form, we never get any answers. In several cases they've extended the public comment period, which we very much needed, given that we had so many within a short time.

Merrijane Yerger, Clean Up Louisiana: As it turned out, when we had our public hearing on this issue, we had the greatest turnout I believe the EPA said they had ever seen. We had over just about 200, 250 people show up. And it was right here in the neighborhood at a high school, and it can house that many people.

MS. HARAGAN: Hi, this is Kelly Haragan with the Environmental Integrity Project, and I had a question about your public-participation comments. It sounded like when you read that letter, someone was making a general comment about monitoring and asking for a hearing and extra time to make more specific comments. Did you grant that request for hearing or give them time to make more specific comments? I know when I try to review some of these, you know, 200-page permits, a 30-day comment period is very short. So I don't always have time to review everything, and extra time can help me make more specific comments.

Amy Mann, Delaware DNR: We did hold a public hearing on this specific permit. I can't remember off the top of my head if the three-day process was extended. But, typically, what we'll do is, at the close of a hearing, if people express the fact that they need more time to look at the requirement or to comment on issues that came up at the hearing, we'll keep the comment period open for a few more weeks after the public -- or the public hearing closes.

Frequency of requests for public hearings

Mohsen Nazemi, South Coast AQMD: And public hearings have been requested for less than two percent of our Title V permits. We have initiated a lot of meetings -- public consultation meetings -- without any request, especially like for refineries because we knew there was public interest. But, certainly, this level of participation does not considered as extensive but rather sporadic.

Heidi Hollenbach, Michigan DEQ: Public hearings aren't extremely common. I think in our State maybe we've had 20 public hearings to date for Title V permits. A lot of times the comments tend to be more New Source Review permitting comments that we can't address through the Title V process. But I do believe if there are comments that are

appropriate, that our staff try to make the appropriate change in the permit if it is relevant and appropriate to do so.

MR. PAUL: We've had no requests for public hearings.

Notice of hearing

Bob Hall, Nevada Environmental Coalition: We have had some public hearings and -- well, first, let me put it this way. I shouldn't say public hearings. We've requested hearings and then we go into a room. Those hearings are not published. No one else knows about them. They have never published, to the best of my knowledge, publicly published the hearing was ongoing, and that's at the county level.

Related issue: Pre-Comment Period Public Involvement

PALZER: Well, one of the points that he [Steve Murawski] made, and I was going to ask a follow-up question, but I asked another one instead, but I thought I might ask you, he was recommending that the EPA and the State agencies should have a pre-public comment review by the prospective permittee before the permit is issued. That is to, you know, to avoid problems that you have down the line later. My question to you is, do you feel that it would be helpful for the public to be involved in a process before a public hearing occurs, rather than getting a permit that's been negotiated between the permittee and the regulatory agencies?

Bruce Nilles, Sierra Club: I think some additional safeguards to avoid sort of the situation where you have a public hearing, and it's sort of a fait accompli. That here is the permit, and you basically take it. Because we've seen multiple instances here in Illinois where the agency and the company show up at a hearing or right before a hearing and say, "Here is the draft permit," and we raise very serious concerns, like where is the underlying Title I obligations, and they're forced to rescind the entire permit and start over. So from a resource perspective, there may be a lot of value in soliciting public input at an early stage, avoiding the scenario like we've seen in multiple permits in East St. Louis, where the permits come out, allegedly the by-product of a negotiation between the State and the industry, we point out serious defects, and they're back to the drawing board for another six months or more.

5.4 TOPIC: PUBLIC NOTICE THROUGHOUT PROCESS

Issue Observation/Description:

What This Paper Addresses: This paper addresses the degree to which public notification of permit proceedings has been effective, the extent to which comments have been made on permits, and what potential improvements could be made to address any problems that do exist in State implementation of notice requirements.

Legal Requirements: The Clean Air Act Amendments of 1990 provide specific requirements for public notification and participation in the Title V permit process to help ensure that permits comply with the Act's requirements. Specifically, Section 502(b)(6) requires permitting authorities to include in the State programs:

> adequate, streamlined, and reasonable procedures for .. processing … applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

EPA implemented the above statutory provision in Section 70.7(h) of the Title V regulations, stating:

> Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit."

EPA went on to require that public notice be provided:

> by publication 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 [and] to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public."

40 CFR § 70.7(h). Part 70 also specifies a series of items that must be included in a public notice, including (1) identification of the affected facility, (2) permittee's name and address, (3) permitting authority's name and address, (4) the activities involved in the permit action, (5) the emissions change involved in any permit modification, (6) contact information for a person from whom interested persons may obtain additional information, (7) a brief description of the comment procedures, and (8) the time and place

of any hearing, including a statement of procedures to request a hearing (unless a hearing has already been scheduled). *Id.* Part 70 does not provide for public notification of when a permitting authority forwards a proposed permit to EPA for review or issues a final permit. Nor does Part 70 speak to public notification of the start of the 60-day public petition period.

Summary of Comments Received

Most of the comments on this issue were submitted by representatives of environmental organizations ("environmental group commenters"). However, State agencies also commented on the cost of newspaper notices and provided input on various ways they use to apprise the public that a draft permit is available for comment. All of the environmental group commenters emphasized the need for better public outreach. Three local agency representatives and one State representative testified that they had received few or no comments on their draft Title V permits.

Newspaper notices: Several State and environmental group commenters stated that legal notices in newspapers are often ineffective at notifying the general public of permit proceedings. One local agency representative and two State agency representatives serving on the Task Force noted that newspaper notices are very expensive and that their cost seems high given how few people they appear to be reaching. However, two environmental group commenters reported that there had been times when a member of the public had come to them for help after reading a legal notice. Those environmental group commenters who were asked whether they supported eliminating newspaper notices indicated that they thought newspaper notices should continue to be required but could be made more useful. They stated that there are many people who read newspapers but don't use the internet. One environmental group commenter stated that a newspaper ad written in plain, non-legalistic language is far more effective than a legal notice. ("If it is so technical and it talks about Title V or CAAPP, people still don't know what that is. Get it down to the level that someone reading the newspaper—say this is a power plant, and this is your chance to talk about what it emits, and is it complying, and come to the hearing. Market it a little bit instead of just narrowly complying with the technical language in the law.") (Zingle). Two commenters urged the Task Force to recommend that newspaper notices be published both in English and in the second language that is prevalent in the community where the permit applicant is located. Some environmental commenters were concerned that the limited geographic distribution of newspapers used to publicize permit proceedings could lead to parts of the affected community never receiving actual notice of a permit for a facility in their area. An example given was of a facility located near the border of two communities, where notice was provided only in the newspaper applicable to one of the communities. One commenter explained that his State applied a "critical mass standard" in deciding whether to hold hearings, and the limited geographic scope of the newspaper notices "generally results in no one, other than our organization, requesting a public hearing." Thus, the commenter reported that public hearings on Title V permits were almost never held in his State. Several commenters stated that it was difficult to know which paper was the "official" paper where public notices would appear.

Internet notices: In general, environmental group commenters were highly supportive of State efforts to publicize permit proceedings using the internet. Both State and environmental group commenters described helpful State websites that include information regarding where permits are in the permitting process as well as key documents such as draft permits and statements of basis. Several environmental commenters stated that email notification of permit proceedings is very effective. While supporting internet tools to provide notice, when asked these environmental group commenters stated that newspaper notices were still important. Several commenters expressed concern that while email notice is a great way to alert employees of environmental organizations, other members of the public may not have regular internet access. One commenter clarified that it is insufficient for a State merely to publish a notice on their website without providing direct notification to interested individuals.

Mailing lists: Some commenters indicated that they had asked to be placed on mailing lists or had subscribed to internet email notification devices that had worked well in providing them with notices on particular facilities or on all facilities in a State. Several environmental group commenters suggested that permitting authorities should maintain a mailing list that includes not just people who notify them in writing that they want to be included on a mailing list, but also other potentially interested parties such as community groups, environmental groups, local government entities, churches, and individuals who have participated in prior permit proceedings affecting the permit applicant. Two commenters criticized their State agencies for failing to notify them of the start of the public comment period on Title V permits for particular facilities, even though these commenters had previously been involved in other types of permit proceedings affecting these facilities and were clearly concerned about these facilities. One commenter reported that her State was not complying with the requirement to maintain a mailing list of interested parties. One local agency commenter and one State agency commenter reported that their agencies maintained a broad mailing list of all parties that they believed might be interested in a permit proceeding.

Other forms of public outreach: Some commenters noted that States had held public information meetings in advance of a draft permit in order to help the public around a particular facility understand the Title V process. A suggestion made in the testimony was for permitting authorities to enlist the assistance of community and environmental organizations in notifying affected communities of upcoming permit proceedings. One environmental group commenter suggested that notices should be posted at public libraries. One State agency representative on the Task Force explained that his agency requires permit applicants to post a notice of their upcoming permit proceeding on the outside of their building, and one environmental group commenter confirmed that she thought that was a good idea. One environmental group commenter suggested that permitting authorities should contact potentially interested parties by phone. One environmental group commenter suggested that permitting authorities should ask radio and TV stations to run public service announcements. One environmental group commenter noted that she only knew to look for Title V notices after attending an EPA training session on how to review Title V permits (and the author of this paper reports that nearly

all of the environmental commenters have attended such a session at some point during the past five years).

Ability to track upcoming permit proceedings: One environmental group commenter stated that it would be helpful if there were a way that his organization could know when permits for various facilities were likely to be ready for public review, so that the organization could plan out its work on Title V permits.

Public notice of final and proposed permits/start of public petition period: One environmental group commenter reported that he had filed comments on a draft permit, but he did not receive notification of when the permit was proposed to EPA or of when time period for petitioning EPA to object to the permit began. He had an expectation that the permitting authority would have communicated with him when these milestones in the process occurred. He stated that because the permitting authority failed to notify him of these actions, he missed the deadline for filing a petition for an EPA objection and instead had to depend on EPA's willingness to reopen the final permit. An industry representative on the Task Force indicated that typically a permitted facility is also not given any notice that its permit has been forwarded to EPA or when the time period for petitioning to EPA to object to a permit would begin and end.

Public notice delay: One industry commenter voiced concern about the delay in getting a public notice published.

Discussion

Alternatives to newspaper notice: State agency Task Force members noted that newspaper notices can be very expensive in large metropolitan areas and are not necessarily effective in communicating with the public. One industry member stated that at least in smaller towns, newspaper notices seemed very effective and not too expensive. A State agency member indicated that in larger urban areas, a newspaper notice can cost as much as $5,000 just for a small legal notice. Another State member explained that in a large urban area in his State, the notice could cost as much as $10,000. These members explained that this was the cost of a notice in small print in the legal section of the paper; a notice printed in larger print in a different section would cost even more. Thus, these members believed that it was unreasonable for the Task Force to recommend that these notices be expanded or made more prominent. All members present at the discussion agreed that newspaper notices in large urban areas were very expensive considering testimony and personal experience suggesting that these urban notices do not seem very effective at alerting people to permitting actions.

The Task Force spent a significant amount of time discussing whether it would be feasible to allow permitting authorities to replace newspaper notices with other public notice mechanisms under certain circumstances. Several members expressed concern that at least with a newspaper notice, all community residents at least have the opportunity to find out about a permit proceeding. By contrast, other notification mechanisms have a more limited audience. These members recognized, however, that in reality, the vast

majority of residents in urban areas did not read a newspaper's legal notices. Several alternatives were discussed. One industry member noted that the legal requirement is to provide notice *either* in a newspaper *or* in the State's analog to the Federal Register. Thus, this member suggested States that have a "register" type document could use that rather than newspaper notice and then find other, more effective ways to alert the public around a facility with the money that would have been spent on the newspaper notice. One pointed out that an ad on a cable television station is much less expensive than a newspaper notice, and that such an ad would probably reach many more people. Another Task Force member pointed out that the problem with a TV ad is that it goes by very quickly and you usually don't have time to write down information before the ad is over. A Task Force member suggested notices in utility bills. Several members agreed that utility bill notices were fairly effective, but that such a notice may not be published in a timely fashion. Task Force members discussed a variety of other options, including enlisting community groups to circulate notice of permit proceedings, posting notices at grocery stores, day care centers, and community centers, and circulating a press release announcing a public hearing, if one is to be held. One State agency member informed the Task Force that from what he has seen, his State's requirement that a source post notices around the perimeter of the facility is far more effective at notifying the public of the permit proceeding than is a newspaper notice.

In discussing the possibility of a recommendation that EPA revise its rules to authorize permitting authorities to replace newspaper notices with other public notification mechanisms, Task Force members sought to craft a recommendation that would account for the tremendous variability among communities (*e.g.*, whether or not internet access is uniformly available). In communities where it was feasible to publish a larger-sized notice than the typical legal notice, most Task Force members believed that these notices were probably fairly effective and should be continued. Task Force members agreed that the problem was with tiny but expensive legal notices in large urban areas. Members agreed that the effectiveness of a particular type of notice would vary depending on a community's demographics and geography. One Task Force member suggested that perhaps EPA could undertake a pilot project designed to find out what types of public notices work best, *e.g.*, by surveying people who attend a hearing to find out how they found out about the proceeding. Other members voiced concern that how people ultimately find out about a particular permit proceeding is often unique to that proceeding, and that it would be extremely difficult to translate a survey of public participation in one or even several permit proceedings into a generalized finding of which types of public notice are most effective.

Ultimately, all members present at the discussion agreed to a recommendation for EPA to allow permitting authorities to replace newspaper notices with alternative notification mechanisms, but only where the permitting authority finds that the alternative notification mechanism will be "more effective in informing a cross section of the affected public including those members lacking routine access to the internet." Task Force members wished to emphasize that this finding was not to be a generalized finding for all notices in a State, but that the permitting authority must instead "consider geographic and demo-

graphic differences." Task Force members clarified that a decision to utilize alternate notification mechanisms must be based on "objective criteria."

Newspaper Notice Content: Environmental group members expressed concern that newspaper notices are not communicating to the public what is at stake in a particular permit proceeding. One environmental group member explained that it is often difficult to know from a public notice what type of facility is being permitted, and thus, it is difficult to determine by looking at the notice whether to get involved in the particular proceeding. Other Task Force members agreed that it would be helpful for a notice to specify the type of facility being permitted, *e.g.*, a steel mill. All members present at the discussion agreed to a recommendation that EPA require that a notice include this information.

The Task Force also discussed a recommendation made in testimony that notice content be expanded to better inform the public of how they can participate in the permit proceeding. An environmental group member explained that, aside from representatives of the regulated facilities, most of the public does not know about Title V, and so it is important for the notice to explain what a Title V permit is and how a person can participate in the process. Several State agency members suggested that newspaper notices were already too expensive and that it would be prohibitively expensive to expand the content of the notices—at least with respect to notices published in large urban newspapers. Likewise, an industry member pointed to testimony by industry representatives that the program is already extremely expensive, and suggested that it does not make sense to put additional money into expanding newspaper notices since the vast majority of permits receive no public comment. Environmental group representatives suggested that low public participation is not indicative of a lack of public interest in industrial permitting, but is due in part to poor public notice of what is at stake and how the public can influence the permitting process. Industry members and one State agency member suggested that low public participation in the permitting process was not reflective of insufficient notice, but instead indicates that the public generally relies on the State agency and EPA to represent their interests and issue good permits and has confidence in the State permitting system to record properly the applicable requirements.

One industry member stated that notices are not meant to "market" a permit proceeding, but only to notify the public of the proceeding. Environmental group members disagreed with that statement. Their view was that the public relies on agency officials to notify them of when something is happening that may affect them and to educate them regarding how they can influence the process.

Given the disparate views on this issue, the Task Force chose not to make additional recommendations relating to the content of newspaper notices. However, many Task Force members were able to agree on ways that a permitting authority could better inform the public of Title V proceedings using other outreach mechanisms. Those discussions are described below.

Newspaper notice distribution: The Task Force also discussed how it might address testimony describing circumstances where a facility was located near a county line, and newspaper notice was published only in a newspaper serving the county in which the facility was located, and not in a newspaper serving residents of the adjacent county. One Task Force member pointed out that this issue also arises where a facility is located near a State line.

One Task Force member suggested, and others agreed, that the best way to tie a recommendation on this point to the existing Part 70 regulations would be to recommend that EPA clarify that under circumstances where a facility is located near a county or State line, the phrase "affected public" in § 70.7(h) includes residents of the adjacent counties or States. See Recommendation #7.

Mailing lists: The Task Force spent a significant amount of time discussing testimony that criticized permitting authorities for not providing notice of a permit proceeding to people who had previously expressed concern about the facility being permitted. Environmental group representatives suggested that permitting authorities should be required to add someone to their mailing list if they have reason to believe that person might be interested in the permit proceeding. While many Task Force members agreed with this general concept, there was extensive discussion regarding how to identify people who might be interested in a permit proceeding. Several members of the Task Force were concerned about requirements based on such a vague standard and whether this could invalidate a permit or a permit revision if it was later determined that the permitting authority should have known that someone would be interested in a permit proceeding. In addition, there were concerns raised about cost. In an effort to put more specific parameters around this issue, the Task Force discussed the possibility of requiring permitting authorities to notify a broad range of people within a specified geographic range of a facility, such as elected officials, day care providers, schools, community centers, and public interest groups. Many Task Force members were concerned that such a requirement would waste agency resources because most of the people receiving these automatic notices would not be interested in the permit proceeding. These members suggested that outreach efforts should be focused on people who were more likely to be interested.

Some Task Force members noted that the rules already provide a way for interested parties to receive notice of proceedings and questioned why people who are interested in Title V proceedings would not sign up on the Title V mailing list that is required by the rules. Environmental group representatives responded that most people do not know that there is such a thing as a Title V mailing list. One member asked how States went about notifying people of the opportunity to sign up on a mailing list. Task Force members generally agreed that permitting authorities do not appear to be doing much outreach to notify the public of the opportunity to sign up on a mailing list. One Task Force member noted the testimony of South Coast AQMD which indicated that agency had done extensive outreach but still did not received significant public comment. This Task Force member took that as an indication that the lack of comment on permits could indicate that members of the public are not truly interested in the permit proceedings, even with efforts to get them interested.

Ultimately, most Task Force members agreed to recommend that EPA strongly encourage permitting authorities to add people to their mailing lists who recently have expressed interest in air emissions from the facility being permitted. The Task Force members agreed that, among others, people who have commented on a construction or operating permit for the facility should be included.

Internet notification: All Task Force members agreed that internet notices are very effective as a supplement to newspaper or State register notices. Task Force members agreed that internet notices should not replace newspaper and State register notices, because some people lack regular access to the internet, or do not look on the internet regularly enough to receive timely notice of permit proceedings. However, Task Force members agreed that internet notices are the most effective way to notify environmental professionals (including industry and environmental group employees) of permit proceedings. All Task Force members present at the discussion agreed that the internet is the primary way that they learn about permit proceedings.

Task Force members agreed that some States have developed excellent websites that provide notice of draft permits and permit modifications. Examples raised of good websites were Indiana, Michigan and the San Francisco Bay Area Air Quality Management District. An industry member pointed out that Pennsylvania provides its State register online, but that this website is not as effective as the websites mentioned above because it is difficult to download permit documents.

Task Force members noted that there are two ways that States use the internet to provide public notice. Some States post public notices and relevant documents on a webpage. Some States email interested parties when they update their webpage, or when the public comment begins on a particular draft permit, or both. In addition, some States provide an email notification regarding particular facilities to people who have expressed interest in that facility, although the Task Force heard from one commenter that though he expressed interest to his permitting authority in certain facilities, he did not receive notification of permit proceedings.

Ultimately, all Task Force members agreed to recommend that EPA encourage States to utilize the internet to better publicize permit proceedings by providing guidance with suggestions on how to do that. In addition to posting notices and certain permit-related documents online, Task Force members thought that EPA should encourage States to utilize the web to educate the public about what the Title V program is and how to participate in permit proceedings.

One specific improvement that Task Force members agreed needed to be made with respect to most State sites is better public notice of the opportunity to sign up on a Title V mailing list. Several members noted that they seldom saw any information about Title V mailing lists on State websites. One permitting authority representative stated that information about the Title V mailing list is available on his State's site, but recognized that this information was not provided in the same place on the website as other information

about the Title V program. Task Force members generally agreed that it was important for information about how the public can get involved in Title V proceedings to be provided in the same area of an agency's website where other Title V information is located.

Supplemental outreach efforts: The Task Force discussed whether permitting authorities should be supplementing their traditional public notice with additional outreach efforts. One environmental group member pointed out that the Part 70 regulations require that a permitting authority provide notice "by other means if necessary to assure adequate notice to the affected public." Task Force members offered various ideas for extra steps a permitting authority might take to better inform the public of a permit proceeding.

One industry member suggested that there should be a way to identify those facilities that are likely to be of interest and to go the extra step with notice in those situations, rather than creating broad recommendations to be implemented for every permit. That member noted that the vast majority of permits (according to one State agency about 97%) received no comments from anyone but the facility. An environmental group representative noted that the lack of comments on a facility's permit does not necessarily mean that the facility is non-controversial, but may instead reflect poor public notice of the permit proceeding. However, that representative did not object to tailoring supplemental outreach efforts to those facilities that are most likely to be of public concern. One permitting authority representative indicated that his State knows which facilities are likely to be controversial and supported the concept of tailoring supplemental notice recommendations to those facilities. One industry Task Force representative noted that a person's view as to the adequacy of notice likely was related to their view as to what Title V authorizes and requires. For example, a person who views Title V's purpose as simply ensuring that all applicable requirements are incorporated accurately into a single permit likely would view notice to be adequate if it was designed to reach people who were interested in that somewhat limited process. On the other hand, those who view Title V's purpose as including the addition of new requirements to address comments regarding "compliance assurance" likely would want notice to go to anyone who was interested in addition of such requirements to a facility's permit.

The Task Force then discussed when supplemental outreach might be appropriate. Many members agreed that supplemental outreach may be warranted in some circumstances, such as where a facility is located in a community that is disproportionately affected by emissions from stationary sources, or where the permitting authority knows that the facility being permitted is or recently has been the subject of significant public interest due to its size and/or actual or anticipated environmental impacts. There was also general agreement that additional outreach may be warranted if a facility had compliance issues in the past. With respect to this last category, however, several members advocated against recommending additional outreach whenever a facility has been found to be in violation of a requirement. These members explained that permits contain numerous recordkeeping and monitoring requirements and missing occasional records, while a deviation that needs to be reported, is not an indicator that there is a compliance problem generally with a facility. Moreover, they noted that EPA's high priority violator (HPV)

policy has taken an approach that sweeps sources into the HPV category even if the violations do not indicate exceedance of emission limits.

Recommendation #8 includes a list of supplemental outreach strategies with an indication of when they might be appropriate, and suggests that EPA issue guidance to States regarding use of such strategies. Several members suggested that EPA's Office of Environmental Justice should be involved in preparing this guidance. While this recommendation identifies a variety of different supplemental outreach approaches, the Task Force recognized that the effectiveness of various outreach methods would vary depending on the characteristics of the community. In addition, several of the Task Force members supporting the recommendation as well as those opposing it indicated that not all of these methods are appropriate in all cases but that they need to be tied to the likely interest in an individual facility and the resources required to implement them. In particular, permitting authority representatives on the Task Force especially wanted to ensure that this would be a menu of options from which they could choose and that EPA guidance would not be perceived as being mandatory. In addition, an industry Task Force member objected to some of the language used in the recommendation. For example, she objected to the suggestion that EPA ask States to make determinations about disproportionate impacts from emissions. She also objected to the suggestion that States "know" whether sources are violating requirements, unless the issue has been adjudicated, because often those issues are disputed. She also felt that the suggestion that States "explain what can be achieved through participation in the permit proceeding" was inappropriate, given that the view on what can be achieved is tied to issues that are not resolved (*e.g.*, the extent of authority to add new requirements).

Notice of events after the close of public comment period: Environmental group representatives felt strongly about the need for improved public notice regarding when a permit moves from one step to the next in the process. These members explained that under the current Part 70 rules, there is no requirement for a permitting authority to notify commenters when it forwards a permit to EPA for review. Likewise, there is no rule requirement that the permitting authority or EPA notify a commenter of the start of the 60-day period for filing a petition seeking the EPA Administrator's objection to a permit, or of when a final permit is issued. They noted that some permitting authorities have been known to wait for a year or even more before forwarding a proposed permit to EPA for review after the close of the public comment period. Because the time lag between the close of the public comment period and the start of the public petition period can be significant, it is easy for a public commenter to lose track of where the permit is in the process, and therefore, to miss all or part of the public petition period. Recommendations #4 and #5 were designed to address this issue.

Recommendations

Recommendation #1

State programs should be able to include in their rules alternatives to newspaper notification, provided the alternative is more effective in informing a cross section of the affected public including those members lacking routine access to the internet.

In Favor (17)*: Schwartz, Paul, Wood, Hodanbosi, Powell, Raettig, Owen, Morehouse, Hagle, Freeman, Sliwinski, Kaderly, Broome, Keever, van der Vaart, Golden, Palzer

Opposed:

Abstentions:

Clarifications: Effectiveness needs to be evaluated based on objective criteria and considering geographic and demographic differences.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

The content of a public notice should include the type of facility (*e.g.*, steel plant, chemical manufacturing).

In Favor (17): Schwartz, Paul, Wood, Hodanbosi, Powell, Raettig, Owen, Morehouse, Hagle, Freeman, Sliwinski, Kaderly, Broome, Keever, van der Vaart, Golden, Palzer

***Opposed*:**

***Abstentions*:**

***Clarifications*:** Voting in favor of this recommendation does not indicate that other improvements to the form of the notice are or are not needed.

Recommendation #3

States should improve their Title V websites to provide better notice and access to relevant documents in a permit proceeding, emulating agencies that have developed websites with information on public notice and draft permits. EPA should issue guidance to permitting authorities with suggestions for how to utilize the internet to publicize permit proceedings. That guidance should encourage permitting authorities to:

a) provide interested members of the public with the option to receive notification of draft permits via electronic mail instead of traditional mail;

b) maintain a website that includes, among other things, public notices, draft, proposed, and final permits, statements of basis, a table of draft permits out for review and the date the comment period will end, the dates that final permits are issued and will expire, and a description of any permit revision made following initial permit issuance.

c) Include information on their website about what the Title V program is, how to obtain more information about the program and the sources subject to it, and how to sign up to be included on a mailing list.

In Favor (17): Golden, Paul, Palzer, Powell, Hagle, Schwartz, Morehouse, Raettig, Owen, Wood, Keever, Sliwinski, Kaderly, Broome, Freeman, van der Vaart, Hodanbosi

***Opposed*:**

***Abstentions*:**

(Clarification for Recommendation #3)

***Clarifications*:** Freeman, Broome, and Wood clarify that listing of draft, proposed, and final permits in (b) does not imply agreement that the draft and proposed permits need to be separate documents or that serial review is required. van der Vaart supports contingent to ability to provide alternates to newspaper notice rather than making this a cumulative recommendation.

Recommendation #4

EPA should revise its rules to require that the permitting authority notify any person who makes comments on the record on a draft Title V permit when it forwards a proposed permit to EPA for review. That notice should inform the commenter:

- of when EPA's 45-day review period will end;
- that if EPA does not object to the permit, the State can issue the permit as final;
- that if EPA does not object to the permit within its review period, the public will have 60 days during which it can petition the EPA Administrator to object to the permit;
- of the projected beginning and ending dates of the public petition period, assuming that EPA does not object during its review period;
- what happen if EPA objects to the permit, and
- of the availability of a document that describes any differences between the draft and proposed permit and how to receive a copy free of charge (electronically or by mail, if requested).

