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Clean Air Permitting: Implementation and Issues

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Summary

The 1990 Clean Air Act (CAA) amendments required major industrial sources of air pollutants to obtain operating permits. These permits, authorized in Title V of the act, are intended to enhance environmental compliance by detailing for each covered facility all of the emission control requirements to which it is subject. Title V also was intended to generate permit fees that would be used by state and local permitting authorities for administering the program. Implementation of these requirements affects more than 15,000 industrial sources of air emissions, as well as state and local air pollution control agencies. Adding these provisions to the act was controversial, and implementation, too, has generated controversies.

The Environmental Protection Agency (EPA) issued regulations to implement Title V in 1992. Aspects of those rules (particularly concerning procedures to modify permits) have been contentious since then. EPA has considered a number of regulatory revisions but has not finalized any modifications. However, EPA has issued white papers and a number of formal and informal guidance documents that, together with the 1992 rules, comprise the agency's current interpretation of statutory and regulatory requirements.

Because of regulatory and program approval delays, state and local agencies were slow to begin issuing Title V permits, falling far short of statutory deadlines and EPA's goals. As of March 2000, for example, less than 45% of all required Title V permits had been issued. According to an EPA Inspector General report, key factors that delayed issuance of permits included insufficient state resources, complex EPA rules and limited guidance, and conflicting state priorities. Now, however, 99% of all required original permits have been issued, and permit reissuance (required after five years) and modification have replaced issuance of initial permits as the major ongoing task of permitting agencies.

Attention to the Title V program increased in 2010 when EPA initiated several controversial regulatory actions to regulate emissions of greenhouse gases (GHGs) under existing CAA authority with implications for Title V permits. For Title V, these actions mean including GHG control requirements in Title V permits issued for non-GHG. To minimize the costs and administrative burden of its GHG regulations, EPA issued a "Tailoring Rule" to impose requirements only on the largest sources of GHG emissions. In June 2014, the Supreme Court found that EPA exceeded its statutory authority in issuing the Tailoring Rule but upheld the agency's authority to require sources that already need permits for conventional pollutant emissions to comply with CAA requirements for GHGs.

Most stakeholders agree that at least some of the benefits of Title V identified by Congress in the 1990 CAA amendments have been achieved, such as incorporation of applicable air pollution control requirements in a single document that is accessible to regulators, the public, and industrial sources. At the same time, there also is widespread dissatisfaction with the program's complexity, costs, and confusing requirements. Many believe that a lack of EPA guidance and oversight has contributed greatly to implementation problems. Congressional examination of Title V has been limited to a few oversight hearings, most recently in 2000. Clean Air Act issues have been of considerable interest during the 113th Congress, especially scrutiny of EPA's regulation of greenhouse gas emissions. Although EPA's actions concerning GHGs involve multiple provisions of the act, this congressional attention has not included Title V.

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Introduction

A key element of the 1990 Clean Air Act (CAA) amendments (P.L. 101-549; 42 U.S.C. §§7661-7661f) was the comprehensive permit program established in Title V of the act. It was added to the CAA to enhance compliance by detailing for each covered facility all the emission control requirements to which the facility is subject. Previously, an industrial source's pollution control obligations—ranging from emission controls and monitoring to record-keeping and reporting requirements—were scattered throughout numerous, often hard-to-find provisions of state plans or various federal regulations. While approximately 35 states or localities had operating permit programs before 1990, they varied considerably, and few were as comprehensive as the new Title V program. Adding these provisions to the CAA was controversial, and implementation, too, has generated controversies.

Congress's intent in creating the operating permits program was to "(1) better enforce the requirements of the law by applying them more clearly to individual sources and allowing better tracking of compliance, and (2) provide an expedited process for implementing new control requirements." Benefits of the air permit program were expected to include clarification of pollution control requirements, simplification of procedures for modifying a source's control obligations, augmenting state resources through permit fees, and enhancing states' ability to administer other significant new CAA responsibilities, such as the air toxics and acid deposition programs.[1]

This report describes the statutory background of the Title V program and the status of implementation, in terms of federal approval of state and local permitting authorities' programs and permit issuance. Regulatory actions by the Environmental Protection Agency (EPA) to limit emissions of greenhouse gases that will have implications for Title V permits are reviewed. It also discusses broad policy issues identified by various stakeholders, including program complexity, costs and permit fees, and inconsistencies due to a lack of sufficient federal guidance.

Major Features of the Operating Permits Program

Prior to the 1990 amendments, the CAA required individual permits only for construction of new or modified industrial sources of air pollutants. Existing sources did not have to obtain permits unless they were subsequently modified and increased their air emissions. Title V, which was modeled after a similar program in the Clean Water Act, expanded the number of sources requiring federal permits by stipulating that all major pollution sources and other designated sources must obtain operating permits, which permitting agencies will use to ensure compliance with the CAA.

