



Enforcement and Permitting Coordination

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**NACAA Joint Permitting and
Enforcement Workshop
Chicago, Illinois**



Enforcement and Permitting Training Schedule

- Atlanta, GA – September 2008
- Washington, D.C. – January 2009
- Dallas, TX – February 2009
- Philadelphia, PA – June 2009
- Seattle, WA – July 2009
- Kansas City, KS – October 2009
- Chicago, IL – November 2009
- Denver, CO – March 2010
- Region 1 – November 2010
- Region 9 –
- Region 2 –
- ?



Enforcement and Permitting Training

Key Concepts

- Case-law (NSR focus)
- Elements of an Enforceable Permit
- Importance of Coordination
- Opportunities for better coordination
- Best practices
- Impact of Enforcement on Permitting
- Targeting
- Priorities



Enforcement/Permitting

- Inextricably linked . . .
- Permits
 - Not just license to operate
 - Establishes legal obligations of source
 - The method for assuring compliance
 - Notifies government and public of a source's obligations
 - Operations and environmental performance must be transparent



Interpretation of Permit Terms

- Permit requirements must "stand-alone"
- Courts will look first to "four corners of the permit" to understand legal obligations
 - Courts evaluate extra-permit information only if permit terms and conditions are ambiguous
- Permit language is strictly construed
- Permittees are strictly liable for compliance with all permit "terms and conditions"



Important Elements of an Enforceable Permit

- Does permit plainly identify:
 - Emissions units
 - All emissions limitations, standards, and other requirements
 - Control technology and requirements
 - Averaging period(s)
 - Monitoring requirements
 - Method(s) for determining compliance, including use of credible evidence
 - Reporting and recordkeeping requirements
 - Excess emissions/deviation reporting



Issues with Enforceability

- Example from a Title V permit application for foam manufacturing facility:
 - Facility wanted to make equipment changes and additions without triggering permit review requirements
 - Applicant stated
 - “Equipment installations must often occur very quickly to ensure a competitive response to customer demand. Therefore, [the facility] requests that an approved permit not list the specific equipment noted herein.” (emphasis added)

Issues with Enforceability

Table 1: Emissions Unit Description

Emissions Unit	Emissions Unit Description	Size Rating / Design Capacity	Control Unit Description	Permit, Order, or Registration #
EU-1	3 Pre-Expansion Units	Variable	None	P/X 10-009
EU-2	60 Pre-puff Storage Bags	Variable	None	P/X 10-009
EU-3	15 Molding Presses	Variable	None	P/X 10-009
EU-4	Finished Goods Storage	Variable	None	P/X 10-009
EU-5	Curing Room	Variable	None	P/X 10-009
EU-6	Drying Tunnel	Variable	None	P/X 10-009

It is not intended to incorporate by reference these NSR Permits into this Title V permit



Issues with Enforceability

- Avoid Conditions that may Never Be Satisfied
 - 1998 PSD permit for Cement Plant
 - Compliance with BACT limits “will be determined by testing in accordance with Condition 10”
 - Condition 10a: “within 180 days of reaching the maximum production rate . . . emissions and opacity of the kiln shall be measured by an approved testing service”
 - As of 12/07 facility had not reached the maximum production rate- therefore there has never been a compliance determination



Issues with Enforceability

- Specify methods
 - A chemical manufacturer changed the method in which it calculated VOC emissions
 - The company decided to report VOCs on a carbon basis, instead of a compound basis because the monitoring technique was not clearly specified
 - Reporting VOCs on a carbon basis undercounted VOCs emitted by the facility
 - A fiberglass process did not count formaldehyde that was generated in the glass making process
 - All emissions are not included



Issues with Enforceability

- Permit should plainly identify all applicable emissions limitations, standards and other operational limits
 - Source's most fundamental legal requirement
- Where?
 - In the permit's "terms and conditions" section
 - Note: In one instance, the source requested that an operating limit on heat input be transformed to a "descriptive" term
- Important: Incorporation by reference of an emission limitation (either by reference to permit application or underlying regulation) can create legal ambiguity.
- Title V Permits: All applicable SIP, NSPS, NESHAP, NSR requirements should be included in a simple, understandable manner