The revised rules should also require a permitting authority to notify those same individuals when it issues the permit as final.

In Favor (9): Sliwinski, Palzer, Powell, Hagle, Schwartz, Raettig, Kaderly, Owen, Keever,

***Opposed (7)*:** van der Vaart, Broome, Paul, Freeman, Wood, Golden, Morehouse

***Abstentions*:**

***Clarifications*:** Morehouse and Paul oppose because of the recommendation to revise the Part 70 rules. Paul believes these recommendations should be best practices, but not require rule changes. Freeman agrees that this information should be available to the public, but does not agree with the recommendation for rule revision. Wood clarifies he does not object to notification of those commenting, but does not believe a rule revision is necessary or appropriate. Golden clarifies that, while he supports these as best practices, he does not believe rule requirements are appropriate.

Recommendation #5

EPA should revise its rules to require a permitting authority to retain the name and mailing address of any person who comments on a draft Title V permit, where such information is provided by the commenter. If EPA objects to the proposed permit during its 45-day review period, EPA must notify persons on that list of the objection and (a) provide a copy of the objection, or information regarding how a copy of the objection can be obtained free of charge, (b) explain the process by which the objection will be addressed, and (c) explain when the public will have the opportunity to petition EPA to object to other aspects of the permit, or to the objectionable permit terms once they are revised.

In favor (10): Palzer, Sliwinski, Powell, Hagle, Schwartz, Raettig, Owen, Keever, van der Vaart, Kaderly

***Opposed (6)*:** Freeman, Broome, Paul, Wood, Golden, Morehouse

***Abstentions*:**

***Clarifications*:** Paul and Wood oppose because they believe that this recommendation can be accomplished without revising the Part 70 rules. Golden and Morehouse clarify that while they support these as best practices, they do not believe rule requirements are appropriate. Broome opposes the rule change element and the mandatory nature of the recommendation.

Recommendation #6

In addition to notifying people who request to be included on a Title V mailing list, EPA should strongly encourage permitting authorities to directly notify people (by putting them on the mailing list or otherwise) who have recently expressed concern about the air emissions from the facility. People who have expressed an interest in the air emissions from the facility include, among others, those that commented on other air permits or permit revisions for the facility (construction or operating permits).

In Favor (15): Hodanbosi, Palzer, Raettig, Powell, Keever, Van Frank, Broome, Hagle, Owen, Paul, Sliwinski, Kaderly, Golden, Morehouse, Wood

***Opposed*:**

***Abstentions (1)*:** Freeman

***Clarifications*:** Broome, Morehouse, Wood, and Golden clarify that they do not support a regulatory requirement in this regard. Kaderly clarifies that she supports this recommendation with the understanding that the person expressing concern about the facility has not requested that their name and address be held in confidence.

Recommendation #7

EPA should clarify that where a facility is located near a county or State line, the term "affected public" in § 70.7(h)(1) includes affected residents in the adjacent counties/States.

In Favor (12): Sliwinski, Powell, Keever, Wood, Schwartz, Palzer, Paul, Raettig, Owen, Van Frank, Hodanbosi, Kaderly

***Opposed (1)*:** van der Vaart

***Abstentions (4)*:** Freeman, Broome, Hagle, Morehouse

(Clarification on next page)

(Clarification for Recommendation #7)

***Clarifications*:** Kaderly emphasizes that EPA must be clear as to what it means to be "near." Hodanbosi clarifies that he is in favor as long as there is a reasonable standard applied to the notification requirements for people in nearby States (*e.g.*, for a large source near a State border, notification would not need to be any greater than the immediate neighboring county).

Recommendation #8

EPA should issue guidance to permitting authorities regarding how to implement the 40 CFR § 70.7(h)'s directive that notice be provided "by other means if necessary to assure adequate notice to the affected public." That guidance should encourage permitting authorities to take extra steps to publicize permit proceedings, especially those that involve (1) a facility located in a community that is disproportionately affected by emissions from stationary sources, particularly if the community is composed primarily of low income or minority residents, or (2) a facility that has previously been the subject of significant public interest, or that the permitting authority knows is now the subject of significant public interest due to its size and/or actual or anticipated environmental impacts, or (3) a facility that the permitting authority knows to be in persistent violation of applicable emission limits. Supplemental outreach efforts could include, among other things:

a) contacting community group leaders and elected officials by telephone prior to the start of the public comment period and inviting them to assist with outreach efforts;
b) posting notice of the permit proceeding along the perimeter of the facility;
c) requesting that local radio stations notify the public in a public service announcement;
d) posting notices at locations that receive significant foot traffic, such as grocery stores, day care, senior, and community centers, and churches;
e) ensuring that notices are written in plain language, and that they explain what can be achieved through participation in the permit proceeding;
f) circulating a press release announcing a public hearing, if a hearing is to be held;
g) publishing notices in both English and in any other language spoken by significant numbers of people in the community where the facility is located;
h) providing an outreach coordinator to take an active role in notifying the public about permit proceedings, educating interested members of the public about how they can participate, and responding to questions from the public about permit proceedings in a timely manner;
i) where a language other than English is spoken by a significant number of people within the community where a permit applicant's facility is located, publishing notice of an upcoming permit proceeding in that language in a publication printed primarily in that language, and/or circulating other outreach materials to the affected community in that language (in addition to English notices);

(Recommendation continued on next page)

(Recommendation #8 continued)

j) periodically, but at least annually, undertaking outreach to notify the general public of the opportunity to sign up on a Title V mailing list. Outreach materials should provide basic information about the Title V program and how the public can participate.

In Favor (11): Powell, Palzer, Keever, Owen, Raettig, Van Frank, Sliwinski, Schwartz, Hodanbosi, Kaderly, Hagle

***Opposed (7)*:** Broome, Freeman, Paul, Wood, Morehouse, van der Vaart, Golden

***Abstentions*:**

***Clarifications*:** Paul, Broome and Freeman clarify that they support outreach when appropriate but believe that it should be more targeted. Therefore, their opposition is not to the concept of increasing outreach but to the inclusion of such a wide range of measures without specifically tying them to the need in a particular case. Paul is also concerned that EPA guidance might be perceived as a mandate and that this list could at most rise only to the level best practices to be selected by the permitting authority on a case-by-case basis. van der Vaart opposes use of the word "supplemental" in this recommendation – if he used any of these suggestions, he would want to replace something he is currently doing (*i.e.*, newspaper notices). Hodanbosi, Hagle and Kaderly clarify that they are in favor of this recommendation as long as the guidance provides examples on how to improve the outreach to communities, and they would oppose mandatory actions that must be completed by permitting authorities. They also note that while the recommendation provides many good examples of ways to improve outreach, they would be concerned about the resources needed to complete all the activities that are identified. Kaderly adds that resources would also be an issue if the measures were mandatory.

Related topics: Response to Comments on Draft Permits, Public Hearings, Public Access to Documents.

Attachment: Relevant Testimony

Usefulness and cost of newspaper notices

Lyman Welch, Mid-Atlantic Environmental Law Center: Lyman Welch, MAELC: Delaware may be better than other States, even though we've had our problems there, but, you know, just knowing when a Title V permit is available for comment or to ask for a hearing, can be difficult. I mean, there are requirements to put legal notices in newspapers, but not everyone is going to see those types of notices.

Welch: I think the newspaper public notice is important, and there are many people in the community who don't have Internet access or do read the newspaper more often and see those notices and would call us up or become involved through that newspaper notice.

Susan Zingle, Lake County Conservation Alliance: I think the newspapers have to be done. Because there's the -- the freaks like me that need to get a life and do this all the time. The av- -- this is meant to benefit the average person in the neighborhood; and they're not going to go to an Internet to look to see if there's a hearing on a permit that

they don't even know exists. You have to get it in front of their face, and you have to get it in terms that they can understand.

Zingle: People are very concerned about what goes on near them; and they are inherently suspicious of something that -- that -- a big plant that may make noise or may emit things near them. So the newspaper ads as opposed to the legal notices are a very good thing. And the bigger they can be, the better. But there's been a new trick coming on where they'll list several projects in one notice. And I think that that is confusing and unfair; because you may read the top line and not realize that your project is farther down the list. Each one deserves its own notice and its own explanation of what's going on there.

Steve Hagle, Texas: "in Texas we do a newspaper notice elsewhere in the paper, some other section of the paper; and it's just a very short notice, a little blurb. And it directs people to the legal section where we have a long explanation of the processes that people can go through, and what the facility is emitting, and all of that kind of information. And that's -- in some of the major cities like Houston and Dallas that's a pretty expensive. Now for the Dows and Exxons of the world, that may be okay. But we do have some smaller Title V sites, and we're talking 3- to 4,000 dollars for that notice, especially the piece elsewhere in the newspaper. And so -- and what we found is we really don't get a lot of comments or responses to the notice."

John Suttles, Tulane Environmental Law Clinic: "Well, of course, there are public notice requirements and sometimes the public will come to us with a permit that's been noticed in their local official journal, which, by the way, is not a terribly effective method. I don't know how many people even know what their official journal is. But sometimes the public will come to us having seen a permit that's been proposed. You can also, in Louisiana, you can ask the Department of Environmental Quality to send you public notices either for any permit they're considering or permits in a particular area or permits that pertain to a particular medium. So we typically get them from the Department of Environmental Quality. Sometimes we will -- that's got been a perfect technique. Sometimes we don't get a notice for one reason or another, but we check the web site periodically. So between those two methods we hope to catch most or all of the permits that are proposed."

Peter Hess, Bay Area AQMD: The first issue I'd like to address is public noticing requirements. We feel that these need to be modernized. Newspaper noticing requirements are largely an ineffective means of outreach. They also can be very expensive. The use of Internet postings or e-mail distributions should be allowed as an alternative. We feel that the permitting agency should be given the flexibility to use other creative means of notifying, based on input received from community groups.

R. PAUL: Very quick. Part of the fact-finding role here. Do you know how much your agency spends on public notices that are published in the newspaper per year?

MR. HESS: Yes, I do. And I would provide that to the committee.

MR. PALZER: Thank you for coming. You mentioned that there should be different approaches to having public notice. And it seems to me that in the use of the Internet, would certainly be a good way of doing that. And I have a question: How would you

suggest getting out a notice by the Internet, keeping in mind that there is a segment of the society that isn't plugged into the Internet?

MR. HESS: Yes. And we have faced that problem. And what we have done is we've used the community groups who are interested in providing notice to neighborhoods. We've enlisted the support of neighborhood groups and -- to get out the word to people that we're having a hearing, come, voice your -- your -- your opinion on the permit. It's very important to have public participation. And we do not want to -- shall we say, stymie or limit that; but there are better ways to get the word out to people that we're going to have the hearing, whether it's direct mailing or -- but newspapers are not the only way to do it. A lot of people don't read newspapers anymore.

MR. VAN DER VAART: But I also agree with the use of the Internet as a less expensive way than newspapers. It's an amazing cost.

Bulletin notices

Lyman Welch, MAELC: In Pennsylvania, stuff is published in the Bulletin, but there is no way that you can track when a Title V permit is coming up for review. We've called Pennsylvania and asked them, you know, how do we know what facility is coming up? And it's like, there's no way. We don't know. Even the engineers are working on permits. They don't know when they are going to be made available for public comment, and they've got this -- they have sort of a website system, but it doesn't really work for commenting on permits or when comment deadlines become open. So from a State point of view, it's -- you know, you have to get the Bulletin where they put the legal notices, but there's not an easy way for citizens to find out, you know, when can we ask for a hearing? And often, dates are missed; hearings are not requested, because the date passes and then the thing is put in final form, and citizens just don't have that opportunity.

Overall level of interest and comment on Title V Permits

Michael Lake, San Diego County APCD: I would note that when we issue Title V permits, we do provide public notice of those proposed permits, and this includes significant modifications to Title V permits. We provide website notice, and we also provide direct notice to interested parties that have indicated their interest in receiving notice of Title V permits. And, to date, for all the Title V permits that we've issued, we have received no public comment, we've received no public objections or expressions of any public or interest-group objections or areas of concern.

Chris Korleski, Honda: And it's a good question, because -- and I'm going to struggle with that, because, to my knowledge, we've never had a comment. We sometimes request our own public hearings to expedite to getting a permit through. But we've never had public comments on any of our permits. …

Mohsen Nazemi, South Coast AQMD: And I'd just like to quickly go to public participation. The Title V program provides for an increased opportunity for public participation and other citizen actions in case of noncompliance. The goal of enhancing public participation and one that we truly support. And as a leader in environmental justice program, we have held town hall meetings in -- many town hall meetings -- in areas to address

specific concerns by the communities. However, we have had mixed results with our public participation in the Title V program. To give you a sense of EPA and public participation of the Title V program, we have issued -- sorry -- Title V permits we have issued today, we have received comments from EPA on about five percent of our permits. Public and environmental organizations have provided comments on less than three percent of our permits. And public hearings have been requested for less than two percent of our Title V permits. We have initiated a lot of meetings -- public consultation meetings -- without any request, especially like for refineries because we knew there was public interest. But, certainly, this level of participation does not considered as extensive but rather sporadic.

Bill O'Sullivan, New Jersey Dept. of Env. Protection: Public outreach. We don't get much public interest in our permits.

MS. BROOME: Have you had any public comments [on any draft permit]?

MR. PAUL: Not that I'm aware of.

MS. BROOME: That's why I said it's kind of asking for something that you probably didn't think about before you came in here.

MR. J. PAUL: I know we've had comments from the region. I know we've had comments from the company. So I don't think we've had any comments from the public.

Heidi Hollenbach, Michigan DEQ: Public hearings aren't extremely common. I think in our State maybe we've had 20 public hearings to date for Title V permits. A lot of times the comments tend to be more New Source Review permitting comments that we can't address through the Title V process. But I do believe if there are comments that are appropriate, that our staff try to make the appropriate change in the permit if it is relevant and appropriate to do so.

Use and effectveness of electronic notices

Heather Abrams, Georgia EPD: "We post [the notice] on our website."

Lyman Welch, Mid-Atlantic Environmental Law Center: But the website and Internet notice, I think, should be in addition to the newspaper or legal notice, and, ideally, I would like to have a website where it would put, here's a notice of the facility, and, in the ideal situation, you'll be able to click on that and get a copy of the draft permit, as well as the statement of basis or the technical memorandum.

Welch: In Delaware what they done is, they've established a website, and on that website, you can go and you can look at all the public notices that are currently open. So, for any facility that currently you could comment on or ask for a hearing on, you can go to a page on DNREC's website and it will list all the public notices that, you know, are just basically an electronic copy of what was printed in the paper, and it's available on their website, and you can click on it and see how to go about requesting a hearing. So, if I'm on vacation for a week or two, and I come back and I say, well, what's going on? I can click on this web page and I can see, well, here's what I could comment on or ask for a hearing on. The public finds this very valuable, instead of trying to look through the paper every day to figure out, you know, if there is a public notice going on. Also, Delaware allows you to sign up so that

you can get e-mail notices, so when they put a public notice on the website, I get an e-mail that says here are all the public notices that have gone up this day. And, you know, I use that; I subscribe to that; I get these notices, and that's very valuable. I don't think every State offers that opportunity.

Welch: All right, EPA has done a good job when it gets to their level. They have a website of noting, you know, here are the permits that are under our review; we got them on this date and we've got a 45- day review period, and it ends on this date, and then there's a 60-day public petition period that's open. And EPA has a good -- at least in Region III, anyway, has a web page that you can get all that information from, and it's updated every week or so, and that's helpful. I guess the problem is, from the public standpoint, is that EPA would prefer that we get involved at the State level, and if the States don't notify us about when we can ask for hearing, then all we're left to do is, well, we have to petition the EPA to fix the problem that would have been better corrected at the State level, and EPA doesn't like that.

Kelly Haragan, Environmental Integrity Project: On the notice and getting things up on the web, I think that's fantastic and one of the best things that you can do for public participation because, first, it makes sure that all of the documents are really there when you put them up on the web. It is a lot easier access. If people don't have computers at their homes, they can still go to the agency and pull the documents up on the agency's computers or in the files. But, for a lot of people, they do have computer access and it makes it so much easier to be able to pull the notice, the draft permit, the underlying permits off the web. I know Texas started a notice process where they've got a webpage. At least all of the facilities that have been authorized to go to public notice, so it's actually a little bit before the 30 days actually starts. It's a great system because you can actually go and look and see which facilities are going to be coming up for notice and you can plan a little bit for how you want to comment, which ones you want to prioritize.

Jeff Kitchens, Alabama DEM: "[W]e put the -- we put our statement of basis, public comments, and public notice in the draft permit on our website which can be downloaded free of charge."

Scott Gollwitzer, Appalachian Voices: I would like to commend [North Carolina] DAQ for doing an admiral job in providing interested parties electronic notification of draft permits. Specifically they provided a copy of the draft permit and the permit application review at the same time they provide notice that the permit is open for public comment.

Heidi Hollenbach, Michigan DEQ: Public participation is an important component of Title V. In Michigan, all draft Title V permits are public noticed both on website and in the department's calendar, a bimonthly publication mailed and e-mailed to a large constituency. Controversial permits are also noted in the newspaper and/or through direct mailing. Information regarding the date by which EPA must receive petitions is also outlined on the permit web page.

MS. HARAGAN: Do you know -- do you think providing more documents electronically on the Web is a useful thing?

Bradley Angel, Greenaction: I do. I think that's important. But realize, again, that a lot of community folks -- particularly in the three case-examples I mentioned briefly -- it

wouldn't have helped a lot of the people there, but it certainly is something; and it's easy enough to do.

Swati Prakash, West Harlem Environmental Action: I think that e-mail alert -- I don't know if environmental news bulletin has -- I don't know how -- I don't know the details of how this would work, but there are a lot of groups that are lucky enough to have staff like we have. A lot of us do use e-mail on a fairly regular basis, and it's just one step. There could be some sort of alert for any time a Title V draft permit is issued.

Notice Content

Susan Zingle, Lake County Conservation Alliance: If the law requires public notice in the newspapers, then -- then I still think it's valuable. I think a lot goes in to how it's worded. If it is so technical and it talks about Title V or CAAPP, people still don't know what that is. Get it down to the level that someone reading the newspaper say this is a power plant, and this is your chance to talk about what it emits, and is it complying, and come to the hearing. Market it a little bit instead of just narrowly complying with the technical language in the law.

Geographic Scope of Notice

Scott Gollwitzer, Appalachian Voices: In North Carolina, the public notice net is cast in very narrow geographic range. The circumstance generally results in no one, other than our organization, requesting a public hearing. This allows the director of DAQ to impermissibly use a critical mass standard to determining whether to hold a public hearing.

… DAQ should make every effort to cast the widest net possible in terms of soliciting public comment. This could be accomplished by broadly defining the affected community. Although no bright line has been established for defining the extent of an affected community, the Clean Air Act provides some congressional guidance. For instance, section 7661d requires that the permitting authority submit proposed permits to States lying within 50 miles of the polluter. Hence, at a minimum, DAQ should provide public notice in all communities lying within a 50-mile radius of a polluter. In casting this wider public net, the public will be well served if DAQ would enlist the help of radio and TV stations that regularly run public service announcements. Likewise, where appropriate, public notice should be announced through non-English speaking media outlets. The public benefit associated with casting this wider public notice net cannot be overstated. Our experience to date demonstrates that if each county within 50 miles of a particular polluter were included as part of the affected community, DAQ would be better equipped to achieve the spirit of Title V's environmental justice considerations. In fact, when one calculates the number of low income African-American and Latin -- excuse me, Latino-American residents within this broader affected community in North Carolina, one invariably finds a disproportionate number of one or more of these subsets of North Carolina's population residing within the shadows of the polluter's facility. I would like to mention another less obvious benefit of casting this wider net. If one considers the fact that many polluters are large employers within the immediate vicinity of their facility, there's little doubt that many residents are intimidated for fear of losing their job or an

opportunity to get one to speak out against any polluter. These fears, whether real or imagined, have a chilling effect on the public's willingness to engage in the Title V process. Casting a wider public notice net will not only alleviate this chilling effect, but would go a long way to ensure -- and I'm quoting EPA here -- that no group 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.

Kathy Andria, American Bottoms Council: I wish there were some way of making uniform what is a paper of record. Things go into a community, and if it's a little town that it's that newspaper that gets it, I mean, there is not a wall around there. The next community over doesn't get that paper, but they're breathing that air. So I think there needs to be better enhanced outreach on that.

Hamilton, Ogden Dunes: Additionally, according to Charlotte Reed of Save the Dunes Council, in the 14 years since the Title V program began, none of the largest permits have been public noticed in our region. After expressing interest in the Title V process to both IDEM and EPA at a meeting in our community last November, one or more Title V permits in Burnes Harbor have gone through the public comment phase without our town being noticed via mail or e-mail. Citizens clearly need more help through the process.

Alexandra Gorman, Women's Voices for the Earth: I have missed like a permit comment period or two. One of the problems we do have in Montana, since it's a fairly rural State, and the public comment notice, you know, requirements are to run in the local paper and sometimes the local paper serves only a very small audience. So I work and live in Missoula. There are often papers, they're not on-line, and I can't actually purchase them in Missoula, so I sometimes I miss those public notices.

Friedman, Canary Coalition: The hearings were minimally publicized beforehand in the local newspapers of the hearing venue despite the fact that the emissions from these plants affect hundreds of thousands of people in large urban areas downwind of the facilities.

Additional Public Outreach

Heather Abrams, Georgia EPD: "We have a listing of people we notify anytime that we hold a public meeting …We also do outreach in the communities themselves. We usually have a pretty good indication of those folks in the area that are interested, either through past comments that we received or complaints that we received in that area. And we have the phone numbers and addresses, and we'll send them letters to let them know."

Susan Zingle, Lake County Conservation Alliance: I think the IEPA still may be a little concerned about the intensity of public comment. When all those speak peaker plants were going on, they were contentious, and we went to hearings that routinely had 3- and 400 angry people. And the hearings routinely went on until eleven o'clock or midnight. Well, so now it comes time for the Title V permit, all those people had to sign in to get into that hearing. As a follow-up, did the EPA go back to those people and say, okay,

this plant's been running now for a couple years and we've got its Title V permit, why don't you come to the hearing and let's talk about it? No. They did not. Do they go -- do they get a GIS map or go to the tax assessor's office and look at the PIN numbers and get those properties that are closest to the plant? No.

Steve Hagel, Texas: The other thing that we do in Texas is require them to put signs up around the facility.

Susan Zingle, Lake County Conservation Alliance: That's a good idea.

Hagel: And those signs don't contain hardly any information except they're going to build X, Y, Z here at the site. And that's where I feel like we get more comments from the public, especially the local public.

Zingle: I hadn't even thought about signs at the site. That's a wonderful idea. And we do that here with development permits; why wouldn't we do it with Title V or construction permits as well? The follow-up on -- on post cards aren't cheap exactly; but you know in advance when that hearing's going to be. You could mail bulk. And you could mail to a certain radius around that plant and have something go right into their homes. But again, put it in layman's English; what this means to you as a citizen. Not the technical EPA Title V language that nobody but people that have taken the course know what it means.

Marian Feinberg, Better Bronx: The DEC has failed to really set up an environmental justice program and the EPA kind of pushed them to do that several years ago. There were hearings held all over the State and one of the major things that people testified on is this issue about community notification. And there were recommendations that were raised at that time … in New York City there's readily available lists from community boards and from programs from city officials lists of community-based organizations, lists of State-based institutions, et cetera. And it really needs to be broad notification to the institutions that really the information conduits in the community. Posting something in some obscure place on the DEC web site does not constitute public notification. And the DEC, you know, I mean at least to notify people who testified at prior hearings at the same facility, that would be nice. That would be an advance to where -- you know, to where we are now. They don't seem to take this question seriously at all. The information, public information you know the whole idea of an informed citizenry is totally essential to the issue of democracy and totally essential to the issue of really allowing public comment. …. Often community-based organizations and churches in our community do not find out about a comment period until the last minute or even after a deadline. Although I personally have helped organize the public outcry for a Title V hearing on the NYOFCO plant two years ago and had testified at that hearing, even I didn't receive notification that a comment period had now opened just this past fall for revisions.

Swati Prakash, West Harlem Environmental Action: So this is in reference to the Title V permits for the North River Waste Water Pollution Control Plant, and April 27th of 2001 the nearest New York State DEC issued a notice of complete application for the draft Title V permit for that facility, which the draft permit was noted in the May 2, 2001 edition of the New York State DEC's Environmental News Bulletin. I actually was not aware of the Title V program at the time and I didn't make comments during that draft period. It wasn't until I went through the Title V training cosponsored by EPA Region 2

and the Earth Day Coalition in November of 2001 that I knew to be on the lookout for a revised permit for North River.

MS. POWELL: So I had a question for you about community notification. You mentioned that is one of your key concerns and I wanted to know if you had some ideas about what would be effective notification for the availability of draft permits and public hearings.

MS. PRAKASH: Yeah. I think that e-mail alert -- I don't know if environmental news bulletin has -- I don't know how -- I don't know the details of how this would work, but there are a lot of groups that are lucky enough to have staff like we have. A lot of us do use e-mail on a fairly regular basis, and it's just one step. There could be some sort of alert for any time a Title V draft permit is issued. Because right now what we have to do -- there's two ways that there's notification. One is you have to sort of check the environmental news bulletin on a regular basis, which is not so practical, and then the second is that they do send hard copies to the local community boards, which is one, I think, good way to conduct community notification, but I would say it's not sufficient. So there's e-mail list and then -- if there's a way to expand the number of organizations that receive hard copy, just letters even of notification directing people to either a web site, an updated and accurate web site, or to the physical location of the permit, that would be helpful. The permit -- I believe revised permits were sent to -- they were with one local DEC office, they were with one local community organization, and it was with the community board. But if you're not sort of physically near those areas, it's hard, I think, to stop by and read the copies in-house. That's just sort of off the top of my head response.

MS. POWELL: Just to let you know, Swati, I think that DEC maintains a mailing list that you can sign up for, so you might want to get on that. So you think if they were effectively maintaining a mailing list or e-mailing notification, that that would be enough?

MS. PRAKASH: You know, there's a whole spectrum of community notification. There's the sort of Cadillac version and then there's the, okay, we can live with this version. And I think that good hard copy mailing list, good electronic mailing list, updated web sites and -- would be probably just as a threshold of adequate, yeah. And then there's the next batch of things, which would be -- the way I was notified ultimately was through a phone call from folks, which I realize is not that practical, but that's another, I think, resource for groups that really are not on-line regularly. And then finally, public libraries actually -- although they're severely underfunded -- do serve as a source of information for many communities. That's another realm that I think shouldn't be underestimated.

Bradley Angel, Greenaction: But public participation doesn't just mean you have a process and you advertise it on the obituary page of a newspaper. It means that you actually notify the community. It means that you actually notify them in the language spoken by the community impacted by the facility for which a decision is being made.

….There should also be, you know, real research into -- for each particular community -- both languages, if there's multiple languages spoken; what are the media that absolutely reach out; enlisting the help of community organizations in the impacted area.

Scott Gollwitzer, Appalachian Voices: "In casting this wider public net, the public will be well served if DAQ would enlist the help of radio and TV stations that regularly run public service announcements. Likewise, where appropriate, public notice should be announced through non-English speaking media outlets."

