

STATE OF MICHIGAN

DEPARTMENT OF ATTORNEY GENERAL

CLEAN AIR ACT TITLE V OPERATING PERMIT PROGRAM
CERTIFICATION AND OPINION

Pursuant to my authority as Attorney General, and in accordance with Clean Air Act (CAA) Section 502(d), as amended, (42 U.S.C. Sec. 7401, *et seq*), and 40 CFR 70.4(b)(3), it is my opinion that the laws and rules of the State of Michigan provide adequate authority to carry out all aspects of the program submitted by the Michigan Department of Environmental Quality (MDEQ) to the U.S. Environmental Protection Agency (USEPA) for approval to administer and enforce the operating permits program under Title V of the CAA. The specific authorities provided, which are contained in statutes, rules, or other legal authorities lawfully adopted, and which shall be fully effective by the time the program is approved, include those identified below.

I. AUTHORITY TO ISSUE PERMITS

MCL 324.5501-5542 of the Natural Resources and Environmental Protection Act, 1994 PA 451, Article II, Chapter 1, Part 55 (Air Pollution Control) (hereinafter known as "Part 55") and the rules adopted thereunder provide authority for the MDEQ to issue renewable operating permits to all air pollution sources in Michigan that are required to have permits pursuant to the CAA 502(a) and 40 CFR 70.3, and to incorporate into those permits and assure compliance with each applicable requirement of the CAA and 40 CFR Part 70. Part 55 also provides authority to issue renewable operating permits for solid waste incineration units combusting municipal waste pursuant to CAA 129(e) that assure compliance with all applicable requirements of the CAA and 40 CFR Part 70.

State Authority:

A. Authority to issue permits. (40 CFR 70.4(b)(3)(i)) Part 55, MCL 334.5503(b), 5503(c), 5506(4)(a) and (g), 5507(2), 5510, and 5512(1) effective March 30, 1995; R 336.1211(1) and (3), R 336.1212(2) and (4), effective August 22, 2001.

B. Timely and complete applications. (40 CFR 70.5(a)), Part 55, MCL 334.5506(3), 5506(4)(b)(e) and (n), 5506(5), effective March 30, 1995; R 336.1210(2), (4)-(8), R 336.1212(1)-(4), effective August 22, 2001.

C. Requirement for permit in order to operate. (40 CFR 70.7(b)), Part 55, MCL 334.5506(1), (2), (4)(h)-(k), (5), effective March 30, 1995. Sec. 91(2) of Administrative Procedures Act of 1969, 1969 P.A. 306, MCL 24.291(2), effective July 1, 1970; R 336.1210(1), R 336.1215, effective August 22, 2001, R 336.1216(1)-(3), R 336.1217(1)(a), effective July 26, 1995.

D. Incorporation of all applicable requirements of 40 CFR Part 70. (40 CFR 70.4(b)(3)(v)), Part 55, MCL 334.5506(6), effective March 30, 1995; R 336.1101(o), effective April 10, 2000; R 336.1213(2) effective August 22, 2001.

E. Standard permit content requirements. (40 CFR 70.6(a)(1)-(10)) 40 CFR 70.6(a)(1) (Emission Limits), Part 55, MCL 334.5506(6) effective March 30, 1995; R 336.1213(2), effective August 22, 2001.

40 CFR 70.6(a)(2) (5 Year Limit), Part 55, MCL 334.5506(5), effective March 30, 1995; R 336.1213(7), effective August 22, 2001.

40 CFR 70.6(a)(3) (Monitoring and Recordkeeping), Part 55, MCL 334.5506(4)(d), effective March 30, 1995; R 336.1213(3), effective August 22, 2001.

40 CFR 70.6(a)(4) (Title IV Allowances), R 336.1213(10), effective August 22, 2001.

40 CFR 70.6(a)(5) (Severability), Part 55, MCL 334.5506(6) effective March 30, 1995; R 336.1213(1)(f), effective August 22, 2001.

40 CFR 70.6(a)(6) (Compliance and Enforcement), R 336.1210(10) and (11), R 336.1213(1)(a), (b), (c), (e), and (h), effective August 22, 2001.

40 CFR 70.6(a)(7) (Fees), R 336.1213(1)(g), effective August 22, 2001.

40 CFR 70.6(a)(8) (Interfacility Emission Trading), R 336.1213(12), effective August 22, 2001.

40 CFR 70.6(a)(9) (Identified Operating Scenarios), Part 55, MCL 334.5506(4)(l), effective March 30, 1995; R 336.1213(8), effective August 22, 2001.