Issues with Enforceability

- Public Citizen et al v. American Electric Power,
2006 U.S. Dist. LEXIS 93336
 - Pollutant limits expressed as lbs/ MM Btu “while firing at full load (5156 MM Btu/hr, Nameplate Capacity: 558 MW)”
 - Court: Heat input limit not enforceable
 - Court: Only those terms preceded by “shall not exceed” were enforceable



Issues with Enforceability

- The monitoring method should not be listed such that only that method can be used to demonstrate compliance?
 - For Example: “Source’s compliance shall be determined by EPA Reference Method 9A”
 - Permit should specify methods of compliance but not **preclude** the use of “any other credible evidence.” 42 U.S.C. 7413(e)
 - Remember: Credible Evidence
 - Suggested language: “Nothing in this permit is intended to, or shall, alter or waive any applicable law (including but not limited to defenses, entitlements, challenges or clarifications related to the Credible Evidence Rule , 62. Fed. Reg. 8315 (Feb. 27, 1997) concerning the use of data for any purpose under the Act, generated by the reference method specified herein or otherwise.”



Issues with Enforceability

- Do the permit terms assure continuous compliance (cont'd)?
 - Sierra Club, et al v. U.S. EPA and American Petroleum Inst., et al, (DC Cir. 2008)
 - That all Title V permits should include monitoring requirements “sufficient to assure compliance with the terms and conditions of the permit” and
 - That a permitting authority may supplement an inadequate monitoring requirement so that the requirement will “assure compliance with the permit terms and conditions”



Reporting and Recordkeeping Requirements

- Recordkeeping
 - Without recordkeeping, there is no enforceability
 - New York I - D.C. Circuit remanded “reasonable possibility” because there were no recordkeeping requirements, and therefore, the provision was unenforceable
 - Ensure that everything that the source must comply with has a recordkeeping requirement
- Reporting Form
 - Agency is moving to replace paper reporting with electronic. “Improving Our Regulations: A Preliminary Plan for Periodic Retrospective Reviews of Existing Regulations” (5/24/11).
www.epa.gov/improvingregulations



State Issue #1: Sometimes the Title V permit doesn't properly bring forward all requirements from NSR permit, and vice versa

- **State Solution:** Have the same staff process both the NSR & Title V permitting for a given facility (facility assignment)
 - **Single Staff Processing of NSR & TV applications**
 - Permitting staff become more aware of all issues and requirements to be brought forward into the next permitting action
 - Facility assignment encourages greater identification with and, thus, enhanced 'ownership' of the permitting process for a facility
 - **Creation of a Major Source Section to handle all TV major permitting actions**
 - This promotes focused meetings & training
 - This promotes major source (advanced) permitting specialists aware of complex major source permitting issues
 - **Staff are cross trained (assigned) so that various staff are assigned to the different refineries, as opposed to having a 'refinery expert'**



State Issue #2: Reduce the differences between NSR & Title V permits to provide consistency and ease of enforceability

- **State Solution:** Parallel programs that streamline the process
 - **Universal Application**
 - A single application for both programs makes it easier for applicants to prepare the application and staff to review NSR & TV actions
 - Excel tables in the application are formatted to be copied & pasted into both the SOB and either permit template, reducing errors
 - Differences in the programs require a single TV specific section
 - **Universal Statement of Basis**
 - Universal SOB promotes bringing forward SOB between the programs
 - **Universal Permit Template** (format)
 - Promotes bringing forward requirements from one program to the other

