# Part Two

# Special Topics

# Chapter One

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

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

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

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

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

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

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

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

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

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

(2) When you write the letter:

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

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

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

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

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

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

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

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

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

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

A sample document request is included on page 29.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Sample Information Request

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

June 2, 2001

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

Dear Mr. Chantland:

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

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

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

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

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

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

Sincerely,

Elena Bennett
Staff Scientist, Trufalla Tree Trust

CC: Keiko Nishimura, Region 2 Permit Administrato

# Chapter Two

# Title V and Environmental Justice

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

## I. Introduction

### *What is environmental justice?*

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

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

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

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

### *How does Title V relate to environmental justice?*

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

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

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

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

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

***What existing government policies and statutes address environmental justice concerns?***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. Case Studies

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

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

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

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

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

- announcing future public hearings on the radio and TV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## V. Conclusion

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

# Chapter Three

# Citizen Enforcement of the Clean Air Act

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

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

## Lawsuits Against Facilities

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

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

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

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

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

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

**Lawsuits Against Permitting Authorities**

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

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

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

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

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

**Lawsuits Against U.S. EPA**

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

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

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

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

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

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

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

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

**Exhaustion of Administrative Remedies**

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

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

**60-Day Notices**

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

**Standing**

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

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

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

**About Lawyers**

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

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

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

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

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

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

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

# Chapter Four

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

**By Brian Flack, New York Public Interest Research Group (NYPIRG)**
**New York, NY**

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

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

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

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

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

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

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

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

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

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

### B. *Is federal enforceability a necessary requirement?*

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

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

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

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

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

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

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

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

To be practicably enforceable, a limit must state:

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

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

[6] In January 1995, before the court opinions, U.S. EPA issued a "Transition Policy" for Title V and Title III purposes. Pursuant to the Transition Policy, U.S. EPA stated that for its purposes it would consider a source to be a "minor source" even if the source did not have PTE limits if the source's actual emissions had remained below 50 percent of the applicable major source threshhold since January 1994 (as demonstrated by adequate records). U.S. EPA also stated that it would honor state-only enforceable PTE limits, even where the regulations or SIP required federal enforceability. While U.S. EPA plans to continue to honor state-only enforceable limits until the PTE rulemaking is complete, the provision allowing a source without any PTE limits to avoid major source status is due to expire in December 2000. See Memorandum, Third Extension of January 25, 1995 Potential to Emit Transition Policy, from John S. Seitz and Eric V. Schaeffer (Dec. 20, 1999).

A facility can include permit conditions that will limit or "cap" its emissions to levels below the thresholds of Title V. To appropriately limit potential to emit, all permits must contain a production or operational limitation in addition to the emission limitation.[7] A production limitation is a restriction on how much of a final product a facility produces. An operational limitation is a restriction on how many hours a facility operates or how much raw material a facility uses. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions that specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level.

Also, to be practicably enforceable the "averaging time" of the limit must be over the shortest practical time period. The averaging time or duration is the length of time or duration over which compliance is measured. For example, consider a facility, that accepts a limit upon the amount of fuel that it burns as a way to ensure that its $SO_2$ emissions stay below the Title V level. If the limit is on how much fuel the facility can burn each day, the monitoring must take place daily. By looking at the facility's daily records, you can know immediately whether the facility was complying with the limit on the previous day. Such a limit is practicably enforceable. If the limit is annual, however, you cannot know whether the facility is complying with the limit until the end of each year. This limit is not practicably enforceable.

It is not uncommon to see a limit that is based upon a "12-month average, rolled monthly." In the example provided in the paragraph above, that would mean that at the end of each month, the facility would total the amount of fuel used in the previous 12 months. This "rolled" standard is clearly better than a straight annual average because you can know from month to month whether the facility is complying with the limit. An annual limit rolled monthly is probably acceptable for the purpose of allowing a facility to avoid Title V requirements because Title V eligibility is determined based upon the amount of pollution that can be caused by a facility each year. If the limit relates to whether a facility must comply with MACT standards (discussed in the next section), you will need to look to the language of the particular MACT standard that is being avoided. It may be that you need a shorter averaging time to assure compliance, such as a monthly limit rolled daily.

