

Chapter Three

Common Problems in a Draft Title V Permit

This chapter provides an overview of common problems with Title V permits. This overview is meant only to give you an idea of what you might encounter when you review a draft permit. A detailed explanation of how to review a permit begins on page 35.

What are common problems in a draft Title V permit?

Though Congress created the Title V permitting program to increase facility compliance with air quality requirements, a poorly written permit could lead to the opposite result. Weak permits that slip through review by U.S. EPA and the public could protect permit holders from enforcement even as they continue to violate air quality laws. It is not unusual to identify the following problems in Title V permits:

- The permit misapplies an applicable requirement or improperly identifies a requirement as inapplicable. (p. 28).
- A permit condition is too vague to be enforceable. (p. 30).
- The permit leaves out requirements contained in permits issued prior to application for a Title V permit (e.g. state operating permits or pre-construction permits). (p. 31).
- The permit lacks monitoring and reporting requirements sufficient for the public and government regulators to determine whether the facility is in compliance. (p. 32).
- The permit limits the type of evidence members of the public and government regulators may rely upon to show that the facility is violating an air quality requirement. (p. 33).
- The permit improperly prevents the U.S. EPA and the public from enforcing certain requirements. (p. 34).

This list of potential problems with a Title V permit is not comprehensive. It is meant only to illustrate why it is important for people who are concerned

about air quality in their communities to get involved in the Title V program. The following discussion provides details on each of the problems listed above.

A. The permit misapplies an applicable requirement or improperly identifies a requirement as inapplicable.

Example:

A draft permit condition incorporates a SIP requirement by stating that “all perchloroethylene dry cleaners who generate 75,000 dollars per year in revenue must conduct a visual inspection of the dry cleaning system at least once a week for perceptible leaks.”

The underlying SIP requirement also requires corrective action. (“Perceptible leaks shall be repaired within 24 hours of detection.”) The corrective action portion of the requirement is not included in the draft permit.

At the very least, the misapplication of an applicable requirement misleads the public about how the requirement applies to the facility. In most cases, the misapplication of a requirement will make it difficult to enforce the requirement properly. This is because most Title V permits include a permit shield. In the example above, the public would have trouble enforcing the duty to repair leaks if the permit contained a shield.

1. What is a permit shield?

A permit shield is language in a permit that limits the rights of the public, U.S. EPA, and the Permitting Authority to sue a facility for violating an air quality law. If the permit contains a shield (and most permits do), then the facility is considered to be in compliance with any air quality requirement mentioned in permit so long as it complies with permit terms. The permit shield is not a problem if the permit correctly includes all the requirements that apply to a facility.

For the permit shield to protect a facility from enforcement of a particular requirement, the requirement must be described in the permit as not applying to the facility. This determination must be included in the text of the permit or as an attachment. A facility cannot be excused from a requirement simply because it was overlooked by the Permitting Authority when the Title V permit was created. The Permitting Authority *may not* shield the facility with a generic statement that any requirement that is not included in the permit does not apply to the facility.

2. Why does Part 70 allow permit shields?

A Title V permit benefits the permitted facility by providing notice of all of the requirements that apply to the facility and what the facility must do to comply with those requirements. If a facility is not protected by a permit shield, then the facility can be sued for violating an applicable air quality requirement even if it is complying with the terms of the permit if it turns out that the terms of the requirement were incorporated incorrectly into the permit. Many permitting authorities choose to include a permit shield in Title V permits to provide facilities with certainty that if they comply with the terms of their permits, they are considered to be in compliance with the air quality requirements covered by the permit.

3. What should I look for when I review the permit shield language in a draft permit?

Here's an example of typical language in a Title V permit that creates a permit shield:

Compliance with the terms of this permit shall be deemed compliance with applicable requirements as of the date of permit issuance provided that:

1. Such applicable requirements are included and are specifically identified in the permit; or
2. the Permitting Authority has determined in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determinations.

Note that the problems with the permit shield are not generally mistakes in how the permit shield language is drafted. The problems happen when the Permitting Authority (1) misapplies an applicable requirement, or (2) makes a mistake in deciding that a particular requirement does not apply to the facility. If the Permitting Authority misinterprets the effect of a statute or regulation as it applies to a facility and the permit includes a permit shield, the facility only needs to obey the terms of the permit, not the correct interpretation of the law, until the permit is reopened and corrected. Moreover, if the Permitting Authority mistakenly finds that a requirement is not applicable and excludes the requirement from the permit, the facility is shielded from enforcement related to the excluded requirement until the permit is reopened and corrected.

