

Chapter Four

Suggested Strategy for Reviewing a Title V Permit

At this point you have selected a draft permit to review, and you have obtained background information about the facility that will help you during the review process. Perhaps you feel well prepared. Then you take a look at the draft permit and suddenly you feel overwhelmed. The draft permit is lengthy and complicated, with little explanation of permit conditions. The draft permit refers to equipment and processes that you have never heard of.

Don't panic. Though you may feel intimidated the first time you see a draft Title V permit, you will quickly discover that there are simple ways to improve the final permit. In doing so, you will make the permit a more useful tool for keeping track of whether a facility is complying with air quality requirements.

The key to successfully reviewing your first draft permit is to remain focused upon what you hope to achieve. In particular, you want the final Title V permit to:

- include all Clean Air Act requirements that apply to the facility (these are called “applicable requirements”);
- clearly describe the monitoring and reporting activities required by law;
- require the facility to perform periodic monitoring that assures the facility's compliance with each permit requirement;
- include an enforceable plan and timetable for bringing the facility into compliance with air quality requirements if the facility is not in compliance at the time the permit is issued;
- require the facility to submit regular documentation to the permitting authority that demonstrates whether the facility is complying with its permit; and
- preserve your right to hold the facility owner or operator legally accountable for any violation of federal applicable requirements.

To effectively review a draft permit, you do not need to understand every permit condition. Certainly, an understanding of how the facility operates is helpful. But keep this thought in mind: some of the points you make in your comment letter may be off the mark. But if even a few of your comments hit

upon an actual problem with the draft permit, your comments could substantially improve the quality of the final permit. In addition, by submitting a comment letter about a draft permit that is of concern to you and others in your community, you provide the Permitting Authority and the U.S. EPA with an incentive to review the draft permit with your comments in mind. While considering your comments, they might notice additional problems with the draft permit that you didn't catch.

The permit review strategy suggested in this section is meant only as a way to get you started in reviewing your first draft permit. Because each Permitting Authority develops its own permit application form and permits, it is difficult to predict which issues you will find as you review draft permits. You might decide upon a different approach after becoming more familiar with Title V permits being issued in your area.

At the point that you are ready to review a draft permit, you should have copies of both the draft permit and the permit application. You also may have had the opportunity to review the facility file maintained by the Permitting Authority. If so, you should already possess a working knowledge of which air quality requirements are most significant at the facility, and what sort of monitoring reports are submitted to the Permitting Authority. Most importantly, you are probably aware of any known, ongoing compliance problems at the facility.

The review strategy described in this section involves the following steps:

- (1) Identify the underlying source for any requirement mentioned in the permit application and draft permit. (p. 37).
- (2) Review the permit application for helpful information. (p. 45).
- (3) Review the statement of basis. (p. 53).
- (4) Evaluate the adequacy of general conditions. (p. 54).
- (5) Check to see if source-specific air quality requirements are correctly incorporated into the permit. (p. 62).
- (6) Determine whether any federal requirements are incorrectly identified as "state-only" in the draft permit. (p. 81).

Each step is explained in detail below.

**Step One in Reviewing a Draft Title V Permit:
Identify and Locate the Underlying Source of Any Requirement
Mentioned in the Permit Application or Draft Permit**

Generally, a Title V permit does not create new air quality requirements. Instead, the Title V permit is designed to gather all federally enforceable air quality requirements into one permit so that it is easy to identify them. Every requirement included in a Title V permit must be based upon an existing law, regulation, or permit. This is what is meant by an “underlying source.”

As you review a draft permit, you will need to refer to the underlying source for each permit condition. Therefore, your first task when reviewing a draft permit is to identify and locate the underlying source for each requirement listed in the permit application and draft permit. The next few pages provide basic information about who makes air quality requirements and how to locate them.

A. Where do air quality requirements listed in a Title V permit application or permit come from?

A Title V permit includes air quality requirements created by:

- (1) U.S. EPA;
- (2) state legislatures; and
- (3) state and local environmental agencies.

1. Regulations adopted by the U.S. EPA

When Congress passed the Clean Air Act, it authorized U.S. EPA to develop regulations under the law. This is because Congress lacks both the time and the expertise to develop the highly specific requirements that are necessary to administer the law. For example, Congress told U.S. EPA that it must develop air quality standards sufficient to protect human health. It was then U.S. EPA’s responsibility to determine what those standards should be. Unless U.S. EPA’s regulations conflict with a statute passed by Congress, U.S. EPA’s regulations have the force of law and can be enforced by a court.

2. State and local law

All air quality requirements aren't found in federal statutes and regulations. In fact, you will discover that the majority of requirements that apply to a facility are found in *state* statutes and regulations. This is because under the Clean Air Act, U.S. EPA sets air quality standards and the States are responsible for adopting air quality requirements that are at least as strict as the federal requirements.

U.S. EPA sets air quality standards for six criteria pollutants that are found in fairly large quantities all across the country. Every state must submit a plan for meeting or "attaining" these standards. This plan is known as the "State Implementation Plan," or just the "SIP." SIPs are collections of air regulations used by a State to reduce air pollution.

A state regulation does not become part of the SIP until the state submits the regulation for approval, and U.S. EPA approves it. Before a state regulation is approved by U.S. EPA, it is only enforceable by the state. This means that even though the regulation might be "in effect" (meaning that facilities that are covered by the regulation must comply with it), the U.S. EPA cannot enforce the requirement.¹ After being approved by the U.S. EPA, a state regulation is "federally-enforceable." This means that the regulation can be enforced in court by the state and federal government as well by the public under the citizen suit provision of the Clean Air Act.

B. Which requirements must be included in a Title V permit?

Under Title V, all "applicable requirements" must be included in a Title V permit. Applicable requirements are air quality limitations and standards developed by state and local governments and by the U.S. EPA to comply with the Clean Air Act. These requirements may be found in:

- U.S. EPA regulations;
- SIPs; and
- other federally-enforceable permits such as preconstruction permits.

¹ Regardless of whether the state regulation has been approved by U.S. EPA as part of the state's SIP, the regulation may be enforced by state authorities.

In addition to air quality requirements found in the Clean Air Act, U.S. EPA regulations, and SIPs, every state has its own set of air quality requirements that are not part of the SIP. In the context of the Title V program, these requirements are referred to as “state-only” requirements. State-only requirements cannot be enforced by the U.S. EPA. Furthermore, members of the public may run into difficulty trying to enforce state-only air quality requirements.² These requirements do not have to be included in a facility’s Title V permit. However, the Permitting Authority may decide to include state-only requirements in Title V permits. If this is done, Part 70 requires that the state-only requirements be specifically identified in the permit as not federally-enforceable. Most approved Title V programs do include state-only requirements in Title V permits.

C. **Complication: Mind the SIP-Gap.**

As explained above, SIPs are primarily made up of state regulations. States regularly revise their air quality regulation, and this creates some confusion over which version of the regulation is included in the SIP. The difference between the SIP version of a regulation and the most recent version of that regulation is referred to as the “SIP-gap.” Consider the following scenario:

February, 1979: A state agency creates an air quality regulation. The regulation applies to certain facilities in the state immediately, but it is not yet federally-enforceable.

June, 1979: The state submits the regulation to the U.S. EPA for inclusion in the state’s SIP. U.S. EPA has not yet approved the regulation, so the regulation is still not federally-enforceable.

June, 1981: Two years after the regulation was submitted to the U.S. EPA by the state, U.S. EPA approves the regulation for inclusion in the SIP. The regulation is now federally enforceable.³

August, 1996: The state revises the regulation. The revisions include several new requirements designed to protect and improve air quality. While the original

² Some states have laws that allow citizens to enforce certain state laws in state court. These state “citizen suit” laws tend to be very restricted.

³ It is not uncommon for U.S. EPA approval of a SIP submission to take up to five years.

regulation approved by the U.S. EPA in June of 1981 is still federally-enforceable as part of the SIP, the new requirements created by the 1996 revisions to the regulation are not part of the SIP and are not federally enforceable.

November, 1996: The state submits the revised regulation to U.S. EPA for inclusion into the SIP.

Present: U.S. EPA is still evaluating the revised regulation for approval and inclusion in the SIP. At the same time, the Permitting Authority is developing a Title V permit for a facility that is required to comply with the revised regulation.

The state includes state-only requirements in Title V permits. According to 40 CFR Part 70, a permit must identify any requirement that is not federally enforceable. How are the requirements of this regulation included in the Title V permit?

The short answer is that both the version of the regulation that is already in the SIP (the “SIP version”) and the current version of the regulation are included in the Title V permit. Any condition required under the SIP version of the regulation remains federally enforceable, even though U.S. EPA is in the process of considering the new regulation for inclusion into the SIP and the state environmental agency no longer enforces the old SIP version of the regulation. U.S. EPA guidance advises that any condition that is required under the new version of the regulation that is not yet approved for inclusion in the SIP should be identified in the permit as a “state-only” requirement.⁴

In sum, the most recent version of a state regulation may not be the same as the version of the regulation that is part of your state’s SIP. Therefore, it is important to examine the SIP status of any state regulation listed in a draft permit.

⁴ EPA guidance does not create legal requirements. Such guidance is only meant to guide state, local and tribal permitting authorities in interpreting and applying the law. Your Permitting Authority may disagree with EPA’s interpretation of the law. It is possible, therefore, that your permitting authority might place a state regulation that is not part of the SIP in the federally-enforceable section of a Title V permit.

D. How do I locate the complete text of a requirement I see mentioned in a permit or permit application?

1. How do I locate the Clean Air Act?

The Clean Air Act is available on the Internet at http://www.epa.gov/oar/oaq_caa.html.

