

Air Permitting Forum Comments
**on the US Environmental Protection Agency's Notice of Public Comment
Period on Operating Permits Program Deficiencies.**

65 *Fed. Reg.* 77376 (December 11, 2000)

Submitted March 12, 2001

The Air Permitting Forum (APF) is providing these comments in response to the Environmental Protection Agency's (EPA) Notice of Comment Period on Clean Air Act Operating Permits Program Deficiencies.¹ The Air Permitting Forum is a group of companies focused on implementation issues related to permitting issues under the Clean Air Act, with a particular focus on Title V permitting concerns. APF members own and operate facilities throughout the country that are subject to Title V and have obtained or are in the process of obtaining operating permits.

APF members have worked for a smooth and reasonable implementation of the program, and therefore want to ensure that any deficiency notices issued to states are grounded in the regulatory and statutory requirements and are based on issues *previously raised* as deficiencies during public comment on the proposed approvals of these programs. APF is particularly concerned that the Agency's decision to solicit "deficiencies" in programs circumvents the process that Congress established for approval of state programs and that responsive notices of deficiency would be disruptive, unnecessary and unlawful.

The Clean Air Act Process for Approving State Programs Is a Final Process; Members of the Public (Including the Regulated Community) May Not Raise New Deficiencies After the Public Comment Period and Judicial Review Deadline on Approval of the State Program.

EPA's Federal Register notice requests comments from the public on "deficiencies" in state operating permit programs that were not identified in the approval process for those programs. At present, state programs have either achieved "full approval" or "interim approval." Fully approved programs are those that were determined to comply with the requirements of 40 CFR Part 70, in particular the minimum program elements in 40 CFR 70.4, after a process that included notice and an opportunity for public comment and the ability to seek judicial review. Similarly, programs that received interim approval were considered approved for all aspects of the program except those deficiencies

¹ Because the notice did not contain a docket number, APF is submitting these comments through email to each of the persons listed in the notice (per Roger Powell's concurrence) and is sending a paper copy of the comments to each through regular US mail. We have included Cheryl Newton in place of Mr. Mathur for the Region V contact because Ms. Newton is the new Acting Air Division Director for that Region. We request that the comments be forwarded to the appropriate person if Ms. Newton is not the correct recipient.

specifically identified in the Federal Register notice of interim approval. Again, the interim approval process involved notice and opportunity for comment and judicial review.

Under Section 307 of the Act, persons who wish to appeal a final agency decision, such as the one to approve a state Title V program, can do so, *but only if they file a petition for review in the appropriate Court of Appeal within 60 days of the final action*. A person who wishes to file a petition after the 60 days has expired may do so but only on grounds that arose after the period and that could not have been raised during the public comment period.

In the EPA's request for deficiencies on Title V programs, the Agency is apparently trying to give persons who failed to exercise their rights to review state programs, comment and appeal agency approvals if needed a second chance to request revision to state programs. Under the principles of Section 307, this is simply not permitted. Moreover, issuing notices of deficiency and requiring rule changes at a time when states are under tremendous pressure to issue Title V permits will be extremely disruptive to state programs.

Finally, we note that under Section 502(i), EPA has limited authority itself to reopen state programs. This provision states in relevant part:

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

EPA's authority to reopen programs is based on the state's failure to administer and enforce a program. Separate provisions of the law address states that have not submitted an approvable program (requiring EPA to apply sanctions and promulgate a federal program in such instances). Nothing indicates that Congress intended for EPA to periodically revisit approvals of state programs as the Agency suggests in its Federal Register notice.

Accordingly, APF members are concerned with EPA's recent efforts to force certain permitting authorities to revise their programs to conform to the Agency's changed view of approvable insignificant emission unit provisions. In addition to being unauthorized, these actions drain needed resources from permitting authorities that are seeking to issue permits expeditiously. Moreover, to the extent EPA wishes to revise its Title V regulations, any required changes in state programs should be accomplished in a single action in response to revision of the regulations. We understand that EPA intends to issue a revised proposal for the part 70 regulations and to finalize new permit revision and other regulatory provisions soon. Permitting authorities will need to revise their programs in response to the new part 70 requirements. It is at that time, and only in response to changed regulations, that permitting authorities should be required to invest the substantial resources required to revise their part 70 regulations.

EPA Is Appropriately Concerned with Deficiencies in Administration of Title V Programs.

As explained above, APF members agree that EPA has the authority to determine whether states are adequately administering their approved programs and to seek conformance by states for any identified deficiencies. Because the states have only recently begun to issue Title V permits to many of APF members' facilities, the deficiencies we have identified are limited at this time. We will apprise EPA of any program administration deficiencies that cannot otherwise be resolved as appropriate in the future.

The Ohio EPA Is Failing to Designate as State-Only Enforceable Permit Terms that Are Not Federally-Enforceable Under the SIP or Other Applicable Clean Air Act Regulations: Ohio EPA has repeatedly included state-only enforceable permit terms in the federally-enforceable section of the operating permit. OEPA has indicated that it is responding to an EPA policy for including any permit terms that were included in a state-issued permit under the SIP as federally enforceable. APF members believe that this action is inconsistent with Ohio EPA's approved Title V program, which like the federal program requires designation of state-only enforceable terms in the permit. OAC 3745-77-07(b).

Of particular concern to APF members is the apparent inclusion of state air toxics requirements as federally enforceable permit terms. OEPA state air toxics provisions are issued pursuant to the state's air toxics policy which has never been approved as part of the SIP. These terms are not permitted to be included as federally-enforceable permit terms. In addition, OEPA has taken the position that permit terms that were designated in a construction permit as being state-only enforceable must now be considered federally-enforceable. This conversion of state-only terms to federally enforceable terms constitutes a deficiency in Ohio's Title V program that must be remedied.

The New York Title V Operating Permit Program Is Imposing Emission Limits Which Are Not Based On Any Applicable Requirements of the Clean Air Act: New York's Title V program is being administered in a manner that is inconsistent with part 70 and the approved New York Title V program. Like the federal program, New York's Title V program does not provide authority to create new substantive requirements. 40 CFR 70.1. Title V was intended as a tool to simply record the requirements that exist in other substantive provisions of the Clean Air Act, such as NESHAPs, NSPS, SIP regulations, and construction permits.

In an effort to simplify permit issuance and minimize the expenses of the program, some states have implemented software programs that automatically prepare the Title V permit based on certain inputs. New York's program uses such a program but this program's design is such that it creates new requirements that are not based on any regulation or previously issued permit. As noted above, this is impermissible under Title V. In the "Process Permissible Emissions" part of the New York software, the program has fields for both pounds per hour and pounds per year emissions levels, called "PTE(s)". The software requires a numeric entry in each of these fields in order for a "permit to be generated." The written instructions further emphasize that both fields must have entries. While some emission units are subject to annual limits, they may not be subject to short term hourly limits. Thus, imposing an hourly limit impermissibly creates a new substantive requirement. Similarly, NSPS requirements are normally hourly limits but the New York program *requires* an additional annual limit also be imposed. This creation of a new annual limit is not allowed under the Title V program.

By using this new software program, New York is failing to administer its program consistent with the provisions of its approved federal regulations. Specifically, EPA should issue a notice of deficiency to require New York to revise its software program to avoid creation of new federally enforceable permit terms.

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Please contact Chuck Knauss at 202-424-7644 or Shannon Broome at 510-985-1710 with any questions regarding these comments.