Since the permit shield applies only to air quality requirements that are specifically mentioned in the permit, the primary concern is whether the requirements that are included in the permit are applied correctly. Sometimes a particular regulation applies to facilities in a variety of ways. For some facilities the regulation might simply require the facility operator to calculate the facility's pollution levels, and keep them on file. Under the same regulation, another facility might be required to install additional pollution control equipment. As a result, a permit might identify the regulation as applicable to the facility, but exempt the facility from complying with the regulation's most stringent requirements. Even if it is later discovered that the regulation was applied incorrectly, the facility cannot be sued for failure to comply with the shielded regulation unless the permit is changed.

4. *What can I do if a facility's permit has already been issued and I believe that it does not include all the requirements that apply to the facility?*

If, after a permit is issued, the Permitting Authority recognizes that the permit does not ensure compliance with all applicable requirements, the Permitting Authority should "reopen" the permit and make necessary adjustments. If you believe that a permit is allowing a facility to violate air quality laws, you can bring this to the attention of the Permitting Authority. If that doesn't work, you can petition the EPA Administrator to reopen the permit. It may be difficult to persuade the Permitting Authority to reopen the permit. Thus, it is far better to identify problems with a permit *before* the permit becomes final.

A more detailed discussion of how to make sure that a draft permit correctly reflects the requirements of the underlying statute or regulation begins on page 65.

B. A permit condition is too vague to be enforceable.

Example:

A draft permit condition provides that "the incinerator must be maintained and inspected as suggested by the manufacturer's specifications."

A Title V permit cannot be relied upon as an effective enforcement tool if the permit is unclear about what counts as a permit violation. Whether a permit condition is enforceable is referred to as "practical enforceability." The

above condition is not enforceable because it does not identify the particular “manufacturer’s specifications.” Moreover, since the manufacturer’s specifications are written only as suggestions to the operator, the facility could claim that certain aspects of the specifications are not necessary for one reason or another. For a permit condition to be enforceable, the permit must leave no doubt as to what the facility must do to comply with the condition.

This topic is discussed in more detail on page 69.

C. The permit leaves out requirements contained in a permit issued prior to issuance of the Title V permit (e.g. a pre-construction permit).

Example:

A coating facility uses coating lines to label plastic packaging. Several years ago, the facility obtained a pre-construction permit that allowed the installation of several new coating lines and a catalytic incinerator to control VOC emissions. The pre-construction permit, which was required under federal law, requires the facility to inspect the incinerator each week, and to continuously monitor the operating temperature of the incinerator to insure that it is functioning properly. The Title V permit says nothing about either of these requirements.

Many facilities are already subject to “pre-construction permits.” Sometimes these are called “permits to install” or “new source review permits.” Pre-construction permits are required under federal law, but are frequently issued by a state or local Permitting Authority. These permits are called “pre-construction” permits because they must be issued before a facility is initially constructed, or before a facility is modified in such a way that would increase air pollution. Many facilities do not have pre-construction permits because they were built before the law was passed, and they were never modified. If a facility does have a pre-construction permit, all conditions in the pre-construction permit must be specifically included in the Title V permit. If they are not and there is a shield in the permit, those conditions will no longer be enforceable unless the permit is reopened to add them or remove the shield.¹

¹ Some states already issued state operating permits to existing facilities prior to the creation of the Title V program. These permits are somewhat similar to Title V permits but generally are not federally enforceable. Terms from these permits can be included in Title V permits but are identified as not federally enforceable. Be aware, however, that it is sometimes difficult to tell if a previously-issued permit is a state operating permit or a federally-required pre-construction permit. Terms from a facility’s pre-construction permit or from a state operating permit program that is part of a SIP must be incorporated into the facility’s Title V permit. In the state of Washington, U.S. EPA dealt

D. The permit lacks monitoring and reporting requirements sufficient for the public and government regulators to determine whether the facility is in compliance.

Example:

A large commercial and residential complex operates four large boilers to generate heat and electricity. The boilers must comply with a requirement that limits opacity (the darkness of the smoke) to no greater than a six-minute average of 20%. Though the draft permit includes the opacity requirement, it does not require the facility to perform any stack testing or visual monitoring to assure compliance with the opacity limitation. The underlying regulation does not include any type of monitoring.

