Pinal County Air Quality Control District
Title V Operating Permit Program Evaluation

Final Report

August 13, 2018

Conducted by the

U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105

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Acknowledgments
EPA Region 9 acknowledges the cooperation of the staff and management of the Pinal County Air Quality Control District (PCAQCD) and Pinal County Counsel. We appreciate their willingness to respond to information requests and share their experiences regarding the development and implementation of PCAQCD's title V program.

Glossary of Acronyms and Abbreviations

Act	Clean Air Act [42 U.S.C. Section 7401 et seq.]
Agency	U.S. Environmental Protection Agency
ARS	Arizona Revised Statutes
ATC	Authority to Construct
AQCD	Air Quality Control District
CAA	Clean Air Act [42 U.S.C. Section 7401 et seq.]
CAM	Compliance Assurance Monitoring
CEMS	Continuous Emissions Monitoring System
CFR	Code of Federal Regulations
COMS	Continuous Opacity Monitoring System
District	Pinal County Air Quality Control District
EJ	Environmental Justice
EPA	U.S. Environmental Protection Agency
FCE	Full Compliance Evaluation
FPS	Facility Permit System
MACT	Maximum Achievable Control Technology
NAAQS	National Ambient Air Quality Standard
NESHAP	National Emission Standards for Hazardous Air Pollutants, 40 CFR Parts 61 & 63
NOV	Notice of Violation
NO_x	Nitrogen Oxides
NSPS	New Source Performance Standards, 40 CFR Part 60
NSR	New Source Review
OIG	EPA Office of Inspector General
PEETS	Permits Engineering Enforcement Tracking System
PCAQCD	Pinal County Air Quality Control District
PM	Particulate Matter
PM_{10}	Particulate Matter less than 10 micrometers in diameter
$PM_{2.5}$	Particulate Matter less than 2.5 micrometers in diameter
PSD	Prevention of Significant Deterioration
PTE	Potential to Emit
PTO	Permit to Operate
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
SOB	Statement of Basis

Executive Summary

In response to the recommendations of a 2002 Office of Inspector General (OIG) audit, the Environmental Protection Agency (EPA or we) has re-examined the ways it can improve state and local title V operating permit programs and expedite permit issuance. Specifically, the EPA developed an action plan for performing program reviews of title V operating permit programs for each air pollution control agency beginning in fiscal year 2003. The purpose of these program evaluations is to identify good practices, document areas needing improvement, and learn how the EPA can help the permitting agencies improve their performance.

EPA Region 9 (Region 9) oversees 47 air permitting authorities with operating permit programs. Of these, 43 are state or local authorities with title V programs approved pursuant to part 70 (35 in California, three in Nevada, four in Arizona, and one in Hawaii). Region 9 also oversees a delegated title V part 71 permitting program in Navajo Nation and part 69 permitting programs in Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Because of the significant number of permitting authorities, Region 9 has committed to performing, on an annual basis, one comprehensive title V program evaluation of a permitting authority with 20 or more title V sources. This approach will cover about 85% of the title V sources in Region 9 once the EPA completes evaluation of those programs.

Region 9 recently conducted a title V program evaluation of the Pinal County Air Quality Control District (PCAQCD), whose permitting jurisdiction includes sources located in Pinal County, Arizona. Our evaluation of PCAQCD is the 13th title V program evaluation Region 9 has conducted. The first twelve were conducted at permitting authorities in Arizona, Nevada, California, and Hawaii. The Region 9 program evaluation team for this evaluation consisted of the following EPA personnel: Meredith Kurpius, Air Division Associate Director; Gerardo Rios, Chief of the Air Permits Office; Ken Israels, Program Evaluation Advisor; Sheila Tsai, Program Evaluation Coordinator; and Lisa Beckham, Air Permits Office Program Evaluation team member.

The evaluation was conducted in four stages. At the first stage, the EPA sent PCAQCD a questionnaire focusing on title V program implementation in preparation for the site visit at PCAQCD's offices (See Appendix B, Title V Questionnaire and PCAQCD Responses). During the second stage of the program evaluation, Region 9 conducted an internal review of the EPA's own set of PCAQCD title V permit files. The third stage of the program evaluation was a site visit, which consisted of Region 9 representatives visiting PCAQCD office, located in Florence, AZ, to interview District staff and managers. The site visit took place September 25-27, 2017. The fourth stage of the program evaluation involved follow-up and clarification of issues for completion of the draft report.

Based on Region 9's program evaluation of PCAQCD, we conclude that PCAQCD implements a solid program, with experienced staff and management. We have also identified certain areas for improvement. Major findings from our report are listed below:

1. Finding: PCAQCD uses an electronic database to track and prepare title V permits effectively. (Finding 2.4)

2. Finding: PCAQCD's Statements of Basis consistently identify regulatory and policy decisions. (Finding 2.5)

3. Finding: PCAQCD successfully implements the CAM requirements. (Finding 3.1)

4. Finding: PCAQCD provides public notices of its draft title V permitting actions on its website. However, PCAQCD does not provide online access to all related files on its website. (Finding 4.1)

5. Finding: PCAQCD could provide more information to the public regarding the right to petition the EPA Administrator to object to a title V permit. (Finding 4.2)

6. Finding: Although Pinal County contains a number of linguistically isolated communities, PCAQCD has not routinely translated public notice packages where translation services may be necessary. (Finding 4.3)

7. Finding: PCAQCD's general practice is to conduct a sequential public and EPA review. PCAQCD does not use a concurrent process for public comment and the EPA's 45-day review. (Finding 4.4)

8. Finding: PCAQCD has no permit backlog and issues initial and renewal permits in a timely manner. (Finding 5.1)

9. Finding: PCAQCD permitting and compliance management communicate well and meet routinely to discuss programmatic issues. (Finding 6.2)

10. Finding: PCAQCD tracks title V program expenses and revenue. However, additional funds have been needed for the past three years to ensure that program expenses are adequately covered. (Finding 7.3)

Our report provides a series of findings (in addition to those listed above) and recommendations that should be considered in addressing our findings. As part of the program evaluation process, we gave PCAQCD an opportunity to review these findings and consider our recommendations on July 9, 2018, when we emailed an electronic copy of the draft report to PCAQCD for comment.

The EPA received PCAQCD's response, which included comments on the draft report, on August 7, 2018 (See Appendix E). Based on the comments received from PCAQCD, the EPA fixed minor typos as identified in PCAQCD's comments on the draft report.

We will work with PCAQCD to address the concurrent process for public comment and the EPA's 45-day review as necessary.

1. Introduction

Background

In 2000, the U.S. EPA's Office of Inspector General (OIG) initiated an evaluation on the progress that the EPA and state and local agencies were making in issuing title V permits under the Clean Air Act (CAA or the Act). The purpose of OIG's evaluation was to identify factors delaying the issuance of title V permits by selected state and local agencies and to identify practices contributing to timely issuance of permits by those same agencies.

After reviewing several selected state and local air pollution control agencies, OIG issued a report on the progress of title V permit issuance by the EPA and states.[1] In the report, OIG concluded that the key factors affecting the issuance of title V permits included (1) a lack of resources, complex EPA regulations, and conflicting priorities contributed to permit delays; (2) EPA oversight and technical assistance had little impact on issuing title V permits; and (3) state agency management support for the title V program, state agency and industry partnering, and permit writer site visits to facilities contributed to the progress that agencies made in issuing title V operating permits.

OIG's report provided several recommendations for the EPA to improve title V programs and increase the issuance of title V permits. In response to OIG's recommendations, the EPA made a commitment in July 2002 to carry out comprehensive title V program evaluations nationwide. The goals of these evaluations are to identify where the EPA's oversight role can be improved, where air pollution control agencies are taking unique approaches that may benefit other agencies, and where local programs need improvement. The EPA's effort to perform title V program evaluations for each air pollution control agency began in fiscal year 2003.

On October 20, 2014, the EPA's Office of Inspector General issued a report, "Enhanced EPA Oversight Needed to Address Risks From Declining Clean Air Act Title V Revenues," that recommended, in part, that the EPA: establish a fee oversight strategy to ensure consistent and timely actions to identify and address violations of 40 CFR Part 70; emphasize and require periodic reviews of title V fee revenue and accounting practices in title V program evaluations; and pursue corrective actions, as necessary.[2]

Region 9 oversees 47 air permitting authorities with operating permit programs. Of these, 43 are state or local authorities with title V programs approved pursuant to part 70 (35 in California, three in Nevada, four in Arizona, and one in Hawaii). Region 9 also oversees a delegated part 71 title V permitting program in Navajo Nation and part 69 permitting programs in Guam, American Samoa, and

[1] See Report No. 2002-P-00008, Office of Inspector General Evaluation Report, AIR, EPA and State Progress In Issuing title V Permits, dated March 29, 2002.

[2] See EPA's Office of Inspector General report, "Enhanced EPA Oversight Needed to Address Risks From Declining Clean Air Act Title V Revenues", Report No. 15-P-0006, dated October 20, 2014, which can be found on the internet at https://www.epa.gov/sites/production/files/2015-09/documents/20141020-15-p-0006.pdf .

the Commonwealth of the Northern Mariana Islands. Due to the significant number of permitting authorities, Region 9 has committed to performing one comprehensive title V program evaluation of a permitting authority with 20 or more title V sources every year. This approach would cover about 85% of the title V sources in Region 9 once the EPA completes evaluation of those programs.

Title V Program Evaluation at Pinal County Air Quality Control District

Region 9's evaluation of PCAQCD's title V program is the 13th such evaluation conducted by Region 9. The first twelve evaluations were conducted at permitting authorities in Arizona, Nevada, California, and Hawaii. The PCAQCD program evaluation team includes: Meredith Kurpius, Air Division Associate Director; Gerardo Rios, Chief of the Air Permits Office; Ken Israels, Program Evaluation Advisor; Sheila Tsai, Program Evaluation Coordinator; and Lisa Beckham, Air Permits Office Program Evaluation team member.

The objectives of the evaluation were to assess how PCAQCD implements its title V permitting program, evaluate the overall effectiveness of PCAQCD's title V program, identify areas of PCAQCD's title V program that need improvement, identify areas where the EPA's oversight role can be improved, and highlight the unique and innovative aspects of PCAQCD's program that may be beneficial to transfer to other permitting authorities. The evaluation was conducted in four stages. In the first stage, the EPA sent PCAQCD a questionnaire focusing on title V program implementation in preparation for the site visit to the PCAQCD office. (See Appendix B, Title V Questionnaire and PCAQCD Responses.) The title V questionnaire was developed by the EPA nationally and covers the following program areas: (1) Title V Permit Preparation and Content; (2) General Permits; (3) Monitoring; (4) Public Participation and Affected State Review; (5) Permit Issuance/Revision/Renewal Processes; (6) Compliance; (7) Resources & Internal Management Support; and (8) Title V Benefits.

During the second stage of the program evaluation, Region 9 conducted an internal review of the EPA's own set of PCAQCD title V permit files. PCAQCD submits title V permits to Region 9 in accordance with its EPA-approved title V program and the Part 70 regulations. Region 9 maintains title V permit files containing these permits along with copies of associated documents, permit applications, and correspondence.

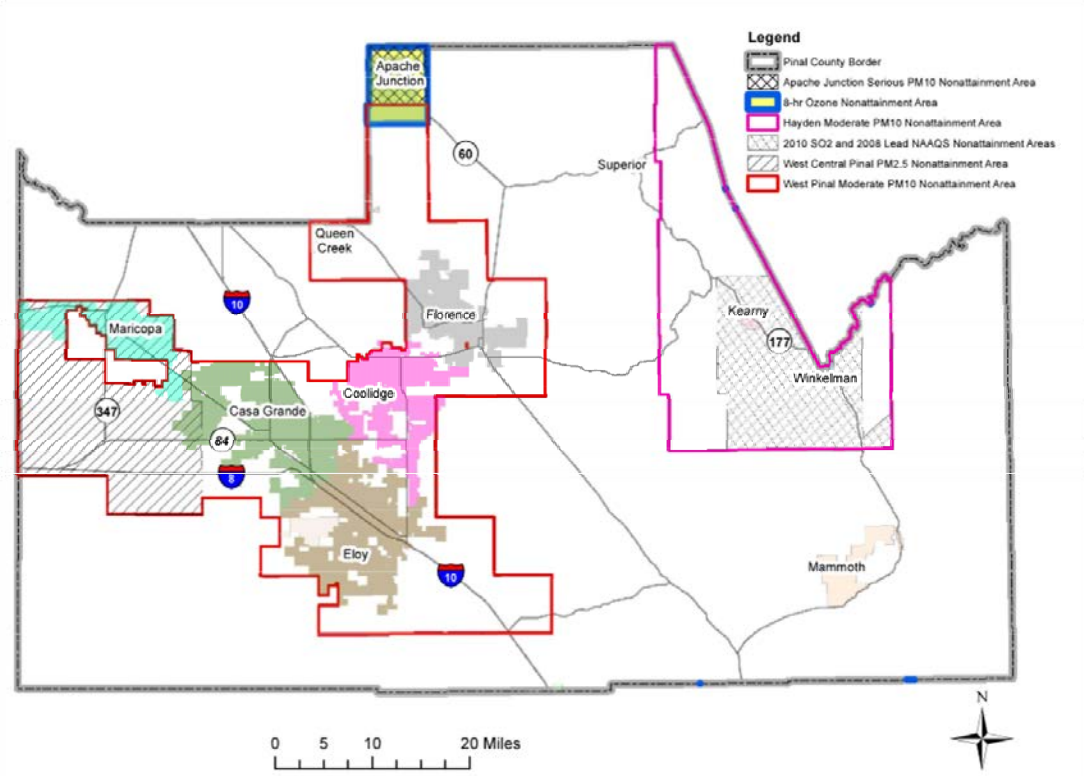
The third stage of the program evaluation included a site visit to the PCAQCD offices in Florence, AZ to conduct further file reviews, interview PCAQCD staff and managers, and review the District's permit-related databases. The purpose of the interviews was to confirm the responses in the completed questionnaire and to ask clarifying questions. The site visit took place September 25-27, 2017.

The fourth stage of the program evaluation was follow-up and clarification of issues for completion of the draft report. Region 9 compiled and summarized interview notes and made follow-up phone calls to clarify Region 9's understanding of various aspects of the title V program at PCAQCD.

PCAQCD Description

The PCAQCD was created pursuant to Article 4, Section 401 of the Pinal County Air Pollution Control Ordinance[3] in accordance with Arizona Revised Statutes (ARS) Title 49-473.B. (1992) and consisting of an operating division of the Pinal County Department of Development Services. Currently, Pinal County is designated nonattainment for areas shown in Figure 1.

Figure 1. Pinal County Nonattainment Areas



PCAQCD has a staff of about 14 employees including managers, inspectors, engineers, specialists, and support staff. PCAQCD is divided into five groups: Administrative, Permitting, Planning, Enforcement/Compliance, and Monitoring. The Administrative group handles the billing, permit administrative duties such as public notices, and general administration tasks. The Permitting group issues title V and non-title V permits, performs title V and non-title V inspections, and reviews source tests and compliance reporting. The Planning group works on rules, emissions inventory, travel reduction, and AQI forecasting. Enforcement/Compliance group handles complaint response, dust inspections, and enforcement activities. The Monitoring group performs NAAQS monitoring network operation.

[3] Last amended on June 6, 1969.

Coordination with the State of Arizona

The Arizona Department of Environmental Quality (ADEQ) is responsible for submitting the State Implementation Plan (SIP) and federally-mandated air permitting programs for Arizona to the EPA. PCAQCD is a local air pollution control agency within the state. State law and delegation agreements between ADEQ and PCAQCD describe the roles and responsibilities of each agency, and delineate jurisdiction of sources within Pinal County. On November 10, 1993, ADEQ, on behalf of PCAQCD, submitted Pinal County's proposed operating permits program, pursuant to title V of the Act and the Arizona Comprehensive Air Quality Act, for approval to the EPA.

The ARS, Title 49, Chapter 3, Air Quality, provide authority for county air quality control agencies to permit sources of air pollution, including sources operating pursuant to title V of the Act. Arizona law provides that ADEQ has jurisdiction over sources, permits and violations that pertain to (1) major sources in any county that has not received New Source Review or Prevention of Significant Deterioration approval from the Administrator; (2) metal ore smelters; (3) petroleum refineries; (4) coal-fired electrical generating stations; (5) Portland cement plants; (6) air pollution by portable sources; (7) mobile sources;[4] and (8) sources located in a county which has not submitted a program as required by title V of the Act or a county that had its program disapproved.[5] All other sources located in Maricopa, Pima, and Pinal Counties are under the jurisdiction of the Counties. Arizona law further provides authority for the Director of ADEQ to delegate to local air quality control agencies authority over sources under ADEQ jurisdiction.[6]

Arizona law provides authority for county air quality control agencies to review, issue, revise, administer, and enforce permits for sources required to obtain a permit.[7] It mandates that county procedures for review, issuance, revision and administration of permits for sources subject to the requirements of title V of the Act be identical to the procedures for such sources permitted by the State. Under Arizona law, all sources subject to permitting requirements within the State of Arizona, exclusive of lands within the exterior boundaries of Indian reservations, are covered by either the state or county permitting program.

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[4] However, per §209(a) of the Clean Air Act, "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." See Section 209 of the Clean Air Act for more details.

[5] See ARS 49-402.

[6] See ARS 49-107.

[7] See ARS 49-480(B). This statute states the following: "Procedures for the review, issuance, revision and administration of permits issued pursuant to this section and required to be obtained pursuant to Title V of the Clean Air Act including sources that emit hazardous air pollutants shall be substantially identical to procedures for the review, issuance, revision and administration of permits issued by the department under this chapter. Such procedures shall comply with the requirements of sections 165, 173 and 408 and Titles III and V of the clean air act and implementing regulations for sources subject to Titles III and V of the clean air act. Procedures for the review, issuance, revision and administration of permits issued pursuant to this section and not required to be obtained pursuant to Title V of the clean air act shall impose no greater procedural burden on the permit applicant than procedures for the review, issuance, revision and administration of permits issued by the department under sections 49-426 and 49-426.01 and other applicable provisions of this chapter."

The PCAQCD Title V Program

The EPA granted interim approval to PCAQCD's title V program on November 29, 1996[8] and full approval on December 7, 2001, effective November 30, 2001[9].

Part 70, the federal regulation that contains the title V program requirements for states, requires that a permitting authority take final action on each permit application within 18 months after receipt of a complete permit application. The only exception is that a permitting authority must take action on an application for a minor modification within 90 days of receipt of a complete permit application.[10] PCAQCD's local rules regarding title V permit issuance contain the same timeframes as Part 70.[11]

Currently, there are 21 sources in Pinal County that are subject to the title V program. The District has sufficient permitting resources, and processes title V permit applications in a timely manner. PCAQCD has not had a title V permitting backlog since their program was first adopted and approved.

The EPA's Findings and Recommendations

The following sections include a brief introduction, and a series of findings, discussions, and recommendations. The findings are grouped in the order of the program areas as they appear in the title V questionnaire.

The findings and recommendations in this report are based on the EPA's internal file reviews performed prior to the site visit to PCAQCD, the District's responses to the title V Questionnaire, interviews and file reviews conducted during the September 25-27, 2017 site visit, and follow-up E-mails and phone calls made since the site visits.

[8] 61 FR 55910 (October 30, 1996).
[9] 66 FR 63166 (December 5, 2001).
[10] See 40 CFR 70.7(a)(2) and 70.7(e)(2)(iv).
[11] See PCAQCD Regulation 3-1-060.

2. Permit Preparation and Content

The purpose of this section is to evaluate the permitting authority's procedures for preparing title V permits. The requirements of title V of the CAA are codified in 40 CFR Part 70. The terms "title V' and "Part 70" are used interchangeably in this report. Part 70 outlines the necessary elements of a title V permit application under 40 CFR 70.5, and it specifies the requirements that must be included in each title V permit under 40 CFR 70.6. Title V permits must include all applicable requirements, as well as necessary testing, monitoring, recordkeeping, and reporting requirements sufficient to ensure compliance with the terms and conditions of the permit.

2.1 **Finding:** PCAQCD has a quality assurance process for reviewing draft versions of permits before they are made available for public and EPA review.

Discussion: At the time of the site visit, PCAQCD had two permit writers, one engineering staff and one manager. They indicated that all draft title V permits are thoroughly reviewed before they are proposed for public and EPA review. PCAQCD has developed standard permit conditions/templates and updates them as new regulations are introduced. The templates ensure consistency from permit to permit. Typically, once a permit writer completes the draft permit, the other permit writer reviews the draft permit for completeness, accuracy, and approval, which is then followed by the director's final review. However, as discussed in Finding 7.7, one permit writer recently left the agency but the District was able to backfill the position quickly.

During interviews, staff and managers also stated that compliance staff are not involved in routine quality assurance review of the draft permit review, but permitting staff consult with compliance staff on a regular basis given their routine interaction with facilities during site inspections. Interaction with compliance can enhance the enforceability of a permit.

Recommendation: PCAQCD should continue its quality assurance practices.

2.2 **Finding:** PCAQCD maintains template documents developed to provide direction for several elements of permit writing.

Discussion: As mentioned in Finding 2.1, PCAQCD uses template permits and statements of basis with standard permit conditions and analysis to ensure consistency. Given there is typically only two permit writers, person-to-person communication is the most effective method to discuss and update the template documents. However, as discussed in Finding 7.7, written policy and guidance documents would be helpful in succession planning.

Recommendation: We encourage PCAQCD to continue to implement the practice of writing template conditions and maintain their standards of consistency and accuracy. We also encourage PCAQCD to develop more written guidance on permit issuance as part of its

succession planning.

2.3 **Finding:** PCAQCD staff have a clear understanding of, and the ability to correctly implement, the various title V permit revision tracks pursuant to District and federal regulations.

Discussion: PCAQCD Rule Chapter 3, Article 2. Permit Amendments and Revisions, contains clear definitions for Administrative, Minor, and Significant Title V revisions. The EPA has found that PCAQCD rules are consistent with federal title V definitions and requirements pursuant to 40 CFR Part 70. The permit writers follow the Chapter 3, Article 2 definitions as guidance to determine which of the title V permit tracks applies to a permit revision. Their determination regarding which track applies is also verified by the other permit writer during the review process. PCAQCD's understanding of the criteria for classifying title V revisions allow for effective processing of title V permit changes. During the EPA's 45-day review, the EPA has not had to comment on PCAQCD's title V revision classification.

Recommendation: PCAQCD should continue to ensure Engineering staff successfully implement and categorize title V permit actions.

2.4 **Finding:** PCAQCD uses an electronic database to track title V permits effectively.

Discussion: PCAQCD uses several databases to track multiple activities within the District. The Permits Access Database and Excel spreadsheet is used for tracking all permitting activity moving through the system. They track the history of the permits from the initial application to the final issuance of the permit including public notice dates, dates of proposed and final permits sent to the EPA (if applicable), etc. The Fee Access Database is used for tracking the fees associated with industrial permits, dust permits, burn permits, and for other billing/invoicing purposes. Time is tracked based on facility IDs so that title V and non-title V activities can be identified. Compliance Access Database is used for tracking emissions, performance testing due dates, test protocols submittal, test report submittals, and other compliance related information. Timesheet Access Database is used for tracking the working hours of the employees. All the databases can generate customized reports containing information such as application submittal date, supplemental submittal date(s), permittee response date, complete date, issuance date, invoices, and employee time.

During our site visit, PCAQCD demonstrated the database's flexibility and utility in retrieving critical information related to specific title V permits. Most managers and staff believe their current system are sufficient; however, they also noted that modernizing the database could improve efficiency. PCAQCD stated that they plan to meet with the County IT department to discuss possible improvements.

Recommendation: The EPA commends PCAQCD for directing resources to build and upgrade a well-structured database that provides a variety of tools for effectively implementing the title V

program. The EPA encourages PCAQCD to devote the necessary resources to modernize its system to avoid potential problems in the future.

2.5 **Finding:** PCAQCD's Statements of Basis consistently identify regulatory and policy decisions.

Discussion: 40 CFR part 70 requires title V permitting authorities to provide "a statement that sets forth the legal and factual basis for the draft permit conditions" (40 CFR 70.7(a)(5)). The purpose of this requirement is to provide the public and the EPA with the District's rationale on applicability determinations and technical issues supporting the issuance of proposed title V permits. A statement of basis should document the regulatory and policy issues applicable to the source, and is an essential tool for conducting meaningful permit review.

The EPA has issued guidance on the required content of statements of basis on several occasions. This guidance has consistently explained the need for permitting authorities to produce statements of basis with sufficient detail to document their decisions in the permitting process. For example, the EPA Administrator's May 24, 2004 Order responding to a petition to the EPA to object to the proposed title V permit for the Los Medanos Energy Center includes the Administrator's response to statement of basis issues raised by the petitioners. The Order states:

"A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from a straight recitation of requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 CFR 70.6(a)(3)(i)(B)…Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit." Order at 10.

Appendix C of this report contains a summary of the EPA guidance to date on the suggested elements in the Statements of Basis.

The EPA reviewed many PCAQCD title V permits and statements of basis. A statement of basis, in general, includes six main section: background, process description, emission, regulatory requirements and monitoring, ambient impact assessment, and list of abbreviations. The background section includes applicant/application history, attainment classification, permitting history, and compliance/enforcement history. The process description section includes general process descriptions and process changes descriptions. The emissions section includes general methodology, potential/allowable emissions, changes in emissions, and greenhouse gas emissions. Regulatory requirements and monitoring section includes discussion on title V/PSD applicability, regulatory emission limitations and compliance/monitoring, NSPS/NESHAP

applicability, and non-applicable requirements. The ambient impact assessment section discusses modeling if required.

We found that the District routinely provides clear descriptions of technical, regulatory, and/or policy issues made in the permitting process. As an example, the statement of basis for the Republic Plastics renewal permit describes an issue related to storage emissions that was of concern to PCAQCD. PCAQCD provides details related to the concern, including information received from the applicant, and how PCAQCD ultimately determined that a particular emission factor was appropriate. We also find the detailed permitting history, compliance history, and emission calculation methodology, including summary tables, to be helpful in understanding a particular facility.

Recommendation: We commend PCAQCD for its attention to detail in ensuring technical, regulatory, and policy decisions are well-documented and recommend they continue this practice to support their title V permit decisions. [12]

2.6 **Finding:** The District documents rationale/justification for minor permit revisions.

Discussion: As discussed in Finding 2.5, PCAQCD documents all permit revisions, including administrative and minor permit revisions in its Permitting History Summary table and discuss in more detail under "Permitting History Detail" under Section 1 of the statement of basis.

Asarco Inc, Ray Complex Permit V20654.R02 and Apache Junction Landfill Permit V20670.R01's statement of basis provides a good example of PCAQCD's documentation of its minor permit revisions.

Recommendation: PCAQCD should continue its practice of thoroughly documenting its permit decisions.

2.7 **Finding:** The District incorporates applicable requirements into title V permits in an enforceable manner.

[12] Typically, PCAQCD provides specific citations to previous policy or technical decisions. We nonetheless found a few instances where a statement of basis contained general references to previous determinations. [HEXCEL R5 – specific in one place, but generic in another (monitoring/testing)] PCAQCD could further improve by consistently including specific citations to previous determinations. In the case of permit renewals, if the new statement of basis relies heavily on a previous determination, we recommend it be attached to the renewal action so that the public can adequately review the basis for the terms and conditions of the new permit. [EL Paso Natural Gas – Casa Grande] In the case of permit revisions, we recommend that PCAQCD identify that a particular element (testing, recordkeeping, etc.) is not being reviewed as part of the particular action instead of generically referring to previous actions.

Discussion: A primary purpose of title V is to provide each major facility with a single permit that ensures compliance with all applicable CAA requirements. To accomplish this purpose, permitting authorities must incorporate applicable requirements in sufficient detail such that the public, facility owners and operators, and regulating agencies can clearly understand which requirements apply to the facility. These requirements include emission limits, operating limits, work practice standards, and monitoring, recordkeeping, and reporting provisions that must be enforceable as a practical matter.

Based on our review of the District's title V permits, PCAQCD incorporates applicable requirements into its title V permits with the appropriate level of detail. For example, Copper Crossing Energy Center's permit V20672.000 and the related statement of basis include an applicability analysis, applicable conditions, and appropriate citations for requirements.

Recommendation: PCAQCD should continue its good practice of incorporating requirements in sufficient detail to be practically enforceable.

2.8 **Finding:** The District regularly conducts pre-application meetings with potential sources to help identify the project scope and regulatory requirements.

Discussion: The permitting staff regularly conduct pre-application meetings with potential sources to help identify the project scope and regulatory requirements. Permitting staff also participate in planning level meetings set up by County and/or City economic development staff to assist applicants thru the process. Additionally, permitting staff participate in the County zoning process at the application level by attending scoping meetings. The County also employs tracking system software for zoning and building safety issues that PCAQCD is linked into for approvals.

Recommendation: The EPA commends PCAQCD for conducting pre-application meetings and being involved in the planning process to reduce permit processing time.

3. Monitoring

The purpose of this section is to evaluate the permitting authority's procedure for meeting title V monitoring requirements. Part 70 requires title V permits to include monitoring and related recordkeeping and reporting requirements. (See 40 CFR 70.6(a)(3).) Each permit must contain monitoring and analytical procedures or test methods as required by applicable monitoring and testing requirements. Where the applicable requirement itself does not require periodic testing or monitoring, the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that is representative of the source's compliance with the permit. As necessary, permitting authorities must also include in title V permits requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

Title V permits must also contain recordkeeping for required monitoring and require that each title V source record all required monitoring data and support information and retain such records for a period of at least five years from the date of the monitoring sample, measurement, report, or application was made. With respect to reporting, permits must include all applicable reporting requirements and require (1) submittal of reports of any required monitoring at least every six months and (2) prompt reporting of any deviations from permit requirements. All required reports must be certified by a responsible official consistent with the requirements of 40 CFR 70.5(d).

In addition to periodic monitoring, permitting authorities are required to evaluate the applicability of Compliance Assurance Monitoring (CAM), and include CAM provisions and a CAM plan into a title V permit when applicable. CAM applicability determinations are required either at permit renewal, or upon the submittal of an application for a significant title V permit revision. CAM regulations require a source to develop parametric monitoring for certain emission units with control devices, which may be required in addition to any periodic monitoring, to assure compliance with applicable requirements.

3.1 **Finding:** PCAQCD successfully implements the CAM requirements.

Discussion: The CAM regulations, codified in 40 CFR Part 64, apply to title V sources with large emission units that rely on add-on control devices to comply with applicable requirements. The underlying principle, as stated in the preamble, is "to assure that the control measures, once installed or otherwise employed, are properly operated and maintained so that they do not deteriorate to the point where the owner or operator fails to remain in compliance with applicable requirements" (62 FR 54902, October 22, 1997). Per the CAM regulations, sources are responsible for proposing a CAM plan to the permitting authority that provides a reasonable assurance of compliance to provide a basis for certifying compliance with applicable requirements for pollutant-specific emission units (PSEU) with add-on control devices.

Based on interviews conducted during our site visit, we found that permit writers and managers at PCAQCD understand the purpose of the CAM rule. Interviewees consistently displayed knowledge of CAM applicability and permit content requirements. Of the total 21 PCAQCD title

V permits, there are three title V permits with CAM monitoring: Salt River Project – Copper Crossing Energy Center (V20672.000), Hexcel Corporation (V20661.R02), and ASARCO – Ray Mine (V20654.R02). In our review of District permits we found that the District generally explains CAM applicability correctly and adds appropriate monitoring conditions to title V permits for sources with PSEUs subject to CAM.

Recommendation: PCAQCD should continue to implement the CAM rule as it processes permit renewals and significant modifications.

4. Public Participation and Affected State Review

This section examines PCAQCD procedures used to meet public participation requirements for title V permit issuance. The federal title V public participation requirements are found in 40 CFR 70.7(h). Title V public participation procedures apply to initial permit issuance, significant permit modifications, and permit renewals. Adequate public participation procedures must provide for public notice including an opportunity for public comment and public hearing on the draft permit, permit modification, or renewal. Draft permit actions must be noticed in a newspaper of general circulation or a state publication designed to give general public notice; to persons on a mailing list developed by the permitting authority; to those persons that have requested in writing to be on the mailing list; and by other means necessary to assure adequate notice to the affected public.

The public notice should, at a minimum: identify the affected facility; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the draft permit, the application, all relevant supporting materials, and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the required comment procedures; and the time and place of any hearing that may be held, including procedures to request a hearing (See 40 CFR 70.7(h)(2).)

The permitting authority must keep a record of the public comments and of the issues raised during the public participation process so that the EPA may fulfill the Agency's obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted. The public petition process, 40 CFR 70.8(d), allows any person who has objected to permit issuance during the public comment period to petition the EPA to object to a title V permit if the EPA does not object to the permit in writing as provided under 40 CFR 70.8(c). Public petitions to object to a title V permit must be submitted to the EPA within 60 days after the expiration of the EPA 45-day review period. Any petition submitted to the EPA must be based only on comments regarding the permit that were raised during the public comment period, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.

4.1 **Finding:** PCAQCD provides public notices of its draft title V permitting actions on its website. However, PCAQCD does not provide online access to all related files on its website.

Discussion: A permitting authority's website is a powerful tool to make title V information available to the general public. Information that would be useful for the public review process can result in a more informed public and, consequently, more meaningful comments during title V permit public comment periods.

The District website provides general information to the public and regulated community regarding the PCAQCD permitting program.[13] The public can find information regarding the permitting process, whether a permit is needed for an operation, how to obtain a permit, application forms, and information about related programs that inform the District's permitting program. Final permits, statements of basis, and the signed certificates for title V sources are posted online after issuance. Previous statements of basis are not available online but are available upon request.

PCAQCD's website provides a list of sources under public comment periods;[14] however, it does not provide online access to any of the documents. Although PCAQCD has a title V permit notification list, PCAQCD's public notices and website do not include information regarding the existence of the notification list, nor provide the public instructions on how to sign up to receive notifications.

Recommendation: We recommend that the District continue to provide the public information related to title V permits through the various approaches currently used. We also recommend that the District update its practices by providing the public with access to all the draft permit materials and by developing opportunities for the public to request to be added to its notification list, including through its website and public notices.

4.2 **Finding:** PCAQCD could provide more information to the public regarding the right to petition the EPA Administrator to object to a title V permit.

Discussion: 40 CFR 70.8(d) and District Rule 3-1-065 provide that any person may petition the EPA Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to a title V permit. The petition must be based only on objections that were raised with reasonable specificity during the public comment period.[15]

Even though District Rule 3-1-065 contains information about the public's right to petition the EPA Administrator to object to a title V permit, neither the District's draft and final permit packages, nor the public notice for the permit action inform the public of the right to petition the EPA Administrator to object to a title V permit.

Recommendation: The EPA recommends that PCAQCD revise its public notice information to inform the public of the right to petition the EPA Administrator to object to a title V permit.

[13] http://www.pinalcountyaz.gov/AirQuality/Pages/IndustrialPermitsProcess.aspx

[14] http://www.pinalcountyaz.gov/AirQuality/Pages/IndustrialPermitPublicNotices.aspx

[15] An exception applies when the petitioner demonstrates that it was impracticable to raise those objections during the public comment period or that the grounds for objection arose after that period.

4.3 **Finding:** Although Pinal County contains a number of linguistically isolated communities, PCAQCD has not routinely translated public notice packages where translation services may be necessary.

Discussion: PCAQCD's jurisdiction includes sources located throughout Pinal County. The EPA prepared a map of linguistically isolated communities within PCAQCD's jurisdiction in which title V permits have been or may be issued (see Appendix D). The EPA's map indicates that there are significant populations that are linguistically isolated. These linguistically isolated communities have a significant population density, and thus PCAQCD should provide translation services in those communities during the title V permitting process. Using a map like that found in Appendix D may provide additional opportunities to direct PCAQCD's translation efforts.

Recommendation: The EPA recommends that PCAQCD provide translation services for their linguistically isolated communities. PCAQCD should consider directing translation efforts by using mapping tools as appropriate to assure updated information.

4.4 **Finding:** PCAQCD's general practice is to conduct a sequential public and EPA review. PCAQCD does not use a concurrent process for public comment and the EPA's 45-day review.

Discussion: Per section 505(b) of the CAA and 40 CFR 70.10(g), state and local permitting agencies are required to provide proposed title V permits to the EPA for a 45-day period during which the EPA may object to permit issuance. The EPA regulations allow the 45-day EPA review period to either occur following the 30-day public comment period (i.e., sequentially), or at the same time as the public comment period (i.e., concurrently). When occurring sequentially, permitting agencies will make the draft permit[16] available for public comment, and following the close of public comment, provide the proposed permit and supporting documents to the EPA.[17] When occurring concurrently, a state or local agency will provide the EPA with the draft permit and supporting documents at the beginning of the public comment period, so that both periods start at the same time. If comments are received during the 30-day public review period, the 45-day EPA review would be restarted.

Recommendation: PCAQCD should continue its practice to prepare a response to comments, make any necessary revisions to the permit or permit record, and submit the proposed permit and other required supporting information to restart the EPA review period. PCAQCD might also consider options for using a concurrent review process if PCAQCD would like to expedite the EPA permit review period.

[16] Per 40 CFR 70.2, "draft permit" is the version of a permit for which the permitting authority offers public participation or affected State review.

[17] Per 40 CFR 70.2, "proposed permit" is the version of a permit that the permitting authority proposes to issue and forwards to the EPA for review. In many cases these versions will be identical; however, in instances where the permitting agency makes edits or revisions as a result of public comments, there may be material differences between the draft and proposed permit.

5. Permit Issuance / Revision / Renewal

This section focuses on the permitting authority's progress in issuing initial title V permits and the District's ability to issue timely permit renewals and revisions consistent with the regulatory requirements for permit processing and issuance. Part 70 sets deadlines for permitting authorities to issue all initial title V permits. The EPA, as an oversight agency, is charged with ensuring that these deadlines are met as well as ensuring that permits are issued consistent with title V requirements. Part 70 describes the required title V program procedures for permit issuance, revision, and renewal of title V permits. Specifically, 40 CFR 70.7 requires that a permitting authority take final action on each permit application within 18 months after receipt of a complete permit application, except that action must be taken on an application for a minor modification within 90 days after receipt of a complete permit application.[18]

5.1 **Finding:** PCAQCD has no permit backlog and issues initial and renewal permits in a timely manner.

Discussion: PCAQCD has issued 34 initial title V permits since it began implementing its title V program. Some title V sources took a synthetic minor limit and are no longer subject to the title V program. Thus, there are only 21 current title V sources. The District's depth of knowledge and internal procedures produced a solid record of timely permit issuance. The District has issued more than 43 renewal permits since the inception of their program. The District does not anticipate any delays in processing renewal applications.

Recommendation: The District should continue the practices that allow it to process title V permits in a timely manner.

5.2 **Finding:** District Rule 3-1-084, "Voluntarily Accepted Federally Enforceable Emissions Limitations; Applicability; Reopening; Effective Date," allows sources to voluntarily limit their potential to emit to avoid title V applicability.

Discussion: A source that would otherwise have the potential to emit (PTE) a given pollutant that exceeds the major source threshold for that pollutant can accept a voluntary limit (a "synthetic minor" limit) to maintain its PTE below the applicable threshold and avoid major New Source Review and/or the title V program. The most common way for sources to establish such a limit is to obtain a synthetic minor permit from the local permitting authority.

[18] See 40 CFR 70.7(a)(2) and 70.7(e)(2)(iv).

Synthetic minor limits must be both legally enforceable and enforceable as a practical matter.[19] According to the EPA guidance, for emission limits in a permit to be practically enforceable, the permit provisions must specify: 1) a technically-accurate limitation and the portions of the source subject to the limitations; 2) the time period for the limitation; and 3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting. [20]

In response to a petition regarding the Hu Honua Bioenergy Facility, the EPA stated that synthetic minor permits must specify: 1) that all actual emissions at the facility are considered in determining compliance with its synthetic minor limits, including emission during startup, shutdown, malfunction or upset; 2) that emissions during startup and shutdown (as well as emission during other non-startup/shutdown operating conditions) must be included in the semi-annual reports or in determining compliance with the emission limits; and 3) how the facility's emissions shall be determined or measured for assessing compliance with the emission limits.[21]

District Rule 3-1-084 allows major sources to voluntarily limit their PTE to below major source thresholds to avoid the requirement to obtain a title V permit. Title V sources are required to demonstrate that their PTE is permanently reduced either through a facility modification or by accepting an enforceable permit condition to limit the PTE to levels below the title V major source emission thresholds specified in District Rule 3-3-203.

At our request, PCAQCD provided us with four examples of synthetic minor permits.[22] Our review indicates that the example permits meet the EPA standards for practical enforceability. For example, each of the example permits contained requirements for the source to monitor hours of operation, material usage amount, and criteria pollutant emission rates. The sources were required to track, record, and maintain records of their emissions on at least a monthly basis to demonstrate that they have not exceeded major source thresholds. Some of the sources were required to monitor these parameters on an hourly or daily basis to demonstrate compliance, depending on the individual source's types of operation. All the permits contained information on what part of the source's operation were required to comply with the specific emission limits.

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[19] *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)*, John S. Seitz, Director, Office of Air Quality Planning and Standards (January 25, 1995).

[20] *Guidance an Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits*, Kathie A. Stein, Director, Air Enforcement Division (January 25, 1995).

[21] *Order Responding to Petitioner's Request that the Administrator Object to Issuance of State Operating Permit Petition No. IX-2011-1*, Gina McCarthy, Administrator (February 7, 2014).

[22] The four permits included the following types of facilities: an automobile manufacturing facility; a cotton seed delinting facility; an ethanol manufacturing facility; and a hot mix asphalt plant.

Recommendation: The District should continue issuing synthetic minor permits as needed with requirements that ensure sources' emissions are below applicable major source thresholds. PCAQCD should also consider the criteria from the Hu Honua petition response in future synthetic minor permits.

6. Compliance

This section addresses PCAQCD practices and procedures for issuing title V permits that ensure permittee compliance with all applicable requirements. Title V permits must contain sufficient requirements to allow the permitting authority, the EPA, and the general public to adequately determine whether the permittee complies with all applicable requirements.

Compliance is a central priority for the title V permit program. Compliance assures a level playing field and prevents a permittee from gaining an unfair economic advantage over its competitors who comply with the law. Adequate conditions in a title V permit that assure compliance with all applicable requirements also result in greater confidence in the permitting authority's title V program within both the general public and the regulated community.

6.1 **Finding:** PCAQCD performs full compliance evaluations of most title V sources on an annual basis.

Discussion: The EPA's 2016 Clean Air Act Stationary Source Compliance Monitoring Strategy recommends that permitting authorities perform Full Compliance Evaluations (FCEs) for most title V sources at least every other year.[23] For the vast majority of title V sources, the EPA expects that the permitting authority will perform an on-site inspection to determine the facility's compliance status as part of the FCEs. During interviews, District inspectors reported that the District's plan requires title V permits to be inspected once every two years. PCAQCD's internal performance measures set a goal of inspecting 80% of the title V permits annually. Since the tracking of performance measurements started in 2008 the District has consistently met this goal. Thus, when the permit writers are working on a title V permit revision, they are able to check the compliance status of the facility as determined by the most recent inspection and/or reporting.

Recommendation: The EPA commends PCAQCD for performing full compliance evaluations of most title V sources annually.

6.2 **Finding:** PCAQCD permitting and compliance management communicate well and meet routinely to discuss programmatic issues.

Discussion: As discussed in Finding 2.1, PCAQCD compliance staff are not involved in the review of draft title V permits as a matter of standard procedure. However, PCAQCD's compliance manager and engineering manager hold routine meetings to discuss permitting and compliance issues. Similarly, engineering staff indicated compliance staff are readily accessible if there were any questions regarding a source or a permit.

[23] This document is available at: https://www.epa.gov/sites/production/files/2013-09/documents/cmspolicy.pdf.

Recommendation: The EPA commends PCAQCD for the good communication between permitting and compliance management and staff. We encourage PCAQCD to continue information sharing between engineering and compliance staff.

7. Resources and Internal Management

The purpose of this section is to evaluate how the permitting authority is administering its title V program. With respect to title V administration, the EPA's program evaluation: (1) focused on the permitting authority's progress toward issuing all initial title V permits and the permitting authority's goals for issuing timely title V permit revisions and renewals; (2) identified organizational issues and problems; (3) examined the permitting authority's fee structure, how fees are tracked, and how fee revenue is used; and (4) looked at the permitting authority's capability of having sufficient staff and resources to implement its title V program.

An important part of each permitting authority's title V program is to ensure that the permit program has the resources necessary to develop and administer the program effectively. In particular, a key requirement of the permit program is that the permitting authority establish an adequate fee program. Part 70 requires that permit programs ensure that title V fees are adequate to cover title V permit program costs and are used solely to cover the permit program costs. Regulations concerning the fee program and the appropriate criteria for determining the adequacy of such programs are set forth in 40 CFR 70.9.

7.1 **Finding:** District engineers and inspectors receive effective legal support from the County Counsel's office.

Discussion: The County Counsel's office represents and advises PCAQCD on air quality permitting and enforcement matters and typically participates in meetings when PCAQCD meets with a permittee or others who have legal counsel. During our site visit, interviewees reported that they receive effective legal support from the County Counsel's office.

Recommendation: PCAQCD should continue to ensure that it receives effective legal support from the County Counsel's office.

7.2 **Finding:** The District has an effective electronic database for permits management.

Discussion: As discussed in Finding 2.4, PCAQCD uses various Excel and Access databases to manage their permits. PCAQCD consistently updates the information in their database to keep it relevant and reliable. PCAQCD permits can be easily managed by running the various reports stated in Finding 2.4. Most managers and staff believe their current system fulfill the requirements for what they need; however, they also noted that modernizing the database could potentially make it more efficient. PCAQCD stated that they are in the process of planning to meet with the County IT Department to discuss possible improvements.

Recommendation: The EPA encourages PCAQCD to devote resources to building and upgrading its well-structured database that provides a variety of tools for effectively implementing the title V program.

7.3 **Finding:** PCAQCD tracks title V program expenses and revenue. However, additional funds have been needed for the past three years to ensure that program expenses are adequately covered.

Discussion: CAA Section 503(b)(3)(i) and 40 C.F.R. part 70 require permit fees be sufficient to cover program costs and are used solely to cover the permit program costs. In addition, the EPA has provided guidance on title V fees that provides general principles regarding the funding of title V permitting program.[24] During our evaluation, PCAQCD provided a clear accounting of its title V program costs showing that, from 2014 through 2017, PCAQCD's title V permitting program expenses exceeded its title V program revenue on average by a little over 11% (this number is mostly attributable to the result of the 2015 to 2016 timeframe).[25]

PCAQCD attributed the gap between title V revenue and expenses to increases in indirect costs such as retirement, healthcare, and the District's facilities. According to PCAQCD, the differences between fee revenue and program expenses between 2014 and 2017 have been covered by the use of other District funds. Reliance on variable, non-recurring funding sources raises concerns of possible problematic shortfalls.

Recommendation: First, the EPA commends PCAQCD for its current accounting practices that provide sufficient information regarding expenses and revenue associated with title V permits. Second, the EPA strongly encourages PCAQCD to take measures, such as raising permit fees and reducing expenses, to minimize continued use of other District funding sources to cover program funding deficits. The EPA also strongly recommends that the PCAQCD evaluate its use of funding sources other than title V fees consistent with any guidelines provided by the EPA.

