Region 9
Title V Permit Review Guidelines

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EPA Region 9
Title V Permit Review Guidelines

Table of Contents

Section	Page No.
Introduction	i
Part I: Step-by-Step Process for Permit Review	I-1
Part II: Checklist of Topics to be Addressed in Review	II-1
Part III: Guidelines	
Applicable Requirements	III-1
-SIP	III-5
-NSPS, NESHAP, MACT	III-11
-NSR and PSD Permit Conditions	III-25
-Acid Rain	III-35
-Other Applicable Requirements	III-39
Standard Permit Conditions	III-45
Practical Enforceability	III-53
Permit Shield	III-65
Streamlining	III-77
Periodic Monitoring	III-87
Schedules of Compliance	III-101
Alternative Operating Scenarios and Emissions Trading Provisions	III-107
Cross Referencing and Level of Detail	III-117
Origin and Authority Citation	III-123
Insignificant Activities	III-127
Part IV: Appendices	
Appendix A	
• White Paper 1	
• White Paper 2	
Appendix B	
• CAPCOA Title V Attachment	
• Memo on Objection Communication Strategy	
• Example: Objection Letter	

Appendix C

- **Delegation of General Provisions Memo**
- **Area Source Deferrals and Exemptions for Title V Permitting**
- **Model Acid Rain Permit**

Appendix D

- **Credible Evidence Rule**
- **Memo on Startup, Shutdown, Maintenance and Malfunction**
- **Memo on Limiting Potential to Emit**

Appendix E

- **National Periodic Monitoring Memo**
- **CAM Questions and Answers**
- **CAPCOA/CARB/EPA Region IX Periodic Monitoring Recommendations for Generally Applicable Requirements in SIP**
- **CAPCOA/CARB/EPA Periodic Monitoring Process and Criteria**

Appendix F

- **Insignificant Activities List**
- **Q&As on Portable Equipment**

Appendix G

- **May 20, 1999 Letter from EPA to STAPPA/ALAPCO**

Guidelines:

Practical Enforceability

September 9, 1999

What is Practical Enforceability?

A permit is enforceable as a practical matter (or practically enforceable) if permit conditions

- establish a clear legal obligation for the source
- allow compliance to be verified.

Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.

Emission limits or other applicable requirements must have associated monitoring, recordkeeping, and reporting to make it possible to verify compliance and provide for documentation of non-compliance. (More information on monitoring to verify compliance is included in the Guidelines section on Periodic Monitoring.) Further, the permit must not prevent the use of *credible evidence* by the source, public, permitting authority, or EPA.

What is Credible Evidence?

Section 113(a) of the Act gives EPA the authority to bring enforcement actions "on the basis of *any information available* to the Administrator." In an enforcement action, the court then decides whether the available information is *credible evidence* of a violation. Credible evidence includes (but is not limited to):

- The reference test method
- Other evidence that is comparable to information generated by the reference test method, such as
    - Engineering calculations
    - Indirect estimates of emissions
    - CEMS data
    - Parametric monitoring data

Data need not be required to be collected in a title V permit in order to be considered credible.

Since any credible evidence can be used to show a violation of or, conversely, demonstrate compliance with an emissions limit, it is important that permit language not exclude the use of any data that may provide credible evidence. The permit must specify the source's obligations for monitoring in a way that does not establish an exclusive link between the test method and the emissions limit. Permit language may not

- Specify that only certain types of data may be used to determine compliance
- Specify that certain data is more credible than other types of data, or
- Include language that excuses violations under specific circumstances.

In general, the permit should simply tell the source what it must do (e.g., monitor pressure drop in such a manner, take corrective action under these conditions, etc.) For example, "The permittee shall monitor the emissions unit weekly in accordance with method X."

It is not necessary to say that a term assures compliance or that an activity is required to assure compliance.

Why Review Permits for Practical Enforceability?

The practical enforceability of a permit should be reviewed to assure the public's and EPA's ability to enforce the title V permit is maintained, and to clarify for the title V source its obligations under the permit. Possible consequences of not examining the permit for practical enforceability include:

- source noncompliance due to misunderstanding unclear permit conditions,
- permit conditions creating new exemptions from requirements in the underlying applicable requirements, and
- permit language that allows noncompliance, or does not promote detection and prompt correction of problems leading to noncompliance.

The first table below identifies key permit terms to examine for practical enforceability. The second table provides examples of common language pitfalls and how they can be corrected.