You will almost never see a provision of the Clean Air Act cited in a Title V permit application or permit. If you do, the citation will be in one of two formats. The first format is simply to cite to the section of the Act, directly. So, for example, the section of the Clean Air Act that creates the Title V program starts at CAA § 501. The second way to cite to the Clean Air Act is to cite to the part of the United States Code where the Clean Air Act was published. So, if you were to cite to the first part of Title V of the Clean Air Act according to its location in the code, you would cite to 42 U.S.C. § 7661.

2. How do I locate a federal regulation?

When a federal agency develops a regulation, it must allow for a minimum public comment period for the proposed regulation. The public comment period starts on the day the proposed regulation is published in the Federal Register. The Federal Register is published every weekday and includes any proposed or final regulations developed by a federal administrative agency. After the public comment period ends and the agency decides upon a final version of the regulation, the final version is also published in the Federal Register.

Sometimes, a federal regulation will be identified by its Federal Register citation, which will look something like this: 56 FR 102984 (June 2, 1991). Each federal regulation has two Federal Register citations: one that refers to the proposed version of the regulation, and one that refers to the final version of the regulation.

Once each year, federal regulations that were published in the Federal Register over the course of the year are compiled into the Code of Federal Regulations (“CFR”). Most of the federal regulations that appear in Title V permit applications and draft permits have been around long enough to be published in the CFR. Therefore, most of the citations to federal regulations will appear in CFR format: 40 CFR § 51-xx.

You can access the Federal Register and the CFR at any law library. In addition, every federal regulation that is referred to in a Title V permit application or draft permit is most likely available on the Internet. The following websites should be helpful in locating federal regulations:

www.epa.gov/oar/oarregul.html: provides access to EPA regulations and guidance documents.

www.epa.gov/epacfr40: provides access to the full text of the CFR, by chapter, subchapter, and parts.

3. *What federal regulations are mentioned frequently in Title V permit applications and permits?*

There are several federal regulations that you should be aware of as you review your first draft permit. First, as explained above, 40 CFR Part 70 provides the minimum requirements for a U.S. EPA-approved state, local, or tribal Title V program. These regulations can be found in Appendix A and are also available at www.epa.gov/oar/oaqps/permits/requirem.html.⁵ It is very important that you become familiar with Part 70 requirements. As you review your first permit application and draft permit, you might be surprised to find that Part 70 is rarely mentioned, if it is mentioned at all. Why? Because when a Permitting Authority requests U.S. EPA approval to issue Title V permits in its area, it must demonstrate that the relevant state, local, or tribal laws and regulations meet all of the requirements of Part 70. That means that state laws and regulations basically duplicate many Part 70 requirements. So, even though a particular permit requirement originated in Part 70, the regulation you generally see cited in a Title V permit application or permit is the duplicate state or local regulation.

40 CFR Part 60 contains “New Source Performance Standards” or “NSPS,” which are federal standards that apply to new facilities. They are generally a lot stricter than requirements that apply to older facilities. Any facility that was built after the regulations were issued must comply with them.

⁵ Note that 40 CFR Part 70 was amended by the Compliance Assurance Monitoring (“CAM”) rule. See www.epa.gov/ttn/oarpg/t5pfpr.html. Furthermore, a lawsuit filed by the Natural Resources Defense Council and decided in October 1999 resulted in the court finding that part of the CAM rule violated the Clean Air Act. (The court found that while the Clean Air Act requires Title V permittees to indicate in their annual compliance certifications whether compliance with legal requirements was continuous or intermittent, the CAM rule only required Title V permittees indicate whether the data used to determine compliance were continuous or intermittent).

Many older facilities that have been substantially rebuilt also have to comply with these standards. In most states, 40 CFR Part 60 will be listed in a facility's permit application as an "applicable requirement" if NSPS applies. Some states have state regulations that duplicate 40 CFR Part 60 requirements. If this is true for your state, you will see a state regulation listed in the permit application rather than 40 CFR Part 60.

40 CFR Part 63 contains "Maximum Available Control Technology" ("MACT") standards that apply to facilities that emit hazardous air pollutants. To learn more about MACT standards, refer to Part Two, Chapter Five of this handbook. Like with NSPS, you usually will see 40 CFR Part 63 listed in a facility's permit application if MACT standards apply to the facility. If the facility is located in a state that duplicates MACT standards in state regulations, you will see a state regulation listed in the permit application rather than 40 CFR Part 63. 40 CFR Part 63 can be found on the Internet in PDF format at www.epa.gov/ttn/uatw/eparules.html.

Prior to the 1990 Clean Air Act Amendments, U.S. EPA issued regulations governing seven hazardous air pollutants. These regulations are published at 40 CFR Part 61.

All regulations mentioned above are available on the Internet at www.access.gpo.gov/nara/cfr/index.html.

4. *How do I locate a state statute or regulation?*

Any law library in your area will have a copy of your state's air quality laws and regulations. In addition, state regulations can often be accessed at larger public libraries and on the Internet. Most air quality requirements listed in a Title V permit are based upon state regulations. Appendix B provides the Title V website addresses for many state and local agencies.

Many state regulations are also part of the SIP. Even if it appears that the state regulation cited in a Title V permit is available on the Internet, it is important that you take a look at the version of the regulation that is in the SIP. This is because, as discussed above, the SIP version of a regulation may not be the most recent version. If a state regulation is available on the Internet, be aware that it may not be the SIP-approved version of the regulation.

Under the Clean Air Act, the U.S. EPA is required to compile an updated version of each state's SIP every three years.⁶ The first compilation was due in 1995. A state SIP is a very large collection of materials, so it is somewhat impractical to request a full copy of your state's SIP. You have the right to review the contents of the SIP and it should not be difficult to arrange an appointment with someone at your U.S. EPA regional office so that you may do so. In addition, if you plan to review more than one draft permit you may want to request a copy of the state regulations that make up the SIP. If you are only reviewing one draft permit, you might request just a copy of the SIP regulations that are relevant to stationary sources of air pollution (e.g. power plants, factories). Be sure to get a copy of SIP provisions that apply to all facilities, such as generic SO₂ limits or opacity limits See Appendix B for who to contact at U.S. EPA for information about your state's SIP.

⁶ CAA § 110(h).

Step Two in Reviewing a Draft Title V Permit: Review the Permit Application for Helpful Information

Your second task as you begin to review a draft permit is to review the permit application for helpful information. A Title V permit application must include a wide variety of information, including a description of activities that take place at a facility (such as painting, burning oil for heat or energy, or storing gasoline), descriptions of equipment and pollution control devices, citation and description of air quality requirements that apply to the facility, and whether the facility is currently complying with those requirements. A typical permit application is twenty pages or so without attachments. Attachments can be several hundred pages for a large facility. This handbook does not cover every type of information that you will find in a permit application. Instead, this handbook focuses on the application information that usually is the most helpful in reviewing a draft permit. If you would like to see a listing of all permit application requirements, see the applicable federal regulation, published at 40 CFR § 70.5. Your state Title V regulations should also include a description of permit application requirements.

A. Does every Permitting Authority use the same permit application?

No. State and local permitting authorities are allowed to develop their own unique application forms, so long as they meet the minimum requirements established by the U.S. EPA in 40 CFR § 70.5. Thus, permit application forms vary substantially from state to state. Some states require an applicant to submit the application electronically, others require paper applications, and others will accept either format. Some application forms are easy to understand, while others are complicated and may take substantial effort to unravel. Due to this variability, you may find some of the recommendations provided in this handbook difficult to apply. If that happens, you may want to investigate whether the application form used in your state complies with legal requirements. (See 40 CFR § 70.5).

B. What are the most important things to notice in the permit application?

As you review the application, you are pursuing two objectives. First, you want to identify information that will be helpful to you in understanding and reviewing the draft permit. Second, you want to make a note of any information that appears to be missing or incomplete. Under federal

regulations, a final Title V permit may not be issued for a facility if the permit application is incomplete. In your comments on the draft permit, you should note if any application information is missing or incomplete.

The following information found in a permit application is particularly important:

- the identification of the facility, description of facility processes (operating hours, type of fuel burned, etc.), type and quantity of pollutants emitted;
- the citation and description of all applicable requirements and a description of or reference to any applicable test method for determining compliance with each requirement.
- the certification of truthfulness by a “responsible official”;
- the compliance certification (stating whether the facility is currently in compliance with air quality requirements); and
- the compliance plan (see p. 50).

C. Where in the permit application do I find information about the type and amount of pollution the facility releases?

Information about the type and amount of pollution the facility releases, as well as information about any pollution control equipment installed at the facility will be scattered throughout the application. You should begin your review of the application by quickly reading over all information and getting a feel for the facility. You probably will need to refer back to the permit application for this information as you review the draft permit since the draft permit does not duplicate all of the background information included in the permit application.

D. What might I learn by reviewing the requirements and applicable test methods that are identified in the permit application?