7.4 **Finding:** District staff report that supervisors and management are available for one-on-one consultation on title V permitting issues

Discussion: With a small group of staff, both engineering and compliance managers are able to provide frequent one-on-one training. The staff indicated that the managers are accessible if there are any title V permitting or compliance issues. Each issue can be evaluated on a case-by-case basis.

[24] See August 4, 1993 guidance entitled, "Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V" and March 27, 2018 guidance entitled, "Updated Guidance on EPA Review of Fee Schedules for Operating Permit Programs Under Title V" found in Appendix E of this report.

[25] See Appendix E for PCAQCD's narrative and table accounting of revenue and expenses for the timeframe 2014 to 2017. PCAQCD tracks title V revenue separately from other revenue collected by the District. The EPA has not conducted an analysis to determine whether or not the title V revenue collected is above the presumptive minimum as defined in 40 CFR Part 70.

Recommendation: The EPA encourages PCAQCD to continue to provide one-on-one consultation on title V permitting issues.

7.5 **Finding:** The District provides training for its permitting staff.

Discussion: Based on our interviews, District staff indicated that in-house training (primarily one-on-one mentoring, for example) is provided. Permit writers have an ongoing training metric in their performance measures. District staff also participate in the EPA's Air Pollution Training Institute (APTI) and CARB courses. The EPA's APTI primarily provides technical air pollution training to state, tribal, and local air pollution professionals, although others may benefit from this training.[26] The curriculum is available in classroom, telecourse, self-instruction, and web-based formats. APTI provides training in a variety of areas including Entry-Level Training, Engineering, Ambient Monitoring, Inspections, and Permitting, among others. The CARB training program provides comprehensive education to further the professional development of environmental specialists. These courses cover pollution history, the procedures required to properly evaluate emissions, the analysis of industrial processes, theory and application of emission controls, and waste stream reduction.[27]

In Finding 7.7, we discuss the District's efforts to address succession planning. As the District considers the need to preserve institutional knowledge in succession planning, it may be useful to develop a standard written curriculum that identifies training that is essential for effective implementation of its permitting program. The preparation of a written curriculum that captures their already effective training approach may provide continuity as the District brings on new staff.

Recommendation: The District's current training program for permitting staff provides a solid foundation for effective permitting. In consideration of the District's succession planning efforts, the District should consider preparing a written curriculum to ensure implementation of a comprehensive title V training program.

7.6 **Finding:** The District would like to collaborate and coordinate with the EPA in addressing Environmental Justice (EJ) issues.

Discussion: PCAQCD, as noted in Finding 4.3, has identified and addressed issues associated with EJ in their translation efforts for the permitting program. During our interviews, the EPA learned that EJ-related permitting issues have arisen over the years. When a potential EJ issue is identified, PCAQCD considers how best to meaningfully involve community members through

[26] See http://www.epa.gov/air/oaqps/eog/course_topic.html for additional details.

[27] See http://www.arb.ca.gov/training/training.htm for additional details.

the provision of translation and other outreach services. PCAQCD provided the EPA with examples of the District's efforts that resulted in substantive community comments leading to permit modifications that are more protective. During our interviews, the District asked that the EPA provide assistance on EJ-related permitting issues.

Recommendation: PCAQCD should continue to implement its EJ program and increase internal awareness among its engineering and compliance staff. The EPA will collaborate with PCAQCD at the District's request to provide assistance and training on environmental justice.

7.7 **Finding:** PCAQCD expects significant attrition in the next several years because of retirements.

Discussion: PCAQCD has experienced very low turnover among its permitting staff and management over the years. Low turnover has resulted in a very experienced permitting group at the District, with a concentration of knowledge at the management level. The District acknowledges that a significant portion of its experienced staff and management will become eligible for retirement over the next several years. Because of the upcoming retirements and other staff availability issues, the District is beginning to look at measures to bring on new employees as the more experienced employees begin to transition towards retirement with the hope of promoting knowledge transfer and preserving institutional knowledge.

Recommendation: The EPA recommends PCAQCD increase its focus on succession planning and agrees that it should develop a long-term plan. We note that in January 2018, one of PCAQCD's more experienced title V staff departed PCAQCD. As of August 2018, the District is now fully staffed at 14 employees.

8. Title V Benefits

The purpose of this section is to evaluate how the permitting authority's existing air permitting and compliance programs have benefited from the administration of the permitting authority's title V program. The title V permit program is intended to generally clarify which requirements apply to a source and enhance compliance with any CAA requirements, such as NSPS or SIP requirements. The program evaluation for this section is focused on reviewing how the permitting authority's air permitting program changed as a result of title V, resulted in transparency of the permitting process, improved records management and compliance, and encouraged sources to pursue pollution prevention efforts.

8.1 **Finding:** The reporting requirements associated with having a title V permit have resulted in increased awareness and attention to compliance obligations on the part of regulated sources.

Discussion: Sources with title V permits are subject to reporting requirements that are not typically required by local permits, such as the requirement to submit annual compliance certifications and semiannual monitoring reports, as well as being subject to a full compliance evaluation annually. The District has observed increased awareness of compliance obligations at its title V sources.

During interviews, staff stated that as a result of the title V program, sources have become more conscious of reporting requirements and deliver required title V reports (deviation reports, semi-annual monitoring reports, and annual compliance certifications) promptly. In addition, staff and managers indicated that title V facilities are more attentive to compliance issues, and are more likely to have dedicated staff to handle environmental work. Title V sources are more forthcoming through self-reporting of breakdowns and deviations, and look for ways to prevent them from recurring.

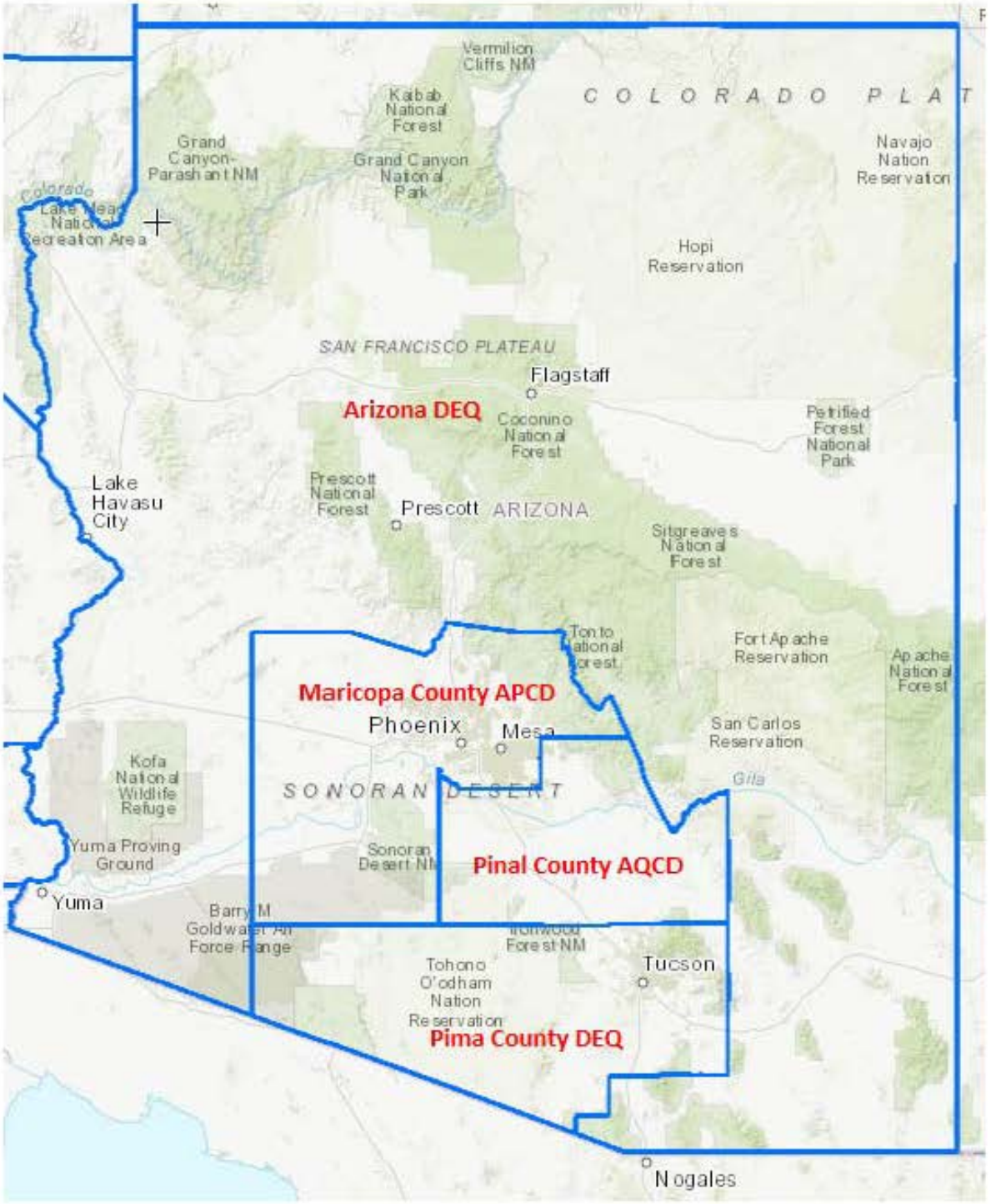
Recommendation: The EPA appreciates this feedback.

8.2 **Finding:** Some sources have accepted enforceable limits to reduce their potential emissions and thus avoid title V applicability.

Discussion: Some major sources avoid title V permitting by voluntarily accepting PTE limits that are less than the major source thresholds, resulting in reductions in potential emissions and, in some cases, in actual emissions. Compliance with PCAQCD's Rule 3-1-084, "Voluntarily Accepted Federally Enforceable Emissions Limitations; Applicability; Reopening; Effective Date," sources can obtain a Part 70 permit with federally-enforceable elective emission limits. Reduced emissions result in improvements to human health and the environment.

Recommendation: The EPA recommends that the District continue its practice of creating synthetic minor sources with practically and legally enforceable permit terms and conditions.

Appendix A. Air Pollution Control Agencies in Arizona


Vermilion Cliffs NM
COLORADO PLAT
Kaibab National Forest
Grand Canyon-Parashant NM
Grand Canyon National Park
Navajo Nation Reservation
Colorado
Lake Mead National Recreation Area
Hopi Reservation
SAN FRANCISCO PLATEAU
Flagstaff
Arizona DEQ
Coconino National Forest
Petrified Forest National Park
Lake Havasu City
Prescott National Forest
Prescott
ARIZONA
Sitgreaves National Forest
Tonto National Forest
Fort Apache Reservation
Apache National Forest
Maricopa County APCD
Phoenix
Mesa
San Carlos Reservation
Kofa National Wildlife Refuge
SONORAN DESERT
Gila
Yuma Proving Ground
Sonoran Desert NM
Pinal County AQCD
Yuma
Barry M Goldwater Air Force Range
Ironwood Forest NM
Tucson
Tohono O'odham Nation Reservation
Pima County DEQ
Nogales

Appendix B. Title V Questionnaire and PCAQCD Responses

EPA

Title V Program Evaluation

Questionnaire

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A. Title V Permit Preparation and Content

Y☐ N☒ **1. For those title V sources with an application on file, do you require the sources to update their applications in a timely fashion if a significant amount of time has passed between application submittal and the time you draft the permit?**

Since July of 2013 our average issuance time for Title V permits is 199 days and our maximum is 465 days. Since our normal permit issuance time is relatively short and we require all permits to submit an annual compliance certification and a product throughput / compliance summary report (locally referred to as an Appendix A report) and all Title V permits submit an annual emission inventory we have not typically asked for updated applications. If, during the application review process, the applicant indicates significant variation from the original application a revision to the application material would be requested.

Y☒ N☐ **a. Do you require a new compliance certification?**

All of our permits require an annual compliance certification. If the annual compliance certification has been submitted and asserts compliance we have not typically required a second one during a revision application process.

Y☒ N☐ **2. Do you verify that the source is in compliance before a permit is issued and, if so, how?**

Our CMS plan requires Title V permits to be inspected once every two years. Our internal performance measures set a goal of inspecting 80% of the Title V permits once every year. Since the tracking of performance measurements started in 2008 we have consistently met the 80% goal. Thus, when the permit writer is working on a Title V permit revision, they are to check the compliance status of the facility as determined by the most recent inspection and/or reporting. This assessment is then summarized in the Technical Support Document (TSD) (aka statement of bias).

a. In cases where a facility is either known to be out of compliance, or may be out of compliance (based on pending NOVs, a history of multiple NOVs, or other evidence suggesting a possible compliance issue), how do you evaluate and document whether the permit should contain a compliance schedule? Please explain, and refer to appropriate examples of statements of basis written in 2005

or later in which the Department has addressed the compliance schedule question.

If during the revision process the permit writer finds the facility has an open compliance issue as determined by the most recent inspection and/or reporting or an open NOV the permit will contain a compliance schedule. Often a settlement document resolves the NOV and the facility can certify compliance prior to the revision being issued. In these cases a compliance plan is not included in the permit.

Frito-Lay permit revision V20638.R01 and the associated TSD (April 2014) is an example of a situation where an NOV prompted the permit revision, but the revision was issued after the source was brought into compliance via an Order of Abatement by Consent (OAC) thus the permit did not contain a compliance schedule.

Hexcel permit revision V20602.R07 and the associated TSD (November 2009) is an example of a situation where an NOV prompted a permit revision, but the revision was issued after the source was brought into compliance via an Order of Abatement by Consent (OAC) thus the permit did not contain a compliance schedule.

3. **What have you done over the years to improve your permit writing and processing time?**

Both Arizona Revised Statutes and internal performance measures require the tracking of permit processing times. We track the permit processing time for all of our permits and we typically meet or perform better than the requirements / goals. In the rare instance where we have not met the permit processing timelines it has typically been related to ongoing litigation concerning applicability.

We currently have a standard format for permits and TSDs to assist permit writers in incorporating the correct requirements and doing so in a consistent manner.

Y☒ N☐ 4. **Do you have a process for quality assuring your permits before issuance? Please explain.**

Permits are reviewed by the permit manager and director prior to issuance.

Y☐ N☒ **5. Do you utilize any streamlining strategies in preparing the permit? Please explain.**

a. What types of applicable requirements does the Department streamline, and how common is streamlining in District permits?

b. Do you have any comments on the pros and cons of streamlining multiple overlapping applicable requirements? Describe.

6. What do you believe are the strengths and weaknesses of the format of District permits (i.e. length, readability, facilitates compliance certifications, etc.)? Why?

Strengths:
Our permits provide a good road map to compliance in that we strive to list all applicable requirements as required and reference the applicable citations. Also our Appendix A reports supply a quick reference for assessing compliance.

Weakness:
Since we have not implemented any streamlining strategies our permits are fairly lengthy.

7. How have the Department's statements of basis evolved over the years since the beginning of the Title V program? Please explain what prompted changes, and comment on whether you believe the changes have resulted in stronger statements of basis.

Over the years the format of our TSDs (aka statement of basis) has been updated as staff has had more training and experience. These format changes have resulted in more consistent information being documented and in providing a greater level of detail. As areas for improvement are identified the TSD format is updated accordingly.

8. Does the statement of basis explain:

Y☒ N ☐ **a. the rationale for monitoring (whether based on the underlying standard or monitoring added in the permit)?**

Y☒ N ☐ **b. applicability and exemptions, if any?**

Y☐ N ☒ **c. streamlining (if applicable)?** (not applicable)

Y☒ N ☐ **9. Do you provide training and/or guidance to your permit writers on the content of the statement of basis?**

Given the small permitting staff of two people; person to person communication and the standard TSD format document provide for an opportunity to discuss and improve the content of our TSDs.

Both permit writers have attended a week long training course for PSD and NNSR permits within the last 2 years.

10. Do any of the following affect your ability to issue timely initial title V permits: (If yes to any of the items below, please explain.)

Y☐ N ☒ **a. SIP backlog (i.e., EPA approval still pending for proposed SIP revisions)**

Y☐ N ☒ **b. Pending revisions to underlying NSR permits**

Y☐ N ☒ **c. Compliance/enforcement issues**

Y☐ N ☒ **d. EPA rule promulgation pending (MACT, NSPS, etc.)**

Y☐ N ☒ **e. Permit renewals and permit modification (i.e., competing priorities)**

Y☐ N ☒ **f. Awaiting EPA guidance**

11. Any additional comments on permit preparation or content?

No

B. General Permits (GP)

Y☒ N ☐ **1. Do you issue general permits?**

a. If no, go to next section

b. If yes, list the source categories and/or emission units covered by general permits.

Currently the only general permits that the District can issue are for source categories that the Arizona Department of Environmental Quality (ADEQ) has issued a general permit. The ADEQ formatted permit is issued as is with no changes other than the equipment list and the certificate issued by the District. Currently only one source, a Title V air curtain, is permitted in this manner.

Y☐ N ☒ **2. In your agency, can a title V source be subject to multiple general permits and/or a general permit and a standard "site-specific" title V permit?**

a. What percentage of your title V sources have more than one general permit? ____0_____%

Y☒ N ☐ **3. Do the general permits receive public notice in accordance with 70.7(h)?**

a. How does the public or regulated community know what general permits have been written? (e.g., are the general permits posted on a website, available upon request, published somewhere?)

The general permits currently being issued are written, noticed and published by ADEQ. The District issues the ADEQ formatted permit as is with no changes other than the equipment list and the certificate. Copies of the general permits issued by the District are also available upon request via a public information request or viewable at the main office during business hours. All of our Title V permit are also posted to our website, http://pinalcountyaz.gov/AirQuality/Pages/TitleVPermitsIssued.aspx , including the one Title V general permit we have.

4. Is the 5 year permit expiration date based on the date:

Y☒ N ☐ **a. the general permit is issued?**

Y☐ N ☒ **b. you issue the authorization for the source to operate under the general permit?**

5. Any additional comments on general permits?

No

C. Monitoring

1. **How do you ensure that your operating permits contain adequate monitoring (i.e., the monitoring required in §§ 70.6(a)(3) and 70.6(c)(1)) if monitoring in the underlying standard is not specified or is not sufficient to demonstrate compliance ?**

   Input provided by the compliance staff after inspections, review of the performance test documents, annual compliance reports along with the consistent format of both the permit and TSD ensure adequate monitoring requirements in the permit.

Y☐ N ☒

   a. **Have you developed criteria or guidance regarding how monitoring is selected for permits? If yes, please provide the guidance.**

Y☒ N ☐

2. **Do you provide training to your permit writers on monitoring? (e.g., periodic and/or sufficiency monitoring; CAM; monitoring QA/QC procedures including for CEMS; test methods; establishing parameter ranges)**

   Both permit writers have completed CARB 220, Compliance Assurance Monitoring, and a week long NSR/PSD course within the last two years

Y☒ N ☐

3. **How often do you "add" monitoring not required by underlying requirements? Have you seen any effects of the monitoring in your permits such as better source compliance?**

   Most of our permits have some sort of monitoring requirements which are updated as needed based on data either gathered by the compliance staff or provided by the source itself. Many of our permits also have added periodic performance testing that is designed to either demonstrate compliance with an emission limit and/or build emission factors to assist in determining compliance.

4. **What is the approximate number of sources that now have CAM monitoring in their permits? Please list some specific sources.**

   About three:
   Salt River Project - Copper Basin Energy Center
   Hexcel
   ASARCO – Ray Mine

Y☐ N ☒

5. **Has the Department ever disapproved a source's proposed CAM plan?**

No we have worked with each source to come up with an approvable plan**.**

D. Public Participation and Affected State Review

Public Notification Process

1. **Which newspapers does the Department use to publish notices of proposed title V permits?**

   All permit notices are published in the County Seat newspaper, the Florence Reminder & Blade Tribune. If there is a local newspaper for the site the notice is also published there. Additional local newspapers include:
   Casa Grande Dispatch
   Maricopa Monitor
   Coolidge Examiner
   Eloy Enterprise
   Arizona City Independent
   San Tan Valley Sentinel
   Apache Junction News
   Superior Sun
   San Manual Miner
   Copper Basin News

Y☐ N☒ 2. **Do you use a state publication designed to give general public notice?**

   We follow state statute and SIP approved rules regarding publishing notice and neither one requires statewide publication.

Y☒ N☐ 3. **Do you sometimes publish a notice for one permit in more than one paper?**

   a. **If so, how common is if for the Department to publish multiple notices for one permit?**

      Most of the time, as a large number of our sources are located in an area that has a local newspaper and the notice is always published in the County seat newspaper.

   b. **How do you determine which publications to use?**

      All permit notices are published in the County Seat newspaper, the Florence Reminder & Blade Tribune. If there is a local newspaper for the site the notice is also published there. Otherwise the second notice is published in a local newspaper closed to the facility.

c. What cost-effective approaches have you utilized for public publication?

We typically publish permit notices once a month as the newspapers charge less for bundled notices.

Y☒ N☐ **4. Have you developed mailing lists of people you think might be interested in title V permits you propose? [e.g., public officials, environmentalists, concerned citizens]**

Title V public notices are sent to the following:
USEPA R9
Arizona Department of Environmental Quality
United States Forest Service
National Park Service
Pinal County Manager
Central Arizona Association of Governments
Maricopa County Air Quality
Pima County Air Quality
City Mayors (dependent on proximity)
Tohono O'Odham Nation (dependent on proximity)
Gila River Indian Community (dependent on proximity)
San Carlos Apache Tribe (dependent on proximity)
Others as requested

Y☐ N☒

a. Does the Department maintain more than one mailing list for title V purposes, e.g., a general title V list and source-specific lists?

b. How does a person get on the list? (e.g., by calling, sending a written request, or filling out a form on the Department's website)

c. How does the list get updated?

d. How long is the list maintained for a particular source?

e. What do you send to those on the mailing list?

Y☐ N☒ **5. Do you reach out to specific communities (e.g., environmental justice communities) beyond the standard public notification processes?**

Y☒ N☐ **6. Do your public notices clearly state when the public comment period begins and ends?**

7. **What is your opinion on the most effective methods for public notice?**

   Website

Y☐ N☒ 8. **Do you provide notices in languages besides English? Please list the languages and briefly describe under what circumstances the Department translates public notice documents?**

Public Comments

9. **How common has it been for the public to request that the Department extend a public comment period?**

   Uncommon

Y☐ N ☒ a. **Has the Department ever denied such a request?**

b. **If a request has been denied, the reason(s)?**

Y☒ N☐ 10. **Has the public ever suggested improvements to the contents of your public notice, improvements to your public participation process, or other ways to notify them of draft permits? If so, please describe.**

We are currently working on posting draft permit and TSD documents to our website for Title V permits

11. **Approximately what percentage of your proposed permits has the public commented on?**

    5-10%

Y☐ N☒ 12. **Over the years, has there been an increase in the number of public comments you receive on proposed title V permits?**

Y☐ N☒ 13. **Have you noticed any trends in the type of comments you have received? Please explain.**

a. **What percentage of your permits change due to public comments?**

   Less than 5%

Y☐ N☒ **14. Have specific communities (e.g., environmental justice communities) been active in commenting on permits?**

Y☐ N☒ **15. Do your rules require that any change to the draft permit be re-proposed for public comment?**

a. If not, what type of changes would require you to re-propose (and re-notice) a permit for comment?

Substantial changes are reviewed on a case-by-case basis and if the proposed changes meet the rule definitions related to significant permit revisions the permit would be sent to public notice again.

EPA 45-day Review

Y☒ N☒ **16. Do you have an arrangement with the EPA region for its 45-day review to start at the same time the 30-day public review starts? What could cause the EPA 45-day review period to restart (i.e., if public comments received, etc)?**

On a rare case-by-case basis we have asked EPA R9 if they would be willing to conduct their review concurrently with the public review. If comments are received during the 30 day public review period the 45-day EPA review would be restarted and not concurrent.

a. How does the public know if EPA's review is concurrent?

Given the rarity in which we request concurrent reviews we do not currently have a policy addressing the subject. If concurrent review is known at the time of publication we would note that the EPA comment period is concurrent with public comment period in the public notice.

17. If the Department does concurrent public and EPA review, is this process a requirement in your title V regulations, or a result of a MOA or some other arrangement?

It is addressed on a case-by-case basis with EPA R9, the process is not described in our regulation nor do we have an MOA with EPA.

Permittee Comments

Y☒ N☐ **18. Do you work with the permittees prior to public notice?**

Y☒ N☒ **19. Do permittees provide comments/corrections on the permit during the public comment period? Any trends in the type of comments? How do these types of comments or other permittee requests, such as changes to underlying NSR permits, affect your ability to issue a timely permit?**

We strive to limit substantial comments/corrections by the permittee to the time period before the public comment period by addressing outstanding issues prior to public notice. But, permittees have the right to comment during the public comment period if they choose. If substantial changes are made during the public comment period the issue is reviewed on a case-by-case basis to see if the public comment period needs to be restarted.

Public Hearings

20. What criteria does the Department use to decide whether to grant a request for a public hearing on a proposed title V permit? Are the criteria described in writing (e.g.., in the public notice)?

All requests for a public hearing during the public comment period are granted.

Y☐ N☒ **a. Do you ever plan the public hearing yourself, in anticipation of public interest?**

We have routinely offered sources the ability to self-request a public hearing prior to the public notice so that the public comment period and the notice for the hearing can be a concurrent 30 day period.

Availability of Public Information

Y☒ N☐ **21. Do you charge the public for copies of permit-related documents?**

If yes, what is the cost per page?

$0.25 per page

Y☒ N☐ **a. Are there exceptions to this cost (e.g., the draft permit requested during the public comment period, or for non-profit organizations)?**

Electronic copies are free

Y☒ N☐ **b. Do your title V permit fees cover this cost? If not, why not?**

22. What is your process for the public to obtain permit-related information (such as permit applications, draft permits, deviation reports, 6-month monitoring reports, compliance certifications, statement of basis) especially during the public comment period?

Records can always be obtained via a public records request. Finalized Title V permits and TSDs are posted to our website. We are currently working on a system to post Title V draft permits, draft TSDs and public notices to the website.

Y☐ N☒ **a. Are any of the documents available locally (e.g., public libraries, field offices) during the public comment period? Please explain.**

23. How long does it take to respond to requests for information for permits in the public comment period?

Typically 24-48 hours

Y☐ N☒ **24. Have you ever extended your public comment period as a result of requests for permit-related documents?**

Y☒ N☐ **b. Do information requests, either during or outside of the public comment period, affect your ability to issue timely permits?**

25. What title V permit-related documents does the Department post on its website (e.g., proposed and final permits, statements of basis, public notice, public comments, responses to comments)?

Currently finalized Title V permits and TSDs are posted to the website and we are working on a system to post Title V draft permits, draft TSDs and public notices

a. How often is the website updated? Is there information on how the public can be involved?

The website is updated upon Title V permit issuance and/or when the Title V public notice begins. The public notice summarizes how the public can be involved.

Y☒ N☒ **26. Have other ideas for improved public notification, process, and/or access to information been considered? If yes, please describe.**

We have considered an electronic notification system recently purchased by Pinal County Emergency Management that would allow voluntary enrollment in an email group related to air permitting. Permit related documents and notices could be shared through this application. The system is new and still being evaluated.

Y☐ N☒ **27. Do you have a process for notifying the public as to when the 60-day citizen petition period starts? If yes, please describe.**

Y☒ N☐ **28. Do you have any resources available to the public on public participation (booklets, pamphlets, webpages)?**

We are currently setting up a system to post Title V draft permits, draft TSDs and public notices on our website. Our website also describes the public participation process and lists summary information on all permits currently in public notice.

Y☐ N☒ **29. Do you provide training to citizens on public participation or on title V?**

Y☐ N☒ **30. Do you have staff dedicated to public participation, relations, or liaison?**

a. Where are they in the organization?

b. What is their primary function?

Affected State Review and Review by Indian Tribes

31. How do you notify tribes of draft permits?

US mail

32. Has the Department ever received comments on proposed permits from Tribes?

Tribes have requested draft documents.

33. Do you have any suggestions to improve your notification process?

No

Any additional comments on public notification?

No

E. Permit Issuance / Revision / Renewal

Permit Revisions

1. **Did you follow your regulations on how to process permit modifications based on a list or description of what changes can qualify for:**

Y☒ N☐ a. **Administrative amendment?**

Y☒ N☐ b. **§502(b)(10) changes?**

Y☒ N☐ c. **Significant and/or minor permit modification?**

Y☒ N☐ d. **Group processing of minor modifications?**

2. **Approximately how many title V permit revisions have you processed for the last five years?**

   19 (July 2012 thru June 2017)

   a. **What percentage of the permit revisions were processed as:**

      i. **Significant** – 53%

      ii. **Minor** – 42%

      iii. **Administrative** – 5%

      iv. **Off-permit –** 0%

      v. **502(b)(10)** – 0%

3. **For the last five years, how many days, on average, does it take to process (from application receipt to final permit revision):**

   a. **a significant permit revision?** - 232

   b. **a minor revision?** - 147

3. **How common has it been for the Department to take longer than 18 months to issue a significant revision, 90 days for minor permit revisions, and 60 days for administrative amendments? Please explain.**

In the last five years the longest significant revision timeline is 455 days.
In the last five years the average minor permit revision timeline is 147 days, the median is 147 days, the minimum is 70 days, and the maximum is 237 days.
In the last five years one administrative amendment was issued in 8 days.

5. What have you done to streamline the issuance of revisions?

Given the modest size of our organization we have simply strived to issue permits in a timely fashion and typically meet or exceed regulatory requirements and/or performance measurements.

6. What process do you use to track permit revision applications moving through your system?

An Excel spreadsheet and Access database are both used to track permit applications moving thru the system. Additionally performance measures concerning permit issuance timelines are reviewed quarterly and reported to management, including the Air Quality Director and the County Manager, via the Pinal County Performance Measurement tracking system.

Y☐ N☒ **7. Have you developed guidance to assist permit writers and sources in evaluating whether a proposed revision qualifies as an administrative amendment, off-permit change, significant or minor revision, or requires that the permit be reopened? If so, provide a copy.**

Y☒ N☐ **8. Do you require that source applications for minor and significant permit modifications include the source's proposed changes to the permit?**

Y☒ N☐ **a. For minor modifications, do you require sources to explain their change and how it affects their applicable requirements?**

Y☐ N☒ **9. Do you require applications for minor permit modifications to contain a certification by a responsible official that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used?**

10. **When public noticing proposed permit revisions, how do you identify which portions of the permit are being revised? (e.g., narrative description of change, highlighting, different fonts).**

    Draft permit revisions are redlined and the introduction of the permit and TSD provide summary narratives of the proposed changes.

11. **When public noticing proposed permit revisions, how do you clarify that only the proposed permit revisions are open to comment?**

    The public notice states: "Grounds for comment are limited to whether the proposed permit/revision meets the criteria for issuance prescribed in statute or rule."

Permit Renewal Or Reopening

Y☐ N☒ 12. **Do you have a different application form for a permit renewal compared to that for an initial permit application?**

    a. **If yes, what are the differences?**

Y☒ N☐ 13. **Has issuance of renewal permits been "easier" than the original permits? Please explain.**

    The base document has already been crafted.

Y☒ N☐ 14. **How are you implementing the permit renewal process (ie., guidance, checklist to provide to permit applicants)?**

    All permit holders are notified of upcoming renewal obligations via US mail.

15. **What % of renewal applications have you found to be timely and complete for the last five years?**

    Renewal application timeliness has not been tracked. We have worked with all of sources until the application is complete.

16. **How many complete applications for renewals do you presently have in-house ready to process?**

    0

Y☒ N☐ 17. **Have you been able to or plan to process these renewals within the part 70 timeframe of 18 months? If not, what can EPA do to help?**

In the last five years the average Title V renewal timeline is 215 days and the maximum is 465 days.

Y☐ N☒ **18. Have you ever determined that an issued permit must be revised or revoked to assure compliance with the applicable requirements?**

While permits have been revised as part of the NOV process to update the list of applicable requirements we do not recall initiating a revision in response to the facility not being able to assure compliance with an applicable standard that is already in the permit.

F. Compliance

1. **Deviation reporting:**

   a. **Which deviations do you require be reported prior to the semi-annual monitoring report? Describe.**

   All deviations are to be reported within ten days.

Y☐ N☒ b. **Do you require that some deviations be reported by telephone?**

c. **If yes, do you require a followup written report? If yes, within what timeframe?**

Y☐ N☒ d. **Do you require that all deviation reports be certified by a responsible official? (If no, describe which deviation reports are not certified).**

Only the annual certification summarizing the deviations has to be certified by a responsible official

Y☐ N☒ i. **Do you require all certifications at the time of submittal?**

Y☒ N☐ ii. **If not, do you allow the responsible official to "back certify" deviation reports? If you allow the responsible official to "back certify" deviation reports, what timeframe do you allow for the followup certifications (e.g., within 30 days; at the time of the semi-annual deviation reporting)?**

At the time of the semi-annual report

2. **How does your program define deviation?**

We do not have a formal definition

Y☒ N☐ a. **Do you require only violations of permit terms to be reported as deviations?**

b. **Which of the following do you require to be reported as a deviation (Check all that apply):**

Y☒ N☐ i. **excess emissions excused due to emergencies (pursuant to 70.6(g))**

Y☒ N☐ **ii. excess emissions excused due to SIP provisions (cite the specific state rule)**

We do not currently have such a rule thus the excess emissions would be reported.

Y☐ N☒ **iii. excess emissions allowed under NSPS or MACT SSM provisions?**

If the permit defines the SSM exception the excess emission would not be a deviation.

Y☒ N☐ **iv. excursions from specified parameter ranges where such excursions are not a monitoring violation (as defined in CAM)**

Unless the permit defines an acceptable excursion range and/or number the excess emission would be a deviation.

Y☒ N☐ **v. excursions from specified parameter ranges where such excursions are credible evidence of an emission violation**

Y☒ N☐ **vi. failure to collect data/conduct monitoring where such failure is "excused":**

Y☐ N☒ **A. during scheduled routine maintenance or calibration checks**

Y☐ N☒ **B. where less than 100% data collection is allowed by the permit**

Y☒ N☐ **C. due to an emergency**

Y☐ N☒ **vii. Other? Describe.**

3. Do your deviation reports include:

Y☒ N☐ **a. the probable cause of the deviation?**

Y☒ N☐ **b. any corrective actions taken?**

Y☒ N☐ **c. the magnitude and duration of the deviation?**

Y☒ N☐ **4. Do you define "prompt" reporting of deviations as more frequent than semi-annual?**

Y☒ N☐ **5. Do you require a written report for deviations?**

Y☐ N☒ **6. Do you require that a responsible official certify all deviation reports?**

7. What is your procedure for reviewing and following up on:

a. deviation reports?

Deviation reports are reviewed upon receipt and followed up on a case-by-case basis depending on severity.

b. semi-annual monitoring reports?

Semi-annual reports are reviewed upon submittal by the sources and annually during the emission inventory process.

c. annual compliance certifications?

Annual certifications are reviewed as they are filed.

8. What percentage of the following reports do you review?

a. deviation reports

100%

b. semi-annual monitoring reports

100%

c. annual compliance certification

100%

9. Compliance certifications

100%

Y☐ N☒ **a. Have you developed a compliance certification form? If no, go to question 10.**

Y☐ N☐ **i. Is the certification form consistent with your rules?**

ii. Is compliance based on whether compliance is continuous or intermittent or whether the compliance monitoring method is continuous or intermittent?

Y☐ N☐ **iii. Do you require sources to use the form? If not, what percentage does?**

Y☐ N☐ **iv. Does the form account for the use of credible evidence?**

Y☐ N☐ **v. Does the form require the source to specify the monitoring method used to determine compliance where there are options for monitoring, including which method was used where more than one method exists?**

10. Excess emissions provisions:

Y☒ N☐ **a. Does your program include an emergency defense provision as provided in 70.6(g)? If yes, does it:**

Y☒ N☐ **i. Provide relief from penalties?**

Y☒ N☐ **ii. Provide injunctive relief?**

Y☐ N☒ **iii. Excuse noncompliance?**

The emergency should still be reported as a deviation.

Y☐ N☒ **b. Does your program include a SIP excess emissions provision? If no, go to 10.c. If yes does it:**

Y☐ N☐ **i. Provide relief from penalties?**

Y☐ N☐ **ii. Provide injunctive relief?**

Y☐ N☐ **iii. Excuse noncompliance?**

c. Do you require the source to obtain a written concurrence from the Department before the source can qualify for:

Y☐ N☒ **i. the emergency defense provision?**

When a source invokes the emergency defense provision we work with them on a case-by-case basis to see if the situation qualifies

Y☐ N☐ **ii. the SIP excess emissions provision?**

N/A

Y☐ N☒ **iii. NSPS/NESHAP SSM excess emissions provisions?**

11. Is your compliance certification rule based on:

Y☐ N☒ **a. the '97 revisions to part 70 - i.e., is the compliance certification rule based on whether the compliance monitoring method is continuous or intermittent; or:**

Y☒ N☐ **b. the '92 part 70 rule - i.e., is the compliance certification rule based on whether compliance was continuous or intermittent?**

12. Any additional comments on compliance?

No

G. Resources & Internal Management Support

Y☒ N☐ **1. Are there any competing resource priorities for your "title V" staff in issuing title V permits?**

a. If so, what are they?

All permits, roughly 400 total sources and 20 Title V sources, are written by two people. Thus we must balance minor NSR, Title V and PSD permit applications accordingly.

2. Are there any initiatives instituted by your management that recognize/reward your permit staff for getting past barriers in implementing the title V program that you would care to share?

No

3. How is management kept up to date on permit issuance?

Performance measures that relate to permit timelines are reported to management quarterly and the Director signs all permit public notices and final permits.

Y☒ N☐ **4. Do you meet on a regular basis to address issues and problems related to permit writing?**

The permitting staff, two permit writers and one inspector, meet monthly to discuss hot topics. The permit manager and director have a standing monthly meeting to discuss permitting issues. The Director and permitting staff also discuss permitting issues on an as-needed basis.

Y☒ N☐ **5. Do you charge title V fees based on emission rates?**

a. If not, what is the basis for your fees?

b. What is your title V fee?

$19.78 per ton per pollutant

6. How do you track title V expenses?

The Title V expenditures tracking has recently been updated to track expenditure through our payroll system.

7. How do you track title V fee revenue?

All deposits are made through the Accela system, there is a specific line for Title V deposits so the revenues are tracked through the deposits. The department also keeps a database of all deposits so the revenues are reconciled using the database and the Accela deposits.

8. How many title V permit writers does the agency have on staff (number of FTE's, both budgeted and actual)?

Two staff, reflecting two FTE's (the two FTE's are not dedicated to Title V)

Y☐ N☒ **9. Do the permit writers work full time on title V?**

a. If not, describe their main activities and percentage of time on title V permits.

Both permit writers work on non-Title V and Title V permits. Both permit writers spend approximately 40% of their time on Title V activities.

b. How do you track the time allocated to Title V activities versus other non-title V activities?

Time is tracked in an Access database based on facility IDs so that Title V and non-Title V activities can be identified

Y☒ N☐ **10. Are you currently fully staffed?**

11. What is the ratio of permits to Title V permit writers?

2 permit writers and 20 Title V sources

12. Describe staff turnover.

Permitting staffing has been stable over the past 15 years. During that time only one staff change has occurred. Currently, one permit writer has been with the Department 19 years (4 years in permitting), one permit writer has been with the Department 15 years and the stationary source inspector has been with the Department 18 years.

a. How does this impact permit issuance?

Due to the minimal turnover, the permitting staff not only has a good relationship with each other but also with the permitted sources.

b. How does the permitting authority minimize turnover?

We have not experienced significant turnover that would impact our permit program.

Y☐ N☒ **13. Do you have a career ladder for permit writers?**

a. If so, please describe.

Y☒ N☐ **14. Do you have the flexibility to offer competitive salaries?**

Our permitting salaries are similar to other competing agencies.

Y☒ N☐ **15. Can you hire experienced people with commensurate salaries?**

16. Describe the type of training given to your new and existing permit writers.

Both permit writers have an ongoing training metric in their performance measures. Both permit writers have taken a week long NSR/PSD course within the last two years. Both permit writers take CARB and WESTAR classes as they become available, typically at least one a year.

17. Does your training cover:

Y☒ N☐ **a. how to develop periodic and/or sufficiency monitoring in permits?**

Y☒ N☐ **b. how to ensure that permit terms and conditions are enforceable as a practical matter?**

Y☒ N☐ **c. how to write a Statement of Basis?**

Y☒ N☐ **18. Is there anything that EPA can do to assist/improve your training? Please describe.**

Funding is helpful to defer travel costs associated with training.

19. How has the Department organized itself to address title V permit issuance?

Both permit writers are able to take on Title V projects so that neither is overwhelmed when multiple Title V applications are received.

20. Overall, what is the biggest internal roadblock to permit issuance from the perspective of Resources and Internal Management Support?

Given the modest size of the department there are no significant hurdles. We spend a significant amount of time working with sources to assist them in providing complete and accurate information so that we can keep permitting timelines as low as possible.

Environmental Justice Resources

Y☐ N☒ **21. Do you have Environmental Justice (EJ) legislation, policy or general guidance which helps to direct permitting efforts?**

If so, may EPA obtain copies of appropriate documentation?

Y☐ N☒ **22. Do you have an in-house EJ office or coordinator, charged with oversight of EJ related activities?**

Y☐ N☒ **23. Have you provided EJ training / guidance to your permit writers?**

Y☐ N☒ **24. Do the permit writers have access to demographic information necessary for EJ assessments? (e.g., socio-economic status, minority populations, etc.)**

Y☐ N☒ **25. When reviewing an initial or renewal application, is any screening for potential EJ issues performed? If so, please describe the process and/or attach guidance.**

H. Title V Benefits

1. **Compared to the period before you began implementing the title V program, does the title V staff generally have a better understanding of:**

Y☒ N☐ a. **NSPS requirements?**

Y☒ N☐ b. **The stationary source requirements in the SIP?**

Y☒ N☐ c. **The minor NSR program?**

Y☒ N☐ d. **The major NSR/PSD program?**

Y☒ N☐ e. **How to design monitoring terms to assure compliance?**

Y☒ N☐ f. **How to write enforceable permit terms?**

2. **Compared to the period before you began implementing the title V program, do you have better/more complete information about:**

Y☒ N☐ a. **Your source universe including additional sources previously unknown to you?**

Y☒ N☐ b. **Your source operations (e.g., better technical understanding of source operations; more complete information about emission units and/or control devices; etc.)?**

Y☒ N☐ c. **Your stationary source emissions inventory?**

Y☒ N☐ d. **Applicability and more enforceable (clearer) permits?**

3. **In issuing the title V permits:**

Y☐ N☒ a. **Have you noted inconsistencies in how sources had previously been regulated (e.g., different emission limits or frequency of testing for similar units)? If yes, describe.**

Y☐ N☒ b. **Have you taken (or are you taking) steps to assure better regulatory consistency within source categories and/or between sources? If yes, describe.**

Given our small agency size, consistency has historically been relatively easy to control.

4. Based on your experience, estimate the frequency with which potential compliance problems were identified through the permit issuance process:

	Never	Occasionally	Frequently	Often
a. prior to submitting an application	❑	☒	❑	❑
b. prior to issuing a draft permit	❑	☒	❑	❑
c. after issuing a final permit	❑	☒	❑	❑

5. Based on your experience with sources addressing compliance problems identified through the title V permitting process, estimate the general rate of compliance with the following requirements prior to implementing title V:

	Never	Occasionally	Frequently	Often
a. NSPS requirements (including failure to identify an NSPS as applicable)	❑	☒	❑	❑
b. SIP requirements	❑	☒	❑	❑
c. Minor NSR requirements (including the requirement to obtain a permit)	❑	☒	❑	❑
d. Major NSR/PSD requirements (including the requirement to obtain a permit)	☒	❑	❑	❑

6. What changes in compliance behavior on the part of sources have you seen in response to title V? (Check all that apply.)

Y☐ N☒ **a. increased use of self-audits?**

Y☒ N☐ **b. increased use of environmental management systems?**

Y☐ N☒ **c. increased staff devoted to environmental management?**

Y☐ N☒ **d. increased resources devoted to environmental control systems (e.g., maintenance of control equipment; installation of improved control devices; etc.)?**

Y☐ N☒ **e. increased resources devoted to compliance monitoring?**

Y☒ N☐ **f. better awareness of compliance obligations?**

Y☐ N☒ **g. other? Describe.**

Y☐ N☒ **7. Have you noted a reduction in emissions due to the title V program?**

Y☐ N☒ **a. Did that lead to a change in the total fees collected either due to sources getting out of title V or improving their compliance?**

Y☐ N☒ **b. Did that lead to a change in the fee rate (dollars/ton rate)?**

8. Has title V resulted in improved implementation of your air program in any of the following areas due to title V:

Y☐ N☒ **a. netting actions**

Y☒ N☐ **b. emission inventories**

Y☐ N☒ **c. past records management (e.g., lost permits)**

Y☐ N☒ **d. enforceability of PTE limits (e.g., consistent with guidance on enforceability of PTE limits such as the June 13, 1989 guidance)**

Y☐ N☒ **e. identifying source categories or types of emission units with pervasive or persistent compliance problems; etc.**

Y☒ N☐ **f. clarity and enforceability of NSR permit terms**

Y☒ N☐ **g. better documentation of the basis for applicable requirements (e.g., emission limit in NSR permit taken to avoid PSD; throughput limit taken to stay under MACT threshold)**

Y☐ N☒ **h. emissions trading programs**

Y☐ N☒ **i. emission caps**

Y☐ N☒ **j. other (describe)**

Y☐ N☒ **9. If yes to any of the above, would you care to share how this improvement came about? (e.g., increased training; outreach; targeted enforcement)?**

Y☒ N☐ **10. Has title V changed the way you conduct business?**

Y☒ N☐ **a. Are there aspects of the title V program that you have extended to other program areas (e.g., require certification of accuracy and completeness for pre-construction permit applications and reports; increased records retention; inspection entry requirement language in NSR permits). If yes, describe.**

All of our permits require an annual compliance certification.

Y☒ N☐ **b. Have you made changes in how NSR permits are written and documented as a result of lessons learned in title V (e.g., permit terms more clearly written; use of a statement of basis to document decision making)? If yes, describe.**

We use the same TSD format for Title V and NSR permits.

Y☒ N☐ **c. Do you work more closely with the sources? If yes, describe.**

We have historically and continually worked closely with sources.

Y☐ N☒ **d. Do you devote more resources to public involvement? If yes, describe.**

Y☐ N☒ **e. Do you use information from title V to target inspections and/or enforcement?**

Y☐ N☒ **f. Other ways? If yes, please describe.**

Y☒ N☐ **11. Has the title V fee money been helpful in running the program? Have you been able to provide:**

Y☒ N☐ **a. better training?**

Y☐ N☒ **b. more resources for your staff such as CFRs and computers?**

Y☐ N☒ **c. better funding for travel to sources?**

Y☒ N☐ **d. stable funding despite fluctuations in funding for other state programs?**

Y☐ N☒ **e. incentives to hire and retain good staff?**

Y☐ N☒ **f. are there other benefits of the fee program? Describe.**

Y☒ N☐ **12. Have you received positive feedback from citizens?**

Y☐ N☒ **13. Has industry expressed a benefit of title V? If so, describe.**

Y☐ N☒ **14. Do you perceive other benefits as a result of the title V program? If so, describe.**

Y☐ N☒ **15. Other comments on benefits of title V?**

Good Practices not addressed elsewhere in this questionnaire

Are any practices employed that improve the quality of the permits or other aspects of the title V program that are not addressed elsewhere in this questionnaire?

