

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Comments Requesting a Finding of Deficiency With Respect to the Title V Program
Administered by the Ohio Environmental Protection Agency**

These Comments are submitted in response to the United States Environmental Protection Agency's "Notice of Comment Period on Program Deficiencies," 65 Fed. Reg. 77376 (December 11, 2000) and under 40 CFR § 70.10 on behalf of Ohio Public Interest Research Group, Inc., Ohio Environmental Council, Inc., The Buckeye Forest Council, Inc., Earth Day Coalition, Inc., Clean Air Conservancy, Ohio Citizen Action, Keith Bailey, Caroline Beidler, and John J. Nicastro, Sr. (collectively, "Commenters"). These Comments identify deficiencies in Ohio's Title V regulations and in the manner in which the Ohio Environmental Protection Agency ("Ohio EPA") is administering the Ohio Title V program. Commenters appreciate the opportunity to share their concerns with the United States Environmental Protection Agency ("U.S. EPA") and hope that the agency will act promptly to ensure that Ohio residents receive all of the benefits offered by the Clean Air Act Title V program.

These Comments do not supersede or amend the "Petition for Withdrawal of the Authorization of the RCRA Subtitle C and the Approval of CAA Title V and FWPCA NSPDS and General Permit Programs of the State of Ohio" (as amended and supplemented in September 1998, August 1999, and January 2000) filed by the Sierra Club, Ohio Citizen Action, Rivers Unlimited, and the Ohio Public Interest Research Group. Rather, these Comments identify additional, specific deficiencies with respect to Ohio's Title V regulations and Ohio EPA's implementation of the Ohio Title V program. Commenters seek a formal determination by U.S. EPA that these deficiencies violate 40 CFR Part 70.

I. Ohio EPA is in Violation of the Statutory Deadlines for Acting on Permit Applications

Under the Clean Air Act, Ohio EPA was required to take final action on all initial Title V permit applications within three years of the U.S. EPA's approval of the Ohio Title V program. Since Ohio's program received full U.S. EPA approval on August 15, 1995, all initial Title V permits should have been issued by August 15, 1998. Ohio EPA dramatically missed that deadline. According to information provided on U.S. EPA's website, Ohio EPA had only acted on 26% of all permit applications as of October 18, 2000. Based on data provided on Ohio EPA's website, as of January 1, 2001 Ohio EPA had taken final action on only 27% of all permit applications. See <http://www.epa.gov/ARD-R5/permits/oper/table.htm>.

While many states failed to meet the Clean Air Act deadline for taking final action on permit applications, Ohio is unusual in that a large number of the state's permits are bottlenecked in the draft or preliminary proposed stage. In fact, based on data provided by Ohio EPA's Division of Air Pollution Control, as of February 28, 2001, 572 permits have been issued in draft form. Of these permits, 226 have been issued as final. Of the 346 drafts that have not been issued as final permits, 239 have been in draft form for at least one year. Eighty-three (83) have been in draft form for more than two years. Eighteen (18) have been in draft form for more than

3 years. One permit, for American Roller Co. (Facility ID 1431070666) has been in draft form for more than 4 years. These permits have all been subject to public comment, but for some reason Ohio EPA has failed to submit them as proposed permits to U.S. EPA. Given that developing an initial draft permit is the most time-intensive part of the permitting process, it is likely that Ohio EPA's failure to issue Title V permits in accordance with the statutory deadline is based on something more than a simple lack of resources.

It may be that the draft permit bottleneck is primarily the result of a protracted dispute between U.S. EPA and Ohio EPA over whether "Best Available Technology" ("BAT") requirements in Ohio preconstruction permits are to be included in Title V permits as federally enforceable conditions. On June 18, 1999, after numerous exchanges between the two agencies, U.S. EPA finally sent a letter to Ohio EPA that threatened a U.S. EPA objection to any Title V permit that failed to include BAT requirements as federally enforceable conditions. Based on the permit tracking data available on Ohio EPA's website, it appears that Ohio EPA largely stopped forwarding Title V permits to U.S. EPA review for a substantial period of time following receipt of the letter. Thus, Ohio EPA issued very few final Title V permits even though large numbers of permits had been drafted and released for public comment.

As discussed below, Commenters agree that the Administrator must object to any Title V permit that fails to include BAT requirements as federally enforceable conditions. In addition to objecting to defective permits, however, U.S. EPA must require Ohio EPA to comply with the statutory time frame for permit issuance. If Ohio EPA proposes a defective permit to U.S. EPA, the Administrator must object to the permit and give Ohio EPA 90 days to submit a revised permit. See 40 CFR § 70.8(c)(4). If Ohio EPA fails to correct the deficiencies in the permit within the 90-day time frame, the U.S. EPA Administrator must "issue or deny the permit in accordance with the requirements of the Federal permit program promulgated under title V of the Act."¹ 40 CFR § 70.8(c)(4). In this way, the permitting process continues to move forward even when disagreements arise between U.S. EPA and a state permitting authority.

In addition to failing to abide by the overall statutory deadlines for permit issuance, Ohio EPA consistently fails to respond to public comments on draft Title V permits within a reasonable timeframe. And, even if Ohio EPA does respond to public comments, the agency fails to then forward a proposed permit to U.S. EPA. As a result, the time at which a member of the public can challenge the permit in the form of a petition to U.S. EPA is delayed for an indeterminate amount of time. Further, because a final permit is not issued until after U.S. EPA's 45-day review period, the opportunity for a member of the public to challenge the final permit in state court is also delayed for an indeterminate amount of time. Commenters are aware of the following Ohio Title V permits that are languishing following the submission of public comments during the formal public comment period:

Permit: Lake Shore Power Plant, Cleveland, OH

Comments by: Earth Day Coalition, Sierra Club, Clean Air Conservancy, et al.

Date Submitted: July 6, 1999 (oral testimony and written comments)

Ohio EPA Response: No formal response.

Permit Status: Draft

¹ The federal regulations governing the federal permit program are found in 40 CFR Part 71.

Permit: Lincoln Electric Company
Comments by: Clean Air Conservancy
Date Submitted: September 18, 2000
Ohio EPA Response: No formal response
Permit Status: Draft

Permit: Hydraulic Press Brick, Independence, OH
Comments by: John Nicaastro, Independence Mining and Environmental Committee, Sierra Club, numerous individuals
Date Submitted: Sierra Club comments submitted May 4, 2000, Other comments submitted June 27, 2000 (written and oral testimony) at the public hearing
Ohio EPA Response: No response
Permit Status: Draft

Permit: Cleveland Electric Illuminating Co., Ashtabula Plant
Comments by: Sierra Club
Date Submitted: Jan 6., 2000
Ohio EPA Response: No response

Permit: Cleveland Electric Illuminating Co., Avon Lake Power Plant
Comments by: Sierra Club
Date Submitted: March 6, 2000
Ohio EPA Response: No response
Permit Status: Draft

Permit: Cleveland Electric Illuminating Co., Eastlake Plant
Comments by: Sierra Club, Ohio Public Interest Research Group, Inc. ("Ohio PIRG")
Date Submitted: Sierra Club comments submitted September 14, 1999 and on December 16, 1999 (comment period extended at Sierra Club's request), Ohio PIRG comments submitted September 15, 1999
Ohio EPA Response: No response
Permit Status: Draft

Permit: Day-Glo Color Corp.
Comments by: Sierra Club
Date Submitted: before or during April, 1999
Ohio EPA Response: No response
Permit Status: Draft

Permit: Dixon-Ticonderago Co., New Castle Refractories Div.
Comments by: Sierra Club
Date Submitted: July 30, 1999
Ohio EPA Response: No response
Permit Status: Draft

Permit: DP&L, O.H. Hutchings Generating Station
Comments by: Sierra Club
Date Submitted: January 28, 2000
Ohio EPA Response: No response
Permit Status: Draft

Permit: LTV Lime Plant
Comments by: Sierra Club
Date Submitted: January 29, 2000
Ohio EPA Response: Response dated June 27, 2000
Permit Status: Draft

Permit: Nylonge Corporation
Comments by: Sierra Club
Date Submitted: July 13, 2000
Ohio EPA Response: Responses on Sep 27, 2000 and on Feb 22, 2000
Permit Status: Draft

Permit: Plaskolite, Inc.
Comments by: Sierra Club
Date Submitted: July, 1999
Ohio EPA Response: Response dated July 10, 2000
Permit Status: Draft

Permit: Roton Corporation
Comments by: Sierra Club
Date Submitted: July 13, 1999
Ohio EPA Response: No response
Permit Status: Draft

Formal administrative action against Ohio EPA over its failure to comply with the statutory deadline for permit issuance is long overdue. In the absence of formal action, Commenters have no reason to believe that Ohio EPA will begin processing permits in a timely manner.

U.S. EPA must issue a formal finding that Ohio EPA is inadequately administering the state's Title V program due to its failure to take final action on permit applications within a time period that is anywhere close to the statutory deadline.

II. Permits Issued by Ohio EPA Improperly Limit the Use of Credible Evidence to Prove a Violation of an Applicable Requirement

As underscored by U.S. EPA's Credible Evidence Rule, 62 Fed. Reg. 8314 (Feb. 24, 1997), the Clean Air Act allows citizens, Ohio EPA, U.S. EPA, and the facility itself, to rely upon any credible evidence to demonstrate violations of or compliance with permit terms and conditions. A review of correspondence between Ohio EPA and U.S. EPA Region 5 reveals that

the inclusion of language in Ohio Title V permits that limits credible evidence has been the subject of discussion between the two agencies for several years. As a result of these discussions, Ohio EPA agreed to include the following general condition in each Title V permit:

Nothing in this permit shall alter or affect the ability of any person to establish compliance with, or a violation of, any applicable requirement through the use of credible evidence to the extent authorized by law. Nothing in this permit shall be construed to waive any defenses otherwise available to the permittee, including but not limited to, any challenge to the Credible Evidence Rule (see 62 Fed. Reg. 8314, Feb. 24, 1997), in the context of any future proceeding.