What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
Emission Limits	Title V conditions must assure compliance with all applicable requirements. To assure that emission limits will be complied with, the limits must be written in a practically enforceable way. The title V permit must clearly include each limit and associated information from the underlying applicable requirement that defines the limit, such as averaging time and the associated reference method.	When reviewing an emission limit, make sure that • The limit is clearly written, • The meaning of the applicable requirement has not been altered, • The averaging time is included, • The reference diluent concentration (e.g. "As determined at 15% O_2") is included, • The source is required to comply with the limit at all times unless exceptions are specifically allowed for by the applicable requirement, • The specific reference test method associated with the limit is identified, and • The number of test runs is specified (if not included in the reference method).
Potential to Emit Limits The title V permit may be used by a source to establish limits on potential to emit (PTE) for purposes of avoiding an otherwise applicable requirement.	These emission limits are important because a source has agreed to comply with a limit set at a level below major source emission thresholds in order to not be subject to requirements such as NSR, PSD, or MACT. These types of limits are one of the few types of conditions that may be established solely in the title V permit, without an underlying applicable requirement. Since the title V permit is the mechanism for creating these limits, it is also the primary mechanism for assuring they are enforceable as a practical matter.	In addition to the general concerns for any emission limits listed above, PTE limit must also: • Have short averaging times. Averaging times must be no longer than one day, or if set on a rolling basis, on a 12-month rolling average, calculated no less frequently than daily. • Otherwise meets the requirements of the June 13, 1989 Hunt/Seitz memorandum "Guidance on Limiting Potential to Emit in New Source Permitting."

What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
Director's Discretion This term refers to a permit condition that is phrased in such a way that the decision as to whether the condition is met is left to the director of the permitting authority. Example: "The source shall maintain adequate records, *as determined by the Director*" or "The source may use an alternative control device *if the Director finds that* equivalent emissions reductions would be achieved." or "or other .... as approved by the Director." as in "The reference test method is EPA Method 5 or other method approved by the Director."	This type of provision is problematic and should not be included in the permit. EPA and citizens would have difficulty disputing a finding by the Director that the source had met the requirements of that condition. In the first example, even if the facility was *not* maintaining adequate records, the condition is drafted in such a way that the permitting authority's determination that the records *are* adequate could preclude EPA or citizen action. Similarly, in the second example, as long as the Director found that the source's alternative control device was achieving equivalent emissions reductions, EPA or citizens would find it difficult to take action against the source. Director's discretion would allow the source to negotiate a different test method "off permit" and bypass the process required for approval of alternative test methods. Other test methods could be acceptable but must be specifically identified in the permit.	When reviewing a title V condition that allows Director's discretion, • Check the underlying applicable requirement to see if it allows director's discretion. • Unless the underlying applicable requirement allows director's discretion (e.g. through SIP-approved rule), the language must be removed from the title V permit. • An acceptable alternative to Director's discretion language is to include specific options up front in the permit. Example: "The source may use an alternative control device that achieves an overall control efficiency of 99%." or "The reference test method is EPA Method 5 or Local Method 5 as approved by the Director on 12/15/93."

What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
Start Up/Shut Down and Malfunction Language In addition to the emergency provisions of 70.6(g), permits will sometimes contain excess emissions provisions. These provisions may have been created in the permit, or may come from rules designed to give special treatment to sources that emit in excess of their limits because • the source is unable to comply with the emissions limit during startup and shutdown, or • process equipment or pollution control equipment breaks down. These rules are usually called "excess emissions rules" or "startup/shutdown rules."	If properly written, excess emission provisions only apply in situations where it is technologically impossible for the source to comply, or where circumstances beyond the source's control cause it to exceed its emissions limits. However, if EPA has not approved the provision, it is probably because the provision excuses emissions that should be under a source's control, or allows for Director's discretion. See the memo "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" in Appendix D for more information relating to how these provisions may apply in SIP rules.	When reviewing a title V permit that contains a condition that allows excess emissions, • Verify that any provisions for excess emissions are consistent with a federally promulgated standard or a standard that has been approved by EPA. If so, it is acceptable to include these in the permit. • If inconsistent with federal rules, the excess emissions language must be removed.
Proper Identification of Federally Enforceable Permit Terms Any term defined as an applicable requirement in §70.2 should be identified as federally enforceable (state and local rules may have been included in the definition of applicable requirement in the state/local program).	Sometimes federally enforceable permit terms are misidentified as being enforceable by the State only. See also discussion of State only requirements in the Applicable Requirements section.	When reviewing a provision identified as State-only • Make sure that the provision does not originate in a federally-enforceable applicable requirement. See also section on NSR/PSD applicable requirements for more information.

Language That May Indicate Practical Enforceability Problems....

Problem Language	Discussion	Correction
"Normally" as in "The permittee shall normally inspect the unit daily."	The term "normally" is subject to interpretation. Is a permittee still "normally" inspecting on a daily basis if inspections take place only 5 days out of 7? This language may place a burden on the permitting authority to show that the source's failure to inspect daily violated the requirement to "normally" inspect the unit daily.	Require that specific language be substituted for ambiguous language. Example: "The permittee shall inspect the unit daily." If necessary to allow for missed inspections, the permit could include a data recovery provision.
"as soon as possible; promptly" as in "The permittee shall take corrective action as soon as possible."	"As soon as possible" and "promptly" are open-ended. Without an outer limit defined in the permit, the burden may be on the permitting authority to prove that the source could or should have acted sooner.	Require that an outer time limit be set on any actions required to occur "as soon as possible" or "promptly." Example: The permittee shall take corrective action as soon as possible but no later than within 24 hours.
"Significant" as in "The permittee shall take corrective action if parameters are significantly out of range."	"Significant" must be defined for the permit to be enforceable. Otherwise, the burden may be on the permitting authority to show that a problem is significant.	Specify parameter levels or ranges which will trigger action. For example: "The permittee shall take corrective action if parameters are more than 10% out of the range defined in condition xx." Or "The permittee shall take corrective action if pressure drop is less than 15 inches for more than one hour."