The permitting staff regularly conducts pre-application meetings with potential sources to help identify the project scope and regulatory requirements. Permitting staff also participate in planning level meetings set up by County and/or City economic development staff to assist applicants thru the process. Additionally permitting staff participates in the County zoning process at the application level by attending scoping meetings. The County also employs a tracking software system for zoning and building safety issues that Air Quality is linked into for approvals.

EPA assistance not addressed elsewhere in this questionnaire

Is there anything else EPA can do to help your title V program?

Unknown at this time.

Appendix C. U.S. EPA Statement of Basis Guidance

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

February 19, 1999

Mr. David Dixon
Chairperson, Title V Subcommittee
San Luis Obispo County
Air Pollution Control District
3433 Roberto Court
San Luis Obispo, CA 93401

Dear Mr. Dixon:

I am writing to provide a final version of our response to your July 2, 1998 letter in which you expressed concern about Region IX's understanding of the Subcommittee's tentative resolution to the 45-day EPA review period issue. I have also included a summary of the Subcommittee's agreement on two title V implementation issues originally raised by some Subcommittee members at our meeting on August 18, 1998. Our response reflects many comments and suggestions we have received during the past several months from members of the Title V Subcommittee and EPA's Office of General Counsel. In particular, previous drafts of this letter and the enclosure have been discussed at Subcommittee meetings on October 1, 1998, November 5, 1998, January 14, 1999, and February 17, 1999. Today's final version incorporates suggested changes as discussed at these meetings and is separated into two parts: Part I is "guidance" on what constitutes a complete Title V permit submittal; and Part II is a five-point process on how to better coordinate information exchange during and after the 45-day EPA review period.

We will address the letter to David Howekamp from Peter Venturini dated August 7, 1998 regarding permits issued pursuant to NSR rules that will not be SIP approved in the near future. This issue was also discussed at the August 18 Title V Subcommittee meeting.

I appreciate your raising the issues regarding the 45-day EPA review clock to my attention. Your efforts, along with the efforts of other Title V Subcommittee members, have been invaluable towards resolving this and other Title V implementation issues addressed in this letter. The information in the enclosure will clarify Title V permitting expectations between Region IX and the California Districts and will improve coordination of Title V permit information. It is important to implement this immediately, where necessary, so the benefits of this important program can be fully realized as soon as possible in the state of California as well as other states across the country.

If you have any questions please do not hesitate to call me at (415) 744-1254.

Sincerely,

Matt Haber
Chief, Permits Office

Enclosure

cc: California Title V Contacts
California Air Pollution Control Officers
Ray Menebroker, CARB
Peter Venturini, CARB

Enclosure

Neither the guidance in Part I nor the process in Part II replace or alter any requirements contained in Title V of the Clean Air Act or 40 CFR Part 70.

PART I. Guidance on Information Necessary to Begin 45-day EPA Review

A complete submittal to EPA for a proposed permit consists of the application (if one has not already been sent to EPA), the proposed permit, and a statement of basis. If applicable to the Title V facility (and not already included in the application or proposed permit) the statement of basis should include the following:

- additions of permitted equipment which were not included in the application;
- identification of any applicable requirements for insignificant activities or State-registered portable equipment that have not previously been identified at the Title V facility,
- outdated SIP requirement streamlining demonstrations,
- multiple applicable requirements streamlining demonstrations,
- permit shields,
- alternative operating scenarios,
- compliance schedules,
- CAM requirements,
- plant wide allowable emission limits (PAL) or other voluntary limits,
- any district permits to operate or authority to construct permits;
- periodic monitoring decisions, where the decisions deviate from already agreed-upon levels (e.g., monitoring decisions agreed upon by the district and EPA either through: the Title V periodic monitoring workgroup; or another Title V permit for a similar source). These decisions could be part of the permit package or could reside in a publicly available document.

Part II - Title V Process

The following five-point process serves to clarify expectations for reviewing Title V permits and coordinating information on Title V permits between EPA Region IX ("EPA") and Air Pollution Districts in California ("District"). Districts electing to follow this process can expect the following. Districts may, at their discretion, make separate arrangements with Region IX to implement their specific Title V permit reviews differently.

Point 1: The 45-day clock will start one day after EPA receives all necessary information to adequately review the title V permit to allow for internal distribution of the documents. Districts may use return receipt mail, courier services, Lotus Notes, or any other means they wish to transmit a package and obtain third party assurance that EPA received it. If a District would like written notice from EPA of when EPA received the proposed title V permit, the District should notify EPA of this desire in writing. After receiving the request, Region IX will provide written response acknowledging receipt of permits as follows:

(Date)

Dear (APCO):

We have received your proposed Title V permit for (Source Name) on (Date). If, after 45-days from the date indicated above, you or anyone in your office has not heard from us regarding this permit, you may assume our 45-day review period is over.

Sincerely,

Matt Haber
Chief, Permits Office

Point 2: After EPA receives the proposed permit, the permit application, and all necessary supporting information, the 45-day clock may not be stopped or paused by either a District or EPA, except when EPA approves or objects to the issuance of a permit.

Point 3: The Districts recognize that EPA may need additional information to complete its title V permit review. If a specific question arises, the District involved will respond as best it can by providing additional background information, access to background records, or a copy of the specific document.

The EPA will act expeditiously to identify, request and review additional information and the districts will act expeditiously to provide additional information. If EPA determines there is a

basis for objection, including the absence of information necessary to review adequately the proposed permit, EPA may object to the issuance of the permit. If EPA determines that it needs more information to reach a decision, it may allow the permit to issue and reopen the permit after the information has been received and reviewed.

Point 4: When EPA objects to a permit, the Subcommittee requested that the objection letter identify why we objected to a permit, the legal basis for the objection, and a proposal suggesting how to correct the permit to resolve the objection.

It has always been our intent to meet this request. In the future, when commenting on, or objecting to Title V permits, our letters will identify recommended improvements to correct the permit. For objection letters, EPA will identify why we objected to a permit, the legal basis for the objection, and details about how to correct the permit to resolve the objection. Part 70 states that "Any EPA objection...shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections."

Point 5: When EPA objects to a permit, and a District has provided information with the intent to correct the objection issues, the Subcommittee members requested a letter from EPA at the end of the 90-day period stating whether the information provided by the District has satisfied the objection.

While we agree with the Districts' desire for clear, written communication from EPA, a written response will not always be possible by the 90th day because the regulations allow a District 90 days to provide information. To allow EPA ample time to evaluate submitted information to determine whether the objection issues have been satisfied, we propose establishing a clear protocol. The following protocol was agreed to by members of the Subcommittee:

1. within 60 days of an EPA objection, the District should revise and submit a proposed permit in response to the objection;

2. within 30 days after receipt of revised permit, EPA should evaluate information and provide written response to the District stating whether the information provided by the District has satisfied the objection.

December 20, 2001

(AR-18J)

Robert F. Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
122 South Front Street
P. O. Box 1049
Columbus, Ohio 43266-1049

Dear Mr. Hodanbosi:

I am writing this letter to provide guidelines on the content of an adequate statement of basis (SB) as we committed to do in our November 21, 2001, letter. The regulatory basis for a SB is found in 40 C.F.R. § 70.7(a)(5) and Ohio Administrative Code (OAC) 3745-77-08(A)(2) which requires that each draft permit must be accompanied by "a statement that sets forth the legal and factual basis for the draft permit conditions." The May 10, 1991, preamble also suggests the importance of supplementary materials.

> "[United States Environmental Protection Agency (USEPA)]...can object to the issuance of a permit where the materials submitted by the State permitting authority to EPA do not provide enough information to allow a meaningful EPA review of whether the proposed permit is in compliance with the requirements of the Act." (56 FR 21750)

The regulatory language is clear in that a SB must include a discussion of decision-making that went into the development of the Title V permit and to provide the permitting authority, the public, and the USEPA a record of the applicability and technical issues surrounding issuance of the permit. The SB is part of the historical permitting record for the permittee. A SB generally should include, but not be limited to, a description of the facility to be permitted, a discussion of any operational flexibility that will be utilized, the basis for applying a permit shield, any regulatory applicability determinations, and the rationale for the monitoring methods selected. A SB should specifically reference all supporting materials relied upon, including the applicable statutory or regulatory provision.

While not an exhaustive list of what should be in a SB, below are several important areas where the Ohio Environmental Protection Agency's (OEPA) SB could be improved to better meet the intent of Part 70.

Discussion of the Monitoring and Operational Requirements
OEPA's SB must contain a discussion on the monitoring and operational restriction provisions that are included for each emission unit. 40 C.F.R. §70.6(a) and OAC 3745-77-07(A) require that monitoring and operational requirements and limitations be included in the permit to assure compliance with all applicable requirements at the time of permit issuance. OEPA's selection of the specific monitoring, including parametric monitoring and recordkeeping, and operational requirements must be explained in the SB. For example, if the permitted compliance method for a grain-loading standard is maintaining the baghouse pressure drop within a specific range, the SB must contain sufficient information to support the conclusion that maintaining the pressure drop within the permitted range demonstrates compliance with the grain-loading standard.

The USEPA Administrator's decision in response to the Fort James Camas Mill Title V petition further supports this position. The decision is available on the web at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf. The Administrator stated that the rationale for the selected monitoring method must be clear and documented in the permit record.

Discussion of Applicability and Exemptions
The SB should include a discussion of any complex applicability determinations and address any non-applicability determinations. This discussion could include a reference to a determination letter that is relevant or pertains to the source. If no separate determination letter was issued, the SB should include a detailed analysis of the relevant statutory and regulatory provisions and why the requirement may or may not be applicable. At a minimum, the SB should provide sufficient information for the reader to understand OEPA's conclusion about the applicability of the source to a specific rule. Similarly, the SB should discuss the purpose of any limits on potential to emit that are created in the Title V permit and the basis for exemptions from requirements, such as exemptions from the opacity standard granted to emissions units under OAC rule 3745-17-07(A). If the permit shield is granted for such an exemption or non-applicability determination, the permit shield must also provide the determination or summary of the determination. See CAA Section 504(f)(2) and 70.6(f)(1)(ii).

Explanation of any conditions from previously issued permits that are not being transferred to the Title V permit
In the course of developing a Title V permit, OEPA may decide that an applicable requirement no longer applies to a facility or otherwise not federally enforceable and, therefore, not necessary in the Title V permit in accordance with USEPA's "White Paper for Streamlined Development of the Part 70 Permit Applications" (July 10, 1995). The SB should include the rationale for such a determination and reference any supporting materials relied upon in the determination.

I will also note that for situations that not addressed in the July 10, 1995, White Paper, applicable New Source Review requirements can not be dropped from the Title V permit without first revising the permit to install.

Discussion of Streamlining Requirements
The SB should include a discussion of streamlining determinations. When applicable requirements overlap or conflict, the permitting authority may choose to include in the permit the requirement that is determined to be most stringent or protective as detailed in USEPA's "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program" (March 5, 1996). The SB should explain why OEPA concluded that compliance with the streamlined permit condition assures compliance with all the overlapping requirements.

Other factual information
The SB should also include factual information that is important for the public to be aware of. Examples include:

1. A listing of any Title V permits issued to the same applicant at the plant site, if any. In some cases it may be important to include the rationale for determining that sources are support facilities.
2. Attainment status.
3. Construction and permitting history of the source.
4. Compliance history including inspections, any violations noted, a listing of consent decrees into which the permittee has entered and corrective action(s) taken to address noncompliance.

I do understand the burden that the increased attention to the SB will cause especially during this time when OEPA has been working so hard to complete the first round of Title V permit issuance. I do hope that you will agree with me that including the information listed above in OEPA’s SB will only improve the Title V process. If you would like examples of other permitting authorities’ SB, please contact us. We would be happy to provide you with some. I would also mention here that this additional information should easily fit in the format OEPA currently uses for its SB. We look forward to continued cooperation between our offices on this issue. If you have any questions, please contact Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Stephen Rothblatt, Chief
Air Programs Branch

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
LOS MEDANOS ENERGY	)	PETITION NO.
CENTER	)	ORDER RESPONDING TO
	)	PETITIONERS REQUEST THAT THE
MAJOR FACILITY REVIEW	)	ADMINISTRATOR OBJECT TO
PERMIT No. B1866,	)	ISSUANCE OF A STATE OPERATING
Issued by the Bay Area Air	)	PERMIT
Quality Management District	)	
_____	)	

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR OBJECTION TO PERMIT

On September 6, 2001, the Bay Area Air Quality Management District, ("BAAQMD" or "District") issued a Major Facility Review Permit to Los Medanos Energy Center, Pittsburg, California ("Los Medanos Permit" or "Permit"), pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507. On October 12, 2001, the Environmental Protection Agency ("EPA") received a petition from Our Children's Earth Foundation ("OCE") and Californians for Renewable Energy, Inc., ("CARE") (collectively, the "Petitioners") requesting that the EPA Administrator object to the issuance of the Los Medanos Permit pursuant to Section 505(b)(2) of the Act, the federal implementing regulations found at 40 CFR Part 70.8, and the District's Regulation 2-6-411.3 ("Petition").

The Petitioners allege that the Los Medanos Permit (1) improperly includes an emergency breakdown exemption condition that incorporates a broader definition of "emergency" than allowed by 40 CFR § 70.6(g); (2) improperly includes a variance relief condition which is not federally enforceable; (3) fails to include a statement of basis as required by 40 CFR § 70.7(a)(5); (4) contains permit conditions that are inadequate under 40 CFR Part 70, namely that certain provisions are unenforceable; and (5) fails to incorporate certain changes OCE requested during the public comment period and agreed to by BAAQMD.

EPA has now fully reviewed the Petitioners' allegations. In considering the allegations, EPA performed an independent and in-depth review of the Los Medanos Permit; the supporting documentation for the Los Medanos Permit; information provided by the Petitioners in the Petition and in a letter dated November 21, 2001; information gathered from the Petitioners in a November 8, 2001 meeting; and information gathered from the District in meetings held on October 31, 2001, December 5, 2001, and February 7, 2002. Based on this review, I grant in part and deny in part the Petitioners' request that I "object to the issuance of the Title V Operating Permit for the Los Medanos Energy Center," and hereby order the District to reopen the Permit

for the reasons described below.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. In 1995, EPA granted interim approval to the title V operating permit program submitted by BAAQMD. 60 Fed. Reg. 32606 (June 23, 1995); 40 CFR Part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to BAAQMD's title V operating permit program. 66 Fed. Reg. 63503 (December 7, 2001).

Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes applicable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a). The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, permitting authorities, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a) of the Act and 40 CFR § 70.8(a), permitting authorities are required to submit all operating permits proposed pursuant to title V to EPA for review. If EPA determines that a permit is not in compliance with applicable requirements or the requirements of 40 CFR Part 70, EPA will object to the permit. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify the exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of Part 70. Part 70 requires that a petition must be "based only on objections to the permit that were raised with reasonable specificity during the public comment period. . ., unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period." 40 CFR § 70.8(d). A petition for administrative review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. BACKGROUND

The Los Medanos Energy Center facility ("Facility"), formerly owned by Enron Corporation under the name Pittsburg District Energy Facility, is a natural gas-fired power plant presently owned and operated by Calpine Corporation. The plant, with a nominal electrical capacity of 555-megawatts ("MW"), is located in Pittsburg, California. The Facility received its final determination of compliance ("FDOC")[1] from the District in June, 1999, and its license to construct and operate from the California Energy Commission ("CEC")[2] on August 17, 1999. The Facility operates two large natural gas combustion turbines with associated heat recovery steam generators ("HRSG"), and one auxiliary boiler. The Facility obtained a revised authority to construct ("ATC")[3] permit from the District in March, 2001 to increase heat input ratings of the two HRSGs and the auxiliary boiler,[4] and to add a fire pump diesel engine and a natural gas-fired emergency generator. The Facility began commercial operation in July, 2001. The Facility emits nitrogen oxide ("NO_X"), carbon monoxide ("CO"), and particulate matter ("PM"), all of which are regulated under the District's federally approved or delegated nonattainment new source review ("NSR") and prevention of significant deterioration ("PSD") programs[5] or other District Clean Air Act programs.

On June 28, 2001, the District completed its evaluation of the title V application for the Facility and issued the draft title V Permit. Under the District's rules, this action started a simultaneous 30-day public comment period and a 45-day EPA review period. On August 1, 2001, Mr. Kenneth Kloc of the Environmental Law and Justice Clinic submitted comments to the

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[1] An FDOC describes how a proposed facility will comply with applicable federal, state, and BAAQMD regulations, including control technology and emission offset requirements of New Source Review. Permit conditions necessary to insure compliance with applicable regulations are also included.

[2] The FDOC served as an evaluation report for both the CEC's certificate and the District's authority to construct ("ATC") permit. The initial ATC was issued by the District shortly after the FDOC under District application #18595.

[3] ATC permits are federally enforceable pre-construction permits that reflect the requirements of the attainment area prevention of significant deterioration and nonattainment area new source review ("NSR") programs. The District's NSR requirements are described in Regulation 2, Rule 2. New power plants locating in California subject to the CEC certification requirements must also comply with Regulation 2, Rule 3, titled Power Plants. Regulation 2-3-405 requires the District to issue an ATC for a subject facility only after the CEC issues its certificate for the facility.

[4] The increased heat input allowed the facility to increase its electrical generating capacity from 520 MW to 555 MW.

[5] The District was implementing the federal PSD program under a delegation agreement with EPA dated October 28, 1997. The non-attainment NSR program was most recently SIP-approved by EPA on January 26, 1999. 64 Fed. Reg. 3850.

District on the draft Los Medanos Permit on behalf of OCE ("OCE's Comment Letter").[6] The District responded to OCE's Comment Letter by a letter dated September 4, 2001, from William de Boisblanc ("Response to Comments"). EPA Region IX did not object to the proposed permit during its 45-day review period. The Petition to Object to the Permit, filed by OCE and CARE and dated October 9, 2001, was received by Region IX on October 12, 2001. EPA calculates the period for the public to petition the Administrator to object to a permit as if the 30-day public comment and 45-day EPA review periods run sequentially, accordingly petitioners have 135 days after the issuance of a draft permit to submit a petition.[7] Given that the Petition was filed with EPA on October 12, 2001, I find that it was timely filed. I also find that the Petition is appropriately based on objections that were raised with reasonable specificity during the comment period or that arose after the public comment period expired.[8]

III. ISSUES RAISED BY THE PETITIONERS

A. District Breakdown Relief Under Permit Condition I.H.1

Petitioners' first allegation challenges the inclusion in the Los Medanos Permit of Condition I.H.1, a provision which incorporates SIP rules allowing a permitted facility to seek relief from enforcement by the District in the event of a breakdown. Petition at 3. Petitioners assert that the definition of "breakdown" at Regulation 1-208 would allow relief in situations beyond those allowed under the Clean Air Act. Specifically, Petitioners allege that the "definition of 'breakdown' in Regulation 1-208 is much broader than the federal definition of breakdown, which is provided in 40 CFR Part 70," or more precisely, at 40 CFR § 70.6(g).

Condition I.H.1 incorporates District Regulations 1-208, 1-431, 1-432, and 1-433 (collectively the "Breakdown Relief Regulations") into the Permit. Regulation 1-208 defines breakdown, and Regulations 1-431 through 1-433 describe how an applicant is to notify the District of a breakdown, how the District is to determine whether the circumstances meet the definition of a breakdown, and what sort of relief to grant the permittee. To start our analysis, it

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[6] We note that OCE submitted its comments to the District days after the close of the public comment period established pursuant to the District's Regulation 2-6-412 and 40 CFR § 70.7(h)(4). Though we are responding to the Petition despite this possible procedural flaw, we reserve our right to raise this issue in any future proceeding.

[7] This 135-day period to petition the Administrator is based on a 30-day District public notice and comment period, a 45-day EPA review period and the 60-day period for a person to file a petition to object with EPA.

[8] In its Comment Letter, OCE generally raised concerns with the draft Major Facility Review Permit that are the basis for the Petition. In regard to whether all issues were raised with 'reasonable specificity,' I find that claims one through four of the Petition were raised adequately in OCE's Comment Letter. The fifth claim, that the District did not live up to its commitment to make changes to the Permit, can be raised in the Petition since the grounds for the claim arose after the public comment period ended. See 40 CFR § 70.8(d). Finally, CARE's non-participation in the District's notice-and-comment process does not prevent the organization from filing a title V petition because the regulations allow "any person" to file a petition based on earlier objections raised during the public comment period regardless of who had filed those earlier comments. See CAA § 505(b)(2); 40 CFR § 70.8(d)

is important to understand the impact of granting relief under the Breakdown Relief Regulations. Neither Condition I.H.1, nor the SIP provisions it incorporates into the Permit, would allow for an exemption from an applicable requirement for periods of excess emissions. An "exemption from an applicable requirement" would mean that the permittee would be deemed not to be in violation of the requirement during the period of excess emissions. Rather, these Breakdown Relief Regulations allow an applicant to enter into a proceeding in front of the District that could ultimately lead to the District employing its enforcement discretion not to seek penalties for violations of an applicable requirement that occurred during breakdown periods.

Significantly, the Breakdown Relief Regulations have been approved by EPA as part of the District's federally enforceable SIP. 64 Fed. Reg. 34558 (June 28, 1999) (this is the most recent approval of the District's Regulation 1). Part 70 requires all SIP provisions that apply to a source to be included in title V permits as "applicable requirements." See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, at 23-24 ("Pacificorp"). On this basis alone, the inclusion of the Breakdown Relief Regulations in the permit is not objectionable.[9]

Moreover, Petitioners' allegation that Condition 1.H.1 is inconsistent with 40 CFR § 70.6(g) does not provide a basis for an objection. 40 CFR § 70.6(g) allows a permitting authority to incorporate into its title V permit program an affirmative defense provision for "emergency" situations as long as the provision is consistent with the 40 CFR § 70.6(g)(3) elements. Such an emergency defense then may be incorporated into permits issued pursuant to that program. As explained above, these regulations provide relief based on the District's enforcement discretion and do not provide an affirmative defense to enforcement. Moreover, to the extent the emergency defense is incorporated into a permit, 40 CFR § 70.6(g)(5) makes clear that the Part 70 affirmative defense type of relief for emergency situations "is in addition to any emergency or upset provision contained in any applicable requirement." This language clarifies that the Part 70 regulations do not bar the inclusion of applicable SIP requirements in title V permits, even if those applicable requirements contain "emergency" or "upset" provisions such as Condition 1.H.1 that may overlap with the emergency defense provision authorized by 40 CFR § 70.6(g).

Also, a review of the Breakdown Relief Regulations themselves demonstrates that they are not inconsistent with the Clean Air Act, and therefore, not contrary to the Act. A September 28, 1982, EPA policy memorandum from Kathleen Bennet, titled Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions ("1982 Excess Emission Policy"), explains that "all periods of excess emissions [are] violations of the applicable standard." Accordingly, the 1982 Excess Emission Policy provides that EPA will not approve automatic exemptions in operating permits or SIPs. However, the 1982 Excess Emission Policy also

[9]This holds true even if the Petitioner could support an allegation that EPA had erroneously incorporated the provisions into the SIP. See Pacificorp at 23 ("even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP"). However, as explained below, EPA believes that these provisions were appropriately approved as part of the District's SIP.

explains that EPA can approve, as part of a SIP, provisions that codify an "enforcement discretion approach." The Agency further refined its position on this topic in a September 20, 1999 policy memorandum from Steven A. Herman and Robert Perciasepe, titled State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown ("1999 Excess Emission Policy").[10] The 1999 Excess Emission Policy explained that a permitting authority may express its enforcement discretion through appropriate affirmative defense provisions approved into the SIP as long as the affirmative defense applies only to civil penalties (and not injunctive relief) and meets certain criteria. As previously explained, the Breakdown Relief Regulations approved into the District's SIP provide neither an affirmative defense to an enforcement action nor an automatic exemption from applicable requirements, but rather serve as a mechanism for the District to use its enforcement discretion. Therefore, I find that the provision is not inconsistent with the Act.

Finally, Petitioners allege that the inclusion of Condition I.H.1 "creates unnecessary confusion and unwarranted potential defense to federal civil enforcement." Inclusion of Condition I.H.3 in the Los Medanos Permit clarifies Condition I.H.1 by stating that "[t]he granting by the District of breakdown relief . . . will not provide relief from federal enforcement." Contrary to Petitioners' allegation, we find that addition of this language successfully dispels any ambiguity as to the impact of the provision, especially as it relates to federal enforceability, and therefore clears up "confusion" and limits "unwarranted defenses." For the reasons stated above, I deny the Petition as it relates to Condition I.H.1 and the incorporation of the Breakdown Relief Regulations into the Permit.

B. Hearing Board Variance Relief Under Permit Condition I.H.2

The Petitioners' second allegation challenges the inclusion in the Los Medanos Permit of Condition I.H.2, which states that a "permit holder may seek relief from enforcement action for a violation of any of the terms and conditions of this permit by applying to the District's Hearing Board for a variance pursuant to Health and Safety Code Section 42350. . . ." Petition at 3. Petitioners make a number of arguments in support of their claim that the reference to California's Variance Law in the Los Medanos Permit serves as a basis for an objection; none of these allegations, however, serves as an adequate basis for EPA to object to the Permit.

Health and Safety Code ("HSC") sections 42350 et seq. ("California's Variance Law") allow a permittee to request an air district hearing board to issue a variance to allow the permittee to operate in violation of an applicable district rule, or State rule or regulation for a limited time. Section 42352(a) prohibits the issuance of a variance unless the hearing board makes specific

[10] On December 5, 2001, EPA issued a brief clarification of this policy. Re-Issuance of Clarification – State Implementation Plans (SIPs); Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown.

findings.[11] Section 42352(a)(2) limits the availability of variances to situations involving non-compliance with "any rule, regulation, or order of the district." As part of the variance process, the hearing board may set a "schedule of increments of progress," to establish milestones and final deadlines for achieving compliance. See, e.g., HSC § 42358. EPA has not approved California's Variance Law into the SIP or Title V program of any air district. See, e.g., 59 Fed. Reg. 60939 (Nov. 29, 1994) (proposing to approve BAAQMD's title V program without California's Variance Law); 60 Fed. Reg. 32606 (June 23, 1995) (granting final interim approval to BAAQMD's title V program).

Petitioners argue that the "variance relief issued by BAAQMD under state law does not qualify as emergency breakdown relief authorized by the Title V provisions . . . ." Petition at 4. As with the Breakdown Relief Regulations, Petitioners' true concern appears to be that Condition I.H.2 and California's Variance Law are inconsistent with 40 CFR § 70.6(g), which allows for the incorporation of an affirmative defense provision into a federally approved title V program, and thus into title V permits. Condition I.H.2 and California's Variance Law, however, do not need to be consistent with 40 CFR § 70.6(g) because these provisions merely express an aspect of the District's discretionary enforcement authority under State law rather than incorporate a Part 70 affirmative defense provision into the Permit.[12] As described above, the discretionary

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[11] HSC section 42352(a) provides as follows:

> No variance shall be granted unless the hearing board makes all of the following findings:
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> (1) That the petitioner for a variance is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district.
>
> (2) That, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination of a lawful business. In making those findings where the petitioner is a public agency, the hearing board shall consider whether or not requiring immediate compliance would impose an unreasonable burden upon an essential public service. For purposes of this paragraph, "essential public service" means a prison, detention facility, police or firefighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency.
>
> (3) That the closing or taking would be without a corresponding benefit in reducing air contaminants.
>
> (4) That the applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance.
>
> (5) During the period the variance is in effect, that the applicant will reduce excess emissions to the maximum extent feasible.
>
> (6) During the period the variance is in effect, that the applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the district, and report these emission levels to the district pursuant to a schedule established by the district.

[12] Government agencies have discretion to not seek penalties or injunctive relief against a noncomplying source. California's Variance Law recognizes this inherent discretion by codifying the process by which a source may seek relief through the issuance of a variance. The ultimate decision to grant a variance, however, is still wholly discretionary, as evidenced by the findings the hearing board must make in order to issue a variance. See HSC section 42352(a)(1)-(6).

nature of California's Variance Law is evidenced by the findings set forth in HSC §42538(a) that a hearing board must make before it can issue a variance.[13] Inherent within the process of making these findings is the hearing board's ability to exercise its discretion to evaluate and consider the evidence and circumstances underlying the variance application and to reject or grant, as appropriate, that application. Moreover, the District clearly states in Condition I.H.3. that the granting by the District of a variance does not "provide relief from federal enforcement," which includes enforcement by both EPA and citizens.[14] As Condition I.H.2. refers to a discretionary authority under state law that does not affect the federal enforceability of any applicable requirement, I do not find its inclusion in the Los Medanos Permit objectionable.

Petitioners also argue that the "variance program is a creature of state law," and therefore should not be included in the Los Medanos Permit. Petitioners' complaint is obviously without merit since Part 70 clearly allows for inclusion of state- and local-only requirements in title V permits as long as they are adequately identified as having only state- or local-only significance. 40 CFR § 70.6(b)(2). For this reason, I find that Petitioners' allegation does not provide a basis to object to the Los Medanos Permit.

Petitioners further argue that California's Variance Law allows a revision to the approved SIP in violation of the Act. Petitioners misunderstand the provision. The SIP is comprised of the State or district rules and regulations approved by EPA as meeting CAA requirements. SIP requirements cannot be modified by an action of the State or District granting a temporary variance. EPA has long held the view that a variance does not change the underlying SIP requirements unless and until it is submitted to and approved by EPA for incorporation into the SIP. For example, since 1976, EPA's regulations have specifically stated: "In order for a variance to be considered for approval as a revision to the State implementation plan, the State must submit it in accordance with the requirements of this section." 40 CFR §51.104(d); 41 Fed. Reg. 18510, 18511 (May 5, 1976).

The fact that the California Variance Law does not allow a revision to the approved SIP is further evidenced by the law itself. By its very terms, California's Variance Law is limited in application to "any rule, regulation, or order of the district," HSC § 42352(a)(2) (emphasis supplied); therefore, the law clearly does not purport to modify the federally approved SIP. In addition, California's view of the law's effect is consistent with EPA's. For instance, guidance

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[13] Because of its discretionary nature, California's Variance Law does not impose a legal impediment to the District's ability to enforce its SIP or title V program. EPA cannot prohibit the District's use of the variance process as a means for sources to avoid enforcement of permit conditions by the District unless the misuse of the variance process results in the District's failure to adequately implement or enforce its title V program, or its other federally delegated or approved CAA programs. Petitioners have made no such allegation.

[14] Other BAAQMD information resources on variances also clearly set forth the legal significance of variances. For example, the application for a variance on BAAQMD's website states that EPA "does not recognize California's variance process" and that "EPA can independently pursue legal action based on federal law against the facility continuing to be in violation."

issued in 1989 by the California Air Resources Board ("CARB"), the State agency responsible for preparation of California's SIP, titled Variances and Other Hearing Board Orders as SIP Revisions or Delayed Compliance Orders Under Federal Law, demonstrates that the State's position with respect to the federal enforceability and legal consequences of variances is consistent with EPA's. For example, the guidance states:

> State law authorizes hearing boards of air pollution control districts to issue variances from district rules in appropriate instances. These variances insulate sources from the imposed state law. However, where the rule in question is part of the State Implementation Plan (SIP) as approved by the U.S. Environmental Protection Agency (EPA), the variance does not by itself insulate the source from penalties in actions brought by EPA to enforce the rule as part of the SIP. While EPA can use enforcement discretion to informally insulate sources from federal action, formal relief can only come through EPA approval of the local variance.

In 1993, the California Attorney General affirmed this position in a formal legal opinion submitted to EPA as part of the title V program approval process, stating that "any variance obtained by the source does not effect [sic] or modify permit terms or conditions . . . nor does it preclude federal enforcement of permanent terms and conditions." In sum, both the federal and State governments have long held the view that the issuance of a variance by a district hearing board does not modify the SIP in any way. For this reason, I find that Petitioners' allegation does not provide a basis to object to the Los Medanos Permit.

Finally, Petitioners raise concerns that the issuance of variances could "jeopardize attainment and maintenance of ambient air quality standards" and that inclusion of the variance provision in the Permit is highly confusing to the regulated community and public. As to the first concern, Petitioners' allegation is too speculative to provide a basis for an objection to a title V permit. Moreover, as previously stated, permittees that receive a variance remain subject to all SIP and federal requirements, as well as federal enforcement for violation of those requirements. As to Petitioners' final point, I find that including California's Variance Law in title V permits may actually help clarify the regulatory scheme to the regulated community and the public. California's Variance Law can be utilized by permittees seeking relief from District or State rules regardless of whether the Variance Law is referenced in title V permits; therefore, reference to the Variance Law with appropriate explanatory language as to its limited impact on federal enforceability helps clarify the actual nature of the law to the regulated community. In short, since title V permits are meant to contain all applicable federal, State, and local requirements, with appropriate clarifying language explaining the function and applicability of each requirement, the District may incorporate California's Variance Law into the Los Medanos Permit and other title V permits. For reasons stated in this Section, I do not find grounds to object to the Los Medanos Permit on this issue.

C. Statement of Basis

Petitioners' third claim is that the Los Medanos Permit lacks a statement of basis, as required by 40 CFR § 70.7(a)(5). Petition at 5. Petitioners assert that without a statement of basis it is virtually impossible for the public to evaluate the periodic monitoring requirements (or lack thereof). Id. They specifically identify the District's failure to include an explanation for its decision not to require certain monitoring, including the lack of any monitoring for opacity, filterable particulate, or PM limits. Petition at 6-7, n.2. Additionally, Petitioners contend that BAAQMD fails to include any SO_2 monitoring for source S-2 (Heat Recovery Steam Generator). Id.

Section 70.7(a)(5) of EPA's permit regulations states that "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 or regulatory provisions)." The statement of basis is not part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.[15] Id.

A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from a straight recitation of requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 C.F.R. 70.6(a)(3)(i)(B) or District Regulation 2-6-503. Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit.[16] See e.g., In Re Port

[15]Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations.

[16]EPA has provided guidance on the content of an adequate statement of basis in a letter dated December 20, 2001, from Region V to the State of Ohio and in a Notice of Deficiency ("NOD") issued to the State of Texas. <http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf> (Region V letter to Ohio); 67 Fed. Reg. 732 (January 7, 2002) (EPA NOD issued to Texas). These documents describe the following five key elements of a statement of basis: (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. Id. at 735. In addition, the Region V letter further recommends the inclusion of the following topical discussions in a statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, these recommendations provide a good road map as to what should be included in a statement of basis considering, for example, the technical complexity of the permit, the history of the facility, and any new provisions, such as periodic monitoring conditions, that the permitting authority has drafted in conjunction with issuing the title

Hudson Operation Georgia Pacific, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) ("Georgia Pacific"); In Re Doe Run Company Buick Mill and Mine, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) ("Doe Run"). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method be documented in the permit record. See In Re Fort James Camas Mill, Petition No. X-1999-1, at page 8 (December 22, 2000) ("Ft. James").

EPA's regulations state that the permitting authority must provide EPA with a statement of basis. 40 CFR § 70.7(a)(5). The failure of a permitting authority to meet this procedural requirement, however, does not necessarily demonstrate that the title V permit is substantively flawed. In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. See CAA § 505(b)(2) (objection required "if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); see also, 40 CFR § 70.8(c)(1). Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. See e.g., Doe Run at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. See e.g., Ft. James at 8; Georgia Pacific at 37-40.

In this case, as discussed below, the permitting authority's failure to adequately explain its permitting decisions either in the statement of basis or elsewhere in the permit record is such a serious flaw that the adequacy of the permit itself is in question. By reopening the permit, the permitting authority is ensuring compliance with the fundamental title V procedural requirements of adequate public notice and comment required by sections 502(b)(6) and 503(e) of the Clean Air Act and 40 CFR § 70.7(h), as well as ensuring that the rationale for the selected monitoring method, or lack of monitoring, is clearly explained and documented in the permit record. See 40 CFR §§ 70.7(a)(5) and 70.8(c); Ft. James at 8.

For the proposed Los Medanos Permit, the District did not provide EPA with a separate statement of basis document. In a meeting with EPA representatives held on October 31, 2001, at the Region 9 offices, the District claimed that it complied with the statement of basis requirements for the Los Medanos Permit because it incorporated all of the necessary explanatory information either directly into the Permit or it included such information in other supporting documentation.[17] As such, the District argues, at a minimum, it complied with the substantive requirements of a statement of basis.

V permit.

[17] This meeting along with the others held with the District were for fact-gathering purposes only. In a November 8, 2001 meeting at the Region 9 offices, the Petitioners were likewise provided the opportunity to present facts pertaining to the Petition to EPA representatives.

In responding to the Petition, we reviewed the final Los Medanos Permit and all supporting documentation, which included the proposed Permit, the FDOC drafted by the District for purposes of licensing the power plant with the CEC, and the "Permit Evaluation and Emission Calculations" ("Permit Evaluation") which was developed in March 2001 as part of the modification to the previously issued ATC permit. Although the District provided some explanation in this supporting documentation as to the factual and legal basis for certain terms and conditions of the Permit, this documentation did not sufficiently set forth the basis or rationale for many other terms and conditions. Generally speaking, the District's record for the Permit does not adequately support: (1) the factual basis for certain standard title V conditions; (2) applicability determinations for source-specific applicable requirements, such as the Acid Rain requirements and New Source Performance Standards ("NSPS"); (3) exclusion of certain NSR and PSD conditions contained in underlying ATC permits; (4) recordkeeping decisions and periodic monitoring decisions under 70.6(a)(3)(i)(B) and District Regulation 2-6-503; and (5) streamlining analyses, including a discussion of permit shields.

EPA Region 9 identified numerous specific deficiencies falling under each of these broad categories.[18] For example, the District's permit record does not adequately support the basis for certain source-specific applicable requirements identified in Section IV of the Permit, especially those regarding the applicability or non-applicability of subsections rules that apply to particular types of units such the as NSPS for combustion turbines or SIP-approved District Regulations. For instance, in table IV-B and D of the Permit, the District indicates that subsection 303 of District Regulation 9-3, which sets forth NOx emission limitations, applies to certain emission units. However, the permit record fails to describe why subsection 601 of the same District Regulation, an otherwise seemingly applicable provision, is not included in the tables as an applicable requirement. Subsection 601 establishes how exhaust gases should be sampled and analyzed to determine NOx concentrations for purposes of compliance with subsection 303. Similarly, in the same tables, the District lists certain applicable NSPS subsections, such as those in 40 CFR Part 60 Subparts Da and GG, but does not explain why these subsections apply to those specific emission units nor why other seemingly applicable subsections of the same NSPS regulations do not apply to those units.[19]

The permit record also fails to explain the District's streamlining decisions of certain

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[18] EPA Region 9 Permits Office described these areas of concern in greater detail in a memorandum dated March 29, 2002, "Region 9 Review of Statement of Basis for Los Medanos title V Permit in Response to Petition to Object." This memorandum is part of the administrative record for this Order and was reviewed in responding to this Petition.

[19] The tables in Section IV pertaining to certain gas turbines located at the Facility cite to 40 CFR 60.332(a)(1) as an applicable requirement. However, these same tables fail to cite to subsections 40 CFR 60.332(a)(2) through 60.332(l) of the same NSPS program even though these provisions also apply to gas turbines. The District's failure to provide any sort of discussion or explanation as to the applicability or non-applicability of the subsections of 40 CFR 60.332 makes it impossible to review the District's applicability determinations for this NSPS.

underlying ATC permit conditions as set forth in Section VI of the Permit. The District apparently modified or streamlined the ATC conditions in the context of the title V permitting process but failed to provide an explanation in the permit record as to the basis for the change to the conditions. For instance, Condition 53 of Section VI states that the condition was "[d]eleted [on] August, 2001," but the District fails to discuss or explain anywhere in the permit record the basis for this deletion or the nature of the original condition that was deleted.

As a final example of the District's failure to provide a basis or rationale for permit terms, in accordance with Petitioner's claim, the permit record is devoid of discussion pertaining to how or why the selected monitoring is sufficient to assure compliance with the applicable requirements. See 69 Fed. Reg. 3202, 3207 (Jan. 22, 2004). Most importantly, for those applicable requirements which do not otherwise have monitoring requirements, the Permit fails to require monitoring pursuant to 40 C.F.R. 70.6(a)(3)(i)(B), and the permit record fails to discuss or explain why no monitoring should be required under this provision. As evidenced by these specific examples, I find the District did not provide an adequate analysis or discussion of the terms and conditions of the proposed Los Medanos Permit.

To conclude, by failing to draft a separate statement of basis document and by failing to include appropriate discussion in the Permit or other supporting documentation, the District has failed to provide an adequate explanation or rationale for many significant elements of the Permit. As such, I find that the Petitioners' claim in regard to this issue is well founded, and by this Order, I am requiring the District to reopen the Los Medanos Permit, and make available to the public an adequate statement of basis that provides the public and EPA an opportunity to comment on the title V permit and its terms and conditions as to the issues identified above.

D. Inadequate Permit Conditions

Petitioners' fourth claim is that Condition 22 in the Los Medanos Permit is unenforceable. The Petitioners claim that this condition "appears to defer the development of a number of permit conditions related to transient, non-steady state conditions to a time after approval of the Title V permit." Petition at 7. The Petitioners recommend that "a reasonable set of conditions should be defined" and amended through the permit modification process to conform to new data in the future. I disagree with the Petitioners on this issue.

As Petitioners correctly note, Part 70 and the Act require that "conditions in a Title V permit. . . be enforceable." However, they argue that "Condition 22 is presently unenforceable and must be deleted from the permit." I find that the condition challenged by the Petitioners is enforceable.

Conditions 21 and 22 establish NOx emissions levels for units P-1 and P-2, including limits for transient, non-steady state conditions. Condition 22(f) requires the permittee to gather data and draft and submit an operation and maintenance plan to control transient, non-steady

state emissions for units P-1 and P-2[20] within 15 months of issuance of the permit. Condition 22(g) creates a process for the District, after consideration of continuous monitoring and source test data, to fine-tune on a semi-annual basis the NO_X emission limit for units P-1 and P-2 during transient, non-steady state conditions and to modify data collection and recordkeeping requirements for the permittee.

These requirements are enforceable. EPA and the District can enforce both Condition 22(f)'s requirement to draft and submit an operation and maintenance plan for agency approval and the control measures adopted under the plan after approval. For Condition 22(g), the process for the District to modify emission limits and/or data collection and recordkeeping requirements is clearly set forth in the Permit and the modified terms will be federally enforceable. Moreover, the circumstances that trigger application of Condition 22 are specifically defined since Condition 22(c) precisely defines "transient, non-steady state condition" as when "one or more equipment design features is unable to support rapid changes in operation and respond to and adjust all operating parameters required to maintain the steady-state NO_X emission limit specified in Condition 21(b)." As such, I find that Condition 22 is federally and practically enforceable. Therefore, Petitioners' claim on this count is not supported by the plain language of the Permit itself.

Moreover, to the extent that Petitioners are concerned that Lowest Achievable Emission Rate ("LAER")[21] emission standards are being set through a process that does not incorporate appropriate NSR, PSD, and title V public notice and comment processes, such concerns are not well-founded. By its very terms, the Permit prohibits relaxation of the LAER emissions standards set in the permitting process. Condition 21(b) of the Permit sets a LAER-level emission standard of 2.5 ppmv NOx, averaged over any 1-hour period, for units P-1 and P-2 for all operational conditions other than transient, non-steady state conditions. Condition 22(a) sets the limit for transient, non-steady state conditions of 2.5 ppmv NOx, averaged over any rolling 3-hour period.[22] Implementation of Condition 22 cannot relax the LAER-level emission limits. Condition 22(f) merely requires further data-collecting, planning, and implementation of control

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[20]Unit P-1 is defined as "the combined exhaust point for the S-1 Gas Turbine and the S-2 HRSG after control by the A-1 SCR System and A-2 Oxidation Catalyst" and unit P-2 is defined as "the combined exhaust point for the S-3 Gas Turbine and the S-4 HRSG after control by the A-3 SCR System and A-4 Oxidation Catalyst." Permit, Condition 21(a).

[21]LAER is the level of emission control required for all new and modified major sources subject to the NSR requirements of Section 173, Part D, of the CAA for non-attainment areas. 42 U.S.C. § 7501-15. Since the Bay Area is non-attainment for ozone, the Facility must meet LAER-level emission controls for NO_x emission since NO_x is a pre-cursor of ozone. California uses different terminology than the CAA when applying LAER, however. In California, best available control technology ("BACT") is consistent with LAER-level controls, and California and its local permitting authorities use this terminology when issuing permits.

[22]The District determined this limit to be LAER for transient, non-steady state conditions because, as the District stated in its Response to Comments, "the NOx emission limit (2.5 ppmv averaged over one hour) during load changes . . . . ha[s] not yet been achieved in practice by any utility-scale power plant."

measures for transient, non-steady state emissions that go beyond those already established to comply with LAER requirements. While Condition 22(g) does allow the District to modify the emission limit during transient, non-steady state conditions,[23] this new limit cannot exceed the "backstop" LAER-level limit set by Condition 22(a). As such, Condition 22(g) serves to only make overall emission limits more stringent. The District itself recognized the "no backsliding" nature of Conditions 22(f) and (g) on page 3 of its Response to Comments where it stated that the Facility "must comply with 'backstop' NO_X emission limit of 2.5 ppmv, averaged over 3 hours, under all circumstances and comply with all hourly, daily and annual mass NO_X emission limits."[24]

Finally, for any control measures; further data collection, recordkeeping or monitoring requirements; new definitions; or emission limits established pursuant to Conditions 22(f) or (g) that are to be incorporated into the permit, the District must utilize the appropriate title V permit modification procedures set forth in 40 CFR § 70.7(d) and the District's Regulation 2-6-415 to modify the Permit. The District itself recognizes this in Condition 22(g) by stating that "the Title V operating permit shall be amended as necessary to reflect the data collection and recordkeeping requirements established under 22(g)(ii)." For the reasons described above, we do not find Conditions 22(f) and (g) unenforceable or otherwise objectionable for inclusion in the Los Medanos Permit.

E. Failure to Incorporate Agreed-to Changes

The final claim by the Petitioners is that the District agreed to incorporate certain changes into the final Los Medanos Permit but failed to do so. Namely, Petitioners claim that the District failed to keep its commitments to OCE to add language requiring recordkeeping for stipulated abatement strategies under SIP-approved Regulation 4 and to add clarifying language about NO_X monitoring requirements. The District appeared to make these commitments in its Response to Comment Letter. These allegations do not provide a basis for objecting to the Permit because neither change is necessary to ensure that the District is properly including all applicable requirements in the permit nor are they necessary to assure compliance with the underlying applicable requirements. CAA § 504(a); 40 CFR § 70.6(a)(3).

The first change sought by OCE during the comment period was a requirement that the

[23]The District may modify the emission limit during transient, non-steady state conditions every 6 months for the first 24 months after the start of the Commissioning period. The Commissioning period commences "when all mechanical, electrical, and control systems are installed and individual system start-up has been completed, or when a gas turbine is first fired, whichever comes first. . . ." The Commissioning period terminates "when the plant has completed performance testing, is available for commercial operation, and has initiated sales to the power exchange." Permit, at page 34.