Operating permits are now an important tool in the overall compliance and enforcement aspects of the CAA, because permits contain the plans and schedules for sources to reach attainment with provisions of the act, plus emission limitations and monitoring requirements. Further, they are enforceable, meaning that EPA, states, or citizens may take action to require a source to achieve compliance with the terms of its permit.

[1] U.S. Congress, Senate, Committee on Environment and Public Works, "Clean Air Act Amendments of 1989, report to accompany S. 1630," S.Rept. 101-228, 101st Congress, 1st session, pp. 346-348.

EPA estimates that nearly 15,500 industrial sources are subject to Title V. These specifically include major sources, defined in the CAA as stationary facilities that emit or have the potential to emit 100 tons or more per year of any regulated pollutant or combination of pollutants, and sources subject to the act's acid rain provisions. Title V also covers:

- sources in nonattainment areas[2] that emit as little as 10 tons per year of volatile organic compounds (VOCs), depending on the region's nonattainment status;
- sources subject to New Source Performance Standards (NSPS);[3]
- regulated sources of air toxics emissions (any source that emits more than 10 tons per year of an individual hazardous pollutant or more than 25 tons per year of any combination); and
- sources required to have new source or modification permits under Title I of the act.

Permits compile in a single document all of the enforceable emission limitations and standards, plus inspection, monitoring, compliance certification, and reporting requirements for the source, but they are not intended to change or alter the existing, underlying requirements or add any substantive requirements. Permits generally contain these elements: emissions limitations and standards to assure compliance with all applicable requirements; monitoring, recordkeeping, and reporting; fee payments; and an annual certification by a responsible official of the source. They are issued for five-year periods and must be renewed thereafter.

Title V is intended to be primarily a state-run program. It provides two incentives in this regard: (1) permitting agencies are able to use permit fees collected from sources to run their permit programs and (2) EPA will implement a federal operating program if a state fails to do so. In many cases, states delegate to local programs the responsibility for implementing the operating permits programs. For example, 34 local authorities implement the permit program in California, rather than a single state agency. In other locations (for example, Tennessee, Arizona, Washington, and Idaho), local authorities implement the program in parts of a state, and the state regulatory agency has responsibility elsewhere.

Permitting agencies are required to collect permit fees sufficient to cover the cost of the permit program, and the fees may be used only for administering the program. The act requires that the fee schedule be set so as to collect from all sources, in the aggregate, not less than $25 per ton of each regulated pollutant to cover all reasonable (direct and indirect) costs of administering the program.[4] Regulated pollutants include VOCs, National Ambient Air Quality Standard pollutants

[2] Nonattainment areas are regions that have failed to attain and maintain one or more National Ambient Air Quality Standard (NAAQS). EPA has promulgated NAAQS for six air pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. For background information, see CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements*, by (name redacted) and (name redacted).

[3] New Source Performance Standards establish nationally uniform, technology-based maximum emission levels for categories of new major stationary sources, such as power plants, steel mills, etc. The goal is to force the installation of new pollution control technology and thus prevent new pollution problems.

[4] The fee amount considered sufficient to fund all permit program costs (sometimes called the "presumptive minimum") has been adjusted for inflation by EPA annually from the original level of $25 per ton of regulated pollutant. The current presumptive minimum amount is $48.27. States are not required to adopt the presumptive minimum fee rate; they may charge higher or lower fees, so long as they collect sufficient fees to cover their administrative expenses.

except carbon monoxide, and pollutants regulated under the hazardous air pollutant and NSPS provisions of the act.

EPA Regulations

EPA issued regulations to implement the permit program requirements in July 1992 (40 C.F.R. Part 70), seven months after the statutory deadline. The Part 70 rules cover the minimum elements of state permit programs. Rules promulgated in February 1999 (40 C.F.R. Part 71) cover federal permitting on Indian reservations and in any state that fails to adopt or implement an approvable Title V program.

While state and local agencies primarily implement the Title V program, the CAA provides for EPA oversight of permitting programs and gives EPA the right to review permit applications and object to proposed Title V permits. Defining the parameters of this oversight has been a source of tension among EPA, states, and industry. One overarching issue has been the question of developing permits with sufficient flexibility to allow for the fact that industrial sources often change their operations (thus affecting air emissions) in response to marketplace signals, and they want to be able to do so quickly without needing a revised permit for every such change. The public also has an important role in the permitting process, because citizens may submit comments and request a hearing on draft permits. Further, under CAA Section 505(b), any person may petition EPA to object to issuance of a permit, and Section 502(b)(6) requires that there be an opportunity for judicial review in state court of final permit actions. Judicial review may be sought by the applicant, persons who participated in the public comment process, and any other person who could obtain judicial review of such actions under state laws.