Notice of proposed permit/final permit

George Hays: I see I have a couple minutes left, so let me just touch on another issue that I had experienced that I find problematic. And that is the notice of the actual Title V permits. I had a situation where we commented on a permit that the State in question was proposing to issue, they got our comments and said they were going to address them. We never heard another word from them. The State went ahead and issued the permit without issuing any notice at all. And then EPA apparently published on its website the fact that their clock had now started. There was no notice to any of the actual commenters, which we were included with, that the permit had actually come out. And so that caused a real problem for us because, number one, we didn't know about the Region 4 website. Of course, we know about it now. But, number two, I think that this is a real problem -- that the agency -- well, if your clock is going to start ticking, at least show notice to all the commenters. That's a problem that I see. So I think that's something that you all ought to correct as well. And I'll just leave it at that.

MS. VIDETICH: Hi, George. I think -- can you clarify what happened under this notice scenario that you were explaining at the very end. You commented, as I understand it, on a State permit. They did not respond to your comment?

MR. HAYS: They did respond.

MS. VIDETICH: Oh, they did respond?

MR. HAYS: They responded to the comment and said, "We are going to address these when we issue the permit."

MS. VIDETICH: Then you –

MR. HAYS: And then they waited to get the permit.

MS. VIDETICH: And you saw the EPA propose –

MR. HAYS: No, we didn't. What happened was that we went, you know -- a few months went by and we thought, "Gosh, whatever happened to that?" So then we did some checking around and, lo and behold, found that the State had issued the permit without providing any notice; that EPA had put it on their website for Region 4, which we didn't know about so we weren't checking. So our clock expires. Then we petitioned EPA anyway, saying that there was a problem with this; and we subsequently -- we also asked for a reopener if they didn't accept our argument that there was no notice. So what EPA said was, "Okay. We're going to reopen this," thereby dancing around the notice issue, because, you know, they basically were going to give us the relief that we want by examining this without getting into whether there's a notice deficiency or not.

MS. VIDETICH: So are you here to talk about that particular instance or to State that there's something wrong with this system and you need EPA or someone to address -- the Task Force -- to address an overarching problem or not?

MR. HAYS: I think there is an overarching problem. And that is that if you -- if a citizen comments on a permit, the citizen needs notice of when the State takes final action on that permit, because their rights are going to be affected at that point. And, right now, the way the system is set up, there is no notice that goes to the citizens, you know. The State forwards the permit to EPA and that's it. But it's all, you know, an internal process, if you will. And unless you're bird-dogging it every day or every week, you're not going to know.

MS. VIDETICH: So you didn't even know when it got sent to EPA for its 45-day review and when that review period was up?

MR. HAYS: We didn't. No.

Mailing list notification

MS. POWELL: I just had a question about public notice. Does Montana maintain a mailing list to notify interested members of the public?

Alexandra Gorman, Women's Voices for the Earth: They don't maintain a list. There's no Title V list for all Title V permits, but it seems to vary by department in DEQ. There's some departments for certain type of permits where they do keep those main lists for certain industry areas, but there's no consistency. So sometimes, you know, with certain permit writers I have to write them and tell them, okay, anything that happens with this facility, please let me know, and that sometimes gets me on the list, sometimes it doesn't, but there doesn't seem to be any consistency there.

MS. POWELL: So you don't have the ability to sign up to just get notices on everything?

MS. GORMAN: That's right.

Public notice delay

D. Kalina, RR Donnelley: In addition to that, even though the comment periods may only be 30 to 45 days, we have had delays -- and this may sound trivial, unless you're -- you've got the backhoe out there waiting to start moving dirt around to do the installation -- where it has taken a week to ten days for the public notice to get out of the agency to be published in the newspaper to begin the 30-day public comment period.

Related issue: Technical Assistance

Dona Hippert, Northwest Environmental Defense Center: I contacted someone at Region 10 EPA to see if I could get some technical help. They said that EPA had declined to review the permit because nobody there really knew anything about Title VI. So I contacted EPA's toll-free ozone hotline, but was never called back. And, by the way, something I would really like to State is that this sort of thing would be very helpful in the Title
V program, preferably with someone actually returning the calls.

5.5 TOPIC: STATEMENT OF BASIS

Issue/Observation Description

EPA's implementing regulations for Title V require that each draft permit be accompanied by "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The permitting authority is required to send this "statement of basis" to EPA and "to any other person who requests it."
40 C.F.R. § 70.7(a)(5).

The primary issues identified by the Task Force regarding statements of basis are:

- Are agencies producing statements of basis as required by the rule?
- What should be included in statements of basis at initial issuance, at renewal, and for a permit revision?
- Is the existing statement of basis guidance adequate and is it being followed?
- How are statements of basis being used by the public, permittee and/or agencies?

Supporting Information

In the preamble to the proposed Part 70 rules, EPA explained that it could object to the issuance of a permit where "the materials submitted by the State . . . do not provide enough information to allow meaningful review. . ." 56 Fed. Reg. 21750 (1991).

While EPA headquarters has not issued guidance on the statement of basis requirement, a variety of EPA orders on petitions for objection, letters and guidance exist on the issue. One of the most detailed and specific is a guidance letter from EPA Region V to the Ohio Environmental Protection Agency.

In December of 2001, the Chief of the Air Programs Branch in EPA Region V issued a letter to Ohio providing guidelines on the "content of an adequate statement of basis (SB)." In that letter, EPA Region V explained that:

> . . . the regulatory language is clear in that a *SB must include a discussion of decisionmaking that went into the development of the Title V permit* and to provide the permitting authority, the public, and the EPA a record of the applicability and technical issues surrounding issuance of the permit. The SB is part of the historical permitting record for the permittee. A SB generally should include, but not be limited to, *a description of the facility to be permitted, a discussion of any operational flexibility that will be utilized, the basis for applying a permit shield, any regulatory applicability determinations, and the rationale for the monitoring methods selected*. A

> SB should specifically reference all supporting materials relied upon, including the applicable statutory or regulatory provision.

(Emphasis added). While Region V did not provide an exhaustive list of what should go in a statement of basis, the Region went on to discuss what it described as several areas that are important to meet the intent of Part 70, including the following:

- **Discussion of applicability and exemptions.** "*The SB should include a discussion of any complex applicability determinations and address any non-applicability determinations*. . . . If no separate determination letter was issued, the *SB should include a detailed analysis of the relevant statutory and regulatory provisions and why the requirement may or may not be applicable*. . . ."
- **Explanation of any conditions from previously issued permits that are not being transferred to the Title V permit.** If the permitting authority determines that an "*applicable requirement no longer applies to a facility or otherwise [is] not Federally enforceable and, therefore, not necessary in the Title V permit in accordance with EPA's 'White Paper for Streamlined Development of the Part 70 Permit Applications' (July 10, 1995) . . . [T]he SB should include the rationale for such a determination and reference any supporting materials relied upon in the determination*."
- **Discussion of streamlining requirements.** "When applicable requirements overlap or conflict, the permitting authority may choose to *include in the permit the requirement that is determined to be most stringent or protective* as detailed in EPA's 'White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program' (March 5, 1996). The *SB should explain* why the State concluded that *compliance with the streamlined permit condition assures compliance with all the overlapping requirements*."
- **Other factual information.** "The SB should also *include factual information that is important for the public to be aware of.* Examples include: 1. *A listing of any Title V permits issued to the same applicant at the plant site, if any. . . . 2. Attainment status. 3. Construction and permitting history of the source. 4. Compliance history including inspections, any violations noted, a listing of consent decrees into which the permittee has entered and corrective action(s) taken to address noncompliance.*

(Emphasis added). The letter also stated that the statement of basis must contain "a discussion on the monitoring and operational restriction provisions that are included for each unit."

Although the letter was sent by Region V, the EPA Administrator has referenced the guidelines in the letter in several orders on petitions for objection and other related documents. EPA has also addressed the content of statements of basis in ways that are not entirely consistent with the Region V letter in several orders responding to petitions for objection.

Testimony and Comments Received

The Task Force received a number of comments related to statements of basis. Generally the comments indicated dissatisfaction with the quality of the statements of basis provided by some States, and complaints that some States did not provide a statement of basis at all. There was variation among the States regarding the format and the label applied to the statement of basis, as well as the means for public access to the document. Although few comments were received regarding the substance of the guidance in Region V's 2001 letter specifically, several commenters identified the areas addressed in EPA's guidance as important to the statement of basis. One State (Ohio), however, objected to EPA's development of piecemeal guidance through letters and responses to petitions, and urged the Task Force to support use of Federal rulemaking proceedings to specify the content of a statement of basis. Several State permitting officials also commented on the burdens associated with producing detailed statements of basis. None of the comments addressing whether the content of statements of basis for renewals and permit revisions should be different from initial issuance.

The following is a summary of some of the specific comments received:

A number of commenters noted that a number of States were producing statements of basis and that they were helpful. One commenter said that the statement of basis, or technical memorandum, was very valuable and was the first thing he would review when commenting on a draft permit. He also suggested that statements of basis be made available on-line. (L. Welch, Mid-Atlantic Env. Law Center). A number of commenters did not believe that the statements of basis produced by some States were sufficient. For example, several commenters said that the statements of basis they reviewed, which were called a "project summary," did not provide sufficient detail and questioned whether the format met the regulations. (S. Zingle, Lake County Cons. Alliance; K. Andria, American Bottom Conservancy). Another commenter also did not believe the statements of basis they had seen, which summarized regulations but did not list the actual emission limitations, provided enough specificity for public comment. (S. Prakash, WE ACT). Another commenter noted that they often comment on programmatic issues, like the failure to produce a statement of basis. (K. Haragan, Env. Integrity Project; *see, e.g.,* OAR-2004-0075-0058). One commenter expressed frustration that differences between items identified in the statement of basis, called the "Technical Support Document" in Indiana, and the permit were not always explained. (R. Van Frank, Improving Kids' Environment, OAR-2005-0075-0031).

Several commenters referenced submission of a petition for objection to EPA regarding a statement of basis. One commenter stated that their petition to EPA regarding "inaccuracies and flaws and holes" in the statement of basis was quickly denied. (B. Angel, Greenaction for Health and Env. Justice). Another commenter said that their petition on failure to produce a statement of basis was granted. (M. Boyd, CARE).

One commenter noted that one State (Kansas) required that the applicant include a statement of basis with its permit application and that it was helpful to educate the permit reviewer about the source. (N. Dee, National Petrochemical & Refiners Assoc.).

Several State permitting officials provided information on their treatment of statements of basis. One State permitting official commented on the burdens of producing statements of basis and that their usefulness depended on whether there was a significant prior permitting history for the source, and how well the source of each applicable requirement is identified in the permit itself. (M. Nazemi, SCAQMD; OAR-2004-0075-0091). Another State permitting official commented that the statement of basis was extremely important and that it is subject to the same management review as the draft permit. (N. Jerabek, New Mexico Env. Department (NMED)). A State permitting official from Michigan stated that they had developed "detailed template documents" for their permits and statements of basis, which they refer to as the "staff report," so they have adequate detail and consistency throughout the State. (H. Hollenbach, Michigan Department of Env. Quality).

The most detailed comments from a State permitting official were submitted by Ohio EPA, which objected to EPA's development of piecemeal (and sometimes inconsistent) guidance on the content of statements of basis, expressed concern regarding the amount of resources needed to satisfy some of EPA's suggestions regarding the content of statements of basis, and requested that EPA use rulemaking to clearly and consistently define the legal requirements of a statement of basis. Absent rulemaking, Ohio EPA requested that EPA issue national (not regional) guidance to clearly define the minimum elements of a statement of basis. (R. Hodanbosi, Ohio EPA, OAR-2004-0075-0082).)

Several State permitting officials touched on the content of their statements of basis in the context of testimony on other issues. One State noted that one of the issues they address in the statement of basis is the streamlining of emission limits where there are overlapping requirements. (H. Abrams, Georgia Env. Protection Division). Another State permitting official said that they include a list of qualified insignificant activities in the statement of basis and, where there are questions regarding MACT provisions, which are incorporated into the permit by citing specific sections, that information is included in an addendum to the statement of basis. (N. Jerabek, NMED). With respect to inclusion of compliance history, one State permitting authority said that they would discuss compliance history in the statement of basis if something was included in the permit as a result of an enforcement action or negotiated settlement. (A. Mann, Delaware Dept. of Natural Resources and Env. Control (DNREC)).

Several commenters stated that to the extent explanations of MACTs were provided, they should reside in the statement of basis rather than in the permit language, which should be limited to citations. (Alliance of Automobile Manufacturers, OAR-2004-0075-0056; Air Permitting Forum, OAR-2004-0075-0074).

With respect to access to the statement of basis, one State permitting official said that they make the statement of basis available on-line. (J. Kitchens, Alabama Department of

Env. Management). Another State permitting official said that they have a hard copy of the statement of basis at all of their offices and that they try to provide them in electronic format when requested by email. (A. Mann, DNREC). One commenter noted that they did not have any problem getting access to statements of basis because the public access laws were very good in the State they were in. (A. Gorman, Women's Voices for the Earth).

Task Force Discussion

The Task Force generally discussed the purpose of the statement of basis under Title V, its content, and how EPA should address States that do not provide a statement of basis.

Regarding the purpose of the statement of basis, one environmental group Task Force member explained that the statement of basis helps the public decide if a particular permit is one that they should invest time and resources in reviewing, and that the information in the statement of basis helps guide the public in focusing their comments on the most significant aspects of the permit. According to the Task Force member, the statement of basis also is an essential tool in helping the public understand permitting decisions, and that decisions need not be complex to warrant explanation in the statement of basis. For example, the Task Force member felt that it is important to the public that the statement of basis explain why the permitting authority believes that the monitoring included in the permit is sufficient to assure compliance with the applicable requirements or why certain monitoring is not required.

One State agency Task Force member believed that the statement of basis is also useful for permitting authorities because it documents why the permitting authority made the decisions that it did in the past, which makes it easier for the agency employee charged with handling future revisions or renewals. Since there is a lot of turnover in agency staff, the Task Force member felt that the statement of basis provides vitally important continuity to the process.

As for the content of the statement of basis, although the Task Force agreed that permitting authorities would benefit from consistent guidance on the minimum criteria for statements of basis, the Task Force did not agree on what those minimum criteria should be or the mechanism by which EPA should communicate those criteria (*e.g.*, guidance, best practice examples, or rule).

Some Task Force members felt that the statement of basis should be used as a mechanism for communicating to the public a broad array of information about the source and its operation. For example, some Task Force members felt that the statement of basis should include a discussion about the compliance history of the source, applicability issues, and historic New Source Review decisions. Other information some Task Force members would like to see in a statement of basis include the inspection history of the source, including the date of last inspection, the inspection results, and the typical frequency of inspections. Some Task Force members also supported using the statement of basis to provide an explanation of complicated MACT requirements. One Task Force member

stated that when you have emissions from a major source that deviate significantly from a source test, permit limits, or other emissions factors such that it may cause a violation of SIP requirements and be a factor in exceeding NAAQS standards in the SIP, this information should be required in the statement of basis.

Task Force members who did not support including that type of additional information in the statement of basis felt that it went beyond what was needed to support the legal and factual basis of permit conditions, and that permitting authorities should not be required to develop or summarize a lot of information that was not relevant to a specific permitting decision. Some Task Force members felt that the regulatory requirements for statements of basis should be limited to explaining the basis for actual permit conditions and that permitting officials should not be required to spend time and resources explaining noncontroversial decisions or obvious applicability determinations that could be explained in the permit by citing to the underlying rule or previously issued permit. In some cases, Task Force members felt that the real issue was whether the public should have access to the additional information in other forms. As a result, the Task Force agreed to defer some of those issues to the discussion of the public's access to documents.

The Task Force also spent a fair amount of time discussing the degree to which enforcement related material should be summarized in the statement of basis, including discussing the various types of formal and informal material (*e.g.*, warning letters, notices of violation, administrative and judicial papers) that might exist and various time frames over which they might be examined by a permitting authority. Although the Task Force generally agreed that permitting authorities should consider enforcement related material during their review of a permit application and source's compliance certification, the Task Force did not agree on the relationship between that review and the statement of basis in cases where the review did not result in a specific permitting decision (*see* Recommendation #1.8). The Task Force also discussed the permitting authorities' review of enforcement material in the context of its discussion of compliance schedules.

One point upon which Task Force members agreed was that any complex permitting decisions should be explained in the statement of basis. There also was some consensus about some other items that should be covered in a statement of basis (*see* Recommendations #1.1 - 1.6).

With respect to permit renewals and revisions, the Task Force developed recommendations aimed at ensuring that the information in prior statements of basis were available for review without requiring permitting authorities to repeat previously developed information (*see* Recommendations 2 and 3).

With respect to permitting authorities that were not producing statements of basis, some Task Force members were concerned about recommending specific EPA action that did not provide discretion for failures that might be considered *de minimis* or that did not result in any prejudice to the public. However, the Task Force ultimately did reach consensus on several recommendations (*see* Recommendations 4 and 5).

Recommendations

Recommendation #1

EPA should clarify to States what it expects to be included in a statement of basis. The Task Force considered the following items as appropriate for inclusion:

1.1 A description and explanation of any Federally enforceable conditions from previously issued permits that are not being incorporated into the Title V permit.

1.2 A description and explanation of any streamlining of applicable requirements pursuant to EPA White Paper No. 2.

1.3 A description and explanation of any complex non-applicability determination (including any request for a permit shield under section 70.6(f)(1)(ii)) or any determination that a requirement applies that the source does not agree is applicable, including reference to any relevant materials used to make these determinations (*e.g.*, source tests, State guidance documents).

1.4 A description and explanation of any difference in form of permit terms and conditions, as compared to the applicable requirement upon which the condition was based.

1.5 A discussion of terms and conditions included to provide operational flexibility under section 70.4(b)(12).

1.6 The rationale, including the identification of authority, for any Title V monitoring decision.

In Favor (18)*: Palzer, Sliwinski, Schwartz, Raettig, Owen, Keever, Kaderly, Golden, Freeman, Paul, Morehouse, Hodanbosi, Wood, van der Vaart, Hagle, Powell, Broome, Van Frank
Opposed:
Abstentions:
Clarification:

The Task Force did not reach consensus on the following two Recommendation #1 sub-items regarding the Statement of Basis, and the relative support for these is indicated below.

1.7 A list of all construction permits for the portion of the facility being permitted that are applicable to the facility as of the date of the draft permit if they are not already listed in the Title V permit, and all Title V permits issued to the facility.

In Favor (16)*: Palzer, Sliwinski, Paul, Powell, Freeman, Hagle, Morehouse, Raettig, Owen, Hodanbosi, Wood, Keever, van der Vaart, Broome, Golden, Van Frank
Opposed (1)*: Schwartz
Abstentions (1)*: Kaderly
Clarification:

(Recommendation sub-item 1.8 on next page)

(Recommendation sub-item 1.8)

1.8 - A list of formal enforcement documents over the last five years and the status of implementation, and any active consent decrees.

In Favor (9)*: Palzer, Sliwinski, Schwartz, Raettig, Owen, Keever, Kaderly, Powell, Van Frank

Opposed (9)*: Golden, Freeman, Paul, Morehouse, Hodanbosi, Wood, van der Vaart, Hagle, Broome

Abstentions:

Clarification: Van Frank clarifies that this should include all unresolved notices of violation. Palzer joins Van Frank's clarification.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

The statement of basis for renewal need only address changes since the last Title V permit issuance, provided that the statement of basis issued for prior revisions and the original statement of basis are available.

***In Favor (18)*:** Palzer, Sliwinski, Paul, Powell, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Hodanbosi, Wood, Keever, van der Vaart, Broome, Kaderly, Golden, Van Frank

Opposed:

Abstentions:

Clarification: Powell, Palzer, and Van Frank clarify that they consider the best practice to be to prepare a single comprehensive statement of basis for a renewal permit, thereby eliminating the need to refer back to prior statements. Kaderly clarifies that the previously completed statement of basis must be an accurate reflection of operations at the facility.

Recommendation #3

Statements of basis for revisions do not need to address matters that are outside of the scope of the revision.

***In Favor (18)*:** Palzer, Sliwinski, Paul, Powell, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Hodanbosi, Wood, Keever, van der Vaart, Broome, Kaderly, Golden, Van Frank

Opposed:

Abstentions:

Clarification:

Recommendation #4

EPA should object to Title V permits without a statement of basis.

***In Favor (18)*:** Palzer, Sliwinski, Paul, Powell, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Hodanbosi, Wood, Keever, van der Vaart, Broome, Golden, Kaderly, Van Frank

Opposed:

Abstentions:

(Clarification on next page)

(Clarification for Recommendation #4)

Clarification: Morehouse, Broome, and Freeman clarify that this recommendation is not intended to impose on EPA a requirement to review each permit just to determine if there is a statement of basis, this recommendation does not address the content of the statement of basis, and that EPA would not need to object if the same information was contained elsewhere in the permitting record or in another document that satisfied the intent of the statement of basis. Kaderly clarifies that EPA should object only if the permit does not contain the information that a statement of basis would.

Recommendation #5

EPA should issue a Notice of Deficiency for State programs that routinely do not issue a document satisfying the intent of the statement of basis with their permits.

In Favor (18): Palzer, Sliwinski, Paul, Powell, Freeman, Hagle, Schwartz, Morehouse, Raettig, Owen, Hodanbosi, Wood, Keever, van der Vaart, Broome, Golden, Kaderly, Van Frank
***Opposed*:**
***Abstentions*:**
***Clarification*:**

Related Topics: Public Access to Documents, Title I/Title V Interface, Compliance Schedules, Monitoring, Incorporation of Applicable Requirements, EPA Review of Proposed Permits, Program Costs and Benefits, Insignificant Activities/Emission Units

5.6 TOPIC: RESPONSES TO PUBLIC COMMENTS ON DRAFT PERMITS

Issue Observation/Description

What this paper addresses: This paper addresses concerns by commenters and Task Force members that some permitting authorities are not providing a written response (or any response at all) to public comments on draft permits. It also addresses concerns raised about the difficulty in determining what changes have been made to a permit following the public comment period.

Legal Requirements: CAA § 502(b)(6) requires the Administrator to promulgate regulations that include "[a]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law."

CAA § 505(a)(1): "Each permitting authority—
(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and
(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit."

40 CFR § 70.7(h): Public participation. Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. The procedures shall include the following: …. (5): "The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public."

Discussion

All Task Force members but one agreed that it is important for a permitting authority to prepare a written response to public comments on a draft permit. Several Task Force members explained that such a response was necessary to assure commenters that their comments had been received and considered. Task Force members also noted the importance of a response to comments to form a record for any appeal.

Task Force members noted that often a permitting authority will not provide any response at all to comments on a draft permit. They described circumstances where facility representatives and other commenters submit extensive comments on a draft permit, but receive no explanation from the permitting authority for why requested changes are not made. Industry representatives on the Task Force also noted that often a permitting authority will change a permit even though no comment was made by any party, and without offering an explanation for the change. Several industry and environmental group representatives expressed frustration with permitting authorities who fail to even acknowledge their comments.

Task Force members noted that some agencies consistently respond to comments and discussed what they consider agency "best practices" responding to comments. Most Task Force members agreed that it was important for a response to comments to explain any difference between the draft, proposed, and final permits, and that the response to comments should highlight not only changes made in response to public comments, but also any change made in response to comments by the EPA. Several Task Force members described experiences where a permitting authority changed a draft permit without explanation, and then, when pressed, responded only that EPA requested the change. A State agency representative stated that not only is an explanation of changes important to industry and the public, but it is also beneficial to the permitting authority to be able to refer to the record to see what changes it made and why it made them. That representative explained that if the reason for the change is not documented, it is difficult to defend the change if it is challenged.

Most Task Force members agreed that an effective way to show changes made to a draft permit is to record the changes using the "redline/strikeout" format available in word processing software. One industry member identified Indiana's "technical support document" as an example of a very useful response to comments. According to that member, Indiana repeats the comment and then uses a redline/strikeout format to show how the permit condition was changed in response to the comment.

The Task Force also discussed how the response to comments should be made available to the public. Most members agreed that any person who submitted written comments during the public comment period should be notified automatically when the response to comments is complete, and receive a copy free of charge. Task Force members generally agreed that in many cases, it would be sufficient to provide the response to comments electronically, either by email or by posting the document on a website and providing the commenter with the web address. However, most Task Force members recognized that some people have difficulty accessing the internet and should be given the option of receiving a free paper copy by mail.

Task Force members expressed differing views regarding how the response to comments document should be provided to people who attend a public hearing. Some members expressed concern that not everyone who attends a public hearing will be interested in receiving a response to comments and that it can be costly to personally distribute responses to everyone who attends a hearing. They observed that people attending a public

hearing often just want to hear what is going on, and the hearing itself answers most of their questions. One member responded that any person who goes to the trouble of attending a hearing is likely to be interested in the permitting authority's response to comments. Another member stated that is reasonable to require hearing attendees who are interested in receiving a copy of the response to comments to communicate that request to the permitting authority.

Some members suggested that the permitting authority may not have the names and addresses of every person who attends a hearing. Several members responded that it is standard practice for an agency to have a registration table at a hearing. They explained that the permitting authority can provide a sign-up sheet at the table for anyone who wishes to receive the response to comments.

Generally, the Task Force agreed that a permitting authority should not be required to automatically send the response to comments to every person who attends a hearing, but that each person who attends should be given the option of receiving the response.

An environmental group representative described one State's approach that she viewed as very effective. In that State, the permitting authority pre-prints notification postcards announcing the availability of a response to comments, and providing the web address where the response will be posted. If someone wants notice of when the response is ready, they fill out a card with their address. When the permitting authority posts the response to comments on the internet, it simultaneously mails out the postcards. Similarly, a State agency representative described her State's procedure as follows: "We ask at the time of the hearing whether they wish
to receive the responsiveness summary, and how—email or [traditional] mail. This goes for anyone in attendance at the hearing, whether or not they provided testimony. Some are interested in the outcome, but are too shy to speak up at the hearing. We place someone at a table near the entrance for signing up."

The Task Force generally agreed that this would be an effective approach to notifying public hearing attendees of a response to comments. Again, however, several members emphasized that hearing attendees must also have the option to receive a free paper copy by mail.

Environmental group members explained that it was essential for commenters to receive a copy of the permitting authority's response to comments prior to the start of the 60-day period for petitioning EPA to object to a proposed permit, so that they can take the permitting authority's response into account when drafting a petition.

While nearly all Task Force members agreed on the general recommendation that permitting authorities should respond to public comments, Task Force members were divided as to whether EPA needs to revise Part 70 to incorporate this requirement. Some members explained that the requirement that a permitting authority respond to public comments is already embodied in administrative law; therefore, they contended that there is no need to

revise Part 70 to State this requirement expressly. Indeed, a 2003 EPA order issued in response to a citizen petition declares: "It is a general principle of environmental law that an inherent component of any meaningful notice and opportunity to comment is a response by the regulatory authority to significant comments." *See In the Matter of Consolidated Edison Company, Hudson Avenue Generating Station*, Petition 11-2002-10 at 8 (Sept. 30, 2003)(citing Home *Box Office v. FCC*, 567 F2d 9, 35 (D.C. Cir. 1977)). Other members expressed concern that while they agreed that general principles of administrative law require a response to comments, the most effective way to ensure that permitting authorities prepare such responses is to spell out the requirement in Part 70. Other Task Force members did not believe that this issue rises to the level of needing a rule revision but instead should be promoted through use of best practices to better take into consideration the differing practices across the States. They expressed concern that prescriptive requirements in regulations would soon be outdated by advancements in technology and may not take into consideration acceptable ways of approaching these issues that could exist in some States. These members suggested that States already addressing the core concerns should not be required to change their approaches.