[24]The purpose of Condition 22, as stated by the District, is to allow for limited "excursions above the emission limit that could potentially occur under unforeseen circumstances beyond [the Facility's] control." This is the rationale for the three hour averaging period for transient, non-steady state conditions rather than the one hour averaging period of Condition 21(b) for all other periods.

Facility document response actions taken during periods of heightened air pollution. The District's Regulation 4 establishes control and advisory procedures for large air emission sources when specified levels of ambient air contamination have been reached and prescribes certain abatement actions to be implemented by each air source when action alert levels of air pollution are reached. OCE recommended that the District require recordkeeping in the title V permit to "insure that the stipulated abatement strategies [of Regulation 4] are implemented during air pollution events," and the District appeared to agree to such a recommendation in its Response to Comments. Although the recordkeeping suggested by Petitioners would be helpful, Petitioners have not shown that it is required by title V, the SIP, or any federal regulation, and therefore, this failure to include it is not a basis for objecting to the permit.

The Part 70 regulations set the minimum standard for inclusion of monitoring and recordkeeping requirements in title V permits. See 40 CFR § 70.6(a)(3). These provisions require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). 40 CFR § 70.6(a)(3)(i)(B). There may be limited cases in which the establishment of a regular program of monitoring and/or recordkeeping would not significantly enhance the ability of the permit to reasonably assure compliance with the applicable requirement and where the status quo (i.e., no monitoring or recordkeeping) could meet the requirements of 40 CFR § 70.6(a)(3). Such is the case here.

Air pollution alert events occur infrequently, and therefore, compliance with Regulation 4 is a minimal part of the source's overall compliance with SIP requirements. More importantly, Regulation 4-303 abatement requirements mostly impose a ban on direct burning or incineration during air pollution alert events, activities which are unlikely to occur at a gas-fired power plant such as the Facility and in any case are easy to monitor by District inspectors. The other Regulation 4-303 requirements are mostly voluntary actions to be taken by the sources, such as reduction in use of motor vehicles, and therefore do not require compliance monitoring or recordkeeping to assure compliance. Since the activities regulated by Regulation 4 are unlikely to occur at the Facility, and compliance is easily verified by District inspectors, recordkeeping is not necessary to assure compliance with Regulation 4. Therefore, further recordkeeping requirements sought by the Petitioners are not required by 40 CFR § 70.6(a)(3).

The second change sought by the Petitioners is to add language to Condition 36 clarifying why certain pollutants, such as NO_X emissions, are exempt from mass emission calculations. On page 3 of the District's Response to Comments, the District explained that the NO_X emissions are exempt from the mass emission calculations because they are measured directly through CEMS monitoring, whereas the other pollutant emissions subject to the calculations do not have equivalent CEMS monitoring. Though this clarification is helpful, it does not need to be incorporated into the title V permit itself. Therefore, its non-inclusion in the Permit does not provide a basis for an EPA objection to the Permit. To the extent that such

clarifying language is important, it should be included in the statement of basis, however. Since the District will be drafting a statement of basis for the Los Medanos Permit due to the partial granting of the Petition, we recommend that the clarifying language for Condition 36 be included in the newly drafted statement of basis.

Though we hope that permitting authorities would generally fulfill commitments made to the public, we find that the Petitioners' fifth claim does not provide a basis for an objection to the Los Medanos Permit for the reasons described above. The mere fact that the District committed to make certain changes, yet did not follow through on those commitments, does not provide a basis for an objection to a title V permit. Petitioners have provided no other reason why the agreed upon changes must be made to the permit beyond the District's commitments. I accordingly deny Petitioners' request to veto the permit on these grounds.

IV. CONCLUSION

For the reasons set forth above and pursuant to Section 505(b)(2) of the Clean Air Act, I am granting the Petitioners' request that the Administrator object to the issuance of the Los Medanos Permit with respect to the statement of basis issue and am denying the Petition with respect to the other allegations.

May 24, 2004 _____/S/_____
Date Michael O. Leavitt
Administrator

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of Valero Refining Co Benicia, California Facility Major Facility Review Permit Facility No. B2626 Issued by the Bay Area Air Quality Management District	Petition No. IX-2004-07 ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER DENYING IN PART AND GRANTING IN PART A PETITION FOR OBJECTION TO PERMIT

On December 7, 2004, the Environmental Protection Agency ("EPA") received a petition ("Petition") from Our Children's Earth Foundation ("OCE" or "Petitioner") requesting that the EPA Administrator object to the issuance of a state operating permit from the Bay Area Air Quality Management District ("BAAQMD" or "District") to Valero Refining Co. to operate its petroleum refinery located in Benicia, California ("Permit"), pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, EPA's implementing regulations in 40 C.F.R. Part 70 ("Part 70"), and the District's approved Part 70 program. *See* 66 Fed. Reg. 63503 (Dec. 7, 2001).

Petitioner requested EPA object to the Permit on several grounds. In particular, Petitioner alleged that the Permit failed to properly require compliance with applicable requirements pertaining to, *inter alia*, flares, cooling towers, process units, electrostatic precipitators, and other waste streams and units. Petitioner identified several alleged flaws in the Permit application and issuance, including a deficient Statement of Basis. Finally, Petitioners alleged that the permit impermissibly lacked a compliance schedule and failed to include monitoring for several applicable requirements.

EPA has now fully reviewed the Petitioner's allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which places the burden on the petitioner to "demonstrate[] to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of part 70, *see also* 40 C.F.R. § 70.8(c)(1), and I hereby respond to them by this Order. In considering the allegations, EPA reviewed the Permit and related materials and information provided by the Petitioner in the Petition.[1] Based on this review, I partially deny and

[1]On March 7, 2005 EPA received a lengthy (over 250 pages, including appendices), detailed submission from Valero Refining Company regarding this Petition. Due to the fact that Valero Refining Company made its submission very shortly before EPA's settlement agreement deadline for responding to the Petition and the size of the

partially grant the Petitioner's request that I object to issuance of the Permit for the reasons described below.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. In 1995, EPA granted interim approval to the title V operating permit program submitted by BAAQMD. 60 Fed. Reg. 32606 (June 23, 1995), 40 C.F.R. Part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to BAAQMD's title V operating permit program. 66 Fed. Reg. 63503 (Dec. 7, 2001.).

Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes applicable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a). The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, permitting authorities, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a) of the Act and 40 C.F.R. § 70.8(a), permitting authorities are required to submit all operating permits proposed pursuant to title V to EPA for review. If EPA determines that a permit is not in compliance with applicable requirements or the requirements of 40 C.F.R. Part 70, EPA will object to the permit. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. Section 505(b)(2) of the Act requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of Part 70 and the applicable implementation plan. *See*, 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Part 70 requires that a petition must be "based only on objections to the

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submission, EPA was not able to review the submission itself, nor was it able to provide the Petitioner an opportunity to respond to the submission. Although the Agency previously has considered submissions from permittees in some instances where EPA was able to fully review the submission and provide the petitioners with a chance to review and respond to the submissions, time did not allow for either condition here. Therefore, EPA did not consider Valero Refining Company's submission when responding to the Petition via this Order.

permit that were raised with reasonable specificity during the public comment period. . ., unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period." 40 C.F.R. § 70.8(d). A petition for objection does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of an objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. PROCEDURAL BACKGROUND

A Permitting Chronology

BAAQMD held its first public comment period for the Valero permit, as well as BAAQMD's other title V refinery permits from June through September 2002.[2] BAAQMD held a public hearing regarding the refinery permits on July 29, 2002. From August 5 to September 22, 2003, BAAQMD held a second public comment period for the permits. EPA's 45-day review of BAAQMD's initial proposed permits ran concurrently with this second public comment period, from August 13 to September 26, 2003. EPA did not object to any of the proposed permits under CAA section 505(b)(1). The deadline for submitting CAA section 505(b)(2) petitions was November 25, 2003. EPA received petitions regarding the Valero Permit from Valero Refining Company and from Our Children's Earth Foundation. EPA also received section 505(b)(2) petitions regarding three of BAAQMD's other refinery permits.

On December 1, 2003, BAAQMD issued its initial title V permits for the Bay Area refineries, including the Valero facility. On December 12, 2003, EPA informed the District of EPA's finding that cause existed to reopen the refinery permits because the District had not submitted proposed permits to EPA as required by title V, Part 70 and BAAQMD's approved title V program. *See* Letter from Deborah Jordan, Director, Air Division, EPA Region 9 to Jack Broadbent, Air Pollution Control Officer, Bay Area Air Quality Management District, dated December 12, 2003. EPA's finding was based on the fact that the District had substantially revised the permits in response to public comments without re-submitting proposed permits to EPA for another 45-day review. As a result of the reopening, EPA required BAAQMD to submit to EPA new proposed permits allowing EPA an additional 45-day review period and an opportunity to object to a permit if it failed to meet the standards set forth in section 505(b)(1).

On December 19, 2003, EPA dismissed all of the section 505(b)(2) petitions seeking objections to the refinery permits as unripe because of the just-initiated reopening process. *See e.g.*, Letters from Deborah Jordan, Director, Air Division, EPA Region 9, to John T. Hansen,

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[2] There are a total of five petroleum refineries in the Bay Area: Chevron Products Company's Richmond refinery, ConocoPhillips Company's San Francisco Refinery in Rodeo, Shell Oil Company's Martinez Refinery, Tesoro Refining and Marketing Company's Martinez refinery, and Valero Refining Company's Benicia facility.

Pillsbury Winthrop, LLP (representing Valero) and to Marcelin E. Keever, Environmental Law and Justice Clinic, Golden Gate University School of Law (representing Our Children's Earth Foundation and other groups) dated December 19, 2003. EPA also stated that the reopening process would allow the public an opportunity to submit new section 505(b)(2) petitions after the reopening was completed. In February 2004, three groups filed challenges in the United States Court of Appeals for the Ninth Circuit regarding EPA's dismissal of their section 505(b)(2) petitions. The parties resolved this litigation by a settlement agreement under which EPA agreed to respond to new petitions (i.e., those submitted after EPA's receipt of BAAQMD's re-proposed permits, such as this Petition) from the litigants by March 15, 2005. *See* 69 Fed. Reg. 46536 (Aug. 3, 2004).

BAAQMD submitted a new proposed permit for Valero to EPA on August 26, 2004; EPA's 45-day review period ended on October 10, 2004. EPA objected to the Valero Permit under CAA section 505(b)(1) on one issue: the District's failure to require adequate monitoring, or a design review, of thermal oxidizers subject to EPA's New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

B. Timeliness of Petition

The deadline for filing section 505(b)(2) petitions expired on December 9, 2004. EPA finds that the Petition was submitted on December 7, 2004, which is within the 60-day time frame established by the Act and Part 70. EPA therefore finds that the Petition is timely.

III. ISSUES RAISED BY PETITIONER

A Compliance with Applicable Requirements

Petitioner alleges that EPA must object to the Permit on the basis of alleged deficiencies Petitioner claims EPA identified in correspondence with the District dated July 28, August 2, and October 8, 2004. Petitioner alleges that EPA and BAAQMD engaged in a procedure that allowed issuance of a deficient Permit. Petition at 6-10. EPA disagrees with Petitioner that it was required to object to the Permit under section 505(b)(1) or that it followed an inappropriate procedure during its 45-day review period.

As a threshold matter, EPA notes that Petitioner's claims addressed in this section are limited to a mere paraphrasing of comments EPA provided to the District in the above-referenced correspondence. Petitioner did not include in the Petition any additional facts or legal analysis to support its claims that EPA should object to the Permit. Section 505(b)(2) of the Act places the burden on the petitioner to "demonstrate[] to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of part 70. *See also* 40 C.F.R. § 70.8(c)(1); *NYPIRG*, 321 F.3d at 333 n.11. Furthermore, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has

demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See* CAA § 505(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *In the Matter of Los Medanos Energy Center*, at 11 (May 24, 2004) ("*Los Medanos*"); *In the Matter of Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at 24-25 (July 31, 2002) ("*Doe Run*"). Petitioner bears the burden of demonstrating a deficiency in the permit whether the alleged flaw was first identified by Petitioner or by EPA. *See* 42 U.S.C. § 7661d(b)(2). Because this section of the Petition is little more than a summary of EPA's comments on the Permit, with no additional information or analysis, it does not demonstrate that there is a deficiency in the Permit.

1. EPA's July 28 and August 2, 2004 Correspondence

Petitioner overstates the legal significance of EPA's correspondence to the District dated July 28 and August 2, 2004. This correspondence, which took place between EPA and the District during the permitting process but before BAAQMD submitted the proposed Permit to EPA for review, was clearly identified as "issues for discussion" and did not have any formal or legal effect. Nonetheless, EPA is addressing the substantive aspects of Petitioner's allegation regarding the applicability and enforceability of provisions relating to 40 C.F.R. § 60.104(a)(1) in Section III.G.1.

2 Attachment 2 of EPA's October 8, 2004 Letter

EPA's letter to the District dated October 8, 2004 contained the Agency's formal position with respect to the proposed Permit. *See* Letter from Deborah Jordan, Director, Air Division, EPA Region 9 to Jack Broadbent, Air Pollution Control Officer, BAAQMD, dated October 8, 2004 ("EPA October 8, 2004 Letter"). Attachment 2 of the letter requested the District to review whether the following regulations and requirements were appropriately handled in the Permit:

- Applicability of 40 C.F.R. Part 63, Subpart CC to flares
  Applicability of Regulation 8-2 to cooling towers
- Applicability of NSPS Subpart QQQ to new process units
  Applicability of NESHAP Subpart FF to benzene waste streams according to annual average water content
  Compliance with NESHAP Subpart FF for benzene waste streams
- Parametric monitoring for electrostatic precipitators

EPA and the District agreed that this review would be completed by February 15, 2005 and that the District would solicit public comment for any necessary changes by April 15, 2005. Contrary to Petitioner's allegation, EPA's approach to addressing these uncertainties was appropriate. The Agency pressed the District to re-analyze these issues and obtained the District's agreement to follow a schedule to bring these issues to closure. EPA notes again that the Petition itself provides no additional factual or legal analysis that would resolve these applicability issues and demonstrate that the Permit is indeed lacking an applicable requirement

Progress in resolving these issues is attributable solely to the mechanism set in place by EPA and the District.

EPA has received the results of BAAQMD's review, *see*, Letter from Jack Broadbent, Air Pollution Control Officer, BAAQMD, to Deborah Jordan, Director, Air Division, EPA Region 9, dated February 15, 2005 ("BAAQMD February 15, 2005 Letter"), and is making the following findings.

a. Applicability of 40 C.F.R. Part 63, Subpart CC to Flares

This issue is addressed in Section III.H

b Cooling Tower Monitoring

This issue is addressed at Section III.G.3

Applicability of NSPS Subpart QQQ to New Process Units

Petitioner claims EPA determined that the Statement of Basis failed to discuss the applicability of NSPS Subpart QQQ for two new process units at the facility.

In an applicability determination for Valero's sewer collection system (S-161), the District made a general reference to two new process units that had been constructed since 1987, the date after which constructed, modified, or reconstructed sources became subject to New Source Performance Standard ("NSPS") Subpart QQQ. The District further indicated that process wastewater from these units is hard-piped to an enclosed system. However, the District did not discuss the applicability of Subpart QQQ for these units or the associated piping. As a result, it was not clear whether applicable requirements were omitted from the proposed Permit.

In response to EPA's request for more information on this matter, the District stated in a letter dated February 15, 2005[1] that the process units are each served by separate storm water and sewer systems. The District has concluded that the storm water system is exempt from Subpart QQQ pursuant to 40 C.F.R. 60.692-1(d)(1). However, with regard to the sewer system, the District stated the following:

> The second sewer system is the process drain system that contains oily water waste streams. This system is "hard-piped" to the slop oil system where the wastewater is separated and sent to the sour water stripper. From the sour water stripper, the wastewater [is] sent directly to secondary treatment in the WWTP where it is processed in the Biox units.

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[1] See Letter from Jack Broadbent, Executive Office/APCO, Bay Area Air Quality Management District to Deborah Jordan, Director, Air Division, EPA Region 9.

> The District will review the details of the new process drain system and determine the applicable standards. A preliminary review indicates that, since this system is hard-piped with no emissions, the new process drain system may have been included in the slop oil system, specifically S-81 and/or S104. If this is the case, Table IV-J33 will be reviewed and updated, as necessary, to include the requirements of the new process drain system.

The District's response indicates that the Permit may be deficient because it may lack applicable requirements. Therefore, EPA is granting Petitioner's request to object to the Permit. The District must determine what requirements apply to the new process drain system and add any applicable requirements to the Permit as appropriate.

d. Management of Non-aqueous Benzene Waste Streams Pursuant to 40 C.F.R. Part 61, Subpart FF

Petitioner claims that EPA identified an incorrect applicability determination regarding benzene waste streams and NESHAP Subpart FF. Referencing previous EPA comments, Petitioner notes that the restriction contained in 40 C.F.R. § 61.342(e)(1) was ignored by the District in the applicability determination it conducted for the facility.

The Statement of Basis for the proposed Permit included an applicability determination for Valero's Sewer Pipeline and Process Drains, which stated the following:

> Valero complies with FF through 61.342(e)(2)(i), which allows the facility 6 Mg/yr of uncontrolled benzene waste. Thus, facilities are allowed to choose whether the benzene waste streams are controlled or uncontrolled as long as the uncontrolled stream quantities total less than 6 Mg/yr...Because the sewer and process drains are uncontrolled, they are not subject to 61.346, the standards for individual drain systems.

In its October 8, 2004 letter, EPA raised concerns over this applicability determination due to the District's failure to discuss the control requirements in 40 C.F.R. § 61.342(e)(1). Under the chosen compliance option, only wastes that have an average water content of 10% or greater may go uncontrolled (*see* 40 C.F.R. § 61.342(e)(2)) and it was not clear from the applicability determination that the emission sources met this requirement. In response to EPA's request for more information on this matter, the BAAQMD stated in its February 15, 2005 letter, "In the Revision 2 process, the District will determine which waste streams at the refineries are non-aqueous benzene waste streams. Section 61.342(e)(1) will be added to the source-specific tables for any source handling such waste. The District has sent letters to the refineries requesting the necessary information."

The District's response indicates that the Permit may be deficient because it may lack an applicable requirement, specifically Section 61.342(e)(1). Therefore, EPA is granting Petitioner's request to object to the Permit. The District must reopen the Permit to add Section

61.342(e)(1) to the source-specific tables for all sources that handle non-aqueous benzene waste streams or explain in the Statement of Basis why Section 61.342(e)(1) does not apply.

e. 40 C.F.R. Part 61, Subpart FF - 6BQ Compliance Option

Referencing EPA's October 8, 2004 letter, Petitioner claims that EPA identified an incorrect applicability determination regarding the 6BQ compliance option for benzene waste streams under 40 C.F.R. § 61.342(e). Petitioner claims that this should have resulted in an objection by EPA.

The EPA comment referenced by Petitioner is issue #12 in Attachment 2 of the Agency's October 8, 2004 letter to the BAAQMD. In that portion of its letter, EPA identified incorrect statements regarding the wastes that are subject to the 6 Mg/yr limit under 40 C.F.R. § 61.342(e)(2)(i). Specifically, the District stated that facilities are allowed to choose whether the benzene waste streams are controlled or uncontrolled as long as the uncontrolled stream quantities total less than 6 Mg/yr. In actuality, the 6 Mg/yr limit applies to all aqueous benzene wastes (both controlled and uncontrolled).

The fundamental issues raised by the EPA October 8, 2004 Letter were 1) whether or not the refineries are in compliance with the requirements of the benzene waste operations NESHAP, and 2) the need to remove the incorrect language from the Statement of Basis. The first issue is a matter of enforcement and does not necessarily reflect a flaw in the Permit. Absent information indicating that the refinery is actually out of compliance with the NESHAP, there is no basis for an objection by EPA. The second issue has already been corrected by the District. In response to EPA's comment, the District revised the Statement of Basis to state that the 6 Mg/yr limit applies to the benzene quantity in the total aqueous waste stream. *See* December 16, 2004 Statement of Basis at 26. Therefore, EPA is denying Petitioner's request to object to the Permit. However, in responding to this Petition, EPA identified additional incorrect language in the Permit. Specifically, Table VII-Refinery states, "Uncontrolled benzene <6 megagrams/year." *See* Permit at 476. As discussed above, this is clearly inconsistent with 40 C.F.R. § 61.342(e)(2). In addition, Table IV-Refinery contains a similar entry that states, "Standards: General; [Uncontrolled] 61.342(e)(2) Waste shall not contain more than 6.0 Mg/yr benzene." *See* Permit at 51. As a result, under a separate process, EPA is reopening the Permit pursuant to its authority under 40 C.F.R. § 70.7(g) to require that the District fix this incorrect language.

f. Parametric Monitoring for Electrostatic Precipitators

Petitioner claims EPA found that the Permit contains deficient particulate monitoring for sources that are abated by electrostatic precipitators (ESPs) and that are subject to limits under SIP-approved District Regulations 6-310 and 6-311. Petitioner requests that EPA object to the Permit to require appropriate monitoring.

BAAQMD Regulation 6-310 limits particulate matter emissions to 0.15 grains per dry

standard cubic foot, and Regulation 6-311 contains a variable limit based on a source's process weight rate. Because Regulation 6 does not contain monitoring provisions, the District relied on its periodic monitoring authority to impose monitoring requirements on sources S-5, S-6, and S-10 to ensure compliance with these standards. See 40 C.F.R. § 70.6(a)(3)(i)(B); BAAQMD Reg. 6-503; BAAQMD Manual of Procedures, Vol. III, Section 4.6. For sources S-5 and S-6, the Permit requires annual source tests for both emission limits. For S-10, the Permit requires an annual source test to demonstrate compliance with Regulation 6-310 but no monitoring is required for Regulation 6-311.

With regard to monitoring for Regulation 6-311 for source S-10, the Permit is inconsistent with the Statement of Basis. The final Statement of Basis indicates that Condition 19466, Part 9 should read, "The Permit Holder shall perform an annual source test on Sources S-5, S-6, S-8, S-10, S-11, S-12, S-176, S-232, S-233 and S-237 to demonstrate compliance with Regulation 6-311 (PM mass emissions rate not to exceed 4.10P0.67 lb/hr)." *See* December 16, 2004 Statement of Basis at 84. However, Part 9 of Condition 19466 in the Permit states that the monitoring requirement only applies to S-5 and S-6. December 16, 2004 Permit at 464. In addition, Table VII-B1 states that monitoring is not required. Therefore, EPA is granting Petitioner's request to object to the Permit as it pertains to monitoring S-10 for compliance with Regulation 6-311. The District must reopen the Permit to add monitoring requirements adequate to assure compliance with the emission limit or explain in the Statement of Basis why it is not needed.

Regarding the annual source tests for sources S-5, S-6, and S-10, EPA believes that an annual testing requirement is inadequate in the absence of additional parametric monitoring because proper operation and maintenance of the ESPs is necessary in order to achieve compliance with the emission limits. In the BAAQMD February 15, 2005 Letter, the District stated that it intends to "propose a permit condition requiring the operator to conduct an initial compliance demonstration that will establish a correlation between opacity and particulate emissions." Thus, EPA concludes the Permit does not meet the Part 70 standard that it contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance. *See* 40 C.F.R. § 70.6(a)(3)(i)(B). Therefore, EPA is granting Petitioner's request to object to the Permit. At a minimum, the Permit must contain monitoring which yields data that are representative of the source's compliance with its permit terms and conditions.

3. Attachment 3 of EPA's October 8, 2004 Letter

Attachment 3 of EPA's October 8, 2004 Letter memorialized the District's agreement to address two issues related to the Valero Permit. One issue pertains to applicability determinations for support facilities. EPA does not have adequate information demonstrating that the Valero facility has support facilities, nor has Petitioner provided any such information. EPA therefore finds no basis to object to the Permit and denies the Petition as to this issue.

The second issue pertains to the removal of a permit shield from BAAQMD Regulation 8-2. EPA has reviewed the most recent version of the Permit and determined that the shield was removed. Therefore, EPA is denying Petitioner's request to object to the permit as this issue is moot.

B Permit Application

Applicable Requirements

Petitioner alleges that EPA must object to the Permit because it contains unresolved applicability determinations due to "deficiencies in the application and permit process" as identified in Attachment 2 to EPA's October 8, 2004 letter to the District.

During EPA's review of the Permit, BAAQMD asserted that, notwithstanding any alleged deficiencies in the application and permit process, the Permit sufficiently addressed these items or the requirements were not applicable. EPA requested that the District review some of the determinations of adequacy and non-applicability that it had already made. EPA believes that this process has resulted in improved applicability determinations. Petitioners have failed to demonstrate that such a generalized allegation of "deficiencies in the application and permit process" actually resulted in or may have resulted in a flaw in the Permit. Therefore, EPA denies the Petition on this basis.

2. Identification of Insignificant Sources

Petitioner contends that the permit application failed to list insignificant sources, resulting in a "lack of information ... [that] inhibits meaningful public review of the Title V permit." Petitioner further contends that, contrary to District permit regulations, the application failed to include a list of all emission units, including exempt and insignificant sources and activities, and failed to include emissions calculations for each significant source or activity. Petitioner lastly alleges that the application lacked an emissions inventory for sources not in operation during 1993.

Under Part 70, applications may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate a required fee amount. 40 C.F.R. § 70.5(c). Emission calculations in support of the above information are required. 40 C.F.R. § 70.5(c)(3)(viii). An application must also include a list of insignificant activities that are exempted because of size or production rate. 40 C.F.R. § 70.5(c).

District Regulation 2-6-405.4 requires applications for title V permits to identify and describe "each permitted source at the facility" and "each source or other activity that is exempt from the requirement to obtain a permit . . ." EPA's Part 70 regulations, which prescribe the minimum elements for approvable state title V programs, require that applications include a list of insignificant sources that are exempted on the basis of size or production rate. 40 C.F.R.

§ 70.5(c). EPA's regulations have no specific requirement for the submission of emission calculations to demonstrate why an insignificant source was included in the list.

Petitioner makes no claim that the Permit inappropriately exempts insignificant sources from any applicable requirements or that the Permit omits any applicable requirements. Similarly, Petitioner makes no claim that the inclusion of emission calculations in the application would have resulted in a different permit. Because Petitioner failed to demonstrate that the alleged flaw in the permitting process resulted in, or may have resulted in, a deficiency in the permit, EPA is denying the Petition on this ground.

EPA also denies Petitioner's claim because Petitioner fails to substantiate its generalized contention that the Permit is flawed. The Statement of Basis unambiguously explains that Section III of the Permit, *Generally Applicable Requirements*, applies to all sources at the facility, including insignificant sources:

> This section of the permit lists requirements that generally apply to all sources at a facility including insignificant sources and portable equipment that may not require a District permit....[S]tandards that apply to insignificant or unpermitted sources at a facility(e.g., refrigeration units that use more than 50 pounds of an ozone-depleting compound), are placed in this section.

Thus, all insignificant sources subject to applicable requirements are properly covered by the Permit.

Petitioner also fails to explain how meaningful public review of the Permit was "inhibited" by the alleged lack of a list of insignificant sources from the permit application.[4] We find no permit deficiency otherwise related to missing insignificant source information in the Permit application.

In addition, Petitioner fails to point to any defect in the Permit as a consequence of any missing significant emissions calculations in the permit application. The Statement of Basis for Section IV of the Permit states, "This section of the Permit lists the applicable requirements that apply to permitted or significant sources." Therefore, all significant sources and activities are properly covered by the Permit.

With respect to a missing emissions inventory for sources not in operation during 1993, Petitioner again fails to point to any resultant flaw in the Permit. These sources are appropriately addressed in the Permit.

For the foregoing reasons, EPA is denying the Petition on these issues

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[4] In another part of the Petition, addressed below, Petitioner argues that the District's delay in providing requested information violated the District's public participation procedures approved to meet 40 C.F.R. § 70.7.

3. Identification of Non-Compliance

Petitioner argues that the District should have compelled the refinery to identify non-compliance in the application and provide supplemental information regarding non-compliance during the application process prior to issuance of the final permit on December 1, 2003. In support, Petitioner cites the section of its Petition (III.D.) alleging that the refinery failed to properly update its compliance certification.

Title V regulations do not require an applicant to supplement its application with information regarding non-compliance,[5] unless the applicant has knowledge of an incorrect application or of information missing from an application. Pursuant to 40 C.F.R. § 70.5(c)(8)(i) and (iii)(C), a standard application form for a title V permit must contain, *inter alia*, a compliance plan that describes the compliance status of each source with respect to all applicable requirements and a schedule of compliance for sources that are not in compliance with all applicable requirements at the time the permit issues. Section 70.5(b), *Duty to supplement or correct application*, provides that any applicant who fails to submit any relevant facts, or who has submitted incorrect information, in a permit application, shall, upon becoming aware of such failure or incorrect submission, promptly submit such supplemental or corrected information. In addition, Section 70.5(c)(5) requires the application to include "[o]ther specific information that may be necessary to implement and enforce other applicable requirements ... or to determine the applicability of such requirements."

Petitioner does not show that the refinery had failed to submit any relevant facts, or had submitted incorrect information, in its 1996 initial permit application. Consequently, the duty to supplement or correct the permit application described at 40 C.F.R. § 70.5(b) has not been triggered in this case.

Moreover, EPA disagrees that the requirement of 40 C.F.R. § 70.5(c)(5) requires the refinery to update compliance information in this case. The District is apprised of all new information arising after submittal of the initial application – such as NOVs, episodes and complaints – that may bear on the implementation, enforcement and/or applicability of applicable requirements. In fact, the District has an inspector assigned to the plant to assess compliance at least on a weekly basis. Therefore, it is not necessary to update the application with such information, as it is already in the possession of the District. Petitioner has failed to demonstrate that the alleged failure to update compliance information in the application resulted in, or may have resulted in, a deficiency in the Permit. For the foregoing reasons, EPA denies the Petition on this issue.

C. Assurance of Compliance with All Applicable Requirements Pursuant to the Act, Part 70 and BAAQMD Regulations

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[5] As discussed *infra*, title V regulations also do not require permit applicants to update their compliance certifications pending permit issuance.

1 Compliance Schedule

In essence, Petitioner claims that the District's consideration of the facility's compliance history during the title V permitting process was flawed because the District decided not to include a compliance schedule in the Permit despite a number of NOVs and other indications, in Petitioner's view, of compliance problems, and the District did not explain why a compliance schedule is not necessary. Specifically, Petitioner alleges that EPA must object to the Permit because the "District ignored evidence of recurring or ongoing compliance problems at the facility, instead relying on limited review of outdated records, to conclude that a compliance schedule is unnecessary." Petition at 11-19. Petitioner further alleges that a compliance schedule is necessary to address NOVs issued to the plant (including many that are still pending)[6], one-time episodes[7] reported by the plant, recurring violations and episodes at certain emission units, complaints filed with the District, and the lack of evidence that the violations have been resolved. The relief sought by Petitioner is for the District to include "a compliance schedule in the Permit, or explain why one was not necessary." *Id.* Petitioner additionally charges that, due to the facility's poor compliance history, additional monitoring, recordkeeping and reporting requirements are warranted to assure compliance with all applicable requirements. *Id.*

Section 70.6(c)(3) requires title V permits to include a schedule of compliance consistent with Section 70.5(c)(8). Section 70.5(c)(8) prescribes the requirements for compliance schedules to be submitted as part of a permit application. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance." 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule should "resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." *Id.*

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims that the District improperly considered the facility's compliance history, EPA considers whether a Petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. See CAA § 505(b)(2) (requiring an objection "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act...."). In Petitioner's view, the deficiency that resulted here is the lack of a compliance schedule. For the reasons explained below, EPA grants

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[6]BAAQMD Regulation 1:401 provides for the issuance of NOVs: "Violation Notice: A notice of violation or citation shall be issued by the District for all violations of District regulations and shall be delivered to persons alleged to be in violation of District regulations. The notice shall identify the nature of the violation, the rule or regulation violated, and the date or dates on which said violation occurred."

[7]According to BAAQMD, "episodes" are "reportable events, but are not necessarily violations." Letter from Adan Schwartz, Senior Assistant Counsel, BAAQMD to Gerardo Rios, EPA Region IX, dated January 31, 2005.

the Petition to require the District to address in the Permit's Statement of Basis the NOVs that the District has issued to the facility and, in particular, NOVs that have not been resolved because they may evidence noncompliance at the time of permit issuance. EPA denies the Petition as to Petitioner's other compliance schedule issues.

a. Notices of Violation

In connection with its claim that the Permit is deficient because it lacks a compliance schedule, Petitioner states that the District issued 85 NOVs to Valero between 2001 and 2004 and 51 NOVs in 2003 and 2004. Petitioner highlights that, as of October 22, 2004, all 51 NOVs issued in 2003 and 2004 were unresolved and still "pending." Petition at 14-15. To support its claims, Petitioner attached to the Petition various District compliance reports and summaries, including a list of NOVs issued between January 1, 2003 and October 1, 2004. Thus, Petitioner essentially claims that the District's consideration of these NOVs during the title V permitting process was flawed, because the District did not include a compliance schedule in the Permit and did not explain why a compliance schedule is not necessary.

As noted above, EPA's Part 70 regulations require a compliance schedule for "applicable requirements for sources that are not in compliance with those requirements at the time of permit issuance." 40 C.F.R. §§ 70.6(c)(3), 70.5(c)(8)(iii)(C). Consistent with these requirements, EPA has stated that a compliance schedule is not necessary if a violation is intermittent, not on-going, and has been corrected before the permit is issued. *See In the Matter of New York Organic Fertilizer Company*, Petition Number II-2002-12 at 47-49 (May 24, 2004). EPA has also stated that the permitting authority has discretion not to include in the permit a compliance schedule where there is a pending enforcement action that is expected to result in a compliance schedule (i.e., through a consent order or court adjudication) for which the permit will be eventually reopened. *See In the Matter of Huntley Generating Station*, Petition Number II-2002-01, at 4-5 (July 31, 2003); *see also In the Matter of Dunkirk Power, LLC*, Petition Number II-2002-02, at 4-5 (July 31, 2003).[8]

Using the District's own enforcement records, Petitioner has demonstrated that approximately 50 NOVs were pending before the District at the time it proposed the revised Permit. The District's most recent statements, as of January 2005, do not dispute this fact.[9] The

[8] These orders considered whether a compliance schedule was necessary to address (i) opacity violations for which the source had included a compliance schedule with its application, and (ii) PSD violations that the source contested and was litigating in federal district court. As to the uncontested opacity violations, EPA required the permitting authority to reopen the permits to either incorporate a compliance schedule or explain that a compliance schedule was not necessary because the facility was in compliance. As to the contested PSD violations, EPA found that "[i]t is entirely appropriate for the [state] enforcement process to take its course" and for a compliance schedule to be included only after the adjudication has been resolved.

[9] As stated in a letter from Adan Schwartz, Senior Assistant Counsel, BAAQMD, to Gerardo Rios, Air Division, U.S. EPA Region 9, dated January 31, 2005, "The District is following up on each NOV to achieve an appropriate resolution, which will likely entail payment of a civil penalty." EPA provided a copy of this letter to

permitting record shows that the District issued the initial Permit on December 1, 2003 and the revised Permit on December 16, 2004. According to the District, the facility did not have noncompliance issues at the time it issued the initial and revised permits. The permitting record contains the following statements:

- July 2003 Statement of Basis,"Compliance Schedule" section: "The BAAQMD Compliance and Enforcement Division has conducted a review of compliance over the past year and has no records of compliance problems at this facility." July 2003 Statement of Basis at 12.

  July 2003 Statement of Basis, "Compliance Status" section: "The Compliance and Enforcement Division has prepared an Annual Compliance Report for 2001. . . The information contained in the compliance report has been evaluated during the preparation of the Statement of Basis for the proposed major Facility Review permit. The main purpose of this evaluation is to identify ongoing or recurring problems that should be subject to a schedule of compliance. No such problems have been identified." July 2003 Statement of Basis at 35. This section also noted that the District issued eight NOVs to the refinery in 2001, but did not discuss any NOVs issued to the refinery in 2002 or the first half of 2003. EPA notes that there appear to have been approximately 36 NOVs issued during that time, each of which is identified as pending in the documentation provided by Petitioner.

  December 16, 2004 Statement of Basis: "The facility is not currently in violation of any requirement. Moreover, the District has updated its review of recent violations and has not found a pattern of violations that would warrant imposition of a compliance schedule." December 2004 Statement of Basis at 34.

  2003 Response to Comments ("RTC") (from Golden Gate University): "The District's review of recent NOV's failed to reveal any evidence of current ongoing or recurring noncompliance that would warrant a compliance schedule." 2003 RTC (GGU) at 1.

EPA finds that the District's statements at the time it issued the initial and revised Permits do not provide a meaningful explanation for the lack of a compliance schedule in the Permit. Using the District's own enforcement records, Petitioner has demonstrated that there were approximately 50 unresolved NOVs at the time the revised Permit was issued in December 2004. The District's statements in the permitting record, however, create the impression that no NOVs were pending at that time. Although the District acknowledges that there have been "recent violations," the District fails to address the fact that it had issued a significant number of NOVs to the facility and that many of the issued NOVs were still pending. Moreover, the District provides only a conclusory statement that there are no ongoing or recurring problems that

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Petitioner on February 23, 2005

could be addressed with a compliance schedule and offers no explanation for this determination. The District's statements give no indication that it actually reviewed the circumstances underlying recently issued NOVs to determine whether a compliance schedule was necessary. The District's mostly generic statements as to the refinery's compliance status are not adequate to support the District's decision that no compliance schedule was necessary in light of the NOVs.[10]

Because the District failed to include an adequate discussion in the permitting record regarding NOVs issued to the refinery, and, in particular, those that were pending at the time the Permit was issued, and an explanation as to why a compliance schedule is not required, EPA finds that Petitioner has demonstrated that the District's consideration of the NOVs during the title V permitting process may have resulted in a deficiency in the Permit. Therefore, EPA is granting the Petition to require the District to either incorporate a compliance schedule in the Permit or to provide a more complete explanation for its decision not to do so.

When the District reopens the Permit, it may consider EPA's previous orders in the Huntley, Dunkirk, and New York Organic Fertilizer matters to make a reasonable determination that no compliance schedule is necessary because (i) the facility has returned to compliance; (ii) the violations were intermittent, did not evidence on-going non-compliance, and the source was in compliance at the time of permit issuance; or (iii) the District has opted to pursue the matter through an enforcement mechanism and will reopen the permit upon a consent agreement or court adjudication of the noncompliance issues. Consistent with previous EPA orders, the District must also ensure that the permit shield will not serve as a bar or defense to any pending enforcement action.[11] *See Huntley* and *Dunkirk* Orders at 5.

b Episodes

Petitioner also cites the number of "episodes" at the plant in the years 2003 and 2004 as a basis for requiring a compliance schedule. Episodes are events reported by the refinery of equipment breakdown, emission excesses, inoperative monitors, pressure relief valve venting, or other facility failures. Petition at 15, n. 21. According to the District, "[e]pisodes are reportable events, but are not necessarily violations. The District reviews each reported episode. For those that represent a violation, an NOV is issued." Letter from Adan Schwartz, Senior Assistant Counsel, BAAQMD to Gerardo Rios, EPA Region IX, dated January 31, 2005. The summary chart entitled "BAAQMD Episodes" attached to the Petition shows that the District specifically

[10] In contrast, EPA notes that the state permitting authority in the Huntley and Dunkirk Orders provided a thorough record as to the existence and circumstances regarding the pending NOVs by describing them in detail in the permits and acknowledging the enforcement issues in the public notices for the permits. Huntley at 6, Dunkirk at 6. In addition, EPA found that the permits contained "sufficient safeguards" to ensure that the permit shields would not preclude appropriate enforcement actions. *Id.*

[11] After reviewing the permit shield in the Permit, EPA finds nothing in it that could serve as a defense to enforcement of the pending NOVs. The District, however, should still independently perform this review when it reopens the Permit.

records for each episode, under the heading "Status," its determination for each episode: (i) no action; (ii) NOV issued; (iii) pending; and (iv) void. This document supports the District's statement that it reviews each episode to see whether it warrants an NOV. Because not every episode is evidence of noncompliance, the number of episodes is not a compelling basis for determining whether a compliance schedule is necessary. Moreover, Petitioner did not provide additional facts, other than the summary chart, to demonstrate that any reported episodes are violations. EPA therefore finds that Petitioner has not demonstrated that the District's consideration of the various episodes may have resulted in a deficiency in the Permit, and EPA denies the Petition as to this issue.

c. Repeat Violations and Episodes at Particular Units

Petitioner claims that certain units at the plant are responsible for multiple episodes and violations, "possibly revealing serious ongoing or recurring compliance issues." Petition at 16. The Petition then cites, as evidence, the existence of 16 episodes and 8 NOVs for the FCCU Catalytic Regenerator (S-5), 9 episodes and 4 NOVs for a hot furnace (S-220), 9 episodes and 7 NOVs for the Heat Recovery Steam Generator (S-1031), and 3 episodes and 2 NOVs for the South Flare (S-18).

A close examination of the BAAQMD Episodes chart relied upon by Petitioner, however, reveals that the failures identified for these episodes and NOVs are actually quite distinct from one another, often covering different components and regulatory requirements. This fact makes sense as emission and process units at refineries tend to be very complex with multiple components and multiple applicable requirements. When determining whether a compliance schedule is necessary for ongoing violations at a particular emission unit based on multiple NOVs issued for that unit, it would be reasonable for a permitting authority to consider whether the violations pertain to the same component of the emission unit, the cause of the violations is the same, and the cause has not been remedied through the District's enforcement actions. Again, Petitioner has failed to demonstrate that the District's consideration of the various repeat episodes and alleged violations may have resulted in a deficiency in the Permit. EPA therefore denies the Petition as to this issue.

d. Complaints

Petitioner contends that the "numerous complaints" received by the District between 2001 and 2004 also lay a basis for the need for a compliance schedule. These complaints were generally for odor, smoke or other concerns. As with the episodes discussed above, the mere existence of a complaint does not evidence a regulatory violation. Moreover, where the District has verified certain complaints, it has issued an NOV to address public nuisance issues. As such, even though complaints may indicate problems that need additional investigation, they do not necessarily lay the basis for a compliance schedule. Because Petitioner has not demonstrated that the complaints received by the District may have resulted in a deficiency in the Permit, EPA denies the Petition as to this issue.

e. Allegation that Problems are not Resolved

Petitioner proposes three "potential solutions to ensure compliance:" (1) the District should address recurring compliance at specific emission units, namely S-5, S-220 and S-1030, (2) the District should impose additional maintenance or installation of monitoring equipment, or new monitoring methods to address the 30 episodes involving inoperative monitors; and (3) the District should impose additional operational and maintenance requirements to address recurring problems since the source is not operating in compliance with the NSPS requirement to maintain and operate the facility in a manner consistent with good air pollution control practice for minimizing emissions. Petition at 18-19.

In regard to Petitioner's first claim for relief, EPA has already explained that Petitioner has not demonstrated that the District's consideration of the various 'recurring' violations for particular emission units may have resulted in a deficient permit or justifies the imposition of a compliance schedule. In regard to the second claim for relief, the 30 episodes cited by Petitioner are for different monitors, and spread over a multi-year period. As long as the District seeks prompt corrective action upon becoming aware of inoperative monitors, EPA does not see this as a basis for additional maintenance and monitoring requirements for the monitors. Moreover, EPA could only require additional monitoring requirements to the extent that the underlying SIP or some other applicable requirement does not already require monitoring. *See* 40 C.F.R. § 70.6(a)(3)(i)(B). Lastly, in response to Petitioner's third claim for relief seeking imposition of additional operation and maintenance requirements due to an alleged violation of the "good air pollution control practice" requirements of the NSPS, EPA believes that such an allegation of noncompliance is too speculative to warrant a compliance schedule without further investigation. As such, EPA finds that Petitioner has not demonstrated that the District's failure to include any of the permit requirements Petitioner requests here resulted in, or may have resulted in, a deficient permit, and EPA denies the Petition on this ground.

2. Non-Compliance Issues Raised by Public Comments

Petitioner claims that since the District failed to resolve New Source Review ("NSR")[12] compliance issues, EPA should object to the issuance of the Permit and require either a compliance schedule or an explanation that one is not necessary. Petition at 21. Petitioner claims to have identified four potential NSR violations at the refinery, as follows: (i) an apparent substantial rebuild of the fluid catalytic cracking unit ("FCCU") regenerator (S-5) without NSR review,[13] based on information that large, heavy components of the FCCU were recently

[12] "NSR" is used in this section to include both the nonattainment area New Source Review permit program and the attainment area Prevention of Significant Deterioration ("PSD") permit program.

[13] Petitioner also alleges that S-5 went through a rebuild without imposition of emission limitations and other requirements of 40 C.F.R. § 63 Subpart UUU. EPA notes that the requirements of Subpart UUU are included in the Permit with a future effective date of April 11, 2005. Permit at 80.

replaced; (ii) apparent emissions increases at two boiler units (S-3 and S-4) beyond the NSR significance level for modified sources of NOx, based on the District's emissions inventory indicating dramatic increases in NOx emissions between 1993 and 2001; and (iii) an apparent significant increase in SO_2 emissions at a coker burner (S-6), based on the District's emissions inventory indicating a dramatic increase in SO_2 emissions in 2001 over the highest emission rate during 1993 to 2000.[14] Petition at 20.

All sources subject to title V must have a permit to operate that assures compliance by the source with all applicable requirements. *See* 40 C.F.R. § 70.1(b); CAA §§ 502(a), 504(a). Such applicable requirements include the requirement to obtain NSR permits that comply with applicable NSR requirements under the Act, EPA regulations, and state implementation plans. *See generally* CAA §§ 110(a)(2)(C), 160-69, 172(c)(5), and 173; 40 C.F.R. §§ 51.160-66 and 52.21. NSR requirements include the application of the best available control technology ("BACT") to a new or modified source that results in emissions of a regulated pollutant above certain legally-specified amounts.[15]

Based on the information provided by Petitioner, Petitioner has failed to demonstrate that NSR permitting and BACT requirements have been triggered at the FCCU catalytic regenerator S-5, boilers S-3 or S-4, or coke burner S-6. With regard to the FCCU catalytic regenerator, Petitioner's only evidence in support of its claim is (i) an April 8, 1999, Energy Information Administration press release that states that the refinery announced the shutdown of its FCCU on March 19, 1999, and announced the restarting of the FCCU on April 1, 1999;[16] and (ii) information posted at the Web site of Surface Consultants, Inc., stating that "several large, heavy components on [the FCCU] needed replacement." *See* Petition, Exhibit A. Petitioner offers no evidence regarding the nature of these activities, whether the activities constitute a new or modified source under the NSR rules, or whether refinery emissions were in any way affected

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[14] Petitioner also takes issue with the District's position that "the [NSR] preconstruction review rules themselves are not applicable requirements, for purposes of Title V." (Petition, at 21; December 2003 Consolidated Response to Comments ("CRTC") at 6-7). Applicable requirements are defined in the District's Regulation 2-6-202 as "[a]ir quality requirements with which a facility must comply pursuant to the District's regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 C.F.R. § 70.2." Applicable requirements are defined in 40 C.F.R. § 70.2 to include "any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act...." Since the District's NSR rules are part of its implementation plan, the NSR rules themselves are applicable requirements for purposes of title V. Since this point has little relevance to the matter at hand (i.e., whether in this case the NSR rules apply to a particular new or modified source at the refinery), EPA views the District's position as *obiter dictum*.