See Letter from Cheryl Newton, U.S. EPA to Robert F. Hodanbosi, Ohio EPA, dated December 28, 1998. Despite this general condition, Ohio Title V permits are filled with facility-specific conditions that purport to limit the type of evidence that is to be used for compliance purposes. For example, the permit for *Cleveland Electric Illuminating, Avon Lake Power Plant*, Facility ID 02-47-03-0013 (Draft issued 1/31/00)² includes the following language on page 13:

Compliance with the visible emission limitations in OAC rule 3745-17-07(A) shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures specified in OAC rule 3745-17-03(B)(1).

Similar language is also included on pages 18, 28, and 35 of the permit. Page 13 of the draft permit also includes the following language with respect to the facility's compliance with sulfur dioxide limitations:(pp. 13, 18):

Compliance with the sulfur dioxide emissions limitation shall be based upon a rolling, 30-day average of the daily sulfur dioxide emission rates, in accordance with the USEPA's policy entitled "Enforcement Policy for Sulfur Dioxide Emission Limitations in Ohio" and dated February 11, 1980 (45 FR 9101).

This language is also included on page 18 of the draft permit.

A review of other draft and final permits posted on Ohio EPA's website reveals that every permit includes language that purports to limit the type of evidence that can be used to show that a facility is in violation of an applicable requirements. The general credible evidence condition that Ohio EPA includes in each permit does not fully remedy problems caused by the

² All draft, proposed, and final Ohio Title V permits are available on Ohio EPA's website at http://www.epa.state.oh.us/dapc/title_v/permits/tvpermit.html. Since U.S. EPA, Ohio EPA, and members of the public can access the permits on this site, none of the permits discussed in these Comments are attached as exhibits. All permits posted on Ohio EPA's website should be considered part of the record on which these Comments are based.

agency's liberal use of language in Title V permits that limits the use of credible evidence. Once a facility receives a Title V permit, the permit is the primary document to be used for tracking the facility's compliance with applicable requirements. Because of the permit shield, the permit effectively becomes the law as it applies to the facility. Thus, though the general condition allows the use of credible evidence "to the extent authorized by law," a court may construe the specific language included in the permit as the law for compliance purposes.

Commenters request that U.S. EPA issue a formal finding that Ohio EPA is inadequately implementing the Title V program by including language in Ohio permit that limits the type of evidence that can be used for compliance purposes. U.S. EPA should direct Ohio EPA to revise any Title V permit language that specifies certain monitoring methods on which the facility's compliance status will be determined. No single monitoring method can be the exclusive means for proving whether a facility is violating a federally enforceable requirement.

III. Ohio's Title V Permits Fail to Require Adequate Six Month Monitoring Reports and Prompt Deviation Reports

Regular, reliable reporting of monitoring results and deviations from permit requirements is critical to the success of the Title V program. In addition to the annual compliance certification, 40 CFR § 70.6(a)(3)(iii) mandates that a Title V permit require:

(A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with § 70.5(d) of this part.

(B) 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.

40 CFR § 70.6(a)(3)(iii).

Commenters' review of Ohio Title V rules reveals that these rules fail to satisfy Part 70 requirements in several key ways. Further, the actual terms that Ohio EPA places in Title V permits deviate even further from federal requirements. The numerous flaws in Ohio's Title V reporting requirements are discussed in detail below.

A. Ohio's Title V Permits Do Not Require Facilities to Include Sufficient Information in Six Month Monitoring Reports

Under 40 CFR § 70.6(a)(3)(iii) (quoted above), a Title V permit must require the permittee to submit reports of any required monitoring at least once every six months, with

instances of deviations clearly defined in those reports. According to conditions included in Ohio's Title V permits, however, the only information that must be included in a six month monitoring report is an identification of any instance of deviation. If no deviation was recorded over the relevant period, the facility is simply required to submit a report stating that no deviations occurred. In particular, each Ohio Title V permit includes language with respect to six month monitoring reports that is similar to the following:

If no deviations occurred during a calendar quarter, the permittee shall submit a quarterly report, which states that no deviations occurred during that quarter.

See, e.g., Goodyear Tire and Rubber Co., Facility ID 16-77-01-0193, Final permit issued 6/08/00, p. 8.³

Ohio's decision to interpret the federal six month reporting requirement as only a deviation reporting requirement violates 40 CFR Part 70. If U.S. EPA intended for monitoring reports to consist only of a compilation of any deviations recording during the reporting period, the regulation would have stated that. Instead, the regulation states that reports of all required monitoring must be submitted every six months, with instances of deviation from requirements clearly identified. There are many reasons why regulators and members of the public should want to see reports of required monitoring even if no deviations have been recorded over the reporting period. First, it is much easier to confirm that a facility actually performed the required monitoring if the report includes actual monitoring results rather than just a statement that no deviations were recorded. Second, regulators and members of the public may be interested in how close the facility is coming to violating a standard. If periodic monitoring results show that the facility is typically operating quite close to the legally permitted emission level, it may be necessary to revise the permit to include more frequent monitoring. Similarly, if a monitoring device is providing data that is substantially different from what was expected, the monitoring device may be malfunctioning or the required monitoring method may not be the correct method for assuring the facility's compliance. If the facility simply submits a one-sentence report stating that no deviations occurred during the quarter, such problems would escape public notice.

Commenters ask U.S. EPA to issue a formal notice of implementation deficiency to Ohio EPA based on the agency's failure to require Title V facilities to submit adequate reports of all required monitoring at least every six months. Title V facilities must be required to submit six month monitoring reports that document the results of any required monitoring, regardless of whether deviations occurred during the reporting period.

³ Page 1 of the Goodyear Tire & Rubber Co. permit is the first place where reporting requirements are described, but page 1 refers the reader to the condition quoted above "if no deviations occurred during the quarter." Note that reports of "emission limitations, operational restrictions, and control device operating parameter limitations" are submitted on a quarterly basis, while reports of "monitoring, recordkeeping, and reporting requirements" are submitted once every six months. See Goodyear Tire Permit, p. 1. With respect to monitoring, recordkeeping, and reporting requirements, the permit states that "[I]f no deviations are recorded over the six month period, the permittee shall submit a semi-annual report, which states that no deviations occurred during that period." Id.

B. Ohio Does Not Require Facilities to Promptly Report Deviations From Permit Conditions

Ohio's Title V program is also deficient in that facilities are not required to submit prompt reports of deviations as required by 40 CFR § 70.6(a)(3)(iii)(B). This problem occurs in both Title V regulations and in conditions included in Title V permits. In fact, while Ohio's Title V regulations fail to satisfy the minimum requirements in 40 CFR Part 70, the permit conditions stray even farther from the minimum federal requirements and actually conflict with the Ohio regulations.

The fundamental problem is that Ohio's Title V program merges the requirement that a facility submit a prompt report of any deviation with the requirement that a facility submit reports of any required monitoring at least every six months. As a result, deviations need not be reported except as part of the required monitoring reports. Under Ohio Title V permits, reports of deviations from emission limitations, operational restrictions, and control device operating parameter limitations are to be submitted on a quarterly basis. Reports of deviations from monitoring, recordkeeping, and reporting requirements are due every six months. Thus, "prompt" reports of deviations actually take place only every three to six months, depending on the type of violation. Specifically, each Ohio Title V permit includes the following condition:

Except as may otherwise be provided in the terms and conditions for a specific emissions unit, the permittee shall submit required reports in the following manner: . . .

Quarterly written reports of (i) any deviations from federally enforceable emission limitations, operational restrictions, and control device operating parameter limitations, excluding deviations resulting from malfunctions reported in accordance with OAC rule 3745-15-06, that have been detected by the testing, monitoring and recordkeeping requirements specified in this permit, (ii) the probable cause of such deviations, and (iii) any corrective actions or preventive measure taken, shall be promptly made to the appropriate Ohio EPA District Office or local air agency. These quarterly written reports shall satisfy the requirements of OAC rule 3745-77-07(A)(3)(c)(I) and (ii) pertaining to the submission of monitoring reports every six months and OAC rule 3745-77-07(A)(3)(c)(iii) pertaining to the prompt reporting of all deviations except malfunctions, which shall be reported in accordance with OAC rule 3745-15-06.) See B.6 below if no deviations occurred during the quarter.

Written reports, which identify any deviations from the federally enforceable monitoring, recordkeeping, and reporting requirements contained in this permit shall be submitted to the appropriate Ohio EPA District Office or local air agency every six months, i.e., by January 31 and July 31 of each year for the previous six calendar

months. These semi-annual written reports shall satisfy the requirements of OAC rule 3745-77-07(A)(3)(c)(i) and (ii) pertaining to the reporting of any deviations related to the monitoring, recordkeeping, and reporting requirements. If no deviations occurred during a six-month period, the permittee shall submit a semi annual report, which states that no deviations occurred during that period.

(Emphasis added), See e.g., draft Avon Lake Power Plant Permit, p. 1.

Strangely, the condition quoted above conflicts with Ohio's Title V regulations, which require that "[v]erbal⁴ reports . . . shall be submitted to the director as soon as practicable, consistent with diligent verification and certification, but in no case later than three business days after discovery of the deviation, with a follow up written report within thirty days after such discovery." OAC rule 3745-77-07(A)(3)(c). With the exception of deviations caused by malfunctions (discussed in the next section of these comments), Ohio Title V permits do not require a facility to notify Ohio EPA within 3 days after discovering a deviation, either orally or in writing. Furthermore, the majority of written notifications will take place more than thirty days after discovery of a violation, since facilities are only required to submit these written notices as part of their quarterly or six month monitoring reports.

Commenters assert that neither Ohio's Title V regulations nor the reporting requirements that are actually included in Ohio Title V permits satisfy 40 CFR Part 70's prompt reporting requirement. The argument against the approach taken by Ohio EPA is best made by U.S. EPA in the Federal Register notice proposing interim approval of Arizona's Title V program. In that notice, U.S. EPA stated:

The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A).

