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By facsimile

Docket A-93-50
Air and Radiation Docket
U.S. Environmental Protection Agency
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Washington, D.C. 20460

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Regions I – X Directors
U.S. Environmental Protection Agency
Addressees listed below

Re: Comments of the National Environmental Development Association/ Clean Air Regulatory Project on the U.S. Environmental Protection Agency's Notice of Comment Period on Operating Permits Program Deficiencies. 65 Fed. Reg. 77376 (December 11, 2000).

Dear Messrs. and Madams:

The National Environmental Development Association/Clean Air Regulatory Project ("NEDA/CARP")¹ submits the following comments in response to the Environmental Protection Agency's (EPA) Notice of Comment Period on Clean Air Act Operating Permits Program Deficiencies.

NEDA/CARP is a coalition of companies regulated under the Clean Air Act ("CAA" or the "Act"). Its members engage in a wide variety of industrial activities at their facilities, many of which are subject to the CAA's Title V Operating Permit Program. Our members have obtained Title V permits for many facilities and are in the process of obtaining Title V permits for the remainder of those subject to the program. In addition,

¹ NEDA/CARP is a group of companies in many industries that have strong common interests in Clean Air Act issues, including PSD. NEDA/CARP's members are the following: ALCOA, Inc.; The Boeing Company; DaimlerChrysler Corporation; Eli Lilly & Company; ExxonMobil Corp.; General Electric Company; Koch Industries, Inc.; Lucent Technologies; Merck & Co.; Occidental Chemical Corporation; Phillips Petroleum Company; and Procter & Gamble Co.

NEDA members participated in the development of state programs through the normal notice and comment procedures provided and where appropriate, submitted comments on the proposed approvals.

Summary - The Federal Register Notice states that EPA is providing a comment period requesting information on deficiencies in programs or program administration in settlement of a lawsuit filed by various professional environmental advocacy groups. 65 Fed. Reg. 77376. Our comments below are divided into two sections. Section I expresses our concern that EPA is violating its own regulations by identifying new deficiencies in state operating permit programs which it has already approved or for which it has given interim approval. Section II identifies administrative issues that are troubling and should be reviewed in specific state operating permit programs.

I. Federal Regulations Limit EPA's Ability to Find Deficiencies in State Operating Permit Programs

Under 40 CFR 70.10(b), EPA is authorized to issue notices of deficiency for a state's failure to administer its program in accordance with the EPA-approved regulations for the state. The process for objecting to a state's Title V regulations *that have been approved by EPA*, however, is clearly limited to the approval process outlined in those regulations. Under 70.4(e), states are required to adopt laws and regulations (pursuant to state procedures which include public comment), and to submit their proposed part 70 programs to EPA for approval. After submittal, EPA is required to make a determination of completeness, and within a year propose and finalize after public comment approval, interim approval or disapproval of the state's program.

The permit program approval process has been completed for each of the states and territories required to submit programs under part 70. See 40 C.F.R. Part 70, *Appendix A*. Many states have received a final full approval of their programs while other were granted interim approval and given 2 years to cure specified deficiencies at which point full approval would be granted to the programs.

The December 11, 2000 Federal Register notice references section 70.4(i) as providing authority for EPA to require state program revisions in response to newly identified deficiencies in a state's part 70 regulations, even if those deficiencies were not raised during the comment period on the proposed program approval and the state had received either full approval or an interim approval that did not reference these newly identified "deficiencies."

NEDA/CARP is concerned with the Agency's apparent assumption that previously approved programs can now be reopened and required to be changed absent some change in circumstance, such as a revision to federal or state law that alters the situation that existed when the original approval was granted. From a policy perspective, it is important to ensure stability in state part 70 programs as well as to provide certainty to regulators and

the regulated community regarding the validity and finality of Title V permits that are issued. From a legal perspective, we do not believe that Congress contemplated *post hoc* revisitation of approved Title V programs. This is evidenced by the elaborate process that Congress established for public review of state programs and their approval by EPA. Specifically, Clean Air Act Section 502(d)(a) requires the Administrator to provide notice and opportunity for public comment prior to approving or disapproving a program and Section 502(g) states that an interim approval "shall specify the changes that must be made before the program can receive full approval." A final full approval, interim approval or disapproval constitutes a final agency action and is subject to the judicial review provisions of Section 307(b)(1) of the Act, which requires petitions for review to be filed within 60 days of a final agency action.