[15] The Act distinguishes between the requirement to apply BACT, which is part of the PSD permit program for attainment areas, and the requirement to apply the lowest achievable emission rate ("LAER"), which is part of the NSR permit program for nonattainment areas. In this case, however, the District's NSR rules use the term "BACT" to signify "LAER."

[16] This press release is available on the Internet at http://www.eia.doe.gov/neic/press/press123.html (last viewed on February 1, 2005).

by these activities

With regard to the two boilers and the coke burner, Petitioner's only evidence in support of its claims are apparent "dramatic" increases in each of these unit's emissions inventory. However, as the District correctly notes:

> "...the principal purpose of the inventory is planning; the precision needed for this purpose is fairly coarse. The inventory emissions are based, in almost all cases, on *assumed* emission factors, and *reported* throughputs. An increase in emissions from one year to the next as reflected in the inventory may be an indication that reported throughput has increased, however it does not automatically follow that the source has been modified. Unless the throughput exceeds permit limits, the increase usually represents use of previously unused, but authorized, capacity. An increase in reported throughput amount could be taken as an indication that further investigation is appropriate to determine whether a modification has occurred. However, the District would not conclude that a modification has occurred simply because reported throughput has increased,"

December 1, 2003 Consolidated Response to Comments ("2003 CRTC"), at 22. Moreover, Petitioner does not claim to have sufficient evidence to establish that these units are subject to NSR permitting and the application of BACT. The essence of Petitioner's objection is the need for the District to "determine whether the sources underwent a physical change or change in the method of operation that increased emissions, which would trigger NSR." Petition at 20. Not only is Petitioner unable to establish that these units triggered NSR requirements, Petitioner is not even alleging that NSR requirements have in fact been triggered. Petitioner is merely requesting that the District make an NSR applicability determination based on Petitioner's "well-documented *concerns* regarding *potential* non-compliance." Petition at 20 (*emphasis added*).

During the title V permitting process, EPA has also been pursuing similar types of claims in another forum. As part of its National Petroleum Refinery Initiative, EPA identified four of the Act's programs where non-compliance appeared widespread among petroleum refiners, including apparent major modifications to FCCUs and refinery heaters and boilers that resulted in significant increases in NOx and SO_2 emissions without complying with NSR requirements. However, based on the information provided by Petitioner, EPA is not prepared to conclude at this time that these units at the Valero refinery are out of compliance with NSR requirements. If EPA later determines that these units are in violation of NSR requirements, EPA may object to or reopen the title V permit to incorporate the applicable NSR requirements.[17]

Since Petitioner has failed to show that NSR requirements apply to these units, EPA finds

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[17] EPA notes that with respect to the specific claims of NSR violations raised by Petitioner in its comments, the District "intends to follow up with further investigation." December 1, 2003 CRTC, at 22. EPA encourages the District to do so, especially where, as in this case, the apparent changes in the emissions inventories are substantial.

that Petitioner has not met its burden of demonstrating a deficiency in the Permit. Therefore, the Petition is denied on this issue.

3. Intermittent and Continuous Compliance

Petitioner contends that EPA must object to the Permit because the District has interpreted the Act to require only intermittent rather than continuous compliance. Petition at 21-22. Petitioner contends that the District has a "fundamentally flawed philosophy." Petitioner points to a statement made by the District in its Response to Public Comments, dated December 1, 2003, that "[c]ompliance by the refineries with all District and federal air regulations will not be continuous." Petitioner contends that the District "expects only intermittent compliance" and that the District's belief "that it need only assure 'reasonable intermittent' compliance" means that it failed to see the need for a compliance plan in the Permit.

EPA disagrees with Petitioner's suggestion that the District's view of intermittent compliance has impaired its ability to properly implement the title V program. As stated above, EPA has not concluded that a compliance plan is necessary to address the instances of non-compliance at this Facility. Moreover, the Agency disagrees with Petitioner's interpretations of the District's comments on the issue. For instance, EPA finds nothing in the record stating that the District's view of the Permit, as a legal matter, is that it need assure only intermittent compliance. Rather, a fairer reading of the District's view is that, realistically, intermittent non-compliance can be expected. As the District stated:

> The District cannot rule out that instances of non-compliance will occur. Indeed at a refinery, at least occasional events of non-compliance can be predicted with a high degree of certainty. . . . Compliance by the refineries with all District and federal air regulations will not be continuous. However, the District believes the compliance record at this [Shell] and other refineries is well within a range to predict reasonable intermittent compliance. December 1, 2003 RTC at 15.

The District's view appears to be based on experience and the practical reality that complex sources with thousands of emission points which are subject to hundreds of local and federal requirements will find themselves out of compliance, not necessarily because their permits are inadequate but because of the limits of technology and other factors. Even a source with a perfectly-drafted permit – one that requires state of the art monitoring, scrupulous recordkeeping, and regular reporting to regulatory agencies – may find itself out of compliance, not because the permit is deficient, but because of the limitations of technology and other factors.

EPA also believes that, far from sanctioning intermittent compliance, as Petitioner suggests, *see* Petition at 22, n. 36, the District appears committed to address it through enforcement of the Permit, when appropriate: "when non-compliance occurs, the Title V permit will enhance the ability to detect and enforce against those occurrences." *Id.* Although the District may realistically expect instances of non-compliance, it does not necessarily excuse

them. Non-compliance may still constitute a violation and may be subject to enforcement action

For the reasons stated above, EPA denies the Petition on this ground

4. Compliance Certifications

Initial compliance certifications must be made by all sources that apply for a title V permit at the time of the permit application. *See* 40 C.F.R. § 70.5(c)(9). The Part 70 regulations do not require applicants to update their compliance certification pending issuance of the permit. Petitioner correctly points out that the District's Regulation 2-6-426 requires annual compliance certifications on "every anniversary of the application date" until the permit is issued. Petitioner claims that, other than a truncated update in 2003, the plant has failed to provide annual certifications between the initial permit application submittal in 1996 and issuance of the permit in December 2004. Petitioner believes that "defects in the compliance certification procedure have resulted in deficiencies in the Permit." Petition at 24.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, including compliance certifications, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 C.F.R. § 70.8(c)(1); *See also In the Matter of New York Organic Fertilizer Company*, Petition No. II-2002-12 (May 24, 2004), at 9. Petitioner assumes, in making its argument, that the District needs these compliance certifications to adequately review compliance for the facility. This is not necessarily true. Sources often certify compliance based upon information that has already been presented to a permitting authority or based upon NOVs or other compliance documents received from a permitting authority. The requirement for the plant to submit episode and other reports means that the District should be privy to all of the information available to the source pertaining to compliance, regardless of whether compliance certifications have been submitted annually. Finally, the District has a dedicated employee assigned as an inspector to the plant who visits the plant weekly and sometimes daily. In this particular instance, the compliance certification would likely not add much to the District's knowledge about the compliance status of the plant. EPA believes that in this case, Petitioner has failed to demonstrate that the lack of a proper initial compliance certification, or the alleged failure to properly update that initial compliance certification, resulted in, or may have resulted in, a deficiency in the permit.

D. Statement of Basis

Petitioner alleges that the Statements of Basis for the Permit issued in December 2003 and for the revised Permit, as proposed in August 2004, are inadequate. Specifically, Petitioner alleges the following deficiencies:

Neither Statement of Basis contains detailed facility descriptions, including comprehensive process flow information;

- Neither Statement of Basis contains sufficient information to determine applicability of "certain requirements to specific sources." Petitioner specifically identifies exemptions from permitting requirements that BAAQMD allowed for tanks. Petitioner also references Attachments 2 and 3 to EPA's October 8, 2004 letter as support for its allegation that the Statements of Basis were deficient because they did not address applicability of 40 C.F.R. Part 63, Subpart CC to flares and BAAQMD Regulation 8-2 to hydrogen plant vents.

- Neither Statement of Basis addresses BAAQMD's compliance determinations

- The 2003 Statement of Basis was not made available on the District's Web site during the April 2004 public comment period and does not include information about permit revisions in March and August 2004

  The 2004 Statement of Basis does not discuss changes BAAQMD made to the Permit between the public comment period in August 2003 and the final version issued in December 2003, despite the District's request for public comment on such changes.

EPA's Part 70 regulations require permitting authorities, in connection with initiating a public comment period prior to issuance of a title V permit, to "provide a statement that sets forth the legal and factual basis for the draft permit conditions." 40 C.F.R. § 70.7(a)(5). EPA's regulations do not require that a statement of basis contain any specific elements; rather, permitting authorities have discretion regarding the contents of a statement of basis. EPA has recommended that statements of basis contain the following elements: (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. EPA Region V has also recommended the inclusion of the following: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. *See, Los Medanos*, at 10, n.16.

There is no legal requirement that a permitting authority include information such as a specific facility description and process flow diagrams in the Statement of Basis, and Petitioner has not shown how the lack of this information resulted in, or may have resulted in, a deficiency in the Permit. Thus, while a facility description and process flow diagrams might provide useful information, their absence from the Statement of Basis does not constitute grounds for objecting to the Permit.

EPA agrees, in part, that Petitioner has demonstrated the Permit is deficient because the

Statement of Basis does not explain exemptions for certain tanks. This issue is addressed more specifically in Section III.H.3.

EPA agrees with Petitioner's allegation that the Statement of Basis should have included a discussion regarding applicability of 40 C.F.R. Part 63, Subpart CC to flares and BAAQMD Regulation 8-2 to hydrogen plant vents. Applicability determinations are precisely the type of information that should be included in a Statement of Basis. This issue is addressed more specifically in Section III.H.1.

EPA addressed Petitioner's allegations relating to the sufficiency of the discussion in the Statement of Basis on the necessity of a compliance schedule in Section III.C.

EPA does not agree with Petitioner's allegations that the 2003 Statement of Basis was deficient because it was not available on the District's Web site during the 2004 public comment period or because it did not provide information about the 2004 reopening. First, EPA notes that the 2003 Statement of Basis has been available to the public on its own Web site since the initial permit was issued in December, 2003.[15] In addition, Petitioner has not established a legal basis to support its claim that this information is a required element for a Statement of Basis. Petitioner also concedes that the District provided a different Statement of Basis in connection with the 2004 reopening. Petitioner does not claim that the Permit is deficient as a result of any of these alleged issues regarding the Statement of Basis, therefore, EPA denies the Petition on this ground..

EPA does not agree with Petitioner's allegations that the 2004 Statement of Basis was deficient because it did not discuss any changes made between the draft permit available in August 2003 and the final Permit issued in December 2003. Petitioner has not established a legal basis to support its claim that this information is a required element for a Statement of Basis. Petitioner has not demonstrated that the Permit is deficient because the District did not provide this discussion in the 2004 Statement of Basis. Moreover, Petitioner could have obtained much of this information by reviewing the District's response to comments received during the 2003 public comment period, which was dated December 1, 2003. Therefore, EPA denies the Petition on this ground.

E Permit Shields

The District rules allow two types of permit shields. The permit shield types are defined as follows: (1) A provision in a title V permit explaining that specific federally enforceable regulations and standards do not apply to a source or group of sources, or (2) A provision in a title V permit explaining that specific federally enforceable applicable requirements for monitoring, recordkeeping and/or reporting are subsumed because other applicable requirements

[15] Title V permits and related documents are available through Region IX's Electronic Permit Submittal System at http://www.epa.gov/region09/air/permit/index.html

for monitoring, recordkeeping, and reporting in the permit will assure compliance with all emission limits. The District uses the second type of permit shield for all streamlining of monitoring, recordkeeping, and reporting requirements in title V permits. The District's Statement of Basis explains: "Compliance with the applicable requirement contained in the permit automatically results in compliance with any subsumed (= less stringent) requirement." See December 2003 Statement of Basis at 27.

40 C.F.R. §§ 60.7(c) and (d)

Petitioner alleges that the permit shield in Table IX B of the Permit (p669-670) improperly subsumes 40 C.F.R. §§ 60.7(c) and (d) under SIP-approved BAAQMD Regulation 1-522.8, and that the Statement of Basis does not sufficiently explain the basis for the shield. Petition at 28.

BAAQMD Regulation 1-522.8 requires that

> Monitoring data shall be submitted on a monthly basis in a format specified by the APCO. Reports shall be submitted within 30 days of the close of the month reported on.

Sections 60.7(c) and (d) require very specific reporting requirements that are not required by BAAQMD Regulation 1-522.8. For instance, § 60.7(c)(1) requires that excess emissions reports include the magnitude of excess emissions computed in accordance with § 60.13(h) and any conversion factors used. Section 60.7(d)(1) requires, that the report form contain, among other things, the duration of excess emissions due to startup/shutdown, control equipment problems, process problems, other known causes, and unknown causes and total duration of excess emissions.

The Statement of Basis for Valero contains the following justification for the shield

> 40 C.F.R. Part, 60 Subpart A CMS reporting requirements are satisfied by BAAQMD 1-522.8 CEMS reporting requirements. *See* December 2003 Statement of Basis at 31.

EPA agrees with Petitioner that the requirements of 40 C.F.R. §§ 60.7(c) and (d) are not satisfied by BAAQMD Regulation 1-522.8, and that the Statement of Basis does not provide adequate justification for subsuming §§ 60.7(c) and (d). An adequate justification should address *how* the requirements of a subsumed regulation are satisfied by another regulation, not simply that the requirements *are* satisfied by another regulation.

For the reasons set forth above, EPA is granting the Petition on these grounds. The District must reopen the Permit to include the reporting requirements of §§ 60.7(c) and (d) or adequately explain how they are appropriately subsumed.

2. BAAQMD Regulation 1-7

Petitioner also alleges that the District incorrectly attempted to subsume the State-only requirements of BAAQMD Regulation 1 1-7 for valves under the requirements of SIP approved BAAQMD Regulation 8-18-404, and states that only a federal requirement may be subsumed in the permit pursuant to BAAQMD Regulation 2-6-233.2. Petition at 29.

Including a permit shield for a subsumed non-federally enforceable regulation has no regulatory significance from a federal perspective because it is not related to whether the permit assures compliance with all Clean Air Act requirements. See 40 C.F.R. 70.2 (defining "applicable requirement"); 70.1(b) (requiring that title V sources have operating permits that assure compliance with all applicable requirements). State only requirements are not subject to the requirements of title V and, therefore, are not evaluated by EPA unless their terms may either impair the effectiveness of the title V permit or hinder a permitting authority's ability to implement or enforce the title V permit. *In the Matter of Eastman Kodak Company*, Petition No.: II-2003-02, at 37 (Feb. 18, 2005). Therefore, EPA is denying the Petition on this issue.

3. 40 C.F.R. § 60.482-7(g)

Petitioner alleges that a permit shield should not be allowed for federal regulation NSPS Subpart VV, § 60.482-7(g) based upon its being subsumed by SIP-approved BAAQMD Regulation 8-18-404 because the NSPS defines monitoring protocols for valves that are demonstrated to be unsafe to monitor, whereas Regulation 8-18-404 refers to an alternative inspection scheme for leak-free valves. Petitioner states "Because the BAAQMD regulation does not address the same issue as 40 C.F.R. § 60.482-7(g), it cannot subsume the federal requirement." Petition at 29.

EPA disagrees with Petitioner that the two regulations address different issues. Both regulations address alternative inspection time lines for valves. Regulation 8-18-404 specifically states:

> Alternative Inspection Schedule: The inspection frequency for valves may change from quarterly to annually provided all of the conditions in Subsection 404.1 and 404.2 are satisfied.
>
> > 404.1 The valve has been operated leak free for five consecutive quarters;
> > 404.2 Records are submitted and approval from the APCO is obtained.
> > 404.3 The valve remains leak free. If a leak is discovered, the inspection frequency will revert back to quarterly.

NSPS Subpart VV requires valves to be monitored monthly except, pursuant to § 60.482-7(g), any valve that is designated as unsafe to monitor must only be monitored as frequently as practicable during safe-to-monitor times. In explaining the basis for the shield, the Permit states:

[60.482-7(g)] Allows relief from monthly monitoring if designated as unsafe-to-monitor. BAAQMD Regulation 8-18-404 does not allow this relief. Permit at 644.

BAAQMD is correct that the Regulation 8-18-404 is more stringent than 40 C.F.R § 60.482-7(g). Therefore, EPA is denying the Petition on this issue.

F. Throughput Limits for Grandfathered Sources

Petitioner alleges that EPA should object to the Permit to the extent that throughput limits for grandfathered sources set thresholds below which sources are not required to submit all information necessary to determine whether "new or modified construction may have occurred." Petitioner also alleges that the thresholds are not "legally correct" and therefore are not reasonably accurate surrogates for a proper NSR baseline determination. Petitioner also argues that EPA should object to the Permit because the existence of the throughput limits, even as reporting thresholds, may create "an improper presumption of the correctness of the threshold" and discourage the District from investigating events that do not trigger the threshold or reduce penalties for NSR violations. Finally, Petitioner also requests that EPA object to the Permit because the District's reliance on non-SIP Regulation 2-1-234.1 "in deriving these throughput limits" is improper.

The District has established throughput limits on sources that have never gone through new source review ("grandfathered sources"). The Clean Air Act does not require permitting authorities to impose such requirements. Therefore, to understand the purpose of these limits, EPA is relying on the District's statements characterizing the reasons for, and legal implications of, these throughput limits. The District's December 2003 CRTC makes the following points regarding throughput limits:

- The throughput limits being established for grandfathered sources will be a useful tool that enhances compliance with NSR. . . Requiring facilities to report when throughput limits are exceeded should alert the District in a timely way to the possibility of a modification occurring.

  The limits now function merely as reporting thresholds rather than as presumptive NSR triggers.

  They do not create a baseline against which future increases might be measured ("NSR baseline"). Instead, they act as a presumptive indicator that the equipment has undergone an operational change (even in the absence of a physical change), because the equipment has been operated beyond designed or as-built capacity.

  The throughput limits do not establish baselines; furthermore, they do not contravene NSR requirements. The baseline for a modification is determined at the time of

permit review. The proposed limits do not preclude review of a physical modification for NSR implications.

- Throughput limits on grandfathered sources are not federally enforceable.

- The [permits] have been modified to clearly distinguish between limits imposed through NSR and limits imposed on grandfathered sources.

December 1, 2003 RTC at 31-33.

EPA believes the public comments and the District's responses have done much to describe and explain, in the public record, the purpose and legal significance of the District's throughput limits for grandfathered sources. Based on these interactions, EPA has the following responses to Petitioner's allegations.

First, EPA denies the Petition as to the allegation that the thresholds set levels below which the facility need not apply for NSR permits. As the District states, the thresholds do not preclude the imposition of federal NSR requirements. EPA does not see that the throughput limits would shield the source from any requirements to provide a timely and complete application if a construction project will trigger federal NSR requirements.

Second, the Permit itself makes clear that the throughput limits are not to be used for the purpose of establishing an NSR baseline: "Exceedance of this limit does not establish a presumption that a modification has occurred, nor does compliance with the limit establish a presumption that a modification has not occurred." Permit at 4. Therefore, EPA finds no basis to object to the Permit on the ground that the thresholds are not "reasonably accurate surrogates" for an actual NSR baseline, as they clearly and expressly have no legal significance for that purpose.

Third, while EPA shares Petitioner's interest in compliance with NSR requirements, Petitioner's concern that the thresholds might discourage reliance on appropriate NSR baselines to investigate and enforce possible NSR violations is speculative and cannot be the basis of an objection to the Permit.

Fourth, EPA finds that the District's reliance on BAAQMD Regulation 2-1-234.1, which is not SIP-approved, to impose these limits is appropriate. EPA's review of the Permit, however, found a statement suggesting that the District will rely on this non-SIP approved rule to determine whether an NSR modification has occurred. EPA takes this opportunity to remind the District that its NSR permits must meet the requirements of the federally-applicable SIP. *See* CAA 172, 173; 40 C.F.R. § 51. EPA finds no basis, however, to conclude that the Permit is deficient.

G. Monitoring

The lack of monitoring raises an issue as to consistency with the requirement that each permit contain monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit where the applicable requirement does not require periodic monitoring or testing. *See* 40 C.F.R. § 70.6(a)(3)(i)(B). EPA has recognized, however, that there may be limited cases in which the establishment of a regular program of monitoring or recordkeeping would not significantly enhance the ability of the permit to assure compliance with an applicable requirement and where the status quo (i.e., no monitoring or recordkeeping) could meet the requirements of 40 C.F.R. § 70.6(a)(3). *See, Los Medanos*, at 16. EPA's consideration of these issues and determinations as to the adequacy of monitoring follow.

l 40 C.F.R. Part 60, Subpart J (NSPS for Petroleum Refineries)

Petitioner makes the following allegations with regard to the treatment of flares under NSPS Subpart J: (i) BAAQMD has not made a determination as to the applicability of NSPS Subpart J to three of the four flares at Valero; (ii) there is no way to tell whether flares qualify for the exemption in NSPS Subpart J because there are no requirements in the Permit to ensure that the flares are operated only in "emergencies;" (iii) the Permit must contain a federally enforceable reporting requirement to verify that each flaring event would qualify for an exemption from the H2S limit; (iv) the Permit fails to ensure that all other NSPS Subpart J requirements are practically enforceable; and (v) federally enforceable monitoring must be imposed pursuant to 40 C.F.R. §§ 70.6(a)(3)(i)(B) and 70.6(c) and Section 504(c) of the Act to verify compliance with all applicable requirements of Subpart J. Petition at 33.

The New Source Performance Standard (NSPS) for Petroleum Refineries, 40 C.F.R. Part 60, Subpart J, prohibits the combustion of fuel gas containing H_2S in excess of 0.10 gr/dscf at any flare built or modified after June 11, 1973. This prohibition is codified in 40 C.F.R. § 60.104(a)(1). Additionally, 40 C.F.R. §§ 60.105(a)(3-4) requires the use of continuous monitors for flares subject to § 60.104(a)(1). However, the combustion of gases released as a result of emergency malfunctions, process upsets, and relief valve leakage is exempt from the H_2S limit. The draft refinery permits proposed by BAAQMD in February 2004 applied a blanket exemption from the H_2S standard and associated monitoring for about half of the Bay Area refinery flares on the basis that the flares are "not designed" to combust routine releases. The statements of basis for the refinery permits state, however, that at least some of these flares are "physically capable" of combusting routine releases. To help assure that this subset of flares would not trigger the H_2S standard, BAAQMD included a condition in the permits prohibiting the combustion of routine releases at these flares.

Following EPA comments submitted to BAAQMD in April of 2004; BAAQMD revised its approach to the NSPS Subpart J exemption. The permits proposed to EPA in August of 2004 indicate that all flares that are affected units under 60.100 are subject to the H2S standard, except when they are used to combust process upset gases, and gases released to the flares as a result of relief valve leakages or other malfunctions. However, the permits were not revised to include the

continuous monitors required under §§ 60.105(a)(3) and (4) on the basis that the flares will always be used to combust non-routine releases and thus will never actually trigger the H2S standard or the requirement to install monitors.

With respect to Petitioner's first allegation, BAAQMD has clearly considered applicability of NSPS Subpart J to flares, and has indicated that NSPS Subpart J applies to one, S-19. Page 16 of the December 2004 Statement of Basis states:

> The Benicia Refinery has three separate flare header systems: 1) the main flare gas recovery header with flares S-18 and S-19, 2) the acid gas flare header with flare S-16, and 3) the butane flare header with flare S-17. Flares S-16 and S-18 were placed in service during the original refinery startup in 1968. Flare S-17 was placed in service with the butane tank TK-1726 in 1972. Flare S-19 was added to the main gas recovery header in 1974 to ensure adequate relief capacity for the refinery. S-19 is subject to NSPS Subpart J, because it was a fuel gas combustion device installed after June 11, 1973, the effective date of 60.100(b).

The table on page 18 of the Statement of Basis also directly states that flares S-16, S-17 and S-18 are not subject to NSPS Subpart J. While the Permit would be clearer if BAAQMD included a statement that the flares have not been modified so as to trigger the requirements of NSPS Subpart J, such a statement is not required by title V. Therefore, EPA is denying the Petition on this issue.

However, EPA agrees with Petitioner that the Permit is flawed with respect to issues (ii) and (iii) above. First, the continuous monitoring of §§ 60.105(a)(3) and (4) is not included in the Permit because, BAAQMD claims, flare S-19 is never used in a manner that would trigger the H2S standard and the requirement to install a continuous monitor. While the Permit does contain District-enforceable only monitoring to show compliance with a federally enforceable condition prohibiting the combustion of routinely-released gases in a flare (20806, #7), there is currently no federally enforceable monitoring requirement in the Permit to demonstrate compliance with this condition or with NSPS Subpart J, both federally enforceable applicable requirements. Because NSPS Subpart J is an applicable requirement, the Permit must contain periodic monitoring pursuant to 40 C.F.R. § 70.6(a)(3)(i)(B) and BAAQMD Reg. 6-503 (BAAQMD Manual of Procedures, Vol. III, Section 4.6) to show compliance with the regulation.

Therefore, EPA is granting the Petition on the basis that the Permit does not assure compliance with NSPS Subpart J, or with federally enforceable permit condition 20806, #7. BAAQMD must reopen the Permit to either include the monitoring under sections 60.105(a)(3) or (4), or, for example, to include adequate federally enforceable monitoring to show compliance with condition 20806, #7.

With respect to issues (iv) and (v), it is unclear what other requirements Petitioner is referring to, or what monitoring Petitioner is requesting. For these reasons, EPA is denying the

Petition on these grounds.

2 Flare Opacity Monitoring

Petitioner notes that flares are subject to SIP-approved BAAQMD Regulation 6-301, which prohibits visible emissions from exceeding defined opacity limits for a period or periods aggregating more than three minutes in any hour. Petitioner alleges that the opacity limit set forth in Regulation 6-301 is not practically enforceable during short-duration flaring events because no monitoring is required for flaring events that last less than fifteen minutes and only limited monitoring is required for events lasting less than thirty minutes. Petitioner alleges that repeated violations of BAAQMD Regulation 6-301 due to short-term flaring could be an ongoing problem that evades detection.

The opacity limit in Regulation 6-301 does not contain periodic monitoring. Because the underlying applicable requirement imposes no monitoring of a periodic nature, the Permit must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . . ." 40 C.F.R. § 70.6(a)(3)(i)(B). Thus, the issue before EPA is whether the monitoring imposed in the Permit will result in reliable and representative data from the relevant time period such that compliance with the Permit can be determined.

In this case, the District has imposed certain monitoring conditions to determine compliance with the opacity standard during flaring events. The Permit defines a "flaring event" as a flow rate of vent gas flared in any consecutive 15 minute period that continuously exceeds 330 standard cubic feet per minute (scfm). Within 15 minutes of detecting a flaring event, the facility must conduct a visible emissions check. The visible emissions check may be done by video monitoring. If the operator can determine there are no visible emissions using video monitoring, no further monitoring is required until another 30 minutes has expired. If the operator cannot determine there are no visible emissions using video monitoring, the facility must conduct either an EPA Reference Method 9 test or survey the flare according to specified criteria. If the operator conducts Method 9 testing, the facility must monitor the flare for at least 3 minutes, or until there are no visible emissions. If the operator conducts the non-Method 9 survey, the facility must cease operation of the flare if visible emissions continue for three consecutive minutes.

Although EPA agrees with Petitioner that the Permit does not require monitoring during short-duration flaring events, EPA does not believe Petitioner has demonstrated that the periodic monitoring is inadequate. For instance, Petitioner has not shown that short-duration flaring events are likely to be in violation of the opacity standard, nor has Petitioner made a showing that short-duration flaring events occur frequently or at all. Thus, Petitioner has not demonstrated that the periodic monitoring in the Permit is insufficient to detect violations of the opacity standard.

Additionally, in June 1999, a workgroup comprised of EPA, CAPCOA and CARB staff completed a set of periodic monitoring recommendations for generally applicable SIP requirements such as Regulation 6-301. The workgroup's relevant recommendation for refinery flares was a visible emissions check "as soon as an intentional or unintentional release of vent gas to a gas flare but no later than one hour from the flaring event." See CAPCOA/CARB/EPA Region IX Periodic Monitoring Memo, June 24, 1999, at 2. In comparison, the periodic monitoring contained in the Permit would appear to be both less stringent, by not requiring monitoring for up to thirty minutes of a release of gas to a flare, and more stringent, by requiring monitoring within 30 minutes rather than one hour. Therefore, EPA encourages the District to amend the Permit to require monitoring upon the release to the flare, rather than delaying monitoring as currently set forth in the Permit.

Finally, EPA notes that the Permit does not prevent the use of credible evidence to demonstrate violations of permit terms and conditions. Even if the Permit does not require visible emissions checks for short-duration flaring events, EPA, the District, and the public may use any credible evidence to bring an enforcement case against the source. 62 Fed. Reg. 8314 (Feb. 24, 1997).

For the reasons cited above, EPA is denying the Petition on this issue.

3 Cooling Tower Monitoring

Petitioner claims that the Permit lacks monitoring conditions adequate to assure that the cooling tower complies with SIP-approved District Regulations 8-2 and 6. Petitioner further alleges that the District's decisions to not require monitoring for the cooling towers is flawed due to its use of AP-42 emission factors, which may not be representative of the actual cooling tower emissions.

a. Regulation 8-2

District Regulation 8-2-301 prohibits miscellaneous operations from discharging into the atmosphere any emission that contains 15 lb per day and a concentration of more than 300 ppm total carbon. Although the underlying applicable requirement does not contain periodic monitoring requirements, the District declined to impose monitoring on source S-29 to assure compliance with the emission limit.[16]

The December 1, 2003 Statement of Basis sets forth the grounds for the District's decision that monitoring is not necessary to assure compliance with this applicable requirement. First, the District stated that its monitoring decisions were made by balancing a variety of factors including 1) the likelihood of a violation given the characteristics of normal operation, 2) the degree of variability in the operation and in the control device, if there is one, 3) the potential

[16] See Permit, Table VII – CS Cooling Tower, pp. 541

severity of impact of an undetected violation, 4) the technical feasibility and probative value of indicator monitoring, 5) the economic feasibility of indicator monitoring, and 6) whether there is some other factor, such as a different regulatory restriction applicable to the same operation, that also provides some assurance of compliance with the limit in question. In addition, the District provided calculations that purported to quantify the emissions from the facility's cooling tower. The calculations relied upon water circulation and exhaust airflow rates supplied by the refinery in addition to two AP-42 emission factors. The District found that the calculated emissions were much lower than the regulatory limit and concluded that monitoring was not necessary. Although it is true that the results suggest there may be a large margin of compliance, the nature of the emissions and the unreliability of the data used in the calculations renders them inadequate to support a decision that no monitoring is needed over the entire life of the permit.

An AP-42 emission factor is a value that roughly correlates the quantity of a pollutant released to the atmosphere with an activity associated with the release of that pollutant. The use of these emission factors may be appropriate in some permitting applications, such as establishing operating permit fees. However, EPA has stated that AP-42 factors do not yield accurate emissions estimates for individual sources. *See In the Matter of Cargill, Inc.*, Petition IV-2003-7 (Amended Order) at 7, n.3 (Oct.19, 2004); *In re: Peabody Western Coal Co.*, CAA Appeal No. 04-01, at 22-26 (EAB Feb. 18, 2005). Because emission factors essentially represent an average of a range of facilities and emission rates, they are not necessarily indicative of the emissions from a given source at all times; with a few exceptions, use of these factors to develop source-specific permit limits or to determine compliance with permit requirements is generally not recommended. The District's reliance on the emission factors in making its monitoring decision is therefore problematic.

Atmospheric emissions from the cooling towers include fugitive VOCs and gases that are stripped from the cooling water as the air and water come into contact. In an attempt to develop a conservative estimate of the emissions, the District used the emission factor for "uncontrolled sources." For these sources, AP-42 Table 5.1.2 estimates the release of 6 lb of VOCs per million gallons of circulated water. This emission factor carries a "D" rating, which means that it was developed from a small number of facilities, and there may be reason to suspect that the facilities do not represent a random or representative sample of the industry. In addition, this rating means that there may be evidence of variability within the source population. In this case the variability stems from the fact that 1) contaminants enter the cooling water system from leaks in heat exchangers and condensers, which are not predictable, and 2) the effectiveness of cooling tower controls is itself highly variable, depending on refinery configuration and existing maintenance practices.[20] It is this variability that renders the emission factor incapable of assuring continued compliance with the applicable standard over the lifetime of the permit. For all practical purposes, a single emission factor that was developed to represent long-term average emissions can not forecast the occurrence and size of leaks in a collection of heat exchangers and is therefore not predictive of compliance at any specific time.

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[20] AP 42, Fifth Edition, Volume I, Chapter 5

EPA has previously stated that annual reporting of NOx emissions using an equation that uses current production information, along with emission factors based on prior source tests, was insufficient to assure compliance with an emission unit's annual NOx standard. Even when presented with CEMs data which showed that actual NOx emissions for each of five years were consistently well below the standard, EPA found that a large margin of compliance alone was insufficient to demonstrate that the NOx emissions would not change over the life of the permit. *See In the Matter of Fort James Camas Mill*, Petition No. X-1999-1, at 17-18, (December 22, 2000).

Consistent with its findings in regard to the Fort James Camas Mill permit, EPA finds in this instance that the District failed to demonstrate that a one-time calculation is representative of ongoing compliance with the applicable requirement, especially considering the unpredictable nature of the emissions and the unreliability of the data used in the calculations. Therefore, under the authority of 40 C.F.R. § 70.6(a)(3)(i)(B), EPA is granting Petitioner's request to object to the Permit as the request pertains to cooling tower monitoring for District Regulation 8-2-301.

As an alternative to meeting the emission limitation cited in Section 8-2-301, facilities may operate in accordance with an exemption under Section 8-2-114, which states, "emissions from cooling towers...are exempt from this Rule, provided best modern practices are used." As a result, in lieu of adding periodic monitoring requirements adequate to assure compliance with the emission limit in Section 8-2-301, the District may require the Statement of Basis to include an applicability determination with respect to Section 8-2-114 and revise the Permit to reflect the use of best modern practices.

b. Regulation 6

BAAQMD SIP-approved Regulation 6 contains four particulate matter emissions standards for which Petitioner objects to the absence of monitoring. The District's decision for each standard is discussed separately below.

(1) Regulation 6-310

BAAQMD Regulation 6-310 limits the emissions from the cooling tower to 0.15 grains per dry standard cubic foot. Appendix G of the December 1, 2003 Statement of Basis sets forth the grounds for the District's decision that monitoring is not necessary to assure compliance with this requirement. Specifically, Appendix G provides calculations for the particulate matter emissions from the cooling tower and compares the expected emission rate to the regulatory limit. In calculating the emissions, the District used the PM-10 emission factor of 0.019 lb per 1000 gal circulating water from Table 13.4-1 of AP-42. The calculations show that the emissions are expected to be approximately 180 times lower than the emission limit. As a result, the District concluded that periodic monitoring is not necessary to assure compliance with the standard.

Petitioner alleges that these calculations do not adequately justify the District's decision because the AP-42 emission factor used carries an E rating, which means that it is of poor quality. As a result, Petitioner claims it is unlikely that the calculated emissions based on this factor are representative of the actual cooling tower emissions.

Petitioner is correct that the emission factor used by the District has an E rating. However, EPA disagrees that this rating alone is sufficient to conclude that the emission factor is not representative of the emissions from the cooling towers at the refinery. PM-10 emissions from cooling towers are generated when drift droplets evaporate and leave fine particulate matter formed by crystallization of dissolved solids. Particulate matter emission estimates can be obtained by multiplying the total liquid drift factor by the total dissolved solids (TDS) fraction in the circulating water. The AP-42 emission factor used by the District is based on a drift rate of 0.02% of the circulating water flow and a TDS content of approximately 12,000 ppm. With regard to both parameters, the District indicated in the December 1, 2003 Statement of Basis that the emission factor yielded a higher estimate of the emissions than the actual drift and TDS data that was supplied by the refineries. Therefore, EPA believes that the District's reliance on this emission factor does not demonstrate a deficiency in the Permit.[21]

EPA notes that the emission factor's poor rating is due in part to the variability associated with cooling tower drift and TDS data. As discussed in the Statement of Basis, the degree to which the emissions may vary was taken into account when considering the ability of the emission factor to demonstrate compliance with the emission limit. With respect to the drift, EPA believes that the emission factor is conservatively high compared to the 0.0005% drift rate that cooling towers are capable of achieving. Where TDS are concerned, AP-42 indicates that the dissolved solids content may range from 380 ppm to 91,000 ppm. While the emission factor represents a TDS concentration at the lower end of this spectrum, increases in the TDS content do not significantly increase the grain loading due to the large exhaust air flow rates exiting the cooling towers. Even assuming that the TDS concentration reached 91,000 ppm, the calculated emissions are still approximately 22 times lower than the regulatory limit.[22]

The District has provided sufficient evidence to demonstrate that the emissions will not vary by a degree that would cause an exceedance of the standard. Given the representative air flow and water circulation rates supplied by the refinery, compliance with the applicable requirement is expected under conditions (i.e., maximum TDS content) that represent a reasonable upper bound of the emissions. Therefore, EPA is denying Petitioner's request to object to the Permit as it pertains to periodic monitoring for Regulation 6-310.

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[21] Although EPA stated above in the discussion for Regulation 8-2 that AP-42 emission factors are generally not recommended for use in determining compliance with emission limits, there are exceptions. Data supplied by the refineries indicates that the AP-42 emission factor for PM-10 conservatively estimates the actual cooling tower emissions; as discussed further below, compliance with the limit is expected under conditions that represent a reasonable upper bound on the emissions.

[22] Again, this is assuming a drift rate of 0.02%.

(2) Regulation 6-31

BAAQMD Regulation 6-311 states that no person shall discharge particulate matter into the atmosphere at a rate in excess of that specified in Table 1 of the Rule for the corresponding process weight rate. Assuming the process weight rate for the cooling tower remains at or above the maximum level specified in Table 1, the rule establishes a maximum emission rate of 40 lb/hr. Unlike for Regulation 6-310, the District provided no justification for its decision to not require monitoring to assure compliance with this limit.

Using the PM-10 emission factor cited by the District in its calculations for Regulation 6-310, EPA estimates the emissions from S-29 to be in excess of 40 lb/hr. While the District stated that the emission factor represents a more conservative estimate of the emissions than the actual data provided by the refineries, it did not say how conservative the factor is. As a result, the District's monitoring decision is unsupported by the record and EPA finds that the Permit fails to meet the Part 70 standard that it contain periodic monitoring sufficient to yield reliable data that are representative of the source's compliance with its terms. *See* 40 C.F.R. § 70.6(a)(3)(i)(B). Therefore, EPA is granting Petitioner's request to object to the Permit. The Permit must include periodic monitoring adequate to assure compliance with BAAQMD Regulation 6-311. *See* 40 C.F.R. § 70.6(a)(3)(i)(B).

(3) Regulation 6-305

BAAQMD Regulation 6-305 states that, "a person shall not emit particles from any operation in sufficient number to cause annoyance to any other person...This Section 6-305 shall only apply if such particles fall on real property other than that of the person responsible for the emission." Nuisance requirements such as this may be enforced by EPA and the District at any time and there is no practical monitoring program that would enhance the ability of the permit to assure compliance with the applicable requirement. Therefore, EPA is denying Petitioner's request to object to the Permit as it pertains to monitoring for BAAQMD Regulation 6-305.

(4) Regulation 6-301

BAAQMD Regulation 6-301 states that a person shall not emit from any source for a period or periods aggregating more than three minutes in any hour, a visible emission which is as dark or darker than No. 1 on the Ringelmann Chart. While the Statement of Basis does not contain a justification for the District's decision that monitoring is not required for this standard, the District stated the following in response to public comments: "The District has prepared an analysis based on the AP-42 factors for particulate, which are very conservative, and has indeed determined that 'it is virtually impossible for cooling towers to exceed visible or grain loading limitations.' The calculations show that the particulate grain loading is a hundredth or less than the 0.15 gr/dscf standard due to the large airflows. When the grain loading is so low, visible emissions are not expected." 2003 CRTC at 59. EPA finds the District's assessment of the visible emissions to be reasonable and that Petitioner has not demonstrated otherwise. Therefore,

EPA is denying Petitioner's request to object to the Permit as it pertains to monitoring for BAAQMD Regulation 6-301.

4. Monitoring of Pressure Relief Valves

Petitioner alleges that the Permit must include additional monitoring to assure that all pressure relief valves at the facility are in compliance with the requirements of SIP-approved District Regulation 8-28 (Episodic Releases from Pressure Relief Valves). Petition at 36.

Regulation 8-28 requires that within 120 days of the first "release event" at a facility, the facility shall equip each pressure relief device of that source with a tamperproof tell-tale indicator that will show that a release has occurred since the last inspection. Regulation 8-28 also requires that a release event from a pressure relief device be reported to the APCO on the next working day following the venting. Petitioner states that neither the regulation nor the Permit includes any monitoring requirements to ensure that the first release event of a relief valve would ever be recorded, and that available tell-tale indicators or another objective monitoring method should be required for all pressure relief valves at the refinery, regardless of a valve's release event status.

First, EPA believes that the requirement that a facility report all release events to the District is adequate to ensure that the first release event would be recorded. EPA also notes that the refinery is subject to the title V requirement to certify compliance with all applicable requirements, including Regulation 8-28. See 40 C.F.R. § 70.6(c)(5). Thus, EPA does not have a basis to determine that the reporting requirement would not assure compliance with the applicable requirement at issue.

For the reasons stated above, EPA is denying the Petition on this issue

5. Additional Monitoring Problems Identified by Petitioner

Petitioner claims that several sources with federally enforceable limits under BAAQMD Regulation 6 do not have monitoring adequate to assure compliance. The sources and limits at issue are discussed separately below.

Sulfur Storage Pit (S-157) / BAAQMD Regulations 6-301 and 6-310

BAAQMD Regulation 6 contains two particulate matter emissions standards for which Petitioner objects to the absence of monitoring. Specifically, BAAQMD Regulation 6-301 limits visible emissions to less than Ringelmann No. 1 and Regulation 6-310 limits the emissions to 0.15 gr. per dscf. Although Regulation 6 does not contain periodic monitoring requirements for either of the standards, the District declined to impose monitoring on this source.

The December 1, 2003 Statement of Basis provides the District's justification for not

requiring monitoring. Specifically, the District stated, "Source is capable of exceeding visible emissions or grain loading standard only during process upset. Under such circumstances, other indicators will alert the operator that something is wrong." *See* December 1, 2003 Statement of Basis, n. 4, at 23. If the source is not capable of exceeding the emission standards at times other than process upsets, it is reasonable that the District would not require regularly scheduled monitoring during normal operations. However, if, as stated by the District, S-157 is capable of exceeding the emission standards during process upsets, monitoring during those periods may be necessary. While the District stated that indicators would alert the operator that something is wrong in the event of a process upset, the District failed to demonstrate how the indicator or the operator's response would assure compliance with the applicable limits.

EPA finds in this case that the District's decision to not require monitoring is not adequately supported by the record. Therefore, EPA is granting Petitioner's request to object to the Permit as it pertains to monitoring for S-157. The District must re-open the Permit to include periodic monitoring that yields reliable data that are representative of the source's compliance with the permit or further explain in the Statement of Basis why monitoring is not needed.

b. Lime Slurry Tanks (S-174 and S-175) / BAAQMD Regulations 6-301, 6-310, and 6-311

BAAQMD Regulation 6 contains three standards for which Petitioner objects to the absence of monitoring. Regulation 6-311 sets a variable emission limit depending on the process weight rate and the requirements of 6-301 and 6-310 are described above. Regulation 6 does not contain periodic monitoring requirements for any of the standards and the District did not impose monitoring on these sources.

As in the previous case for source S-157, the Statement of Basis states that the District did not require monitoring to assure compliance with Regulations 6-301 and 6-310 because the "source is capable of exceeding visible emissions or grain loading standard only during process upset. Under such circumstances, other indicators will alert the operator that something is wrong." *See* December 1, 2003 Statement of Basis, n. 4, at 23. The Statement of Basis is silent on the District's monitoring decision for Regulation 6-311. Therefore, for the reasons stated above, EPA is granting Petitioner's request to object to the Permit as it pertains to monitoring for sources S-174 and S-175 to assure compliance with Regulations 6-301, 6-310, and 6-311. The District must reopen the Permit to include periodic monitoring or further explain in the Statement of Basis why monitoring is not needed.

c Diesel Backup Generators (S-240, S-241, and S-242) / BAAQMD Regulations 6-303.1 and 6-310

BAAQMD Regulation 6 contains two particulate matter emissions standards for which Petitioner objects to the absence of monitoring. The requirement of Regulation 6-310 is described above and Regulation 6-303.1 limits visible emissions to Ringelmann No. 2.

Regulation 6 does not contain periodic monitoring requirements for any of the standards and the District did not impose monitoring on these sources.

As a preliminary matter, EPA notes that opacity monitoring is generally not necessary for California sources firing on diesel fuel, based on the consideration that sources in California usually combust low-sulfur fuel.[21] Therefore, EPA is denying Petitioner's request to object to the Permit as it pertains to monitoring for Regulation 6-303.1.

With regard to Regulation 6-310, the December 1, 2003 Statement of Basis sets forth the basis for the District's decision that monitoring is not necessary. Specifically, the District states, "No monitoring [is] required because this source will be used for emergencies and reliability testing only." While it is true that Condition 18748 states these engines may only be operated to mitigate emergency conditions or for reliability-related activities (not to exceed 100 hours per year per engine), this condition is not federally enforceable. Absent federally enforceable restrictions on the hours of operation, the District's decision not to require monitoring is not adequately supported. Therefore, EPA is granting Petitioner's request to object to the Permit as it pertains to Regulation 6-310. The District must reopen the Permit to add periodic monitoring to assure compliance with the applicable requirement or further explain in the statement of basis why it is not necessary.

d. FCCU Catalyst Regenerator (S-5) and Fluid Coker (S-6) / BAAQMD Regulation 6-305

BAAQMD Regulation 6 contains one particulate matter emission standard for which Petitioner objects to the absence of monitoring. Regulation 6 does not contain periodic monitoring requirements for any of the standards and the District did not impose monitoring on these sources.

BAAQMD Regulation 6-305 states that, "a person shall not emit particles from any operation in sufficient number to cause annoyance to any other person. . .This Section 6-305 shall only apply if such particles fall on real property other than that of the person responsible for the emission." Petitioner has failed to establish that there is any practical monitoring program that would enhance the ability of the permit to assure compliance with the applicable requirement. Therefore, EPA is denying Petitioner's request to object to the Permit as it pertains to monitoring for BAAQMD Regulation 6-305.

e. Coke Transport, Catalyst Unloading, Carbon Black Storage, and Lime Silo (S-8, S-10, S-11, and S-12) / BAAQMD Regulation 6-311.

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[21]Per CAPCOA/CARB/EPA Region IX agreement. *See Approval of Title V Periodic Monitoring Recommendations*, June 24, 1999.

BAAQMD Regulation 6 contains one particulate matter emission standard for which Petitioner objects to the absence of monitoring. Specifically, BAAQMD Regulation 6-311 sets a variable emission limit depending on the process weight rate. Regulation 6 does not contain periodic monitoring requirements for any of the standards and the District did not impose monitoring on these sources.