60 Fed. Reg. 36083 (July 13, 1995).

In general, Commenters agree with U.S. EPA that deviation reports must be submitted within two to ten days, though deviations that present a significant health or environmental risk must be reported more quickly. In addition, these reports must be made in writing. Notification by telephone is inadequate to satisfy the deviation reporting requirement. As a practical matter, government regulators and concerned members of the public need for there to be a paper trail in order to determine in a timely fashion whether a facility is operating in ongoing compliance with

⁴ Commenters assume that Ohio EPA used "verbal" to mean "oral."

all permit conditions. Moreover, as a legal matter, it is clear that deviation reports must be in writing because 40 CFR § 70.6(c)(1) provides that “[a]ny document (including reports) required by a part 70 permit shall contain a certification by a responsible official that meets the requirements of § 70.5(d) for this part.” Obviously, any such certification would need to be in writing.

Ohio EPA’s policy of allowing reports of deviations to be submitted solely as part of the three or six month monitoring reports violates both the letter and the spirit of federal regulations governing the Title V program. Since 40 CFR § 70.6(a)(3)(iii)(A) establishes prompt reporting of permit deviations as a distinct requirement from the requirement to submit semiannual monitoring reports, Ohio’s decision to merge these two requirements is legally unjustified. Commenters ask U.S. EPA to make a formal determination that Ohio EPA’s failure to require Title V facilities to submit prompt reports of deviations violates 40 CFR Part 70.

C. Ohio Title V Permits Purport to Allow Facilities to Disregard Certain Kinds of Monitoring Data for Purposes of Six Month Monitoring Reports and Deviation Reports

A primary purpose of the Title V program is to provide government regulators and concerned members of the public with a simple way to determine whether a facility is operating in violation of applicable requirements. As discussed above, this goal is achieved, in part, by requiring Title V facilities to submit prompt reports of any deviation from permit conditions, and reports of any required monitoring at least every six months. See 40 CFR § 70.6(a)(3)(iii) (quoted above on page 6). Unfortunately, Ohio’s Title V regulations limit the type of monitoring data that a facility official must review in determining whether his or her facility is operating in compliance with permit conditions. Under Ohio’s rules, facilities are only required to report deviations that are measured by “the compliance method required under the permit.” In particular, Ohio’s Title V regulations state that the permit must require the following:

- (i) That the permittee submit a report of any required monitoring every six months. . .
- (ii) That each report submitted under paragraph (A)(3)(c)(i) of this rule shall clearly identify any deviations from permit requirements since the previous report that have been detected by the compliance method required under the permit and any deviations from the monitoring, recordkeeping, and reporting requirements under the permit;
- (iii) That each permit shall require prompt reporting of deviations from federally enforceable permit requirements that have been detected by the compliance method required under the permit, including deviations attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken.

OAC rule 3745-77-07(A)(3)(c) (emphasis added).

A regulation that only requires a permittee to report deviations measured by the “compliance method” is problematic because the permittee could interpret this terminology to cover certain monitoring methods and not others. In fact, Ohio’s Title V permits always identify a certain kind of monitoring method as the method that will be used to determine compliance. For example, the draft permit issued to Cleveland Electric Illuminating, Avon Lake Power Plant, Facility ID 02-47-03-0013 (Dated 1/31/00)(“the Avon Lake Power Plant permit”), states that “compliance with the visible emission limitations in OAC rule 3745-17-07(A) shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9, and the procedures specified in OAC rule 3745-17-03(B)(1).”⁵ See Avon Lake Power Plant permit p. 13. In a different section, the permit requires the facility to operate and maintain a Continuous Opacity Monitoring System (“COMS”), but the permit does not say that data from the COMS will be used to determine compliance. See Avon Lake Power Plant permit p. 10. Thus, it appears that the “compliance method” under OAC rule 3745-77-07(A)(3)(c) is Method 9. The permittee could argue that due to the language of OAC rule 3745-77-07(A)(3)(c), the permittee is under no obligation to report deviations measured by the COMS in either the six month monitoring reports or the prompt deviation reports.

The damage caused by the flawed language in Ohio’s Title V regulations is somewhat mitigated by the fact that Ohio EPA does not include the exact regulatory language in Title V permits. Instead of stating that the facility must report deviations measured by the “compliance method,” it appears that Ohio Title V permits state that the facility must report deviations “that have been detected by the testing, monitoring, and recordkeeping requirements specified in this permit.” See, e.g. Avon Lake Power Plant permit, p. 1. Even this language, however, adds a limitation to the reporting requirement that is not included in 40 CFR Part 70. Under Part 70, a facility must report any deviation from permit conditions, even if the deviation is detected by monitoring that is not required under the terms of the facility’s Title V permit. So, for example, if a facility operates continuous emissions monitors, but these monitors are not required under the facility’s Title V permit, the facility cannot ignore data from the continuous monitors that indicates that the facility is violating a permit condition. U.S. EPA identified some version of this problem when it reviewed a draft of Ohio’s Title V regulations in 1993. See “USEPA Comments on the Ohio Title V Pre-draft Rules,” under cover letter dated October 22, 1993 from Valdas V. Adamkus, U.S. EPA Regional 5 Administrator, to Donald R. Schregardus (commenting that with respect to draft OAC rule 3745-77-07(A)(3)(c)(iii), “this provision must require prompt reporting of all deviations from permit requirements and not just the ones ‘detected by monitoring requirements in the permit.’”)(Attached as Exhibit A). It is unclear why the problem in the regulations persisted even after U.S. EPA informed Ohio EPA of its concerns.

Regardless of the language used in Ohio Title V permits, existing Ohio Title V regulations appear to authorize Ohio EPA to issue a permit that allows a facility to ignore relevant monitoring data when submitting Title V compliance reports. Commenters ask U.S. EPA to make a formal determination that this program flaw violates 40 CFR Part 70.

⁵ Method 9 is a visible emissions test that is performed by a trained human “smoke reader.” Facilities that rely on Method 9 to assure their compliance with opacity limits typically perform a Method 9 test once or twice each day.

D. Ohio Does Not Require Facilities to Report Deviations Due to Malfunction Unless the Malfunction Lasts More Than 72 Hours

Ohio's Title V permits are also deficient because they fail to require adequate reporting of deviations from permit conditions that are purportedly caused by equipment "malfunction."

Under 40 CFR § 70.6(a)(3)(iii)(B), a Title V facility must promptly report all "deviations from permit requirements," including "those attributable to upset conditions as defined in the permit." 40 CFR § 70.6(a)(3)(iii)(A) requires that "[a]ll instances of deviations from permit requirements must be clearly identified in [six month monitoring] reports." Essentially the same language pertaining to "upset conditions" is included in OAC rule 3745-77-07(A)(3)(c). The problem with reporting of deviations caused by malfunction only shows up in Ohio's Title V permits, which each include a general condition stating that deviations caused by malfunction "shall be reported in accordance with OAC rule 3745-15-06." See e.g., draft Avon Lake Power Plant Permit, p. 1. Each permit specifically states that "quarterly reports shall exclude deviations resulting from malfunctions reported in accordance with OAC rule 3745-15-06." Id.

Under OAC rule 3745-15-06, a facility is not required to provide Ohio EPA with a written report of a deviation caused by a malfunction unless the malfunction lasts more than 72 hours. Specifically, OAC rule 3745-15-06(B) provides:

(B) Malfunctions of air pollution control equipment shall be reported as follows:

(1) In the event that any emission source, air pollution control equipment, or related facility breaks down in such a manner as to cause the emission of air contaminants in violation of any applicable law, the person responsible for such equipment shall immediately notify the Ohio environmental protection agency district office or delegate agency of such failure or breakdown. If the malfunction continues for more than seventy-two hours, the source owner or operator shall provide a written statement to the director within two weeks of the date the malfunction occurred.

Since a written report is not required for a deviation caused by a malfunction that lasts less than 72 hours, and Ohio's Title V permits specifically exclude this type of permit deviation from the semi-annual monitoring reports, the public has no way of uncovering these deviations. This is true no matter how frequently malfunctions occur at a facility. Moreover, Ohio's definition of malfunction includes scheduled maintenance activities, so long as the maintenance "is scheduled to prevent a malfunction which would occur within two weeks if the maintenance were not performed." OAC rule 3745-15-06(A). Thus, deviations that take place under a variety of different conditions are shielded from public review.

As discussed on page 9, prompt deviation reports must be in writing. While Ohio EPA may exercise its discretion in deciding whether to bring an enforcement action against a facility for a deviation caused by malfunction, Ohio EPA is not authorized to waive the prompt reporting

requirement under 40 CFR § 70.6(a)(3)(iii)(B) for any type of deviation. Furthermore, these deviations must be included in the monitoring reports required under 40 CFR § 70.6(a)(3)(iii)(A). The primary value of six month monitoring reports is that they allow government regulators and members of the public to obtain a quick overview of the compliance status of a facility. If monitoring reports indicate that equipment malfunctions occur frequently at a particular facility, this may be cause for concern. It could be that the facility is not maintaining its equipment properly or that the equipment is outdated and needs to be replaced. Because Ohio EPA does not require deviations caused by malfunctions to be included in the regular monitoring report, however, government regulators and members of the public cannot tell how frequently malfunctions occur at a facility. Undoubtedly, this lack of information interferes with the ability of regulators and the public to determine whether a facility is operating in compliance with permit conditions.

For the Title V program to assure the public that a facility is complying with applicable requirements, the facility's monitoring reports must include sufficient data. This data must include, but not be limited to, all instances of deviations from permit conditions. Commenters ask U.S. EPA to make a formal determination that Ohio EPA is inadequately administering Ohio's Title V program by failing to require facilities to submit adequate reports of deviations caused by equipment malfunction.