### D. *How does a facility become subject to a PTE limit that excuses it from the Title V program?*

U.S. EPA identified several available approaches for creating federally enforceable limits on potential to emit. These include (1) non-Title V federally enforceable state operating permit programs (FESOPs), (2) exclusionary or prohibitory rules that create federally enforceable restrictions applicable to many sources, (3) general permits that could be included in a State Implementation Plan (SIP) in order to create potential to emit limits for groups of sources, (4) pre-construction permits ("New Source Review" or NSR), and (5) Title V permits.

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[7] *See*, Memorandum, *Guidance on Limiting Potential to Emit in New Source Permitting*, from Terrell E. Hunt and John S. Seitz to EPA Regional Offices (June 13, 1989).

One method of achieving federal enforceability for state and local regulations is to attain EPA approval of a state's own operating permit program, thus creating a "federally enforceable state operating permit program" (FESOP). The program must: (a) be approved into the SIP, (b) impose legal obligations to conform to the permit limitations, (c) provide for limits that are enforceable as a practical matter, (d) be issued in a process that provides for review and an opportunity for comment by the public and by U.S. EPA, and (e) ensure that there is no relaxation of otherwise applicable federal requirements.[8]

Another mechanism for creating federally enforceable restrictions is through general restrictions on many sources within a single category, known as "prohibitory" or "exclusionary" rules, which may be included in a SIP. In order to be a valid constraint on a source's potential to emit, an exclusionary rule must be practicably enforceable, adopted with adequate opportunity for public comment, and incorporated into the SIP.[9] State and local permitting authorities can adopt general rules limiting the potential to emit of smaller facilities, thus allowing these facilities to avoid "major source" requirements. The general rule will place emissions limitations on such smaller sources and ensure compliance with the established limit through recordkeeping and reporting requirements.

A third approach for creating federally enforceable restrictions is through a general permit, which is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. A general permit provides for conditions limiting potential to emit in a one-time permitting process. Though generally considered part of a Title V permit program, state and local agencies can also submit a general permit program as part of its SIP. Furthermore, general permits included within a SIP-approved FESOP can also create potential to emit limits for groups of sources.[10]

Another type of case-by-case permit is a pre-construction permit. Many states are using their existing NSR programs to limit a source's potential to emit so as to allow sources to legally avoid being considered major sources for Title V purposes.[11] USEPA has taken the position that minor NSR permits issued under programs that have already been approved into a SIP are federally enforceable. Thus, USEPA allows the use of federally enforceable minor NSR permits to limit a source's potential to emit provided that the scope of a state's program allows for this and that the minor NSR permits are in fact enforceable as a practical matter.[12] But note that it is not acceptable for a source to use a major NSR permit to create a limit to avoid Title V applicability. All sources with a major NSR permit are Title V sources regardless of there actual or potential emissions. Furthermore, once a source accepts a limit on its PTE, increasing its operations above these limits may trigger major NSR requirements.

Facilities may also limit their potential to emit through the Title V permitting process. Many states are using Title V permits to create various, federally enforceable

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[8] *See*, Memorandum, *Options for Limiting Potential to Emit* at 3.
[9] *See id.* at 4.
[10] *See id.* at 4.
[11] *See id.* at 5.
[12] *See*, Letter from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Jason Grumet, Executive Director, Northeast States for Coordinated Air Use Management (November 2, 1994).

emission limitations. For example, if a facility is above certain threshold emission levels for either criteria or hazardous air pollutants, that facility could limit its potential to emit to below that level of emissions for purposes of prospectively avoiding future MACT compliance dates. That facility would use a Title V permit to establish federally enforceable limitations, thus ensuring the facility is not considered a major source for hazardous or other air pollutants.

### E. *How to identify and track potential to emit violations*

You may find that a facility you are interested in does not have to apply for a TitleV permit because it accepted a potential to emit limit on the total amount of pollution it may release or has agreed to comply with a limit in order to avoid compliance with a more stringent requirement, such as MACT, NSR, or Prevention of Significant Deterioration (PSD). However, you need to be aware that a few facilities may try to get around these limits. For example, a facility may burn more fuel or use more raw materials than would be contained in its permit or operate an additional shift when the source was restricted in operating hours.