For all four emission sources, the Permit requires monitoring with respect to Regulations 6-301 and 6-310 but not 6-311. Given this apparent conflict and the failure of the Statement of Basis to discuss the absence of monitoring, EPA finds that the District's decision in this case is not adequately supported by the record. Therefore, EPA is granting Petitioner's request as it pertains to monitoring for sources S-8, S-10, S-11, and S-12. The District must reopen the Permit to include periodic monitoring for Regulation 6-311 that yields reliable data that are representative of the source's compliance with the permit or explain in the Statement of Basis why monitoring is not needed.

H. Miscellaneous Permit Deficiencies

1 Missing Federal Requirements for Flares (Subpart CC)

Petitioner states that the District incorrectly determined that Valero flares are categorically exempt from 40 C.F.R. § 63 Subpart CC (NESHAP for Petroleum Refineries). Petitioner further states that "EPA disagreed with the District's claim that the flares qualify for a categorical exemption from Subpart CC when used as an alternative to the fuel gas system," and that the Valero Permit and Statement of Basis contain incorrect applicability determinations for flares S-18 and S-19, and that there is not enough information to determine applicability for flares S-16 and S-17. Petitioner states that for all flares subject to Subpart CC, the Permit must include all applicable requirements, including 40 C.F.R. § 63 Subpart A, by reference from 40 C.F.R. § 63 Subpart CC. Petitioner goes on to note that Petitioner has requested in past comments that the District determine the potential applicability of a number of federal regulations to the Valero flares, including 40 C.F.R. § 63 Subpart A, 40 C.F.R. § 63 Subpart CC, and 40 C.F.R. § 60 Subpart A, but that the District did not do so. Petitioner notes that given a lack of relevant information, Petitioner was unable to make an independent evaluation of applicability. Petitioner also alleges that EPA agreed with Petitioner that the District failed to provide sufficient information for the applicability determinations for flares S-16 and S-70 via Attachment 2 of EPA's October 8 comment letter. Finally, Petitioner states that EPA must object to the Permit until the District provides a sufficient analysis regarding the applicability of these federal rules to the Valero flares, and until the Permit contains all applicable requirements.

a. 40 C.F.R. Part 60, Subpart A

EPA finds that the applicability of 40 C.F.R. § 60 Subpart A is adequately addressed in the December 16, 2004 Statement of Basis for Valero. *See* Statement of Basis at 18 (Dec. 16, 2004). The District has included a table on page 18 of the December 16, 2004 Statement of Basis

indicating applicability of NSPS Subpart A to each of Valero's flares. Therefore, EPA is denying the Petition on this issue.

b. 40 C.F.R. Part 63, Subparts A and CC

40 C.F.R. Part 63, Subpart CC contains the Maximum Achievable Control Technology ("MACT") requirements for petroleum refineries. Under Subpart CC, the owner or operator of a Group 1 miscellaneous process vent, as defined in § 63.641, must reduce emissions of Hazardous Air Pollutants either by using a flare that meets the requirements of section 63.11 or by using another control device to reduce emissions by 98% or to a concentration of 20 ppmv. 40 C.F.R. § 63.643(a)(1). If a flare is used, a device capable of detecting the presence of a pilot flame is required. 40 C.F.R. § 63.644(a)(2).

The applicability provisions of Subpart CC are set forth in section 63.640, "Applicability and designation of affected source." Section 63.640(a) provides that Subpart CC applies to petroleum refining process units and related emissions points. The Applicability section further provides that affected sources subject to Subpart CC include emission points that are "miscellaneous process vents." 40 C.F.R. § 63.640(c)(1). The Applicability section also provides that affected sources do not include emission points that are routed to a fuel gas system. 40 C.F.R. § 63.640(d)(5). Gaseous streams routed to a fuel gas system are specifically excluded from the definition of "miscellaneous process vent," as are "episodic or nonroutine releases such as those associated with startup, shutdown, malfunction, maintenance, depressuring, and catalyst transfer operations." 40 C.F.R. § 63.641.

The District's Statement of Basis indicates that flares S-18 and S-19 are not subject to MACT Subpart CC pursuant to the exemption set forth in 40 C.F.R. § 63.640(d)(5). *See* December 16, 2004 Statement of Basis at 18. In the BAAQMD February 15, 2005 Letter, BAAQMD again asserted section 63.640(d)(5) as a basis for finding that the refinery's flares are not required to meet the standards in Subpart CC. EPA continues to believe that a detailed analysis of the configuration of the flare and compressor is required to exempt a flare on the basis that it is part of the fuel gas system.

BAAQMD's February 15, 2005 letter also provides an alternative rationale that gases vented to the refinery's flares are not within the definition of "miscellaneous process vents." Specifically, BAAQMD asserts that the flares are not miscellaneous process vents because they are used only to control "episodic and nonroutine" releases. As BAAQMD states:

> At all of the affected refineries, process gas collected by the gas recovery system are routed to flares only under two circumstances: (1) situations in which, due to process upset or equipment malfunctions, the gas pressure in the flare header rises to a level that breaks the water seal leading to the flares; or (2) situations in which, during process startups, shutdown, malfunction, maintenance, depressuring [sic], and catalyst transfer operations are, by definition, not miscellaneous process vents, and are not subject to

Subpart CC

EPA agrees that a flare used only under the two circumstances described by the District would not be subject to Subpart CC because such flares are not used to control miscellaneous process vents as that term is defined in § 63.641. According to the BAAQMD February 15, 2005 Letter, BAAQMD intends to revise the Statement of Basis to further explain its rationale that Subpart CC does not apply to the Bay Area refinery flares, and intends to solicit public comment on its rationale.

Because the Permit and the Statement of Basis for Valero's flares S-18 and S-19 contain contradictory information with regard to the use of these flares, EPA agrees with Petitioner that the Statement of Basis is lacking a sufficient analysis regarding the applicability of MACT CC to these flares. Therefore, EPA is granting the Petition on this issue. BAAQMD must reopen the Permit to address applicability in the Statement of Basis, and, if necessary, to include the flare requirements of MACT Subpart CC in the Permit.

2 Basis for Tank Exemptions

Petitioner claims that the statement of basis and the Permit lack adequate information to support the proposed exempt status for numerous tanks identified in Table IIB of the Permit.

Table IIB of the Permit contains a list of 43 emission sources that have applicable requirements in Section IV of the Permit but that were determined by the District to be exempt from BAAQMD Regulation 2, which specifies the requirements for Authorities to Construct and Permits to Operate. Rule 1 of the regulation contains numerous exemptions that are based on a variety of physical and circumstantial grounds. EPA agrees with Petitioner that the Permit itself contains insufficient information to determine the basis for the exempt status of the equipment with respect to the exemptions in the rule. However, for most of the sources in Table IIB, Petitioner's claim that the Statement of Basis lacks the information is factually incorrect. Petitioner is referred to pages 94-99 of the Statement of Basis that accompanied the Permit issued by the District on December 1, 2003. Nonetheless, EPA is granting Petitioner's request on a limited basis for the reasons set forth below.

EPA's regulations state that the permitting authority must provide the Agency with a statement of basis that sets forth the legal and factual basis for the permit conditions. 40 C.F.R. § 70.7(a)(5). EPA has provided guidance on the content of an adequate statement of basis in a letter dated December 20, 2001, from Region V to the State of Ohio[24] and in a Notice of Deficiency (NOD) issued to the State of Texas.[25] These documents describe several key elements of a statement of basis, specifically noting that a statement of basis should address any

[24] The letter is available at: http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf.

[25] 67 Fed. Reg. 732 (January 7, 2002)

federal regulatory applicability determinations. The Region V letter also recommends the inclusion of topical discussions on issues including but not limited to the basis for exemptions. Further, in response to a petition filed in regard to the title V permit for the Los Medanos Energy Center, EPA concluded that a statement of basis should document the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issues surrounding the issuance of the permit. Such a record ought to contain a description of the origin or basis for each permit condition or exemption. *See, Los Medanos*, at 10.

As stated in *Los Medanos*, the failure of a permitting authority to meet the procedural requirement to provide a statement of basis does not necessarily demonstrate that the title V permit is substantively flawed. In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See* CAA § 505(b)(2) (objection required "if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); *see also* 40 C.F.R. § 70.8(c)(1). Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See e.g., Doe Run*, at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit.

With regard to the Valero Permit, the majority of the sources listed in Table IIB are identified in the December 1, 2003 Statement of Basis along with a citation from Regulation 2 describing the basis of the exemption. For the sources that fall within this category, EPA finds that the permit record supports the District's determination for the exempt status of the equipment. However, in reviewing the December 16, 2004 Statement of Basis, EPA noted that three of the sources listed in Table IIB of the Permit are not included in the statement of basis with the corresponding citations for the exemptions.[26] For these sources, the failure of the record to support the terms of the Permit is adequate grounds for objecting to the Permit. Therefore, EPA is granting Petitioner's request to object to the Permit with respect to the listing of exempt sources in Table IIB but only as the request pertains to the three sources identified herein. Although EPA is not aware of other errors, the District should review the circumstances for all of the sources in Table IIB and the corresponding table in the statement of basis to further ensure that the Permit is accurate and that the record adequately supports the Permit. EPA also encourages the District to add the citation for each exemption to Table IIB as was done for the ConocoPhillips, Chevron, and Shell permits.

3 Public Participation

[26]Compare Table IIB of the Permit with the December 1, 2003 statement of basis for the LPG Truck Loading Rack, the TK-2710 Fresh Acid Tank, and the Cogeneration Plant Cooling Tower.

Petitioner argues that the District did not, in a timely fashion, make readily available to the public, compliance information that is relevant to evaluating whether a schedule of compliance is necessary. Specifically, Petitioner asserts that it had to make several requests under the California Public Records Act to obtain "relevant information concerning NOVs issued to the facility between 2001 and 2004" and the "2003 Annual Report and other compliance information, which is not readily available." Petitioner states that it took three weeks for the District to produce the information requested in Petitioner's "2003 PRA request." Petitioner contends that it expended significant resources to obtain the data and received the data so late in the process that they could not be sufficiently analyzed.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims here that the District failed to comply with public participation requirements, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA, Section 505(b)(2)(objection required "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of [the Act], including the requirements of the applicable [SIP].") EPA's title V regulations specifically identify the failure of a permitting authority to process a permit in accordance with procedures approved to meet the public participation provisions of 40 C.F.R. § 70.7(h) as grounds for an objection. 40 C.F.R. § 70.8(c)(3)(iii). District Regulations 2-6-412 and 2-6-419 implement the public participation requirements of 40 C.F.R. § 70.7(h). District Regulation 2-6-412, *Public Participation, Major Facility Review Permit Issuance*, approved by EPA as meeting the public participation provisions of 40 C.F.R. § 70.7(h), provides for notice and comment procedures that the District must follow when proposing to issue any major facility review permit. The public notice, which shall be published in a major newspaper in the area where the facility is located, shall identify, *inter alia*, information regarding the operation to be permitted, any proposed change in emissions, and a District source for further information. District Regulation 2-6-419, *Availability of Information*, requires the contents of the permit applications, compliance plans, emissions or compliance monitoring reports, and compliance certification reports to be available to the public, except for information entitled to confidential treatment.

Petitioner fails to demonstrate that the District did not process the permit in accordance with public participation requirements. The District duly published a notice regarding the proposed initial issuance of the permit. The notice, *inter alia*, referenced a contact for further information. The permit application, compliance plan, emissions or compliance monitoring reports, and compliance certification reports are available to the public through the District's Web site or in the District's files, which are open to the public during business hours. Petitioner admits that it ultimately obtained the compliance information it sought, albeit later than it wished. Petitioner fails to show that the perceived delay in receiving requested documents resulted in, or may have resulted in, a deficiency in the Permit. Therefore, EPA denies the Petition on this issue.

IV TREATMENT, IN THE ALTERNATIVE, AS A PETITION TO REOPEN

As explained in the Procedural Background section of this Order, EPA received and dismissed a prior petition ("2003 OCE Petition") from this Petitioner on a previous version of the Permit at issue in this Petition. EPA's response in this Order to issues raised in this Petition that were also included in the 2003 OCE Petition also constitutes the Agency's response to the 2003 Petition. Furthermore, EPA considers the Petition validly submitted under CAA section 505(b)(2). However, if the Petition should be deemed to be invalid under that provision, EPA also considers, in the alternative, the Petition and Order to be a Petition to Reopen the Permit and a response to a Petition to Reopen the Permit, respectively.

V CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I deny in part and grant in part OCE's Petition requesting that the Administrator object to the Valero Permit. This decision is based on a thorough review of the draft permit, the final Permit issued December 16, 2004, and other documents pertaining to the issuance of the Permit.

MAR 15 2005

Date

Stephen L. Johnson
Acting Administrator

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF ONYX ENVIRONMENTAL SERVICES	)
	) ORDER RESPONDING TO) PETITIONERS' REQUEST THAT
Petition number V-2005-1 CAAPP No. 163121AAP Proposed by the Illinois Environmental Protection Agency	) THE ADMINISTRATOR OBJECT) TO ISSUANCE OF A STATE) OPERATING PERMIT)

ORDER AMENDING PRIOR ORDER PARTIALLY DENYING AND PARTIALLY GRANTING PETITION FOR OBJECTION TO PERMIT

EPA has become aware of a factual error in the February 1, 2006 Order Responding to Petitioners' Request that the Administrator Object to Issuance of a proposed State Operating Permit for Onyx Environmental Services. To correct that error, I am amending the February 1, 2006 Order by striking out the section entitled "VI. Monitoring" and replacing it with the language appearing below. As a result of the correction, I am hereby granting the petition on that issue.

The amended language for section VI is as follows:

VI. Monitoring

The Petitioners argue that the Administrator must object to the proposed Onyx permit because it fails to include conditions that meet the legal requirements for monitoring. The Petitioners cite condition 7.1.8.b.ii. on page 56 of the proposed Onyx permit, which provides that Onyx must install, calibrate, maintain, and operate Particulate Matter Continuous Emission Monitors (PM CEMs) to demonstrate compliance. Petitioners note that the next clause provides that the permittee need not comply with the requirement to "install, calibrate, maintain, and operate the PM CEMs until such time that U.S. EPA promulgates all performance specifications and operational requirements for PM CEMs." Petitioners argue that there are no PM monitoring requirements established in the permit without the obligation to install and operate the PM CEMs, which is contingent on future U.S. EPA action. Petition at 18.

U.S. EPA promulgated the performance specification for PM CEMs (Performance Standard 11) on January 12, 2004. However, U.S. EPA has not yet promulgated the operational requirements for PM CEMs. Accordingly, the requirement to install and operate PM CEMs does not currently apply to Onyx, although the permit properly requires PM CEMs once U.S. EPA promulgates such operational requirements. However, subpart EEE contains other

requirements intended to help assure compliance with the PM limits, including a requirement for bag leak detection monitoring.[6] The Onyx facility is equipped with baghouses, and therefore Onyx is required to operate and maintain a system to detect leaks from the baghouses, but the permit currently lacks provisions requiring a leak detection system. Accordingly, the lack of a currently applicable requirement to operate and maintain PM CEMs does not make the permit deficient under 40 C.F.R. 70.6(a)(3)(i)(B), but Petitioners are correct that the permit lacks monitoring required under other provisions of 40 C.F.R. §70.6, and therefore I am granting the petition on this issue and directing IEPA to revise the permit to incorporate all PM monitoring required for the facility under subpart EEE, including a leak detection system.[7]

I am not revising the Order issued February 1 in any other way and its provisions, other than section VI, remain undisturbed and in effect.

Dated: AUG -9 2006

Stephen L. Johnson
Administrator

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[6] See Final Technical Support Document for HWC MACT Standards, Vol. IV: Compliance with the HWC MACT Standards (July 1999).

[7] Subpart EEE has been amended since the permit was proposed by IEPA, although the requirement for bag leak detection applied to the Onyx facility at the time the permit was proposed. In re-proposing the permit, IEPA should ensure that the permit properly reflects all of the current MACT requirements

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

APR 30 2014

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits

FROM: Stephen D. Page
Director

TO: Regional Air Division Directors, Regions 1-10

This memorandum and attachments provide guidance on satisfying the Clean Air Act title V annual compliance certification reporting and statement of basis requirements. It addresses two outstanding recommendations made by the Office of Inspector General (OIG) in the report titled, "Substantial Changes Needed in Implementation and Oversight of Title V Permits if Program Goals are to be Fully Realized," (OIG Report No. 2005-P-00010):

> *Recommendation 2-1: Develop and issue guidance or rulemaking on annual compliance certification content, which requires responsible officials to certify compliance with all applicable terms and conditions of the permit, as appropriate.*
>
> *Recommendation 2-3: Develop nationwide guidance on the contents of the statement of basis which includes discussions of monitoring, operational requirements, regulatory applicability determinations, explanation of any conditions from previously issued permits that are not being transferred to the title V permit, discussion of streamlining requirements, and other factual information, where advisable, including a list of prior title V permits issued to the same applicant at the plant, attainment status, and construction, permitting, and compliance history of the plant.*

In a February 8, 2013, memorandum to the OIG, the EPA stated its intent to address these two recommendations, as well as similar recommendations from the Clean Air Act Advisory Committee's Title V Task Force (*see* "Final Report to the Clean Air Act Advisory Committee: Title V Implementation Experience," April 2006).

The attachments below provide non-binding guidance that responds to OIG recommendations regarding annual compliance certification and statement of basis. The attachments highlight existing statutory and regulatory requirements and guidance issued by the EPA, and state and local permitting authorities. In addition, the attachments highlight key components of the applicable legal requirements and clarifications responsive to certain OIG recommendations. As you are aware, this information was developed in collaboration with EPA regional offices. Note that state and local permitting authorities

also provide guidance on title V requirements; the EPA encourages sources to consult with their state and local permitting authorities to obtain additional information or to obtain specific guidance.

If you have any questions, please contact Juan Santiago, Associate Director, Air Quality Policy Division/OAQPS, at (919) 541-1084, *santiago.juan@epa.gov*.

Attachments

Disclaimer

These documents explain the requirements of the EPA regulations, describes the EPA policies, and recommends procedures for sources and permitting authorities to use to ensure that the annual compliance certification and the statement of basis are consistent with applicable regulations. These documents are not a rule or regulation, and the guidance they contain may not apply to a particular situation based upon the individual facts and circumstances. The guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can," is intended to describe the EPA policies and recommendations. Mandatory terminology such as "must" and "required" is intended to describe controlling requirements under the terms of the Clean Air Act and the EPA regulations, but the documents do not establish legally binding requirements in and of themselves.

Attachment 1

Implementation Guidance on Annual Compliance Certification Requirements Under the Clean Air Act Title V Operating Permits Program

I. Overview of Title V and Annual Compliance Certification Requirements

Title V of the Clean Air Act (CAA or Act) establishes an operating permits program for major sources of air pollutants, as well as other sources. CAA sections 501-507; 42 U.S.C. Sections 7661-7661f. A detailed history and description of title V of the CAA is available in the preamble discussions of both the proposed and final original regulations implementing title V – the first promulgation of 40 CFR Part 70. *See* 57 FR 32250 (July 21, 1992) (Final Rule); 56 FR 21712 (May 10, 1991) (Proposed Rule). The EPA recently provided further information regarding compliance certification history in a proposed rulemaking titled, "Amendments to Compliance Certification Content Requirements for State and Federal Operating Permits Programs," published on March 29, 2013. 78 FR 19164. Under title V, states are required to develop and implement title V permitting programs in conformance with program requirements promulgated by the EPA in 40 CFR Part 70. Title V requires that every major stationary source (and certain other sources) apply for and operate pursuant to an operating permit. CAA section 502(a) and 503. The operating permit must contain conditions that assure compliance with all of the sources' applicable requirements under the CAA. CAA section 504(a). Title V also states, among other requirements, that sources certify compliance with the applicable requirements of their permits no less frequently than annually (CAA section 503(b)(2)), provides authority to the EPA to prescribe procedures for determining compliance and for monitoring and analysis of pollutants regulated under the CAA (CAA section 504(b)), and requires each permit to "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." (CAA section 504(c).)

This guidance document focuses on the annual compliance certification, which applies to the terms and conditions of issued operating permits. CAA section 503(b)(2) states that the EPA's regulations implementing title V "shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority." CAA section 504(c) states that each title V permit issued "shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. . . Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy." Additional requirements of compliance certification are described in section 114(a)(3) of the CAA as follows:

> The Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, require enhanced monitoring and submission of compliance certifications. Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance

status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require. Compliance certifications and monitoring data shall be subject to subsection (c) of this section [availability of information to the public].

CAA section 114(a)(3), 42 U.S.C. section 7414(a)(3). The EPA promulgated regulations implementing these provisions for title V operating permits purposes. Key regulatory provisions regarding compliance certifications are found in 40 CFR section 70.6(c), "Compliance requirements."

II. Overview of Annual Compliance Certification Requirements

The EPA's regulations at 40 CFR section 70.6(c) describe the required elements of annual compliance certifications. Specifically, 40 CFR section 70.6(c)(5)(iii)-(iv) provides that all permits must include the following annual compliance certification requirements:

> (iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):
>
> (A) The identification of each term or condition of the permit that is the basis of the certification;
>
> (B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section;
>
> (C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and
>
> (D) Such other facts as the permitting authority may require to determine the compliance status of the source.
>
> (iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority.
>
> (6) Such other provisions as the permitting authority may require.

Further information surrounding compliance certification is described in the regulatory provision addressing the criteria for a permit application, 40 CFR section 70.5(d). There have been revisions to Part 70 since its original promulgation in 1992.

One rulemaking action relevant to compliance certifications was in response to an October 29, 1999, remand from the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council (NRDC)* v. *EPA*, 194 F.3d 130 (D.C. Cir. 1999). In that case, the Court upheld a portion of the EPA's compliance assurance monitoring rule, but remanded back to the EPA the need to ensure 40 CFR sections 70.6(c)(5)(iii) and 71.6(c)(5)(iii) were consistent with language in CAA section 114(a)(3) which states that compliance certifications shall include, among other requirements, " 'whether compliance is continuous or intermittent.' " *NRDC* at 135 (internal citations omitted). Accordingly, the EPA proposed to add appropriate language to paragraph (c)(5)(iii)(C) of both 40 CFR sections 70.6 and 71.6. However, the final rule on June 27, 2003 (68 FR 38518) inadvertently deleted an existing sentence from the regulations (which was not related to the addition which resulted from the D.C. Circuit decision). The OIG Report referenced this issue and in response to the OIG, as agreed, the EPA has proposed to restore the inadvertently deleted sentence back into the rule. *See, e.g.,* 78 FR 19164 (March 29, 2013). This proposed rule would reinstate the inadvertently removed sentence – which, consistent with the Credible Evidence rule, requires owners and operators of sources to "identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information" – in its original place before the semicolon at the end of 40 CFR sections 70.6(c)(5)(iii)(B) and 71.6(c)(5)(iii)(B). The EPA is still reviewing comments received on this proposal; however, today's guidance document is based on statutory and long-standing regulatory requirements regarding compliance certifications, obligations for "reasonable inquiry" and consideration of credible evidence, many of which were also relied upon in the EPA's proposal.

III. Implementation of the Annual Compliance Certification Requirements

The statutory and regulatory provisions regarding compliance certification provide direction to sources and permitting authorities regarding implementation of these provisions. Nonetheless, questions arise periodically and, as a general matter, responding to those questions typically occurs on a case-by-case basis, consistent with the statutory and regulatory requirements, as well as applicable state or local regulations. Questions may be posed to authorized permitting authorities, EPA Regional Offices, or EPA Headquarters offices. As a general matter, where formal responses are provided by EPA, such responses may be searched and viewed on various websites. These include, among others:

- *http://www.epa.gov/ttn/oarpg/t5pgm.html*

- Environmental Appeals Board (EAB) decisions on PSD permitting
http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/PSD+Permit+Appeals+(CAA)?OpenView
Environmental Appeals Board (EAB) decisions on title V permitting
http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Title+V+Permit+Appeals?OpenView

- The EPA's online searchable database of many PSD and title V guidance documents issued by EPA headquarters offices and EPA Regions (operated by Region 7) *http://www.epa.gov/region07/air/policy/search.htm.*

- The EPA's online searchable database of CAA title V petitions and issued orders (operated by Region 7) *http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm.*[1]

A review of these databases indicates that there are a number of issues that arise with some regularity and those general questions and responses are addressed below. In addition, the EPA notes that state and local permitting authorities are also a source of guidance on compliance certification form, instructions, and content. In some circumstances, state and local permitting authorities may require additional content for the annual compliance certification. *See, e.g.,* 40 CFR sections 70.6(c)(5)(iii)(D) and (c)(6). As a result, sources should review such requirements prior to completing the annual compliance certification.

A. Level of Specificity in Describing the Permit Term or Condition

The CAA and the EPA's regulations require that the annual compliance certification identify the terms and conditions that are the subject of the certification. As a general matter, specificity ensures that the responsible official has in fact reviewed each term and condition, as well as considered all appropriate information as part of the certification.[2] This does not mean, however, that each and every permit term and condition needs to be spelled out in its entirety in the annual compliance certification or that the certification needs to resemble a checklist of each permit term and condition. While some sources (and states) use what is informally referred to as a "long form" for certifications (where each term or condition is typically individually identified), such forms are not expressly required by either the CAA or the EPA's regulations, even though it may be advisable to use such a form.

The certification should include sufficient specificity and must identify the terms and conditions that are being covered by the certification. 40 CFR section 70.6(c)(5)(iii)(A)-(D). As a "best practice," sources may include additional information where there are unique or complex permit conditions such that "compliance" with a particular term and condition is predicated on several elements. In that case, additional information in the annual compliance certification may be advisable to explain how compliance with a particular condition was determined and, thus, the basis for the certification of compliance.

Consistent with the EPA's regulations, the annual compliance certification must include "[t]he identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period." 40 CFR section 70.6(c)(5)(iii)(B). For example, there may be situations where certification is based on electronic

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[1] The EPA's practice is to publish a notice in the *Federal Register* announcing that a petition order was signed. Once signed, the EPA's practice is to place a copy of that final order on the title V petition order database, which is searchable online.

[2] The EPA's regulations require that a "responsible official" sign the compliance certification. The term "responsible official" is defined in 40 CFR section 70.2.

data from continuous emissions monitoring devices, which may result in a fairly straightforward annual compliance certification. Alternatively, there may be situations where compliance during the reporting period was determined through parametric monitoring, which requires the source to consider various data and perform a mathematical calculation, to determine the compliance status. In that latter situation when various data from parametric monitoring are combined via calculation, the annual compliance certification may contain more detail regarding that term or condition which relies on parametric monitoring in the permit.[3]

Regardless of the level of specificity provided for the particular terms and conditions in the annual certification itself, the minimum regulatory requirements include "[t]he identification of each term or condition of the permit that is the basis of the certification." 40 CFR Section 70.6(c)(5)(iii)(A). As noted above, there may be different ways to meet this requirement. For example, when referencing a permit term or condition in the certification, if the permit incorporates by reference a citation without explaining the particular term or condition, the source may choose to provide additional clarity in the compliance certification to support the certification. Another situation where additional specificity may be advisable is where a source has an alternative operating scenario where the source may be best served by providing additional compliance related information in support of the certification. As another example, the part 71 federal operating permits program administered by the EPA includes a form, and instructions, for sources to use for their annual compliance certifications. Annual Compliance Certification (A-COMP), EPA Form 5900-04, at page 4, available at: *http://www.epa.gov/airquality/permits/pdfs/a-comp.pdf.* This form is not expressly required for non-EPA permitting authorities; however, this form and the instructions provide feedback regarding what to include in an annual compliance certification.

Importantly, permitting authorities have additional compliance certification requirements and/or recommendations that sources should consult before finalizing a compliance certification in order to ensure compliance with the applicable requirements. *See, e.g.*, 40 CFR section 70.6(c)(6).

B. Form of the Certification

As a general matter, there is no requirement in the Act or in Part 70 that a source use a specific form for the compliance certification (although some states have adopted specific forms and instructions). The most relevant consideration in certifications is not the form, but the content and clarity of the terms and conditions with which the compliance status is being certified. Some state permitting authorities have developed template forms and instructions to assist sources in ensuring compliance with applicable requirements. The EPA has not provided such templates, except as noted above where a form is provided for the EPA's part 71 permit program. While templates are not required by the statute or the regulations, they can be useful tools (e.g., to facilitate electronic reporting and consistency) so long as sources consider whether the form adequately covers their permitting and certification situation, and the sources are able to make adjustments where appropriate to ensure compliance. The type of form used should be

[3] The CAA and the EPA's regulations require other more frequent compliance reports in addition to the annual compliance certification. In some circumstances, it may be helpful for a source to reference another compliance report in the annual compliance certification, as appropriate.

considered in light of the regulatory requirement to certify compliance with the specific terms and conditions of the permit. 40 CFR section 70.6(c)(5)(iii)(C). Additionally, as was noted earlier, because approved state and local areas may require additional elements in the annual compliance certifications, sources should confirm that their form is consistent with applicable state and local permitting requirements.

C. Certification Language

The EPA's regulations at 40 CFR section 70.5(d) require that the annual compliance certification include the following language: "Based on information and belief formed after reasonable inquiry, I certify that the statements and information in this certification are true, accurate, and complete." (Emphasis added.) While the EPA appreciates that each permit includes specific monitoring requirements, additional data may be available that indicate compliance (or noncompliance). The EPA recently proposed to provide additional clarity on this issue by proposing to restore a sentence to 40 CFR section 70.6(c)(5)(iii)(B) that had been inadvertently deleted, as discussed above.

IV. Discussion of Compliance Certification Content in Clean Air Act Advisory Committee Final Report on the Title V Implementation Experience

In the EPA's February 8, 2013, memorandum to the OIG, stated its intent to address the OIG's recommendation concerning the annual compliance certification, as well as similar recommendations from the Clean Air Act Advisory Committee's Title V Task Force.[4] While this guidance document responds to the 2005 OIG Report, information provided above overlaps with recommendations from the Title V Task Force. This guidance document does not adopt the Task Force recommendations; however, to the extent that they overlap with the discussion above, the EPA provides some observations regarding those recommendations.

Section 4.7 of the Task Force Report discusses compliance certification forms. This section includes, among other items, comments from stakeholders, a summary of the Task Force discussions, and Task Force recommendations. Of the five recommendations included in this section of the Report, three were unanimously supported by the Task Force members (Recommendations 3, 4, and 5). Task Force Final Report at 119-120. EPA's discussion above regarding the level of specificity and the form of the annual compliance certification generally addresses the two recommendations for which there was not consensus within the Task Force (Recommendations 1 and 2).

The five recommendations, directly quoted from the Task Force Report, are as follows:

[4] In April 2006, the Title V Task Force finalized a document titled, "Final Report to the Clean Air Act Advisory Committee: Title V Implementation Experience." This document was the result of the Task Force's efforts to review the implementation and performance of the operating permit program under title V of the 1990 Clean Air Act Amendments. Included in the report are a number of recommendations, including some specific recommendations regarding compliance certifications that are consistent with existing regulations and information provided in this guidance document.

Recommendation #1. Most of the Task Force endorsed an approach akin to the "short form" certification, believing that a line-by-line listing of permit requirements is not required and imposes burdens without additional compliance benefit. Under this approach, the compliance certification form would include a statement that the source was in continuous compliance with permit terms and conditions with the exception of noted deviations and periods of intermittent compliance. Although the permittee would cross-reference the permit for methods of compliance, in situations where the permit specifies a particular monitoring method but the permittee is relying on different monitoring, testing or other evidence to support its certification of compliance, that reliance should be specifically identified in the certification and briefly explained. An example of such a case would be where the permit requires continuous temperature records to verify compliance with a minimum temperature requirement. If the chart recorder data was not recorded for one hour during the reporting period because it ran out of ink, and the source relies on the facts that the data before and after the hour shows temperature above the requirement minimum and that the alarm system which sounds if temperature falls below setpoint was functioning and did not alarm during the hour, these two items would be noted as the data upon which the source relies for certifying continuous compliance with the minimum temperature requirement.

Recommendation #2. Others on the Task Force believed that more detail than is included in the short form is needed in the compliance certification to assure source accountability and the enforce-ability of the certification. These members viewed at least one of the following options as acceptable (some members accepting any, while others accepting only one or two):

1. The use of a form that allows sources to use some cross-referencing to identify the permit term or condition to which compliance was certified. Cross-referencing would only be allowed where the permit itself clearly numbers or letters each specific permit term or condition, clearly identifies required monitoring, and does not itself include cross-referencing beyond detailed citations to publicly accessible regulations. The compliance certification could then cite to the number of a permit condition, or possibly the numbers for a group of conditions, and note the compliance status for that permit condition and the method used for determining compliance. In the case of permit conditions that are not specifically numbered or lettered, the form would use text to identify the requirement for which the permittee is certifying.
2. Use of the long form.
3. Use of the permit itself as the compliance certification form with spaces included to identify whether compliance with each condition was continuous or intermittent and information regarding deviations attached.

Recommendation # 3. Where the permit specifies a particular monitoring or compliance method and the source is relying on other information, that information should be separately specified on the certification form.

Recommendation # 4. Where a permit term does not impose an affirmative obligation on the source, the form should not require a compliance certification; e.g., where the permit states that it does not convey property rights or that the permitting authority is to undertake some activity such as provide public notice of a revision.

Recommendation # 5. All forms should provide space for the permittee to provide additional explanation regarding its compliance status and any deviations identified during the reporting period.

Task Force Final Report at 118-120.[5] With regard to these recommendations, the EPA offers several observations. First, there is nothing in the CAA or Part 70 that prohibits Recommendation 3, 4, and 5, which had unanimous support from the Task Force. *See* 40 CFR section 70.6(c)(5)(iii)-(iv). Second, with regard to Recommendations 3 and 5, these should be considered "best practices" to ensure that the annual certification provides adequate information. Third, Recommendations 1 and 2 outline different ideas surrounding the level of specificity and the form of the annual compliance certification. This guidance document does address those issues and recommends activities consistent with the regulatory requirements while also providing some flexibility on the level of specificity depending on the complexity of the permit conditions being certified.

[5] With regard to the first recommendation, the EPA observes that the example provided in the Task Force Report identifies a scenario in which additional narrative on the annual compliance certification form would be useful to explain the determination that the sources was (or was not) in compliance with a permit term or condition.

Attachment 2

Implementation Guidance on Statement of Basis Requirements Under the Clean Air Act Title V Operating Permits Program

I. Overview of Legal Requirements for Statement of Basis

Section 502 of the CAA addresses title V permit programs generally. Among other required elements of the EPA's rules implementing title V, Congress stated that the regulations shall include:

> Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions....

CAA section 502(b)(6). The EPA's regulations implementing title V require that a permitting authority provide "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to the EPA and to any other person who requests it." 40 CFR section 70.7(a)(5). As will be discussed below, among other purposes, the statement of basis is intended to support the requirements of CAA section 502(b)(6) by providing information to allow for "expeditious" evaluation of the permit terms and conditions, and by providing information that supports public participation in the permitting process, considering other information in the record.

Since the EPA promulgated its Part 70 regulations, the EPA has provided additional guidance and information surrounding the statement of basis. This information is available on EPA's searchable online database of Title V guidance (*http://www.epa.gov/region07/air/policy/search.htm*). A search of that database reveals numerous documents dating back to 1996 that provide feedback regarding the content of the statement of basis.[1] Because the specific content of the statement of basis depends in part on the terms and conditions of the individual permit at issue, the EPA's regulations are intended to provide flexibility to the state and local permitting authorities regarding content of the statement of basis. The statement of basis is required to contain, as the regulation states, sufficient information to explain the "legal and factual basis for the draft permit conditions." 40 CFR section 70.7(a)(5).

II. Guidance on the Content of Statement of Basis

Since promulgation of the Part 70 regulations, the EPA has provided guidance on recommended contents of the statement of basis. Taken as a whole, various title V petition orders and other documents, particularly those cited in those orders, provide a good roadmap as to what should be

[1] *See, e.g.*, Region 10 Questions & Answers No. 2: Title V Permit Development (March 19, 1996) (available online at *http://www.epa.gov/region07/air/title5/t5memos/r10qa2.pdf*).

included in a statement of basis on a permit-by-permit basis, considering, among other factors, the technical complexity of a permit, history of the facility, and the number of new provisions being added at the title V permitting stage. This guidance document identifies a few such documents for example purposes and provides references for locating such materials on the Internet.

The EPA provided an overview of this guidance in a 2006 title V petition order. *In the Matter of Onyx Environmental Services*, Order on Petition No. V-2005-1 (February 1, 2006) (*Onyx Order*) at 13-14. In the *Onyx Order*, in the context of a general overview statement on the statement of basis, the EPA explained,

> A statement of basis must describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that U.S. EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of applicable requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 C.F.R. § 70.6(a)(3)(i)(B). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit. (Footnotes omitted.) *See, e.g., In Re Port Hudson Operations, Georgia Pacific,* Petition No. 6-03-01, at pages 37-40 (May 9, 2003) *("Georgia Pacific"); In Re Doe Run Company Buick Mill and Mine,* Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) *("Doe Run"); In Re Fort James Camas Mill,* Petition No. X-1999-1, at page 8 (December 22, 2000) (*"Ft. James"*).

Onyx Order at 13-14. In the *Onyx Order*, there is a reference to a February 19, 1999, letter that identified elements which, if applicable, should be included in the statement of basis. In that letter to Mr. David Dixon, Chair of the California Air Pollution Control Officers Association (CAPCOA) Title V Subcommittee, the EPA Region 9 Air Division provided a list of air quality factors to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region 9's review. Specifically, this letter identified the following elements which, if applicable, should be included in the statement of basis:

- additions of permitted equipment which were not included in the application,
- identification of any applicable requirements for insignificant activities or State-registered portable equipment that have not previously been identified at the Title V facility,
- outdated SIP requirement streamlining demonstrations,
- multiple applicable requirements streamlining demonstrations,
- permit shields,
- alternative operating scenarios,
- compliance schedules,
- CAM requirements,

- plant wide allowable emission limits (PAL) or other voluntary limits,
- any district permits to operate or authority to construct permits,
- periodic monitoring decisions, where the decisions deviate from already agreed-upon levels. These decisions could be part of the permit package or could reside in a publicly available document. (Parenthetical omitted)

Enclosure to February 19, 1999, letter from Region 9 to Mr. David Dixon.

In 2001, in a letter from the EPA to the Ohio Environmental Protection Agency, which is also cited to in the *Onyx Order*, the EPA explained that:

> The [statement of basis] should also include factual information that is important for the public to be aware of. Examples include:
>
> 1. A listing of any Title V permits issued to the same applicant at the plant site, if any. In some cases it may be important to include the rationale for determining that sources are support facilities.
> 2. Attainment status.
> 3. Construction and permitting history of the source.
> 4. Compliance history including inspections, any violations noticed, a listing of consent decrees into which the permittee has entered and corrective action(s) taken to address noncompliance.

Letter from Stephen Rothblatt, EPA Region 5 to Robert Hodanbosi, Ohio EPA, December 20, 2001 (available online at *http://www.epa.gov/region07/air/title5/t5memos/sbguide.pdf*). In 2002, in the context of finding deficiencies with the State of Texas operating permits program, the EPA explained that, "a statement of basis should include, but is not limited to, a description of the facility, a discussion of any operational flexibility that will be utilized at the facility, the basis for applying the permit shield, any federal regulatory applicability determinations, and the rationale for the monitoring methods selected." 67 FR 732, 735 (January 7, 2002).

The EPA has also addressed statement of basis contents in additional title V petition orders (available in an online searchable database at *http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm*). In some cases, title V petition orders provide information even where a statement of basis is not directly at issue. For example, the EPA has interpreted 40 CFR section 70.7(a)(5) to require that the rationale for selected monitoring methods be clear and documented in the permit record. *In the Matter of CITGO Refining and Chemicals Company LP (CITGO)*, Order on Petition No. VI-2007-01 (May 28, 2009) at 7; *see also In the Matter of Fort James Camas Mill* (*Fort James*), Order on Petition No. X-1999-1 (December 22, 2000) at page 8. This type of information could be included in the statement of basis. The EPA observes that where such information is included in the statement of basis, this can facilitate a better understanding of the rationale for monitoring. Such information could also be included in other parts of the permit record. In addition, it is particularly helpful when the statement of basis identifies key issues that the permitting authority anticipates would be a priority for EPA or public review (for example, if such issues represent new conditions or

interpretations of applicable requirements that are not explicit on their face). *See, e.g., In the Matter of Consolidated Edison Co. Of NY, Inc. Ravenswood Steam Plant,* Order on Petition No. II-2001-08 (Sept. 30, 2003) at page 11; *In the Matter of Port Hudson Operation Georgia Pacific,* Order on Petition No. 6-03-01 (May 9, 2003) at pages 37-40; *In the Matter of Doe Run Company Buick Mill and Mine* (*Doe Run*), Order on Petition No. VII-1999-001 (July 31, 2002) at pages 24-26; *In the Matter of Los Medanos Energy Center* (Order on Petition) (May 24, 2004) at pages 14-17.

Each of the various documents referenced above provide generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering, among other factors, the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage.[2]

III. Discussion of Statement of Basis Content in Clean Air Act Advisory Committee Final Report on the Title V Implementation Experience

In the EPA's February 8, 2013, memorandum to the OIG, the EPA stated its intent to address the OIG's recommendation concerning the statement of basis, as well as similar recommendations from the Clean Air Act Advisory Committee's Title V Task Force.[3] While this guidance document responds to the 2005 OIG Report, information provided above overlaps with recommendations from the Title V Task Force. This guidance document does not adopt the Task Force recommendations; however, to the extent that they overlap with the discussion above, the EPA provides some observations regarding those recommendations.

Section 5.5 of the Task Force Final Report addresses the statement of basis. This section includes a regulatory background piece, comments from stakeholders, a summary of the Task Force discussions, and Task Force recommendations. The recommendations section includes a list of items considered appropriate for inclusion into a statement of basis. Final Report at 231. Members of the Task Force unanimously supported the recommendations regarding the statement of basis. Because these recommendations overlaps substantially, if not wholly, with guidance previously provided by EPA, it is appropriate to include these recommendations within this guidance document as an additional guideline for developing an adequate statement of basis.

The Task Force recommended that the following items are appropriate for inclusion in a statement of basis document:

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[2] With regard to the title V permitting stage, a best practice includes making previous statements of basis accessible to give background on provisions that already exist in the permit and may not be a part of the permit action at issue, and provide context for the permit as a whole and the particular revisions at issue in that permit action or permit stage.

[3] In April 2006, the Title V Task Force finalized a document titled, "Final Report to the Clean Air Act Advisory Committee: Title V Implementation Experience." This document was the result of the Task Force's efforts to review the implementation and performance of the operating permit program under title V of the 1990 Clean Air Act Amendments. Included in the report are a number of recommendations, including specific recommendations regarding statement of basis contents that overlap with or are informative to this guidance document.

1. A description and explanation of any federally enforceable conditions from previously issued permits that are not being incorporated into the Title V permit.
2. A description and explanation of any streamlining of applicable requirements pursuant to EPA White Paper No. 2.
3. A description and explanation of any complex non-applicability determination (including any request for a permit shield under section 70.6(f)(1)(ii)) or any determination that a requirement applies that the source does not agree is applicable, including reference to any relevant materials used to make these determinations (e.g., source tests, state guidance documents).
4. A description and explanation of any difference in form of permit terms and conditions, as compared to the applicable requirement upon which the condition was based.
5. A discussion of terms and conditions included to provide operational flexibility under section 70.4(b)(12).
6. The rationale, including the identification of authority, for any Title V monitoring decision.

Task Force Final Report at 231. With regard to these recommendations, the EPA offers several observations. First, there is nothing in the CAA or Part 70 that precludes a permitting authority from including the items listed above in a statement of basis. Not all of those items will apply to every permit action (as is the case with the lists provided by the EPA in the previously-cited guidance documents). Second, concerning item #1, we note that there are very limited circumstances in which a condition from a previously issued permit would not need to be incorporated into the title V permit. Third, concerning item #2, the "White Paper" refers to "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program", dated March 5, 1996 (available online at *http://www.epa.gov/region07/air/title5/t5memos/wtppr-2.pdf*).

In developing the statement of basis, as was discussed earlier, the EPA recommends that permitting authorities consider the individual circumstances of the permit action in light of the regulatory requirements for the permit record in order to determine whether information along the lines of the items identified by the Task Force warrants inclusion into the statement of basis. In making this determination, the permitting authority is encouraged to consider whether the inclusion of such information would provide important explanatory information for the public and the EPA, and bolster the defensibility of the permit (thus improving the efficiency of the permit process and reducing the likelihood of receiving an adverse comment or an appeal), while also ensuring that the statutory and regulatory requirements are being met.

