Title V Air Permit - Overview of Legislation

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I. INTRODUCTION

(a) General Background

(i) 1967 Air Quality Act - In 1967, Congress made the first real attempt to provide for clean air. The Air Quality Act established a system for air quality control regions (AQCRs) where necessary to protect "public health and welfare." The federal government was to issue air quality criteria for major pollutants which identified levels at which there would be no health effects to provide states with limited guidance. The federal government's role was very limited with the government becoming involved only when states failed to promulgate air quality standards or where interstate air pollution constituted a public health threat or a state requested federal involvement. The only power the federal government had to enforce the provisions of the Air Quality Act were through conference proceedings or individual actions against polluters.

(ii) Clean Air Act Amendments of 1970 - The Clean Air Act (CAA) was enacted in 1970. The Act originally had three titles. Title I dealt with stationary sources, such as factories. Title II dealt with mobile sources such as automobiles and airplanes. Title III set forth miscellaneous provisions such as applicable definitions, citizen suit provisions and standards for judicial review.

Under the Clean Air Act amendments of 1970, Congress provided for uniform national standards of performance for new stationary sources of air pollution and uniform national emission standards for "hazardous" air pollutants likely to cause danger to human health. The Clean Air Act also directed the EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants which endangered public health or welfare. Standards were to be set for the following criteria pollutants: carbon monoxide, particulate matter, sulfer dioxide, nitrogen oxide, hydrocarbons, ozone, and lead. The National Ambient Air Quality Standards were broken down into "primary" standards and "secondary" standards. Primary standards were to allow "an adequate margin of safety, . . . to protect the public health" and secondary standards were required to "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. §7409(b), [§ 109(b)]. Within three (3) years (or shorter) after promulgation of a National Ambient Air Quality Standard each state was required to submit a plan designated to implement and maintain that standard, commonly known as a state implementation plan (SIP). 42 U.S.C. §7410(a)(1), [§110(a)(1)J. Once the state plan was approved by the EPA, it was enforceable as federal and state law.

(iii) Clean Air Act Amendments of 1977 - The 1977 amendments revised all three sections. In particular it provided for prevention of significant deterioration (PSD) provisions in Title I, Subtitle C, for areas with air cleaner than national standards and added nonattainment provisions to Subtitle D [to address area failing to meet deadlines to achieve national

ambient air quality standards (NAAQS)].

(iv) Clean Air Act Amendments of 1990 - In 1990, the CAA was amended to add comprehensive provisions to regulate emissions of toxic air pollutants under Title I (creating a technology-based control program for toxic air pollutants under Section 112); acid rain emissions and related power plant emissions under a new Title IV; stratospheric ozone protection under Title VI [mandating the phase-out of chlorofluorocarbons (CFC's)]; strengthened federal enforcement provisions of Section 113; and most importantly for purposes of this seminar created Title V, an elaborate comprehensive permit program.

(b) Title V

Prior to the 1990 amendments, the Clean Air Act was the only major federal environmental statute which lacked a uniform federal permit program. There was not a comprehensive permit system for major sources of air pollution. Although a source could be subject to numerous regulations such as SIP limits (if built prior to 1970); new source performance standards (NSPS), lowest achievable emission rates (LAER) if in nonattainment area, and best available control technology (BACT) if in an attainment area, there was no comprehensive and unified permit. Other than permit requirements for new and modified major stationary sources the CAA did not have a permit program for applying comprehensive source specific control requirements to regulate facilities. Title V seeks to address these concerns by imposing a federal permit program for major sources of air pollutants. Although Congress and the EPA have established minimum requirements, the Title V permit program is to be operated on the state level. The EPA promulgated minimum permit requirements in 1991, and issued its final rule on July 21, 1992. These rules have been codified in the Code of Federal Regulations at 40 C.F.R. Part 70. Extensive revisions to the permit program were proposed by the EPA last August. See 59 Fed. Reg. 44, 460 (1994).

II. Applicability of Title V Permits

(a) Sources Subject to Title V Permits

Who must obtain a Title V permit? Section 502 and the definitions of §501 as well as EPA̓s regulations promulgated thereunder and found at 40 C.F.R. Part 70, provide the answer to this question. A state permit program is required to provide for the permitting of the following sources:

(1) major stationary sources (those which emit or have the potential to emit more than 100 tons per year of any air pollutant);

(2) major sources under the hazardous air pollutant provisions of Section 112 [sources which emit or have the potential to emit more than 10 tons per year of a hazardous air pollutant or 25 tons per year of any combination of such pollutants regulated under Section 112 (area sources under Section 112 will also be required to obtain permits)];

(3) sources regulated under Title I (sources subject to New Source Performance Standards (NSPS), as well as some existing sources);

(4) sources required to have permits pursuant to the prevention of significant deterioration (PSD) provisions of Title I, Subtitle C;

(5) sources requiring permits under the nonattainment provisions of Title I, Subtitle D; [60 tons per year of VOC or NO(x) in 13 nonattainment counties in the Atlanta area (Cherokee, Clayton, Cobb, Cowetta, Dekalb, Douglas, Forsyth, Fayette, Fulton, Gwinnett, Henry, Paulding, and Rockdale Counties)];

(6) sources requiring permits under the Title IV acid rain provisions (coal or oil-fired electric power plants); and

(7) other sources as designated by the EPA.