Emissions Units

- Example from state operating permit

Process	Plant Identifier	AIRS Stack Number	Description	Size	Pollution Control Device
Clinker Cooling	P007	007	SO16 – Clinker Drag Chains SO17 – Clinker Cooler	81 tons per hour	Baghouse (3 each)
Kiln Burning	P008	008	SO18 Precalciner Kiln	120 tons per hour (Dry)	Baghouse

Emissions Units

Parameter	Permit Condition Number	Limitations	Emission Factors	Monitoring	
				Method	Interval
Kiln Feed Rate	10.3	120 tons/hour 967,680 tons/year (dry basis)	NA	Recordkeeping	Daily and Monthly
PM & PM10 - Kiln	10.4	0.275 pound/ton of feed (dry basis)	NA	Stack Test	Annually
NOx CO SO2	10.7 (rolling 12-month total, etc.)	2649 tons/year 396 tons/year 1340 tons/year	NA	CEM	Continuously
VOC	10.7 (Method 25A. Rolling 12-month total, etc.)	138 tons per year	Stack Test	Stack Test Recordkeeping & Calculation	Annually Monthly



State Issue #3: Permits sometimes lack proper MRR

- **State Solution:** Build in systems to reduce mistakes, especially in MRR
 - **Universal Permit Template**
 - The Universal Template helps ensure previous requirements are brought forward into the next permitting action
 - **The MRR Tabular Operating Requirement Format**
 - The MRR Tabular Operating Requirement Format (next slide) ensures MRR for each limit and operating requirement
 - **Pasting Tables from the Application into the Permit**
 - Copying and pasting the Equipment Tables and the Requested Allowables Tables from the application directly into the permit, helping to reduce errors



State Issue #3 (continued): Permits sometimes lack proper MRR

- **Requirement:** Total ethanol produced by facility shall not exceed 600 gallons per hour
- **Monitoring:** A flow meter and data logger shall be installed and continuously operated that measures the hourly flow volume in gallons of produced ethanol
- **Recordkeeping:** Records of the hourly flow volume shall be kept including the date, the hour of the day, and the total flow volume of produced ethanol during the proceeding hour in gallons
- **Reporting:** By January 31 of each year, the facility will submit a report to the Department including the data required in this condition for all 8760 hours of the year. A synopsis shall be added to the beginning of the report summarizing each hour in the year the hourly ethanol production exceeded 300 gallons per hour.



Areas which can cause a disconnect

- Competing priorities
- Structural differences
- Lack of familiarity with each other's policies
- Misunderstanding of commingling policies
- Differences in relationships with sources



Where can enforcement and permits better coordinate?

- NSR permits
- Title V operating permits
- Applicability determinations
- Priorities
- SIP review and approval
- Rulemaking
- Citizen suits/Environmental Justice issues



NSR Permits and Challenges

- Do enforcement staff know of pending permits, and permit staff know of enforcement matters?
- Is there a mechanism for exchanging information?
- Do staff understand the parameters of co-mingling?



Commingling

- EPA has dual role –
 - Addressing non-compliance
 - Issuing permits
- Permit actions are adjudicatory in nature
 - Implicates due process
- Enforcement can not unduly influence permitting decisions (fact specific)
- Enforcement officials may provide information to independent permit decision makers
 - Bethlehem Steel Corp. v. U.S. EPA, 638 F. 2d 994 (7th Cir. 1980)
 - Marine Shale Processors Inc. v. U.S. EPA, 81 F3d 1371 (5th Cir. 1996, cert. denied, 519 U.S. 1055 (1997))
 - Due Process Considerations Raised by Agency “Commingling” or Enforcement and Regulatory Functions (9/21/99)



What are some “Best Practices” to Improve Coordination?

- Pick up the phone
- Have regular meetings
- Establish process to allow for coordination
- Highlight specific areas or issues of concern (e.g., NSR permits in non-attainment areas, enforcement priorities)



What are some “Best Practices” to Improve Coordination?

- Keep lines of communication open at all times
- Debate and discussion allow for critical thinking, and, hopefully . . .
 - better work product
- Examine your document and personnel structures