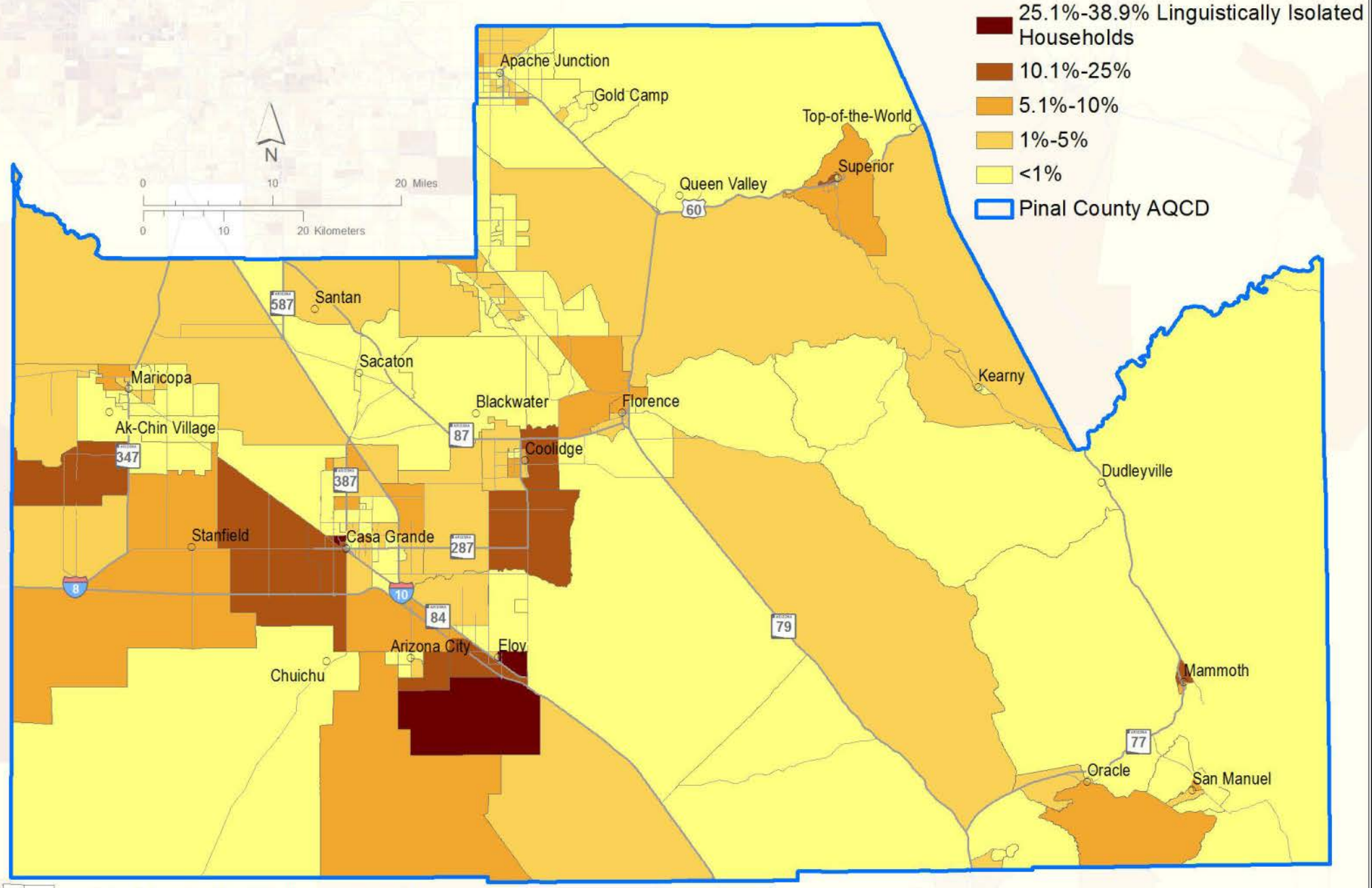
Table of SOB guidance

Elements	Region 9's Febuary 19, 1999 letter to SLOC APCD	NOD to Texas' part 70 Program (January 7, 2002)	Region 5 letter to state of Ohio (December 20, 2001)	Los Medanos Petition Order (May 24, 2004)	Bay Area Refinery Petition Orders (March 15, 2005)	EPA's August 1, 2005 letter regarding Exxon Mobil proposed permit	Petition No. V-2005-1 (February 1, 2006) (Onyx Order)	EPA's April 30, 2014 Memorandum: Implementation Guidance on ACC Reporting and SOB Requiremetns for Title V Operating Permits
New Equipment	Additions of permitted equipment which were not included in the application					√		
Insignificant Activities and portable equipment	Identification of any applicable requirements for insignificant activities or State-registered portable equipment that have not previously been identified at the Title V facility					√		
Streamlining	Multiple applicable requirements streamlining demonstrations		Streamlining requirements	Streamlining analysis		√		
Permit Shields	Permit shields	The basis for applying the permit shield	√	Discussion of permit shields	Basis for permit shield decisions	√		
Alternative Operating Scenarios and Operational Flexibility	Alternative operating scenarios	A discussion of any operational flexibility that will be utilized at the facility.	√			√		
Compliance Schedules	Compliance Schedules				Must discuss need for compliance schedule for multiple NOVs, particularly any unresolved/outstanding NOVs	Must discuss need for compliance schedule for any outstanding NOVs		
CAM	CAM requirements					√		
PALs	Plant wide allowable emission limits (PAL) or other voluntary limits					√		
Previous Permits	Any district permits to operate or authority to construct permits		Explanation of any conditions from previously issued permits that are not being transferred to the title V permit	A basis for the exclusion of certain NSR and PSD conditions contained in underlying ATC permits		√		
Periodic Monitoring Decisions	Periodic monitoring decisions, where the decisions deviate from already agreed upon levels (eg. Monitoring decisions agreed upon by the district and EPA either through: the Title V periodic monitoring workgroup; or another Title V permit for a	The rationale for the monitoring method selected	A description of the monitoring and operational restrictions requirements	1) recordkeeping and period monitoring that is required under 40 CFR 70.6(a)(3)(i)(B) or district regulation	The SOB must include a basis for its periodic monitoring decisions (adequacy of chosen monitoring or justification for not	The SOB must include a basis for its periodic monitoring decisions. Any emissions factors, exhaust characteristics, or other assumptions or inputs used to justify no periodic monitoring is required, should be included in SOB		√

	similar source). These decisions could be part of the permit package or reside in a publicly available document.			2) Ensure that the rationale for the selected monitoring method or lack of monitoring is clearly explained and documented in the permit record.	requiring periodic monitoring)			
Facility Description		A description of the facility	√			√		
Applicability Determinations and Exemptions		Any federal regulatory applicability determinations	Applicability and exemptions	1) Applicability determinations for source specific applicable requirements 2) Origin or factual basis for each permit condition or exemption	SOB must discuss the Applicability of various NSPS, NESHAP and local SIP requirements and include the basis for all exemptions	SOB must discuss the Applicability of various NSPS, NESHAP and local SIP requirements and include the basis for all exemptions		√
General Requirements			Certain factual information as necessary	Generally the SOB should provide "a record of the applicability and technical issues surrounding the issuance of the permit."		√	√	√

Appendix D. Map of Linguistically Isolated Households in Pinal County

PERCENTAGE OF LINGUISTICALLY ISOLATED HOUSEHOLDS
PINAL COUNTY AIR QUALITY CONTROL DISTRICT



Note: A household in which all members age 14 years and over speak a non-English language and also speak English less than "very well" (have difficulty with English) is linguistically isolated.

EPA

AIR18034 - Pinal County Linguistic Isolation Percentages.mxd (February 27, 2018)
Sources: US EPA's EJSCREEN (Version 2017), US Census Bureau's 2011-15 American Community Survey (2017), Teledyne (2012).

Appendix E. Fee Information

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

MAR 27 2018

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Updated Guidance on EPA Review of Fee Schedules for Operating Permit Programs Under Title V

FROM: Peter Tsirigotis
Director

TO: Regional Air Division Directors, Regions 1 – 10

The attached guidance is being issued in response to the Environmental Protection Agency Office of Inspector General's (OIG) 2014 report regarding the importance of enhanced EPA oversight of state, local, and tribal[1] fee practices under title V of the Clean Air Act (CAA).[2] Specifically, this guidance reflects the EPA's August 22, 2014, commitment to the OIG in response to OIG's Recommendation 1 to "assess our existing fee guidance and to re-issue, revise, or supplement such guidance as necessary" (we refer to the attached guidance as the "**updated fee schedule guidance**"). The EPA's response to the OIG's other recommendations are being issued concurrently in a separate memorandum and guidance concerning title V program and fee evaluations ("title V evaluation guidance").[3]

Title V of the CAA and 40 CFR part 70 contain the minimum requirements for operating permit programs developed and administered by air agencies, including requirements that each program issue operating permits to certain facilities (facilities that are "major sources" of air pollution and certain other facilities) and that each program charge fees ("permit fees") to these facilities to fund the permit program. These operating permits are intended to identify all federal air pollution control requirements that apply to a facility ("applicable requirements") and to require the facility to track and report compliance pursuant to a series of recordkeeping and reporting requirements. Section 502(b)(3) of the CAA requires each air agency to collect fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer" its title V permit program.[4] The 40 CFR part 70 regulations establish the minimum program

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[1] As used herein, the term "air agency" refers to state, local, and tribal agencies.
[2] *Enhanced EPA Oversight Needed to Address Risks from Declining Clean Air Act Title V Revenues*; U.S. EPA Office of the Inspector General. Report No. 15-P-0006, October 20, 2014 ("OIG Report").
[3] *Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70*, Peter Tsirigotis, Director, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, to Regional Air Division Directors, Regions 1 – 10, March 27, 2018 ("title V evaluation guidance"). See the EPA's title V guidance website at *https://www.epa.gov/title-v-operating-permits/title-v-operating-permit-policy-and-guidance-document-index*.
[4] 42 U.S.C. § 7661a(b)(3)(A).

requirements for operating permit programs, including requirements for fees to be administered by air agencies with approved part 70 programs.[5]

On August 4, 1993, the EPA issued a memorandum, commonly referred to as the "1993 fee schedule guidance," to provide initial guidance on the Agency's approach to reviewing fee schedules for part 70 programs.[6] Since that time, the EPA has issued a number of memoranda and a final rule[7] that have touched upon, revised, or clarified certain topics contained in the 1993 fee schedule guidance.[8] The attached updated fee schedule guidance provides additional direction on how the EPA interprets the title V permit issuance and fee collection activities, as well as discussion of other fee requirements for air agencies. In addition to the memoranda and final rule noted above, the updated fee schedule guidance includes numerous changes to remove outdated regulatory provisions and focuses on the review of existing part 70 programs, rather than on initial program submittals.[9]

The updated fee schedule guidance sets forth updated principles, which will generally guide the EPA's review of part 70 fee programs. These updates are consistent with the fee requirements of title V and part 70, as well as prior guidance on fee requirements. Accordingly, these updates do not themselves provide substantively new fee guidance or create any inconsistencies with fee requirements or prior fee guidance.

The development of this guidance included outreach and discussions with stakeholders, including the EPA Regions, the National Association of Clean Air Agencies, and the Association of Air Pollution Control Agencies.

If you have any questions concerning the updated fee schedule guidance, please contact Juan Santiago, Associate Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, at (919) 541-1084 or *santiago.juan@epa.gov*.

Attachments:
1. Updated Guidance on EPA Review of Fee Schedules for Operating Permit Programs under Title V
2. Attachment A – List of Guidance Relevant to Part 70 Fee Requirements
3. Attachment B – Example Presumptive Minimum Calculation

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[5] 40 C.F.R. § 70.9.

[6] *See Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs under Title V*, John S. Seitz, Director, OAQPS, U.S. EPA, to Air Division Directors, Regions I-X (August 4, 1993) ("1993 fee schedule guidance") at page 1. Note that there was an earlier document on this subject that was superseded by the 1993 fee schedule guidance.

[7] *See* the October 23, 2015, final rule, *Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Stationary Sources: Electric Utility Generating Units*. 80 FR 64510, 64633 (Section XII.E "Implications for Title V Fee Requirements for GHGs").

[8] A list of the relevant title V fee-related guidance memoranda is included as Attachment A.

[9] At this time, all air agencies have EPA-approved part 70 programs. It is conceivable that additional part 70 program submittals will be received in the future for a number of Indian tribes, and, if so, the EPA will work closely with the tribes to assist them with identifying activities which must be included in costs related to the program submittal and to meet other fee requirements of part 70.

DISCLAIMER

These documents explain the requirements of the EPA regulations, describe the EPA policies, and recommend procedures for sources and permitting authorities to use to ensure that title V fee schedules and fee evaluations are consistent with applicable regulations. These documents are not a rule or regulation, and the guidance they contain may not apply to a particular situation based upon the individual facts and circumstances. The guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can," is intended to describe the EPA policies and recommendations. Mandatory terminology, such as "must" and "required," is intended to describe controlling requirements under the terms of the Clean Air Act and the EPA's regulations, but the documents do not establish legally binding requirements in and of themselves.

Updated Guidance on EPA Review of
Fee Schedules for Operating Permit Programs under Title V

The purpose of this document and the attachments is to provide guidance on the Environmental Protection Agency's (EPA's) review of fee schedules for operating permit programs under 40 CFR part 70 (part 70), the regulations that set minimum requirements for permit programs administered by state, local, and tribal air agencies (referred to here as, "air agencies") authorized under title V of the Clean Air Act (CAA or Act). This document updates and clarifies the previous fee schedule guidance issued by the EPA on August 4, 1993 (the "1993 fee schedule guidance").[1] This updated fee schedule guidance clarifies which permit program costs must be included in an analysis to demonstrate that adequate fees are collected to fund all part 70 program costs. The guidance also discusses other fee-related requirements for air agencies. The updated fee schedule guidance focuses on the costs of program implementation, rather than on the costs of initial program development (as was the case for the 1993 fee schedule guidance).

I. General Principles for Review of Title V Fee Schedules

Section 502(b)(3)(A) of the Act requires operating permit programs to fund all "reasonable direct and indirect costs" of the permit programs through fees collected from "part 70 sources"[2] and requires the fees to be sufficient to cover all reasonable permit program costs.[3] The terms "fee schedule" and "permit fees" are sometimes used interchangeably to describe the fees that an air agency charges to part 70 sources to fulfill this requirement.[4] Section II of this guidance provides an explanation of the term "direct and indirect costs" and a detailed explanation of specific permit program activities to be included in costs for the purpose of analyzing whether the permit fees are sufficient to cover all the permit program costs.

The fees collected under a part 70 program are classified as "exchange revenue" or "earned revenue" in governmental accounting guidance because a good or service (e.g., a permit) is provided by a governmental entity in exchange for a price (e.g., a permit fee).[5] Also, governmental accounting guidance provides that only revenue classified as "exchange revenue" should be compared to costs to

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[1] *See Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs under Title V*, John S. Seitz, Director, OAQPS, U.S. EPA, to Air Division Directors, Regions I-X (August 4, 1993) ("1993 fee schedule guidance").

[2] The term "part 70 sources" is defined in 40 CFR § 7.2 to mean "any source subject to the permitting requirements of this part, as provided in 40 CFR §§ 70.3(a) and 70.3(b) of this part." Thus, a source is a part 70 source prior to obtaining a part 70 permit if the source is subject to permitting under the applicability provisions of 40 CFR § 70.3.

[3] *See* 40 CFR § 70.9(a).

[4] The fee schedule is typically included in the regulations that the air agency uses to implement part 70; it is a component of the part 70 program. The fee schedule (and other elements of an air agency's regulations for part 70) can vary significantly across air agencies.

[5] *See* Statement of Recommended Accounting Standards Number 7, *Accounting for Revenue and Other Financing Sources and Concepts for Reconciling Budgetary and Financial Accounting*, issued by the Federal Accounting Standards Advisory Board (FASAB) ("FASAB No. 7") at page 2. *See also* Statement No. 33, *Accounting and Financial Reporting for Nonexchange Transactions* (December 1998), issued by the Governmental Accounting Standards Board (GASB) at pages 1-4 ("GASB No. 33").

determine the overall financial results of operations for a period.[6] This means that legislative appropriations, taxes, grants,[7] fines and penalties, which are generally characterized as "nonexchange revenue,"[8] should not be compared to part 70 program costs to determine if permit fees are sufficient to cover costs.

Any fee required by part 70 must "be used solely for permit program costs" (in other words, the feesaa must not bediverted foranon-part 70 purposes).[9] Manyair agencies transfer fees that are inæxcess of program costs foræ particular year into accounts to be used foraparta70 purposes in another year when there is expected to be a fee shortfall, and this is an acceptable practice. However, if title V fees are transferred for uses not authorized by part 70 (e.g., highway maintenance or other general obligations of government), they would be considered improperly diverted.

Each air agency is required, as part of its part 70 program submittal, to submit a "fee demonstration" to show that its fee schedule would result in the collection and retention of fees sufficient to cover program costs, including an "initial accounting" to show thatá"required fee revenues" would be used solely to cover program costs.[10]

The EPA will generally presume that a feeæscheduleis sufficient to cover program costs if it results in the collection and retention of fees in an amount above the "presumptive minimum" —i.e., "an amount *notless than* $25 per ton" adjusted annually for increases in the Consumer Price Index[11] "times the total tons of theactual emissions of each regulated air pollutant (for presumptive fee calculation) emitted from part 70 sources," plus any greenhouse gas (GHG) cost adjustments, asapplicable.[12] A fee schedule that is expected to result in fees above the "presumptive minimum" isæconsidered to be "presumptively adequate." Note that the "presumptive minimum" isanique to each air agency because the total tons of actual emissions of "regulated air pollutants (for presumptive fee calculation)" are unique to each air agency.

As part of a fee demonstration, air agencies with fee schedules that would not be presumptively adequate are required to submit a "detailed accounting" to show that collection and retention of fee

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[6] *See* FASAB No. 7 at page 8; GASB No. 33.

[7] Concerning grants, an EPA memo, *Use of Clean Air Act Title V Permit Fees as Match for Section 105 Grants*, Gerald Yamada, Acting General Counsel, U.S. EPA, to Michael H. Shapiro, Acting Assistant Administrator, Office of Air and Radiation, U.S. EPA, October 22, 1993, states that part 70 fees are "program income" under 40 CFR § 31.25(a), and, because of this, part 70 fees cannot be used as match for section 105 grants and no air agency may count the same activity for bothtt grant and part 70 fee purposes.tt

[8] "Nonexchange revenue" arises primarily from the exercise of governmental power to demand payment from the public (e.g., income tax, sales tax, property taxes, fines, and penalties) and when a government gives value directly without directly receiving equal value in return (e.g., legislative appropriations and intergovernmental grants).

[9] *See* 40 CFR § 70.9(a).

[10] *See* 40 CFR §§ 70.9(c)-(d) (fee demonstration requirements); 1993 fee schedule guidance (explaining that preparing the fee demonstrations that is part of the initial part 70 program submittal).

[11] *See* CAAt§ 502(b)(3)(B); 40 CFR § 70.9(b). The presumptive minimum fee rate is adjusted for increases in the Consumer Price Index each year in September. The fee rate for the period of September 1, 2016, through August 31, 2017, is $48.88 per ton. For more information, including a list of historical adjustment to the fee rate, *see https://www.epa.gov/title-v-operating-permits/permit-fees*.

[12] *See* 40 CFR § 70.9(b)(2) (emphasis added). The components of the "presumptive minimum" calculation—including certain emissions that may be excluded from the calculation, and an upward "GHG cost adjustment" that may apply—are addressed in 40 CFR §§ 70.9(b)(2)(i)-(v).

revenue would be sufficient to cover program costs.[13] Air agencies are also required to provide an "initial accounting" to show how "required fee revenues" will be used solely to cover permitting program costs.[14] Air agencies with fee schedules considered "presumptively adequate" are nevertheless required to submit fee demonstrations,[15] but they may be "presumptive minimum program cost" demonstrations[16] showing that expected fee revenues are above the "presumptive minimum" calculated for the air agency. In order to receive the EPA's approval, any fee demonstration must provide an "initial accounting" showing how required fee revenues will be used solely to cover program costs.[17]

After an air agency fee program is approved by the EPA, there are several fee requirements that may apply to the permit program as circumstances dictate. One requirement is for an air agency to submit, as required by the EPA, "periodic updates" of the "initial accounting" portion of the fee demonstration to show how "required fee revenues" are used solely to cover the costs of the permit program.[18] Further, an air agency must submit a "detailed accounting" demonstrating that the fee schedule is adequate to cover costs if an air agency changes its fee schedule to collect *less than* the presumptive minimum or if the EPA determines—based on the EPA's own initiative, or based on comments rebutting a presumption of fee sufficiency—that there are serious questions regarding whether the fee schedule is sufficient to cover the costs.[19]

In addition, title V and part 70 provide general authority for the EPA to conduct oversight activities to ensure air agencies adequately administer and enforce the requirements for operating permits programs, including that the requirements for fees are being met on an ongoing basis.[20] One method the EPA uses to perform such oversight is through periodic program or fee evaluations of part 70 programs. As part of such an evaluation, the EPA may carefully review how the state has addressed the fee requirements of part 70 as previously described and work with the air agency to seek improvements or make corrections and adjustments if any fee concerns are uncovered. Also, as part of such an evaluation, the EPA may require "periodic updates" to a fee demonstration or a "detailed accounting" that fees are sufficient to cover permit program costs.[21] See the EPA's separate *Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70* ("title V evaluation guidance") for more on this subject.[22]

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[13] *See* 40 CFR § 70.9(b).
[14] *See* 40 CFR § 70.9(d).
[15] *See* 40 CFR § 70.9(c).
[16] *See* Sections 1.1 and 3.2 of the fee demonstration guidance.
[17] *See* 40 CFR § 70.9(d).
[18] *See* 40 CFR § 70.9(d).
[19] *See* 40 CFR § 70.9(b)(5); fee demonstration guidance, Section 2.0 (providing an example of a "detailed accounting"). The scope and content of a "detailed accounting" may vary but will generally involve information on program fees and costs and other accounting procedures and practices that will show how the air agency's fee schedule will be sufficient to cover all program costs.
[20] *See* CAA § 502(i); 40 CFR § 70.10(b).
[21] *See* 40 CFR §§ 70.9(a); 70.9(b)(1), (5)(ii).
[22] *Program and Fee Evaluation Strategy and Guidance for 40 CFR Part 70*, Peter Tsirigotis, Director, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, to Regional Air Division Directors, Regions 1 – 10, March 27, 2018.

II.aa Types of Costs and Activities Included inaTitle V Costsaa

A.a Overviewaa

Activities that count as part 70 costs (direct and indirect costs of part 70).tPart 70 uses the term "permit program costs" to describe the costs that must count for fee purposes under part 70.[23] This term is defined in 40 CFR § 70.2 as "all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in [40 CFR § 70.9(b)] (whether such costs are incurred by the permitting authority or other State or local agencies that do not issue permits directly, but that support permit issuance or administration)." At a minimum, any air program activity performed by an air agency under title V or part 70 must be included in program costs. Many of the activities required under title V or part 70 are described in Sections II.B through II.K of this guidance.

As described above, part 70 costs must include all "reasonable direct and indirect costs"[24] that are incurred by air agencies intthe development, implementation, and enforcement of the part 70 program. "Direct costs" are expenses that can be directly attributed to part 70 program activities or services. "Direct costs" can generally be subdivided into two categories: "direct labor costs" and "other direct costs." The term "direct labor costs" refers to salary and wages for direct work on part 70, including fringe benefits. The term "other direct costs" refers to other direct part 70 expenses, such as materials, equipment, professional services, official travel (e.g., transportation, food and lodging), public notices, public hearings, and contracted services. "Indirect costs" are costs for "general administration" or "overhead" that are not directly attributable to a part 70 program because they benefit multiple programs or cost objectives, but they are needed to operate a part 70 program. "Indirect costs" for a part 70 program are typically determined based on an indirect rate or a proportional share of the expenses of a larger organization. Examples of "indirect costs" include, but are not limited to, costs for utilities, rent, general administrative support, data processing charges, training and staff development, budget and accounting support, supplies and postage.

Intaddition, note that air agency accounting practices vary in how they nominally categorize costs as "direct costs," "indirect costs," or "other direct costs," depending on the specific nature of the activity. An example would be training costs, which are typically treated as "indirect costs" buttsometimes astt "direct costs," particularly where the training istabout part 70 (e.g., for permit staff development). While accounting practices and terminology may vary among air agencies, the important principle to remember is that all reasonable directtand indirect costs of the program must be represented in the costs reported to the EPA, regardless of how the costs are categorized by the air agency.

Part 70 and the 1993tfee schedule guidance describe the part 70 activities of "reviewing and acting on any application for a part 70 permit"[25] and "implementing and enforcing the terms of anytpart 70tt

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[23] See 40 CFR § 70.9(a).

[24] The phrases, "reasonable direct and indirect costs" and "reasonable (direct and indirect) costs" have the same meaning. The phrase "reasonable direct and indirect costs" was initially used by the EPA in the 1993 fee schedule guidance, page 1. The phrase "reasonable (direct and indirect) costs" is also found in CAA section 502(b)(3)(A), (C)(iii).

[25] The response to comments document for the part 70 final rule clarifies that the phrase "acting on permit applications" in section 503(c) of the Act means the act of issuing or denying a permit, not just beginning review of a permit application. *See* Technical Support Document for Title V Operating Permits Programs (May 1992) at page 4-4, EPA Docket No. EPA-HQ-OAR-2004-0288; Legacy Docket No. A-90-33.

permit," and these activities must be included in part 70 costs.[26] The following paragraphs use these phrases to clarify the extent that certain activities performed by the air agency must be included in part 70 costs. The phrase "reviewing and acting on any application for a part 70 permit" refers to all activities related to processing the permit application and issuing (or denying) the final part 70 permit, while the phrase "implementing and enforcing the terms of any part 70 permit" refers to all activities necessary to administer and enforce final part 70 permits, prior to the filing of an administrative or judicial complaint or order.[27]

Also, the following paragraphs clarify the extent to which fees must fund the costs of "permit programs under provisions of the Act other than title V" (hereafter referred to as "other permits") (e.g., preconstruction review permits) and "activities which relate to provisions of the Act in addition to title V" (hereafter referred to as "other activities") (e.g., a requirement for an air agency to develop a case-by-case emissions standard for an existing source).[28]

Costs related to "other permits."[29] The costs of "implementing and enforcing" the terms of a part 70 permit must be treated as a part 70 cost.[30] Thus, part 70 costs must include the cost of implementing and enforcing any term or condition of a non-part 70 permit required under the Act[31] that is incorporated into a part 70 permit and meets the definition of "applicable requirement"[32] in part 70. Similarly, the cost of implementing and enforcing any term or condition of a consent decree or order that originates in a non-part 70 permit that has been incorporated into a part 70 permit must be included as a part 70 cost.[33]

The costs of implementing and enforcing "applicable requirements" from a non-part 70 permit that will go into a part 70 permit in the future may be counted as part 70 costs. However, once a source has

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[26] The phrases "reviewing and acting on any application for a part 70 permit" and "implementing and enforcing the terms of any part 70 permit" are found at 40 CFR § 70.9(b)(1)(ii) and (iv). Similar phrases are found in the EPA's 1993 fee schedule guidance at page 3 and the phrases in the guidance have the same meaning as the phrases in part 70. *See also*, CAA § 502(b)(3)(A).

[27] An EPA memo, *Matrix of Title V-Related and Air Grant-Eligible Activities*, OAQPS, U.S. EPA, September 23, 1993 (the "matrix guidance"), page 8, which clarifies that enforcement costs are counted for part 70 purposes prior to the filing of a complaint or order. *See* page 8.

[28] The phrases cited here were originally discussed on pages 2 and 3 of the cover memorandum for the 1993 fee schedule guidance.

[29] Note that the EPA's 1993 fee schedule guidance contains the statement that "the costs of reviewing and acting on applications for permits required under Act provisions other than title V *need not* be recouped by title V fee." This statement has been interpreted by some to mean that the costs of non-title V permits "are not needed" or "may *optionally*" be counted in title V costs.

[30] *See* 40 CFR § 70.9(b)(1)(iv).

[31] Examples of non-part 70 permits required under the Act may include "minor new source review" (minor NSR) permits, "synthetic minor" permits, Prevention of Significant Deterioration (PSD) permits, and Nonattainment NSR permits authorized under title I of the Act.

[32] "Applicable requirements" are the air quality requirements that must be included in part 70 permits. See the definition of "applicable requirement" in 40 CFR § 70.2, which includes "any terms and conditions of any preconstruction permits issued pursuant to any regulations [under title I]," and certain requirements under titles I, III, IV and VI of the Act.

[33] The EPA has previously explained that consent decrees and orders reflect the conclusion of a judicial or administrative process resulting from the enforcement of "applicable requirements," and, because of this, all CAA-related requirements in such consent decrees and orders "are appropriately treated as 'applicable requirements' and must be included in title V permits. . ." *See In the Matter of Citgo Refining and Chemicals Company, L.P.*, Order on Petition Number VI-2007-01, at 12 (May 28, 2009).

submitted a timely and complete part 70 application and paid part 70 fees, all costs of implementing and enforcing the non-part 70 permit must be counted as part 70 costs.[34]

Also, any implementation and enforcement activities related to a requirement that is incorporated into a part 70 permit that is not "federally enforceable" and would not meet the definition of an "applicable requirement" (e.g., a "state-only" requirement) need not be treated as a part 70 cost.[35] The matrixtt guidance also clarifies that state-only requirements are air grant-eligible activities, rather than title V-eligible activities.

Costs of performing certain other activities related to applicable requirements.ttCertain activities required by the Act or its implementing regulations are not "applicable requirements" as defined in part 70 because they apply to the permitting authority rather than the source.[36] We refer to such activities asttt "other activities." As such, questions often arise as to whether the costs of "other activities" are part 70 costs, costs of the underlying standard, or costs of the preconstruction review permitting process.

Examples of applicable requirements associated with "other activities" include, but are not limited to, the following:

- ttt Emissions standards or other requirements for new sources under section 111(b) of the Act;tt
- ttt Emissions standards or other requirements for existing sources under section 111(d) of the Act;tt
- ttt Case-by-case maximum achievable control technology (MACT) standards that may be requiredtt under section 112 of the Act; andtt
- ttt Activities required by a state, federal, or tribal implementation plan (SIP, FIP, or TIP), includingtt section 110 of the Act.tt

The 1993 fee schedule guidance stated that the cost for performing "other activities" would be part 70 costs only to the extent the activities are "necessary for part 70 purposes."[37] The 1993 fee schedulett guidance has resulted in numerous questions over the years as to the scope of the term "part 70 purposes." The EPA believes a clearer standard for determining when "other activities" must be included in part 70 costs would include an evaluation of: the extent to which the air agency is required to perform the "other activities" pursuant to part 70, title V, or the approved part 70 program; the extent to which the activity is performed to assure compliance with, or enforce, part 70 permit terms and conditions; or the extent to which a non-part 70 rule (e.g., a section 111 or 112 standard) requires the air agency to perform the activity in the part 70 permitting context. If an "other activity" does not meet any

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[34] *See* EPA memo, *Additional Guidance on Funding Support for State and Local Programs*, Mary D. Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, to Regional Administrators, Regions I–X, August 28, 1994.
[35] *See* 40 CFR § 70.6(b)(2).
[36] Although the "other activities" may originate within a federal standard or requirement that we generally refer to as an "applicable requirement" and the activities may result in an "applicable requirement," the activities themselves do not meet the definition of "applicable requirement" within 40 CFR § 70.2.
[37] See page 2 of the introductory memorandum for the 1993 fee schedule guidance.

of these criteria (e.g., a non-part 70 rule requires an activity in a non-part 70 context), it should not be included in part 70 costs.

Nonetheless, if any activity is an "applicable requirement" for a source, the applicable requirement must be included in a part 70 permit and the costs to the air agency of including it in the permit (and implementing and enforcing) must be treated as part 70 costs.[38]

For example, the cost of *incorporating* a standard (e.g., a section 111(b) standard) into a part 70 permit—where the task is merely one of copying the requirements from the regulation unchanged into a permit—would be a part 70 cost. However, the cost of *developing* a source-specific emission limitation outside the permit processing context (e.g., a standard pursuant to section 111(d) emission guidelines) would be a section 111 cost (although the cost of subsequently incorporating that standard into the part 70 permit would be a part 70 cost).

The costs of "other activities" related to implementation plans, including section 110 or 111 of the Act, should not be counted for part 70 purposes if the activities are required as part of the preconstruction review process or directly relate to implementation plan development, as required by title I of the Act.[39] On the other hand, part 70 costs can include ambient monitoring or emission inventories necessary to implement the part 70 program (e.g., development and quality assurance of emissions inventory for potential part 70 sources for the purpose of determining applicability).[40] If an air agency is unsure where to draw the line on including such activities in part 70 costs, they should contact the EPA for assistance.

General standard for EPA review of part 70 costs for a particular air agency. In general, the EPA expects that part 70 permit fees will fund the activities listed in this guidance. However, in evaluating a part 70 program, the EPA will consider the particular design and attributes of that program. Because the nature of permitting-related activities can vary across air agencies, the EPA evaluates each program individually. The activities listed in this guidance may not represent the full range of activities to be covered by permit fees.[41] Additionally, some air agencies may have further program needs based on the particularities of their own air quality issues and program structure.

Sections II.B through II.K of this guidance provide further information on specific permitting activities and the extent to which the costs of such activities must be treated as part 70 costs.

B. The Costs of Part 70 Program Administration

All part 70 program administration costs must be treated as part 70 costs.[42] Examples of program administration costs include:

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[38] *See* § 70.9(b)(1)(ii), (4).

[39] Implementation plan development is mandated under title I of the Act and costs typically include such activities as maintaining state-wide emissions inventories and performing ambient monitoring and emissions modeling of air pollutants for which national ambient air quality standards have been set.

[40] *See* the matrix guidance at page 1.

[41] The fee demonstration guidance cites various factors that may affect the types of activities included in a permit program and influence costs. *See* fee demonstration guidance at 4-5.

[42] This section includes many activities that would be categorized as part 70 costs under 40 CFR §§ 70.9(b)(1)(i)-(iii) that are not covered elsewhere in subsequent sections of this guidance and are necessary to conduct a part 70 program.

- Program infrastructure costs (e.g., development of part 70 regulations, implementation guidance, policies, procedures, and forms);

- Program integration costs (adapting to changes in related programs, such as NSR, section 112 programs, and other programs);

- Data system implementation costs (including data systems for submitting permitting information to the EPA, for permit program administration, implementation and tracking and to provide public access to permits or permit information);

- Costs to operate local or Regional offices for part 70, the costs of interfacing with other state, local, or tribal offices (e.g., briefing legislative or executive staff on program issues and responding to internal audits);

- Costs related to interfacing with the EPA (e.g., related to program oversight, including program evaluations, responding to public petitions, revising implementation agreements between the air agency and the EPA); and

- Activities similar to those above.

In addition, there are other program implementation costs, such as the costs of making determinations of which sources are subject to part 70 permitting requirements that must be treated as part 70 costs.[43] Examples of such activities include:

- Maintaining an inventory of part 70 sources (e.g., for enforcement of the requirement for sources to obtain a permit or for part 70 fee purposes);

- Costs of determining if an individual source is a major source (for applicability purposes);

- Costs of determining if a source qualifies for coverage under a general permit (if the air agency chooses to issue them); and

- Costs of determining if a non-major source is required to obtain a part 70 permit and costs of implementing any insignificant activity and emission level exemptions under part 70.

C. The Costs of Part 70 Program Revisions

All costs of revising an approved part 70 program must be treated as part 70 costs, including the costs of developing new program elements to respond to changes in requirements, whether the revisions are the air agency's own initiative or required by the EPA.[44] Examples of program revision costs include:

- Costs of revising the program elements that are changing (e.g., program legal authority, implementing regulations, data systems, and other program elements);

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[43] Many of these activities may also be described as related to reviewing and acting on applications for part 70 permits, as provided in 40 CFR § 70.9(b)(1)(ii).

[44] *See* 40 CFR § 70.4(i).

- Costs of documenting the changes; and

- Costs associated with obtaining the needed approvals, including for submitting program revisions to the EPA and any necessary follow-up work related to obtaining approval.

D. The Costs of Reviewing Applications and Acting on Part 70 Permits

All costs of reviewing an application for a part 70 permit, developing applicable requirements as part of the process of a permit, and ultimately acting upon the application must be treated as part 70 costs.[45] These costs must include the costs of the application completeness determination, the technical review of the application (including the review of any supplemental monitoring that may be needed, review of any compliance plans, compliance schedules, and review of initial compliance certifications included in the application), drafting permit terms and conditions to reflect the applicable requirements that apply to the source, determining if any permit shields apply, public participation, the EPA and affected air agency review, and issuing the permit. The cost of these activities must be included for initial permit processing, permit renewal, permit reopening, and permit modification.

The costs of developing part 70 permit terms and conditions. All costs associated with the development of permit terms and conditions to reflect the "applicable requirements," including the costs of incorporating such terms in part 70 permits, must be treated as part 70 costs. The applicable requirements include the emissions limitations and standards and other requirements as provided for in the definition of applicable requirements in 40 CFR § 70.2. Such costs may include the costs to determine the provisions of the applicable requirements that specifically apply to the source, to develop operational flexibility provisions, netting/trading conditions, and appropriate compliance conditions (e.g., inspection and entry, monitoring and reporting). Appropriate compliance provisions may include periodic monitoring and testing under 40 CFR § 70.6(a)(3)(i)(B) and monitoring sufficient to assure compliance under 40 CFR § 70.6(c)(1).

Part 70 also requires certain regulatory provisions to be included in permits, such as citation to the origin and authority of each permit term, a statement of permit duration, requirements related to fee payment, certain part 70 compliance and reporting requirements, a permit shield (if provided by the air agency), and similar terms. The costs of developing such terms must be covered by permit fees.[46]

The costs of developing "state-only" permit terms need not be treated as part 70 costs. Air agencies should screen or separate "state-only" requirements from federally-enforceable requirements and—while the act of separating part 70 terms from state-only terms should be treated as part 70 costs—the costs of developing state-only permit terms, putting them in the part 70 permit, and implementing and enforcing them as they appear in the part 70 permit need not be treated as part 70 costs for fee purposes.[47]

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[45] *See* CAA section 502(b)(3)(A)(i); 40 CFR § 70.9(b)(1)(ii).
[46] *See* 40 CFR § 70.6.
[47] *See* the matrix guidance, which notes that state-only requirements in part 70 permits are air-grant-eligible activities, rather than title V-eligible activities.

The costs of public participation and review (by the EPA and the affected air agency):ttAll costs of notices (or transmitting information) to the public, affected air agencies and the EPA for part 70 permit issuance, renewal, significant modifications and (if required by state or local law) for minor modifications (including staff time and publication costs) must be treated as part 70 costs.[48]

Any costs associated with hearings for part 70 permit issuance, renewal, significant modifications, and for minor modifications (if required by state or local law), including preparation, administration, response, and documentation, must be treated as part 70 costs.

All costs for the air agency to develop and provide a response to public comments received during the public comment period must be treated as part 70 costs.

Any costs associated with transmitting necessary documentation to the EPA for review and response to an EPA objection must be treated as part 70 costs.[49] Also, the costs associated with an air agency's response to an EPA order granting objection to a part 70 permit and/or the costs of defending challenges to part 70 permit terms in state court must be treated as part 70 costs.

E. The Costs of Implementation and Enforcement of Part 70 Permits

With some exceptions related to court costs and enforcement actions, the costs of implementing and enforcing the terms of any part 70 permit must be treated as part 70 program costs.[50] Implementation and enforcement of permit terms and conditions related to part 70 includes requirements for compliance plans, schedules of compliance, monitoring reports, deviation reports, and annual certifications.

The costs of any follow-up activities when compliance/enforcement issues are encountered should be treated as part 70 costs. Part 70 costs include such activities as conducting site visits, stack tests, inspections, audits, and requests for information either before or after a violation is identified (e.g., requests similar to the EPA's CAA section 114 letters).

Part 70 costs should include the costs for any notices, findings, and letters of violation, and the development of cases and referrals up until the filing of the complaint or order. Excluded from permit costs are enforcement costs incurred after the filing of an administrative or judicial complaint.[51]

Part 70 costs must also include the costs of implementing and enforcing any restrictions on potential to emit (PTE) that are included in a part 70 permit, whether they originate in the part 70 permit or were transferred from a non-part 70 permit, such as a minor NSR permit for a "synthetic minor source."

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[48] *See* 40 CFR § 70.7(h) concerning public participation and 40 CFR § 70.8 concerning the EPA and affected air agency review.
[49] *See* 40 CFR § 70.8(a).
[50] *See* 40 CFR §§ 70.4(b), 70.6, 70.9(b)(1)(iv), and 70.11.
[51] *See* the matrix guidance at page 8.

F. The Costs of Implementing and Enforcing the Requirements of Non-Title V Permits Required Under the Act

Part 70 fees must cover the costs of implementing and enforcing the terms and conditions of "other permits" (non-part 70 permits) required under the Act, such as preconstruction review permits under title I, that have been incorporated in part 70 permits as "applicable requirements."[52]

Also, the costs of implementing and enforcing the terms and conditions of consent decrees and orders that originate in a non-part 70 permit that are incorporated into a part 70 permit must be treated as part 70 costs. *See* Section II.A of this guidance.

The costs of implementing and enforcing applicable requirements for "prospective part 70 sources" need not be treated as part 70 costs until such time as the source submits a timely and complete permit application and pays fees. In addition, the costs of implementing and enforcing "state-only" requirements need not be treated as part 70 costs.

G. The Costs of Performing Certain "Other Activities" Related to Applicable Requirements

Certain activities are required by the Act but are not "applicable requirements" because they apply to the permitting authority, rather than the source; such activities are referred to as "other activities."[53] Examples of applicable requirements that contain these activities include, but are not limited to, standards for existing sources under section 111(d) of the Act; case-by-case MACT under sections 112 of the Act; and certain activities required by a SIP, FIP, or TIP, including section 110 of the Act. The costs of other activities must be treated as part 70 costs, if the air agency is required to perform the activities by part 70, title V, or the air agency's approved part 70 program; if a non-part 70 rule requires them to be performed in the part 70 permitting context; or if the activities are needed to assure compliance with, or to enforce, the terms and conditions of a part 70 permit. The costs of other activities should not be treated as part 70 costs, if they do not meet any of these criteria (e.g., a non-part 70 rule requires an activity that occurs in a non-part 70 context). *See* Section II.A of this guidance.

H. The Costs of Revising, Reopening, and Renewing Part 70 Permits

All costs associated with processing permit revisions, including for administrative amendments, minor modifications (fast-track and group processing), and significant modifications, must be treated as part 70 costs.[54] The part 70 costs must include all the costs of reviewing and acting on the application, as well as implementing and enforcing the revised permit terms.[55] The costs of implementing any "operational flexibility provisions"[56] approved into a program to streamline permit revision procedures must be treated as permit program costs (this may also generally be considered to be one of the costs of implementing a permit).

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[52] Required to be treated as part 70 costs in certain cases by 40 CFR § 70.9(b)(1)(iv).

[53] Required to be treated as part 70 costs in certain cases by 40 CFR §§ 70.9(b)(1)(ii) and (iv).

[54] Required to be treated as part 70 costs under 40 CFR § 70.9(b)(1)(ii). Also *see* 40 CFR § 70.7 for more on permit issuance, renewal, reopening and revision procedures.

[55] 40 CFR §§ 70.9(b)(1)(ii) and (iv).

[56] Section 502(b)(10) of the Act requires the operating permit regulations to include provisions to allow changes within a permitted facility without requiring a permit revision under certain circumstances. The EPA refers to these provisions as "operational flexibility provisions." *See* 40 CFR § 70.4(b)(12).

The cost for the air agency to reopen a part 70 permit for cause must be treated as part 70 costs. The proceedings to reopen a permit shall follow the same procedures that apply to initial permit issuance, and include a requirement for the air agency to provide a notice to the source of the agency's intent to reopen the permit.

When the EPA reopens a part 70 permit for cause, the air agency's costs for the proposed determination of termination, modification, or revocation and reissuance, and the costs to resolve the objection in accordance with the EPA's objection, must be treated as part 70 costs.

The cost of renewing permits every 5 years, which involves the same procedural requirements, including public participation, and the EPA and affected air agency review, must be treated as part 70 costs,[57] just as for initial permit issuance.

I. The Costs of General and Model Permits

All costs for development and implementation of general and model permits under part 70 must be included in part 70 program costs, including the costs of drafting permits, public participation, the EPA review and any affected air agency's review, permit issuance, publication, assessing applications for coverage under the general permit, and other related costs.[58] Note that the issuance of general and model permits is an option for air agencies, but if such permits are issued by an air agency under part 70, the costs must be included in part 70 costs.

J. The Costs of the Portion of the Small Business Assistance Program (SBAP) Attributable to Part 70 Sources

The SBAP under title V is authorized to provide counseling to help small business stationary sources to determine and meet their obligations under the Act.[59] The SBAP is authorized to provide assistance to small business stationary sources, as defined by CAA § 507(c)(1), under the preconstruction and operating permit programs; however, air agencies need only to include costs related to assistance with part 70 in part 70 costs.[60] *See* 40 CFR § 70.9(b)(1)(viii). Allowable costs for part 70 include the costs to establish a small business ombudsman program to provide information on the applicability of part 70 to sources, available assistance for part 70 sources, the rights and obligations of part 70 sources, and options for sources subject to part 70. Allowable costs also include the costs associated with part 70 applicability determinations.

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[57] 40 CFR § 70.9(b)(1)(ii).

[58] Required to be included in part 70 costs by 40 CFR §§ 70.9(b)(1)(ii) and (iv). Also *see* 40 CFR § 70.6(d) for more on the administration of general permits.

[59] For examples of the types of activities of a SBAP that could be attributable to part 70 sources and funded by part 70 fees, see *Transition to Funding Portions of State and Local Air Programs with Permit Fees Rather than Federal Grants*, Mary D. Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, to Regional Administrators, Regions I – X, July 21, 1994 ("transition guidance"); Letter from Conrad Simon, Director, Air & Waste Management Division, EPA Region II to Mr. Billy J. Sexton, Director, Jefferson County Department of Planning and Environmental Management, Air Pollution Control District, Louisville, Kentucky, January 23, 1996 ("Sexton memo").

[60] Note that the preconstruction review permitting costs of assisting non-part 70 sources should generally not be included as part 70 costs, except for costs related to implementation and enforcement of permit terms from a preconstruction review permit that have been included in a part 70 permit.

Part 70 costs for SBAP must include the costs for outreach/publications on the requirements of part 70 and/or the applicable requirements included in part 70 permits, the costs of assisting part 70 sources through a clearinghouse on compliance methods and technologies, including pollution prevention approaches, and the costs to assist sources with part 70 permitting, which may include the portion of costs for a small business compliance advisory panel that are related to part 70.

K. The Costs of Permit Fee Program Administration

All costs associated with the administration of an air agency's part 70 fee program must be included in part 70 costs, including the costs for revising fee schedules (as needed to cover all required costs), periodic updates, detailed accounting (if needed), determining the presumptive minimum for the air agency, participating in EPA evaluations of fee programs or similar EPA oversight activities, assisting sources with fee issues, auditing fee payment by sources, assessing penalties for fee payment errors, responding to internal audits and inquiries, and similar activities.[61]

III. Flexibility in Fee Schedule Design

An air agency may design its fee schedule to collect fees from sources using various methods, provided the fee structure raises sufficient revenue to cover all required program costs.[62] Thus, air agencies may charge: emissions-based fees based on actual emissions or allowable emissions; fixed fees for certain permit processes (different fees for initial permit review, renewals, or for various types of permit revisions); different fee rates (e.g., dollars per ton of emissions) for certain air pollutants; fees reflecting the actual costs of services for sources (such as charging for time and materials for a review); or other types of fees, including any combination of such fees. Finally, air agencies may charge annual fees or fees covering some other period of time.

This flexibility for fee schedule design is available without regard to whether the air agency has set its fees to collect above or below the presumptive minimum. Many air agencies have designed their fee schedules to collect fees using an emissions-based approach that mirrors the approach of part 70 for determining the presumptive minimum program cost for an air agency.[63] However, air agencies are not required to charge fees to sources in that manner, and it is possible that such an approach may not necessarily result in fees that would be sufficient to cover all part 70 program costs.

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[61] *See* 40 CFR § 70.9(b)(l)(ii); *Overview of Clean Air Title V Financial Management and Reporting – A Handbook for Financial Managers*, Environment Finance Center, University of Maryland, Maryland Sea Grant College, University of Maryland. Supported by a grant from the U.S. EPA, January 1997 ("Financial Manager's Handbook") (providing an overview of air agency application of general government accounting, budgeting, and financial reporting concepts to the part 70 program).

[62] *See* 40 CFR § 70.9(b)(3).

[63] *See* 40 CFR § 70.9(b)(2)(i).

IV. The EPA Review of Existing Air Agency Fee Programs

The initial program submittals involved review of data on expected fee revenue, program costs and accounting practices that were prospective in nature, since little or no data would have been available on actual fees or costs at that time.

At this point, the EPA review of air agency fee programs generally focuses on a review of actual data on fee revenue, program costs, and review of existing accounting practices. The EPA oversight of existing fee programs will also likely be conducted as part of a program evaluation, a separate fee evaluation, or through submittal of any periodic updates or detailed accountings related to fee demonstration requirements. The EPA has issued a separate memorandum and guidance on part 70 program and fee evaluations concurrently with this updated fee schedule guidance.[64]

Fee evaluations for existing part 70 programs will generally focus on certain key requirements of the Act and part 70 for fees discussed in Section I, *General Principles for Review of Title V Fee Schedules*, of this guidance. Such reviews may cover certain aspects of air agency accounting practices and procedures related to fees, particularly fee assessment procedures, tracking of fee collection and revenue uses (including transfers in and out of part 70 program accounts), whether all part 70 costs are included in the air agency's accounting of costs, and potentially other accounting aspects.