You can track violations of these production or operational limits. Facilities have recordkeeping requirements that they must follow, thereby allowing citizens to verify a source's compliance with its limit. In many circumstances, operating logs are kept in which hours of operation are recorded. These logs may be available for inspection by citizens (ask the Permitting Authority). The failure to comply with a PTE limit may result in a notice of violation for failure to get a Title V permit or comply with MACT or PSD/NSR requirements.

## II. Avoiding MACT Standards

Section 112 of the Clean Air Act provides for regulation of hazardous air pollutants, and distinguishes between "major sources" and "area sources" of such pollutants. Section 112 of the Clean Air Act defines a "major source" as:

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

MACT standards apply to many major sources of hazardous air pollutants. But, lesser or no controls may be required of area sources in a particular industry. U.S. EPA issued a guidance document clarifying when a major source of hazardous air pollutants can obtain federally enforceable limits on its potential to emit to avoid applicability of major source requirements.[13]

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[13] *See*, Memorandum, *Potential to Emit for MACT Standards – Guidance on Timing Issues*, by John S. Seitz to EPA Regional Offices (May 16, 1995). Only MACT is addressed in this section. But note that a facility that relies upon a limit to avoid particular legal requirements, such as MACT standards, can rely on this same limit to avoid other legal requirements that would otherwise require, such as NSR and PSD.

U.S. EPA's guidance document states that "facilities may switch to area source status at any time until the 'first compliance date' of the standard."[14] The "first compliance date" is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement in the applicable MACT standard. Moreover, U.S. EPA provides that "sources should not be allowed to avoid compliance with a standard after the compliance date, even through a reduction in potential to emit.[15] It is U.S. EPA's belief that once a source is required to install controls or take other measures to comply with a MACT standard, it should not be able to substitute different controls or measures as a method of bringing the source below the major facility threshold.[16] U.S. EPA refers to this as the o*nce in, always in* policy. A "once in, always in" policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.[17] It is important to point out, that under the *once in, always in* policy, a source may be major for one MACT standard, but an area source for a subsequent MACT standard.

But, you should look very carefully for facilities that are exempting themselves from MACT regulations by taking "voluntary restrictions on their potential to emit." For example, consider a facility that accepts a throughput limit to avoid applicability of the gasoline MACT standard without any explanation in either the draft permit or any supporting documentation of what that limit is. In fact, the draft permit never refers to the MACT standard at all. The only information in the draft permit that appears to relate to the MACT standard is the description of facility processes, which states that the facility is "willing" to accept a throughput limit. Simply saying that a facility is willing to accept a limit is not the same as creating the limit. Thus, it would appear that this facility does not have an enforceable limit on its potential to emit and is therefore eligible for the particular MACT standard. The only way that this facility would not be subject to this standard is if it can demonstrate that an actual federally enforceable limit on its potential to emit applied to the facility prior to the first compliance date of the MACT standard.

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[14] *See id.* at 5.
[15] *See id.* at 5.
[16] *See id.* at 5.
[17] *See id.* at 9. Example: A facility has potential emissions of 100 tons/year. After compliance with the applicable MACT standard, which requires a 99 percent emissions reduction, the facility's total potential emissions would be 1 ton/year. Under EPA's guidance memo, that facility could not subsequently operate with emissions exceeding the maximum achievable control technology emission level. The facility could not avoid continued applicability of the MACT standard by obtaining "area source" status through limitations on emissions up to the 10/25 tons/year major source thresholds.

Limits on potential to emit to avoid applicability of MACT standards must be federally enforceable. A voluntary limit is insufficient to avoid applicability of the rule. All requirements contained in the MACT standard must be included in the facility's permit unless the facility can demonstrate that it received a federally enforceable limit on potential to emit prior to the first compliance date.