See 42 U.S.C. §7661(a), [§502(a)]; 40 C. F .R. §70.3.

(b) “Major Source”

A major source is not clearly defined, but is a critical term in the Title V permitting scheme. It is through the definition of “major source” that the majority of sources previously not regulated under the CAA become subject to regulation. A “major source” is generally any source that emits or has the potential to emit 100 tons of regulated pollutants per year (NO(x), VOCs, SO(2), PM(10), Lead, CO, or NO(2)) or emits 10 tons per year of any one hazardous air pollutant under Section 112(b) or 25 tons per year of any combination of pollutants under §112(b) [42 U.S.C. §7412(b)] Note, there are 189 listed pollutants under §112(b). See 42 U.S.C. §7602(g) and §7412(a)(1).

Whether a source is a “major source” depends on its “potential to emit” not actual emissions. The “potential to emit” is “[t]he maximum capacity of a stationary source to emit any air pollutant under its physical and operation design. Any physical or operation limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed shall be treated as part of its design if the limitation is• enforceful by the administrator.” 40 C.F.R. §70.2.

Not only is the maximum capacity of the source to emit measured by the physical and operational design of the source, but it also may be limited by restrictions on hours of operation which are enforceable by the EPA. Thus, although the operational design of a source has the capacity to emit over 100 tons per year, due to enforceable restrictions, it may only be permitted to emit 90 tons per year.

(c) What constitutes a source?

A facility may have to combine its different emission units in determining whether or not it is classified as a “major source.” Pursuant to the definition of “major source” any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person r persons under common control]) belonging to a single “major industrial grouping” that emits quantities of pollutants at or above the threshold level will be considered a major source. See 42 U.S.C. §7661(2), [§501(2)]; 40 C.F.R. §70.2. Therefore, a company with two emission units located

on adjacent properties may be grouped together for determining whether the company is a “major source.” Different units of the same company are considered part of the same industrial grouping if the pollutant emitting activities have the same two-digit Standard Industrial Classification code. 40 C.F.R. §70.2. Pursuant to this provision, if an owner operated two distinct and non similar operations on adjacent parcels of property, the two different operations would not be treated together for determination of whether it is a “major source.”

(d) Modifications

Owners and operators of sources should examine the applicability of the Title V permit requirements whenever they make an operational modification. Due to a modification, a non major source may become a major source. Remember application of the Title V permit requirements is based on the “potential to emit.”

(e) Exceptions

EPA regulations allow states to initially exempt virtually all non-major sources from Title V permitting requirements. Georgiȧs program provides for such exemptions. However, it must be emphasized that this exemption may be short lived as it is anticipated that the EPA will conduct rule making in the next several years to cover permitting of non-major sources. Solid waste incineration units and acid rain “affected sources” are required to obtain a permit irrespective of whether they are a major source or not. See 42 U.S.C. §7661(1), [§501 (1)]; 40 C. F.R. §70. 3(b)(1)-(2) (additional “affected sources” included).

(t) Synthetic Minor Sources

Even if a source has the “potential to emit” pollutants in excess of the trigger amounts, if a federally enforceable physical or operational limitation prohibits the source from emitting pollutants in an amount triggering permit requirements, the source may be able to bypass the comprehensive Title V permit requirements.

If these limitations are not currently in a sourcės Air Quality Permit, the source will be considered a Conditional Minor Source. The limitations must be added to the sourcės permit before the source will qualify as a Synthetic Minor Source.

III. STATE PERMIT PROGRAMS

(a) Minimum Requirements

States are required to submit their program for implementing the Title V permit regulations by November 15, 1993. The state program must contain the following:

1. A standard permit application form and criteria for timely determining when an application is complete [§502(b)(1)];

2. Adequate monitoring and reporting requirements [§502(b)(2)];

3. A permit fee program significant to raise enough money to make the permitting program

self sufficient [§502(b)(3)];

4. Assurances of adequate personnel and funding [§502(b)(4)];

5. Adequate authority by the state to administer and properly enforce the program and permit requirements [§502(b)(5)], including provisions to:

(a) issue permits with a fixed term of not longer than 5 years;
(b) incorporate SIP requirements into permits on issuance or renewal;
(c) terminate, revoke or modify permits for cause;
(d) enforce permits, fee requirements, and obligation to obtain a permit including ability to obtain civil and criminal penalties;
(e) provide the EPA with the opportunity to timely object to any permit before it is issued;

6. Public notice and an opportunity for pubic comments and hearings, as well as an opportunity for judicial review of the final permit by the applicant in state court and those who commented on the permit application, and procedures to insure that permits are treated in a timely manner.

See 40 C.F.R. §70.4 (additional requirements are described therein).