The 1992 regulations were challenged by environmentalists, states, and industry, mostly over details concerning permit revisions. In response, in 1994, EPA proposed modifications intended to address some of the biggest issues. Those proposed changes were not widely accepted by states and industry, however, and EPA took additional steps to streamline the permit programs. Since 1994, EPA has worked with states, industry, and environmentalists to reach consensus on key issues and has issued and re-drafted several regulatory proposals but has not finalized major modifications to Part 70.

The focus of efforts to revise the rules has been on how to streamline aspects of the regulations concerning permit modifications and revisions. According to EPA officials, the 1992 regulations give states ample flexibility to write permits that allow for minor operational changes by industry and to process permit modifications. Still, efforts to revise those rules have been driven by concerns of many permitting authorities and industrial sources that the current rules do not allow sufficient flexibility. One issue that has been particularly contentious concerns the procedures and amount of public review required for relatively minor modifications at emissions sources. At issue have been the definition and criteria for facility changes that are neither so minor that little or no review will be required, nor clearly so environmentally significant that full EPA review and public comment will be appropriate. EPA continued internal and external discussions on revising the Part 70 rules for some time, but by early 2005, agency officials apparently had ceased these activities. However, in October 2009, the Obama Administration finalized a rule announced as one of the Bush Administration's final regulatory actions. Called the Flexible Air Permit rule, it clarifies existing regulations concerning how industry can make changes to facilities without having to obtain a new permit. It is intended to reaffirm opportunities for accessing operational

flexibility under current regulations, while ensuring existing levels of environmental protection.[5] With these modifications, the 1992 and 1994 Part 70 and Part 71 rules remain in effect.

During the lengthy consideration of possible Part 70 rule changes, EPA issued guidance in the form of white papers to address some implementation issues that had been raised, such as permit revisions, EPA's role in reviewing permits, administrative complexity, etc. The first was issued in July 1995 (concerning streamlining to reduce costs and paperwork), and the second in March 1996 (concerning overlapping federal and state requirements). A third white paper, concerning options for operational flexibility, was drafted in mid-2000, but was criticized by environmentalists and some state officials and was not issued (instead, EPA issued the flexible air permit rule in October 2009; see above). In addition, EPA has issued some formal guidance on specific implementation issues.

Status of the Permit Program and Permit Issuance

Under the CAA, all states and territories were to submit operating permit programs by November 15, 1993. Once a state or locality's program was approved by EPA (within one year), major industrial sources had one year to submit permit applications to the state or local authority, and permitting agencies had three years to issue permits.

As of June 1997, EPA had approved permit programs for all 114 submissions by states, local agencies, and territories. In part because of regulatory and program approval delays, state and local agencies were slow to begin issuing Title V permits. In early 1998, EPA surveyed states and EPA regions and found that only about 2,100 permits had been issued as of December 1997, compared with an estimated 11,000 that should have been issued. In March 1999, EPA proposed an ambitious goal of resolving the permit backlog by the end of 2000. Permit issuance increased, but it continued to fall far short of the statutory deadlines and EPA's goals. As of March 2001, 57% had been issued. While there were consequences for permitting authorities that did not get program approval by EPA (i.e., the possibility of federal takeover, which EPA initiated in a few cases but did not impose), there were no real consequences or penalties for industrial sources that did not receive Title V permits due to state and local agencies' delays. The principal consequence was a delay in attaining the policy objectives intended by Congress when it established the Title V program.

An 2002 EPA Inspector General (IG) report criticized EPA and state and local agencies over the program's continuing problems. The IG noted that, as of December 31, 2001, 30% of required permits had not been issued, and only 4 state and 17 local agencies had issued all of their Title V permits. Key factors delaying the issuance of permits included insufficient state resources, complex EPA regulations and limited guidance, and conflicting state priorities, the IG reported.[6] A consequence of those delays is that the benefits that Congress intended the permit program to achieve have not been realized, according to the IG's analysis. According to EPA, as of January 2008—12 years after the first program approvals—99% of all original permits required for Title V sources had been issued. After that initial process, the ongoing tasks of permit reissuance

[5] U.S. Environmental Protection Agency, "Operating Permits Program; Flexible Air Permit Rule," 74 *Federal Register* 51418-51440, October 6, 2009.

[6] U.S. Environmental Protection Agency, Office of the Inspector General, "Evaluation Report: EPA and State Progress in Issuing Title V Permits," Report No. 2002-P-00008, March 29, 2002, pp. 8-14.