The Title V permit application must include the citation and description of every air quality requirement that applies to the facility and a description of or reference to any applicable test method for determining compliance with each requirement. See 40 CFR § 70.5(c)(4). You might want to write down the citation to each requirement that applies to the facility as you read through the permit application. Take note if any of these requirements are missing when you review the draft permit. There are several reasons why this might happen. The Permitting Authority may have decided that the facility is exempt from the

requirement. Another reason might be that Permitting Authority found that the requirement didn't actually apply to the facility or that the requirement was not an air quality requirement and did not need to be included in the Title V permit. Sometimes it is missing just because of an oversight. If a requirement that was listed in the permit application is missing from the draft permit, you should try to figure out whether the Permitting Authority was justified in leaving the requirement out of the permit. The best way to do this is to take a look at the underlying requirement and see if there is an obvious reason for why the facility would not need to comply with it. If you can't find a strong explanation for why the requirement is left out of the draft permit, consider including a statement in your comments such as:

74 DNR § 100.2(a) was listed in the permit application but not included in the draft permit. If this requirement applies to the facility, it must be included in the permit. If the Department of Ecology determined that this requirement does not apply to the facility, an explanation must be included in the statement of basis accompanying the permit.

In addition to finding that some requirements are left out of the draft permit, you might discover the reverse: a requirement might be included in a draft permit that was not mentioned in the original permit application. Sometimes, the requirement left out of the permit application is simply a generic requirement that does not require the facility operator to take any sort of immediate action. For example, consider the following requirement:

No person shall operate any air contamination source sealed by the commissioner unless a modification has been made which enables such source to comply with all requirements applicable to the source.

It is highly unlikely that a facility that is applying for a Title V permit has been "sealed," which would mean that the facility had been forced to cease operations. A facility's failure to identify such a requirement in its permit application is relatively harmless.

On the other hand, if you find that the permit applicant left out a requirement mandates that the facility to install pollution control equipment, apply for an additional permit, or perform additional monitoring, you have reason to be concerned. If the applicant failed to list such a requirement in its permit application, it is possible that the facility was not aware that it was

subject to the requirement. The facility might be in violation of the requirement. If so, the draft and final permit must include an enforceable compliance schedule. In your comments, you might want to say something like the following:

ECL § 8961(d)(1)(B), which requires that the facility install conservation vents, is included in the draft permit but was not listed in ABC Co.'s permit application. If ABC Co. is not in compliance with this requirement, a compliance schedule must be included in the permit. Otherwise, the permit must make it clear that ABC Co. has already installed conservation vents in conformance with ECL § 8961(d)(1)(B).

If you discover that a facility is violating an applicable requirement, you may be able to bring a “citizen suit” against the violator under the Clean Air Act. See Part Two, Chapter Three for more information.

E. What is the purpose of the certification of truthfulness?

A facility official must certify that information provided in the application is true, accurate, and complete. The certification must be based on a “reasonable inquiry” into the truthfulness of the information and must contain language similar to the following:

TITLE V CERTIFICATION	
I certify under penalty of law that, based on information and belief formed after reasonable inquiry, the statements and information in this document and all attachments are true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.	
Responsible Official:	Title:
Signature:	Date:

Make sure that the application includes a certification of truthfulness and that it is signed by a “responsible official.” In general, a responsible official is a person who has authority to make policy decisions for the company.⁷ For example, a

⁷ 40 CFR § 70.2 provides a lengthy regulatory definition for “responsible official.” U.S. EPA’s “White Paper for Streamlined Development of Part 70 Permit Applications,” July 10, 1995, provides additional insight into who qualifies as a responsible official. (p. 24). You can access this “White Paper” at www.epa.gov/ttn/oarpg/t5wp.html. The White Paper is only a guidance document. It is not legally enforceable.

plant engineer usually does not qualify, but a plant manager usually meets the criteria. If you have any doubt that the person who signed the certification is a “responsible official” or that the language of the certification is adequate, you should include that concern in your comments.

F. What must be included in the initial compliance certification?

The compliance certification is separate from the certification of truthfulness, but should be attached to the application.

The compliance certification is one of the most important parts of a Title V permit application, because it tells the Permitting Authority and the public whether the applicant is currently violating any air quality requirements. Like the certification of truthfulness, the compliance certification must be signed by a responsible official. It must include:

- a statement that says whether the facility is currently complying with all air quality requirements;
- a statement of the methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods (the responsible official must consider all monitoring records maintained by the facility when certifying whether the facility is in compliance with applicable requirements);
- a schedule for submission of compliance certifications after the permit is issued (the facility must agree to submit a compliance certification to the Permitting Authority at least once every 12 months) (This statement is often pre-printed on the application form, and the applicant simply checks the box next to the statement);
- A statement indicating whether the source is complying with any enhanced monitoring and compliance certification requirements of the Clean Air Act (also usually next to a check-off box).

The format for the compliance certification varies tremendously from state to state. Some states require permit applicants to complete compliance certification forms that are separate from the primary application form. Others include a compliance certification section as part of the primary application form. It is also common to find that the various parts of the compliance certification are scattered throughout the permit application.

G. What can I do if I find that the initial compliance certification is inadequate?

The public has a right to know whether a facility that is scheduled to receive a Title V permit is in violation of any legal requirement. You are denied that right if a facility submits an inadequate compliance certification. Members of the public should feel confident that each Title V applicant has submitted a complete and reliable initial compliance certification as part of its permit application. If you believe that required compliance certification information is missing from a facility's permit application, you should make this point in your comments on the facility's draft permit.

H. What must be included in a compliance plan?

Every facility must submit a compliance plan, even if the facility is currently complying with all air quality requirements. The compliance plan includes five parts.

- The applicant must give the facility's compliance status. However, many states interpret this requirement as calling for the same information as is contained in the initial compliance certification and do not require that the information be repeated in the compliance plan.
- The applicant must promise to obey all the air quality requirements with which the applicant is currently complying. Most permit applications simply require the applicant to check off a box which contains a statement that the applicant will continue to comply with applicable air quality requirements.
- The applicant must promise to obey all the air quality requirements that will come into effect after the permit is issued.
- If the applicant is violating an applicable requirement at the time the permit application is submitted, it must describe and propose a schedule for when and how it will bring the facility into compliance with those requirements. If the compliance schedule proposed in the permit application is reasonable, it will form the basis for the schedule of compliance that is included in the permit, provided that the facility is still out of compliance as of the date of permit issuance. The compliance schedule in the permit must contain an enforceable sequence of measures that will result in full compliance. The schedule must require the applicant to submit progress reports at least every

6 months after the permit is issued. These reports are public information. This is your way of keeping track of whether the facility is meeting the schedule after the permit is issued. Neither a compliance plan nor a compliance schedule protects the applicant from being sued over the violation by the government or by the public through a citizen suit.⁸ You may want to consider an enforcement action against the facility.

If it appears that the applicant is in compliance with all applicable requirements, then you simply need to make sure that all of the required statements listed above are included in the compliance plan that is submitted as part of the permit application.

I. How should I follow up if there is a compliance schedule in the permit application?

The existence of a compliance schedule in a facility's permit application or draft permit is a red flag that the facility has had difficulty complying with applicable air quality requirements in the past and is currently out of compliance.

Most applicants will have submitted their applications more than a year prior to issuance of the final permit. If a facility proposed a compliance schedule in its permit application, then you should find out if the applicant is still out of compliance at the time the draft permit is released for public comment. If so, an up-to-date compliance schedule must be incorporated into the final permit. When looking at the draft permit, you should consider whether the compliance schedule will bring the facility into compliance and whether the time allowed is reasonable.

Sometimes, the compliance schedule in the application simply refers to an administrative consent order (an enforcement agreement between the Permitting Authority and the facility that typically includes milestones for bringing the facility into compliance) or a consent decree (an agreement between the Permitting Authority and a facility that is out of compliance, which has been approved by a court). If the application refers to such an order, make sure that you get a copy from the Permitting Authority.

⁸ If the compliance plan is based upon a judicially approved consent order that resulted from an enforcement action in state or federal court (as opposed to an administrative enforcement action), you are barred from bringing your own citizen suit against the facility for the same violation. See CAA § 304. In such cases, you still have the right to intervene in the lawsuit against the facility.

When reviewing a compliance schedule, keep the following in mind. First, a compliance schedule in a Title V permit must never be interpreted as granting the facility permission to operate in violation of an applicable requirement. See 40 CFR § 70.5(c)(8)(iii)(C). The underlying requirement must be included in the draft permit even if a compliance schedule is in place. Second, the compliance schedule must resemble and “be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.” See 40 CFR § 70.5(c)(8)(iii)(C). If the applicable consent decree or administrative order does not seem likely to lead to compliance within a reasonable period of time, the compliance schedule in the Title V permit must be made stronger than the consent decree or administrative order. ***The compliance schedule may not be used to shield a facility from an applicable requirement.***

Box 4.1: Important note on applications:

Some states require applicants to “correct” their initial application before the draft permit is released for public comment. For example, if the application left out requirements that apply to the applicant’s facility, the applicant may be required to revise the application to include these requirements. For the purpose of permit review, it is helpful to know what the applicant said in the initial application. Therefore, you should make sure that you have a copy of the original application submitted by the applicant, not just the revised version that accompanies the draft permit. The Permitting Authority must provide you with the original permit application if you request it.

Step Three in Reviewing a Draft Permit: Review the Statement of Basis

Under 40 CFR § 70.7(a)(5) “the Permitting Authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The Permitting Authority shall send this statement to U.S. EPA and to any other person who requests it.” This statement is frequently referred to as the “statement of basis.” Every Permitting Authority interprets the requirement for a statement of basis differently. Some permitting authorities include extensive information in the statement of basis, while others hardly include any information at all. Though some permitting authorities call the statement a “statement of basis,” most do not. You might see it called a “permit description” or an “introduction.” Regardless of what it is called, each Title V permit must be accompanied by a document that satisfies § 70.7(a)(5). When you request a copy of a draft permit and permit application, you should also request a copy of the Permitting Authority’s statement of basis.