# Chapter Five

## Controlling Emissions of Hazardous Air Pollutants with the Clean Air Act Requirements

**by Alexander J. Sagady, Environmental Consultant (East Lansing, MI)**

Citizens dealing with Clean Air Act operating permit for major industrial facilities will inevitably have to address emissions of hazardous air pollutants (HAPs). Under the Federal Clean Air Act, Maximum Achievable Control Technology (MACT) standards published by the U.S. EPA control emissions of HAPs from major industrial sources.

MACT standards originated in the 1990 Clean Air Act amendments. Prior to the 1990 amendments, U.S. EPA had issued only a handful of regulations covering specific hazardous pollutants under the 1977 amendment to the Clean Air Act.

Under the 1977 amendments, U.S. EPA was to develop National Emission Standards for Hazardous Air Pollutants (NESHAP) that were "health-based" standards. The NESHAP standards were intended to protect public health with a margin of safety. However, certain pollutants that are cancer-causing agents do not necessarily display a health effects threshold for detrimental exposures. As a result of the difficulty U.S. EPA had with writing standards under the original NESHAP statutory provisions, only a few were finally issued.

The 1990 Clean Air Act amendments changed the entire approach to regulating HAPs. Congress established a list of 189 HAPs that were subject to emission control regulations; it also defined a major source of HAPs as one that emits or has the potential to emit 10 tons or more of any single HAP or 25 tons per year or more of any combination of HAPs.

Under Section 112 of the Act, U.S. EPA was then mandated to develop stringent technology-based emission regulations applicable to several industrial categories. Section 129 of the Act provided additional requirements for solid waste combustion units, like municipal waste incinerators, because of special concerns about the toxic emissions from these units, such as chlorinated dibenzo-dioxins/furans and mercury.

The Congressional action first established a list of HAPs to be regulated. The primary focus was then on determining the level of available emission control performance for the best and near best controlled facilities in order to set new emission standards. Health-based considerations could still enter the decision-making, but only after a baseline level of performance based on emission control technology considerations was established.

Under the 1990 amendments, MACT standards were intended to strictly control emissions of HAPs. New sources of HAPs had the most stringent requirements:

> The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent that the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator." (CAA Section 112(d)(3))

For existing sources of HAPs, MACT emission standards:

> "...shall not be less stringent, and may be more stringent than:
>
> (A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information) ..... for categories and subcategories with 30 or more sources, or
>
> (B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) .... the category or subcategories with fewer than 30 sources."

These provisions are known as the "MACT floor" in the decision-making process. The Administrator can also set standards more stringent than the MACT floor, where such standards:

> Shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources.

The Administrator is mandated to also consider available methods to limit emissions through process changes, substitution of materials, enclosure of systems, and through design, equipment, work practice or operational standards, or a combination of all of these techniques.

In general, an existing source that is subject to a MACT standard must comply with that standard within three years after it is issued.

Some MACT standard-setting decisions by U.S. EPA have already been controversial. In mid-1999, the DC Circuit of Appeals remanded U.S. EPA's MACT decision on medical waste incinerators back to the agency for better justification after a challenge by the Sierra Club and the Natural Resources Defense Council.

The 1990 amendments put the U.S. EPA on a deadline to issue MACT standards with different sets of rules due in 1992, 1994, 1997, and 2000. However, U.S. EPA will not meet this deadline for the vast majority of needed industrial categories for which a MACT standard is required.

Anticipating delays, Congress added the so-called "MACT hammer" provision. This provision states that if U.S. EPA fails to issue a standard for a category of sources within 18

months of the statutory deadline, each source in that category must apply to the State for a permit in which the State determines MACT on a case-by-case basis.

There is another situation in which states may have to decide MACT on a case-by-case basis. The 112(g) program (named for section 112(g) of the Clean Air Act) applies when HAP sources that are not yet subject to a MACT standard (or not yet on the list of source categories for which U.S. EPA will develop a MACT standard) seek to construct or reconstruct a major source. (The rule does not apply to modifications). The program applies whether the source is a green field source or adding a new unit, provided the PTE of the new source or unit meets or exceeds 10 tons per year of any one HAP, or 25 tons per year of combined HAPs. Sources subject to the rule need a "notice of MACT approval," which is a pre-construction permit. Most states have adopted 112(g) programs, and it is their responsibility to decide case-by-case MACT. The MACT determination of a state has no binding effect on other states, but by definition, other states cannot adopt a less stringent MACT for the same type of facility. (They can adopt a more stringent MACT for the same type of facility). Prior to making a MACT determination, state and local agencies generally investigate the MACT determinations made by other states.