(required after five years) and modification have become the focus of most permitting authorities' attention. According to EPA, nationally, every year about 100 new sources are required to obtain initial permits, and about 3,000 sources are required to obtain renewal permits.[7]

Implications of Regulating Greenhouse Gas Emissions for Title V Permitting

In 2010 EPA initiated several regulatory actions to limit emissions of greenhouse gases (GHGs) under existing CAA authority that have implications for Title V permits and permitting. EPA's actions followed from the agency's issuance in December 2009 of an "endangerment finding" under Section 202 of the act, which permits (in fact, requires) it for the first time to regulate pollutants for their effects as greenhouse gases. Relying on this finding, EPA finalized GHG emission standards for new cars and light trucks on April 1, 2010. The implementation of these standards, in turn, triggered CAA permitting requirements and the imposition of technology-based control requirements for new and modified major stationary sources of GHGs (e.g., power plants and industrial facilities) beginning in January 2011.[8] Affected facilities are subject to the permitting requirements of Title V and the Prevention of Significant Deterioration (PSD) provisions of the law. For PSD, this includes state determinations of what constitutes Best Available Control Technology (BACT) that affected facilities will be required to install to limit GHG emissions. For Title V, this means including GHG control requirements in Title V permits.

As noted above, under Title V, major stationary sources are defined as those that emit or have the potential to emit more than 100 tons or more per year of any air pollutant subject to EPA regulation. For greenhouse gases, this is a relatively low threshold: EPA initially estimated that more than 6 million existing stationary sources emit 100 tons or more of GHGs annually and that a 100-ton threshold for GHGs would increase the number of facilities subject to Title V more than 400-fold. Calling such a permitting increase an "absurd result" that would affect "an extraordinarily large number of small sources," in June 2010 the agency promulgated a regulation called the "Tailoring Rule" to reduce the potential burden on sources and permitting agencies.[9] In that rule, EPA established a Title V permitting threshold of 100,000 tons per year or more of carbon dioxide-equivalent GHG emissions. Accordingly, EPA estimated that the majority of the 15,000 existing sources already subject to Title V will need to have GHG requirements added when those permits are renewed or revised and that an additional 550 sources would require new Title V permits based solely on their GHG emissions (primarily commercial and large residential facilities). These requirements took effect beginning July 1, 2011.

In the Tailoring Rule, EPA explained that modifying existing Title V permits and issuing a small number of new Title V permits will impose costs on permitting authorities totaling about $8 million per year more than the previous program. Without the Tailoring Rule that modifies the 100-ton-per-year threshold that applies to non-GHG pollutants, permitting authorities would face administrative costs of $21 billion per year, or nearly 340 times more than the previous program,

[7] See http://www.epa.gov/airquality/permits/issuestatus.html.

[8] For information, see CRS Report R40506, *Cars, Trucks, and Climate: EPA Regulation of Greenhouse Gases from Mobile Sources*, by (name redacted) and (name redacted).

[9] U.S. Environmental Protection Agency, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule," 75 *Federal Register* 31514-31608, June 3, 2010.

EPA estimated. Further, on average, an industrial source would incur costs of about $46,000 to prepare a Title V application and receive the permit, while a commercial or residential source would incur costs of about $23,000, because most have no experience with Title V permitting.

EPA's suite of regulatory actions regarding GHG emissions has been highly controversial. They have been challenged in the federal courts, but in 2012 a federal court upheld EPA's GHG regulatory program in its entirety, including the 2010 tailoring rule.[10] The Supreme Court granted review of a portion of the lower court's ruling. The Court's June 2014 decision put limits on sources that would be required to obtain Title V and PSD permits. The Court held that the CAA does not allow EPA to require permits solely on the basis of potential GHG emissions and that the agency lacked authority to tailor numerical thresholds to accommodate such an interpretation. However, the Court upheld EPA's authority to require sources that already need Title V and PSD permits for conventional, non-GHG pollutants to comply with BACT requirements for GHGs.[11] Following this ruling, EPA issued a memorandum confirming that it will no longer require Title V or PSD permits for sources if greenhouse gases are the only pollutant that would trigger the requirements. The memo also said that EPA anticipates that it will need to revise federal regulations governing Title V and PSD permitting and approved Title V programs, in light of the Court's decision, but the timing and content of those changes are unknown for now.[12]

EPA's regulatory actions also have been controversial with Members of Congress. Since the 111th Congress, legislation to delay or halt the agency's GHG initiatives has been debated by legislators, but none has been enacted.[13] Most of the congressional criticism has focused on impacts of the PSD provisions of EPA's rules—not Title V—because the largest costs resulting from the GHG rules will be for compliance with BACT requirements (although the details of those requirements are evolving),[14] not the procedural requirements of Title V.

Title V Issues

Most stakeholders agree that at least some of the objectives and benefits identified by Congress when it enacted the Title V program in 1990 have been achieved:

- Incorporating applicable requirements in one document that consolidates duplicative and redundant requirements is beneficial to regulatory agencies, the public, and regulated sources.