If the draft permit lacks a statement of basis, you can argue that it violates Part 70 requirements. Also, you can argue that the lack of a statement of basis makes public participation during the public comment period difficult because the public is not provided with the Permitting Authority’s rationale for permit conditions. As one U.S. EPA staff member notes:

In essence, this statement is an explanation of why the permit contains the provisions that it does and why it does not contain other provisions that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the Permitting Authority in drafting the permit.⁹

If the permit that you are reviewing *does* include a statement of basis, then you should consider whether the statement is complete. In general, if you need more information in order to evaluate conditions included in the draft permit, you can argue that this information must be included in the statement of basis.

⁹ Joan Cabreza, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development, March 19, 1996.

A primary purpose of the statement of basis is to provide an explanation of the Permitting Authority's periodic monitoring decisions, especially if a facility is required to perform less monitoring than one would normally expect to be required. It may be that less monitoring is needed because the facility is burning a "clean fuel" that makes a violation of the requirement highly unlikely. Or, a recent stack test might demonstrate that the facility's pollution levels are substantially below the limits contained in the permit. Under these circumstances, the Permitting Authority may decide that the facility need not be burdened with excessive monitoring requirements. If this is the case, the statement of basis must include the Permitting Authority's rationale for applying less strict monitoring requirements. (A discussion of how you can evaluate whether monitoring requirements included in the draft permit are adequate begins on page 72).

Step Four in Reviewing a Draft Permit: Review General Conditions

A. What is a general condition?

A general condition is a condition that is included in every Title V permit, no matter what type of facility is being permitted. Most permits group these conditions in a separate section of the permit. If you review more than one draft permit developed by the same Permitting Authority, you will probably discover that the general conditions for each draft permit are nearly identical. Once you develop comments on the general conditions for one draft permit, you can rely upon those comments when developing comments on other draft permits developed by the same Permitting Authority.

There are three different types of general conditions. They are:

- general conditions required under 40 CFR Part 70;
- optional general conditions under 40 CFR Part 70;
- general conditions that have been approved by U.S. EPA for inclusion into the SIP for the state where the facility is located.

Each of these types of general conditions are discussed below.

B. What general conditions are required by 40 CFR Part 70?

The following checklist will help you make sure that a draft permit includes all required general conditions.¹⁰ In most cases, the Permitting Authority is not required to phrase general conditions exactly as they are phrased in Part 70. If the language varies significantly, however, look closely to make sure that the substance of the condition is the same as required under Part 70. If a general condition is misstated or missing in the draft permit, you can argue in your comments that the draft permit violates federal requirements and must be revised.

The checklist provides the relevant 40 CFR Part 70 citation for each general condition. In all likelihood, the draft permit will not provide this citation. Instead, you should see the citation to the relevant state permitting regulation. State and local regulations often duplicate the language of Part 70.

- Permit term:** The permit term shall not exceed 5 years. § 70.6(a)(2).
- Severability Clause:** In the event of challenge to any portion of the permit, the rest of the permit remains valid. § 70.6(a)(5).
- Duty to comply:** The permittee must comply with all conditions of the permit. Noncompliance constitutes a violation of the Act and is grounds for enforcement; permit termination, revocation and reissuance, or modification; or for denial of permit renewal. § 70.6(a)(6)(i).
- Halting/reducing activity not a defense:** It shall not be a defense in an enforcement action that it would have been necessary to halt or reduce activity in order to comply. § 70.6(a)(6)(ii).
- Reopening for cause:** The permit term may be modified, revoked, reopened, or terminated for cause. Filing of request for permit action by permittee does not stay any permit condition. § 70.6(a)(6)(iii).
- Reopening for cause:** The permit shall be reopened and revised if:
 - additional requirements become applicable and more than three years remain on the term of the permit;
 - additional acid rain requirements become applicable to the source;
 - the permit contains a material mistake or inaccurate statements were made in establishing terms or conditions of the permit; or
 - the permit must be revised or revoked to assure compliance with applicable requirements. § 70.7(f).

¹⁰ The checklist is a modified version of the checklist developed by U.S. EPA Region 9 as part of its *Title V Permit Review Guidelines*, developed for use by U.S. EPA Title V permit reviewers.

Suggested Strategy for Reviewing a Title V Permit

- Property rights:** The permit does not convey any property rights of any sort, or any exclusive privilege. § 70.6(a)(6)(iv).
- Duty to provide information:** The permittee shall furnish to the Permitting Authority, within a reasonable time, any information that the Permitting Authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. The permittee shall also furnish copies of records required to be kept under the terms of the permit. § 70.6(a)(6)(v).
- Confidential information:** For information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality. § 70.6(a)(6)(v).
- Payment of fees:** Source must pay fees consistent with fee schedule. § 70.6(a)(7).
- Emissions trading:** No permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit. § 70.6(a)(8).
- Certification of all documents:** Any application form, report, or compliance certification submitted pursuant to Part 70 shall contain certification by a responsible official. The certification shall state that, based on information and belief formed after reasonable inquiry, the statement and information in the document are true, accurate and complete. § 70.5(d).
- Compliance certification:** Source must certify compliance, at least annually with the terms and conditions of the permit. The certification must include the identification of each term or condition of the permit that is the basis for certification, the compliance status, whether compliance was continuous or intermittent, and the method used for determining compliance. Compliance certifications must be submitted to the Administrator as well as to the permitting authority. § 70.6(c)(5). [Note: Check to see that it is clear that the compliance certification covers every term and condition of the permit. The permit must not be ambiguous on this point].
- Inspection and entry:** Upon presentation of proper credentials, the permittee shall allow the permitting authority or authorized representative to:
 - enter the facility;
 - access and copy records that must be kept under the conditions of the permit;
 - inspect facilities, equipment, practices, or operations regulated or required under the permit; and
 - sample and monitor at reasonable times for substances or parameters for the purpose of assuring compliance with the applicable requirements. § 70.6(c)(2).

- Schedule of compliance.** § 70.6(c)(3).
 - **Permittee will continue to comply:** For requirements with which the source is in compliance, the permit shall contain a statement that the source will continue to comply. § 70.5(c)(8)(iii)(A).
 - **Permittee will comply with future requirements:** For requirements that will become effective during the term of the permit, the permit shall contain a statement that the source will meet such requirements on a timely basis. § 70.5(c)(8)(iii)(B).
 - **Source not in compliance:** [Note: This provision is not necessary if source is in compliance. Check the compliance certification in the source's application to see if it is out of compliance and needs a schedule of compliance in the permit.] If the source is not in compliance at the time of permit issuance, the permit must contain:
 - A schedule of measures leading to compliance [§ 70.5(c)(8)(iii)(C)]; and
 - A schedule for submission of certified progress reports at least every 6 months. [§ 70.5(c)(8)(iv)].
- Records of required monitoring.** § 70.6(a)(3)(ii)(A). Where applicable the permit shall require records of required monitoring information that include the following:
 1. The date, place, and time of sampling or measurement;
 2. The date the analyses were performed;
 3. The company that performed the analyses;
 4. The analytical techniques or methods used;
 5. The results of such analyses; and
 6. The operating conditions as existing at the time of sampling or measurement.
- Record retention:** Records of all required monitoring data and support information must be retained for at least 5 years. § 70.6(a)(3)(ii)(B).
- Reports of required monitoring:** Reports of all required monitoring must be submitted at least every six months. Reports shall identify all instances of deviations from permit requirements and must be certified by a responsible official. § 70.6(a)(3)(iii)(A). [Note: Make sure that the draft permit is absolutely clear about what monitoring requirements must be covered in the 6 month monitoring reports. It is better to resolve any ambiguity at the outset, rather than waiting for a dispute to arise over reporting requirements six months later].
- Prompt reporting of deviations:** The permittee shall promptly report deviations from permit requirements, including those attributable to upset conditions as defined in the permit, including the probable cause of the deviation and any corrective actions or preventative measures taken. [Note: The Permitting Authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements. § 70.6(a)(3)(iii)(B). Pay careful attention to how the draft permit defines prompt. The Permitting Authority has broad discretion in

deciding how quickly a deviation must be reported. But the definition of “prompt” must be reasonable. If you notice that the draft permit allows the facility to delay reporting a deviation for a very long time, you can argue that this long delay is unreasonable and violates Part 70 requirements].

C. What additional general conditions are optional under 40 CFR Part 70?

40 CFR Part 70 describes two additional permit conditions that the Permitting Authority may include in its permits. These conditions are not required under federal law, though they may be required under state law in some states. The first is the “Permit Shield,” which was described above on page 28. The second optional condition is the “Emergency Defense.”

The emergency defense provides that if a violation occurs due to an emergency, the violator can defend itself against any resulting enforcement action (by the state or federal government or by the public) by asserting that the violation was unavoidable. For the defense to be valid, the violator must demonstrate that an emergency actually occurred at the facility.¹¹ Based upon

¹¹ Note that the emergency defense only applies to technology-based emission limits (such as MACT standards) and not health-based standards. Differentiating between technology-based limits and health-based limits is somewhat difficult and goes beyond the scope of this handbook. The issue is apparently confusing for the government and the public alike, but U.S. EPA provides the following definition of “technology-based standards”:

By technology based standards, EPA means those standards, the stringency of which are based on determinations of what is technologically feasible, considering relevant factors. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic air pollutants does not change their character as technology-based standards.