Several members stated that it was important for EPA to receive a copy of the response to comments for its use during its review of a proposed permit. Though no Task Force member present at the discussion opposed providing EPA with a copy of the response to comments, some members were concerned that a recommendation that EPA be provided with its copy prior to the start of its 45-day review period might interfere with "concurrent review," (*i.e.*, allowing EPA's 45-day review period to run concurrently with the 30-day public comment period). As explained in the paper entitled "EPA Review of Proposed Permits," some Task Force members support the idea of concurrent review, while others do not. The wording of Recommendation #2 reflects an effort to craft a recommendation that members could support regardless of whether they support concurrent or sequential review. As reflected in the "EPA Review of Proposed Permits" paper, those who support concurrent review generally agree that if a member of the public submits significant comments germane to the draft Title V permit, the review process should switch to "sequential" review (*i.e.*, EPA's 45-day review period will start at or sometime after the close of the 30-day public comment period). However, those members do not believe that review should switch to sequential under circumstances where the only commenter is the permit applicant. In an effort to reach consensus on a recommendation (without taking any position on concurrent versus sequential review), Recommendation #2 states that EPA should be provided with a response to comments for consideration during its 45-day review period if "the permitting authority received public comments from anyone other than the permittee during the public comment period."

Recommendations

Recommendation #1

If a permitting authority receives comments on a draft permit, it is essential that the permitting authority prepare a written response to comments. The response should (1) respond to each public comment, and (2) identify and explain any changes to the draft permit reflected in the proposed permit (including all changes from public/EPA/permittee comments, either written or oral).

Upon issuance of a final permit, if there is any difference between the proposed and final permit, it is essential that the permitting authority prepare a final response to comments that (in addition to the information provided in the initial response) identifies and explains any difference between the proposed and final permits.

The permitting authority should provide a copy of the initial response available to the public prior to the start of the 60-day period for petitioning the EPA Administrator to object to the permit. Any person who participated in the public comment period on the draft permit should be provided with a copy of the initial and final responses to comments, as follows:

- When the initial response to comments is completed, the permitting authority should notify the permittee and any person who submitted a written comment on the draft permit that the response is complete and provide a copy free of charge, electronically and by mail upon request. The same procedures should apply with respect to the final response to comments, if the permitting authority amends its initial response.
- The permitting authority should provide any person who attends a public hearing or information session on a draft permit the option to be notified when the initial response to comments is available, and to receive a copy free of charge (electronically and by mail, if requested). The same procedures should apply with respect to the final response to comments, if the permitting authority amends its initial response.

***In Favor (18)*:** Raettig, Van Frank, Powell, Keever, Paul, Golden, Owen, Palzer, Hagle, Wood, Broome, Freeman, Morehouse, Hodanbosi, Kaderly, Schwartz, Sliwinski, Golden
***Opposed (1)*:** van der Vaart
***Abstentions*:**

(Clarifications on next page)

(Clarifications for Recommendation #1)

***Clarifications*:** "Public comment" refers to a comment made during the public comment period either in writing or orally at a public hearing. The public includes the facility being permitted. Hodanbosi clarifies that he supports this recommendation because it describes what he views as the "desired State." He does not believe that his agency could have followed this recommendation for initial permit issuance, but believes his agency should be able to respond as described above when issuing renewal and new source permits. Kaderly clarifies that if EPA makes comments on a proposed permit, her agency would probably prepare a separate response to their comments rather than revising the initial response to public comments. Sliwinski clarifies that he does not support the idea of providing commenters with a paper copy of the response to comments free of charge. He believes that this could become a burden on the permitting authority for controversial permits with hundreds of commenters. Schwartz clarifies that the permitting authority should be able to use an economical means of providing its response if there are a large number of commenters.

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

If the permitting authority received public comments from anyone other than the permittee during the public comment period, the response to comments described in Recommendation #1 should be provided to the EPA for consideration during its 45-day review period.

***In Favor (16)*:** Raettig, Van Frank, Powell, Keever, Hodanbosi, Schwartz, Wood, Palzer, Owen, Hagle, Broome, Morehouse, Paul, Sliwinski, Freeman, Golden

***Opposed (2)*:** van der Vaart, Kaderly

***Abstentions*:**

***Clarifications*:** Kaderly clarifies that she opposes this recommendation because she thinks that EPA should have the benefit of seeing a response to the permittee's comments in addition to a response to comments from other members of the public. Freeman, Golden and Broome clarify that nothing in this recommendation should be read to preclude the use of concurrent review or to suggest that EPA should not receive a response to comments by the permittee when that would not interfere with concurrent review. Hodanbosi makes the same clarification as he does for Recommendation #1.

Recommendation #3

EPA should revise 40 C.F.R. Part 70 to require permitting authorities to implement the procedures described above in Recommendation #1.

***In Favor (8)*:** Raettig, Van Frank, Powell, Keever, Schwartz, Palzer, Owen, Sliwinski

***Opposed (10)*:** van der Vaart, Hodanbosi, Broome, Hagle, Paul, Kaderly, Wood, Freeman, Golden, Morehouse

***Abstentions*:**

(Clarification on next page)

(Clarification for Recommendation #3)

***Clarifications*:** Hodanbosi and Wood clarify that they do not think that adopting regulations is the best way to accomplish Recommendations #1 and #2 because nuances of the different State permitting programs would make it difficult for permitting authorities to modify their programs to comply with whatever EPA might prescribe. Kaderly and Golden clarify that instead of revising Part 70, EPA should carefully review each State's process of responding to comments to determine whether it is effective and deal specifically with those States where there is a problem.

Recommendation #4

If a permitting authority fails to prepare a written response to comments on a draft permit, and to make this response available to the public in a manner consistent with the above recommendations, EPA should object to issuance of the permit pursuant to CAA § 505(b).

***In Favor (10)*:** Raettig, Van Frank, Powell, Keever, Palzer, Owen, Hagle, Schwartz, Sliwinski, Kaderly

***Opposed (7)*:** van der Vaart, Hodanbosi, Morehouse, Wood, Broome, Freeman, Golden

***Abstentions (1)*:** Paul

***Clarifications*:** Hagle and Schwartz clarify that EPA should not object where comments were insignificant or irrelevant. Kaderly clarifies that regardless of the comment, she thinks it is inappropriate not to respond at all—she views that as a sign of disrespect to the individual who took the time to review and comment on the permit. Hodanbosi, Wood, Golden, and Broome clarify that they are opposed because they think that the mandatory penalty is too large for what could be a minor administrative error. They believe that if the permitting authority consistently does not provide a copy of the response to comments, EPA should have the ability to use the objection process, but an objection should not be mandatory. Freeman also clarifies that all failures to comply with the above recommendations should not result in an EPA objection to the proposed permit. As an example, she explains that a permitting authority's failure to provide a copy of the response to comments to someone who attended a hearing but did not testify or comment should not result in an objection.

Recommendation #5

The permitting authorities should clearly document the changes made to a draft Title V permit. A recommended way to document changes is using redline/strikeout in edited or amended versions of the proposed Title V permit or by describing the changes in a transparent manner (*e.g.*, in the technical support document/statement of basis).

In Favor (17): Powell, Keever, Raettig, Owen, Palzer, Van Frank, Broome, Freeman, Schwartz, Paul, Sliwinski, Morehouse, Kaderly, Hodanbosi, Wood, Golden, Hagle

Opposed:

Abstentions:

Clarifications:

Related topics: Public Notice, Public Hearings, Statement of Basis

Attachment: Relevant Comments

Susan Zingle, Lake County Conservation Alliance: Some technical things that have come up with Title V permits that did impact us, one is streamlining. I am all for streamlining. Let's make everything as quick and easy as we can. But let's identify what we took out. Let's not use streamlining as an excuse to gut regulations out of existing permits and make us proofread every single line of every single permit to find what was changed.

Kathy Andria, ABC: The Illinois EPA FOIA policy is very good. They provide not-for-profits free copying and make the material available to us. There is a lot of time that's involved to the public in reviewing Title V permits because we take it seriously. We first read the permit. We look to see what we need. We FOIA the material. We have to drive all the way to Springfield to look at the material, to request the different things that we need. We then have to drive all the way back, prepare for the public hearing, prepare questions, listen to the questions, wait for the transcript, wait for the answers -- which for the most part never come that we are promised to have something that they say, "We'll get back to you" -- and then write our comments. And somewhere down the line here we forget that we have to look to see what changes, if any, are made. Finally -- this is a wonderful success that I view -- we got a copy of a permit with the tracking changes, and we could finally see that there were changes. Now, a couple were our suggestions, that we got reporting and recordkeeping and testing added, at least in words, to the permit, but also we noticed that they changed the Title I emission limits. So that hadn't gone through the public process. We didn't have an opportunity to comment. But in my reading of it, and I just saw it in the last two days, it went from talking about pounds per hour, the annual emission limits seemed to go down to either monthly or pounds per hour, and I thought, "Gee, you know, that's okay. You're talking about operational flexibility. But if you're a child who has asthma who lives in that neighborhood, it's not acceptable."

Scott Gollwitzer, Appalachian Voices: I have yet -- and, again, it's based on our own resources -- to see any significant changes in permits. By the same token, I must admit it's really tough to review a proposed permit after we've submitted draft comments. Again, it's one of the reasons why we would like to see written responses to our comments. If, in fact, the DAQ took the time to file a written response to my comments, I could read that much quicker than looking at a proposed permit and comparing the proposed to the draft and going back to my comments to see how everything fit into that puzzle.

MR. HODANBOSI: I think this will be pretty quick, this question. Certainly, you appear to have been involved with Delaware in providing a number of comments. I was just wondering, you've provided comments on a draft permit. Do you have followup with the agencies? Do you talk with them? Do they call you? Do you get to see a final permit and you compare and say, oh, you took our comment and changed it? I just want to know how much interaction there is after you've filed comments.

Lyman Welch, Mid-Atlantic Environmental Law Center: We have requested hearings on a number of the permits, so there is that opportunity to present oral comments and additional written comments at the public hearing. After that, it's really up to the agency. We have no contact with them after that. I'm sure we could call and ask them questions, if we had a question about what was going on, but they don't make any effort to reach out to us and

involve us in the process after that. They do make an effort to involve the permittee. They will go to the permittee and say these are all the comments that we've received from the public. What's your response? And they will often put the permitee's response into the record, and when they do issue the permit, Delaware now is being much better at having a written comment and response document, so there is a response to comment documents that the agency will prepare, which gives some explanation about how they either ignored our comment or made a change.

MS. OWEN: Okay. Thank you. Do you respond to comments?

MS. HOLLENBACH, Michigan DEQ: Yes

Our Children's Earth (written comments): Submitted a summary of issues raised at an environmental justice session held at Golden Gate University. One issue was that there is "no response to comments from the community." The proposed solution was to require agencies to respond to questions and concerns raised at public hearings, and to make transcripts of hearings available on the internet.

5.7 TOPIC: PERMIT RE-OPENING, REVISIONS AND OPERATIONAL FLEXIBILITY

Issue/Observation Description

Among the most significant challenges to the Title V program are maintaining the permit to reflect current applicable requirements, expeditiously processing permit revisions, and maintaining operational flexibility for sources. If one of the primary benefits of the Title V program is that the permit is a compilation of all the applicable requirements for an individual source, then an effective process for revising the permit is important to preserve that benefit. A permit that is not current does not inform the public or the source about the applicable requirements. Furthermore, it may lead to confusing compliance circumstances for sources if the permit and the applicable regulatory requirements are out of sync. At the same time, as new requirements come into effect, either through revised or new construction permits or new regulations, complying with and implementing these requirements may need to be accomplished before a permit revision can be completed.

Many different factors challenge permitting authorities' ability to keep the permit current. There are many reasons why a permit may not reflect current requirements or need revision. New regulations are promulgated and existing ones are revised. In some cases, the new or revised rules are incorporated into a SIP. In addition, the permit may contain errors or omissions. The source may be making changes to its operations or adding new equipment. With all of these factors creating circumstances to update the permit, permitting authorities may not have enough resources to process all the changes in a timely manner. This in turn may unreasonably delay projects, prevent opportunities for public participation, or put sources in jeopardy of noncompliance. Furthermore, confusion about which permit revision process applies may create stress, inefficiency, and delay in the system.

The Task Force initially identified a number of questions it had about the implementation of the Title V permit revision and operational flexibility provisions. Those questions are listed below.

- **Classification of Permit Modifications:** Is the permit modification process working well? If not, how should it be changed? Are modifications being addressed in a timely manner?
- **Reopenings:** Does every reopening have to follow full issuance procedures? Should Part 70 be changed to allow some simpler reopenings to occur without public notice? For instance, should incorporation of a new Federal standard require full process? How should States identify and reopen existing permits when a generally-applicable regulation is promulgated or revised? Are there ways other than reopening to incorporate newly promulgated requirements?
- **Operational Flexibility:** Is the provision for "section 502(b)(10) changes" in § 70.4(12)(i) working well? Is it being used or not, and if not, is that good (*i.e.*,does lack of use indicate well written permits or lack of education regarding available operational flexibility in the rules)? Are the other operational flexibility provisions in-

cluded in Section 70.4(b)(12) being utilized effectively? Is the "off-permit" authority of 70.4(b)(15) being used effectively? If not, how can their use be improved?

Upon hearing testimony and receiving written comments, the Task Force identified additional discussion questions about permit revisions and operational flexibility. These include the following:

1. Are current Title V permit revision procedures impeding companies' ability to make changes quickly enough to remain competitive, or unreasonably delaying environmentally beneficial projects? If so, does the delay arise from the rules, themselves, or from some other factor? If the problem is with the rules, can they be streamlined in a way that would still allow for effective oversight by the permitting agency, EPA, and the public?
2. Do current permit revision procedures provide adequate opportunities for public notice and comment? If not, how can they be revised to address this problem? Is the public participating in the permit modification process?
3. Is there confusion regarding which permit revision procedures apply to particular types of changes? If so, how can this be remedied?
4. How are major and minor NSR permitting requirements affected by or affecting Title V permit revisions?

Background

Legal Requirements: Statute. The Clean Air Act includes the following provisions that address reopening or revision of Title V permits and operational flexibility.

CAA § 502(b)(6): The Administrator shall promulgate regulations that include "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of the action under applicable law."

CAA § 502(b)(9): The Administrator shall promulgate regulations that include "a requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals."

CAA § 502(b)(10): The Administrator shall promulgate regulations that include "[p]rovisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: Provided, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies."

CAA § 505(a)(1): "Each permitting authority—(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter …..

Regulations. The Part 70 rules contain several procedural mechanisms for reopening or revising Title V permits or addressing other changes at the source. These are summarized below. Actual rule language appears at the end of this document.

Permit reopening [40 CFR 70.7(f) and (g)]: The permit reopening provisions enable the permitting authority to add new or revised applicable requirements to a permit without the permittee requesting the change. The rules contemplate reopening for such purpose if more than three years remain of the permit term when the new requirement becomes applicable. In addition, the permit reopening provisions authorize a permitting authority or EPA to revise a permit if it determines that the permit contains a material mistake or that "the permit must be revised or revoked to assure compliance with the applicable requirements." If a permitting authority reopens a permit, it must follow the full Title V review and public participation process to revise the permit.

Administrative permit amendments [40 CFR 70.7(d)]: Administrative permit amendments provide a simple and quick process to address ministerial changes to the permit [typographical changes; changes in ownership], changes that incorporate requirements from preconstruction review permits that have already undergone agency review and public participation procedures, and changes that require more frequent monitoring or reporting by the permittee. The Part 70 rules also allow other changes of a similar nature to the previously described changes if the EPA approves those types of changes into the permit program.

Minor permit modification [40 CFR 70.7(e)(2)]: Minor permit amendments provide a source the opportunity to make its change quickly – upon the submittal of the application if allowed by the State — but the process for actually revising the permit entails adjacent State notification and EPA review of the change. No public participation is required under the Part 70 rules, but some States require public participation. The criteria for the types of changes eligible for minor permit modification are subjective; as a result States and EPA regions have interpreted the criteria both broadly [many types of changes qual-

ify for minor permit modification], and narrowly [few changes qualify for minor permit modification].

Significant permit modification [40 CFR 70.7(e)(4)]: The significant permit modification process is the default permit revision process. Any change that requires a permit revision and does not qualify as an administrative permit amendment or a minor permit modification must be processed as a significant permit modification. In addition, significant changes in monitoring requirements and relaxations of record keeping and reporting requirements must also be processed as significant permit modifications. The process for these modifications is the same as the process for the initial issuance of a Title V permit: full public participation and EPA review before the modification goes into effect.

Operational flexibility. The Part 70 rules also include a number of "operational flexibility" provisions that enable sources to make changes without revising the Title V permit. The availability of these provisions is limited in that the change may not be in violation of applicable requirements, increase emissions above the emissions allowable under the permit, or constitute a Title I modification. In most cases, these provisions require the source to submit a notification to the permitting authority before making a proposed change. Below is a list of these provisions:

- Section 502(b)(10) changes [40 CFR 70.4(b)(12)(i)]
- Trading of emission increases and decreases where provided by the applicable requirement or SIP [40 CFR 70.4(b)(12)(ii)]
- Trading of emission increases and decreases for purposes of complying with an emission cap [40 CFR 70.4(b)(12)(iii)]
- So-called off-permit changes [40 CFR 70.4(b)(14)]
- Alternative operating scenarios [40 CFR 70.6(a)(9)]

Finally, the preamble to the final part 70 rules explains that permittees have inherent flexibility in that emissions or other practices not prohibited by a permit are allowed, providing that the revision and operational flexibility provisions of the rules do not create:

> any limit on the inherent flexibility sources have under their permits. A permittee can always make changes, including physical and production changes that are not constrained under the permit. For example, a facility could physically move equipment without providing notice or obtaining a permit modification if the move does not change or affect applicable requirements or Federally-enforceable permit terms or conditions. Or a painting facility with a permit that limits the VOC content of its paints can switch paint colors freely as long as each color complies with the VOC limit in the permit.
>
> 57 Fed. Reg. 32267.

Supporting Information: Comments Received

Twenty-one persons providing oral testimony to the Task Force included the issues of permit reopening, permit revision, and operational flexibility in the scope of their testimony. Similarly, twenty-three of the written comments included discussion of these issues. It should be noted that some of the written comments were submitted by the same persons or organizations that provided oral testimony.

Nearly all of the testimony and comments on this topic were made by representatives of permitting authorities, industry trade organizations, or individual companies. The primary points raised in the comments were as follows:

Permit reopenings

- Permitting authorities are not able to keep up with permit reopenings to incorporate newly adopted or revised applicable requirements. Sources have adapted by applying themselves for permit revisions or to utilize off-permit notification to comply with new requirements, particularly MACT standards. [API, Michigan DEQ, IDEM, Puget Sound, STAPPA/ALAPCO, Air Permitting Forum]
- The process to reopen Title V permits to address new or revised applicable requirements should not be a significant permit modification because it is too burdensome. Instead the permit should be revised at renewal, by minor permit modification, off-permit change, or some other simple process. [BAAQMD, NPRA, Michigan DEQ, API, Indiana DEM, STAPPA/ALAPCO, Lilly, CASE]

Permit revisions

- The permit revision rules should not be changed because the rules are complex and permitting authorities are just starting to learn to implement them. Revision at this point in the process will create confusion. [ACC, Auto Alliance, Air Permitting Forum]
- Permitting authorities and sources are confused about which revision process applies to specific changes. [RR Donnelly, Michigan DEQ, Alabama DEM, API, Lilly, Auto Alliance, Ohio EPA, Air Permitting Forum]
- There is inconsistent application of the permit revision processes to types of changes from jurisdiction to jurisdiction. [RR Donnelly, NPRA, Connectiv, Alabama DEM,
- The permit revision process is onerous or burdensome or overwhelming States. [Michigan DEQ, Georgia EPD, San Diego APCD, DoD, Ohio EPA, Air Permitting Forum
- EPA should issue guidance to clarify the types of changes that fall into the different categories. [ACC, New Jersey DEP, CAPCOA, BAAQMD, Georgia EPD
- The permit revision process needs streamlining. [NPRA]
- Too many permit revisions are being processed as significant permit revisions. [STAPPA/ALAPCO, Ohio EPA, CENSARA]

- Permitting authorities are interpreting the scope of minor permit revisions too narrowly. [BAAQMD]
- A significant portion of the Title I modifications that are being reviewed as significant permit modifications do not warrant that much process because there is little environmental or compliance significance to the change. [BAAQMD, SCAQMD, Indiana DEM, San Diego APCD]
- Title I modifications should be eligible for minor permit modification procedures. [Indiana DEM]
- There is inconsistent guidance about what constitutes a Title I modification. [Indiana DEM]
- Permit revisions take too long to complete or are burdensome, in particular significant permit revisions. [RR Donnelly, API, ACC, Indiana DEM, NPRA, Air Permitting Forum]
- Long permit revision times cause delay for environmentally beneficial projects and projects necessary for sources to remain economically competitive. [AFPA, Indiana DEM]
- Monitoring changes specified in a rule should not require significant permit modification. [Indiana DEM]
- Monitoring, record keeping, and reporting changes should be processed as minor permit modifications. [Ohio EPA]
- No public comment period should be required for minor permit modifications. [ACC]
- States should be required to meet the regulatory time frames. [Murawski]
- States should offer expedited review processes for time-sensitive changes. [Murawski]
- Off-permit and minor permit modification procedures have proved to be crucial to enable sources to make changes and should be retained. Immediate implementation of changes under these processes is important. They are the only thing keeping the permit revision system from becoming completely overwhelmed. [NPRA, ACC, DoD, CAIP, Auto Alliance, CASE, Air Permitting Forum]
- States that do not offer off-permit processes should be required to adopt them. [CASE]
- Confusion about off-permit processes discourages States from using it. [Air Permitting Forum]
- When concurrent EPA review is used, minor changes from draft to proposed rule should not trigger another 45 day EPA review. [Indiana DEM]
- Errors in the Title V permit should be corrected by administrative permit amendments or minor permit modifications. [Lilly]

- Minor permit modifications should only include changes requested by the source. Some permitting authorities add new provisions in this process, and sources can only appeal the modification if they disagree with the unsolicited changes. [UARG]
- Addition or revision of terms not requested by the source should be accomplished by reopening or at renewal. [CASE]

Operational flexibility

- Operational flexibility is crucial for businesses to change to stay competitive. [API, NPRA, GPA, 3M, ACC, NPRA]
- States should utilize operational flexibility provisions. [Murawski]
- Flexible permits based on advance approvals provide significant flexibility for sources to make changes and remain economically competitive. [3M, Lilly]
- EPA should issue rules for flexible permits [CAIP]
- Permits should be written to retain inherent flexibility. [Lilly, Auto Alliance, RR Donnelly]

Interaction with NSR permitting

- Multiple, duplicative, or overlapping permit review processes are inefficient, consume resources, and delay startup of construction and operation. [NPRA, Honda, AFPA, GPA, API, RAPCA, Alabama DEM
- Off permit provisions provide an opportunity to streamline NSR permitting into Title V. [API, AFPA, Michigan DEQ]
- Minor permit modifications, administrative permit amendments, or other streamlined processes should be used to incorporate NSR terms into the Title V permit. [API, NPRA, Honda, Michigan DEQ, ACC, AFPA, GPA, Lilly, Auto Alliance, Alabama DEM]
- EPA should clarify the meaning of the different minor permit modification gatekeepers to address permit changes which were first processed in NSR permitting. [Auto Alliance]
- Concurrent NSR and Title V reviews help reduce burden and delay. [AFPA]
- EPA should issue rules regarding concurrent NSR and Title V review procedures. [CAIP]
- Sources should be able to begin construction and operation if an NSR permit has been issued prior to final Title V permit modification. [New Jersey DEP, Honda, Auto Alliance]

Task Force Discussion

The issues regarding the ability of the Title V program to keep the Title V permit up-to-date can be distilled into finding the best allocation among three competing interests: resources expended by the permitting authorities and sources [staff time and costs]; timeliness for the sources; and public awareness of and access to permit modification information. Task Force members expressed strong views about how best to implement permit revisions and operational flexibility requirements, and those views depended greatly on which of the three interests [resources, timeliness, and public access/awareness] was most important to each member of the Task Force.

Notwithstanding these differences, the Task Force members generally agreed with the concept that the amount of process associated with a permit modification should be proportional to the level of discretion exercised by the permitting authority to incorporate the changes into the permit, and to the degree of environmental significance associated with that discretion. For example, if the permit modification is a change that entails a straightforward incorporation of previously established requirements into the permit, then the permit modification process should generally be short and simple. The degree of discretion being exercised by the permitting authority is in the context of revising the Title V permit, and not the discretion within the underlying applicable requirement. One environmental group Task Force member stated agreement with this general concept, but expressed concern that when permits are revised without public notice, it is difficult or impossible for the public to determine whether permitting authorities are correctly applying the proper permit revision process. That member also noted that there are substantial differences of opinion regarding the circumstances under which a permit revision entails an exercise of the permitting authority's discretion.

One Task Force member representing permitting agencies suggested, based on extensive public comment and testimony, that if the complexity and burden of the permit revision process is inhibiting permit authorities from revising permits, then the Title V program is not achieving a goal of having the permit reflect the current requirements for the source.

After discussing the long history of failed attempts to "fix" the permit revision rules, the Task Force did not reach consensus that the existing permit revision rules should be changed. Most members agreed that while the current system is complex and burdensome, future changes were more likely to increase the complexity and burden of the rules than to reduce it. Many Task Force members suggested the most logical path for reducing the complexity and burden of the rules could be achieved through EPA education and outreach to permitting authorities, and, if necessary, guidance or best practice documents, rather than rule revisions. As a result of this recognition, the Task Force recommendations that appear later in this paper are divided into two categories: recommendations that can be implemented under the Part 70 rules as they now exist, and recommendations that would require a revision to the Part 70 rules. This approach allowed Task Force members that believe the rules do not need revision to vote in favor of recommendations in the latter category without being considered to agree with a rule change.

When a permit revision is needed: Industry representatives on the Task Force suggested that one way that EPA could reduce the complexity of the Title V program would be for the agency to clarify that permit revisions are required only in specific circumstances: when an applicable requirement is created or revised and off-permit procedures are not available, or when the source proposes an activity that is inconsistent with or in violation of existing permit terms. In the second instance, these Task Force representatives suggested the permit should be revised to accommodate the proposed activity, but only if the revisions are consistent with the underlying applicable requirements [*i.e.,*MACT rule or NSR permitting requirements], and all other Title V requirements are satisfied. Permit revisions should not be required, however, in other situations. For example, while it might be useful, or even desirable for a Title V permit to be revised when a source is adding a new emissions unit to the facility or modifying an existing emissions unit, a permit revision is not required if the change does not create any new applicable requirements or modify existing applicable requirements for the emissions unit. Environmental group representatives on the Task Force did not agree with this proposed clarification.

New Applicable Requirements: Industry and permit agency Task Force members expressed concern with the amount of process required to add new or amended regulatory requirements to a Title V permit through the permit re-opening process. They noted that for most re-openings, there is little discretion exercised by the permitting authority, for example, when new or amended MACT requirements are added to a permit. The existing Part 70 rules, however, require significant permit modification procedures and additional process to re-open the permit. Many Task Force members observed that permitting agencies are either not re-opening permits or they are using alternative approaches such as requesting sources file applications for permit modifications or using off-permit procedures.