[10] Coalition for Responsible Regulation, et al. vs. EPA, 684 F.3d 102 (D.C. Circuit 2012).

[11] Utility Air Regulatory Group (UARG) vs. EPA, No. 12-1146, 572 U.S. ____, 2014 Westlaw 2807314 (U.S. June 23, 2014).

[12] Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, Memorandum, "Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in *Utility Air Regulatory Group v. Environmental Protection Agency*," July 24, 2014, http://www.epa.gov/nsr/documents/20140724memo.pdf.

[13] See CRS Report R42895, *Clean Air Issues in the 113th Congress: An Overview*, by (name redacted).

[14] Permitting authorities (not EPA) determine what technology constitutes BACT on a case-by-case basis, although EPA has provided guidance to the states. What specific control technologies are prescribed generally has focused on energy-efficient processes and technologies that will reduce GHG emissions. For information, see CRS Report R41505, *EPA's BACT Guidance for Greenhouse Gases from Stationary Sources*, by (name redacted).

- Establishment of a funding mechanism provides resources to state and local permit programs.
- Source compliance assurance systems—driven by improved understanding of compliance requirements, obligations on corporate officials to certify compliance and report deviations, and a strengthened penalty/enforcement mechanism—have improved.
- Public participation has improved at various stages of the permitting process.

At the same time, there also is widespread dissatisfaction with the program as it exists, due to program complexity; confusion and uncertainty about some of its requirements; and criticism of costs to regulated entities, permit agencies, and even the general public. While many believe that the permit program has clarified requirements and fostered consistency and fairness in regulatory treatment of sources, others argue otherwise, saying that permits suffer from excessive length and increased complexity. Benefits are more likely to be observed in states and localities that had no operating permit program prior to Title V and are likely to be questioned more vigorously where such a program previously did exist. Likewise, views are mixed on whether the Title V program has resulted in air quality and health benefits. Arguably, this was not an objective, because Title V is an administrative program and was not intended to have a direct impact on emissions. Permitting agencies, however, say that many major sources have voluntarily restricted their operating conditions or installed pollution controls in order to reduce emissions below the Title V regulatory thresholds (thus becoming what is often referred to as "synthetic minors"; see discussion on page 9), which is a plus for the environment.

Critiques of the Title V program are reflected in a 2005 report of the EPA Inspector General[15] and in a 2006 report by a Task Force on Title V Implementation Experience that was convened by EPA's Clean Air Act Advisory Committee. The Task Force, consisting of state and local permitting agency, industry, and environmental advocacy group representatives, developed an extensive list of recommendations for program improvements, which it believed could be implemented under current legislative and regulatory authority.[16]

Complexity

Prior to establishment of the Title V program, major sources of air pollution were not required to have federally enforceable operating permits. Regulatory requirements for these sources typically derive from multiple provisions of the CAA and were often scattered among multiple documents, thus complicating efforts to determine compliance and to provide effective enforcement of the law. Consolidating existing requirements (some dating from the 1970s) into a single, comprehensive document, while undoubtedly beneficial, also has resulted in permits that are lengthy and detailed, making it difficult to read them without precise knowledge of the individual source's operations, according to some stakeholders.

[15] U.S. Environmental Protection Agency, Office of the Inspector General, "Substantial Changes Needed in Implementation and Oversight of Title V Permits If Program Goals Are to Be Fully Realized," Report No. 2005-P-00010.

[16] The Title V Task Force, "Final Report to the Clean Air Act Advisory Committee on the Title V Implementation Experience," April 2006, available at http://www.epa.gov/air/caaac/titlev.html.

Many issues have arisen, including what level of detail must be incorporated in a Title V permit (versus streamlining or simplifying the permit), how small and insignificant emissions sources should be treated, and how newly issued CAA requirements such as hazardous air pollutant standards will be incorporated. Another issue is the extent to which permitting agencies can adapt or update a source's existing requirements (particularly those that were established many years earlier) so as to reflect its current operating conditions, without resulting in changes that exceed the scope of Title V, since the permit program was intended to consolidate but not substantively alter regulatory requirements. Title V was not intended to affect the stringency of requirements incorporated into a permit, but stakeholders disagree on whether actions such as the addition of new monitoring or new compliance methods affect stringency or are sometimes tantamount to creating new substantive requirements.