40 CFR 70.6(a)(10) (Intrafacility Emission Trading), Part 55, MCL 334.5506(4)(m), effective March 30, 1995; R 336.1213(9), effective August 22, 2001.

F. Federally Enforceable Requirements (40 CFR 70.6(b)), R 336.1213(1)(a) and (5), effective August 22, 2001.

G. Compliance Requirements

40 CFR 70.6(c)(1) (Monitoring and Recordkeeping), Part 55, MCL 334.5506(4)(d), effective March 30 1995; R 336.1213(3), effective August 22, 2001.

40 CFR 70.6(c)(2) (Inspection), Part 55, MCL 334.5506(4)(d), 5526(1), effective March 30, 1995; R 336.1213(1)(d) and (3), effective August 22, 2001.

40 CFR 70.6(c)(3) and (4) (Schedule of Compliance and Progress Reports), Part 55, MCL 334.5506(6), effective March 30, 1995; R 336.1119(a), effective July 26, 1995, R 336.1213(4), effective August 22, 2001.

40 CFR 70.6(c)(5) (Compliance Certification), R 336.1213(3)(a), (c), and (4)(c), effective August 22, 2001.

H. General Permits and Temporary Sources (40 CFR 70.6(a) and (e), Part 55, MCL 334.5506(16), effective March 30, 1995; R 336.1213(11), effective August 22, 2001; R 336.1218, effective July 26, 1995.

I. Permit Shield (40 CFR 70.6(f)), Part 55, MCL 334.5506(11) effective March 30, 1995; R 336.1213(6), effective August 22, 2001.

J. Emergency (40 CFR 70.6(g)), Part 55, MCL 334.5527, effective January 11, 2001.

K. Permits for Solid Waste Incinerator Units (40 CFR 70.6(b)(3)(iv), Part 55, MCL 334.5502, effective February 6, 1998; R 336.1211(1)(c) and 1213(7), effective August 22, 2001.

II. AUTHORITY TO ISSUE PERMITS TO NON COMPLYING SOURCES

Part 55 and the rules adopted thereunder provide authority for the MDEQ to issue renewable operating permits to sources that are not in compliance with applicable requirements and to include compliance schedules in such permits to bring sources into compliance.

State Authority:

A. Compliance Plan (40 CFR 70.5(c)(8)), Part 55, MCL 334.5506(4)(b) and (c), 5507(1)(f)(xii), 5507(3) effective March 30, 1995; R 336.1103(ee)(iii), effective April 10, 2000.

B. Schedule of Compliance (40 CFR 70.6(c)(3)), Part 55, MCL 334.5501(s), effective July 8, 1998; MCL 334.5506(6), 5507(1)(f)(xiii), effective March 30, 1995; R 336.1119(a)(i), effective December 12, 1996; R 336.1213(4)(a)-(c), effective August 22, 2001.

III. PERMIT BOARD MEMBERSHIP AND CONFLICTS OF INTEREST

Act 451, the rules thereunder, and Michigan Civil Service Commission rules provide that the person authorized to take final action on renewable operating permits (i.e., the MDEQ Director or his or her authorized representative) represents the public interest and does not derive a significant portion of his or her income from persons subject to renewable operating permits. Michigan Civil Service Commission rules provide that any potential conflicts of interest by such authorized persons be adequately disclosed.

Neither the MDEQ Director nor his or her authorized representative who is authorized to take final action on renewable operating permits has responsibility, in whole or in part, for the design and construction or operation for any solid waste incinerator units subject to the requirements of the CAA and 40 CFR 70. Michigan law does not authorize such responsibility.

State Authority:

1994 P.A. 451, MCL 334.301(a), (b), and (d), 501(4); Part 55 MCL 334.5503(b) and (c), 5504, and 5506(4)(g), effective March 30, 1995; R 336.1214(7); Civil Service Commission rules 2-21.1, 2-22.1, and 2-22.3; and MDEQ Personnel Policy and Procedure 01-007 dated December 19, 1997.

IV. PERMIT FEES

Part 55 provides authority for MDEQ to assess and collect annual permit fees from sources within Michigan subject to the requirements of the Title V operating permit program ("fee-subject facilities") from October 1, 2001 to September 30, 2005 and that the fees be used solely for renewable operating program costs. No conclusions are drawn by the Attorney General as to whether the amount collected is sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the renewable operating program.