See 59 FR 45530, 45559 n. 7 (August 31, 1995). U.S. EPA’s Region 10 explains that:

SIP requirements, such as an opacity limit or grain loading standard, are health-based standards, not technology-based standards because they are proposed by state and approved by EPA for the purposes of maintaining the NAAQS, which are health-based standards. Examples of technology-based emission limits include best available control technology standards, lowest achievable emission rate standards, maximum achievable control technology standards under 40 CFR part 63, and new source performance standards under 40 CFR part 60.

See Memorandum from Joan Cabreza, “Region 10 Questions and Answers #2: Title V Permit Development,” Mar. 19, 1996, p. 6. For purposes of reviewing a draft Title V permit, it is not necessary for you to be able to distinguish between a technologically-based and a health-based emission limit. Instead, you should just make sure that the emergency defense or other excuse provision is limited to excusing technologically-based emission limits.

the language of 40 CFR § 70.6(g), an emergency defense condition in a permit will look something like the following:

Emergency Defense:

1. Definition: An “emergency” means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.
2. Effect of an emergency: An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the following conditions are met.
 - (a) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:
 - (1) An emergency occurred and that the Permittee can identify the cause(s) of the emergency;
 - (2) The permitted facility was at the time being properly operated;
 - (3) During the period of the emergency the Permittee took all reasonable steps to minimize levels of emissions that exceeded the emissions standards or other requirements in the permit; and
 - (4) The Permittee submitted notice of the emergency to the Director within 2 working days of the time when emission limitations were exceeded due to an emergency. This notice shall contain a description of the emergency, any steps taken to mitigate emissions, and corrective action taken.
 - b. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an emergency has the burden of proof. This provision is in addition to any emergency or upset provision contained in any applicable requirement.

If you come across a permit condition that provides for an emergency defense, read the language carefully to determine if it varies from 40 CFR § 70.6(g). A condition that provides for an emergency defense should mimic the language of 40 CFR § 70.6(g) virtually word for word. If the language is different, it may

expand the application of the emergency defense and make it more difficult to enforce emission limits and standards included in the permit.

D. What should I look for when reviewing a general condition that is based upon a SIP requirement?

In addition to general conditions required under 40 CFR Part 70, draft permits contain additional general conditions that are specific to a state's statutes or regulations. These requirements will show up in nearly every permit in your state in exactly the same way, but they are unique to your state. As explained on page 38, state requirements are federally-enforceable so long as they have been approved by the U.S. EPA as part of the SIP. Every applicable SIP requirement must be included in a facility's Title V permit.

1. *Is the condition actually based upon the statute or regulation cited in the draft permit?*

The first thing to do when evaluating a state-specific general condition is to check to see whether the condition is actually based on the statute or regulation cited in the draft permit. (A Title V permit must include a citation to the underlying statute or regulation that supports each permit condition). If you find significant differences when you compare the language of the actual requirement to the permit condition, you should mention this discrepancy in your comments.

2. *Is it necessary to add details to the permit about how the requirement applies to the facility?*

You should also consider whether it is appropriate for the requirement to be included in the permit as a general condition, or if more details are necessary to understand exactly how the requirement applies to the facility covered by the permit. A "general condition" should apply to every facility in just about the same way. Here's an example of a general condition that is based on a SIP requirement:

No person shall burn, cause, suffer, allow, or permit the burning in an open fire of garbage, rubbish for salvage, or rubbish generated by industrial or commercial activities.

Every facility located in the state where this SIP requirement applies, regardless of the type of facility, must comply with it. There is no need to tailor this

requirement to each facility being permitted; nor is it necessary to require a facility to perform ongoing monitoring to demonstrate compliance with the requirement.

By contrast, consider the following condition:

Maintenance of Equipment

Any person who owns or operates an air contamination source which is equipped with an emission control device shall operate such device and keep it in a satisfactory state of maintenance and repair in accordance with ordinary and necessary practices, standards and procedures, inclusive of manufacturer's specifications, required to operate such a device effectively.

This condition does not apply to every facility in the same way. What qualifies as sufficient maintenance will vary depending on the type of control device used at a particular facility. Thus, the permit must identify the control device and define the meaning of "ordinary and necessary practices, standards and procedures, inclusive of the manufacturer's specifications, required to operate such a device effectively." Since a member of the public cannot easily obtain the manufacturer's specifications for the emission control device (particularly since the permit does not identify the emission control device that this condition refers to), it is not good enough for the permit to just refer to the manufacturer's specifications. For this condition to be enforceable, the specifications must be included in the permit.

If application of the requirement depends upon the particular characteristics of the permitted facility, you should evaluate the condition based upon the discussion of "source-specific" requirements in "Step Five," below.

Box 4.2: Excess Emissions Provisions that Apply During Periods of Startup, Shutdown, Malfunction, or Maintenance

Many SIPs allow the Permitting Authority to excuse violations of emission limitations that occur during startup, shutdown or maintenance of equipment. The Permitting Authority may also excuse violations that occur during equipment malfunction. Regulatory provisions that allow a Permitting Authority to excuse a facility that violates emission limitations are sometimes referred to as “excess emissions provisions.” Though this type of provision is not mentioned in 40 CFR part 70, an applicable federal regulation (such as a MACT regulation) might include an excess emissions provision that applies only to a violation of that particular regulation.

It is proper for a Permitting Authority to include an excess emissions provision in a Title V permit if it is based on a U.S. EPA-approved SIP or a federal regulation. A Permitting Authority is *not* allowed to include an excess emissions provision in a Title V permit if there is no federally enforceable law or regulation that provides the basis for the provision.

If you discover an excess emissions provision in a draft Title V permit, you should review it carefully to ensure that the permit does not allow the facility to take advantage of the provision unless legally entitled to do so. Refer to Chapter Six in Part Two of this handbook for a more detailed discussion of what to look for when reviewing an excess emissions provision.

**Step Five in Reviewing a Draft Permit:
Check to See if Source-Specific Air Quality Requirements Are Correctly
Applied to the Facility**

A. What are source-specific air quality requirements?

“Source-specific” air quality requirements only apply to certain kinds of facilities and equipment. A common source-specific requirement is a limitation on smoke emissions. This type of limitation is called an “opacity” limitation. Large factories and power plants are usually required to install a “continuous opacity monitoring system” (“COMS”) on each smokestack to monitor smoke

emissions. Because this requirement does not apply to all Title V facilities, it is referred to as “source-specific.”

B. Why is it important to review source-specific air quality requirements?

Well-written source-specific air quality requirements are at the heart of an effective Title V permit. In fact, it was largely the confusion over which source-specific requirements apply to each facility that prompted Congress to adopt the Title V program. Source-specific permit conditions relate to important pollution control issues such as how much pollution a facility can release and what kind of pollution control equipment must be installed. If the permit does a poor job of applying source-specific requirements to the permitted facility, it may be difficult for you to know whether the facility is complying with these requirements. Thus, review of source-specific requirements is often the most important aspect of reviewing a permit.

C. How are source-specific requirements organized in a Title V permit?

Source-specific requirements are typically located immediately after general permit conditions. You will find two types of source-specific requirements in a Title V permit. These are:

1. Requirements that apply to the entire facility.

Requirements that apply to the entire facility are typically included in a Title V permit as “source-wide,” “site level,” or “facility-specific” conditions. This handbook uses the term “source-wide.” Opacity limitations are often listed as source-wide permit conditions.

2. Requirements that apply to only particular parts of the facility.

Some air quality requirements only apply to particular types of equipment or fuel used at a facility. For example, a facility that operates a small boiler might be required to perform a boiler tune-up once each year.

Requirements that only apply to particular types of equipment are typically referred to in Title V permits as “emission unit level” conditions. This is because Title V permits usually group similar types of equipment into

“emission units.” For example, in the case of a facility with three medium-sized boilers and two large boilers, it is likely that the Title V permit will group the three medium-sized boilers into one emission unit, and the two large boilers into a second emission unit.

Grouping equipment into emission units is helpful in developing a Title V permit because similar types of equipment are typically covered by identical requirements. By grouping similar types of equipment into emission units, the Permitting Authority avoids stating the same conditions over and over again in the Title V permit.

D. How is a source-specific air quality requirement typically incorporated into a Title V permit?

A Title V permit must include every applicable air quality requirement. In addition, the permit must include monitoring, recordkeeping, and reporting conditions that are sufficient to assure that the facility is complying with each requirement. Thus, one air quality requirement might result in four or more permit conditions. For example, an air quality requirement found in a SIP might state the following:

The sulfur content of fuel oil may not exceed 0.3%.

A Title V permit might incorporate this requirement into a Title V permit with the following permit conditions:

Condition 1: The sulfur content of the fuel oil burned at this facility may not exceed 0.3 percent.

Condition 2: The Permittee must test the sulfur content of fuel oil upon its delivery to the facility. *(This is the monitoring requirement).*

Condition 3: A record of the sulfur content of each shipment of fuel oil must be kept in a log book on-site. *(This is the recordkeeping requirement).*

Condition 4: A report of the results of sulfur testing must be submitted to the Commissioner every 6 months following issuance of a final permit. *(This is the reporting requirement).*

Each of these four permit conditions is based upon the same underlying air quality requirement.

When you review a draft Title V permit, be aware that the various permit conditions associated with a single air quality requirement (as above) may not be in the same place in the draft permit. Some permitting authorities divide monitoring, recordkeeping, and reporting requirements into separate sections of the permit. If you find that this is the case for a draft permit that you are reviewing, you may want to take the time to create a “working document” for yourself that compiles all the conditions that relate to each requirement (as in the example above).