Clean air advocates concerned with operating permits and toxic emission controls must become aware of the MACT setting process because of interactions with the issuance of operating permits.

State case-by-case MACT determinations set standards which can then become the norm for many years. Citizen advocacy and technical comments in the setting of case by case MACT standards may result in more stringent HAP emission controls.

For operating permits involving MACT standards already issued by U.S. EPA, citizens should ensure that all applicable regulatory provisions of the MACT are in place in the proposed operating permit, including the relevant provisions from the "general provisions" of 40 CFR Part 63. Information about completed, proposed, and upcoming MACT standards is available on the Internet at www.epa.gov/ttn/uatw/eparules.html. In addition to numerical limitations on emissions, MACT standards will also generally require certain mandatory work practices, operator training, emission and operational parameter monitoring and other detailed requirements that should be specified in the operating permit provisions.

Refer to page 122 for information about how a facility can avoid a MACT standard by obtaining an enforceable limitation on its potential to emit HAPs.

# Chapter Six

## "Unavoidable" Violations of Emission Limits

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

Many Title V permits include a provision that allows the Permitting Authority to excuse permit violations that are considered "unavoidable." Violations that are typically considered "unavoidable" are those that occur because of an emergency or because of an unforeseeable equipment malfunction. Sometimes, violations that occur during startup, shutdown, or maintenance of equipment are considered to be unavoidable. These provisions are referred to by a variety of different names, including, among others, "Unavoidable Noncompliance and Violations," "Malfunction/Upset," and "Affirmative Defenses." For purposes of this discussion, these provisions are referred to as "excess emissions provisions."

Excess emissions provisions come in many forms. They are all based upon the idea that under certain conditions, a facility cannot avoid violating air quality requirements. Some excess emissions provisions prevent the Permitting Authority from penalizing a facility for unavoidable violations. This type of provision is called an "affirmative defense." Under an affirmative defense, once the facility presents evidence that the defense applies, it is up to the Permitting Authority (or the citizen suit plaintiff) to demonstrate that the defense does not apply. Other excess emissions provisions simply provide the Permitting Authority with discretion over whether to bring an enforcement action when it determines that a violation was "unavoidable." Under this type of discretionary excess emissions provision, the Permitting Authority is authorized to bring an enforcement action even if the violation was unavoidable.

Just like everything else in a Title V permit, an excess emissions provision must be derived from some pre-existing applicable requirement. Excess emissions provisions in Title V permits are usually derived from State Implementation Plans (SIPs) (See Part One, page 38) and certain federal regulations (usually a MACT or NSPS regulation, see Part One, page 42). It is proper for the Permitting Authority to include an excess emissions provision in a Title V permit if it is based on a U.S. EPA-approved SIP rule or a federal regulation. A Permitting Authority is *not* allowed to include an excess emissions provision in a Title V permit if there is no federally-enforceable statute or regulation that provides the basis for such a provision.

If you see an excess emissions provision in a Title V permit, the provision may be based on a federal regulation or a U.S. EPA-approved SIP and therefore properly included in the permit. Nevertheless, it is important to make sure that the Title V permit does not expand the scope of the provision, and that the permit includes sufficient monitoring, recordkeeping, and reporting requirements to ensure that the provision is not applied improperly. This section discusses these issues in detail.

**What are the steps in reviewing an excess emissions provision in a Title V permit?**

Your objective is to make sure that the facility does not take advantage of an excess emissions provision unless it is entitled to do so. In general, you will need to ask the following questions as you review the provision:

1. Is the provision allowed by a federally-approved air quality regulation (SIP) or a federal regulation?

2. If the provision is allowed, does it excuse more than the underlying regulation intended to be excused? In other words, does it enlarge the excess emissions provision?