In its submittal of September 14, 2001, the MDEQ is providing a demonstration pursuant to 40 CFR 70.9(c) that the fee schedule will result in the collection and retention of fees in an amount sufficient to meet the requirements of 40 CFR 70.9(b).

State Authority:

Part 55, MCL 334.5501(j) and (k), effective July 8, 1998; MCL 334.5503(t), effective March 30, 1995; MCL 334.5521(2), effective July 8, 1998; MCL 334.5522(1), (2), (5), and (11) effective July 20, 2001.

V. PERMIT TERM

Part 55 and its rules provide authority to issue renewable operating permits for a fixed term not to exceed 5 years, including permits for solid waste incineration units combusting municipal waste. Part 55 and its rules also require that renewable operating permits with acid rain provisions be issued for a fixed term of 5 years.

State Authority:

Part 55, MCL 334.5502, effective February 6, 1998; MCL 334.5506(5), effective March 30, 1995; R 336.1211(1), 1213(7), effective August 22, 2001.

VI. MONITORING, RECORD KEEPING, AND REPORTING

Part 55 and its rules provide authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into renewable operating permits consistent with 40 CFR 70.6 and to incorporate periodic monitoring or testing requirements into such permits consistent with 40 CFR 70.6(a)(3)(i)(B).

State Authority:

Part 55, MCL 334.5506(4), effective March 30, 1995; R 336.1213(3) and (4), effective August 22, 2001.

VII. INSPECTION/ENTRY AUTHORITY

Part 55 and its rules provide authority to incorporate into renewable operating permits inspection and entry requirements consistent with 40 CFR 70.6(c)(2).

State Authority:

Part 55, MCL 334.5503(i), 5506(4)(d), and 5526, effective March 30, 1995; R 336.1213(1)(d), effective August 22, 2001.

VIII. INCORPORATION OF ALL APPLICABLE REQUIREMENTS INTO PERMIT

Part 55 and its rules provide authority to incorporate into a renewable operating permit, upon issuance or renewal, all applicable requirements as defined in 40 CFR 70.2, and as provided generally in the CAA and 40 CFR Part 70.

State Authority:

See citations to State Authority under Authority to Issue Permits, subsections (D) and (E).

IX. PERMIT REOPENING

Part 55 and its rules provide authority to revise renewable operating permits with remaining terms of 3 or more years to incorporate new applicable requirements which become effective after issuance of the permit; and, authority to reopen renewable operating permits when additional acid rain requirements become applicable, regardless of the remaining permit term. Part 55 and its rules provide authority to terminate, modify, or revoke permits for cause at any time during the permit term consistent with 40 CFR 70.7(f) and (g).

State Authority:

Part 55, MCL 334.5506(4)(g), 5506(7)(a)-(d), and 5510, effective March 30, 1995; R 336.1213(1)(c), effective August 22, 2001; R 336.1217(2)(a)-(c), effective July 26, 1995.

X. OPERATIONAL FLEXIBILITY

Part 55 and its rules provide authority to issue renewable operating permits which allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of Title I of the CAA, and the changes do not exceed the emissions allowable under the permit, provided that the source provides at least 7 days written notice to the state and to the EPA. Part 55 and its rules provide authority for permits to include terms and conditions for reasonably anticipated, alternative operating scenarios.

State Authority:

Part 55 MCL 334.5505(4), 5506(4)(h) and (i), effective March 30, 1995; R 336.1213(8) and (9), 1215, effective August 22, 2001.

XI. PERMIT MODIFICATIONS

Part 55 and its rules provide authority to process modifications to renewable operating permits in a manner that is consistent with and substantially equivalent to the procedures in 40 CFR 70.7(e).

State Authority:

Part 55, MCL 334.5506(4)(g), (j), and (k), 5506(7), (8), (11), and (13), effective March 30, 1995; R 336.1216(2) and (3), 1219, effective July 26, 1995.

XII. PUBLIC PARTICIPATION

Part 55 and its rules provide authority for procedures to allow public participation in MDEQ's action to issue or deny a renewable operating permit; to modify such permit, except as provided in 40 CFR 70.7(e)(2); or, to renew such permit. Public participation under Part 55 and its rules includes the opportunity for public comment and the opportunity for a hearing on proposed actions on renewable operating permit applications in accordance with the requirements of the CAA and 40 CFR 70.7(h). Part 55 and its rules provide for affected states to review such applications in accordance with the CAA and 40 CFR 70.8(b).