IV. Language Included in Ohio Title V Permits Can be Interpreted as Allowing Facilities to Rely Exclusively on Data Obtained from Specified "Compliance Methods" When Submitting Annual Compliance Certifications

As discussed above in Section III.C., Ohio Title V permits typically designate a particular method by which compliance will be determined with each applicable requirement. As with deviation reports and six month monitoring reports, permit language that limits the type of evidence used for compliance purposes may affect the content of annual compliance certifications. In particular, a facility official may decide that he or she is not obligated to admit to deviations from permit conditions that are measured by methods other than those that are designated as "compliance methods."

Correspondence exchanged between U.S. EPA and Ohio EPA indicates that Ohio EPA, in fact, "does not agree that the Title V permits can require [Continuous Opacity Monitoring Systems] for compliance purposes. [Ohio EPA] staff have indicated an understanding that the permit must instead reference only the compliance method required by the SIP, Method 9 in this case." Letter from Pamela Blakley, U.S. EPA Region 5, to Robert F. Hodanbosi, Ohio EPA, dated September 27, 2000 ("the U.S. EPA COMS letter").

It is obvious from the U.S. EPA COMS letter that Ohio's designation of particular methods as "compliance" methods may affect the content of compliance certifications. In the letter, U.S. EPA informs Ohio EPA that no matter what method is designated as the compliance method, each facility is obligated to consider COMS data when submitting its annual compliance certification. U.S. EPA bases this argument on 40 CFR § 70.6(c)(5)(iii)(B), which provides for the use of "any material information" in certifying compliance with the Title V permit. However, Ohio's Title V rules do not include this "any material information" language. Rather,

Ohio's rules are based on an older version of Part 70 and require that compliance certifications include the following:

- (i) The identification of each term or condition of the permit that is the basis of the certification;
- (ii) The permittee's current compliance status;
- (iii) Whether compliance was continuous or intermittent;
- (iv) The method(s) used for determining the compliance status of the source, currently and over the reporting period as required by paragraph (A)(3) of this rule; and
- (v) Such other facts as the director may require in the permit to determine the compliance status of the source.

OAC rule 3745-77-07(C)(5)(c). Paragraph (A)(3) refers exclusively to monitoring that is included in the permit.

For purposes of the annual compliance certification, a facility official could interpret OAC rule 3745-77-07(C)(5)(c) as only requiring an examination of data obtained from "compliance methods" designated in the permit. Since Ohio's Title V program is governed by state regulations that have been approved by U.S. EPA, the fact that 40 CFR Part 70 requires consideration of "any material information" is an inadequate safeguard against this interpretation of the compliance certification requirements. This is especially true since U.S. EPA has not required Ohio to revise its regulations to bring them into conformance with 40 CFR 40 CFR § 70.6(c)(5)(iii)(B).

Reliable, comprehensive compliance certifications are a cornerstone of the Title V program. U.S. EPA must not allow Ohio EPA to continue issuing Title V permits that leave it unclear as to whether the permitted facility can disregard material information when submitting annual compliance certifications. In addition, U.S. EPA must require Ohio to update its Title V regulations to include the most recent federal requirements governing compliance certifications. Commenters request that U.S. EPA issue Ohio EPA both a notice of implementation deficiency and a notice of program deficiency based on these violations of 40 CFR Part 70.

V. Ohio EPA Consistently Issues Title V Permits that Lack Sufficient Monitoring and are not Enforceable as a Practical Matter

Many permits issued by Ohio EPA lack sufficient monitoring to assure compliance with all applicable requirements. Because of the importance of monitoring to the success of the Title V program, Ohio EPA's failure to require facilities to perform adequate monitoring is a serious Title V implementation deficiency.

While there has been dispute over the last couple years over what constitutes sufficient monitoring to satisfy federal requirements, U.S. EPA recently explained that:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit 'periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.' See 40 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

U.S. EPA, *In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Order Partially Granting and Partially Denying Petition for Objection to Permits, November 16, 2000, pp. 18-19 (Attached as Exhibit B). In addition to containing adequate monitoring, each permit condition must be "enforceable as a practical matter" in order to assure the facility's compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition.

A review of several recently issued final and draft Title V permits prepared by Ohio EPA reveals that Ohio EPA routinely fails to include monitoring in permits that is sufficient to assure compliance with applicable requirements. Moreover, permits issued by Ohio EPA include conditions that are not enforceable as a practical matter. Below, Commenters point to defects in specific Ohio Title V permits in order to illustrate Ohio EPA's overall failure to develop enforceable permits that require facilities to perform sufficient monitoring to assure compliance. It must be emphasized that Commenters believe that this problem is endemic throughout Ohio's Title V program and is not particular to the permits discussed below. While Commenters would like to see the flaws in these individual permits corrected, Commenters ask that U.S. EPA address the pattern of inadequate monitoring in Ohio Title V permits by issuing a formal finding that Ohio EPA is inadequately administering the Title V program.

Sample Monitoring and Enforceability Problems in Ohio Title V Permits

Cleveland Electric Illuminating, Avon Lake Power Plant, Facility ID 02-47-03-0013 (Draft issued 1/31/00):

Condition II.A.1. (p. 9): Emission Control Action Programs. This condition states:

This facility is subject to the applicable requirements specified in OAC Chapter 3745-25. In accordance with Ohio EPA Engineering Guide #64, the emission control action programs, as specified in OAC rule 3745-25-03, shall be developed and submitted within 60 days after receiving notification from the Ohio EPA.

Condition II.A.1. does not assure compliance with OAC Chapter 3745-25 because it does not require the facility to develop an emission control action plan until after receiving notification from the Ohio EPA. Chapter 3745-25 has been part of Ohio's SIP since the 1970s, and required that each existing facility develop an emission control action plan within six months after the effective date of the regulation. Thus, every existing facility must already have an episode action plan. The purpose of this rule is to require major air pollution sources to have an episode action plan ready in case of an emergency caused by unsafe levels of air pollution. If a facility does not have a plan in place, the facility will not be able to respond effectively under emergency circumstances.

According to Ohio EPA's Engineering Guide #64, Ohio has not experienced air quality levels that would trigger the mandatory use of episode action plans since the mid-1970s and the Ohio EPA has not required industries to file or update these plans since the early 1980s. See Engineering Guide #64 <<http://www.epa.state.oh.us/dapc/engineer/guide64.html>>. Ohio EPA explains in Engineering Guide #64 that the agency is exercising its discretion by not expecting the development and submission of an episode action plan. Ohio EPA's approach is legally flawed, however, because U.S. EPA lacks discretion to change an applicable requirement in a Title V permit. While Ohio EPA can exercise its discretion by not bringing an enforcement action against a facility that fails to comply with OAC Chapter 3745-25, Ohio EPA cannot use the Title V permit to waive this federally enforceable requirement. Furthermore, the Title V permit must assure the facility's compliance with each applicable requirement, including OAC Chapter 3745-25. Thus, this permit is defective because Condition II.A.I. is not enforceable as a practical matter and lacks monitoring, recordkeeping and reporting that is sufficient to assure the facility's compliance with the requirement that it develop an emission control action program.

Condition III.A.(p. 10): Particulate emissions. This condition states, in part:

Visible particulate emissions shall not exceed 20% opacity as a 6-minute average, except as provided by rule.

Unfortunately, the permit fails to describe the exceptions to this standard. An examination of OAC rule 3745-17-07(A) reveals that the rule contains extensive exceptions to the 20% opacity limit during periods of startup, shutdown, and malfunction. For example, since the permit

indicates that the unit is controlled by an electrostatic precipitator, the following exception applies during startup:

For any fuel burning equipment which are equipped with baghouses or electrostatic precipitators, until the exhaust gases have achieved a temperature of two hundred fifty degrees Fahrenheit at the inlet of the baghouses or electrostatic precipitators, provided that the director may incorporate a higher start-up temperature in the permit or variance for such source for which an applicant demonstrates to the satisfaction of the director that the higher temperature is needed for safety considerations or to prevent damage to the control equipment.

OAC rule 3745-17-07(A)(3)(a)(i). Though the application of this exception clearly depends on the temperature at the inlet of the ESP, the permit lacks a condition requiring the facility to measure or record this temperature. Similarly, though application of the exception during shutdown is also related to the temperature of the unit, there is no federally enforceable condition requiring the facility to monitor and record temperature during shutdown of the unit. As a result, this permit fails to assure the facility's compliance with the applicable opacity limitation because the public has no way of knowing when exceptions to the rule apply.

On page 14, the permit includes a condition in the state-only enforceable section of the permit that requires the facility to operate and maintain a temperature monitor that measures the temperature of gases entering the ESP. This requirement should be made federally enforceable because it is included to assure the facility's compliance with applicable requirements. Further, this condition needs to be modified to make it enforceable as a practical matter. The condition states that "the temperature monitor shall be installed, calibrated, operated, and maintained in accordance with the manufacturer's recommendations, with any modifications deemed necessary by the permittee." This language makes the condition unenforceable as a practical matter because the manufacturer's recommendations are not included, and the permittee is given blanket authority to modify the monitors at will.

Condition III.A. is also flawed because it fails to provide adequate detail to describe how 40 CFR Part 60.13 applies to the facility. The condition simply states that the permittee shall comply with the requirements specified in 40 CFR Part 60.13. 40 CFR Part 60.13, however, is not written to be enforceable as a practical matter. For example, § 60.13(b) states that verification of operational status "shall, as a minimum, include completion of the manufacturer's written requirements or recommendations for installation, operation, and calibration of the device." Since the permit fails to identify the manufacturer's recommendations that apply to this facility's equipment, the condition is unenforceable as a practical matter. Similarly, the applicability of various parts of § 60.13 depends upon facility-specific factors that are not provided in the permit. Under § 60.13(c), the requirements vary depending on whether the facility "elects to submit continuous opacity monitoring system (COMS) data for compliance with the opacity standard as provided under § 60.11(e)(5)." Also, under § 60.13(i), the U.S. EPA Administrator can establish any number of alternative monitoring requirements upon application by the facility. Nothing in this permit explains whether alternative methods have been

established for this facility. It is also unclear how often this facility will be required to test the COMS to determine whether they are functioning properly. Condition III.A. simply requires that the facility “maintain a certification letter from the Ohio EPA documenting that the continuous opacity monitoring system has been certified in accordance with the requirements of 40 CFR Part 60, Appendix B, Performance Specification 1.” No requirement for additional testing of the COMS is included in the permit. In light of the lack of detail provided in the permit with respect to maintenance and testing of the COMS, this permit fails to satisfy 40 CFR Part 70’s monitoring requirements.