3. Does the permit need additional terms to ensure that the facility can be held accountable for violations when the excess emissions provision does not apply?

Each of these questions is covered in detail below. But first, you need to know how to recognize an excess emissions provision.

**What does an excess emissions provision look like?**

As a preliminary matter, you need to be able to recognize an excess emissions provision when you see one. You are likely to see the following types of excess emissions provisions in a Title V permit:

- **Emergency Defense:** One kind of excess emissions provision is the "emergency defense," discussed in Part One of this handbook (page 58). The emergency defense is explicitly allowed under the federal regulation governing the Title V program. See 40 CFR § 70.6(g). (Appendix A of this handbook). Though a Permitting Authority is not required to include an emergency defense in its Title V permits, it has the option to do so. If the Permitting Authority incorporates an emergency defense into a Title V permit, it may not expand the emergency defense beyond that allowed under § 70.6(g). Carefully examine any difference between § 70.6(g) and permit language.

- **Startup/Shutdown and Malfunction provisions under Federal Regulations:** It is not uncommon for an NSPS or MACT regulation to excuse violations that occur during startup/shutdown or malfunction of equipment. If the regulation containing the startup/shutdown or malfunction provision is applicable to the facility, the Permitting Authority is allowed to include the provision in the permit. An example such a provision in a federal regulation can be found at 40 CFR § 63.6(f), which provides that "The nonopacity emission standards set forth in this part shall apply at all times except during periods of startup, shutdown, and malfunction, and as otherwise specified in an applicable subpart." § 63.6(f) requires the regulated facility to develop a startup/shutdown/malfunction "plan." This plan is incorporated into the Title V permit by reference.

- **Startup/Shutdown, Maintenance, Upset, or Malfunction Provisions in a SIP:** The U.S. EPA has approved of a wide variety of excess emissions provisions as part of SIPs. It is particularly important to review an excess emissions provision derived from a SIP because many were approved long ago and it may be necessary to add language to the permit that clarifies the scope of the provision. The following is an example of a SIP-approved excess emissions provision (This provision is provided only as an example. It should not be considered a "model" to be replicated.):

> Unavoidable excess emissions. Excess emissions determined to be unavoidable under the procedures and criteria in [state regulation] shall be excused and not subject to penalty.
>
> (1) The permittee shall have the burden of proving [to the Permitting Authority] that excess emissions were unavoidable. This demonstration shall be a condition to obtaining relief under (2), (3) or (4).
>
> (2) Excess emissions due to startup or shutdown conditions shall be considered unavoidable provided the source reports as required under [state regulation] and adequately demonstrates that the excess emissions could not have been prevented through careful planning and design and if a bypass of control equipment occurs, such that bypass is necessary to prevent loss of life, personal injury, or severe property damage.
>
> (3) Excess emissions due to scheduled maintenance shall be considered unavoidable if the source reports as required under [state regulation] and adequately demonstrates that the excess emissions could not have been avoided through reasonable design, better scheduling for maintenance or through better operation and maintenance practices.
>
> (4) Excess emissions due to upsets shall be considered unavoidable provided the source reports as required under [state regulation] and adequately demonstrates that:
>
> (a) The event was not caused by poor or inadequate design, operation, maintenance, or any other reasonably preventable condition;
>
> (b) The event was not of a recurring pattern indicative of inadequate design, operation, or maintenance; and
>
> (c) The operator took immediate and appropriate corrective action in a manner consistent with good air pollution control practice for minimizing emissions during the event, taking into account the total emissions impact of the corrective action, including slowing or shutting down the emission unit as necessary to minimize emissions, when the operator knew or should have known that an emission standard or permit condition was being exceeded.

**How do I know whether an excess emissions provision in a Title V permit is based upon a federal regulation or a U.S. EPA-approved SIP?**

Under 40 CFR § 70.6(a)(1)(i), the permit must "specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based." Refer to page 37 in

Part One of this handbook for information about how to locate state and federal air quality regulations.