A related issue concerns whether a Title V permit should include a compliance schedule for facilities that have received notices of violation regarding applicable requirements identified in the permit. EPA regulations provide that if a source is not in compliance with a particular requirement, the source must provide in its permit application a description of how it will come into compliance and a schedule that includes a compliance plan. Environmentalists and EPA have disagreed over whether the permit can include compliance schedules over alleged—rather than settled—violations. Activists argue that permits must include compliance schedules to address allegations of permit violations (essentially making the permit an active mechanism to enforce permitted limits), while EPA, states, and industry contend that that goes beyond the scope of the permit. Federal courts have split on the issue. The Obama Administration reportedly will support inclusion of compliance schedules to correct alleged violations only when challengers can unambiguously demonstrate that the violations are occurring at the facility.[17]

From the beginning of the program, a key concern for EPA, states, regulated industries, and environmental advocacy groups has been the issue of operational flexibility in operating permits, the concept of allowing for operational change at a facility, while assuring compliance with applicable requirements and ensuring environmental protection. EPA addressed the issue in the 1992 Part 70 regulations and subsequent guidance (especially a 2000 draft white paper). Also, beginning in 1993, EPA sponsored a flexible permitting pilot program with industrial facilities in 13 states in an effort to evaluate opportunities to design air permits to accommodate operational flexibility. EPA evaluated the economic and administrative benefits of flexible permits and documented several environmental performance benefits (including emissions reductions). Based on its assessment of the pilots, in 2009, EPA finalized a Flexible Air Permit rule that clarified opportunities under existing regulations allowing industry to be market-responsive while ensuring equal or greater environmental protection than that achieved by conventional permits.[18]

Costs and Permit Fees

Industry groups generally believe that the regulatory burden and costs of the Title V program outweigh the benefits and far exceed EPA's estimate at the time the Part 70 rules were adopted of $15,000 average cost per facility annually. In addition to permit applications, facilities incur recurring costs related to staffing, permit changes/corrections, report preparation, legal reviews, and management reviews of compliance. Some stakeholders (environmental advocates, for

[17] "DOJ Explains Rationale for High Bar on Title V Compliance Schedules," *InsideEPA.com*, December 11, 2009.

[18] Supra, note 5.

example) argue that program cost is not a significant issue when viewed in the context of cost as a percentage of a company's operating cost, and that companies often benefit from the additional information gained through the program.

Costs are a continuing concern for state and local regulatory authorities with regard to increasing paperwork requirements and the sufficiency of current permit fees. Having adequate resources to administer federal environmental programs is always an issue for states and localities, especially in light of increasing program demands. State environmental agencies' revenue sources vary, but they generally depend on a combination of EPA and state grant funding—both of which have been in decline—Title V permit fees, and other fees, in a few cases. The Title V permit fee requirement was intended to ensure that sufficient resources would be provided for necessary permitting activities. EPA has not conducted a comprehensive audit of permitting agency resources, but available information suggests that a number of states (perhaps many) are not collecting sufficient fees to cover their costs, which contributes to problems in hiring staff and processing permits.

In 2007, an environmental advocacy group, the Environmental Integrity Project, released a report concluding that more than half of the states have fee structures that do not meet federal minimum standards. The report focused on 18 states in which fees fell below the federal minimum, either because the states set lower emission fees or set a ceiling on the amount that could be collected from each polluter that was lower than the federal presumptive minimum on at least the first 4,000 tons of emissions of each pollutant covered by a Title V permit. The report found that, if states were to raise fees to at least the minimum federal amount, they could provide a significant source of funding to support their air quality management programs, but that additional funding (for example, from EPA CAA grants) also is needed. It recommended that EPA undertake a comprehensive evaluation to ensure that low emission fees are not weakening the CAA permit program or its enforcement.[19]

A 2011 survey of state air quality officials found that dwindling budgets are pushing some states to consider returning their delegated CAA permitting programs to EPA, unless they can raise permit fees charged to industry or identify other sources of revenue. States have authority to determine the level of fees that they want to set—EPA's "presumptive minimum" fee level is not mandatory—and the state survey found that they vary widely.[20] Virginia was one state identified in the survey as needing additional funding to maintain desired performance, and early in 2012, the legislature authorized state officials to revise and increase permit application, annual emissions, and maintenance fees in order to fully fund the Title V program and avoid returning the program to EPA.

One factor affecting fee revenues is the large number of sources that have lawfully opted out of the Title V program. EPA originally estimated that about 37,000 facilities nationwide would be subject to Title V. Today, the universe of Title V sources is nearly 15,500, and the others—often termed "synthetic minors"—have installed pollution control equipment or taken other steps to ensure that their emissions are below the Title V threshold of what is a major source. For permitting agencies, the resource issue is twofold. First, most agencies initially calculated fee

[19] Environmental Integrity Project, "Shortchanging the Clean Air Act: An Analysis of State Revenues Lost Due to Low Emission Fees," March 2007.