Section 502(i) of the Act specifies the conditions under which the Administrator may find an approved state Title V program deficient. This provision clearly limits that authority to situations where the Administrator makes a determination that a permitting authority is "not adequately administering and enforcing" a program. Nothing in this section indicates that the Administrator may reopen a program simply because it has changed its mind regarding the provisions that were originally approved. Indeed, the statutory language focuses directly on the administration and enforcement of an approved program – according to the terms of that program. Accordingly, under the Act, EPA must find that a state is not following the *approved rules for its program* prior to issuing a notice of deficiency for failure to administer or enforce the program. Congress did not provide broader authority for EPA to mandate program revisions in cases where a state is simply administering the program as approved and the approval of that program was never challenged under Section 307(b).

EPA's regulations implementing these provisions of the Act are found in Sections 70.4(i) and 70.10(b) of the part 70 regulations. These provisions must be interpreted consistent with the authority granted by Congress in the statutory provisions noted above. Under Section 70.10(b), EPA may issue a notice of deficiency for failure to administer or enforce a program consistent with the requirements of the regulations. Section 70.4(i) provides in relevant part:

Program revisions. Either EPA or a State with an approved program may initiate a program revision. *Program revision may be necessary when the relevant Federal or State statutes or regulations are modified or supplemented.* The State shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures.

- (1) *If the Administrator determines pursuant to §70.10* that a State is not adequately administering the requirements of this part, or that the State's permit program is inadequate in any other way, the State shall revise the program or its means of implementation to correct the inadequacy. The program shall be revised within 180

days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years if the State demonstrates that additional legal authority is necessary to make the program revision.

Under this provision, which must be read consistent with the Agency's authority under the Act, program revisions are contemplated when relevant state or federal statutes or regulations are revised or when a notice of deficiency is issued. Under subparagraph (1), however, EPA can only issue a notice of deficiency if it determines that the program is inadequate pursuant to Section 70.10. As explained above, Section 70.10 notices of deficiency are limited to situations where a state is not administering or enforcing its program.

EPA's Federal Register notice appears to contemplate public comments which will provide "deficiencies" beyond those listed in the interim approvals for state programs or wholly new "deficiencies" for programs that have been fully approved. Neither the Clean Air Act nor the part 70 regulations authorize EPA to issue a notice of deficiency to states that are adequately administering their approved programs as written.² We believe that EPA must consider carefully any request to reopen a state program at this late date with the current burdens of issuing permits facing state permitting authorities. It is critical that states be allowed to focus their resources on issuing accurate and complete Title V permits that provide needed operating flexibility for sources. Any steps to undermine flexibility in Title V permits must be avoided.

To the extent that commenters identify deficiencies in the *administration or enforcement* of state Title V programs, NEDA/CARP agrees that the Agency may issue notices of deficiency to ensure that the programs are administered and enforced consistent with the approved regulations.

II. Deficiencies in the Administration of State Title V Programs

NEDA/CARP has identified deficiencies in the administration of certain state Title V programs and requests that these deficiencies be addressed by the EPA. Deficiencies in the Ohio, New York, Michigan, Indiana, and Missouri operating permit programs are detailed below.

² NEDA/CARP notes that EPA has taken preliminary steps to issue notices of deficiency to certain states regarding the provisions of their program related to insignificant emissions units (IEU's). Specifically, EPA has requested program changes in Jefferson County, Kentucky and Ohio and has indicated in the Federal Register notice granting full approval to the Washington Title V program that it intends to issue a notice of deficiency regarding that state's Title V program. The Clean Air Act and the regulations simply do not permit EPA to reopen state programs on the heels of granting full approval to them.

A. Ohio

Inclusion of State-Only Permit Terms as Federally-Enforceable Requirements in Title V Permits: Ohio EPA has determined that all provisions of construction permits must be included as federally-enforceable permit terms. This includes permit terms that are not necessary to attain and maintain the National Ambient Air Quality Standards, such as provisions related to the Ohio Air Toxics Policy which has never been incorporated into the approved State Implementation Plan. In addition, it includes provisions that had been specifically designated as being "state-only enforceable" in the original construction permit.