If the underlying source is a federal regulation, then you know that the particular excess emissions provision has been approved by U.S. EPA. As long as the language in the permit is the same as the language in the regulation, the Permitting Authority is allowed to include it in the permit.

If the underlying source is a state regulation, you need to determine whether the state regulation has been approved by U.S. EPA into the SIP (See Part One, page 43). If the state regulation has been approved by U.S. EPA and is part of the SIP, the Permitting Authority is allowed to include the provision in the permit.

**How do I make sure that the Title V permit does not expand the scope of the excess emissions provision?**

To ensure that the Title V permit does not improperly expand the type of violations that can be excused, you need to determine whether the language of the permit is more lenient than the language in the applicable regulation. The Permitting Authority may not use a Title V permit to expand the types of violations that may be excused under the excess emissions provision. If you notice any differences between the terms in the draft permit and the language of the underlying regulation, think carefully about the potential impact of these differences. Even if you aren't sure about the implications of the different terms, you may want to note the discrepancy in your comments.

Examples of improper attempts to expand the scope of an excess emissions provision include, but are not limited to, the following:

- The excess emissions provision in the underlying air regulation only applies to violations that occur due to an equipment "malfunction," but the permit applies the provision to startup/shutdown and/or maintenance situations. (Many facilities allege that it is impossible for them to comply with air quality limitations during startup/shutdown and maintenance activities. Nevertheless, if the provision in the underlying regulation only applies during malfunction situations, the Title V permit cannot be used to expand the excess emissions provision to cover violations that occur during startup/shutdown or maintenance).

- The excess emissions provision in the underlying regulation only applies to "nonopacity" violations, but the permit applies the provision to opacity violations.

- The excess emissions provision in the underlying regulation simply allows the Permitting Authority to excuse a violation under particular circumstances, but the permit provides that certain types of violations are automatically exempt from enforcement.

**How do I know if additional permit terms are needed to ensure that the facility can be held accountable for violations when the excess emissions provision does not apply?**

In general, if an excess emissions provision is derived from a federal regulation that was adopted after 1990, it probably is not necessary to supplement the provision with additional permit terms. Note that many of the excess emissions provisions found in SIPs were approved long ago and leave a lot of room for varying interpretations. Thus, it may be necessary to add terms to the permit to assure that the excess emissions provision is applied correctly. In evaluating the adequacy of an excess emissions provision, ask yourself the following questions:

***Does the permit require the facility to submit reports of excess emissions as required by the relevant air quality regulations or Part 70?***

Often, an underlying requirement will require that the facility submit a report, called a deviation report, when the facility deviates from a regulatory standard. Generally, the underlying requirement establishes the content of this report and when it must be submitted. If applicable to a particular facility, these requirements must be included in that facility's Title V permit. In addition, every Title V facility is subject to 40 CFR § 70.6(a)(3)(iii)(B), which requires:

> Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

Title V permits typically include permit terms based on this regulation. The Title V permit must define what "prompt" means in as specific terms as possible. Otherwise, the requirement of prompt reporting is unenforceable. The definition must be reasonable.

As you review the excess emissions provision in a draft permit, ask yourself if you can monitor whether or not the facility has exceeded air pollution limits on a timely basis. If not, the draft permit needs to be revised.

The public cannot know whether an excess emissions provision is applied properly if there is no written record of when and why a violation is excused. Consider a provision that states:

> In the event that emissions of air contaminants in excess of any emission standard . . . occur due to a malfunction, the facility owner and/or operator shall report such malfunction by telephone to the commissioner's representative as soon as possible during normal working hours, but in any event not later than two working days after becoming aware that the malfunction occurred. Within 30 days thereafter, when requested in writing by the commissioner's representative, the facility owner and/or operator shall submit a written report to the commissioner's representative describing

> the malfunction, the corrective action taken, identification of air contaminants, and an estimate of the emission rates.

Under the above excess emissions provision, the facility is required to submit a written report about the occurrence only "if requested in writing by the commissioner's representative." If the commissioner's representative elects not to make this request, there will be no report of the malfunction. It is essential that the facility provide written reports to the Permitting Authority whenever a violation is excused under an excess emissions provision.