Industry and permit agency representatives on the Task Force supported the idea that minor permit modifications or off-permit procedures be used to update permits in lieu of reopening. Consequently, the Task Force recommended that EPA encourage permitting authorities to use minor permit modifications and off-permit procedures instead of re-opening Title V permits as contemplated by Title V. This could be accomplished without revising the Part 70 rules. Environmental group Task Force members opposed this recommendation because of concerns about reduced public awareness of and access to permitting decisions.

Choosing a Type of Revision: Several industry Task Force members described the confusion caused when permitting authorities and EPA regional offices inconsistently apply permit revision procedures. The confusion often led to delays, which could be prevented if there were clearer definition of the types of changes that fell into each permit revision process. As a result, the Task Force recommended that EPA clarify the scope and applicability of the various permit revision processes – primarily through training and outreach efforts. Formal guidance is not necessary, but greater clarity is essential. This could be accomplished without revising the Part 70 rules.

Off-Permit Changes: Industry Task Force members reiterated the statements of many commenters that the off-permit process was keeping the permit revision process from collapsing under its own weight. These members encouraged greater use of the process. The process should be supported more since it enables timely changes and employs notification to permitting authorities. Furthermore, the process requires both the permitting authority and the source to maintain copies of the notices and the applicable requirements. The process could potentially be improved by increasing public awareness of when off-permit procedures were employed. These Task Force members expressed concern that some States did not adopt off-permit procedures. Based on these issues, the Task Force suggested three recommendations to increase the use of off-permit procedures and to increase public awareness of off-permit submittals. These recommendations could be accomplished without revising the Part 70 rules. Environmental group Task Force members voiced opposition to "off permit" changes because they make it so that the public cannot rely on a permit as a comprehensive statement of a facility's Clean Air Act obligations.

While the Task Force recognized that using off-permit notifications is somewhat inconsistent with the goal of keeping the Title V permit current, under the current program most felt it necessary since it is the only way that a source can timely comply with new requirements when the permitting authority has not revised the permit. While not agreeing that part 70 rules should be revised, the industry and permit authority members of the Task Force agreed that if part 70 was changed, the off-permit procedure could be eliminated, if sufficiently streamlined procedures were developed matching procedure with the discretion in recording the requirement in the Title V permit and the significance of the change to the permit. Environmental group representatives did not agree with this suggestion.

Administrative Amendments: Industry Task Force members suggested that the administrative permit amendment procedures are under-utilized. They suggested that there are a large number of changes to Title V permits that reflect no discretion on the part of the permitting authority that could be good candidates for administrative permit amendments. Most State regulations, however, are based on the default administrative permit amendment categories described in the Part 70 rules. Permitting agencies are generally not taking advantage of authority provided to them in 40 CFR 70.7(d)(1)(vi). This provision allows EPA to approve a Title V program that allows administrative permit amendments for permit revisions that are similar to those revisions specifically identified in the regulations as suitable for inclusion by administrative amendment. As an example of a change that should qualify for incorporation by administrative amendment, industry Task Force members pointed to incorporation of new MACT or NSPS requirements into the permit, or other similar changes where little or no agency discretion is exercised. Environmental group Task Force members disagreed with this example, stating that incorporation of a MACT or NSPS standard may entail an exercise of discretion because the permitting authority is obligated to add monitoring, recordkeeping, and reporting obligations as needed to assure a source's compliance with such requirements. Many Task Force members supported a recommendation to encourage States to broaden the scope of changes that can be incorporated into a permit by administrative amendment, and for EPA to

approve Title V programs that have broadened administrative amendments appropriately. This recommendation could be accomplished without revising the Part 70 rules.

Permit Flexibility: Representatives of industry and permitting authorities on the Task Force agreed with several commentors that EPA should encourage greater use of tools to make Title V permits flexible. Task Force members cited numerous techniques to retain and create flexibility. For example, a number of Task Force members recommended that permitting agencies should not issue permits that restrain the inherent flexibility of a permit, that is, a permit should not restrict changes that have no impact on the applicable requirements incorporated into the permit or flexibility explicitly provided in the applicable requirements. In addition, a number of Task Force members recommended greater use of advance approval provisions [as a form of alternative operating scenarios] that allow a source to undertake changes upon notice provided that the type of change is described in the permit and the applicable requirements relevant to the change are already incorporated into the permit. These recommendations could be accomplished without revising the Part 70 rules. Environmental group Task Force members opposed these recommendations because of concerns regarding public awareness of the changes being made.

Title I/Title V Revision Streamlining: Industry and permitting authority Task Force members also agreed with commenters that there needs to be greater coordination and streamlining between New Source Review and Title V permit revision procedures for those permitting agencies that have separate construction and operating permit programs. Many Task Force members joined in recommending administrative permit amendments, minor permit modifications, and off-permit procedures as the preferred means of authorizing operation of changes subject to pre-construction permits. This could be accomplished without revising the Part 70 rules.

Environmental group members on the Task Force pointed out that the current Part 70 regulations already allow a change that is processed under the Clean Air Act's "minor new source review" procedures to be added to a Title V permit as an administrative amendment, so long as the public process accompanying that change was substantially equivalent to what Title V requires. Because EPA recently revised its New Source Review regulations to allow many more changes to be processed under minor NSR, the Task Force member explained that it was more important than ever to ensure that those changes were subject to public review under either NSR or Title V procedures. Several State and industry Task Force members disagreed with the need for public review of minor NSR changes.

Permitting agency representatives on the Task Force requested that States be allowed to use simultaneous public notice and permit processing for issuing pre-construction permits and modifying Title V permits without needing some type of EPA approval to engage in the simultaneous processing. Some States have found that EPA will not allow simultaneous processing unless the State has a memorandum of understanding or some other approval from the relevant EPA regional office. This could be accomplished without revising the Part 70 rules.

Scope of Permit Revisions: Industry representatives on the Task Force expressed concern that when a source submitted a request for a permit revision, some permitting authorities were adding changes to the permit that were not relevant to the change requested by the source, and in some cases, the source did not agree with the State-initiated changes. This practice placed sources in a difficult situation. A source could end up expending resources and time negotiating with the permitting authority on the disputed changes, a process that could delay the changes being sought by the source when the rules require that the permitting authority follow reopening procedures under such circumstances. Industry Task Force members noted that if a source applies for a permit modification, that the modification is supposed to be limited in scope to changes sought by the source, unless agreed to by the source. Adhering to this rule requirement could be accomplished without revising the Part 70 rules. The Task Force also considered a recommendation that EPA should object to any permit modifications if a source petitioned EPA to object on the basis that the permitting authority added terms through the modification that were not requested and agreed to by the source – unless the permitting authority accomplished the change through permit reopening procedures.

Notice procedures: Environmental group Task Force members expressed concern that not all permit revisions undergo public notice and comment prior to being issued. This prevents the public from adequately knowing when a permit is being changed, and prevents the public from being able to express its concerns about a permit revision. These members supported a general recommendation that Part 70 be revised to require public notice and comment for all Title V permit revisions. Industry and permitting authority representatives opposed this recommendation because of the additional cost and time delays such as system would impose for all changes, including those which are minor in nature or require no decision making on the part of the permitting authority. Environmental group representatives noted that there were many possible approaches to provide for public review of permit revisions, and that public participation procedures could vary depending on the type of permit revision at issue. Due to the lack of interest among industry and permitting authority representatives in this type of recommendation, however, environmental group representatives chose not to present more specific public participation proposals for discussion.

Environmental group Task Force members expressed concern that the current minor modification procedure allows permits to be changed without public notice or an opportunity for public comment, even where the public was heavily involved in the development of the original permit. These members explained that members of the public could obtain improvements in the initial permit, only to see these improvements eliminated in a piecemeal fashion without public review. Industry representatives on the Task Force noted that in their experience, permits are only modified if there is a new requirement or equipment change and that it states do not revisit recently issued terms, particularly those that had been the subject of comments.

Environmental group Task Force members also expressed concern that if a permit modification is made without public notice and an opportunity for comment, and the public

later concludes that the modified permit terms are deficient, there is no regulatory deadline for EPA to respond to a public petition to reopen and revise the deficient permit. They further explained that while the public has an inherent right to file a reopening petition, and EPA has itself told participants at Title V training sessions about this opportunity, there are no regulations in place to guide the filing and processing of such petitions. Environmental group representatives stated that the lack of a deadline for EPA to act on such petitions is a significant problem, explaining that reopening petitions filed many years ago are still pending before the agency. To address this concern, environmental group Task Force members recommended revising the Part 70 rules to create procedures for the public to petition permitting authorities and EPA to reopen/revise permits for cause. The regulatory changes would include a deadline for the permitting authority and/or EPA to respond to the petition. Industry and permitting authority representatives expressed concern that reopening petitions might be used to argue decisions that had been previously addressed in an earlier permitting process, and about the amount of uncertainty/lack of finality this tool could add to the process. Environmental group Task Force members responded that insofar as reopening petitions add uncertainty or lack of finality to the process, that already exists because the public already has the right to petition for a permit to be reopened, and EPA and permitting authorities already have the right to reopen and revise a permit either in response to a petition or on their own accord. They explained that by issuing regulations, EPA would be adding more certainty to the process.

Potential Changes to Part 70 If Otherwise Reopened: Although not generally supportive of revising the Part 70 rules, Industry representatives on the Task Force stated that if the Part 70 permit modification procedure are otherwise being revised, expanding administrative amendments to cover a broader range of changes to a permit is appropriate if the permit revision requires little discretion by the permitting agency (*e.g.*, incorporating a new applicable requirement into the permit like a MACT standard or the terms of a construction permit). Several permitting authority representatives on the Task Force concurred with this view but Environmental group representatives on the Task Force opposed this recommendation.

In addition, permitting agency and industry Task Force members also suggested that if the part 70 rules were otherwise being revised, they should allow a Title V permit revision to be processed without additional public notice and comment if the process to create a new or revised permit term already included public notice and comment (*e.g.*, an NSR permit that includes public notice and comment or rules), provided that the applicable requirement contains those terms that are otherwise required under Section 70.6. This would allow States to incorporate NSR permit requirements into the Title V permit using the minor permit modification process instead of the significant permit revision process, as is required currently for Title I modifications. This approach would also make clear that incorporating regulatory requirements such as MACT standards or NSPS requirements could be accomplished through administrative permit amendments or minor permit revisions.

Recommendations

Recommendations #1-9 are based on implementation of the Part 70 regulations as they currently exist – that is, the Task Force recommends implementing these recommendations without changing the Part 70 regulations.

Recommendation #1 [Permit reopening]

In implementing the current rules, EPA should encourage permitting authorities to use minor permit modification or off-permit procedures to add new applicable requirements to the Title V permit instead of using the permit reopening/ significant permit modification track.

In Favor (11)*: Morehouse, Freeman, Paul, Hagle, Sliwinski, Broome, Wood, Schwartz, Golden, Kaderly, Hodanbosi

Opposed (7)*: Owen, Van Frank, Palzer, Keever, Raettig, van der Vaart, Powell

Abstentions:

Clarifications:

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2 [Permit revisions]

In implementing the current rules, EPA should clarify the scope and applicability of the various permit revision processes through training and outreach efforts. In particular, EPA should provide examples of the types of changes that fit into each of the revision tracks.

In Favor (17): Keever, Powell, Van Frank, Morehouse, Freeman, Paul, Hodanbosi, Hagle, Wood, Raettig, Owen, Palzer, Golden, Schwartz, Kaderly, Broome, Sliwinski

Opposed (1): van der Vaart

Abstentions:

Clarifications: Hodanbosi supports with a request that the outreach and education materials include examples from permitting authorities, and that the examples clearly identify which modification track is applicable to the modification.

Recommendation #3(a) [Off-permit]

In implementing the current rules, EPA should encourage greater use of off-permit notification changes to address new MACT standards, NSPS and minor NSR permit terms.

In Favor (10): Morehouse, Freeman, Paul, Hodanbosi, Hagle, Wood, Golden, Schwartz, Kaderly, Broome

Opposed (8): Keever, Powell, Van Frank, Raettig, Palzer, van der Vaart, Owen, Sliwinski

Abstentions:

Clarifications: Sliwinski clarifies that though EPA allows off-permit revisions, it should not engage in promoting its use.

Recommendation #3(b) [Off-permit]

In implementing the current rules, EPA should encourage States that have not adopted the off-permit notification process to adopt and utilize this process.

In Favor (9): Morehouse, Freeman, Paul, Hodanbosi, Wood, Golden, van der Vaart, Kaderly, Broome

Opposed (7): Keever, Powell, Van Frank, Palzer, Owen, Raettig, Sliwinski

Abstentions (2): Schwartz, Hagle

Clarifications: Kaderly supports with clarification that while Part 70 provides an off-permit process, it is not a required element. Thus EPA should only encourage off-permit procedures and not require them. Sliwinski clarifies that though EPA allows off-permit revisions, it should not engage in promoting its use.

Recommendation #3(c) [Off-permit]

In implementing the current rules, permitting authorities should develop methods to increase public awareness of off-permit notifications that have been received.

In Favor (18): Morehouse, Freeman, Paul, Hodanbosi, Hagle, Wood, Kaderly, Keever, Powell, Van Frank, Raettig, Palzer, Golden, van der Vaart, Schwartz, Owen, Broome, Sliwinski

Opposed:

Abstentions:

Clarifications:

Recommendation #4 [Administrative permit amendment]

In implementing the current rules, EPA should exercise its authority under 40 CFR 70.7(d)(1)(vi) to approve State permitting programs that allow the administrative permit amendment process to be used for changes similar to those in 70.7(d)(1)(i) through (d)(1)(v). For example, administrative permit amendments should be allowed for straightforward incorporation of new MACT, NSPS, other regulatory requirements, or appeal settlements. Changes eligible for incorporation as administrative permit amendments should be those that require little or no agency discretion.

In Favor (12): Golden, van der Vaart, Morehouse, Freeman, Schwartz, Paul, Hodanbosi, Hagle, Wood, Kaderly, Broome, Sliwinski

Opposed (4): Raettig, Powell, Keever, Palzer

Abstentions (2): Van Frank, Owen

Clarifications: Powell opposes because she does not believe that the examples given are appropriate for incorporation by administrative amendment. Palzer joins Powell's clarification.

Recommendation #5 [Operational flexibility]

In implementing the current rules, EPA should encourage greater use of the operational flexibility tools, such as inherent permit flexibility (*e.g.,* changes that have no impact on applicable requirements, flexibility provided explicitly in applicable requirements), and advance approval provisions.

In Favor (12): Broome, Paul, Sliwinski, Hagle, Hodanbosi, Wood, Freeman, Morehouse, van der Vaart, Kaderly, Schwartz, Golden

Opposed (6): Powell, Van Frank, Palzer, Keever, Raettig, Owen

Abstentions:

Clarifications: Kaderly favors provided the flexibility does not compromise enforceability.

Recommendation #6 [Relationship between NSR and Title V]

In implementing the current rules, EPA should encourage greater usage of streamlined procedures to accomplish incorporation of new minor and major NSR requirements into Title V permits in States that have separate construction and operating permit programs. Administrative permit amendments, minor permit modifications, and off-permit procedures should be the preferred methods for authorizing operation of minor and major NSR permit changes.

In Favor (11): Broome, Paul, Sliwinski, Hagle, Hodanbosi, Wood, Freeman, Schwartz, Morehouse, Kaderly, Golden

Opposed (6): Powell, Van Frank, Palzer, Keever, Raettig, Owen

Abstentions (1): van der Vaart

Clarifications: Sliwinski favors provided that all of the Title V requirements are reflected in the NSR permit, the NSR permit was subject to public notice and comment when it was issued, and the notice is clear that both the Title V and NSR requirements are being addressed. Kaderly favors provided the minor NSR program provides for public notice.

Recommendation #7 [Scope of source requested permit modification]

In implementing the current rules, EPA should discourage permitting authorities from including agency-initiated permit modifications that are beyond the scope of the modification being requested by a source unless the source explicitly agrees to the proposed modification.

In Favor (10): Broome, Paul, Sliwinski, Hagle, Hodanbosi, Wood, Schwartz, Morehouse, Golden, Freeman

Opposed (7): Van Frank, Palzer, Keever, Raettig, Owen, van der Vaart, Kaderly

Abstention (1): Powell

Clarifications: Broome, Freeman, Golden, Morehouse, Paul and Wood clarify that the rules already limit the scope of the modification to that which is in the source's application. EPA should not only discourage the practice of permitting authority-initiated changes, but should object to permit modifications initiated by the permitting authority to which the source has not agreed, unless reopening procedures are followed.

Recommendation #8 [Relationship between NSR and Title V]

In implementing the current rules, States should have the ability to use simultaneous public notice and permit processing for the construction permit and the modification of the Title V permit without requiring a memorandum of understanding between the permitting authority and the Regional office [or some other approval process]. This recommendation does not pertain to the ability of States to make EPA and public review periods concurrent.

In Favor (17): Broome, Paul, Sliwinski, Hagle, Hodanbosi, Wood, Freeman, Schwartz, Raettig, Van Frank, Morehouse, Kaderly, Golden, van der Vaart, Powell, Keever, Palzer

Opposed:

Abstention (1): Owen

Clarifications: Powell clarifies that the notice must make it clear that both the construction permit and the Title V permit are being modified. Keever and Palzer join Powell's clarification.

Recommendation #9 [When is a revision required?]

In implementing the current rules, EPA should clarify that the existing rules require a permit revision only under the following circumstances:

- When a new or revised applicable requirement applies to the source, and the off-permit procedures are not available; or
- When a proposed activity at the source would cause operations to be inconsistent with or in violation of an existing permit term.

In Favor (11): Broome, Paul, Hodanbosi, Wood, Freeman, Morehouse, Schwartz, Kaderly, Hagle, Golden, Sliwinski

Opposed (5): van der Vaart, Raettig, Powell, Keever, Palzer

Abstentions (2): Van Frank, Owen

Clarifications:

Recommendations #10-14 are based on revising the existing Part 70 rules. Voting in favor of these recommendations does not indicate that the Task Force member agrees that the part 70 rules should be revised.

Recommendation #10 [Permit revisions]

EPA should provide the public with notice of, and an opportunity to comment on, all revisions to a Title V permit.

In Favor (6): Powell, Keever, Raettig, Palzer, Van Frank, Owen

Opposed (11): Broome, Paul, Sliwinski, Hagle, Hodanbosi, Wood, Freeman, Schwartz, Morehouse, Golden, van der Vaart

Abstentions (1): Kaderly

Clarifications:

Recommendation #11 [Permit reopening]

EPA should promulgate regulations formalizing procedures by which the public may petition State permitting authorities and the EPA to reopen and revise permits for cause under 40 CFR 70.7(f) and (g). Such regulations should include a deadline by which the permitting authority and/or EPA must respond to a reopening petition.

In Favor (9): Powell, Keever, Raettig, Van Frank, Kaderly, Sliwinski, Schwartz, Palzer, Owen

Opposed (8): Hodanbosi, Wood, Freeman, van der Vaart, Broome, Paul, Morehouse, Golden

Abstentions (1): Hagle

Clarifications: Sliwinski clarifies that issues addressed previously cannot be challenged again through this process. Kaderly clarifies that there must be safeguards in the process to prevent petitions for issues that have already been addressed, and to assure there is some finality to the permitting process (*i.e.*,the petitioner must show why it was impracticable to raise the issue during the public comment process). Paul clarifies that although the concept has merit, the lack of safeguards in the process to prevent petitions that revisit issues, and the lack of finality to the permitting process create too much uncertainty to support.

Recommendation #12 [Off-permit]

If EPA amends the permit revision procedures, the extent of procedure for revising a Title V permit should be proportionate to the degree of discretion available in the Title V context and to the potential environmental impact associated with the exercise of that discretion. If the extent of procedure is matched to the significance of the change consistent with these principles, the off-permit provisions of section 70.4(b)(14) could be eliminated in favor of a process that updates the Title V permit contemporaneously with changes at the facility.

In Favor (11): Paul, Broome, Hagle, Schwartz, Kaderly, Golden, Hodanbosi, Wood, Freeman, Sliwinski, Morehouse

Opposed (7): Raettig, Van Frank, van der Vaart, Owen, Palzer, Powell, Keever

Abstentions:

Clarifications: Broome supports with clarification that the degree of discretion exercised by the permitting authority is in the context of the Title V revision as opposed to the underlying applicable requirement.

Recommendation #13 [Administrative permit amendments]

If EPA amends the permit revision procedures, the Part 70 rules should be amended to clarify that the administrative amendment process should include any change to a permit term that requires little discretion (*e.g.*,incorporating a new applicable requirement into the permit like a MACT standard or the terms of a construction permit).

In Favor (12): Broome, Paul, Hodanbosi, Wood, Freeman, Morehouse, Hagle, van der Vaart, Kaderly, Schwartz, Golden, Sliwinski

Opposed (6): Owen, Palzer, Van Frank, Keever, Raettig, Powell

Abstentions:

Clarifications: van der Vaart favors provided the permit shield is explicitly applicable.

Recommendation #14 [Streamlined processes]

If EPA amends the permit revision procedures, the process to create a new or revised permit term already includes public notice and comment (*e.g.*, an NSR permit that includes public notice and comment or rules), public notice and comment should not be required to incorporate it into the Title V permit, provided that the applicable requirement contains those terms that are otherwise required under Section 70.6.

In Favor (12): Broome, Paul, Hodanbosi, Kaderly, Hagle, van der Vaart, Wood, Freeman, Morehouse, Schwartz, Golden, Sliwinski

Opposed (6): Van Frank, Keever, Owen, Palzer, Raettig, Powell

Abstentions:

Clarifications:

5.8 TOPIC: APPEALS AND PETITIONS

Issue/Observation Description

What this Paper Addresses: If a person disagrees with the terms of a Title V permit that is proposed and issued, there are two paths provided in the rules to seek changes to the permit. If the permit has been issued, a party may file an appeal of the permit. Typically, this occurs through the State agency's administrative appeal process and then proceeds, as necessary, to State courts. In general, permittees that disagree with permit terms will follow the path of appealing the permit. The other path to challenge a Title V permit is to petition the EPA to object to the permit. Typically, members of the public that object to a permit petition EPA to object rather than filing an appeal through the State administrative process. This paper addresses the problems that have arisen in each of these paths, with a particular focus on the slow response time by States to appeals and by EPA to petitions.

Legal Requirements:

Permit Appeals: Section 502(b)(6) of the Act requires that a part 70 program provide "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." Section 70.4(b)(3)(x) of the Title V rules requires that each State program provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process and any other person who could obtain judicial review of such actions under State laws.

***Petitions to EP*A:** Under Section 505(b) of the Act, any person may petition EPA to object to the issuance of a Title V permit within 60 days after the expiration of the 45-day EPA review period for a permit. The objections in the petition must have been raised during the public comment period on the permit provided by the State permitting authority, unless the petitioner shows that it was impracticable to raise the objections at that time or that the grounds for the objection arose after that period. The petition does not postpone the effectiveness of a permit that has been issued. Section 505(b)(2) states that EPA must grant or deny any such petition within 60 days after it is filed. If EPA denies a petition, the denial is subject to judicial review in the Federal appeals court. EPA has implemented these statutory requirements in Section 70.8(d) of the Title V rules.

Supporting Information: Comments Received

The overwhelming tenor of the comments received on this issue focused on a lack of responsiveness by EPA to filed petitions and by State administrative bodies or State agencies (regarding timely settlement discussions). The comments are summarized below.

Permit Appeals: While several people mentioned appeals in their comments, the most detailed and substantive comments received were from the National Environmental Development Association's Clean Air Project, NEDA/CAP. The NEDA/CAP comments are in the docket and are quite extensive. They cite to Indiana as an example of a State with a permit appeal backlog, with 47 permit approvals being appealed in FY 04 alone and that there are 150 appeals pending. NEDA/CAP indicates in its comments that this backlog is not unusual. This presents a problem for NEDA/CAP members because they are required to comply with permit terms while appeals are pending, even if they are wrongly imposed. In addition, if a company cannot comply with a permit condition, it must submit deviation reports and disclose the deviation in its compliance certifications, even if it believes the permit term does not accurately represent the requirements of the Clean Air Act. NEDA/CAP explained that this puts a source in an unacceptable situation and that there is currently no leverage to force a State to move forward with an appeal. In addition, NEDA/CAP observes that some States are treating the permit appeal process as part of the permit negotiation and not providing meaningful responses to comments filed or opportunities for input prior to issuance of the permit. In addition, even when a permit appeal is settled, the source is required to apply for a full permit revision. There is no process to allow for expeditiously changing the permit once there is agreement that the original terms were in error.

The examples provided in the comments are too numerous to repeat here but the following is typical of the problems illustrated therein. In one case that was submitted to the Task Force, a petrochemical plant received a draft permit in Summer 2001, which contained numerous technical errors. The permit was issued in September 2001, nine weeks after the close of comment, still with every error that the company had asked to be changed in its comments on the draft and with no meaningful response to the company's comments. The company appealed the permit in October 2001. During negotiations on the permit appeal, the State agreed that the terms were incorrect and the company agreed to apply for a significant permit modification. During the permit appeal, the company filed numerous deviation reports, including two annual compliance certifications where it could not certify continuous compliance; it explained in each that the deviation was not a violation because of the permit flaws under appeal. Nonetheless, the State agency's enforcement office began issuing NOVs with penalties. Final negotiations and settlement of the enforcement action and the permit appeal were concluded shortly before the end of 2004, well over three years after the permit was issued.

In view of this and other examples, commenters to the Task Force expressed concern that the length of time it has been taking to resolve appeals is more than half of the permit term and sometimes can extend until renewal. This means that even though the permittee appeals the permit, it has no effective avenue for relief because the appeal may not be resolved before a renewal application is due 3.5 years later.

Petitions to EPA: Three major issues surrounding petitions were identified in public comments. First, commenters stated that EPA is either slow or fails to respond to citizen petitions. They indicated that petitioners are forced to file deadline lawsuits or new petitions to force EPA to make decisions on petitions. Second, commenters noted that

petitioners, the State agency that issued the permit, and other Title V sources and States with an interest in resolution of any issues raised in the petition, are provided little or no information about the decision-making process and no opportunity to provide input into the decision. Third, commenters stated that the petition process is being used not just to raise and resolve issues regarding the application of the facts of a particular permit to established law, but also to create law on issues of critical importance to the Title V program that they believed ought to be resolved through rulemakings or nationally applicable final actions.

Timing of Responses: While not entirely complete or comprehensive, the Task Force reviewed EPA's petition database to get a sense of the volume and response times for petitions that have been filed since 1996. The data on the website as of December 1, 2005, indicated the following. The EPA petition database currently reveals that in 2005, 7 petitions were filed, but none have been decided. In 2004, 21 petitions were filed: 13 have final decisions, and 8 are still pending. In 2003, 30 petitions were filed, one regarding Illinois' Title V program which is still pending, 13 of which were "dismissed", 10 others which are still pending, and 6 which have been decided. In 2002, 29 petitions were filed, one regarding Wisconsin's Title V program, of which 20 have been decided. In 2001, 27 petitions were filed, and all but 4 have been decided. In 2000 there were 54 petitions filed. Two of these were withdrawn. A number of the petitions addressed the same facility but were filed by different parties, and 6 are still pending. From 1996 to 1999, there were 20 petitions filed. Three others are also still pending and one was withdrawn.
See http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb.htm.