E. How do I make sure that source-specific conditions are adequate?

When reviewing a source-specific permit condition, you should ask the following questions:

- Does the draft permit condition correctly reflect the requirements of the underlying statute or regulation?
- Is the draft permit condition “practicably enforceable”?
- Is the draft permit condition accompanied by sufficient “periodic monitoring”?
- Does the draft permit include adequate recordkeeping and reporting so that you will know the results of any required monitoring on a timely basis?

The following discussion will assist you in answering these questions.

1. Does the permit condition correctly reflect the requirements of the underlying statute or regulation?

Like general conditions, each source-specific condition should include a citation to the statute or regulation that provides the basis for the condition. The first step in reviewing a source-specific condition is to compare the language of each condition to the language of the requirement. You might find that the underlying requirement does not support the permit condition. Consider the following example:

A draft permit states:

Condition 97: Exemption from opacity limits.
Excess smoke emissions from periods of start up and emergency may be exempted if it is shown that the exceedences were not preventable.

The underlying regulation that is identified in the draft permit as the basis for this permit condition states the following:

Compliance with the opacity standard may be determined by:

- (1) conducting observations in accordance with Reference Method 9;
- (2) evaluating Continuous Opacity Monitoring System (COMS) records and reports; and/or
- (3) considering any other credible evidence.

In this case, it is clear that the underlying regulation (which does not allow for any exemptions) does not support the permit condition. A Title V permit cannot be used to modify the requirements that apply to a facility. While the permit should include any additional monitoring that is necessary to show that the facility is complying with a requirement, the requirement itself cannot be changed in the draft permit.

Another problem that you might identify by comparing the permit condition to the underlying requirement is that part of the underlying requirement is left out of the draft permit. Sometimes there is a good reason for part of a requirement to be left out. It is always possible, however, that the Permitting Authority overlooked a requirement or incorrectly determined that a particular requirement does not apply to the facility covered by the draft permit. See the discussion on page 28 for more information on this topic.

Every applicable requirement must be included in a facility's Title V permit, even if it doesn't appear that the facility operator needs to take any additional action to comply with the requirement. For example, if the relevant requirement provides that the facility operator must calculate emissions and keep those calculations on file at the facility for a minimum of five years, that requirement belongs in the Title V permit. If a requirement provides that the facility must place a label on each of its storage containers, that requirement must be included as well, even if it appears that the facility already labeled the containers. If it looks like a relevant requirement is left out of a permit that you are reviewing, you can note this possible omission in your public comments.

When you are feeling pretty confident about your ability to compare draft permit conditions to the underlying laws and regulations cited in the draft permit, you can move on to comparing the requirements in your state's SIP to the conditions in the permit. In some states, the requirements in the SIP are basically the same as current state regulations. Unfortunately, as discussed on

page 39, in many states the requirements in the SIP are found in out-dated state regulations. These requirements are still federally-enforceable and must be included in Title V permits, but they are sometimes difficult to locate. You can contact your Permitting Authority to find out what air quality regulations are part of your state's SIP. If the SIP requirements are different from the most current state regulations, then you can ask your Permitting Authority to provide you with a copy of the regulations that are included in the SIP. Sometimes a Permitting Authority will neglect to include all relevant SIP requirements in a Title V permit. Thus, when you review a Title V permit, you might want to scan the SIP regulations to make sure that no relevant requirement is left out.

If two or more very similar requirements apply to a facility, these requirements might be merged into one permit condition in the draft permit. This is called "streamlining." Refer to Box 4.3 for more information on this topic.

Box 4.3: Streamlining Permit Conditions

It often happens that a facility must comply with two or more very similar requirements. For example, a facility might be subject to the following two requirements:

Requirement #1: No person shall cause or allow any air contamination source to emit any material having an opacity equal to or greater than 20 percent (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity.

Requirement #2: No person shall operate a stationary combustion installation which emits smoke the shade or appearance of which is equal to or greater than:

- (1) 40 percent opacity for any time period, or
- (2) 20 percent opacity, for a period of three or more minutes during any continuous 60 minute period.

Requirements #1 and #2 are both in the SIP. The Permitting Authority could place both requirements in the permit separately. If it were to do this, it would also need to include monitoring with each condition. The Permitting Authority might decide that including each requirement in the permit as a separate condition would result in too much confusion. The solution? Streamlining.

Streamlining involves merging two or more requirements into one permit condition so that both (or all) requirements are met by complying with the streamlined requirement. If you see this being done in a draft permit that you are reviewing, evaluate the streamlined condition carefully. It can be difficult to merge multiple requirements in a way that assures that the facility is always complying with each merged requirement. In the example above, Requirement #2 at first appears to be the least strict requirement since it allows opacity emissions of up to 40%. However, notice that while Requirement #2 never allows emissions to exceed 40% opacity, Requirement #1 allows one six-minute period per hour of emissions that average 57% opacity. In addition, notice that Requirement #2 says "any time" while requirement #1 says "six-minute average." That means that under Requirement #1 there is no upper limit on opacity emissions during a six-minute period, so long as the average opacity over the course of six minutes does not exceed 57%. So, a facility could be violating Requirement #2 even though it is in compliance with Requirement #1.

Box 4.3 (continued from previous page)

In some cases, a new condition must be developed that provides for compliance with all the multiple requirements. In all cases the streamlined requirements must be listed in the permit.

Fortunately, it is not your responsibility to come up with a way to streamline conditions. Instead, ask yourself whether any streamlining that occurs in the draft permit is appropriate. If you figure out a way that a facility could violate one of the underlying requirements but *not* violate the streamlined condition, the streamlined condition is not acceptable. A streamlined condition must assure that the permitted facility complies with *every* requirement that forms the basis for the condition.

U.S. EPA guidance on appropriate strategies for streamlining permit conditions is found in “White Paper #2.” A White Paper is U.S. EPA guidance interpreting regulatory requirements. White Papers and other U.S. EPA guidance documents are not legally enforceable, but courts often rely upon such guidance documents when interpreting laws or regulations. White Paper #2 can be found on the Internet at www.epa.gov/ttn/camr/t5wp.html

It is possible that some requirements that apply to the facility will be left out of the draft permit altogether. However, don't feel obligated to review every existing air quality regulation to determine whether a requirement is left out of a draft permit. Such a strategy would probably be time-consuming and frustrating. Determining which requirements apply to a facility is a complex task—that's why Congress created the Title V program. When you review your first Title V permit, you might want to narrow your focus to making sure that the laws and regulations that are identified in the draft permit or the permit application are correctly applied to the facility. The information provided below should help you do this.

If you notice that a requirement is entirely left out of a draft permit and is not discussed in the statement of basis, you should note this omission in your comments. Even if you are incorrect, it won't hurt to point out the confusion. If you choose to review more than one draft permit, you will start becoming familiar with what sort of requirements should be included in each draft permit and you are more likely to notice when a relevant requirement is omitted.

Remember that if the Permitting Authority leaves a requirement out of the permit without stating explicitly that the requirement does not apply, the permit shield does not cover that requirement. In other words, if you later

discover that the requirement applies to the facility, the permit shield will not stop you from taking the facility to court if you have evidence of a violation. In addition, you can petition the Permitting Authority or the U.S. EPA to reopen the permit and add the omitted requirement.

2. Is each permit condition “practicably enforceable”?

To be practicably enforceable, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it *possible* to determine whether the facility is complying with the condition.

In general, a permit condition is practicably enforceable if it is written so that it is possible to tell if the facility is complying with the condition by inspecting the facility or the facility’s records.

Box 4.4 (below) highlights permit terms that may lead to practical enforceability problems.

Box 4.4: Permit Terms that Create Problems with Practical Enforceability

(from U.S. EPA Region 9’s Draft Permit Review Guidance, Mar. 31, 1999)

“normally”: as in “The permittee shall normally inspect the unit daily.” “Normally” is subject to interpretation. The permit should require more specific language.

“as soon as possible,” “promptly”: as in “The permittee shall take corrective action as soon as possible.” An outer time limit must be set instead of leaving the condition open-ended.

“Significant”: as in “The permittee shall take corrective action if parameters are significantly out of range.” “Significant” must be defined -- the permit should assign an outer acceptable limit.

“Should” or “May”: as in “The permittee should inspect daily.” Both of these terms indicate that the condition is up to the preference of the permittee, and is not required. Ask for “must” or “shall” for all required permit terms.

“As suggested by the manufacturer’s specifications”: Specific numbers must be incorporated into the permit rather than a reference to a document that may not include clear requirements.

“Take reasonable precautions”: The permit must identify the minimum activities that constitute reasonable precautions.”

“Use best engineering practices”: Best engineering practices must be specified in the permit.

In addition to looking for the terms identified in Box 4.4, you should ask the following questions when evaluating the practical enforceability of a permit condition:

- a. *Does the draft permit condition create unclear interpretations of requirements?*

As discussed above, if you can't tell exactly what the facility must do to comply with a condition, the condition is not practicably enforceable. Permit conditions that allow the Director of the Permitting Authority to exercise discretion are problematic because such conditions do not provide clear requirements. For example, a condition might say "The reference test method is EPA Method 5 or other method approved by the Director," or "The source shall maintain adequate records, as determined by the Director." If you see this language, you should look at the underlying requirement and see if it allows the Director to exercise such discretion. If it doesn't, then the discretionary language must be deleted from the permit. Even if the underlying requirement allows the Director to exercise discretion (and many requirements do), it is still necessary for the permit condition to be written so that it is enforceable as a practical matter. It would be acceptable for the permit to either (1) list the options allowed by the Director, or (2) specify exactly what the facility must do to comply with the requirement.