A Title V permit must require the permitted facility to perform monitoring and recordkeeping that is sufficient to provide a reasonable assurance that the facility is obeying the law. Monitoring requirements designed to demonstrate a facility's ongoing compliance with air quality requirements are referred to as "periodic monitoring." Unfortunately, some permits lack sufficient periodic monitoring. Instead, the permits are drafted with the emission limitations listed, but no way to determine whether the facility is complying with those limitations. When this happens, the Title V permit loses its effectiveness as a tool for monitoring a facility's compliance with air quality requirements.

Sometimes an applicable air quality requirement specifically identifies a monitoring method that the facility must use. For example, the applicable requirement might limit the percentage of sulfur contained in fuel oil burned at the facility. To show compliance with the limit, the underlying regulation might require the facility to test the sulfur content of every new fuel oil shipment and record the results in a log book. The sulfur limit and the monitoring or testing requirements included in the underlying regulation must be included in the facility's Title V permit.

Sometimes, the applicable air quality statute or regulation fails to identify an ongoing monitoring method. For example, consider a regulation that limits the percentage of sulfur in fuel but does not specify a monitoring method for

with this problem by taking the position that all requirements included in a pre-existing state permit are considered federally enforceable and must be included in the Title V permit unless the Permitting Authority demonstrates otherwise. If you experience a similar problem in your state, you can propose the Washington approach to your Permitting Authority and your U.S. EPA regional office.

demonstrating compliance. When the Permitting Authority develops a draft Title V permit that includes this requirement, it must add periodic monitoring to demonstrate compliance with the limit (e.g., the facility must measure the sulfur content of each fuel shipment and record the results in a permanently bound log book). This periodic monitoring requirement becomes an enforceable condition in the Title V permit.

This topic is discussed in more detail on page 72.

E. The permit limits the type of evidence that the public, U.S. EPA, and the Permitting Authority may rely upon to show that the facility is violating an air quality requirement.

Example:

A draft permit provides that “the monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined.”

The above example improperly restricts the type of evidence that can be used to prove that the facility is violating an applicable requirement. Under the Clean Air Act, government regulators and members of the public may rely upon any “credible evidence” to demonstrate that a facility is violating an air quality requirement. This means that regulators and the public can rely upon other types of reliable data to prove a violation even when the Title V permit specifies a particular type of monitoring that a facility operator must perform.

At times, the specified monitoring method may not be as effective as other available methods for finding out whether a facility is complying with a requirement. In addition, it is often the case that the facility is already performing additional monitoring for other reasons (perhaps under a state-only requirement that does not need to be included in the Title V permit), and these additional monitoring methods indicate a violation even though monitoring methods required under the Title V permit indicate compliance. According to U.S. EPA and the courts, reliable evidence from alternative monitoring activities can be used in court to prove a violation in addition to data from required monitoring.

Though the rule on the use of all credible evidence is very clear, you may find language in a draft Title V permit that attempts to limit the evidence that can be used to show a violation of permit requirements. For example, a permit might state that “The monitoring methods specified in this permit are the sole

methods by which compliance with the associated limit is determined.” Such language is illegal and must be deleted from Title V permits.

This topic is discussed in more detail on page 70.

F. The permit improperly prevents the U.S. EPA and the public from enforcing certain requirements.

Example:

A state regulation limits the sulfur content of fuel to 0.3%. The state regulation has been approved by U.S. EPA into the SIP, which makes it federally enforceable (i.e., enforceable by U.S. EPA and the public). The draft permit incorrectly identifies the sulfur limitation as a “state-only” requirement. (A state-only condition is not enforceable by U.S. EPA or the public).

Under federal law, a Title V permit must include every “federally enforceable” requirement that applies to the permitted facility. If a state Permitting Authority is responsible for issuing permits, the Permitting Authority has the option of including state requirements that are not federally enforceable (“state-only” requirements). Most state permitting authorities do include state-only requirements in the permits they issue. When state-only requirements are included, the Permitting Authority must identify those conditions as not federally enforceable. A mistake sometimes made in drafting Title V permits is to list requirements that are actually federally enforceable as “state-only” requirements. The practical result of such a mistake may be to prevent both U.S. EPA and the public from enforcing the misidentified requirement.

This topic is discussed in more detail on page 81.