Transparency of the Response Process: The second issue involves the process used to respond to petitions. While citizen petitions are being decided, stakeholders have little to no input into the petition decision process, and it is not apparent that there is any sort of standardized process for EPA to address petitions. Commenters to the Task Force wanted to know what the process was for EPA's decision. Commenters reported that typically when a petition is filed, EPA's statutory 60-day response period passes without response or attempt by EPA to communicate with the citizen petitioner, facility or even the State or local agency who issued the permit. Both citizen petitioners and the facilities for which petitions were filed stated that they were excluded from EPA's decision process. Decisions come a year or more after filing and often there is no interaction with the involved parties (except the State agency). Commenters also requested information regarding the precedent setting nature of EPA decisions on petitions – *i.e.*, what, if any, weight is given to other EPA petition decisions. Finally, the delay in obtaining decisions on petitions has further complicated the permit issuance process in that the proposed or final permit may undergo several revisions that may or may not be subject to public or even facility input during the response process.

Nature of Issues Raised and EPA Responses. The third issue involves the nature of issues being raised in petitions for objections and of EPA's responses. Commenters submitted comments stating that the purpose of the EPA objection and citizen petitions for objection is to determine and resolve issues regarding the application of the facts of a

particular permit to established law. One commenter pointed out that, because a number of important program issues have not been resolved through other means (*e.g.,* through rulemaking or nationally applicable interpretive rules), the EPA objection and petition process is being used not just to apply law to facts, but to develop that law in the first instance. The commenter pointed out that over that past ten years, EPA has been faced with dozens of petitions for objection that raise important legal questions regarding basic elements of the programs. The commenter believes that the short-timeframes for EPA responses (*i.e.*, 60 days), the lack of procedures for public input, and the limitations on judicial review, make clear that Congress did not intend EPA to resolve important, nationally applicable, legal issued by this mechanism. The lack of notices to and procedures for participation by other parties affected by EPA's resolution raises issues of fairness because, once EPA announces its view of the law the Agency is bound to follow it in other permitting proceedings as well. The commenter felt that is the issues raised in a petition involved significant interpretation of law, EPA has no choice but to deny the petition pending completion of an appropriate proceeding to resolve the issue. Comments of the Utility Air Regulatory Group, OAR-2004-0075-0055.

Task Force Discussion

Permit Appeals: The Task Force noted the extensive testimony provided regarding the inability to resolve appeals in a timely manner and that some permits were actually coming up for renewal before the appeals had been resolved. Some members indicated that the State appeals boards had not been prepared for the volume of appeals that could ensue from the Title V process. While this was arguably predictable given the overall number of Title V permits, it did not appear that attorneys to handle appeals on behalf of the State or the appeals boards' staff had increased in anticipation of Title V appeals. One Task Force member observed that in his area there may be a lot of appeals but one or two thematic issues are underlying all of them and if the State could resolve those issues, the appeals would be reduced substantially. The Task Force generally agreed that if a term is being appealed repeatedly, it makes sense for the State to address that issue on a system-wide basis and to do so quickly to avoid the cost of litigating appeals. The issue of Indiana's program was raised. There, the State recognized that the same types of terms were being appealed by several parties and the State developed a programmatic fix to address these concerns. In the meantime, however, the State did not respond to appeals and many appeals languished for a few years.

The Task Force discussed potential recommendations to try to ensure that States respond to filed appeals. It was generally agreed that State attorneys should return phone calls from the permittee and should engage in settlement discussions early in the process to see if the appeal is merely based on a misunderstanding or if a mistake was made on the part of the State. Some Task Force members indicated their experience (and cited to testimony) that in many cases, the permitting authority realized that a mistake had been made and that there was no real substantive disagreement between the facility and the State regarding the appropriate permit terms. The problem was that it took so long to have meaningful settlement discussions that the source was placed in the difficult position of certifying to deviations in the interim period. The Task Force generally agreed that the

attorneys for the State should be more responsive to appeals that are filed and seek to determine which issues can be settled and which represent true disagreements so that they can be litigated and ultimately resolved. The Task Force generally agreed that it is not acceptable for appeals to remain pending for 2 or more years and that States should take steps to ameliorate this problem.

Petitions to EPA: With respect to petitions, the Task Force discussed that EPA's process of responding to petitions is not at all transparent. In many instances, petitions are filed and neither the party who filed it nor the permitted facility is given any sense of EPA's reaction until a decision is issued. The general impression on the Task Force was that EPA generally does not contact any interested parties (including the facility, the State or the petitioner) during its decision-making process. One member of the Task Force noted some examples of EPA reaching out to petitioners and the permitting authority to try and understand the reasoning behind the petition issues. Decisions on petitions are often delayed for months and years. Like the States with the appeals process, the Task Force discussed that it seems as though EPA was unprepared for receiving petitions and for developing timely responses. One Task Force member suggested that EPA should involve itself earlier in the Title V permit process (*e.g.*,during its 45 day review) in order to try and lessen the number of petitions it receives.

Some Task Force members suggested that where the issues being resolved are important legal issues that could set precedent for other sources, there should be some broader consultation and public process before a final resolution is issued. Industry members of the Task Force cited to a situation where EPA used responses to petitions to interpret, or in some Task Force members' view to reinterpret, its rules or develop or revise its policy on important issues, like monitoring. Industry Task Force members noted that judicial review of such decisions may not be available to other parties due to standing issues. Some environmental group representatives noted, partly in response to the comments submitted regarding resolution of programmatic issues, that the statutory time frames and the need to address the enforceability of individual permits often necessitates that programmatic issues will be resolved in the factual context of an individual permit petition. These members stated that where individual Title V programs were inadequate or permitting authorities were not complying with Title V regulations in issuing permits, the only way the program or permits issued under the program could be improved is through the individual Title V permit petition process. It was clarified by other Task Force members that the concern really goes to where EPA has not resolved the legal issue, *e.g.*, monitoring, and the petition will set legal precedent.

Environmental group representatives noted that EPA only seems to respond to petitions when it is sued for unreasonable delay and that if a petitioner does not have the resources to sue EPA, the petition is placed at the bottom of the pile and decisions take years or are never issued.

One Task Force member noted that it is unclear what information EPA uses to decide how to resolve a petition. The petitioner may attach information they think is relevant but it is unclear whether EPA is considering the information submitted or other informa-

tion that is not available to the petitioner. A Task Force member cited situations where she had attached what she believed to be relevant information to her petition and EPA relied on other information to deny the petition without communication to her. One Task Force member also wondered what it would take to get issues that repeatedly come up in petitions and appeals in a certain State resolved when the cause is a programmatic flaw. This Task Force member stated that EPA should work with States to resolve programmatic issues.

One Task Force member also noted the conflict between a petition on a permit pending before EPA at the Federal level and the potential for conflicting decisions from a State permit appeal regarding the same permit.

It was generally recognized that EPA is trying to become current with petitions but that a large backlog has developed. It was also recognized by most Task Force members that all interested parties, the petitioner, the facility, the State agency and EPA, should be involved in the resolution of a petition. In short, the process should be more transparent.

Recommendations

Recommendation #1

States should substantively respond to public comments to minimize the need for appeals and petitions in the first instance.
In Favor (16)*: Broome, Freeman, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi ***Opposed:*** ***Abstentions:*** ***Clarifications:***

**Note: Number in parentheses ( ) is the total number of Task Force members voting for this position.*

Recommendation #2

States should resolve and address appeals in a timely manner.
In Favor (16): Broome, Freeman, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi ***Opposed:*** ***Abstentions:*** ***Clarifications:***

Recommendation #3

In the context of an appeal, attorneys for the State agency and the source should make contact as early as possible to determine if a stay of the appealed term(s) is appropriate.
In Favor (9): Broome, Paul, Wood, Morehouse, Freeman, Schwartz, Golden, Hagle, Hodanbosi ***Opposed (3):*** Keever, Owen, Palzer ***Abstentions (4):*** Sliwinski, Powell, Raettig, Kaderly ***Clarifications:*** While Keever and Owen are in favor of early communication between the State agency and the source they oppose making a recommendation on the possibility of a stay because it is a function of State administrative law.

Recommendation #4

Expedited stay proceedings should be available in the event that the parties are not able to agree whether a stay is appropriate.
In Favor (8): Broome, Paul, Wood, Morehouse, Freeman, Schwartz, Golden, Hodanbosi ***Opposed (3):*** Keever, Owen, Palzer ***Abstentions (5):*** Sliwinski, Powell, Raettig, Hagle, Kaderly ***Clarifications:*** Keever and Owen oppose making a recommendation on the possibility of a stay because it is a function of State administrative law.

Recommendation #5

Permitting authorities and EPA should address issues that are raised repeatedly in appeals and petitions, respectively, on a program-wide basis.
In Favor (16): Broome, Freeman, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi ***Opposed:*** ***Abstentions:*** ***Clarifications:*** Keever, Raettig, Van Frank, Powell, Palzer, and Owen clarify that they do not intend this to imply that EPA can use its plan to address an issue program-wide as a reason for not substantively addressing an issue in a filed petition.

Recommendation #6

EPA should take action to address concerns with the transparency of the process in cases where EPA is addressing a precedent-setting/programmatic issue in an objection or in response to a petition for objection.
In Favor (9): Broome, Morehouse, Paul, Hodanbosi, Freeman, Wood, Golden, Schwartz, Sliwinski ***Opposed (7):*** Kaderly, Powell, Owen, Van Frank, van der Vaart, Keever, Palzer ***Abstentions (2):*** Hagle, Raettig ***Clarifications:*** Kaderly, Powell, Owen, Palzer, and Keever opposed because of concerns about vagueness.

Recommendation #7

When EPA publishes a Federal Register notice that it has responded to a petition, the agency should include a list of the issues resolved in the petition.

In Favor (16): Broome, Freeman, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi
Opposed:
Abstentions:
Clarifications:

Recommendation #8

EPA's database for petitions should be more user-friendly—searchable and organized in a manner that provides interested parties with notice that potentially precedent-setting issues have been resolved.

In Favor (16): Broome, Freeman, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi
Opposed:
Abstentions:
Clarifications:

Recommendation #9

EPA and permitting authorities should engage in a dialogue with interested parties when a petition is filed to determine if the issues can be resolved and the petition withdrawn (in whole or in part). Interested parties include petitioners, the permittee, the permitting authority and EPA representatives. A dialogue among interested parties should occur within 60 days of the filing of a petition to attempt to reach agreement regarding a time-line for EPA to complete its petition response.

In Favor (16): Broome, Freeman, Hagle, Kaderly, Morehouse, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Owen, Keever, Golden, Hodanbosi
Opposed:
Abstentions:
Clarifications: Freeman and Broome clarify that the dialogue should not be used to resolve important legal or policy issues affecting other sources or States in a non-public forum.

Recommendation #10

EPA should not delay in providing meaningful, substantive responses to petitions filed.

In Favor (15): Broome, Hagle, Kaderly, Keever, Morehouse, Owen, Palzer, Paul, Powell, Raettig, Schwartz, Sliwinski, Wood, Golden, Hodanbosi
Opposed:
Abstentions (1): Freeman
Clarifications: Additional resources are needed to accomplish the goal of timely petition responses.

Recommendation #11

EPA should develop procedures consistent with the need to timely respond to petitions by which interested parties may bring to EPA's attention information relevant to the evaluation of the petition. These procedures should provide that any such information is provided to the petitioners when EPA receives it.

In Favor (16): Broome, Freeman, Hagle, Kaderly, Morehouse, Paul, Schwartz, Sliwinski, Wood, Keever, Owen, Powell, Golden, Hodanbosi, Palzer, Raettig

Opposed:

Abstentions:

Clarifications: Powell clarifies that "information relevant to the evaluation of the petition" should be limited to the permit, permit-related documents such as the permitting authority's response to comments, and other information that was before the permitting authority when it made its decision on the permit. Additional information should only be considered if it became available after the permitting authority reached its decision on the permit. Palzer and Raettig join Powell's clarification. Freeman clarifies that interested parties includes other sources and State agencies with an interest in resolution of any issues raised in the petition.

Related Topics: Public Participation, Response to Comments, EPA Review of Proposed Permits

APPENDIX A

LIST OF SPEAKERS AT PUBLIC MEETINGS ON TITLE V IMPLEMENTATION EXPERIENCE

Appendix A. List of Speakers at Public Meetings on Title V Implementation Experience

Speaker Name	Speaker Affiliation
Washington, DC – June 25, 2004	
John Paul	Regional Air Pollution Control Agency
John Walke	Natural Resources Defense Council
Lyman Welch	Mid-Atlantic Environmental Law Center
Glynn Rountree	American Forest & Paper Association
Kelly Haragan	Environmental Integrity Project
Wayne Penrod	Sunflower Electric Power Association
Chicago, IL – September 14, 2004	
Steve Murawski	Gardner, Carton, & Douglas
John Metzger	3M
Bruce Nilles	Sierra Club
Bill Wilson	Environmental Integrity Project
Scott Evans	Clean Air Engineering
Steve Meyers	GE
Anne Slaughter Andrew	CASE Coalition
Kathy Andria	American Bottom Conservancy
Faith Bugel	Environmental Law Policy Center
Keith Harley	Chicago Environmental Law Clinic
Dale Kalina	RR Donnelley
Brian Urbaszewski	American Lung Association of Metro Chicago
Maureen Headington	Stand Up/Save Lives Campaign
Chicago, IL – September 15, 2004	
Bob Hermanson	American Chemistry Council
Ann Alexander	Illinois Attorney General's Office
Susan Zingle	Lake County Conservation Alliance
Carey Hamilton	Ogden Dunes Environment Council
Ellen Rendulich	Citizens Concerning The Environment
Dallas, TX – November 15, 2004	
Marian Feinberg	For a Better Bronx
Michael Boyd	Californians for Renewable Energy, Inc. (CARE)
Robert Hall	Nevada Environmental Coalition
David Frederick	Frederick Law (TX)
Robert Ukeiley	Georgia Center of Law in the Public Interest
Gary Abraham	Concerned Citizens of Cattaraugus County (NY)
Sharon Genasci	Northwest District Association Health and Environment Committee
Scott Gollwitzer	Appalachian Voices (NC)
Avram Friedman	Executive Director of the Canary Coalition
Merrijane Yerger	Clean Up Louisiana
John Wilson	Galveston - Houston Association for Smog Prevention (GHASP)
Alexandra Gorman	Women's Voices for the Earth
Kathy Van Dame	Wasatch Clean Air Coalition (UT)
Melissa Scanlan	Midwest Environmental Advocates

Appendix A. List of Speakers at Public Meetings on Title V Implementation Experience
(Continued)

Speaker Name	Speaker Affiliation
John Suttles	Tulane Environmental Law Clinic
David Monk	Oregon Toxics Alliance
Swati Prakash	West Harlem Environmental Action (WE ACT)
Jane Williams	California Communities Against Toxics
Reed Zars	Citizen attorney
Deborah Masters	Community Board 1 (Brooklyn) and Neighbors Against Garbage (NY)
San Francisco, CA – February 7-8, 2005	
Chuck Layman	Central States Air Resources Agencies (CENSARA) and Central Regional Air Planning Association (CENRAP)
Tammy Wyles	American Forest & Paper Products Association (AF&PA)
Debra Rowe	Alliance of Automobile Manufacturers
Doug Campbell	Iowa Department of Natural Resources
Catherine Fitzsimmons	Iowa Department of Natural Resources
Jack Broadbent	State and Territorial Air Pollution Program Administrators (STAPPA) and Association of Local Air Pollution Control Officials (ALAPCO)
Matt Reis	New York State Department of Environmental Conservation
David Farabee	American Petroleum Institute
Peter Hess	Bay Area Air Quality Management District
Norbert Dee	National Petrochemical & Refiners Association
Leslie Ritts	NEDA
George Hays	Environmental attorney
Mohsen Nazemi	South Coast Air Quality Management District
Bradley Angel	Greenaction for Health and Environmental Justice
Keri Bandics	Environmental Law and Justice Clinic at Golden Gate University
Roger Lin	Environmental Law and Justice Clinic at Golden Gate University
John Admire	Gas Processors Association (GPA)
Chris Korleski	Honda of American Manufacturing, Inc.
Dona Hippert	Northwest Environmental Defense Center
Celeste Draisner	Citizens for Clean Air
Dennis Bolt	Western States Petroleum Association
Don Cuffel	Valero Refining Company
Heidi Hollenbach	Michigan Department of Environmental Quality
Bill O'Sullivan	New Jersey Department of Environmental Protection
Lisa Rector	Northeast States for Coordinated Air Use Management (NESCAUM)
Jeff Kitchens	State of Alabama
Heather Abrams	Georgia Environmental Protection Division

Appendix A. List of Speakers at Public Meetings on Title V Implementation Experience
(Continued)

Speaker Name	Speaker Affiliation
Amy Mann	Delaware Department of Natural Resources and Environmental Control
Ned Jerabek	New Mexico Environment Department
Shannon Therriault	Missoula, Montana City-County Health Department
Michael Lake	San Diego County Air Pollution Control District

APPENDIX B

LIST OF ADDITIONAL WRITTEN COMMENTS RECEIVED ON TITLE V IMPLEMENTATION EXPERIENCE (SUBMITTED TO EPA DOCKET NO. OAR-2004-0075)

Appendix B. List Of Additional Written Comments Received on Title V Implementation Experience (Submitted to EPA Docket No. OAR-2004-0075)

Docket Item Number	Commenter	Commenter Affiliation
0005	Carey Hamilton Chair	Town of Ogden Dunes Environmental Advisory Committee
0007	Anonymous	
0016	Gas Processors Association	
0017	William O'Sullivan, P.E. Director	Division of Air Quality New Jersey Department of Environmental Protection
0018	Harry A. Krug President	California Air Pollution Control Officers Association (CAPCOA)
0019	Thomas W. Easterly Commissioner	Indiana Department of Environmental Management
0020	Steven M. VanSlyke, PE Supervisory Engineer	Puget Sound Clean Air Agency
0021	G. Vinson Hellwig Chief	Air Quality Division, Michigan Department of Environmental Quality
0022	Dona Hippert Air and Toxics Advocate	Northwest Environmental Defense Center
0023	Suzy Coffee	
0024	Lezlie Redden	
0025	Roger Lin and Kerri Bandics Certified Law Students	Environmental Law and Justice Clinic, Golden Gate University School of Law
0030	Russell J. Ayers Chair Doug Brooke Vice-Chair	Lane Regional Air Pollution Authority (LRAPA)
0031	R.M. Van Frank	Improving Kids' Environment
0032	Chris Korleski Counsel	Honda of America Mfg., Inc.
0037	Thomas B. Carter Director of Environment	Health and Safety Portland Cement Association
0039	Kelly Haragan	Environmental Integrity Project
0046	Norbert Dee, Ph.D. Director	Environment & Safety National Petrochemical & Refiners Association (NPRA)
0047	Ted Steichen for Howard J. Feldman Director	Regulatory Analysis and Scientific Affairs American Petroleum Institute

Appendix B. List Of Additional Written Comments Received on Title V Implementation Experience (Submitted to EPA Docket No. OAR-2004-0075) (Continued)

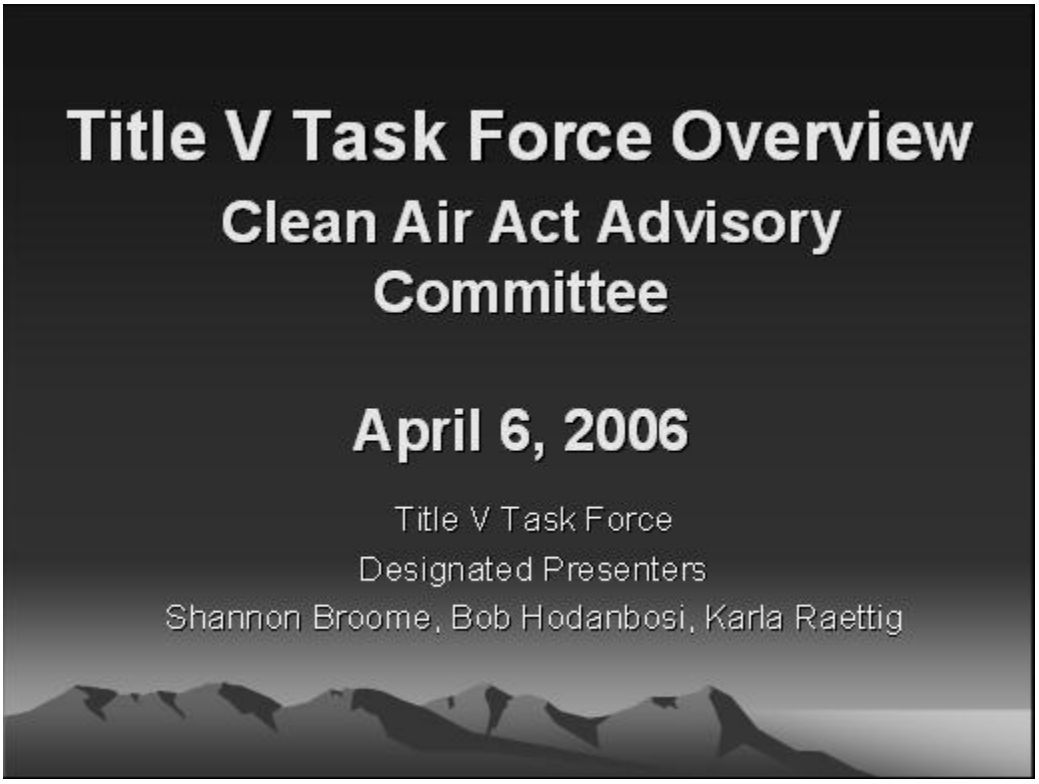
Docket Item Number	Commenter	Commenter Affiliation
0048	Robert Hodanbosi and Ursula Kramer Co-Chairs	STAPPA/ALAPCO
0049	T. Ted Cromwell Managing Director	Environment American Chemistry Council
0050	Bernard Paul	Eli Lilly and Company
0051	Donald Schregardus Deputy Assistant	Office of the Assistant Secretary (Installations and Environment) Department of the Navy
0052	William H. Lewis	Morgan, Lewis & Bockius LLP on behalf of the Clean Air Implementation Project (CAIP)
0053	Timothy Hunt Senior Director	Air Quality Programs American Forest & Paper Association (AF&PA)
0054	Leslie Sue Ritts Counsel	The National Environmental Development Association's Clean Air Project (NEDA/CAP)
0055	Lauren Freeman	Hunton & Williams LLP on behalf of the Utility Air Regulatory Group (UARG)
0056	Gregory J. Dana Vice President, Environmental Affairs Julie C. Becker Assistant General Counsel, Environment Valeris J. Ughetta Director of Stationary Sources Charels H. Knauss Counsel	Alliance of Automobile Manufacturers Swidler Berlin, LLP
0057	John D. Wilson Executive Director	Galveston-Houston Association for Smog Prevention (GHASP)
0058	Kelly Haragan Richard Lowerre	Staff Attorney, Public Citizen Attorney at Law
0074	Charles H. Knauss and Shannon S. Broome	Swidler Berlin LLP on behalf of the Air Permitting Forum
0078	Environmental Integrity Group et. al	

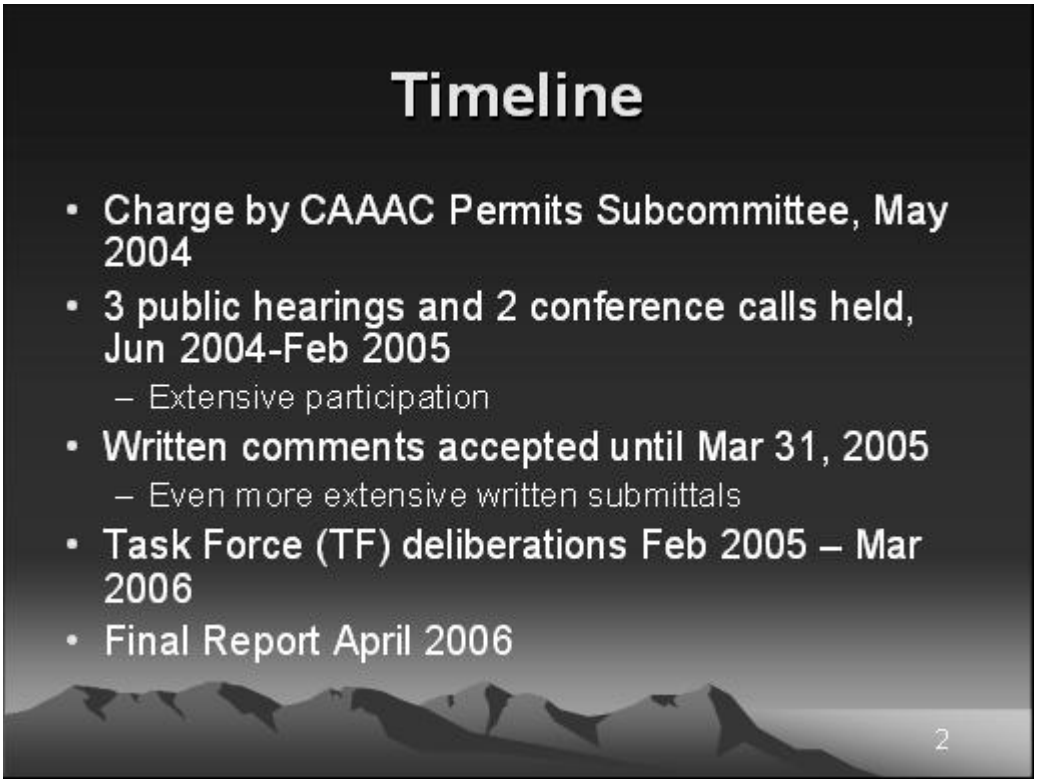
Appendix B. List of Additional Written Comments Received on Title V Implementation Experience (Submitted to EPA Docket No. OAR-2004-0075 (Continued)