***Are all of the relevant terms defined in the permit?***

Sometimes, a permit lacks definitions of essential terms. The lack of definitions may make it easier for a facility to claim that it is protected by the excess emissions provision. Key terms such as "unavoidable," "upset," "emergency," and "malfunction" need to be defined if they appear in an excess emissions provision. If you notice that key terms are not defined in a draft permit, you may want to locate plausible definitions and specifically recommend them in your comments. You may find a satisfactory definition in state regulations.

***Does the permit ensure that the excess emissions provision will be applied in a manner consistent with federal law?***

In the case of an excess emissions provision found in a SIP, it is important to make sure that the provision cannot be interpreted in a way that violates federal law. The only U.S. EPA guidance that discusses limitations upon excess emissions provisions in SIPs is a set of three U.S. EPA memoranda. The first two were released in 1982 and 1983. The third, which clarifies the first two, was released in September 1999. All three memoranda are included in Appendix E. The viewpoints expressed in the memoranda are not the "law," but they are U.S. EPA's interpretation of the law. Since Congress delegated the job of Clean Air Act regulation to U.S. EPA, opinions expressed by the agency are often given quite a bit of weight when a court decides how the law should be interpreted and applied.

When you review a SIP-based excess emissions provision in a draft Title V permit, you should read over the U.S. EPA memoranda in Appendix E. Make a note of any limitations on SIP-based excess emissions provisions that are mentioned in the memos but not mentioned in the draft permit. In your comments, you can argue that these limitations must be added in order for the permit to assure compliance with applicable requirements. Particularly notable limitations include the following:

(1) All periods of excess emissions must be considered violations. Any provision that allows for an automatic exemption for excess emissions is prohibited. This means that if it is not clear whether the excess emissions provision creates an exemption, you should expect the Permitting Authority to clarify in the permit that there is no automatic exemption for excess emissions.

(2) While a state may choose not to impose a penalty on a facility that violates a requirement due to unavoidable circumstances, this decision may not bar U.S.

EPA's or citizens' ability to enforce applicable requirements. Ask that the permit state that the excess emissions provision does not affect your right or U.S. EPA's right to bring an enforcement action for permit violations when the State chooses not to impose a penalty.

(3) In general, because excess emissions that occur during periods of startup and shutdown are reasonably foreseeable, they should not be excused. If the Permitting Authority determines that it is impossible for a certain group of facilities to comply on a consistent basis with air quality requirements during periods of startup and shutdown, this should be addressed through a narrowly-tailored SIP revision that takes into account the impacts on air quality caused by the inclusion of such a provision in the SIP. (In other words, a blanket excess emissions provision that applies to all facilities in the state the same way is inadequate).

(4) Affirmative defenses to claims for injunctive relief are not allowed. (Injunctive relief is when the violator is required by a court to stop illegally polluting the air. While an excess emissions provision can protect a violator from being subject to monetary penalties, U.S. EPA or the public may still get a court-ordered injunction).

See U.S. EPA's policy memorandum, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown*, Sept. 20, 1999 (in Appendix E of this handbook). The 1999 memorandum also includes a long list of requirements that a SIP-based excess emissions provision must meet in order for it to be approved by U.S. EPA. You can review this list and compare it to any excess emissions provision that is included in a Title V permit.

**What is the legal basis for arguing that the Permitting Authority must add terms to a permit to assure that the excess emissions provision is applied properly?**

The permit must assure compliance with all applicable requirements. In this case, the applicable requirement includes the excess emissions provision. If you think that additional permit terms are needed to prevent misapplication of the excess emissions provision, you can argue that 40 CFR Part 70 requires them. In particular, § 70.6(a)(1) provides that each Title V permit must include "[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." In addition, remember that § 70.6(a)(3)(B) provides that:

> Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), [the draft permit must include] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.

If a permit includes a vague excess emissions provision that could be interpreted in a way that violates federal law, or one that lacks adequate monitoring, recordkeeping, and reporting requirements to assure that the facility is complying with permit terms, you can argue that under Part 70, the permit may not be issued as drafted.