- b. *Does the draft permit condition exempt or excuse violations?*

A facility must comply with air quality requirements *at all times*, unless the underlying requirement specifically allows certain types of exemptions or excuses (and even then you might want to investigate whether the exemption or excuse should have been allowed in the first place. See Box 4.2 on "Excess Emission Provisions that Apply During Periods of Startup/Shutdown, Malfunction and Maintenance").

- c. *Does the draft permit limit the type of information that can be used to show that the facility is violating the applicable requirement?*

The Permitting Authority and the public may rely upon any "credible evidence" to prove that a facility is violating its permit, even if the evidence is not the result of monitoring specifically required under the permit.¹² Similarly, a

¹² See U.S. EPA's Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), and the Compliance Assurance Monitoring Rule, 62 FR 54899 (Oct. 22, 1999).

facility can use any credible evidence to demonstrate that it is not violating an applicable requirement. For example, members of the public could rely upon “fence line monitoring” to demonstrate the likelihood of a permit violation. (“Fence line monitoring” refers to when members of the public stand just over the property line of the facility and keep track of smoke emissions, or other information that indicates a problem at a facility).

Draft permits sometimes contain language that limits the type of evidence that can be used to show that a facility is violating a permit requirement. This type of language is not allowed and your comments should point out that this language must be deleted. Sometimes this language can be very subtle (“Compliance is demonstrated by Method 9 testing”) while at other times it can be blatant (“The monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined.”) Box 4.5 provides additional examples of language that unacceptably limits the use of credible evidence.

Box 4.5: Unacceptable Credible Evidence-Limiting Language

(from U.S. EPA Region 9’s Draft Permit Review Guidance, Mar. 31, 1999)

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

“Reference test method results supercede parametric monitoring data.”

“The permittee is considered to be in compliance if less than 5% of any CEM monitored emission limit averaging periods exceeds the associated emission limit”

“Excess emissions that are unavoidable are not violations of permit terms.”

“Compliance with this provision will be demonstrated by . . . (a certain type of monitoring)”

“A ‘deviation from permit requirements’ shall not include any incidents whose duration is less than 24 hours from the time of discovery by the permittee.”

d. Is each permit condition written so that it is understandable by the public?

For a permit to be enforceable, it must be understandable by members of the public and the permittee. It is generally the case that prior to the Title V program, members of the public were rarely involved in reviewing a draft

permit and relying upon the final permit to monitor a facility's compliance with applicable requirements. Because of this, many permits were written in language that the general public cannot easily understand.

You should review the permit to make sure that it is enforceable by the Permitting Authority, the public, and the U.S. EPA. If all or part of a draft permit is written in a way that cannot be understood by the public, this ability to enforce the permit may be jeopardized. You can raise this issue in your comments on the draft permit.

3. *Is the draft permit condition accompanied by sufficient “periodic monitoring”?*

a What is “periodic monitoring”?

In addition to gathering all requirements that apply to a facility into one document, the Title V program is meant to enable the public, U.S. EPA, and the Permitting Authority to know whether the facility is complying with those requirements. To achieve that goal, every Title V permit must include adequate “periodic monitoring.” What this means is that the permit must require the facility to perform monitoring, recordkeeping and reporting so that it can assure the Permitting Authority and the public that it is complying with its permit.¹³ ***Ensuring that a draft Title V permit includes adequate periodic monitoring is the most important aspect of permit review.***

b. Why is it important for a Title V permit to include good periodic monitoring?

If the permit contains good periodic monitoring, the facility can be held accountable if it violates applicable air quality requirements. Without adequate periodic monitoring, it is likely to be impossible for a member of the public to determine whether a facility is violating an air quality requirement. Also, good periodic monitoring will provide the facility with information necessary to identify and minimize compliance problems.

¹³ The requirement for periodic monitoring is rooted in Clean Air Act § 504, which requires that permits contain “conditions as are necessary to assure compliance.” 40 CFR Part 70 adds detail to this requirement. 40 CFR § 70.6(a)(3) requires “monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance” and § 70.6(c)(1) requires all Part 70 permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.”

c. How is periodic monitoring different from practical enforceability?

“Periodic monitoring” is different from “practical enforceability” because while a permit condition is practicably enforceable so long as it is *possible* to monitor the facility’s compliance with the condition, periodic monitoring sets out exactly what type of monitoring must be done.

d. Where do periodic monitoring requirements come from?

Sometimes, the underlying statute or regulation explicitly requires a facility to perform a particular kind of monitoring. Any monitoring that is specifically required must be included in the draft permit. However, many air quality statutes and regulations do not identify a monitoring method. And, even when a monitoring method is specified, there is often no indication of how often the monitoring must be performed. Many statutes and regulations require a facility to perform an initial test to demonstrate compliance, but never require any additional monitoring.

U.S. EPA issued detailed guidance on periodic monitoring in 1998. The guidance suggested that permitting authorities should review the monitoring required by each underlying applicable requirement to determine if the monitoring was sufficient to assure compliance with the requirement. For example, the permitting authority would review a SIP rule to determine if the rule contained sufficient monitoring to determine whether the facility was complying with the SIP rule. If the monitoring in the SIP rule did not meet this standard, additional monitoring would be added to the permit.

The validity of U.S. EPA’s guidance was challenged by several industry groups, and the guidance was invalidated (set aside) by the U.S. Court of Appeals (D.C. Circuit) in a decision dated April 14, 2000. The court held that U.S. EPA’s guidance and the regulation on which the guidance was based (40 CFR § 70.6(a)(3)(i)(B)) could not be used as a basis for requiring additional monitoring unless the applicable requirement “requires no periodic testing, specifies no frequency, or requires only a one-time test.”

Under the court’s ruling, if the underlying State or federal standard requires a facility to perform a specific type of testing or monitoring from time

to time (yearly, monthly, weekly, daily, hourly), then this satisfies the periodic monitoring requirement of § 70.6(a)(3)(i)(B).

If an underlying requirement (1) has no periodic testing or monitoring, (2) does not mention how frequently testing or monitoring should be done, or (3) requires just a one-time test, then periodic monitoring should be added to the permit (except in rare situations monitoring is unnecessary to assure compliance and this is explained in the statement of basis).

- e. *What kind of periodic monitoring might a facility be required to perform?*

The most obvious type of pollution monitoring is the direct measurement of smokestack emissions. Sometimes, a facility is equipped with continuous emissions monitoring systems (“CEMS”) or continuous opacity monitoring systems (“COMS”). As their name implies, these systems directly measure smokestack emissions on a continuous basis. While continuous monitoring is one of the best ways to assure a facility’s compliance with an emission limitation, installation of CEMS and COMS may be expensive compared to frequent manual monitoring. If a facility already has CEMS and COMS, these systems should be identified in the facility’s permit. The permit must require regular reporting of continuous monitoring data. A facility that has a history of violating pollution limitations will probably be required to submit more frequent monitoring reports to the Permitting Authority than a facility that has a strong record of compliance.

If a facility lacks CEMS and COMS, the facility may be required to install these systems. However, the Permitting Authority may decide that some other type of monitoring is sufficient to assure the facility’s compliance with applicable requirements. For example, the Permitting Authority may decide that an annual stack test combined with recordkeeping of the type and amount of fuel the facility burns is sufficient periodic monitoring to support a particular permit condition.

Periodic monitoring must be included with all types of permit conditions, not just those that directly limit pollution levels. For example, a draft permit is likely to include conditions that require regular equipment maintenance and particular work practices. For these types of conditions, regular recordkeeping is usually necessary to satisfy the periodic monitoring requirement. For example, consider the following requirement:

No owner or operator of a facility shall store in open containers spent or fresh VOC and/or solvents to be used for surface preparation, cleanup, or coating removal.

As written, the above requirement lacks any sort of monitoring, recordkeeping, or reporting obligations. Thus, “periodic monitoring” must be added to the Title V permit to assure that the facility complies with this requirement. If you discover that a draft permit lacks periodic monitoring to assure compliance with such a requirement, or that the periodic monitoring included in the draft permit is insufficient, you should point this out in your comments. You may want to suggest an appropriate periodic monitoring regime. For example, to assure compliance with the above requirement you might suggest a permit term that requires a daily inspection of the facility to ensure that solvents are stored in closed containers. In addition, you could recommend a permit term requiring that the results of the inspection be recorded on a daily inspection report. Finally, you can point out that as required by 40 CFR Part 70, the permit must require that reports of any required monitoring be submitted to the Permitting Authority at least once every six months.

f. Is the Permitting Authority required to include periodic monitoring in a Title V permit?

Yes. While the Permitting Authority is under no obligation to incorporate the periodic monitoring that you suggest, the Permitting Authority has an absolute obligation to include periodic monitoring in a Title V permit that is sufficient to assure that the facility is complying with all applicable requirements. If the Permitting Authority does not do this, you have a strong basis for petitioning U.S. EPA to object to the permit. In fact, most of U.S. EPA’s objections during its 45-day review period have involved proposed permits that lacked adequate periodic monitoring. Refer to page 86 for information about how to petition U.S. EPA to object to a permit.

g. What do I look for when I review periodic monitoring in a draft permit?

(1) Does the draft permit contain periodic monitoring?

First, determine whether each permit condition includes periodic monitoring. Often, when an underlying statute or regulation fails to specify a particular monitoring requirement, no monitoring is included in the draft permit to assure compliance with that requirement. The complete absence of

periodic monitoring to assure compliance with a particular requirement is a red flag that periodic monitoring may not be adequate! If you notice this problem, you should bring this to the attention of the Permitting Authority in any comments that you submit during the public comment period.