The permit flaws discussed above reoccur several times in the permit.

Condition III.A. - IV (pp. 10-12)(Sulfur dioxide limitation):

Condition III.A. fails to clearly identify what kind of monitoring the facility will perform to assure compliance with the sulfur dioxide emission limitation. Instead, the permit simply states that if the continuous sulfur dioxide monitoring system is used to demonstrate compliance, the permittee shall operate and maintain the equipment to perform continuous measurements. The permit then states that if coal sampling is used to demonstrate compliance, the permittee shall maintain daily records that include specified information. Nowhere does the permit mandate that the facility perform one or the other of these monitoring activities. Nor does the statement of basis explain why performing either of these monitoring activities is sufficient to assure the facility’s compliance with the sulfur dioxide emission limitation. Commenters believe that continuous monitoring of sulfur dioxide emissions is the only reliable way to assure the facility’s ongoing compliance with sulfur dioxide emission limits. Further, if the facility is operating continuous monitors for sulfur dioxide, it cannot ignore data obtained by these monitors when submitting annual compliance certifications. The permit must make clear that the facility must acknowledge and review all reasonably available data when certifying compliance with the terms and conditions of the permit.

Condition IV improperly excuses the facility from reporting deviations from the sulfur dioxide limit unless the deviation is greater than 1.5 times the sulfur dioxide limitation included in the permit. The permit does not cite to an applicable requirement that allows for this exemption, nor does the statement of basis provide any information about the legal basis for this exemption.

The permit flaws discussed above reoccur several times in the permit.

Condition III.A.II.1. (p. 15): Sulfur Content of Coal. This condition provides that:

The quality of the coal burned in this emissions unit shall meet a sulfur content that is sufficient to comply with the allowable sulfur dioxide emission limitation in Section A.I. above.

This condition is unenforceable because the permit fails to establish the sulfur content that is sufficient to comply with the sulfur dioxide limit. Even when a facility is measuring sulfur dioxide emissions directly, it is important for there to be a backup method in place to assure the

facility's compliance with the applicable standard. When continuous monitors record a violation, data regarding the sulfur content of the fuel being burned may assist regulators in determining whether the monitors were functioning properly at the time that the exceedance was measured. Similarly, for one reason or another, it may turn out to be easier to enforce the sulfur in fuel limitation than the actual emission limitation. To be enforceable as a practical matter, however, this condition must be modified to specifically state what sulfur content is acceptable in coal burned at this facility. This requirement must be supplemented with monitoring and recordkeeping to ensure ongoing compliance with the limitation.

Condition III.A. 2.a. (p. 20): Gas turbine. This condition provides that:

The design of the emissions unit and the technology associated with the current operating practices will satisfy the requirement to minimize the carbon monoxide and nitrogen oxides emissions from this emissions unit.

This condition fails to assure the facility's compliance with carbon monoxide and nitrogen oxide limits because there are no specific, enforceable conditions included in the permit to assure that the facility continues to engage in "current operating practices" or properly maintains and operates control devices. The statement of basis lacks a justification for this condition.

Condition III.A.II. (p. 20): Operational Restrictions for Gas Turbines. This condition provides that:

The quality of the oil burned in this emissions unit shall meet a sulfur content that is sufficient to comply with the allowable sulfur dioxide emission limitation specified in Section A.1. above.

This condition is unenforceable because the permit fails to establish the sulfur content that is sufficient to comply with the sulfur dioxide limit.

Condition III.A.III and IV (p. 21): Monitoring and Reporting for Gas Turbines.

This condition provides the facility with two alternative methods for testing the oil burned in the gas turbines. Both alternatives state that "if necessary, the permittee shall maintain monthly records of the calculated sulfur dioxide emission rate based upon a volume-weighted average of the calculated sulfur dioxide emission rate for all shipments of oil during a calendar month." Condition IV then states that the permittee must notify the Ohio EPA Director of any record which shows a deviation of the allowable sulfur dioxide emission limitation based on the volume-weighted average. The problem with this set of conditions is that the permit never explains when recordkeeping is "necessary." If the facility is never required to maintain monthly records, there will never be a record that shows a deviation of the allowable sulfur dioxide emission rate. Thus, these conditions do not create an enforceable obligation.

On page 22, the permit clarifies that "compliance with the allowable sulfur dioxide emission limitation shall be based upon a volume-weighted average of the calculated sulfur

dioxide emission rates” when “the sulfur content of each shipment of oil received during a calendar month does not comply with the allowable emission limitation on an “as-received” basis or if the sulfur content of each daily sample collected during a calendar month does not comply with the allowable emission limitation on an “as-burned” basis.” Nevertheless, the permit still never actually requires the facility to maintain monthly records of the calculated rate, so there is no guarantee that there will be records from which the compliance status of the facility can be determined.

Condition III.A.V. (p. 22): Testing requirements.

The permit states that “[c]ompliance [with the 20% opacity limit] shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures specified in OAC rule 3745-17-03(B)(1).” The problem with this condition is that the permit never requires the facility to perform a Method 9 test at any point over the course of the permit term. As a result, this condition is unenforceable as a practical matter. Of course, as discussed earlier in the Comments, this condition is also unacceptable because it improperly limits the use of credible evidence. Since this facility uses COMS, data from the COMS can also be used to demonstrate whether the facility is operating in compliance with the opacity limitation.

The permit also states that compliance with the particulate emissions limit is based on the emission factor specified in AP-42. AP-42 emission factors are only rough estimates of emissions and are not designed for use in assuring compliance with an emission limit. Ohio EPA provides no information in the statement of basis to justify reliance on the AP-42 emission factor to assure the facility’s compliance with this permit condition.

Condition III.A.V.5. and III.B.VI (pp. 29-30): Continuous NO_x Monitors.

Though the permit identifies continuous NO_x monitoring as the means by which the facility will demonstrate compliance with the federally enforceable NO_x emissions limit, requirements that assure proper operation of the continuous monitoring system are placed in the “state enforceable section” on page 30. The requirement that the facility maintain a logbook dedicated to the continuous opacity monitoring system is also included in the state enforceable section on page 30. Since these requirements ensure that the facility is properly monitoring compliance with applicable requirements, they should be included in the permit as federally enforceable conditions.

Condition III.A.2. (p. 39): Fugitive Dust from Coal Piles.

None of the conditions governing air pollution from the facility’s coal piles are enforceable as a practical matter. In particular, Ohio EPA:

- allows the permittee to rely on control measures instead of those identified in the permit;
- refers to commitments that the permittee makes in the permit application rather than including enforceable conditions in the permit;

- allows the permittee to determine whether control measures are necessary at any given time, without maintaining records of site conditions; and
- identifies control measures in vague, unenforceable terms such as “precautionary operating practices.”

On page 40, the permit states that “[t]he inspections shall be performed during representative, normal storage pile operating conditions,” virtually assuring that these inspections will never identify a permit violation.

At the bottom of page 40 the permit states:

The permittee may, upon receipt of written approval from the Ohio EPA, Northeast District Office, modify the above-mentioned inspection frequencies if operating experience indicates that less frequent inspections would be sufficient to ensure compliance with the above-mentioned applicable requirements. Such modified inspection frequencies would not be considered a minor or significant modification that would be subject to the Title V permit modification requirements in paragraphs (C)(1) and (C)(3) of OAC rule 3745-77-08.

In other words, the monitoring specified in the permit can be changed significantly without notice to either the public or U.S. EPA. This is despite the fact that OAC rule 3745-77-08(C) and 40 CFR § 70.7(e)(2) explicitly forbid the use of minor permit modification procedures to make “significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit.” Rather, significant changes to monitoring requirements must be made using significant modification procedures.

At the bottom of page 41, the permit explains that the “applicable compliance method” for demonstrating compliance with the opacity limitations is Test Method 9, but the permit never requires the facility to perform a Method 9 reading of coal pile emissions.

Condition III.A.2.e-f (p. 46): Coal Unloading and Conveying System.

Permit conditions governing fugitive dust from the coal unloading and conveying system are also unenforceable as a practical matter. Similar to the permit conditions that apply to the coal pile, permit conditions governing coal handling simply state that the permittee agreed in its permit application to use “adequate enclosures.” No definition of “adequate enclosures” is included in the permit. No monitoring is required to assure that adequate enclosures are maintained. Other control measures are to be employed only if the permittee determines that they are necessary. As with the coal pile conditions, inspections are to be performed “during representative, normal operating conditions, (p. 48), and inspection frequencies can be changed without notice to U.S. EPA or the public.

As with the coal piles, the permit explains that the “applicable compliance method” for demonstrating compliance with the opacity limitations is Test Method 9, but the permit never

requires the facility to perform a Method 9 reading of emissions from the coal unloading and conveying system. (p. 49).

Cleveland Steel Container Corp., Facility ID 02-78-06-0360 (Final permit issued 3/16/00):

VOCs from Steel Sheet Printing and Bake-off Line (p. 12):

Under a pre-existing permit to install, this unit is limited to emitting 4.6 tons of VOC per year. Since the permit to install was issued pursuant to a SIP-approved regulation, the terms and conditions of that permit are federally enforceable. This requirement is improperly placed in the state-only enforceable section, which may interfere with the ability of U.S. EPA and citizens to enforce the requirement. (This problem reoccurs on p. 19.)

Though the permit requires the facility to keep track of certain data on cleanup materials so that actual VOC emissions can be calculated, the permit fails to include the equation that the permittee must use to calculate VOC emissions. Thus, the 4.6 ton VOC limitation is unenforceable as a practical matter.