Under OAC 3745-77-07(b), Ohio EPA is required to designate as not being federally enforceable any permit terms that are not required under the Clean Air Act or that are imposed pursuant to state law only. Despite this clear mandate in the approved Title V program, OEPA has repeatedly included state-only enforceable terms on the federally-enforceable portion of permits. NEDA/CARP requests that EPA issue a Notice of Deficiency to Ohio EPA mandating that permit terms that are not required under the Act be labeled as state-only enforceable.

B. New York

Creation of New Substantive Requirements under Title V: Title V does not provide authority to states or EPA to impose new substantive requirements. 40 CFR 70.1. Instead, Title V permits must simply record the requirements that authorized by the substantive titles of the Act. Many states have developed software to assist in the preparation and tracking of Title V permits. The software, through use of automatic formatting or standard text inclusion, must not impose substantive new requirements. The New York program is an example where the design of the software program results in the addition of substantive new requirements in title V permits. In the "Process Permissible Emissions" part of the NYDEC software is fields for both pounds per hour and pounds per year emissions levels, called "PTE(s)". The software is designed such that a numeric entry in both of these fields is required and written instructions indicate that both fields must have entries. Some emission units in New York have pollutant specific annual emission limits established by PSD or nonattainment construction permits. Those underlying construction permits do not usually contain hourly emission limits. However, due solely to the design of the NYDEC permitting software, permit writers at the NYDEC must enter an hourly emission rate for such units. The "Process Permissible Emissions" term that contains the PSD or nonattainment annual emission limit must be on the Federal side of the permit because it is an applicable requirement. Thus, since the software requires creation of an hourly emission rate for each such term, that hourly number also appears on the Federal side of the permit and thus becomes a substantive new requirement.

Similarly, for those sources that take an annual emissions limit to cap emissions below PSD or nonattainment applicability, the permitting software requires an hourly

emission rate where no such requirement exists in underlying permits or rules. Similarly, applicability of NSPS because of a modification is determined based on changes in potential hourly emissions. A source is allowed to accept a cap on hourly emissions to avoid triggering NSPS requirements. No limit on annual emissions is necessary in these cases. However, again, due to the requirement of the NYDEC permitting software that both fields contain numeric entries, the permit writer must create an annual emission limit where no such applicable requirement existed.

Through the use of this new software program, New York is not failing to administer its program consistent with the provisions of its approved federal regulations. Specifically, EPA should issue a notice of deficiency to require NYDEC to revise its software program such that it will no longer create new federally enforceable permit terms where none previously had been imposed through underlying permits or regulations.

C. Michigan

Inclusion of State-Only Permit Terms as Federally Enforceable Requirements in Title V Permits and Designation of the Underlying Applicable Requirement: In some instances, the Michigan DEQ is designating certain state permit to install conditions as federally enforceable in its Title V Renewable Operating Permits (ROPs) even though these conditions are based solely on a state requirement. For example, the DEQ has designated state permit to install terms that were created to address the state air toxics requirements, such as stack parameters for sources of organics, as federally enforceable in these ROPs. It appears that the DEQ has taken the position that all state permit to install conditions are to be designated federally enforceable. NEDA/CARP requests that EPA issue a notice of deficiency or otherwise clarify to the DEQ that all permit terms and conditions based only on state rules should be identified as "state enforceable only".

Level of Required Periodic Monitoring: The Michigan DEQ is including periodic monitoring requirements in Title V permits that go beyond what is beneficial or necessary to insure compliance and these requirements go beyond what is contemplated in EPA's periodic monitoring guidance. For example, the DEQ has proposed a NOx performance test requirement to be conducted once every 24 months for a 120 MMBtu/hr natural gas-fired boiler with a NOx emissions limit of 0.17 lb./MMBtu. Since the boiler is only capable of burning natural gas, which results in NOx emissions that easily comply with this limit, retesting every two years is excessive and is not necessary to provide a reasonable assurance of compliance. While it might be reasonable to require an initial performance test to demonstrate that the boiler is meeting this limit, subsequent retesting is not necessary to provide a reasonable assurance of compliance. Under the federal part 70 regulations, monitoring authority is limited to that which is necessary to provide a reasonable assurance of compliance. Federally enforceable terms in the permit can require no more. The DEQ has indicated that this additional level of monitoring is reportedly authorized based on Michigan's Rule 213, which allows the DEQ to specify the content of a

ROP. If the DEQ continues to take this position, we request that EPA issue a notice of deficiency regarding this testing to require any such testing be designated as state-only requirements.