[20] National Association of Clean Air Agencies, "NACAA Title V Fees Survey—State by State Results," September 2011, http://www.4cleanair.org/Documents/NACAATVfeessurveystatebystateresultsSep2011.pdf.

amounts and revenues based on a larger number of sources, but actual revenues have been less, since more than one-half of sources have lawfully avoided Title V coverage. Second, these sources still represent a regulatory workload, in terms of non-Title V permitting (separate state requirements) and tracking, which is unlikely to be covered fully by other fee revenues or available funding. Getting state legislatures to approve fee increases to address these concerns is politically difficult, in most cases.

As sources install pollution control equipment that reduces emissions, another issue arises. The majority of permitting authorities have fee structures that are based on emissions, such as a per-ton fee. With decreasing emissions, permit fee revenues also are reduced, which may strain permitting authorities' ability to cover program costs and carry out required program activities.

The EPA's Inspector General 2002 report identified insufficient permit fee resources as a key factor that caused delays in issuing Title V permits.[21] A 2014 EPA IG report focused specifically on revenues to operate the program.[22] The IG found that states' permitting revenues have been declining in recent years and that state operating expenses often exceeded Title V revenues. Among nine of the largest state and local permitting authorities that oversee 45% of the nation's active Title V permits, there was a $69 million shortfall out of $672 million in expenses incurred between 2008 and 2012. Further, the IG criticized EPA for insufficient oversight of state permit fees and attributed the problem to several factors: a lack of a national oversight strategy, outdated (1993) guidance on fee collection, a lack of accounting expertise among EPA staff, and an unwillingness by some regions to pursue formal corrective actions against states. The report found, "The agency's weaknesses in identifying and obtaining corrective actions for Title V revenue sufficiency and accounting practices, coupled with declining resources for some permitting authorities, jeopardizes state and local Title V program implementation." The IG recommended a series of steps to improve the program, all of which EPA accepted, but EPA said that it will not complete most actions until the end of FY2017.

Confusing Requirements and Limited EPA Guidance

Critiques of the Title V program, including the EPA Inspector General's reports and the Title V Task Force report, identify insufficient EPA guidance as a major implementation issue. The IG's 2005 report, based on a review of permits issued by several states, found that permit clarity varies widely from state to state. Permit requirements are often vaguely stated or identified by reference to other documents, without narrative description or precise citation. EPA regulations require that the permitting authority prepare a statement for each draft permit to set forth the legal and factual basis of the permit, but the IG found that such statements often are inadequate or totally missing.

From its review, the IG concluded that many of these problems stem from a lack of EPA guidance on key issues, which results in permitting inconsistencies and contributes to permitting delays that adversely affect sources, agencies, and the public. The IG strongly recommended that EPA issue nationwide guidance on a number of topics (including requirements for the statement of basis in permits, requirements for content of annual compliance certifications by corporate officials, and applicability of sanctions for unresolved program deficiencies) in order to achieve more national cohesion and consistency in Title V permits.

[21] Supra, note 6.

[22] U.S. EPA Office of Inspector General, "Enhanced EPA Oversight Needed to Address Risks from Declining Clean Air Act Title V Revenues," Report No. 15-P-0006, October 20, 2014.

EPA has issued very limited formal guidance and rules on Title V in the past several years. In lieu of formal guidance, EPA has relied on responses to citizen petitions and letters to regions and permitting authorities to convey its position on key Title V issues, arguing that this strategy allows for flexibility that reflects differences in source complexity.[23] Some stakeholders are concerned that, rather than resolving program issues through rule-making or nationally applicable interpretive guidance, EPA is using the petition process and other mechanisms not just to apply law to facts, but to make law in the first instance. The change away from issuing national rules or guidance occurred following a federal court decision which vacated a 1998 EPA guidance document on periodic monitoring. In that case, the court ruled that the agency had exceeded its authority by utilizing nonbinding guidance rather than national rule-making to interpret regulatory requirements (*Appalachian Power Co. vs. EPA*, 208 F.3d 1015 [D.C. Cir. 2000]). The IG noted that permitting authorities may be unwilling to follow or may be unaware of guidance that isn't national in scope.

One example of lack of EPA guidance relates to incorporation of monitoring requirements in permits, one of the most contentious issues in Title V implementation. The CAA mandates that permits include monitoring and reporting requirements to assure compliance with permit terms and conditions. In the 1992 Part 70 rules, EPA required that permits include all monitoring and test methods detailed in the applicable underlying requirements (e.g., in NSPS or hazardous air pollutant standards incorporated in the Title V permit). In addition, where an underlying applicable requirement does not require "periodic monitoring," Part 70 requires that periodic monitoring be specified in the Title V permit.