(b) Time Frames

The EPA must determine whether the submission is complete within 60 days of its receipt. The EPA must then approve, disapprove, or partially approve the state program within one year of the complete submission. 42 U.S.C. §7661a(d)(1), [§502(d)(1)]; 40 C.F.R. §70.4(e). If disapproved in part, a state has 180 days after EPAs disapproval to make the necessary revisions. See 42 U.S.C. §502(d)(1) [§502(d)(1)]; 40 C.F.R. §70.4(e), 70.4(f)(1). The EPA may grant interim approval if a state program substantially meets the Title V requirements. 42 U.S.C. §7661(g), [§502(g)], 40 C.F.R. §70.4(d)(3). If a state does not have their program approved within 18 months of submittal, the EPA is required to impose nonattainment area sanctions, such as a prohibition on highway funds. 42 U.S.C. §7509, [§179]; 40 C.F.R. §70.10. If the program is not approved within 2 years of submission, the EPA must administer the program for the state. 42 U.S.C. §7661a(d),(i) [§502(d),(i)].

The Georgia program was submitted to the EPA on November 12, 1993. The EPA notified the Georgia EPD of Administrative Completeness on January 19, 1994, and completed their substantive review of the Georgia program on June 24, 1994. Final approval is expected in late spring or early summer.

Sources subject to permitting must submit a permit application within one year of the approval of the state program. A state may establish an earlier filing date. See 40 C.F.R. §70.5(a)(1).

IV TITLE V PERMITS

(a) Content

Generally, the Title V permit is designed to incorporate all applicable source requirements

into one permit. Thus, the permit would contain all applicable air emission limitations, monitoring and reporting requirements for the source. The permit must contain:

(1) enforceable emission limitations and standards;

(2) a schedule of compliance

(3) a requirement that the permittee submit monitoring results to the state at least every six (6) months; and

(4) such other conditions as are necessary to assure compliance, including the requirements of an applicable implementation plan.

42. U.S.C. §7661c(a) [§504(a)]. The permit must also set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.

(b) Miscellaneous

A compliance plan must be submitted with the application. 42 U.S.C. §7661b(b) [§503(b)]. The compliance plan must describe how the source will comply with applicable requirements and include a schedule of compliance and a schedule for submission of progress reports at least every six (6) months. 42 U.S.C. §7661b(b), [§503(b)]. The permittee must certify, at least on an annual basis, that the facility is in compliance with applicable permit requirements. Any deviations from permit requirements must be promptly reported by the permittee. 42 U.S.C. §7661b(b)(2), [§503(b)(2)].

All application forms, reports, and compliance certifications, submitted must be certified for truthfulness, accuracy, and completeness by a responsible corporate official. 42 U.S.C. §7661c(c) [§504(c)]. The official's certification must be based on information and belief formed after reasonable inquiry. 40 C.F.R. §70.5(d). False certification can lead to civil and criminal penalties.

Permits, permit applications, compliance plans, emissions or compliance monitoring reports, and certifications must be made available to the public. 42 U.S.C. §7661b(e), [§503(e)].

(c) Permit Shield

Compliance with an issued permit is deemed to be compliance with §502. The permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of the Clean Air Act that relate to the permittee if (1) the permit includes the applicable requirements of such provisions, or (2) the permitting authority acting on the permit application, makes a determination relating to the permittee that such other provisions are not applicable and the permit includes the determination or a concise summary thereof. 42 U.S.C. §7661c(f) [§504(f)]. Note, however, pursuant to EPA regulations, unless the permit specifically states that a "permit shield" exists, it will be presumed not to exist.

It should be noted that all applicable clean air requirements in the permit which are federally

enforceable may be enforced by the EPA and citizens. See generally 40 C.F.R. §70.6(b).

V. REVIEW OF PERMITS

Public participation is required for issuance of an initial permit. The public must be given a 30 day comment period upon issuance of the draft permit. 40 C.F.R. §70.7(h). An informal public hearing may be requested.

The state program must also require an opportunity to the permittee or any person who participated during the public comment to obtain judicial review of the permit under state law. 40 C.F.R. §70.4(b)(3)(x). Petitions for judicial review must be filed within 90 days of the statés final action on the permit.

The permit application, proposed permits and final permits must be submitted to the EPA for its review. §505(a)(1). Additionally, all states whose air quality may be affected by the source, which are contiguous to the permitting state or are within 50 miles of the source, must also be given an opportunity to review the permit. §505(a)(2). See 42 U.S.C. §7661d(a). The EPA must object if any provisions in the permit are not in compliance with the applicable requirements including any state implementation plan. 42 U.S.C. §7661d(b) [§505(b)]. If the EPA does not object in writing to the issuance of the permit any person may petition the EPA within 60 days after the expiration of the 45 day review period to take such action. 42 U.S.C. §7661d(b)(2) [§505(b)(2)]. This petition must be based only on objections to the permit that were raised during the public comment period. The EPA must then grant or deny such petition within 60 days after the petition is filed. Denial of such petition is subject to judicial review. Upon receipt of an objection by the EPA the state may not issue the permit unless it is revised to comply with the objection or if the permit had been previously issued it must be modified, terminated or revoked. 42 U.S.C. §7661d(b)(3) [§505(b)(3)].