If it is highly unlikely that a facility will violate a particular requirement, it may not be necessary to require the facility to perform periodic monitoring to assure compliance with that requirement. For example, if a facility only burns natural gas, it is highly unlikely that the facility will violate opacity requirements. Therefore, though opacity limitations must be included in the facility's permit, there may not be any periodic monitoring associated with these limits. (Note that if the facility is allowed to burn fuel oil as a backup to natural gas, periodic monitoring must be included in the draft permit).

If the Permitting Authority decides not to include periodic monitoring to support a particular requirement, *the rationale for this determination must be included in the statement of basis*. The Permitting Authority may not leave out periodic monitoring without explanation. If you notice that a permit condition is not supported by periodic monitoring, you should note this in any comments you submit during the public comment period. Also, if the Permitting Authority provides an explanation for the lack of periodic monitoring that you are not satisfied with, you can note your disagreement in your comments.

(2) What factors should I consider when reviewing periodic monitoring?

Periodic monitoring requirements are established by each permitting authority on a case-by-case basis where the underlying requirement did not include adequate monitoring. Though a Title V permit must include the minimum amount of periodic monitoring required by 40 CFR Part 70, the Permitting Authority possesses a large degree of discretion over the frequency and type of monitoring that a facility is required to perform. This is an issue on which the public can influence a critical part of the permit.

Evaluating the adequacy of proposed periodic monitoring where the underlying applicable requirement does not contain periodic monitoring may be difficult if you lack technical knowledge. One shortcut is to ask for final copies of Title V permits for similar sources from other states.¹⁴ You can then

¹⁴ It probably won't be that helpful to compare permits for similar facilities in the same state, because the Permitting Authority probably uses the same periodic monitoring for similar facilities.

compare the periodic monitoring required under those permits to the draft permit that you are reviewing. If you choose this approach, you probably should look for draft and final permits on the Internet--particularly in light of the limited time that you have to review a permit. Refer to Appendix B for a list of state and local agency Title V websites.

In addition to looking at permits for similar facilities, you should ask yourself the following questions when the underlying requirement does not include periodic testing and monitoring:

- *Does the facility use a pollution control device to comply with the limit?* If such a device is used and it would prevent a violation if it were functioning properly, the best option may be to monitor the equipment for proper operation.
- *How much are the facility's emissions likely to vary over the course of the permit term?* A facility that uses paints that release VOCs would not need to monitor the VOC content of its paints frequently if it uses the same set of paints throughout the year. A facility that changes operations frequently depending on demand would require more frequent monitoring to provide a reasonable assurance that the facility is complying with permit requirements.
- *What is the likelihood that the facility will violate the requirement?* You can look at the facility's prior stack tests and inspection reports to find out how close the facility came to violating the requirement. You can usually assume that any facility that burns oil or coal has a high potential to violate opacity standards.

Keep in mind that periodic monitoring can include a mix of monitoring techniques. For example, a facility's permit might require daily or weekly inspections of pollution control equipment in addition to a stack test every few months. Also, instead of requiring a facility to monitor pollution coming from its smokestack, a permit might allow a facility to monitor some other aspect of its operations instead. This type of monitoring is called "surrogate" (e.g. substitute) monitoring. Surrogate monitoring is allowed when (1) monitoring of actual emissions is very expensive and/or impractical, and (2) surrogate monitoring is adequate to assure compliance with the underlying applicable requirement. For example, a permit condition might limit the amount of SO₂ that a facility can release each hour. Instead of requiring the facility to directly monitor the amount of SO₂ that comes out of its smokestack, the permit might require the facility to keep track of the sulfur content of fuel burned and

the amount burned each hour. If you find surrogate monitoring in a draft permit, make sure that the permit's statement of basis includes an explanation of the relationship between the surrogate monitoring and the facility's compliance with the actual limit. In this example, the statement of basis would need to explain why a limit on the amount of fuel the facility burns each hour shows compliance with the SO₂ limit.

4. Does the draft permit require the facility to submit reports of required monitoring on a timely basis?

One of the most important things to look for when reviewing a draft Title V permit is whether the facility is required to submit regular monitoring reports to the Permitting Authority. If the draft permit lacks adequate reporting requirements, it will be difficult for you to monitor the facility's compliance with permit conditions.

40 CFR § 70.6(a)(3)(iii)(A) provides that a permitted facility submit "reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with § 70.5(d) of this part." Once a monitoring report or a compliance certification is submitted to the Permitting Authority, it must be made available to the public.¹⁵ By reviewing these documents, you can determine whether a permitted facility is complying with the terms of its permit.

40 CFR § 70.6(a)(3)(iii)(A) does not spell out the specific contents of a six-month monitoring report. Thus, you may discover that while a draft permit includes a general condition requiring the facility to submit monitoring reports every six months, the draft permit does not indicate what must be included in these reports. This is where you are most likely to encounter problems. If the final permit is vague regarding the contents of these documents, you may end up with very little useful information when those documents are submitted.

¹⁵ In addition to reviewing reports submitted to the Permitting Authority, you have the right to review certain monitoring records that are kept at the facility. Under 40 CFR § 70.6(a)(3)(ii), all records of monitoring required under a facility's Title V permit must be kept at the facility for a minimum of five years. (This is a separate requirement from the requirement that the facility submit a report of required monitoring at least once every six months). You should be able to obtain access to these documents through an informal request to the permitting authority or under your state's open records law.

Though there is no set standard by which the adequacy of these reports may be evaluated, it is clear that the reports must inform the public of monitoring results and confirm that the facility is actually performing all monitoring required under its permit. You should make every effort to clarify the required contents of monitoring reports before the final permit is issued.

What to look out for:

First, locate the general condition in the draft permit that requires the facility to submit monitoring reports every six months and make sure that this general condition satisfies 40 CFR § 70.6(a)(3)(iii)(A).

Second, look for language in the draft permit that might conflict with the requirement that the facility submit a report of any required monitoring at least every six months. Particularly in situations where the Permitting Authority simply copies a regulatory or statutory requirement into a draft permit, the draft permit may indicate that reporting is required only upon request by the agency. For example, a permit condition might look something like the following:

Condition 54: No person shall operate a stationary combustion installation which emits smoke that equals or exceeds 20 percent opacity for a period of three or more minutes during any continuous 60-minute period.

Parameter monitored: opacity

Monitoring type: EPA Method 9

Reporting Requirements: UPON REQUEST BY REGULATORY AGENCY

If you find this flaw in a draft permit, you should point it out in any comments that you submit during the public comment period. A permit condition such as the one above causes confusion over what must be included in the facility's six-month monitoring report. The facility could argue that the monitoring required under this condition does not need to be included in the six-month monitoring report because it specifically states that reporting is only due upon request. Under Title V, the facility must submit a report of any required monitoring at least every six months. At the very least, the permit condition above should state that reporting is required "every six months and upon request by regulatory agency." If you have reason to believe that the facility might violate a permit condition, you can ask for more frequent reporting in your comments.

5. Does the draft permit require the facility to certify whether it is in compliance with all permit requirements at least once each year?

As discussed on page 56, every Title V permit must include a general condition that provides that the facility must certify compliance with permit requirements at least once each year. See 40 CFR § 70.6(c)(5). Under Part 70, the facility is required to certify compliance with *all* permit conditions, not just those that are accompanied by periodic monitoring. This is important because there are many permit conditions for which compliance cannot be monitored very easily. For example, most Title V permits will include a generic condition stating that if the facility is modified in a major way, the facility must obtain a special preconstruction permit. The compliance certification is the best way to assure that the facility is complying with conditions such as these.

Look for language in the draft permit that might limit the facility's obligation to certify compliance with all permit conditions. For example, the draft permit might single out certain draft permit requirements as subject to the compliance certification requirement, creating doubts as to whether the compliance certification applies to the remaining requirements. When you review compliance certification requirements in a draft permit, imagine what the compliance certification will look like based upon the permit language. You should request additional permit terms in your comments if there is any ambiguity over the compliance certification.

Your Permitting Authority may have developed a compliance certification form for the facility to fill out each year. This form may or may not be attached to the draft permit. Check with the Permitting Authority to see whether such a form exists. (40 CFR Part 70 does not require the Permitting Authority to develop such a form). If a compliance certification form has been developed for the facility, obtain a copy and review it carefully in conjunction with the draft permit. Remember that the annual compliance certification is one of the most important aspects of the Title V permitting program. If you have any doubt as to the adequacy of compliance certification requirements in a draft permit, it is essential that you raise the issue in your comments on the draft permit. If you don't raise the issue during the public comment period (either in your written comments or in comments at a public hearing), you lose your right to raise this issue in a petition to U.S. EPA or in a court challenge to the final permit.

**Step Six in Reviewing a Draft Permit:
Check to See Whether Any Federal Requirements Are Incorrectly
Identified as State Only Requirements**

Sometimes, a Permitting Authority will misidentify a federally enforceable requirement as being enforceable only by the State. The confusion usually involves whether or not a particular requirement is included in the state's SIP.

Permitting Authorities are not required to include state-only requirements in their Title V permits, but most do. Usually, the Permitting Authority places "state-only" conditions in a separate section of the permit. Some permitting authorities simply include a statement next to particular permit conditions indicating that those conditions are only enforceable by the state.

If the Permitting Authority incorrectly identifies a federally-enforceable requirement as state-only, it may be difficult for U.S. EPA or the public to enforce the misidentified requirement. When reviewing a draft permit, you should review any condition that is identified as state-only to see if it is actually in the SIP. Remember that even though the requirements in the SIP might be based upon out-dated state regulations, they are still federally enforceable until they are removed from the SIP.