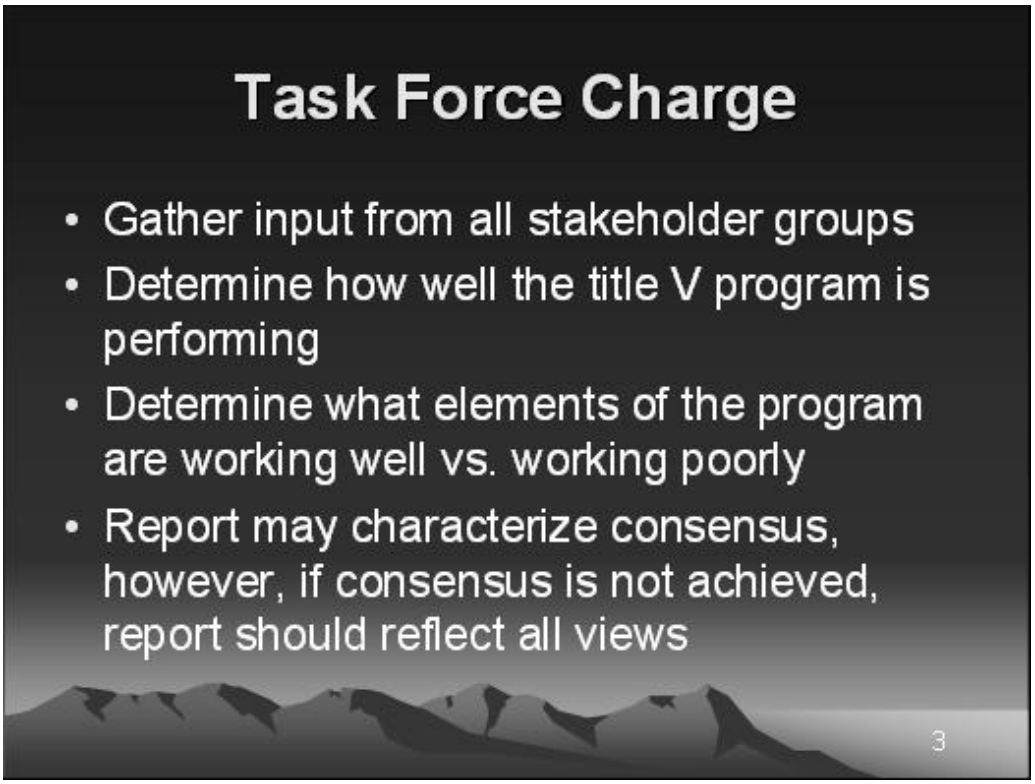
Docket Item Number	Commenter	Commenter Affiliation
0079	Marcie Keever Verena Owen Karen Pierce	Our Children's Earth Foundation Lake County Conservation Alliance Bayview Hunters Point Community Advocates
0080	M. Gary Helm Senior Environmental Coordinator	Conectiv Energy
0081	Rae E. Cronmiller Environmental Counsel	National Rural Electric Cooperative Association (NRECA)
0082	Mike Ahern for Robert Hodanbosi Chief	Division of Air Pollution Control Ohio EPA
0083	Katerina Eftimoff	Porter, Wright, Morris & Arthur, LLP on behalf of the Ohio Chemistry Technology Council, the Ohio Manufacturers' Association, and the Ohio Chamber of Commerce
0084	Jennifer K. Thompson Attorney Danielle M. Bradley Legal Assistant	Bingham McHale, LLP on behalf of the CASE Coalition Environmental Law Group – Bingham McHale, LLP
0086	Thomas B. Carter Director	Environment, Health and Safety, Portland Cement Association
0087	Doug Campbell Supervisor	Operating Permits Section, Air Quality Bureau, Iowa Department of Natural Resources (IDNR)
0089	Peter Hess Deputy Air Pollution Control Officer	Bay Area Air Quality Management District
0091	Barry R. Wallerstein Executive Officer	South Coast Air Quality Management District (SCAQMD)
0092	Barry R. Wallerstein Executive Officer	South Coast Air Quality Management District (SCAQMD)
0093	Michael Lake Assistant Director	County of San Diego Air Pollution Control District

APPENDIX C

COPY OF SLIDES USED BY THE TITLE V TASK FORCE IN BRIEFING THE CLEAN AIR ACT ADVISORY COMMITTEE


Title V Task Force Overview
Clean Air Act Advisory Committee
April 6, 2006
Title V Task Force
Designated Presenters
Shannon Broome, Bob Hodanbosi, Karla Raettig


Timeline
• Charge by CAAAC Permits Subcommittee, May 2004
• 3 public hearings and 2 conference calls held, Jun 2004-Feb 2005
– Extensive participation
• Written comments accepted until Mar 31, 2005
– Even more extensive written submittals
• Task Force (TF) deliberations Feb 2005 – Mar 2006
• Final Report April 2006
2


Task Force Charge
• Gather input from all stakeholder groups
• Determine how well the title V program is performing
• Determine what elements of the program are working well vs. working poorly
• Report may characterize consensus, however, if consensus is not achieved, report should reflect all views
3


Task Force Members
• Steve Hagle, TX
• Bob Hodanbosi, OH
• Shelly Kaderly, NE
• Adan Schwartz, Bay Area
• Rob Silwinski and John Higgins, NY
• Don van der Vaart, NC
• Marcie Keever, Our Children's Earth
• Verena Owen, Lake Co.Conservation Alliance
• Bob Palzer, Sierra Club
• Keri Powell, NYPIRG
• Karla Raettig and Kelly Haragan, Env. Integrity
• Dick Van Frank, Improving Kid's Environment
• Shannon Broome, Air Permitting Forum
• Lauren Freeman, UARG
• David Golden, Eastman Chemical
• Bernie Paul, Eli Lilly
• Bob Morehouse, ExxonMobil
• Mike Wood, Weyerhauser
4

Task Force Issue Areas

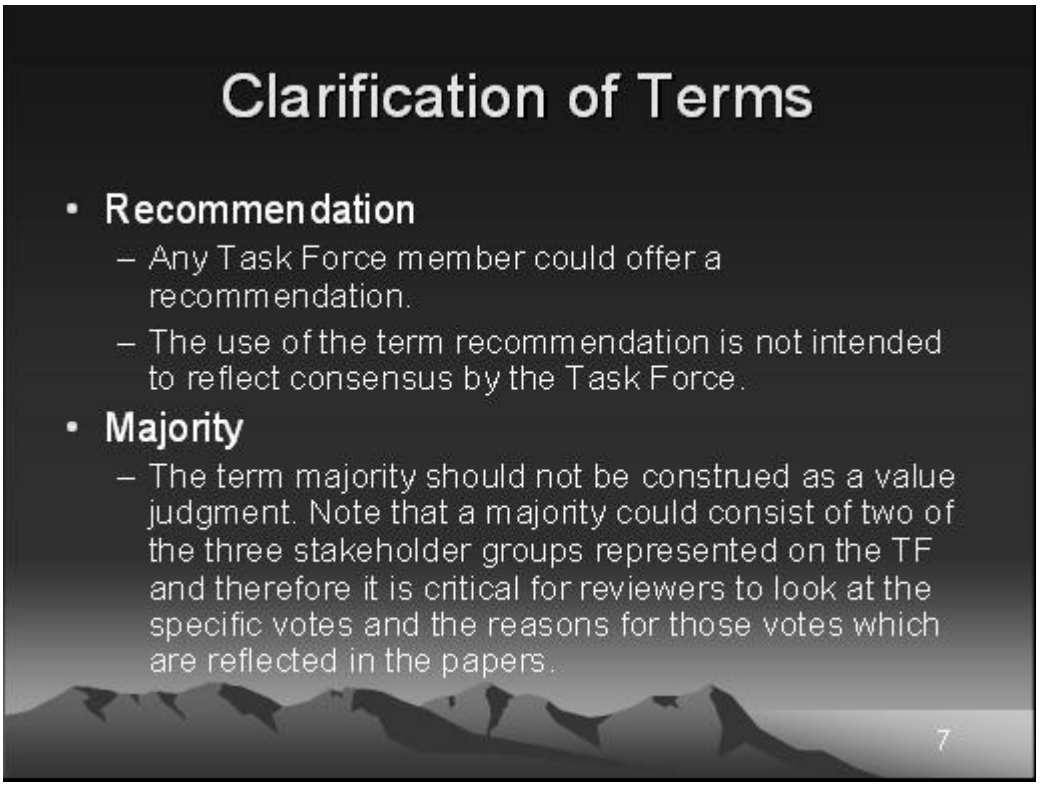
- Program Overview Papers
  - Costs & Benefits
- Content Issues
  - Incorporation of Applicable Requirements
  - Insignificant Emission Units
  - Monitoring
  - Title I/Title V Interface
  - New Substantive Requirements
  - Permit Definitiveness
  - Compliance Certifications
  - Startup, Shutdowns and Malfunctions
  - Compliance Schedules
- Process Issues
  - EPA Review of Proposed Permits
  - Public Access to Documents
  - Public Hearings
  - Public Notice throughout Process
  - Statement of Basis
  - Responses to Public Comments
  - Permit Revisions and Operational Flexibility
  - Petitions and Appeals

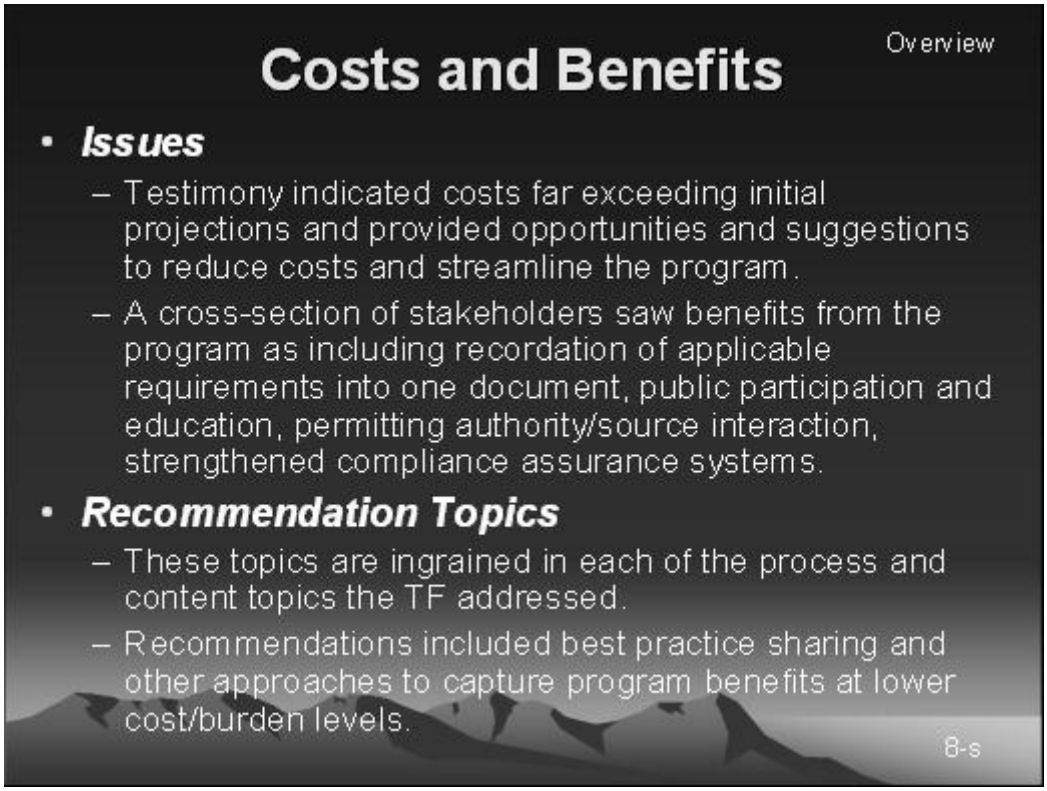
5

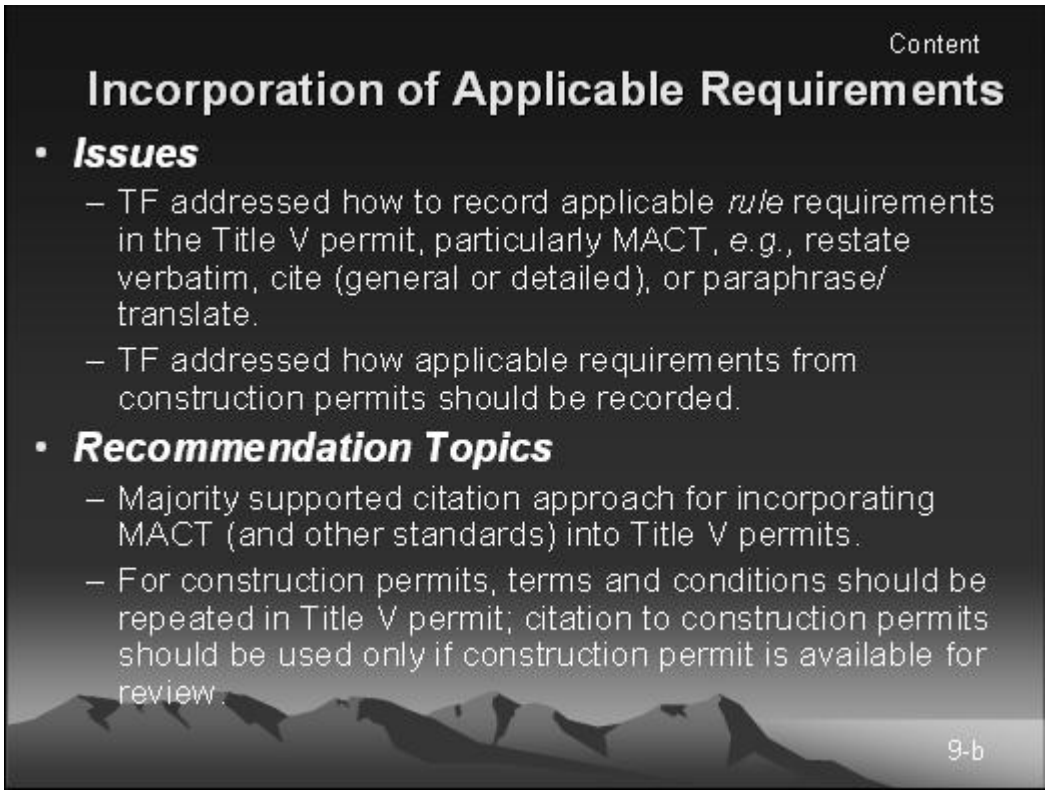
Process

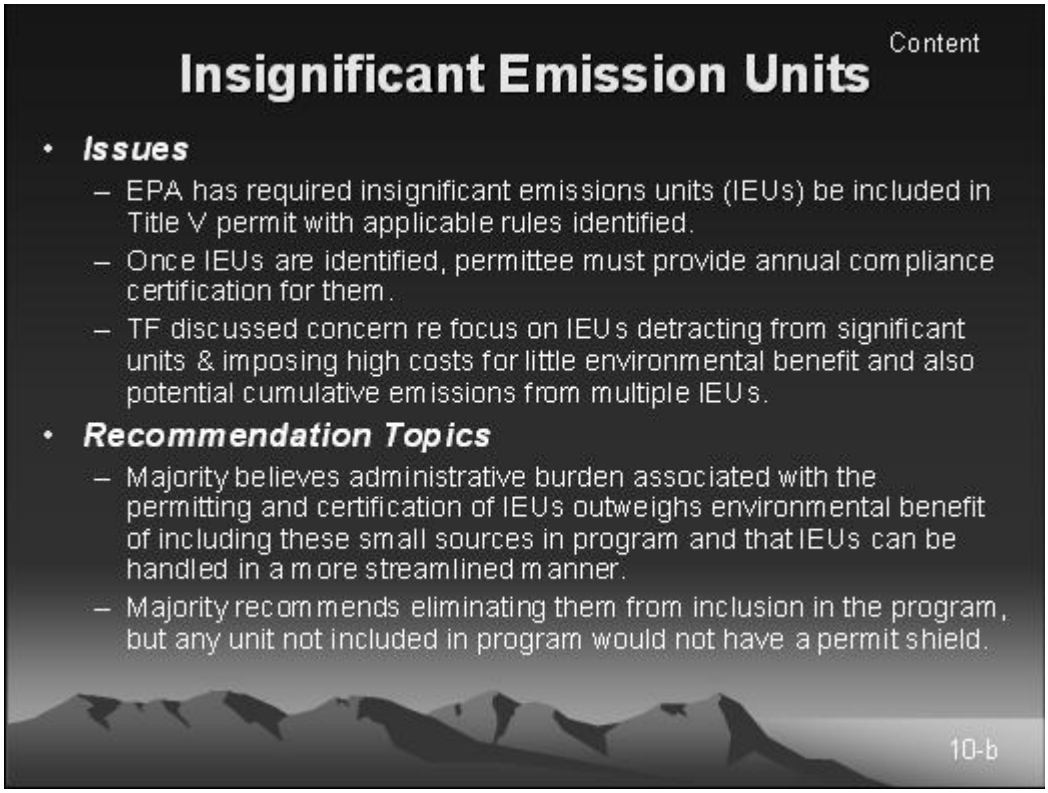
- Each Paper contains
  - **Issue Description**
  - **Supporting Information**
    - Legal requirements
    - Testimony (oral and written) received
  - **Task Force Discussion – summarizes the give and take during Task Force deliberations**
  - **Recommendations (if any)**
    - In general, recommendations do not specify the method by which they should be implemented

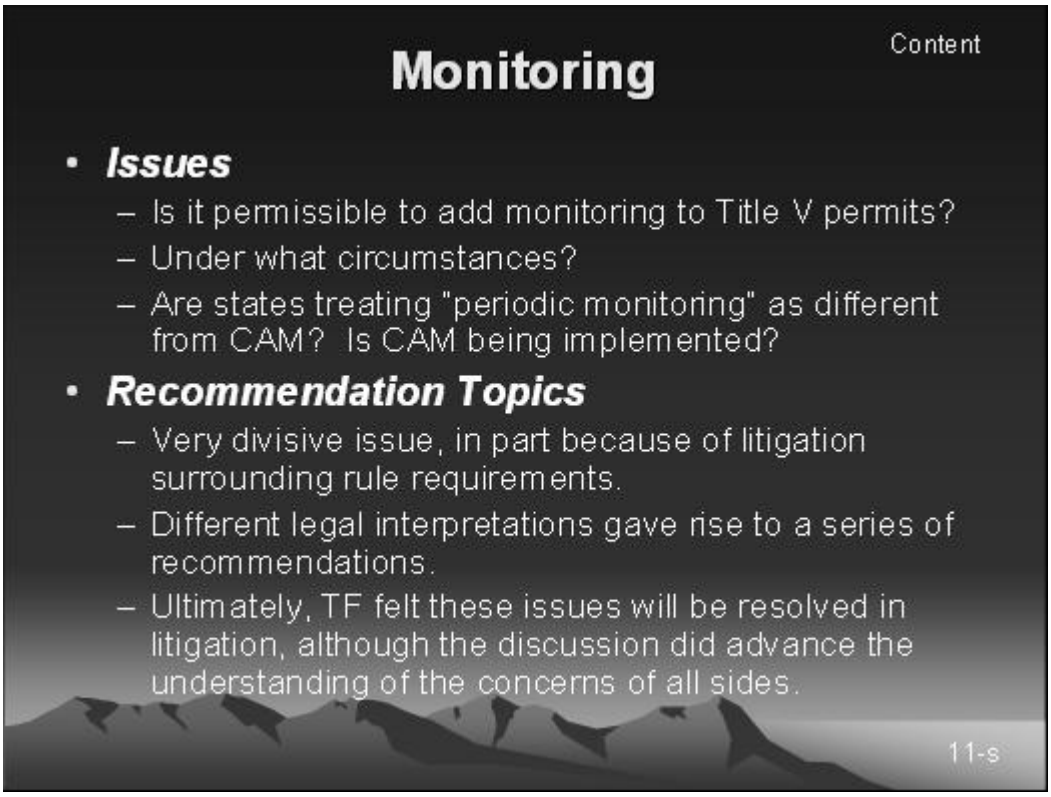
6

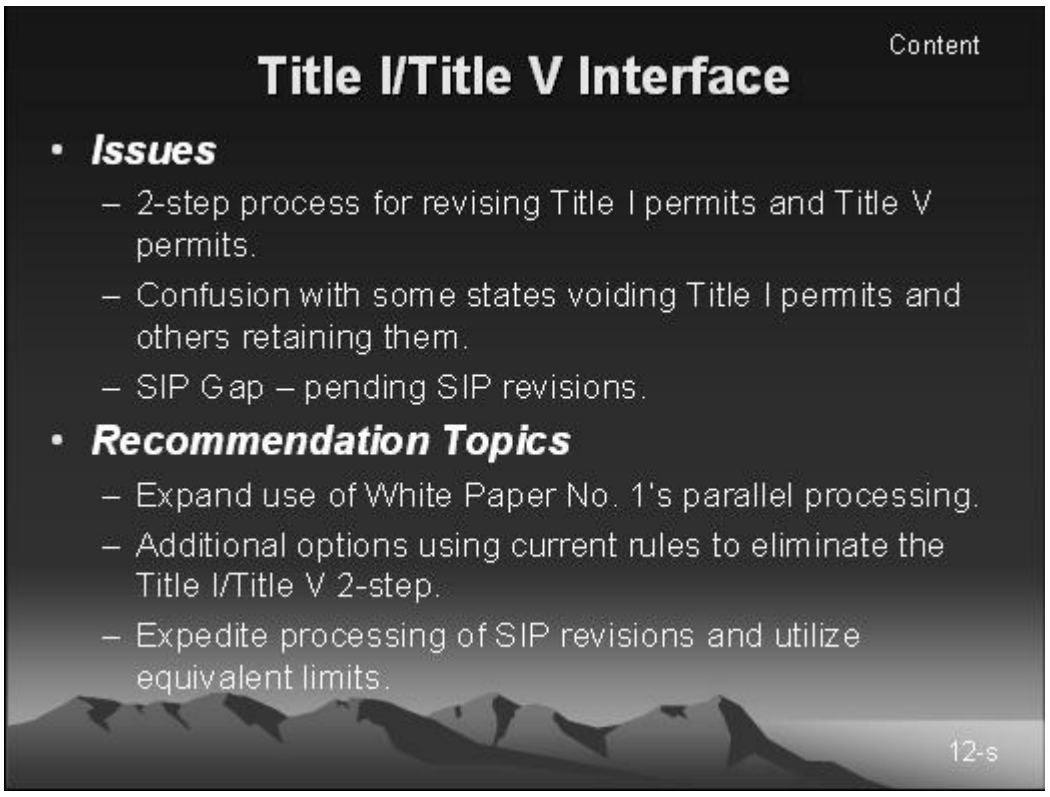

Clarification of Terms
• Recommendation
– Any Task Force member could offer a recommendation.
– The use of the term recommendation is not intended to reflect consensus by the Task Force.
• Majority
– The term majority should not be construed as a value judgment. Note that a majority could consist of two of the three stakeholder groups represented on the TF and therefore it is critical for reviewers to look at the specific votes and the reasons for those votes which are reflected in the papers.
7

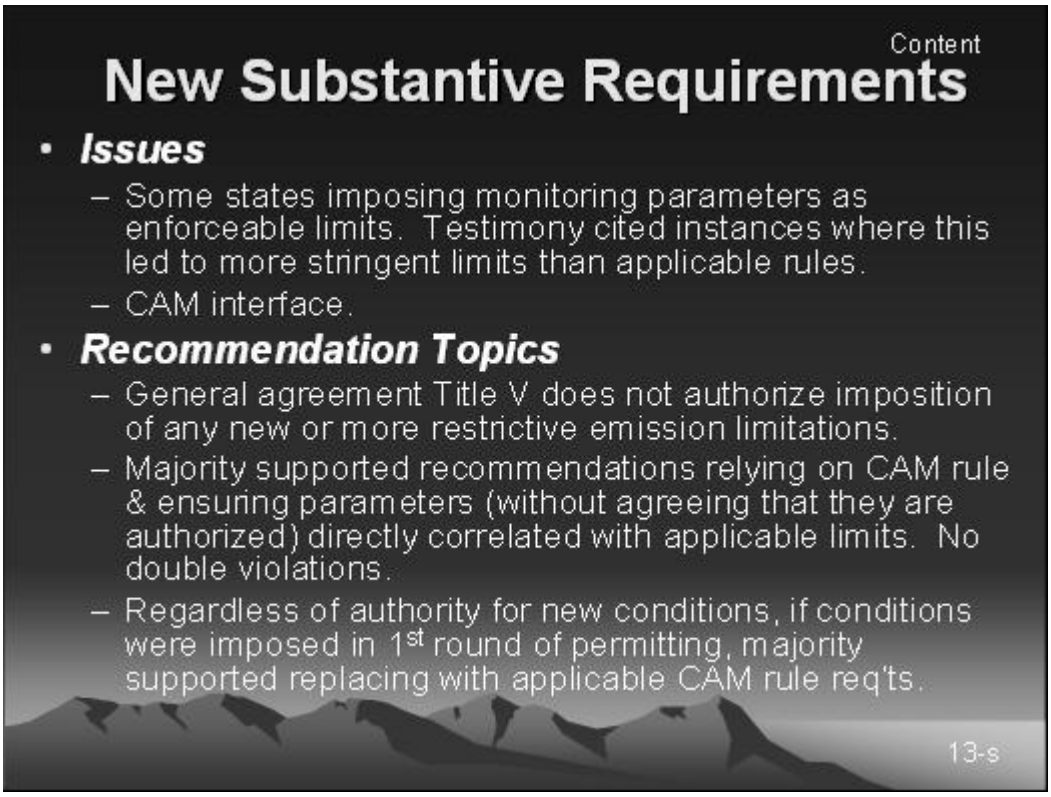

Overview
Costs and Benefits
• Issues
– Testimony indicated costs far exceeding initial projections and provided opportunities and suggestions to reduce costs and streamline the program.
– A cross-section of stakeholders saw benefits from the program as including recordation of applicable requirements into one document, public participation and education, permitting authority/source interaction, strengthened compliance assurance systems.
• Recommendation Topics
– These topics are ingrained in each of the process and content topics the TF addressed.
– Recommendations included best practice sharing and other approaches to capture program benefits at lower cost/burden levels.
8-s

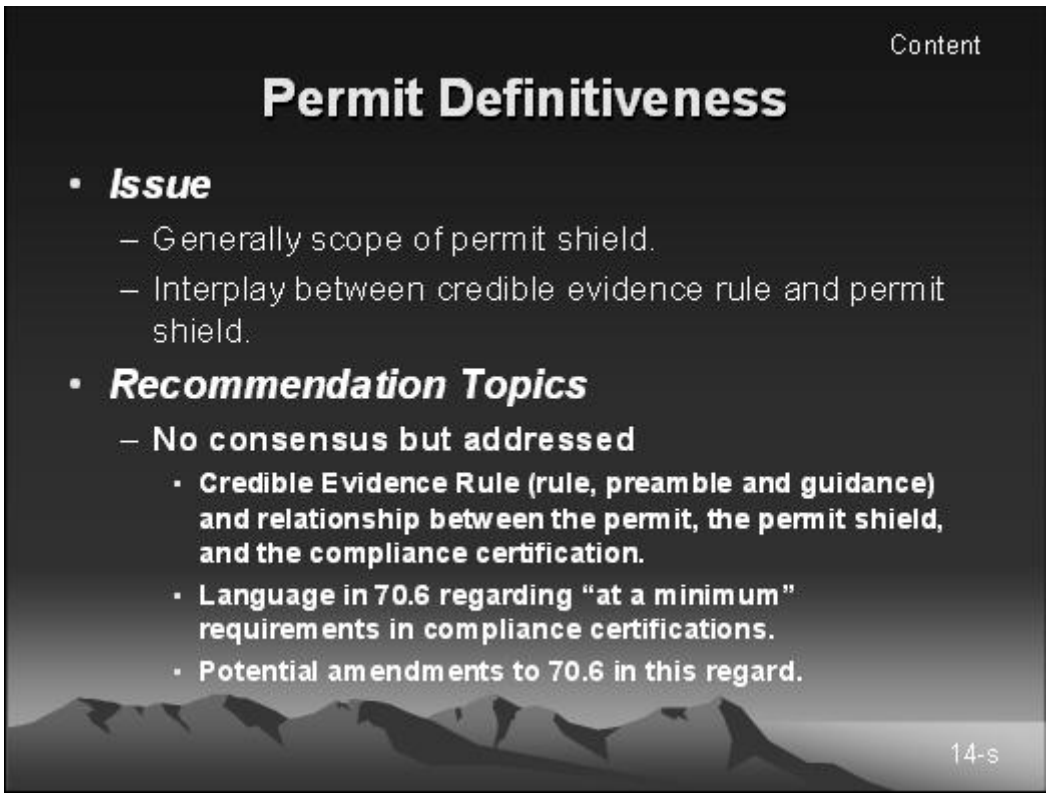

Content
Incorporation of Applicable Requirements
• Issues
– TF addressed how to record applicable rule requirements in the Title V permit, particularly MACT, e.g., restate verbatim, cite (general or detailed), or paraphrase/ translate.
– TF addressed how applicable requirements from construction permits should be recorded.
• Recommendation Topics
– Majority supported citation approach for incorporating MACT (and other standards) into Title V permits.
– For construction permits, terms and conditions should be repeated in Title V permit; citation to construction permits should be used only if construction permit is available for review.
9-b


Content
Insignificant Emission Units
• Issues
– EPA has required insignificant emissions units (IEUs) be included in Title V permit with applicable rules identified.
– Once IEUs are identified, permittee must provide annual compliance certification for them.
– TF discussed concern re focus on IEUs detracting from significant units & imposing high costs for little environmental benefit and also potential cumulative emissions from multiple IEUs.
• Recommendation Topics
– Majority believes administrative burden associated with the permitting and certification of IEUs outweighs environmental benefit of including these small sources in program and that IEUs can be handled in a more streamlined manner.
– Majority recommends eliminating them from inclusion in the program, but any unit not included in program would not have a permit shield.
10-b


Content
Monitoring
• Issues
– Is it permissible to add monitoring to Title V permits?
– Under what circumstances?
– Are states treating "periodic monitoring" as different from CAM? Is CAM being implemented?
• Recommendation Topics
– Very divisive issue, in part because of litigation surrounding rule requirements.
– Different legal interpretations gave rise to a series of recommendations.
– Ultimately, TF felt these issues will be resolved in litigation, although the discussion did advance the understanding of the concerns of all sides.
11-s


Content
Title I/Title V Interface
• Issues
– 2-step process for revising Title I permits and Title V permits.
– Confusion with some states voiding Title I permits and others retaining them.
– SIP Gap – pending SIP revisions.
• Recommendation Topics
– Expand use of White Paper No. 1's parallel processing.
– Additional options using current rules to eliminate the Title I/Title V 2-step.
– Expedite processing of SIP revisions and utilize equivalent limits.
12-s


Content
New Substantive Requirements
• Issues
– Some states imposing monitoring parameters as enforceable limits. Testimony cited instances where this led to more stringent limits than applicable rules.
– CAM interface.
• Recommendation Topics
– General agreement Title V does not authorize imposition of any new or more restrictive emission limitations.
– Majority supported recommendations relying on CAM rule & ensuring parameters (without agreeing that they are authorized) directly correlated with applicable limits. No double violations.
– Regardless of authority for new conditions, if conditions were imposed in 1st round of permitting, majority supported replacing with applicable CAM rule req'ts.
13-s


Content
Permit Definitiveness
• Issue
– Generally scope of permit shield.
– Interplay between credible evidence rule and permit shield.
• Recommendation Topics
– No consensus but addressed
• Credible Evidence Rule (rule, preamble and guidance) and relationship between the permit, the permit shield, and the compliance certification.
• Language in 70.6 regarding "at a minimum" requirements in compliance certifications.
• Potential amendments to 70.6 in this regard.
14-s

Compliance Certifications

Content

- ***Issues***
  - What should the format of compliance certifications be?
  - Wide ranging discussion on the pros and cons of the various forms:
    - Long form can obscure compliance issues for the regulators, company management and the public.
    - Some view long form as management tools.
    - Core recognition that identifying deviations is the key.
- ***Recommendation Topics***
  - Majority of TF recommends short form.
  - Remainder of TF split among three options from a modified short form to the full long form.
  - Consensus on several "nagging" issues re certification forms:
    - should provide space for permittee to clarify or explain its certification.
    - should not require certification for requirements that don't impose an obligation on the source.
    - should include space to indicate where permittee relies on monitoring not specified in the permit in cases when permit specifies a particular method.