State Authority:

A. Public Notice, Comment, Hearing (40 CFR 70.7(h)), Part 55, MCL 334.5511(1), 5511(3), 5516(1), effective March 30, 1995; R 336.1205(1)(b), effective July 2, 1998; R 336.1214(3), effective August 22, 2001; R 336.1216(3)(d), effective December 12, 1996; R 336.1217(1)(b) and (2)(b), 1218(1), effective July 26, 1995.

B. Notice to Affected States (40 CFR 70.8(B)), Part 55, MCL 334.5506(4)(f), effective March 30, 1995; R 336.1214(4), effective August 22, 2001; R 336.1218(1), effective July 26, 1995.

XIII. PUBLIC ACCESS TO PERMIT INFORMATION

The Michigan Freedom of Information Act (FOIA), Part 55, and its rules provide authority to make available to the public any renewable operating permit application, compliance plan, permit, and monitoring and compliance certification report, except for information entitled to confidential treatment. Part 55 and its rules provide that the contents of an operating permit shall not be entitled to confidential treatment.

State Authority:

1976 P.A. 442, as amended, MCL 15.233(1) and 243, effective April 13, 1977; Part 55, MCL 334.5516(2) and (3), effective March 30, 1995; R 336.1210(13), 1213(1)(e), 1214(3), effective August 22, 2001; R 336.1216(3)(d), 1217(1)(b), and (2)(b), 1218(1), effective July 26, 1995.

XIV. ENFORCEMENT OF PERMIT PROGRAM REQUIREMENTS

Part 55 provides civil and criminal enforcement authority consistent with 40 CFR 70.11, including authority to recover penalties and fines in a maximum amount of not less than \$10,000 per day per violation.

State Authority:

A. Imminent and Substantial Endangerment (40 CFR 70.11(a)(1)), Part 55, MCL 5503(f), (h), (u), 5518(1)-(3), 5530(1), effective March 30, 1995.

B. Injunctive Relief (40 CFR 70.11(a)(2)), Part 55, MCL 334.5503(g), (h), (u), 5515(3), 5526(2), 5530(1), effective March 30, 1995.

C. Recoverability of Civil Penalties (40 CFR 70.11(a)(3)(i)), Part 55, MCL 334.5503(g), (h), (u), 5528-5530, effective March 30, 1995.

D. Criminal Penalties (40 CFR 70.11(a)(3)(ii) and (iii)), Part 55, MCL 334.5503(g), (h), (u), 5531, effective March 30, 1995.

E. Burden of Proof (40 CFR 70.11(b)), Part 55, MCL 334.5529(1), 5530(1)-(7), 5531(1)-(11), effective March 30, 1995.

F. Appropriateness of Fine (40 CFR 70.11(c)), Part 55, MCL 334.5532, effective March 30, 1995.

XV. AUTHORITY TO ENFORCE LAPSED PERMITS

Part 55 and its rules provide authority to enforce the terms and conditions of a renewable operating permit which has expired, if the source has filed a timely and complete application for renewal, so as to assure compliance with all applicable requirements.

State Authority:

Part 55, MCL 334.5506(2) and (15), effective March 30, 1995; R 336.1217(1)(a), effective July 26, 1995.

XVI. EPA PERMIT VETO

Part 55 and its rules provide that a renewable operating permit will not issue if the Administrator of the EPA objects in a timely manner to its issuance pursuant to 40 CFR 70.8(c) or, if the permit has been issued, and the Administrator objects pursuant to 40 CFR 70.8(d).

State Authority:

Part 55, MCL 334.5506(4)(f) and (10), effective March 30, 1995; R 336.1214(6)-(8), effective August 22, 2001; R 336.1216(1)(c)(i) and (ii), 1216(2)(c)(iii), 1216(3)(d), 1217(1)(b) and (2)(b), 1218, effective July 26, 1995.

XVII. FINAL AGENCY ACTION ON PERMITS

Part 55 and its rules provide that, solely for the purposes of obtaining judicial review in state court for MDEQ's failure to take final action, "final permit action" shall include the failure of MDEQ to take final action on an application for a renewable operating permit, permit renewal, or permit revision within the promulgated date for action on an application for issuance, renewal or revision. MDEQ's failure to take final action within 90 days of receipt of an application requesting a minor permit modification is subject to judicial review in state court.

State Authority:

Part 55, MCL 334.5506(15), effective March 30, 1995; R 336.1216(2)(c)(iii), effective July 26, 1995.