The 2005 EPA IG report found that specification of monitoring requirements was one of the most significant areas of inconsistency in permits and that a number of stakeholders and EPA regional officials contend that more EPA guidance on these issues is needed. The Title V monitoring rules, and specifically the application of "periodic monitoring" requirements in permits, have been subject to several EPA interpretations (the most recent is a December 2006 interpretive rule)[24] and to litigation challenging those interpretations, in cases asking the court to determine the meaning of the periodic monitoring rule and related regulatory language and to determine the consistency of the rules (as interpreted by EPA) with the statutory requirements. In 2008, a federal appeals court vacated the 2006 rule as inconsistent with the Clean Air Act.[25] According to the 2006 Title V Task Force report, stakeholders fundamentally disagree on the statutory and regulatory requirements and particularly on whether permitting authorities may or must (depending on one's perspective) specify new or revised emissions monitoring requirements in permits.[26] The 2006 rule, which the appeals court struck down in 2008, had said that (contrary to prior policy) state and local authorities could not require supplemental monitoring in cases where existing monitoring is inadequate to ensure compliance with the Clean Air Act. EPA is developing a revised periodic monitoring rule.

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[23] Supra, note 15, pp. 84-85.

[24] U.S. Environmental Protection Agency, "Final Rule Interpreting the Scope of Certain Monitoring Requirements for State and Federal Operating Permits Programs," 71 *Federal Register* 241, December 15, 2006, pp. 75422-75431. In addition to this rule, EPA has committed to take several actions to improve monitoring, including issuing periodic monitoring guidance, and issuing an advanced notice of proposed rule-making (ANPR) seeking public comment on monitoring inadequacies in state implementation plans and federal regulations. This ANPR was published February 16, 2005; see 70 *Federal Register* 7905. New periodic monitoring guidance has not been issued.

[25] Sierra Club vs EPA, No. 04-1243 (DC Cir, August 19, 2008).

[26] Title V Task Force Final Report, pp. 47-63.

Congressional Interest

As the Title V Task Force noted in 2006, much about Title V remains unsettled and subject to debate in both the legal and policy arenas, and it urged that steps be taken to "stem the tide of transaction costs and to bring an increased level of certainty and stability to implementation of this program."[27] Responding to the Task Force report in September 2006, EPA officials identified a number of priorities and next steps. Over the following one to two years, the agency would work with states to identify best practices such as standards for granting a public hearing, providing written responses to public comments, and coordination of Title I and Title V process. Similarly, over the next one to three years, EPA would review existing guidance and issue new guidance as appropriate concerning clarification of the permit revision process and permit reopening, and clarification of certain statements required in draft permits. Finally, EPA would initiate rule-makings to address several concerns, such as clarifying when insignificant activities are exempt from permits, and allowing alternatives to newspapers for public notice requirements. Rule-makings could take three years or more, EPA said. Other priorities include improving online notice, online access to documents, and the EPA petitions website.[28]

In January 2008, EPA officials reportedly told an industry group that the agency was working on a proposed rule and guidance document, in partial response to the Task Force report. The streamlining proposal and guidance were expected to address a number of issues—but only a small percentage of the Task Force's recommendations—including the type of emission units that must be included in a permit, the effectiveness of the public notice process, and the complexity and length of the permits. The proposed rule is also expected to remove insignificant emission units from the Title V permit process, allow the use of online public notices instead of newspaper notices, and clarify the use of administrative amendments and minor permit revisions. A proposed rule was expected to be released in early 2009, but this has not occurred. In April 2012, EPA officials indicated plans to make certain rule changes and issue guidance on how permit writers should include "statements of basis" in the enforceable terms of permits. The impetus for these plans, officials said, came from the 2005 Inspector General report and President Obama's executive orders on reducing regulatory burdens.[29]

Congressional oversight of the Title V program has been limited to hearings by a House Energy and Commerce subcommittee and a Senate Environment and Public Works subcommittee in mid-1995, and a Senate Environment subcommittee field hearing in 2000 that addressed Title V and other CAA issues. So far, Congress has not considered statutory changes that would affect the Title V requirements. Clean Air Act issues have been of considerable interest during the 113th Congress, especially scrutiny of EPA's regulation of greenhouse gas emissions. Although EPA's actions concerning GHGs involve multiple provisions of the act, this congressional attention has not included Title V.

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[27] Title V Task Force Final Report, pp. 8-9.

[28] "EPA's Response to the Title V Task Force Recommendations," presentation to the Clean Air Act Advisory Committee, September 14, 2006. EPA's database of petitions filed to object to the issuance of a Title V permit is available at http://www.epa.gov/region07/air/search.htm.

[29] Executive Order 13563, "Improving Regulation and Regulatory Review," 76 *Federal Register* 3821-3823, January 21, 2011, and Executive Order 13610, "Identifying and Reducing Regulatory Burdens," 77 *Federal Register* 28469-28470, May 14, 2012.

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