A fee evaluation may include a review of an air agency's fee program status with respect to the presumptive minimum defined in 40 CFR § 70.9(b)(2). This may be important in cases where a part 70 program was initially approved to charge above the presumptive minimum, in order to determine if the air agency is now charging less than the presumptive minimum. This is relevant because 40 CFR § 70.9(b)(5)(i) requires an air agency to submit a detailed accounting to show that its fees would be adequate to cover the program costs if the air agency charges less than the presumptive minimum. This requirement is ongoing (not restricted to program submittals).

In addition, the EPA revised the part 70 requirements related to calculating the presumptive minimum to add a "GHG cost adjustment" in an October 23, 2015, final rule.[65] Although the EPA has announced a review of this final rule (82 FR 16330, April 4, 2017), the EPA has not proposed any specific changes to the "GHG cost adjustment." Because air agencies are required to collect sufficient fees to cover the costs of implementing their operating permit programs, they may still use the "GHG cost adjustment" (as applicable) in calculating the fees owed to reflect the associated administrative burden of considering GHGs in the permitting process. The "GHG cost adjustment" is designed to cover the overall added administrative burden of adding GHGs to the permitting program in a general sense.

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[64] *Program and Fee Evaluation Strategy and Guidance for Part 70*, Peter Tsirigotis, Director, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, to Regional Air Division Directors, Regions 1 – 10, March 27, 2018.

[65] The "GHG cost adjustment" was promulgated as part of an October 23, 2015, final rule titled, *Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 FR 64510. Specifically, see Section XII.E. "Implications for Title V Fee Requirements for GHGs" at page 64633. *See also* 40 CFR §§ 70.9(b)(2)(v) and (d)(3)(viii).

"Presumptive Minimum" Calculation

1. **Calculate the "Cost of Emissions."** The calculation is based on multiplying the actual emissions of "fee pollutants"[66] (tons) from the air agency's part 70 sources for a preceding 12-month period by the "presumptive minimum fee rate"[67] ($/ton) that is in effect at the time the calculation is performed.

   Air agencies may exclude the following types of fee pollutants from the calculation:
   - Actual emissions of each regulated fee pollutant in excess of 4,000 tons per year on source-by-source basis.[68]
   - Actual emissions of any regulated fee pollutant emitted by a part 70 source that was already included in the presumptive minimum fee calculation (i.e., double-counting of the same pollutant is not required).[69]
   - Insignificant quantities of actual emissions not required in a permit application pursuant to 40 CFR § 70.5(c).[70]

2. **Calculate the "GHG Cost Adjustment" (as applicable)**[71] The "GHG cost adjustment" is the cost for the air agency to conduct certain application reviews (activities) to determine if GHGs have been properly addressed for an annual period. The adjustment is calculated by multiplying the total hours to conduct the activities (burden hours) by the average cost of staff time ($/hour) to conduct the activities.

   To calculate the total hours for the air agency to conduct the activities, multiply the number of activities performed in each category listed in the following table by the corresponding "burden hours per activity factor," and sum the results.[72]

Table 1. GHG reviews counted for GHG cost adjustment purposes

Activity	Burden Hours per Activity Factor
GHG completeness determination (for initial permit or updated application)	43
GHG evaluation for a permit modification or related permit action	7
GHG evaluation at permit renewal	10

[66] The term "fee pollutants" used here is shorthand for "regulated pollutants (for presumptive fee calculation)," as defined in 40 CFR § 70.2.

[67] The "presumptive minimum fee rate" is calculated by the EPA in September of each year and is effective from September 1 to August 31 of the following year. The fee rate is adjusted annually for changes in the Consumer Price Index (CPI) and is published on the following Internet site: *https://www.epa.gov/title-v-operating-permits/permit-fees.*

[68] *See* 40 CFR § 70.9(b)(2)(ii)(B).

[69] *See* 40 CFR § 70.9(b)(2)(ii)(C). For example, a source may emit an air pollutant that is defined as both a hazardous air pollutant and a pollutant for which a national ambient air quality standard has been established, e.g., a volatile organic compound. The actual emissions of such a pollutant is not required to be counted twice for fee purposes.

[70] *See* 40 CFR § 70.9(b)(2)(ii)(D).

[71] *See* 40 CFR §§ 70.9(b)(2)(i) and (v).

[72] The table shown here is found at 40 CFR § 70.9(b)(2)(v).

To determine the GHG cost adjustmentt($), the total hours to conduct the reviews (calculated above) is multiplied by the average cost of staff time ($/hour). The average cost of staff time must include wages, employee benefits, and overhead and will be unique to the air agency. The average cost may be known for the air program or may be available from the air agency budget office or accounting staff.

3. **Calculate the Total Presumptive Minimum.** The total presumptive minimumt($) for the annual period is determined by adding the "cost of emissions" (determined in Step 1) and the "GHG cost adjustment," as applicable (determined in Step 2).

See Attachment B, *Example Presumptive Minimum Calculation*, for an example calculation for a hypothetical air agency that incorporates the "GHG cost adjustment."

V. Future Adjustments to Fee Schedules

Air agencies must collect part 70 fees that are sufficient to cover the part 70 permit program costs.[73] Accordingly, air agencies may need to revise fee schedules periodically to remain in compliance with the requirement that permit fees cover all part 70 permit program costs. Changes in costs over time may be due to many factors, including but not limited to: changes in the number of sources required to obtain part 70 permits; changes in the types of permitting actions being performed; promulgation of new emission standards; and minor source permitting requirements for CAA sections 111, 112, or 129 standards. Air agencies should keep the EPA Regions apprised of any changes to fee schedules over time. The EPA will assess the proposed revision and determine whether it must be processed by the EPA as a substantial or non-substantial revision. As part of this process, the EPA may request additional information, as appropriate.

[73] 40 CFR § 70.9(a).

ATTACHMENT A

List of Guidance Relevant to Part 70 Fee Requirements

EPA Guidance on Part 70 Requirements:

- January 1992 – *Guidelines for Implementation of Section 507 of the Clean Air Act Amendments – Final Guidelines,* Office of Air Quality Planning and Standards (OAQPS), U.S. EPA. *See* pages 5 and 11-12 concerning fee flexibility for small business stationary sources: *http://www.epa.gov/sites/production/files/2015-08/documents/smbus.pdf.*

- July 7, 1993 – *Questions and Answers on the Requirements of Operating Permits Program Regulations*, U.S. EPA. See Section 9: *http://www.epa.gov/sites/production/files/2015-08/documents/bbrd_qal.pdf.*

- August 4, 1993 – *Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs under Title V*, John S. Seitz, Director, OAQPS, U.S. EPA, to Air Division Directors, Regions I-X ("1993 fee schedule guidance"). Note that there was an earlier document on this subject that was superseded by this document: *http://www3.epa.gov/ttn/naaqs/aqmguide/collection/t5/fees.pdf.*

- August 9, 1993 – *Acid Rain Title V Guidance on Fees and Incorporation by Reference,* Brian J. McLean, Director, Acid Rain Division, U.S. EPA, to Air, Pesticides, and Toxics Division Directors, Regions I, IV, and VI, Air and Waste Management Division Director, Region II, Air and Toxics Division Directors, Regions III, VII, VIII, IX and X and Air and Radiation Division Director, Region V: *http://www.epa.gov/sites/production/files/2015-08/documents/combo809.pdf.*

- September 23, 1993 – *Matrix of Title V-Related and Air Grant Eligible Activities*, OAQPS, U.S. EPA ("matrix guidance"). The matrix notes that it is to be "read and used in concert with the August 4, 1993, fee [schedule] guidance": *http://www.epa.gov/sites/production/files/2015-08/documents/matrix.pdf.*

- October 22, 1993 – *Use of Clean Air Act Title V Permit Fees as Match for Section 105 Grants,* Gerald M. Yamada, Acting General Counsel, U.S. EPA, to Michael H. Shapiro, Acting Administrator, Office of Air and Radiation, U.S. EPA: *https://www.epa.gov/sites/production/files/2015-08/documents/usefees.pdf.*

- November 01, 1993 – *Title V Fee Demonstration and Additional Fee Demonstration Guidance.* John S. Seitz, Director, OAQPS, U.S. EPA, to Director, Air, Pesticides and Toxics Management Division, Regions I and IV, Director, Air and Waste Management Division, Region II, Director, Air, Radiation and Toxics Division, Region III, Director, Air and Radiation Division, Region V, Director, Air, Pesticides and Toxics Division, Region VI and Director, Air and Toxics Division, Regions VII, VIII, IX and X, U.S. EPA ("fee demonstration guidance"): *http://www3.epa.gov/ttn/naaqs/aqmguide/collection/t5/feedemon.pdf.*

- July 21, 1994 – *Transition to Funding Portions of State and Local Air Programs with Permit Fees Rather than Federal Grants,* Mary D. Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, to Regional Administrators, Regions I – X ("transition guidance"): *http://www.epa.gov/sites/production/files/2015-08/documents/grantmem.pdf.*

- August 28, 1994 – *Additional Guidance on Funding Support for State and Local Programs*, Mary D. Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, to Regional Administrators, Regions 1 – X ("additional guidance memo"): *http://www.epa.gov/sites/production/files/2015-08/documents/guidline.pdf.*

- January 25, 1995 – *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)*, John S. Seitz, Director for Office of Air Quality Planning and Standards, U.S. EPA, to Regional Directors, Regions I – X: *https://www.epa.gov/sites/production/files/documents/limit-pte-rpt.pdf.*

- January 23, 1996 – Letter from Conrad Simon, Director, Air & Waste Management Division, EPA Region II to Mr. Billy J. Sexton, Director, Jefferson County Department of Planning and Environmental Management, Air Pollution Control District, Louisville, Kentucky ("Sexton memo"): *https://www.epa.gov/sites/production/files/2016-04/documents/sexton_1996.pdf.*

- January 1997 – *Overview of Clean Air Title V Financial Management and Reporting – A Handbook for Financial Managers*, Environment Finance Center, University of Maryland, Maryland Sea Grant College, University of Maryland. Supported by a grant from the U.S. EPA ("financial manager's handbook"): *http://www.epa.gov/sites/production/files/2015-08/documents/t5finance.pdf.*

- October 23, 2015 – *Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Stationary Sources: Electric Utility Generating Units: Final Rule* (80 FR 64510). *See* Section XII.E, "Implications for Title V Fee Requirements for GHGs" at page 64633: *http://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22837.pdf.*

Guidance on Governmental Accounting Standards Relevant to Part 70:

- Handbook of Federal Accounting Standards and Other Pronouncements, as Amended, as of June 30, 2015, Federal Accounting Standards Advisory Board (FASAB). *http://www.fasab.gov/pdffiles/2015_fasab_handbook.pdf.*

- Statement of Federal Financial Accounting Standards 4: *Managerial Cost Accounting Standards and Concepts*, page 396 of the FASB Handbook ("SFFAS No. 4").

- Statement of Federal Financial Accounting Standards 7: Accounting for Revenue and Other Financial Sources and Concepts for Reconciling Budgetary and Financial Accounting, page 592 of the FASAB Handbook ("SFFAS No. 7").

Statements of the Governmental Accounting Standards Board (GASB):

- Statement No. 33, *Accounting and Financial Reporting for Nonexchange Transactions* (December 1998) ("GASB Statement No. 33"): *http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176160029148&acceptedDisclaimer=true.*

- Statement No. 34, *Basic Financial Statements – and Management's Discussion and Analysis – for State and Local Governments* (June 1999) ("GASB Statement No. 34"): *http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176160029121&acceptedDisclaimer=true.*

ATTACHMENT B

Example Presumptive Minimum Calculation

This attachment provides an example calculation of the "presumptive minimum" under 40 CFR part 70 for a hypothetical air agency ("Air Agency X").[1]

Background:

- The "presumptive minimum" is an amount of fee revenue for an air agency that is presumed to be adequate to cover part 70 costs.[2]
  - If an air agency's fee schedule would result in fees that would be less than the presumptive minimum, there is no presumption that its fees would be adequate to cover part 70 costs and the air agency is required to submit a "detailed accounting" to show that its fees would be sufficient to cover its part 70 costs.[3]
  - If an air agency's fee schedule would result in fees that would be at least equal to the presumptive minimum, there is a presumption that its fees would be adequate to cover costs and a "detailed accounting" is not required. However, a "detailed accounting" is required whenever the EPA determines, based on comments rebutting the presumption of fee adequacy or on the EPA's own initiative, that there are serious questions regarding whether its fees are sufficient to cover part 70 costs.[4]
- In addition, independent of the air agency's status with respect to the presumptive minimum, a "detailed accounting" is required whenever the EPA determines on its own initiative that there are serious questions regarding whether an air agency's fee schedule is sufficient to cover its part 70 costs. This is required because part 70 requires an air agency's fee revenue to be sufficient to cover part 70 permit program costs.[5]
- The quantity of air pollutants and the "GHG cost adjustment" are unique to each air agency and vary from year-to-year. As a result, the presumptive minimum calculated for an air agency is also unique to that particular agency on a year-to-year basis.
- No source should use the presumptive minimum calculation described in this attachment to calculate its part 70 fees.[6] Sources should instead contact their air agency for more information on how to calculate fees for a source.

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[1] The example calculation follows the requirements of 40 CFR § 70.9(b)(2)(i)-(v).
[2] *See* 40 CFR § 70.9(b)(2)(i).
[3] *See* 40 CFR § 70.9(b)(5) (concerning the "detailed accounting" requirement).
[4] *See* 40 CFR § 70.9(b)(5)(ii).
[5] *See* 40 CFR §§ 70.9(a) and (b)(1).
[6] *See* 40 CFR § 70.9(b)(3) (providing air agencies with flexibility on how they charge fees to individual sources).

- An air agency may calculate the presumptive minimum in several circumstances:

    - As part of a fee demonstration submitted to the EPA when an air agency sets its fee schedule to collect at or above the presumptive minimum.

    - As part of a fee evaluation to determine if an air agency with a fee schedule originally approved to be at or above the presumptive minimum now results in fees that are below the current presumptive minimum. When this occurs, the air agency is required to submit a "detailed accounting" to show that its fee schedule will be sufficient to cover all required program costs. Such a change in the presumptive minimum for an air agency may occur for many reasons over time.[7]

    - To update the presumptive minimum amount for the air agency to account for changes that have occurred since the calculation was last performeda A common reason for an air agency to do this is to recalculate the amount to add the GHG cost adjustment.[8]

The presumptive minimum calculation is generally composed of three steps:

1. *Calculation of the "cost of emissions."* "aThe "cost of emissions" is proportional to the emissions of certain air pollutants of part 70 sources.

2. *Calculation of the "GHG cost adjustment" (as applicable).* The "GHG cost adjustment," promulgated in October 23, 2015, is intended to recover the costs of incorporating GHGs into the permitting program.

3. *Sum the values calculated in Steps 1 and 2.*

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[7] It has been almost two decades since most part 70 programs were approved. Changes may have occurred since then that would affect the presumptive minimum calculation for an air agency. For example, changes in the emissions inventory for part 70 sources or changes to air agency fee schedules. The part 70 rules were also revised in 2015 to add a "GHG cost adjustment" to the calculation of the presumptive minimum fee.

[8] *See* 80 FR 64633 (October 23, 2015); 40 CFR § 70.9(b)(2)(v).

Example Scenario and Calculation:

Air Agency X performs its presumptive minimum calculation in November of 2016 using data for Fiscal Year 2016 (FY16 or October 1, 2015, through September 30, 2016).

Step 1 – Calculate the Cost of Emissions:

The "cost of emissions" is determined by multiplying the air agency's inventory of actual emissions of certain pollutants from part 70 sources ("fee pollutants") by an annual fee rate determined by the EPA.

A. Determine the Actual Emissions of "Fee Pollutants" for a 12-month Period Prior to the Calculation.

Note that the term "fee pollutants" used here is shorthand for "regulated pollutants (for presumptive fee calculation)," a defined term in part 70,[9] which includes air pollutants for which a national ambient air quality standard has been set, hazardous air pollutants, and air pollutants subject to a standard under section 111 of the Act, excluding carbon monoxide, greenhouse gases, and certain other pollutants.[10] Note that any preceding 12-month period may be used, for example, a calendar year, a fiscal year, or any other period that is representative of normal source operation and consistent with the fee schedule used by the air agency.

For example, a review of Air Agency X's emissions inventory records for part 70 sources for the 12-month period (FY16) indicates that the actual emissions of "fee pollutants" were 15,700 tons.

Total "Fee Pollutants"t= 15,700 tons for FY16

B. Determine the Presumptive Minimum Fee Rate ($/ton) Effective at the Time the Calculation is Performed.

The presumptive minimum fee rate is updated by the EPA annually and is effective from September 1 until August 31 of the following year. Historical and current fee rates are available online: *https://www.epa.gov/title-v-operating-permits/permit-fees.* The fee rate used in the calculation is the one that is effective on the date the calculation is performed, rather than the fee rate in effect for the annual period of the emissions data.

For example, Air Agency X calculates its "presumptive minimum" for FY16 in November 2016. The air agency first refers to the EPA website (listed above) to find the fee rate effective for November 2016. This fee rate ($48.88) is used in the next step to calculate the cost of emissions.

Presumptive Minimum Fee Rate ($/ton) = $ 48.88 per ton.

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[9] The definition of "regulated pollutant (for presumptive fee calculation)" is found at 40 CFR § 70.2.

[10] Note that 40 CFR §§ 70.9(b)(2)(ii) and (iii) provides exclusions for certain air pollutants and includes a definition of "actual emissions."

C.a Calculate the Cost of Emissions.aa

Calculate the cost of emissions by multiplying the total tons of "fee pollutants" (value found in A)tby the presumptive minimum fee rate (value found intB).tt

Cost of Emissionst= "Fee Pollutants" (tons) * Presumptive Minimum Fee Rate ($/ton)
= 15,700 tonst* $48.88/ton
= $767,416

Value Calculated in Step 1: Cost of Emissionsa= $767,416

Step 2 – Calculate the GHG Cost Adjustment (as applicable):

The "GHG cost adjustment" is the cost for the air agency to review applications for certain permitting actions to determine if GHGs have been properly addressed.

A.aDetermine the Number of GHG Activities for Each Activity Category.aa

Determine the total number of activities processed during the period for each activity category listed in the following table [based on table at 40 CFR § 70.9(b)(2)(v)].

Activity	Burden Factor (hours per activity)
GHG Completeness Determinations (for initial permit or updated application)	43
GHG Evaluations for Permit Modification or Related Permit Actions	7
GHG Evaluations at Permit Renewal	10

For example, Air Agency X's records were reviewed to determine the number of activities that occurred for each activity category during FY16:

- 2 GHG completeness determinations for initial applicationstt
- 46 GHG evaluations for permit modifications or related actionstt
  (11 significant modifications and 35 minor modifications)
- 20 GHG evaluations at permit renewaltt

Note that the activities above are assumed to occur for each initial application, permit modification, or permit renewal, regardless of whether the source emits GHGs or is subject to applicable requirements for GHGs. Thus, there were 20 GHG evaluations at permit renewal because there were 20 permit renewals.

B. Calculate the GHG Burden for Each Activity Category.

The GHG burden for each activity category is calculated by multiplying the number of activities for each category (identified in A) by the relevant burden factor (hours/activity) listed in the table above.

GHG Burden = Number of activities * Burden factor (hours/activity)

For example, Air Agency X calculated GHG burden as follows:

- 2 Completeness Determinations * 43 hours/activity = 86 hours
- 46 Evaluations for Mods or Related Actions * 7 hours/activityt= 322 hours
- 20 Evaluations at Permit Renewal * 10 hours/activity = 200 hours

C. Calculate the Total GHG Burden (in hours).

The total GHG burden hours are calculated by summing the GHG burden hours for each activity category determined in B.

For example, Air Agency X calculated total GHG burden hours as follows:
Total GHG Burden Hours = 86 hours + 322 hours + 200 hours
= 608 hours

D. Calculate the GHG Cost Adjustment.

Calculate the GHG cost adjustment for the period by multiplying the total GHG burden hours (value calculated in C) by the cost of staff time.

GHG Cost Adjustmentt= Total GHG burden hours (hours)t* Cost of staff time ($/hour)

For example, Air Agency X's budget office reported that the average cost of staff time for the Department of Natural Resources (including wages, benefits, and overhead) for FY16 was $56/hour.

GHG Cost Adjustmentt= Total GHG burden hourst* Cost of staff time
= 608 hours * $56/hour
= $34,048

Value Calculated in Step 2: GHG Cost Adjustmenta= $34,048

Step 3 – Calculate the Total Presumptive Minimum:

Calculate the total for the period by adding the cost of emissions (value calculated in Step 1) and the GHG cost adjustment, as applicable (value calculated in Step 2).

Presumptive minimumt= Cost of emission ($) + GHG cost adjustment ($)
= $767,416 + $34,048
= $801,464

TotalaPresumptive Minimum= $801,464

Conclusion:aa

$801,464 is the Air Agency X's presumptive minimum for FY16. This value would be compared against the total part 70 fee revenue for the same period to determine if the total fee revenue is greater than or less than the presumptive minimum.

August 4, 1993

MEMORANDUM

SUBJECT: Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V

FROM: John S. Seitz, Director /s/
Office of Air Quality Planning and Standards (MD-10)

TO: Air Division Director, Regions I-X

On December 18, 1992, I issued a memorandum designed to provide initial guidance on the Environmental Protection Agency's (EPA's) approach to reviewing State fee schedules for operating permits programs under title V of the Clean Air Act (Act). Today's memorandum updates, clarifies, revises, and replaces the earlier memorandum.

Section 502(b)(3) of the Act requires that each State collect fees sufficient to cover all reasonable direct and indirect costs required to develop and administer its title V permits program. [As used herein, the term "State" includes local agencies.] The final part 70 regulation contains a list of activities discussed in the July 21, 1992 preamble to the final rule (57 FR 32250) which must be funded by permit fees. This memorandum and its attachment provide further guidance on how EPA interprets that list of activities, as well as the procedure for demonstrating that fee revenues are adequate to support the program.

The memorandum and attachment set forth the principles which will generally guide our review of fee submittals. The EPA believes that these positions are consistent with the preamble and final rule and are useful in explaining the broad language in the promulgation, but in no way supplant the promulgation itself. In evaluating State program submittals, EPA will make judgments based on the particular design and attributes of the State program, as well as the requirements of section 70.9 of part 70.

The policies set out in this memorandum and attachment are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

Several substantive revisions to the earlier guidance that are reflected in this document deserve special mention. First, with respect to activities which relate to provisions of the Act in addition to title V, the revisions clarify that the cost of those activities would be permit program costs only to the extent the activities are necessary for part 70 purposes. For example, this qualification would apply to activities undertaken pursuant to sections 110, 111, and 112 of the Act. In determining which of the activities normally associated with State Implementation Plan (SIP) development are to be funded by permit fees, for instance, States should include those activities to the extent they are necessary for the issuance and implementation of part 70 permits. Accordingly, if a SIP provision requires that a State perform or review a modeling demonstration of a source's impact on ambient air quality as part of the permit application process, the State's costs which arise from the modeling demonstration (which are ordinarily not permit program costs) must be covered by permit fees.

Second, the revisions provide that case-by-case maximum achievable control technology determinations for modified/ constructed and reconstructed major toxic sources under section 112(g) of the Act are considered permit program costs, even if the determination preceded the issuance of the part 70 permit. This position is consistent with the Agency's guidance on Title V Program Approval Criteria for Section 112 Activities (issued April 13, 1993). In that guidance, EPA explained that in order to obtain approval of their title V permit programs, States must take responsibility for implementing all applicable requirements of section 112, including section 112(g), to fulfill their broader obligation to issue title V permits which incorporate all applicable requirements of the Act. For this reason, these section 112 activities are appropriately viewed as permit program costs and thus funded with permit fees.

Third, the revisions clarify in section II.L that enforcement costs incurred prior to the filing of an administrative or judicial complaint are considered permit program costs, including the issuance of notices, findings, and letters of violation, as well as development and referral to prosecutorial agencies of enforcement cases. This approach is based on legislative history which indicates that Congress viewed the filing of complaints as the beginning of enforcement actions for purposes of the statutory provision that excludes "court costs or other costs associated with any enforcement action" from the costs to be recovered through permit fees.

Fourth, the revisions take a different approach to "State-only" requirements which are part of the title V permit by concluding that part 70 does not require that permit fees cover the costs of implementing and enforcing such conditions, since the rule requires that States designate these requirements as not federally enforceable.

Fifth, the attachment modifies the discussion of the extent to which title V fees must fund the costs of permit programs under provisions of the Act other than title V. After carefully considering section 110(a)(2)(L) (which requires that every major source covered by a permit program required under the Act pay a fee to fund the permit program), as it relates to section 502(b)(3) in general, and section 502(b)(3)(A)(ii) in particular, EPA has concluded that title V fees must cover the costs of implementing and enforcing not only title V permits but of any other permits required under the Act, regardless of when issued. This result makes sense, since the title V permit will incorporate the terms of other permits required under the Act so that enforcing title V permits will have the effect of implementing and enforcing those permit requirements as well. However, the costs of reviewing and acting on applications for permits required under Act provisions other than title V need not be recouped by title V fees. In conclusion, the costs of implementing and enforcing all permits required under the Act must be considered in determining whether a State's fee revenue is adequate to support its title V program. However, States may opt to retain separate mechanisms and procedures for collecting permit fees for other permitting programs under the Act, provided the fees covering the costs of implementing and enforcing permits are included in the determination of fee adequacy for purposes of title V.

Although most of the changes outlined today are not expected to affect significantly whether EPA will find fee programs based on the earlier guidance adequate, we will assist States in resolving any difficulties which may have resulted from reliance on the December 18 guidance.

As a means of providing support for the Regional Offices and States on fee approval issues, we invite early submittal of fee analyses (separate from the entire program submittal) from States, particularly those which propose to charge less than the presumptive fee minimum. We will assist Regional Offices in reviewing these submittals with respect to the requirements of title V. Case-by-case reviews of fee programs which you believe are ripe for review offer a timely opportunity to provide additional guidance on this issue.

If you would like us to assist with review of a State's fee program, please contact Kirt Cox. For further information, you may call Kirt at (919) 541-5399 or Candace Carraway at (919) 541-3189.

Attachment

cc: Air Branch Chief, Regions I-X
Regional Counsel, Regions I-X
M. Shapiro
J. Kurtzweg
A. Eckert
B. Jordan
R. Kellam
J. Rasnic

ATTACHMENT

GUIDANCE FOR STATE FEE PROGRAM DEVELOPMENT

I. GENERAL PRINCIPLES

- States must collect, from part 70 sources, fees adequate to fund the reasonable direct and indirect costs of the permits program.

- Only funds collected from part 70 sources may be used to fund a State's title V permits program. Legislative appropriations, other funding mechanisms such as vehicle license fees, and section 105 funds cannot be used to fund these permits program activities.

- The 1990 Amendments to the Clean Air Act (Act) generally require a broader range of permitting activities than are currently addressed by most State and local permits programs. Title V and part 70 contain a nonexclusive list of types of activities which must be funded by permit fees.

- Title V fees present a new opportunity to improve permits program implementation where funding has been inadequate in the past.

- The fee revenue needed to cover the reasonable direct and indirect costs of the permits program may not be used for any purpose except to fund the permits program. However, title V does not limit State discretion to collect fees pursuant to independent State authority beyond the minimum amount required by title V. The evaluation of State fee program adequacy for part 70 approval purposes will be based solely on whether the fees will be sufficient to fund all permit program costs.

- Any fee program which collects aggregate revenues less than the $25 per ton per year (tpy) presumptive minimum will be subject to close Environmental Protection Agency (EPA) scrutiny.

- If credible evidence is presented to EPA which raises serious questions regarding whether the presumptive minimum amount of fee revenue is sufficient to fund the permits program adequately, the State must provide a detailed demonstration as to the adequacy of its fee schedule to fund the direct and indirect costs of the permits program.

- The EPA encourages State legislatures to include flexible fee authority in State statutes so as to allow flexibility to manage fee adjustments if needed in light of program experience, audits, and accounting reports. States should be able to adapt their fee schedules in a timely way in response to new information and new program requirements.

II. ACTIVITIES EXPECTED TO BE FUNDED BY PERMIT FEES

A. Overview.

- Permits program fees must cover all reasonable direct and indirect costs of the title V permits program incurred by State and/or local agencies. For example, fees must cover the cost of permitting affected units under section 404 of the Act, even though such sources may be subject to special treatment with respect to payment of permit fees.

- In making the determination as to whether an activity is a title V permits program activity, EPA will consider the design of the individual State's title V program and its relationship to its comprehensive air quality program. State design of its air program, including its State Implementation Plan (SIP), will in some cases determine whether a particular activity is properly considered a permits program activity. For example, if a SIP provision requires that a State perform or review a modeling demonstration of a source's impact on ambient air quality as part of the permit application process, the State's costs which arise from the modeling demonstration (which are ordinarily not permit program costs) would be part of the State's title V program costs. Because the nature of permitting-related activities can vary from State to State, the EPA intends to evaluate each program individually using the definition of "permit program costs" in the final regulation.

- In general, EPA expects that title V permit fees will fund the activities listed below. However, in evaluating State program submittals, EPA will consider the particular design and attributes of the State program. It is important to note that the activities listed below may not represent the full range of activities to be covered by permit fees. Implementation experience may demonstrate that additional activities are appropriately added to this list. Additionally, some States may have further

program needs based on the particularities of their own air quality issues and program structure.

- States may use permit fees to hire contractors to support permitting activities.

B. Initial program submittal, including:

- Development of documentation required for program submittal, including program description, documentation of adequate resources to implement program, letter from Governor, Attorney General's opinion.

- Development of implementation agreement between State and Regional Office.

C. Part 70 program development, including:

- Staff training.

- Permits program infrastructure development, including:

  * Legislative authority.

  * Regulations.

  * Guidance.

  * Policy, procedures, and forms.

  * Integration of operating permits program with other programs [e.g., SIP, new source review (NSR), section 112].

  * Data systems (including AIRS-compatible systems for submitting permitting information to EPA, permit tracking system) for title V purposes.

  * Local program development, State oversight of local programs, modifications of grants of authority to local agencies, as needed.

  * Justification for program elements which are different from but equivalent to required program elements.

- Permits program modifications which may be triggered by new Federal requirements/policies, new standards [e.g., maximum achievable control technology (MACT), SIP, Federal implementation plan], or audit results.

D. Permits program coverage/applicability determinations, including:

- Creating an inventory of part 70 sources.
- Development of program criteria for deferral of nonmajor sources consistent with the discretion provided to States in part 70.
- Application of deferral criteria to individual sources.
- Development of significance levels (for exempting certain information from inclusion on permits application).
- Development and implementation of federally-enforceable restrictions on a source's potential to emit in order to avoid it being considered a major source.

E. Permits application review, including:

- Completeness review of applications.
- Technical analysis of application content.
- Review of compliance plans, schedules, and compliance certifications.

F. General and model permits, including:

- Development.
- Implementation.

G. Development of permit terms and conditions, including:

- Operational flexibility provisions.
- Netting/trading conditions.
- Filling gaps within applicable requirements (e.g., periodic monitoring and testing).
- Appropriate compliance conditions (e.g., inspection and entry, monitoring and reporting).
- Screen/separate "State-only" requirements from the federally-enforceable requirements.

- Development of source-specific permit limitations [e.g., section 112(g) determinations, equivalent SIP emissions limits pursuant to 70.6(a)(1)(iii)].

- Optional shield provisions.

H. Public/EPA participation, including:

- Notices to public, affected States and EPA for issuance, renewal, significant modifications and (if required by State law) for minor modifications (including staff time and publication costs).

- Response to comments received.

- Hearings (as appropriate) for issuance, renewal, significant modifications, and (if required by State law) for minor modifications (including preparation, administration, response, and documentation).

- Transmittal to EPA of necessary documentation for review and response to EPA objection.

- 90-day challenges to permits terms in State court, petitions for EPA objection.

I. Permit revisions, including:

- Development of criteria and procedures for the following different types of permit revisions:

  * Administrative amendments.

  * Minor modifications (fast-track and group processing).

  * Significant modifications.

- Analysis and processing of proposed revisions.

J. Reopenings:

- For cause.

- Resulting from new emissions standards.

K. Activities relating to other sections of the Act which are also needed in order to issue and implement part 70 permits, including:

- Certain section 110 activities, such as:

  * Emissions inventory compilation requirements.

  * Equivalency determinations and case-by-case reasonably available control technology determinations if done as part of the part 70 permitting process.

- Implementation and enforcement of preconstruction permits issued to part 70 sources pursuant to title I of the Act, including:

  * State minor NSR permits issued pursuant to a program approved into the SIP.

  * Prevention of significant deterioration/NSR permits issued pursuant to Parts C and D of title I of the Act.

- Implementation of Section 111 standards through part 70 permits.

- Implementation of the following section 112 requirements through part 70 permits:

  * National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under section 112(d) according to the timetable specified in section 112(e).

  * The NESHAP promulgated under section 112(f) subsequent to EPA's study of the residual risks to the public health.

  * Section 112(h) design, equipment, work practice, or operational standards.

- Development and implementation of certain section 112 requirements through part 70 permits, including:

  * Section 112(g) program requirements for constructed, reconstructed, and modified major sources.

    * Section 112(i) early reductions.

    * Section 112(j) equivalent MACT determinations.

    * Section 112(l) State air toxics program activities that take place as part of the part 70 permitting process.

    * Section 112(r)(7) risk management plans if the plan is developed as part of the permits process.

L. Compliance and enforcement-related activities to the extent that these activities occur prior to the filing of an administrative or judicial complaint or order. These activities include the following to the extent they are related to the enforcement of a permit, the obligation to obtain a permit, or the permitting regulations:

- Development and administration of enforcement legislation, regulations, and policy and guidance.

- Development of compliance plans and schedules of compliance.

- Compliance and monitoring activities.

    * Review of monitoring reports and compliance certifications.

    * Inspections.

    * Audits.

    * Stack tests conducted/reviewed by the permitting authority.

    * Requests for information either before or after a violation is identified (e.g., requests similar to EPA's section 114 letters).

- Enforcement-related activities.

    * Preparation and issuance of notices, findings, and letters of violation [NOV's, FOV's, LOV's].

    * Development of cases and referrals up until the filing of the complaint or order.

- Excluded are all enforcement/compliance monitoring costs which are incurred after the filing of an administrative or judicial complaint.

M. The portion of the Small Business Assistance Program which provides:

- Counseling to help sources determine and meet their obligations under part 70, including:
  * Applicability.
  * Options for sources to which part 70 applies.
- Outreach/publications on part 70 requirements.
- Direct part 70 permitting assistance.

N. Permit fee program administration, including:

- Fee structure development.
- Fee demonstration.
  * Projection of fee revenues.
  * Projection of program costs if detailed demonstration is required.
- Fee collection and administration.
- Periodic cost accounting.

O. General air program activities to the extent they are also necessary for the issuance and implementation of part 70 permits.

- Emissions and ambient monitoring.
- Modeling and analysis.
- Demonstrations.
- Emissions inventories.
- Administration and technical support (e.g., managerial costs, secretarial/clerical costs, labor indirect costs, copying costs, contracted services, accounting and billing).

- Overhead (e.g., heat, electricity, phone, rent, and janitorial services).

- States will need to develop a rational method based on sound accounting principles for segregating the above costs of the permits program from other costs of the air program. The cost figures and methodology will be reviewed by EPA on a case-by-case basis.

III. FLEXIBILITY IN FEE STRUCTURE DESIGN

A. A State may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all reasonable direct and indirect permits program costs.

B. Provided adequate aggregate revenue is raised, States may:

- Base fees on actual emissions or allowable emissions.

- Differentiate fees based on source categories or type of pollutant.

- Exempt some sources from fee requirements.

- Determine fees on some basis other than emissions.

- Charge annual fees or fees covering some other period of time.

IV. INITIAL PROGRAM APPROVABILITY CRITERIA

A. Elements of State program submittals which relate to permit fees.

- Demonstration that fee revenues in the aggregate will adequately fund the permits program.

- Initial accounting to demonstrate that permit fee revenues required to support the reasonable direct and indirect permits program costs are in fact used to fund permits program costs.

- Statement that the program is adequately funded by permit fees (which is supported by cost estimates for the first 4 years of the permits program).

B. Methods by which a State may demonstrate that its fee schedule is sufficient to fund its title V permits program:

- Demonstration that its fee revenue in the aggregate will meet or exceed the $25/tpy (with CPI adjustment) presumptive minimum amount.

- Detailed fee demonstration.

  * Required if fees in the aggregate are less than the presumptive minimum or if credible evidence is presented raising serious questions during public comment on whether fee schedule is sufficient or information casting doubt on fee adequacy otherwise comes to EPA's attention.

C. Computation of $25/tpy presumptive minimum.

- The emissions inventory against which the $25/tpy is applied is calculated as follows:

  * Calculate emissions inventory using actual emissions (and estimates of actual emissions).

  * From the total emissions of part 70 sources, exclude emissions of carbon monoxide (CO) and other pollutants consistent with the definition of "regulated pollutant (for presumptive fee purposes)."

  * States may:

    - Exclude emissions which exceed 4,000 tpy per pollutant per source.

    - Exclude emissions which are already included in the calculation (i.e., double-counting is not required).

    - Exclude insignificant quantities of emissions not required in a permit application.

  * States have two options with respect to emissions from affected units under section 404 of the Act during 1995 through 1999.

    - If a State <u>excludes</u> emissions from affected units under section 404 from its inventory, fees from those units may <u>not</u> be used to show that the State's fee revenue meets or exceeds the $25/tpy presumptive minimum amount (see paragraph IV.E below).

    - If a State <u>includes</u> emissions from affected units under section 404 in its inventory, it <u>may</u> include non-emissions-based fees from those units in

showing that its fee revenue meets or exceeds the $25/tpy presumptive minimum amount (see paragraph IV.E below.)

- Computation of the presumptive minimum amount is a surrogate for predicting aggregate actual program costs. Once this aggregate cost has been determined, the method used for computing it does not restrict a State's discretion in designing its particular fee structure. States may impose fees in a manner different from the criteria for calculating the presumptive amount (e.g., charging fees for CO emissions and for emissions which exceed 4,000 tpy per pollutant per source).

D. Establishing that fee revenue meets or exceeds the presumptive minimum.

- Fee revenue in the aggregate must be equivalent to $25/tpy (as adjusted by CPI) as applied to the qualifying emissions inventory.

- States have flexibility in fee schedule design as outlined in paragraph III above and are not required to adopt any particular fee schedule.

E. Fees collected from affected units under section 404.

- States may not use emissions-based fees from "Phase I" affected units under section 404 for any purpose related to the approval of their operating permits programs for the period from 1995 through 1999. The EPA interprets the prohibition contained in section 408(c)(4) of the Act as preventing EPA from recognizing the collection of such fees in determining whether a State has met its obligation for adequate program funding. Furthermore, such fees cannot be used to support the direct or indirect costs of the permits program. However, States may, on their own initiative, impose title V emissions-based fees on affected units under section 404 and use such revenues to fund activities beyond those required pursuant to title V.

  * All units initially classified as "Phase I" units are listed in Table I of 40 CFR part 73. In addition, units designated as active substitution units under section 404(b) are considered "Phase I" affected units under section 404.

- States may collect fees which are not emissions based (e.g., application or processing fees) from such units.
- Role of nonemissions-based fees in determining adequacy of aggregate fee revenue.

  * Such fees may be used as part of a detailed fee demonstration (which does not rely on the $25/tpy presumption).

    * Such fees may not be used to establish that aggregate fees meet or exceed the presumptive minimum amount unless the State exercises its discretion to include emissions from affected units under section 404 in the emissions inventory against which the $25/tpy is applied.

F. Fee program accountability.

- Initial accounting (required as part of program submittal) comprised of a description of the mechanisms and procedures for ensuring that fees needed to support the reasonable direct and indirect costs of the program are utilized solely for permits program costs.

- Periodic accounting every 2-3 years to demonstrate that the reasonable direct and indirect costs of the program were covered by fee revenues.

- Earlier accounting or more frequent accountings if EPA determines through its oversight activities that a program's inadequate implementation may be the result of inadequate funding.

G. Governor's statement assuring adequate personnel and funding for permits program.

- Submitted as part of program submittal.

- A statement supported by annual estimates of permits program costs for the first 4 years after program approval and a description of how the State plans to cover those costs.

    * Detailed description of estimated annual costs is not required if the State has relied on the presumptive minimum amount in demonstrating the adequacy of its fee program.

* Detailed description of estimated costs for a 4-year period showing how program activities and resource needs will change during the transition period is required if State proposes to collect fee revenue which is less than the presumptive minimum amount.

- Projection of annual fee revenue for a 4-year period with explanation of how State will handle any temporary shortfall (if projected revenue for any of the 4 years is less than estimated costs).

V. FUTURE ADJUSTMENTS TO FEE SCHEDULE

A. Continuing requirement of fee revenue adequacy.

- Obligates the States to update and adjust their fee schedules periodically if they are not sufficient to fund the reasonable direct and indirect costs of the permits program.

B. Changes in fee structure over time are inevitable and may be required by the following events:

- Results of periodic audits/accountings.

- Revised number of part 70 sources (discovery of new sources, new EPA standards, expiration of the deferral of nonmajor sources).

- Changes in the number of permit revisions.

- Changes in the number of affected units under section 404 (e.g., substitution units).

- CPI-type adjustments.

- Different activities during post-transition period.

NOTICE

The policies set out in this guidance document are intended solely as guidance and do not represent final Agency action and are not ripe for judicial review. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. The EPA officials may decide to follow the guidance provided in this guidance document, or to act at variance with the guidance, based on an analysis of specific circumstances. The EPA also may change this guidance at any time without public notice.

Title V Revenues

1. Application Deposit Fee
2. Order of Abatement
3. Records Request

Title V Invoices

1. Annual w/Emissions Fee
2. Renewal/Revision Fee

Payment Receipt

The payment is entered into the Air Quality permit database. This updates the permit database indicating payment amount and date received.

The payment is then entered into Accela using one of the categories for deposit in to the Title V Cost Center

1. Industrial Permits Title V
2. Industrial Permits Order of Abatement by Consent Title V
3. Industrial Title V Public Records Request

Title V Expenditures

Staff working on Title V's track their time and enter their hours on their time sheet

The staff's hours are then transferred over to the County payroll where the account hours are charged by employee to the Title V Cost Center where expenditures are tracked and accounted for in the JD Edwards EnterpriseOne accounting software.

Appendix F. PCAQCD Comments on the Draft Report

TSAI, YA-TING

From: Michael Sundblom <Michael.Sundblom@pinalcountyaz.gov>
Sent: Tuesday, August 7, 2018 3:16 PM
To: Rios, Gerardo
Cc: Anu Jain; TSAI, YA-TING; Kurpius, Meredith; Bob Farrell
Subject: RE: Pinal Title V Program Evaluation draft report

Gerardo,

Thank you for the opportunity to review and provide comment on the Pinal Title V Program Evaluation draft report.

We offer the following comments and corrections:

1. Executive Summary, Item 5, page 4 – Item 5 seems to conflict with finding 4.1. To clarify, PCAQCD has historically posted active/issued Title V permits and supporting materials to its web site. In past practice PCAQCD has not posted all supporting documentation for proposed permits or revision but offered to supply that information upon request.

2. PCAQCD Description, Page 7 – EPA noted that PCAQCD has a staff of about twelve employees. As an update, PCAQCD has recently filled vacant positions in the department and as of today, is fully staffed at 14 employees.

3. Section 2.1 – EPA comments and discusses in Finding 7.7 that one permit writer recently left the agency and now the permits are reviewed by one permit writer (the current manager) and the director. As an update, the vacant permit engineer position was filled and the permitting review process continues as it did during the audit.

4. Section 2.4 - Please correct the typos in the discussion on Page 11: "The Permits Access Database and Excel spreadsheet is used for tracking *the all* permitting activity moving thru the system". And, in the discussion, Paragraph 2, Page 11: "PCAQCD stated that *they are plan* to meet with the County IT department to discuss possible improvements".

5. Section 2.5 – Please correct the "PCAQCD" acronym in Footnote 12 on page 13.

6. Section 4.4 - EPA comment in the Finding on page 19 that PCAQCD rarely uses a concurrent process for public comment and the EPA's 45-day review. Response: - PCAQCD's Code §3-1-065.A.2 does not allow for a concurrent review of the TV draft permits. We would like to discuss a process with EPA to address our ability to allow for a concurrent or a consecutive review of the proposed Title V permits.

7. Section 5.2 – Please correct the "PCAQCD" acronym in the Recommendation section on page 23.

Please let me know if you have questions or need further clarification.

Regards,

Mike Sundblom
Director
Pinal County Air Quality Control

Appendix G. EPA Response to PCAQCD Comments

EPA Region 9 Responses to PCAQCD Comments on the Draft Title V Program Evaluation Report August 13, 2018

Thank you for providing comments on the draft title V program evaluation report.[1] The EPA has reviewed PCAQCD's comments and provides the following responses.

1. District Comment: Executive Summary, Item 5, page 4 – Item 5 seems to conflict with finding 4.1. To clarify, PCAQCD has historically posted active/issued Title V permits and supporting materials to its web site. In past practice PCAQCD has not posted all supporting documentation for proposed permits or revision but offered to supply that information upon request.
    a. EPA Response: Thank you for your comment. We have revised the final document to correct this error. The EPA recognizes that the PCAQCD posts active/issued title V permits and supporting materials to its website. We recommend providing historical technical support documents referenced in the active technical support document to provide a better understanding to the public.

2. District Comment: PCAQCD Description, Page 7 – EPA noted that PCAQCD has a staff of about twelve employees. As an update, PCAQCD has recently filled vacant positions in the department and as of today, is fully staffed at 14 employees.
    a. EPA Response: Thank you for the update; our final report includes this information.

3. District Comment: Section 2.1 – EPA comments and discusses in Finding 7.7 that one permit writer recently left the agency and now the permits are reviewed by one permit writer (the current manager) and the director. As an update, the vacant permit engineer position was filled and the permitting review process continues as it did during the audit.
    a. EPA Response: Thank you for the update; our final report includes this information.

4. District Comment: Section 2.4 - Please correct the typos in the discussion on Page 11: "The Permits Access Database and Excel spreadsheet is used for tracking *the all* permitting activity moving thru the system". And, in the discussion, Paragraph 2, Page 11: "PCAQCD stated that *they are plan* to meet with the County IT department to discuss possible improvements".
    a. EPA Response: Typo is now fixed.

5. District Comment: Section 2.5 – Please correct the "PCAQCD" acronym in Footnote 12 on page 13.
    a. EPA Response: Typo is now fixed.

6. District Comment: Section 4.4 - EPA comment in the Finding on page 19 that PCAQCD rarely uses a concurrent process for public comment and the EPA's 45-day review. Response: - PCAQCD's Code §3-1-065.A.2 does not allow for a concurrent review of the TV draft permits. We would like to discuss a process with EPA to address our ability to allow for a concurrent or a consecutive review of the proposed Title V permits.
    a. EPA Response: EPA Region 9 is available to discuss options for concurrent review with the District.

[1] The District's comments, along with EPA's responses to comments, are included as Appendix F and G, respectively, in the final report.

7. District Comment: Section 5.2 – Please correct the “PCAQCD” acronym in the Recommendation section on page 23.
    a. EPA Response: Typo is now fixed.