Language That May Indicate Practical Enforceability Problems....

Problem Language	Discussion	Correction
"Should" or "may" as in " The permittee should inspect daily. The permittee may test monthly."	"Should" indicates a preference, rather than a requirement, and is not appropriate for permit conditions unless the underlying applicable requirement contains provisions that are not mandatory but are recommendations only. "May" indicates an option, rather than a requirement, and is not appropriate for permit conditions.	Require that all required permit terms use "shall" or "must." For example: "The permittee must inspect daily." or " The permittee shall test monthly."
"As suggested by the manufacturer's specifications" as in "The permittee shall maintain pressure drop as suggested by the manufacturer's specifications."	It is acceptable to use the manufacturer's recommendations as the basis for the numbers that go into the permit if there is no better data. However, the specific numbers must be incorporated into the permit rather than a reference to a document which may not include clear requirements.	Require that the specific numbers (which may be based on the manufacturer's recommendations) be included in the permit term. For example: "The permittee shall maintain pressure drop greater than 15 inches."
"Take reasonable precautions" as in "The permittee shall take reasonable precautions to reduce fugitive emissions."	"Reasonable precautions" may be too subjective to be practically enforceable. The permit must identify the minimum activities that constitute "reasonable precautions".	Require the permit to include the specific measures that must be taken. For example, "The permittee shall conduct monthly audits of the facility to assure that the minimum reasonable precautions for preventing fugitive emissions are implemented and shall maintain records in accordance with condition xx. For the purposes of this condition, reasonable precautions shall include but are not limited to the following: a. Storing and mixing volatile materials in covered containers; b. Storing all solvents or solvent containing cloth or other material used for surface preparation in closed containers;... ...[other specific conditions]."

Language That May Indicate Practical Enforceability Problems....

Problem Language	Discussion	Correction
"Use best engineering practices" as in "The permittee shall use best engineering practices to operate and maintain the boiler."	This is the same issue as "reasonable precautions". To be practically enforceable, "best engineering practices" must be defined/specified in the permit.	Require that the engineering practices be specified in the permit. For example: "The permittee shall use best engineering practices to operate and maintain the boiler which shall include but not be limited to servicing the boilers at least once each calendar year to assure proper combustion is occurring and that the units are in proper operating condition."

Conditions that Limit the Use of Credible Evidence

Since the publication of the Credible Evidence Rule on February 24, 1997 (62 FR 8314), and the Compliance Assurance Monitoring Rule on October 22, 1997 (62 FR 54899), EPA has become sensitive to language that could be construed to limit use of credible evidence. Data that is comparable to information generated by a reference method test (for example, CEMS data) could be considered credible evidence. Because any data comparable to the reference test method is credible, permit language limiting the type of data that can be used to establish compliance or a violation is unacceptable. Examples of **unacceptable language** include:

> "Compliance with the emissions limit shall be determined (or demonstrated) by test method X."
> "The permittee shall be deemed in compliance with the emissions limit if the results of an emissions test done in accordance with test method X are less than Y."

Other examples of unacceptable language are included in the following table.

It is beyond the authority of the permit writer to limit what evidence may be used to prove violations. (See 62 FR 54907-8, October 22, 1997) A permit may not be written in such a manner that it would interfere with the use of credible evidence.

When reviewing title V permit conditions that relate to determining compliance,

- Look for, and require the elimination of, any language that would bar the use of credible evidence.
- If the unacceptable language originates in an applicable requirement, flag the requirement for the permitting authority as one that must be addressed to allow for the use of credible evidence in their response to the 1994 credible evidence SIP call, which is still in effect.

Credible Evidence "Busting" Language that must be Deleted

Does the Permit Contain...	CE "Busting" Language to Look For
Language that specifies only certain types of data can be used to determine compliance?	• "The monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined." • "Monitoring and reporting requirements are requirements that the permittee uses to determine compliance...." • "Compliance with this provision will be demonstrated by ....(insert periodic monitoring provisions) ..."

Credible Evidence "Busting" Language that must be Deleted

Does the Permit Contain...	CE "Busting" Language to Look For
Language that specifies certain types of data are more credible than others?	• "Reference test method results supersede parametric monitoring data." • "The EPA Reference Test Method results supersede CEMS data."
Language that excuses violations under certain conditions?	• "The permittee is considered to be in compliance if less than 5% of any CEMS monitored emission limit averaging periods exceeds the associated emission limit." • "If the permitting authority does not take action on an excess emissions demonstration by responding to the permittee in writing within 90 days of receipt, the permitting authority will be deemed to have made a determination that the excess emissions were unavoidable." • "Excess emissions that are unavoidable are not violations of permit terms." • "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."

The Following Information Appears in Appendix D :

- Credible Evidence Rule
- Memo on Start-up, Shut-down, Maintenance and Malfunctions
- Memo on Limiting Potential to Emit