The permittee is only required to submit a report of VOC emissions once each year. This violates under 40 CFR § 70.6(a)(3)(iii)(A), which requires a Title V facility to submit a report of all required monitoring at least once every six months.

Finally, though the permit states that “[t]he VOC content of each coating and cleanup material used shall be based upon the use of USEPA Method 24,” there is no mention of who is required to perform this test or when the test must be performed.

Sheet Coating Line (p. 16):

Condition III.A.II.1. states:

The average temperature of the exhaust gases at the inlet to the catalytic incinerator, for any 3-hour block of time when the emissions unit is in operation, shall not be more than 50 degrees Fahrenheit below the average temperature during the most recent emission test that demonstrated the emissions unit was in compliance. The average temperature difference across the catalyst bed, for any 3-hour block of time when the emissions unit is operating at or near maximum capacity, shall not be less than 80 percent of the average temperature difference during the most recent emission test that demonstrated the emissions unit was in compliance.

This condition is insufficient to assure the facility's compliance with applicable requirements because the permit fails to identify the results of the most recent emission test that demonstrated that the emissions unit was in compliance. No supporting information is provided in the statement of basis.

Also on page 16, the permit states that “temperature monitors and recorder(s) shall be installed, calibrated, operated and maintained in accordance with the manufacturer’s recommendations, with any modifications deemed necessary by the permittee.” This permit condition is unenforceable as a practical matter because it fails to specify particular calibration and maintenance requirements and provides the permittee with unlimited discretion to modify those requirements.

These problems reoccur on pages 21 and 22.

Sheet Roller Coater with Bake Oven and Catalytic Incinerator, p. 19:

To demonstrate compliance with the 40 ton per year VOC limitation that is in a pre-existing Permit to Install, the facility must keep a record of:

The calculated, controlled VOC emission rate for all coatings and cleanup materials, in pounds or tons. The controlled VOC emission rate shall be calculated using the overall control efficiency for the control equipment as determined during the most recent emission test that demonstrated that the emissions unit was in compliance.

This condition is insufficient to assure the facility’s compliance with applicable requirements because the permit fails to identify the results of the most recent emission test that demonstrated that the emissions unit was in compliance. No supporting information is provided in the statement of basis.

As discussed at the beginning of this section, the evaluation of individual permits provided above is meant to illustrate Commenters’ general concerns regarding deficiencies in Ohio Title V permits. While Commenters would like to provide U.S. EPA with a more exhaustive review of Ohio Title V permits, time constraints make this impossible.

Commenters ask that U.S. EPA make a formal determination that Ohio EPA is inadequately administering the Title V program by issuing permits that lack adequate monitoring and that include numerous conditions that are unenforceable as a practical matter.

VI. Ohio EPA Fails to Provide an Adequate Statement of Basis for Terms and Conditions Included in Each Title V Permit

Under 40 CFR §70.7(a)(5), each draft permit must be accompanied by a “statement that sets forth the legal and factual basis for draft permit conditions.” This statement is commonly referred to as the “statement of basis.” Unfortunately, a significant number of Title V permits issued by Ohio EPA altogether lack a statement of basis. In fact, of the 218 final Title V permits posted on Ohio EPA’s website, only 119 are supported by a statement of basis. Based on Commenters’ inquiry, it appears that Ohio EPA only recently began preparing such statements

and decided not to prepare these statements for facilities that already had draft or final permits.⁶ Though a statement of basis is particularly beneficial to the public during the public comment period, the statement of basis is also useful to the public after the final permit is issued because it assists the public in understanding permit terms and how the permit assures the facility's ongoing compliance with permit requirements. Thus, U.S. EPA must require Ohio EPA to prepare a statement of basis for all Title V permits that have been issued to date. Ohio's failure to prepare a statement of basis for each Title V permit is an implementation deficiency that must be remedied immediately.

Though Commenters are pleased that Ohio EPA is now preparing a statement of basis to accompany each Title V permit, Commenters' review of a number of these statements reveals that they are insufficient to satisfy Part 70 requirements because they lack certain essential information.

Generally, the most significant flaw in the statements prepared by Ohio EPA is the lack of discussion with respect to the adequacy of the monitoring requirements included in each permit. On December 22, 2000, U.S. EPA granted a petition for objection to a Washington Title V permit based in part upon the fact that the permit and accompanying statement of basis failed to provide a sufficient basis for assuring compliance with several permit conditions. See Exhibit C, U.S. EPA, *In re Fort James Camas Mill, Order Denying in Part and Granting in Part Petition for Objection to Permit*, December 22, 2000 (the "Fort James Order"). According to the Fort James Order, "the rationale for the selected monitoring method must be clear and documented in the permit record." *Id.* at 8. Since the statements of basis prepared by Ohio EPA rarely provide any sort of rationale for selected monitoring methods, they do not meet the minimum federal standards as interpreted by U.S. EPA in the Fort James Order.

As a concrete example of this persistent deficiency, Commenters direct U.S. EPA's attention to the statement of basis for the *Cleveland Electric Illuminating, Avon Lake Power Plant*, Facility ID 02-47-03-0013 (Draft issued 1/31/00), which is available on Ohio EPA's website at http://www.epa.state.oh.us/dapc/title_v/permits/sob/clev013.pdf.

Page 2 of the statement of basis for the Avon Lake Power Plant discusses emission limitations as they apply to specific emission units. The first entry pertains to the 20% opacity limit that applies to emission units B010 and B012. According to the comments, "[t]he continuous monitoring system will be used to ensure ongoing compliance with the visible particulate emission limitations." The terms of the permit conflict with this statement. Though the permit requires the facility to operate and maintain continuous opacity monitors, the page 13 of the permit explicitly states that "[c]ompliance with the visible emission limitations in OAC rule 3745-17-07(A) shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures specified in OAC rule 3745-17-03(B)(1)." The procedures specified in OAC rule 3745-17-03(B)(1) do not include continuous opacity monitoring. The statement of basis must clarify the role of Method 9 versus COMS in assuring this facility's compliance with the applicable opacity limitation.

⁶ Cheryl Newton, Chief of U.S. EPA Region 5's Permits and Grants Section sent a letter to Thomas Rigo, Ohio EPA on November 10, 1997 informing him that Ohio EPA needed to begin developing a statement of basis to accompany each permit.

With respect to the 0.10 lb/mmBtu particulate limit that applies to emission units B010 and B012, the statement of basis informs us that “[t]he continuous monitoring system will be used to ensure ongoing compliance with the particulate emission limitations.” This explanation is inadequate because neither the permit nor the statement of basis establishes the link between opacity measurements and violations of the particulate matter standard. The correlation between opacity and particulate emissions varies among facilities and typically is established based on a stack test. To assure compliance with the particulate limit, the statement of basis would need to describe the results of any stack test and explain how the relationship between opacity and particulate emissions was determined.

With respect to the SO₂ limit of 4.65 lbs/mmBtu, the statement of basis indicates that “quality of coal burnt in these emissions units shall meet a sulfur content that is sufficient to comply with the allowable SO₂ emission limit.” No explanation is provided as to what quality of coal is sufficient to meet this standard, or how the facility will keep track of the type of coal burned.

For the opacity and particulate limits that apply to Emission Unit B013, the statement of basis provides that “this is an inherently clean emissions unit based upon our regulatory knowledge & experience. This emissions unit shall only fire distillate oils, excluding no. 4.” While it may be the case that it is so unlikely or this unit to violate the applicable emission limits that no monitoring is necessary, it is not sufficient for Ohio EPA to justify a lack of monitoring based on the agency’s “knowledge & experience.” The statement must specifically explain what facts the agency has in its possession that demonstrates a very strong likelihood that this emissions unit will never exceed the applicable limits.

To justify the monitoring for carbon monoxide emissions from Emission Units B015 and B016, Ohio EPA states that “No specific carbon monoxide M & R requirements were, there are M & R requirements for other pollutants on fuel used, that data is then used along with an emission factor to demonstrate compliance and meet the Rp & ET permit requirements.” Ohio EPA makes no attempt to provide a rationale as to why this system of monitoring is sufficient to assure the facility’s compliance with the CO limit.

Finally, no rationale whatsoever is provided for the monitoring requirements that are supposedly designed to assure compliance with opacity limits that apply to the facility’s coal piles and coal handling activities.

It appears that the statements of basis prepared by Ohio EPA for other Title V permits suffer from similar flaws to those described above. In general, very little useful information is included in an Ohio statement of basis. Without an adequate statement of basis, it is very difficult for the public to evaluate Ohio EPA’s monitoring decisions (or lack thereof) and to prepare effective comments during the 30-day public comment period. U.S. EPA must take immediate action to require Ohio EPA to remedy this substantial Title V implementation deficiency.

VII. Many Permits Issued by Ohio EPA Fail to Include Minor New Source Review Requirements as Federally Enforceable Conditions

Over the past several years, Ohio EPA and U.S. EPA have exchanged numerous letters discussing whether terms and conditions of minor new source review (“minor NSR”) permits must be placed in the federally enforceable section of Ohio Title V permits. In a June 18, 1999 letter, U.S. EPA Region 5 informed Ohio EPA that Ohio’s minor NSR requirements are federally enforceable and that any Title V permit in which these requirements are misrepresented as State-only enforceable would be subject to U.S. EPA objection. See Letter from Stephen Rothblatt, Chief of U.S. EPA Region 5’s Air Programs Branch to Robert F. Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency, June 18, 1999. Following issuance of that letter, Ohio EPA agreed to place minor NSR requirements in the federally enforceable section of Title V permits. Unfortunately, Commenters’ review of draft, proposed, and final permits that are currently available on Ohio EPA’s website reveals that there are still many permits in which minor NSR requirements are incorrectly identified as only state enforceable. There is no indication that Ohio EPA is planning to correct these defective permits.