Specific Recordkeeping Forms: The DEQ is including specific recordkeeping forms as attachments to the Title V permits. These attachments do not provide facilities with any flexibility as to how compliance related information is recorded. If a ROP holder would like to use an alternative recordkeeping form, it must first seek approval from the DEQ. NEDA/CARP believes that this advance approval process places an inappropriate and unnecessary burden on ROP holders and impermissibly federalizes state forms that have not been subject to public notice and comment. The use of these forms is being mandated as a federally enforceable requirement since they are specified to be used to demonstrate compliance with certain ROP terms and conditions. NEDA/CARP requests that EPA issue a notice of deficiency to DEQ requiring that the DEQ omit the requirement to use any particular forms or to obtain approval for alternative forms.

D. Indiana

Level of Required Periodic Monitoring: Indiana DEM is requiring new and significant periodic monitoring conditions in permits that go beyond what is beneficial, reasonable or required by federal law. In one example, the DEM required that a facility that had previously been required to perform a daily inspection for visible emissions to increase these inspections to every shift, even though the source was not a significant source of visible emissions and the increased frequency would not provide additional assurance of compliance. Furthermore, these requirements are being applied to sources that have not had historical opacity problems. The DEM has indicated that it believes that this increased level of periodic monitoring is required by EPA and has made all of these requirements federally enforceable. State programs are limited in the periodic monitoring that they impose to that which is necessary to provide a reasonable assurance of compliance under Section 70.6(a)(3). The imposition of these burdensome and unnecessary opacity requirements goes well beyond what is necessary to provide a reasonable assurance of compliance. Including such provisions as federally enforceable requirements is a failure to administer the approved program according to its terms. Accordingly, NEDA/CARP requests that EPA issue a notice of deficiency requiring that DEM not impose monitoring that beyond what is required under the approved part 70 regulations. If the DEM continues to take the position that monitoring that exceeds federal guidelines is required, then EPA must require these provisions to be designated as "state enforceable only."

E. Missouri

Level of Detail in Title V Permits: NEDA/CARP believes that a number of draft Title V permits issued by the Missouri DNR contain detail that should not be designated as federally enforceable conditions. For example, some draft permits contain information regarding the manufacturer and model of certain equipment. Such information does not

constitute applicable requirements within the meaning of 40 CFR 70.2 and therefore is not appropriately included in the permit as enforceable requirements. As a practical matter, including this information will lead to needless permit revisions. If this information is included in the Title V permit, EPA should require that the Missouri DNR note that it is for informational purposes only and that it is not considered federally enforceable.

Level of Periodic Monitoring: The Missouri DNR is requesting periodic monitoring provisions in Title V permits that exceed what EPA requires and what is reasonable and beneficial. For example, in draft Title V permits, the DNR has requested that some facilities perform periodic Method 9 opacity testing for sources that are not significant sources of particulate emissions or opacity. This requirement goes beyond what is needed to provide a reasonable assurance of compliance. NEDA/CARP requests that EPA issue a notice of deficiency to require that the DNR discontinue including these provisions in Title V permits or that they be designated as state-only enforceable terms.

Specific Recordkeeping Forms: The Missouri DNR is including specific recordkeeping forms as attachments to the Title V permits. These attachments do not provide facilities with any flexibility as to how compliance related information is recorded. The attachments are also are not suitable for electronic information collection and recording. Also, the use of these forms is being treated as a federally enforceable requirement since they are specified to be used to demonstrate compliance with certain Title V permit terms and conditions. NEDA/CARP requests that EPA issue a notice of deficiency to prevent the DNR from imposing its forms, which have not been subject to review as part of the approved program, and to allow instead facilities the additional flexibility to maintain records in other formats that record the same required information.

VI. Conclusion

NEDA/CARP would be pleased to provide additional information regarding the above comments. If you have any questions, please call me at the telephone number listed below.

Respectfully submitted,

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