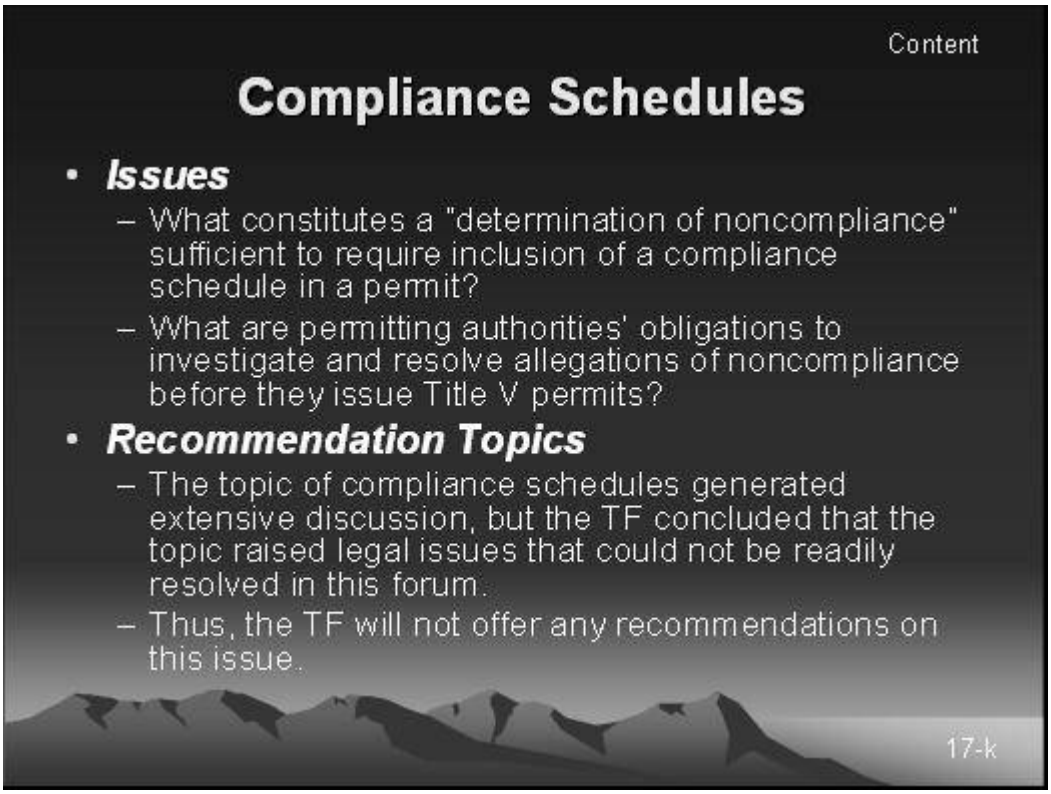
15-s

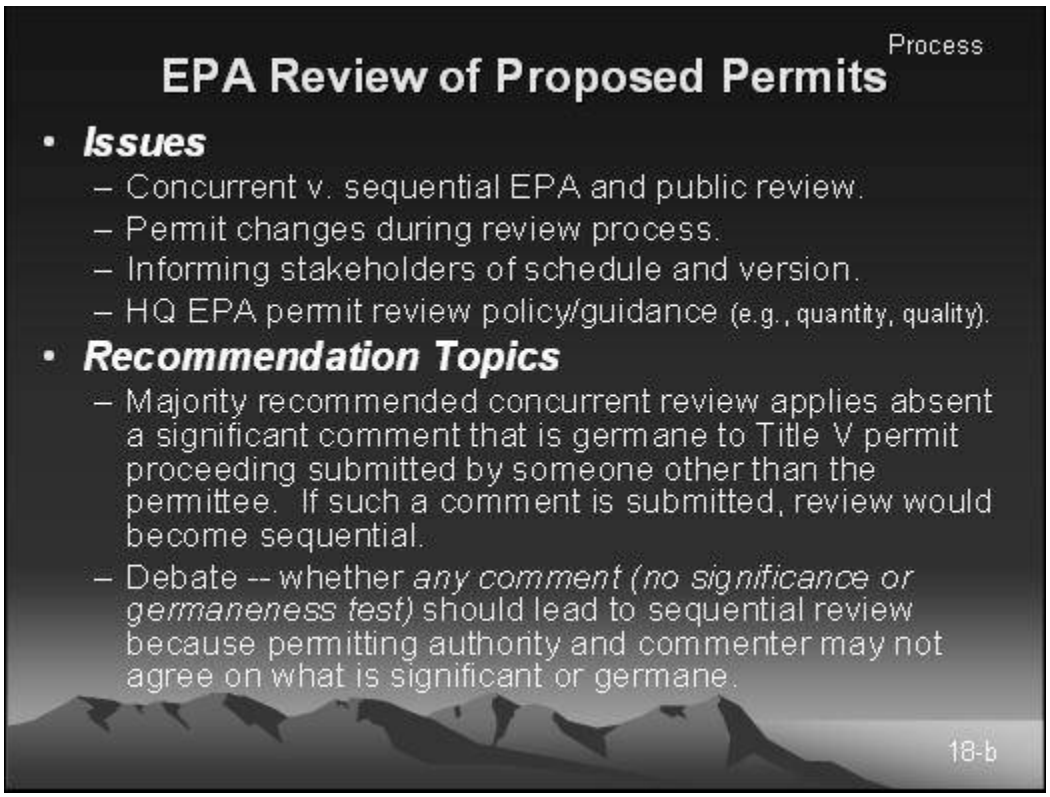
Startup, Shutdown & Malfunction

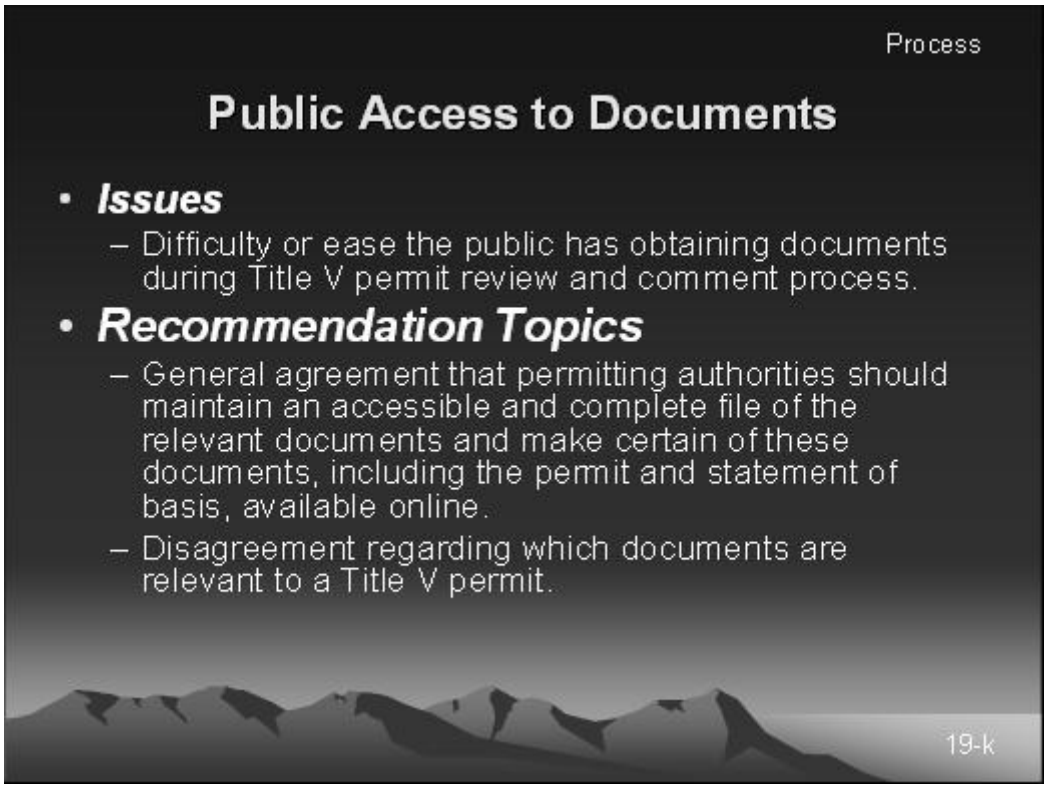
Content

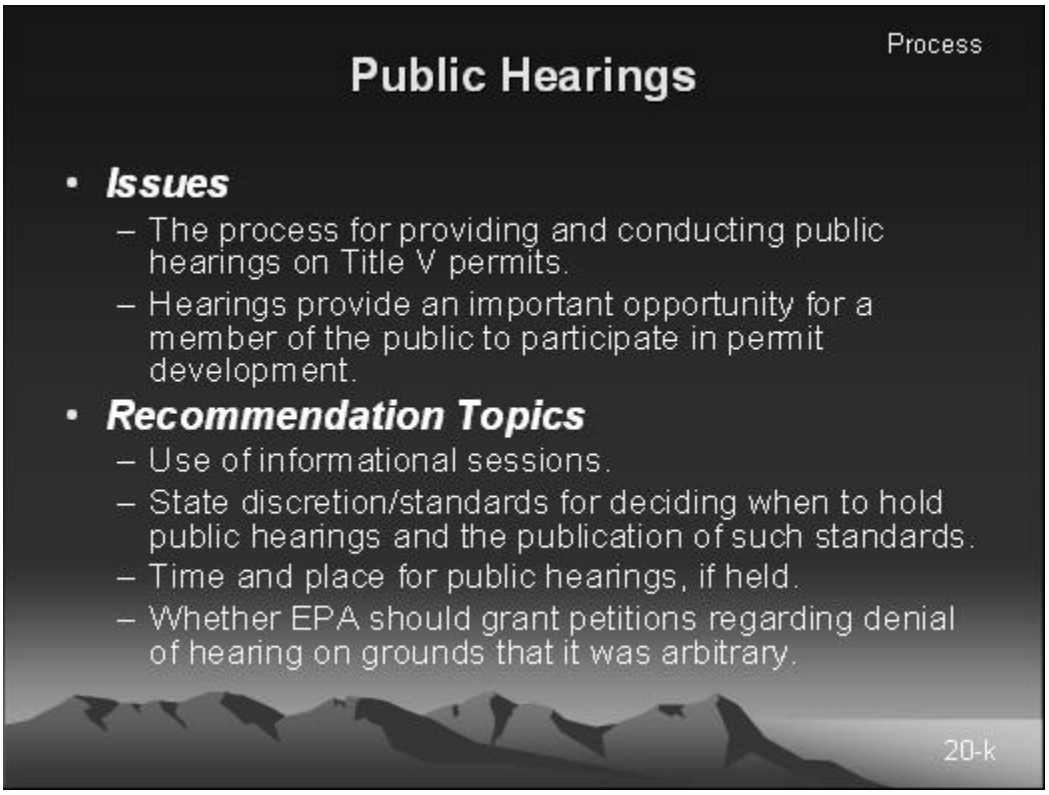
- ***Issues***
  - Whether startup, shutdown, & malfunction (SSM) defenses both in SIPs and federal rules create enforcement and compliance problems.
- ***Recommendation Topics***
  - Differing views among TF.
  - Of 5 offered recommendations, only 1 reached consensus -- that the Title V permit should be clear as to what limits are subject to the emergency defense.
  - Majority supported recommendation that if a rule does not adequately address SSM, rules should be revised rather than address on a permit-by-permit basis.

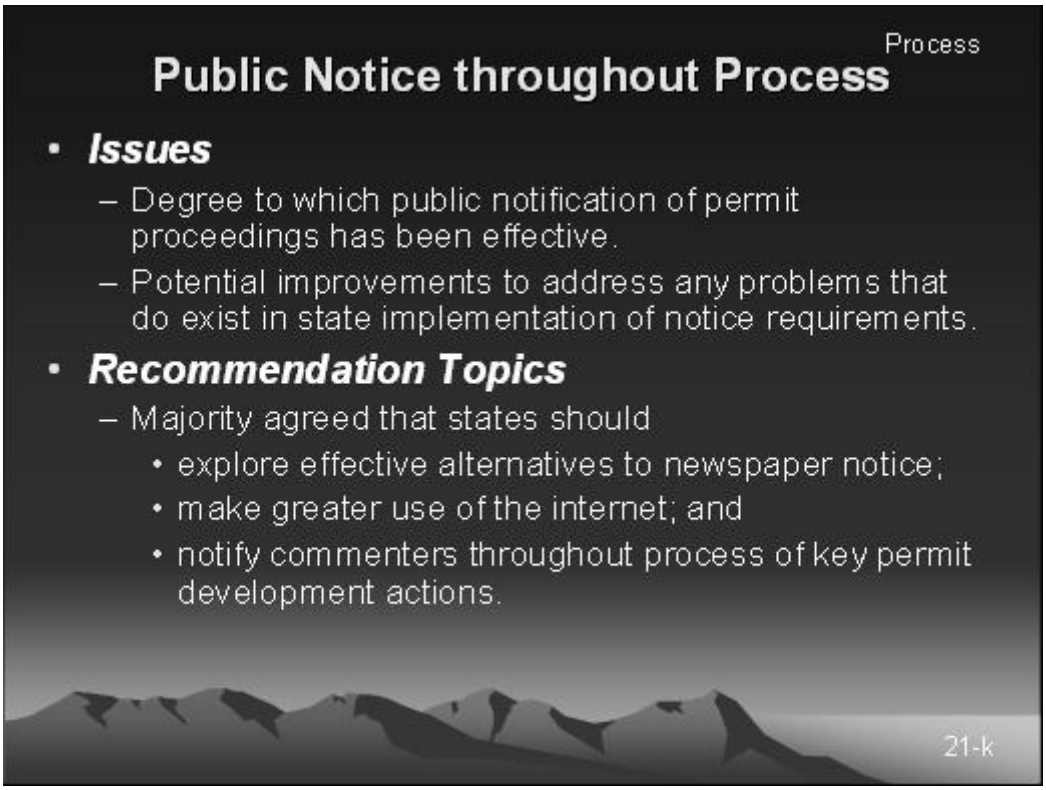
16-b

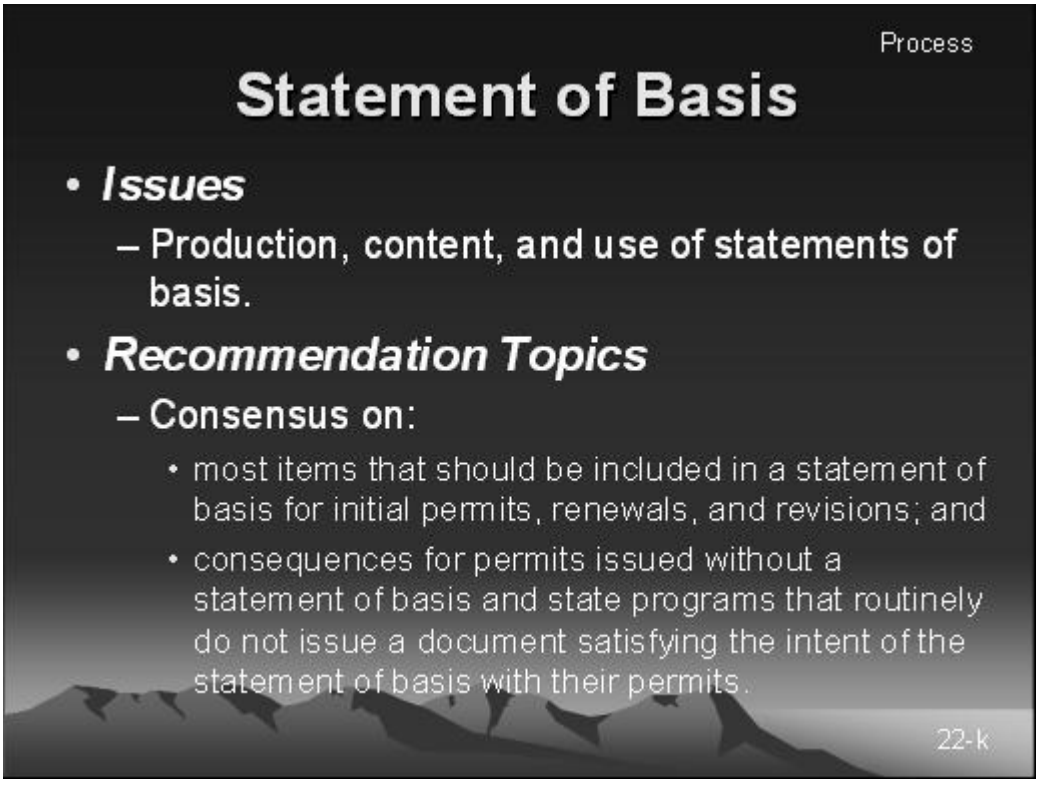

Content
Compliance Schedules
• Issues
– What constitutes a "determination of noncompliance" sufficient to require inclusion of a compliance schedule in a permit?
– What are permitting authorities' obligations to investigate and resolve allegations of noncompliance before they issue Title V permits?
• Recommendation Topics
– The topic of compliance schedules generated extensive discussion, but the TF concluded that the topic raised legal issues that could not be readily resolved in this forum.
– Thus, the TF will not offer any recommendations on this issue.
17-k


Process
EPA Review of Proposed Permits
• Issues
– Concurrent v. sequential EPA and public review.
– Permit changes during review process.
– Informing stakeholders of schedule and version.
– HQ EPA permit review policy/guidance (e.g., quantity, quality).
• Recommendation Topics
– Majority recommended concurrent review applies absent a significant comment that is germane to Title V permit proceeding submitted by someone other than the permittee. If such a comment is submitted, review would become sequential.
– Debate -- whether *any comment (no significance or germaneness test)* should lead to sequential review because permitting authority and commenter may not agree on what is significant or germane.
18-b


Process
Public Access to Documents
• Issues
– Difficulty or ease the public has obtaining documents during Title V permit review and comment process.
• Recommendation Topics
– General agreement that permitting authorities should maintain an accessible and complete file of the relevant documents and make certain of these documents, including the permit and statement of basis, available online.
– Disagreement regarding which documents are relevant to a Title V permit.
19-k


Process
Public Hearings
• Issues
– The process for providing and conducting public hearings on Title V permits.
– Hearings provide an important opportunity for a member of the public to participate in permit development.
• Recommendation Topics
– Use of informational sessions.
– State discretion/standards for deciding when to hold public hearings and the publication of such standards.
– Time and place for public hearings, if held.
– Whether EPA should grant petitions regarding denial of hearing on grounds that it was arbitrary.
20-k


Process
Public Notice throughout Process
• Issues
– Degree to which public notification of permit proceedings has been effective.
– Potential improvements to address any problems that do exist in state implementation of notice requirements.
• Recommendation Topics
– Majority agreed that states should
• explore effective alternatives to newspaper notice;
• make greater use of the internet; and
• notify commenters throughout process of key permit development actions.
21-k


Process
Statement of Basis
• Issues
– Production, content, and use of statements of basis.
• Recommendation Topics
– Consensus on:
• most items that should be included in a statement of basis for initial permits, renewals, and revisions; and
• consequences for permits issued without a statement of basis and state programs that routinely do not issue a document satisfying the intent of the statement of basis with their permits.
22-k

Process

Response to Public Comments

- ***Issues***
  - Concerns some permitting authorities are not providing a written response (or any response at all) to comments on draft permits.
  - Difficulty in determining what changes have been made to a permit following the public comment period.
- ***Recommendation Topics***
  - Majority agreement that permitting authorities should:
    - prepare written response to comments responding to each comment received and explaining changes between draft/ proposed permits; and
    - Send response to comments to EPA.
  - Split on approach and consequences.

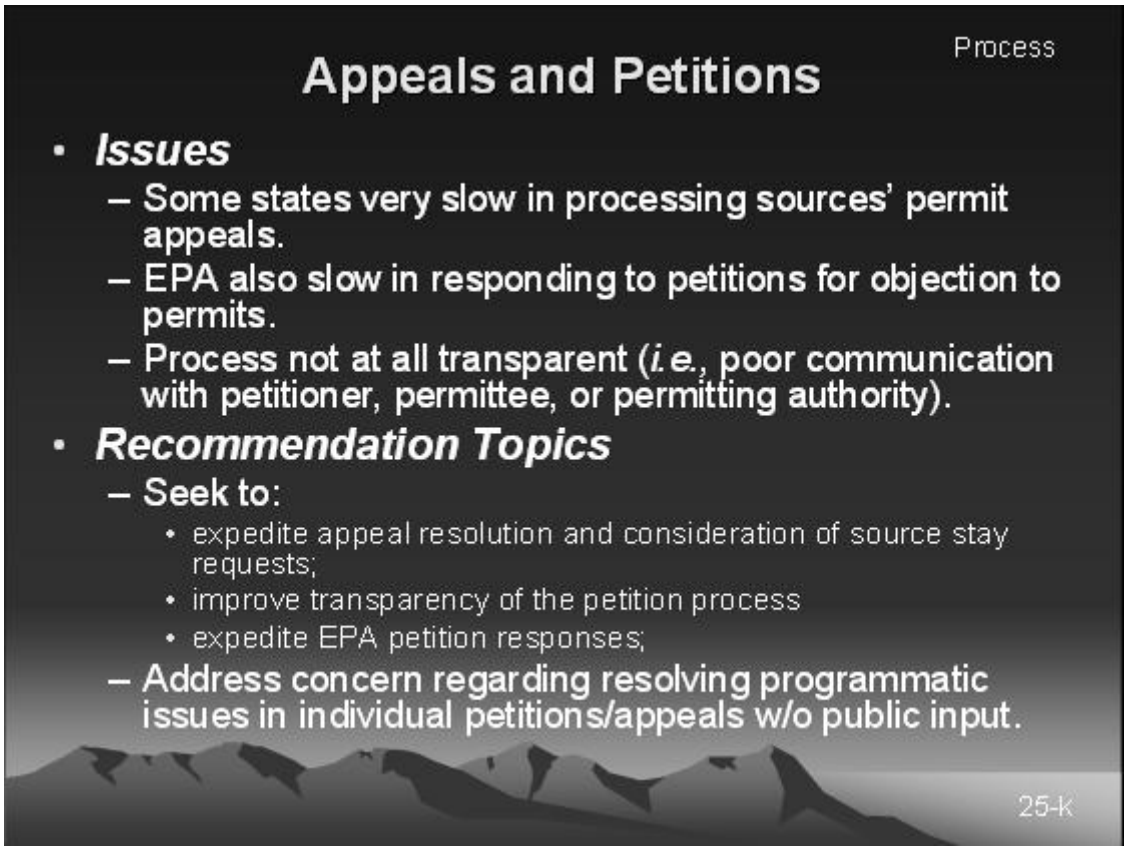
23-k

Process

Permit Revisions/Operational Flexibility

- ***Issues***
  - Examples: (1) reopen/ revise permits for MACT; (2) lack of timely revision processing/system sustained by minor mod and off-permit application/notice; (3) scope of administrative amendment category; (4) permit engineer confusion re which path applies; (5) merged construction/Title V programs (a not-insignificant minority) classify many changes involving little or no discretion categorized as significant.
- ***Recommendation Topics***
  - Didn't pursue whether rules should be revised but offered instead separate sets of recommendations – one to improve current rule *implementation* and another assuming (not supporting/disagreeing with) rule revisions.
  - Under current rules:
    - Addressed incorporation of new requirements, use of off-permit and minor modification, need to respond to revision requests, potential best practice/guidance opportunities.
  - If EPA were to revise the rules:
    - Addressed need to match procedures with the discretion in the Title V permitting process and significance of change.

24-s


Process
Appeals and Petitions
• Issues
– Some states very slow in processing sources' permit appeals.
– EPA also slow in responding to petitions for objection to permits.
– Process not at all transparent (i.e., poor communication with petitioner, permittee, or permitting authority).
• Recommendation Topics
– Seek to:
• expedite appeal resolution and consideration of source stay requests;
• improve transparency of the petition process
• expedite EPA petition responses;
– Address concern regarding resolving programmatic issues in individual petitions/appeals w/o public input.
25-k