If a facility’s Title V permit identifies minor NSR requirements as enforceable only by the State of Ohio, U.S. EPA and members of the public are likely to encounter difficulty enforcing these requirements. Under 40 CFR § 70.7(f)(1), any permit that “contains a material mistake” or does not “assure compliance with applicable requirements” must be reopened and revised. As made clear by the June 18, 1999 U.S. EPA letter, a permit that identifies minor NSR requirements as enforceable only by the state contains a serious material defect. Thus, Ohio EPA is obligated to reopen and revise all permits that contain this defect. Ohio EPA’s failure to correct acknowledged deficiencies in a large number of permits requires U.S. EPA to make a formal determination under 40 CFR § 70.10(b) that Ohio EPA is inadequately implementing the Title V program.

VIII. Ohio EPA’s Policy on “Off Permit Changes” Circumvents Federal Permit Modification Procedures

According to Ohio EPA’s regulations and policy, a Title V facility is not required to apply for a modification to its Title V permit when it makes a change that triggers minor NSR. Instead, such a change can be made “off permit.” Minor NSR requirements are not added to the facility’s permit as federally enforceable conditions until permit renewal.

As a result of Ohio EPA’s broad off permit policy, Ohio Title V permits become outdated quickly. Government officials and concerned members of the public cannot rely on a facility’s Title V permit to identify all applicable requirements, but instead must wade through agency files to determine whether the facility is subject to additional requirements under federally enforceable preconstruction permits. For the reasons stated below, Commenters believe that Ohio EPA’s policy of allowing changes that trigger minor NSR to be made off permit conflicts with the requirements of the Clean Air Act and 40 CFR Part 70.

Under 40 CFR Part 70, the procedures for modifying a Title V permit over the course of the permit term vary depending on the type of change that needs to be made. The quickest

method for revising a permit is making an “administrative amendment” under 40 CFR § 70.7(d)(1)(v). Administrative amendments cover only a narrow set of changes and take place without public notice and comment or an opportunity for U.S. EPA to object to the change. “Significant modifications,” on the other hand, can only be made after a 30-day public comment period and a 45-day U.S. EPA review period. See 40 CFR § 70.7(e)(4). The middle ground between these two options is the “minor modification” procedure. See 40 CFR § 70.7(e)(2). Minor modification procedures do not provide for public notice and comment, but do require that U.S. EPA be notified and given an opportunity to object. Finally, federal regulations allow a Title V facility to make some types of changes without applying for a permit modification. See 40 CFR § 70.4(b)(14). This type of change is referred to in these Comments as an “off permit change.”

The type of modification procedures that must be used to incorporate minor NSR terms into a Title V permit has been the subject of discussion and dispute among government and industry officials since the beginning of the Title V program. Under 40 CFR § 70.7(d)(1)(v), minor NSR terms can be incorporated using administrative amendment procedures, but only if the state's minor NSR program meets procedural requirements that are substantially equivalent to the requirements of § 70.7 and § 70.8—meaning a 30-day public comment period and an opportunity for U.S. EPA to object. A state minor NSR program that complies with the minimum federal standards for minor NSR programs under 40 CFR §§ 51.160-164 should come close to meeting that standard. Unfortunately, Ohio's minor NSR program falls far short of the minimum public participation requirements set out in Part 51. Ohio tends to issue minor NSR permits as “direct final” without any opportunity for public participation.⁷ Thus, Ohio clearly cannot use the administrative amendment procedures to incorporate terms from minor NSR permits into Title V permits.

40 CFR § 70.7(e)(2) limits the availability of minor modification procedures to changes that are not “modifications under any provision of Title I” of the Clean Air Act. The statutory basis for state minor NSR programs is Clean Air Act § 110(a)(2)(C), which is in Title I of the Act. Further, state minor NSR programs cover modifications of major stationary sources. Thus, it seems clear that the minor modification procedure cannot be used to incorporate minor NSR terms into a Title V permit. Further, 40 CFR § 70.7(e)(2)(i)(A) provides that minor modification procedures cannot be used for terms that “require or change a case-by-case determination of an emission limitation or other standard.” Ohio's minor NSR program requires facilities to employ “Best Available Technology” (“BAT”) when making changes that are covered by the minor NSR program. A BAT determination is made on a case-by-case basis.⁸ Thus, Part 70 strictly prohibits the use of minor permit modification procedures for this type of change.

⁷ The legal basis for “direct final” permits to install is unclear. In the report on Ohio's Title V program, however, U.S. EPA explains that “[f]or many years OEPA has been issuing minor source construction permits without public comment under the SIP approved construction permit program.” “1998 Ohio Permit Process Review Summary,” under cover letter from Cheryl Newton, U.S. EPA to Robert Hodanbosi, Ohio EPA, dated August 3, 1998.

⁸ Ohio EPA's website provides information about Best Available Technology at <<http://www.epa.state.oh.us/dapc/fops/addinfo.html>>. The agency offers the following advice to permit applicants:

Your application must demonstrate that the new emissions unit(s) will employ the best available technology (BAT) to minimize air contaminant emissions. The definition of BAT is:

If Ohio EPA were to require use of the significant modification procedure to incorporate minor NSR terms into Title V permits, every minor NSR permit would be subject to public and U.S. EPA review. To avoid that outcome, Ohio EPA focused on the type of changes that could be made off permit under 40 CFR § 70.4(b)(14). Like the rules governing minor permit modifications, 40 CFR § 70.4(b)(14) prohibits off permit changes for “modifications under any provision of Title I of the Act.” Ohio EPA overcame that hurdle by promulgating state Title V rules that define “Title I modification” and “modifications under any provision of Title I” as “any modification under sections 111 and 112 of the Act and any major modification under Parts C and D of Title I of the Act.” OAC rule 3745-77-01(JJ). Ohio EPA then published Engineering Guide #63, which states:

Substantive . . . off-permit changes will require the applicant to apply for and obtain a permit to install (“PTI”) in accordance with OAC Chapter 3745-31. This PTI will allow for the operation of this off permit change for up to one year. Within this one year period of operation allowed for in the PTI, the Title V permit holder must apply to have this administrative change made in state-only portions of the Title V permit as an off-permit change. The Title V permit will then allow for the continued operation of this change through the remaining effective period of the Title V permit. If this change includes significant emission units . . . it will be brought into the federally required portion of the Title V permit at the time the permit is to be renewed. A Title I modification as defined in OAC rule 3745-77-01(JJ) cannot be accomplished as an off-permit change and will require a modification of the Title V permit.

(Exhibit D). The result is that not only is there no public review of minor NSR changes, but minor NSR terms are kept out of Title V permits entirely until permit renewal.

To make matters worse, Ohio EPA's off permit policy results in the incorporation of minor NSR terms into Title V permits as “state-only” until the point that the permit comes up for renewal. As discussed above, U.S. EPA has been trying for several years to get Ohio EPA to place minor NSR terms in the federally enforceable section of Title V permits. Both federal and

“Best available technology” means any combination of work practices, raw material specifications, throughput limitations, source design characteristics, an evaluation of the annualized cost per ton of air pollutant removed, and air pollution control devices that have been previously demonstrated to the director of environmental protection to operate satisfactorily in this state or other states with similar air quality on substantially similar air pollution sources.

In other words, BAT is the use of a control technology at least as effective as those used by other similar emissions units. It is determined on a case-by-case basis. If the allowable emissions of an emissions unit is expected to exceed 50 tons per year, the applicant may be asked to do a study (called a BAT Study) to determine the appropriate control technology for the planned emissions unit(s).

state regulations are clear that a Title V permit must distinguish between conditions that are federally enforceable and those that are enforceable only by the state. Ohio's Title V rules provide that:

Federally enforceable terms and conditions shall be identified as such in the permit and clearly separated from terms and conditions that are not required under the Act or any applicable requirements and that are imposed pursuant to state law only. Terms and conditions that are not required under the Act or any of its applicable requirements shall be identified as such in the permit and clearly separated from those that are.

(1) All terms and conditions of a title V permit that are required under the Act or any of its applicable requirements, including relevant provisions designed to limit the potential to emit of a source, are enforceable by the administrator and citizens under the Act.

(2) Terms and conditions of a title V permit that are not required under the act or any of its applicable requirements shall not be federally enforceable and shall be enforceable under state law only.

OAC rule 3745-77-07(B). Under Ohio's off permit change policy, Ohio EPA intends to make a regular practice of placing federally enforceable minor NSR terms in the state-only section of Title V permits. In light of the strong language of OAC rule 3745-77-07, there is little doubt that this policy will make it more difficult for U.S. EPA and the public to enforce minor NSR conditions in federal court.

One of the primary purposes of Title V is to create a single document for each covered facility that lists all of the applicable requirements that the facility must meet under the Clean Air Act. Ohio's off permit change policy undermines this important goal. Moreover, Ohio EPA's interpretation of 40 CFR Part 70's permit modification procedures defies common sense. Defining "Title I modification" as not including modifications that trigger minor NSR is legally unjustified. Similarly, if minor NSR requirements do not qualify for incorporation under minor modification procedures, it is illogical to conclude that Part 70 allows changes that trigger minor NSR to take place off permit.

Commenters request that U.S. EPA make a formal determination under 40 CFR § 70.10(b) that Ohio EPA is inadequately administering the Title V program by allowing changes that trigger minor NSR to take place off permit. In addition, Commenters ask U.S. EPA to issue a notice of program deficiency requiring corrective action under 40 CFR § 70.10(c) based on Ohio's flawed regulatory definition of "Title I modification."

IX. Title V Permits Issued by Ohio EPA Fail to Adequately Identify Whether Certain Requirements Apply to the Permitted Facility

A primary goal of the Title V program is to clarify which air quality requirements apply to each major air pollution source. Unfortunately, it is common for Ohio EPA to include a requirement in a Title V permit without explaining whether the requirement applies to the source. Two reoccurring examples of this problem in are (1) the condition governing Risk Management Plans, and (2) the condition governing Title IV (Acid Rain) requirements.