XVIII. DEFAULT PERMIT ISSUANCE

Part 55 does not authorize the issuance, modification, or renewal of any renewable operating permit based on the passage of a specified time period when MDEQ has failed to take action on the application, and does not include any other similar provision providing for default issuance of such a permit unless EPA has specifically waived the right of review for itself and affected states.

State Authority:

Part 55, MCL 334.5506(15), effective March 30, 1995:

XIX. OPPORTUNITY FOR JUDICIAL REVIEW OF PERMIT ACTIONS

Part 55 and its rules provide an opportunity for judicial review in state court of any final permit action by the applicant, any person who participated in the public participation process provided under the CAA and 40 CFR 70.7(h), or any other person who could obtain judicial review of such actions under state laws. Any provisions of State law which limit access to judicial review do not exceed corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

State Authority:

Part 55, MCL 5506(14), effective March 30, 1995; R 336.1214(7), effective August 22, 2001; R 336.1216(1)(d), (2)(c)(iii)(D), (3)(e), and (4)(c)(iv), 1217(1)(b), and (2)(b), 1218(2), 1219(2)(c), effective July 26, 1995. APA; RJA Sec. 631, MCL 600.631; MSA 27A.631.

The Michigan Supreme Court has cited and followed U.S. Supreme Court precedent to determine whether a party has standing to sue. *House Speaker v Governor*, 443 Mich 560 (1993). See also, *Attorney General v Michigan Public Service Commission*, 243 Mich App 487 (2000). Therefore, standing requirements in Michigan are equivalent to the standing requirements under Article III of the U.S. Constitution.

XX. LIMITATIONS ON JUDICIAL REVIEW

Part 55 and its rules provides that the opportunity for judicial review of a final permit action in state court as described in section XIX of this opinion shall be the exclusive means for obtaining judicial review of the terms and conditions of renewable operating permits. Part 55 and its rules provides that petitions for judicial review must be filed no later than 90 days after the final permit action. Part 55 and its rules provides that where petitions for judicial review are based solely on grounds arising after the 90 day deadline for judicial review, such petitions may be filed no later than 90 days after the new grounds for review arise. Part 55 and its rules further provides that if the

final permit action being challenged is MDEQ's failure to take final action, a petition for judicial review may be filed at any time before MDEQ denies the permit or issues the final permit.

State Authority:

Part 55, MCL 334.5506(14), effective March 30, 1995; R 336.1214(7), effective August 22, 2001; R 336.1216(1)(d), 1216(2)(c)(iii)(D), (3)(e), and (4)(c)(iv), 1217(1)(b) and (2)(b), 1218(2), and 1219(2)(c), effective July 26, 1995.

XXI. COORDINATION WITH ACID RAIN PROGRAM REQUIREMENTS

Part 55 and its rules are consistent with, and cannot be used to modify, the Acid Rain Program requirements of 40 CFR Part 72.

State Authority:

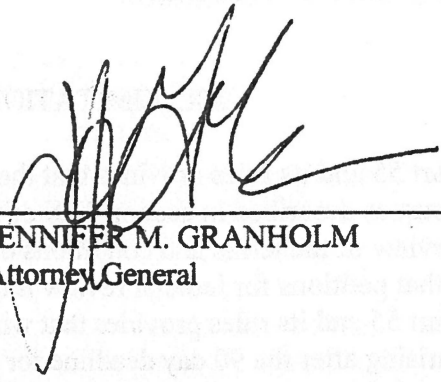
Part 55 MCL 334.5501(u), effective July 8, 1998; MCL 334.5506(4)(i)(ii), 5506(7)(b), effective March 30, 1995; R 336.1101(o)(viii)(C), effective April 10, 2000; R 336.1210(6), 1211(1)(b), 1213(2)(b), (6)(b)(iii), and (10), 1215(3)(b), effective August 22, 2001; R 336.1218(1), effective July 26, 1995, R 336.1299(d), effective August 22, 2001.

XXII. AUTHORITY FOR LOCAL PROGRAMS

Part 55 provides authority for a county with a city of 750,000 or more population to apply for and be granted delegation of authority from MDEQ to develop, administer, and enforce a renewable operating permits program under the CAA and 40 CFR Part 70. No requests for such delegation have yet been made.

State Authority:

Part 55, MCL 5523(1), (2), (6), (8), and (9), effective July 8, 1998.



JENNIFER M. GRANHOLM
Attorney General

Dated: 9/10/, 2001