The general condition governing Risk Management Plans states:

If applicable, the permittee shall develop and register a risk management plan pursuant to section 112(r) of the Clean Air Act, as amended, 42 U.S. C. 7401 et seq. ("Act"); and, pursuant to 40 CFR 68.215(a), the permittee shall submit either of the following:

- a. a compliance plan for meeting the requirements of 40 CFR Part 68 by the date specified in 40 CFR 68.10(a) and OAC 3745-104-05(A); or
- b. as part of the compliance certification submitted under 40 CFR 70.6(c)(5), a certification statement that the source is in compliance with all requirements of 40 CFR Part 68 and OAC Chapter 3745-104, including the registration and submission of the risk management plan.

See, e.g., *Cleveland Steel Container Corp. Title V Permit*, Facility I.D. 02-78-06-0360 (Final issued 3/16/00), p. 2. Based on this condition, it is unclear whether the facility is even required to prepare a Risk Management Plan. In addition, if the facility is subject to a Risk Management Plan, it is not clear from this permit condition that the facility must certify that it is in compliance with the contents of its plan. This issue arose when U.S. EPA commented on Ohio EPA's draft Title V rules in 1993. At that time, U.S. EPA commented that "3745-77-01(B)(17)(d) exempts the contents of a risk management plan from being a federally applicable requirement. This is not acceptable under 70.2." See "USEPA Comments on the Ohio Title V Pre-draft Rules," under cover letter dated October 22, 1993 from Valdas V. Adamkus, U.S. EPA Regional 5 Administrator, to Donald R. Schregardus. U.S. EPA also commented that "[t]he state must secure verification that the source in fact did submit any required Risk Management Plan, and sources also have to certify annually to compliance with any required Risk Management Plan." Id. It appears that the concerns raised by U.S. EPA in 1993 were only partially addressed, if they were addressed at all.

OAC rule 3745-77-01(H)(4) states that the term "applicable requirement" includes:

Any standard or other requirement under Section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act, provided however that the contents of

a risk management plan required under section 112(r) of the Act need not be included in the Title V permit application or permit.

OAC rule 3745-77-07(A)(4) goes on to state:

If the owner or operator of the source is required to develop and register a risk management plan pursuant to section 112(r) of the Act, the permit shall specify that the permittee will comply with the requirement to register such a plan.

40 CFR § 70.2, on the other hand, simply states that the term “applicable requirement” includes “[a]ny standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act.”

Though reasonable minds can differ over the amount of detail that must be included in a facility's Title V permit, the permit must, at a minimum, identify whether and how a requirement applies to the permitted facility. As explained in U.S. EPA's preamble to 40 CFR Part 70:

The [Title V] program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the [Clean Air] Act. Currently, a source's obligations under the Act (ranging from emissions limits to monitoring, recordkeeping, and reporting requirements) are, in many cases, scattered among numerous provisions of the SIP or Federal regulations. In addition, regulations are often written to cover broad source categories, therefore it may be unclear which, and how, general regulations apply to a source.

(emphasis added) 57 Fed. Reg. 32250, 32251 (July 21, 1992). Given that a primary goal of the Title V program is to identify all of the requirements that apply to each facility, Ohio's Title V permits must specifically identify whether the permitted facility is required to submit and comply with a Risk Management Plan. In addition, the permit must make it clear that the facility must comply with the terms of its Risk Management Plan, and the Plan must be made available to the public.

Each Ohio Title V permit also includes the following general condition with respect to Title IV Provisions:

If the permittee is subject to the requirements of 40 CFR part 72 concerning acid rain, the permittee shall ensure that any affected emissions unit complies with those requirements. Emissions exceeding any allowances that are lawfully held under Title IV of the Act, or any regulations adopted thereunder, are prohibited.

See, e.g., Conesville Power Plant Title V Permit, Facility I.D. 06-16-00-0000 (Final issued 2/12/98), p. 2. Again, it is inappropriate for Ohio EPA to place a general condition in a Title V

permit without explaining whether the requirement applies to the facility, and if it does, what the facility must do to comply with the requirement.

Commenters request that U.S. EPA make a formal determination that Ohio EPA is incorrectly implementing the Title V program by failing to clearly identify which requirements apply to each facility.

X. Ohio EPA's Public Participation Procedures Do Not Guarantee a Fair Opportunity for the Public to Participate in Title V Permitting

Based on information provided on Ohio EPA's website, correspondence and reports relating to Ohio's Title V program, and anecdotal evidence provided by members of the commenting organizations, Commenters are concerned that Ohio EPA may not be providing the public with a full and fair opportunity to participate in Title V Permitting. In particular, Commenters are concerned that relevant documents may not be reasonably available to the public, that Ohio EPA district and local offices retain broad discretion to deny requests for public hearings, and that Ohio EPA may be substantially modifying permits after the public comment period without providing the public with an opportunity to review and comment on these modifications.

With respect to the availability of relevant documents, 40 CFR § 70.4(b)(3)(viii) requires Ohio EPA to "[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 Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act." Similarly, the public notice announcing the start of a public comment period on a draft Title V permit must provide the public with the telephone number of a person at the agency who can provide "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 permit decision." 40 CFR § 70.8(h)(2).

It appears that the various Ohio EPA offices around the state may refuse to provide a copies of relevant documents by mail, but can instead require a requestor to visit the office to review the files. According to the "Procedures for Public Records Requests and File Reviews" available on the Internet at www.epa.state.oh.us/pic/facts/records.html, "[e]ach division within Ohio EPA's Central office and each of the five district offices houses its own files. This means that you may need to contact more than one office to obtain all the files on a particular issue or site." "Although these files can be viewed in any of the locations, the most complete files on a site are maintained with the district office. The public can view records for a site in the district region where the site is located." "Items you find in the district files may include: applications, plan review correspondence, violation letters, facility inspection letters, general correspondence, complaint investigations and sampling results. These divisions also maintain files or copies of original paperwork in the Central Office. The majority of these relate to permitting or enforcement issues." Finally, "[w]ith the number of requests and the volume of records involved, at least two weeks may be necessary to schedule a requested file review."

Ohio Revised Code § 149.43, which governs the availability of public records, “upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time.” ORC § 149.43(B)(1). Further, “[u]pon request made in accordance with division (B)(1) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing.”

Thus, under Ohio's public records statute, Ohio EPA is obligated to mail copies of documents to any person upon requests. Commenters seek assurance that despite the language contained in Ohio EPA's policy quoted above, the agency will mail copies of relevant documents to any person upon request within a reasonable time. During the 30-day public comment period, “a reasonable period of time” must be promptly upon request. Moreover, because Ohio EPA indicates that permitting and enforcement documents are scattered throughout various offices, Commenters seek an assurance that at the time a draft permit is released for public comment, the public will have access to a complete record of all documents that relate to development of the permit. Members of the public must not be required to submit written requests to several different offices in order to obtain all of the documents relevant to the draft permit.

Another issue that arises with respect to access to relevant documents is the cost of obtaining copies. As quoted above, Ohio's public records statute allows state agencies to make copies available at cost. Though no specific information about the cost of copies is provided in Ohio rules or on the website, it is the Commenters' understanding that the price charged for copies varies from office to office. Though fees are waived occasionally, Commenters are concerned that the cost of copies may at times interfere with the ability of members of the public to comment effectively on draft Title V permits.

Under 40 CFR § 70.9(a), a state Title V program “shall require that the owners and operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.” Since adequate opportunities for public participation are a required part of any Title V program, Commenters believe that the cost of providing copies of relevant information to the public should be covered by Title V fees. It does not appear that Ohio EPA charges permit applicants separately for copies of documents that they need to prepare their permit application. Also, under OAC 3745-77-08 (A)(3), following the public comment period on a draft permit, “the director shall send the applicant a preliminary proposed permit that incorporates all changes the director proposes to make to the draft permit and the director's responses to comments received on the draft permit.” Again, it does not appear to Commenters that the permit applicant must pay a separate fee to obtain these documents. Just as Ohio EPA considers providing these documents to permit applicants to be part of the cost of the program, documents that a member of the public needs to review a draft permit should be considered part of the cost of running the Title V program.

With respect to public hearings, Ohio EPA has always granted requests for public hearings on Title V permits, as far as Commenters are aware. However, Commenters are

concerned that district and local Ohio EPA offices retain broad authority to refuse to hold a hearing when one is requested. According to a draft report on Ohio's Title V program prepared by U.S. EPA, "[p]ublic hearings are held at the discretion of the field and district offices." Draft Administrative Record for Air Permitting Portion of the Ohio Petition Review, p. 71. Commenters seek an assurance that a public hearing will be granted upon request by a member of the public during the public comment period.

Finally, because OAC 3745-77-08(A)(3) specifically gives permit applicants the right to an informal conference with the Ohio EPA Director following the completion of the public comment period, Commenters are concerned that Ohio EPA may revise a draft permit substantially without resubmitting the permit for public comments. If a permit is significantly revised following the public comment period, it must be resubmitted for public comment as a new draft permit under 40 CFR § 70.7(h). Commenters seek an assurance that any draft permit that is significantly revised after the public comment period will be resubmitted for public review.

XI. Additional Concerns

A number of additional issues merit consideration by U.S. EPA. First, Commenters are concerned that Ohio Title V permits do not provide adequate legal citations for applicable requirements. Many conditions that are included in the permits are not accompanied by a citation to a regulation, statute, or underlying Permit to Install.

Commenters are also concerned about regulations and policies that govern whether a facility is exempt from the Title V program. Under Ohio's rules, synthetic minor facilities only required to report their potential to emit every two years. A report every two years is insufficient to assure that a synthetic minor facility is not emitting pollution at a level that is at or above the Title V threshold. Commenters also request that U.S. EPA consider whether the exemption for Research and Development facilities complies with 40 CFR Part 70.

Relief Requested

Commenters request that U.S. EPA issue a formal notice to Ohio EPA that the defects in Ohio's Title V program described in these comments constitute implementation and program deficiencies under 40 CFR § 70.10.

Respectfully Submitted,

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