

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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SUBJECT: Guidance to States on Authority Necessary to Implement the
Operating Permits Program in Title V of the Clean Air Act
Amendments of 1990

FROM: William G. Rosenberg,
Assistant Administrator
for Air and Radiation

To: Regional Administrators, Regions I - X

Attached is guidance EPA has prepared to help states determine the authority they must have to implement the new operating permit program mandated by Title V of the Clean Air Act Amendments of 1990. On April 23, 1991, EPA signed the proposal of its regulations specifying the details of an approvable Title V operating permit program. 56 Fed. Reg. 21712 (May 5, 1991). The attached guidance is designed to give the states a briefer overview of the Title V program requirements, and to serve as an initial "checklist" to focus states in their review of existing permitting authority. States should use this guidance in conjunction with EPA's proposal, and, ultimately, the final operating permit regulations due in November 1991.

Please circulate this guidance to your states and program offices. If you or your staffs have any questions concerning the guidance, please call Michael Trutna at FTS 629-5345 or (919) 541-5345 or Timothy Williamson at FTS 475-7499 or (202) 475-7499,

Attachment

Cc: Air Division Directors, Regions I - X
Regional Counsels, Regions I - X
E. Donald Elliott, General Counsel
Raymond L. Ludwiazewski, Assistant Administrator,
Office of Enforcement
STAPPA/ALAPCO
National Governors Association
National Association of State Legislatures

AUTHORITY NECESSARY TO IMPLEMENT
THE OPERATING PERMITS PROGRAM IN
TITLE V OF THE CLEAN AIR ACT AMENDMENTS OF 1990

The operating permits program in title V of the Clean Air Act Amendments of 1990 poses a major challenge to State and local permitting authorities. By November 15, 1993, each State must submit to EPA for approval an operating permit program that meets the requirements of title V and of EPA's implementing regulations. EPA signed the proposal of those regulations on April 23, 1991, and must finalize the regulations by November 15, 1991. To accommodate States wishing to submit an approvable program as soon as possible, EPA is providing the following guidance to the States concerning the elements of a permitting program the States must have authority to implement.

Where the provisions of title V are unclear, the following guidance cannot necessarily predict how EPA will interpret the statute in its final regulations, and this guidance will take no position on potentially vague provisions. Moreover, this guidance in no way binds or constrains EPA in its subsequent rulemaking actions to implement title V. This guidance will present EPA's current understanding of the main requirements of title V for which the States must provide authority in support of their operating permit programs. For a complete discussion of EPA's proposal concerning the state's obligations, please refer to EPA's proposed regulation signed April 23, 1991, 56 Fed. Reg. 21712 (May 5, 1991). Nothing in this guidance supersedes or restricts that proposal.

This guidance lists the elements of a state program required in title V. It is not meant to dictate to a state or permitting authority how the state must authorize each element as a matter of state law. Some states may have the flexibility to implement many of these elements with administrative regulations without changing their applicable statutory authority; other states may need substantially revised statutory authority. In any case, the Governor must submit a legal opinion from the attorney general, attorney for those state air pollution control agencies with independent legal counsel, or the chief legal officer of an interstate compact, stating that the laws of the state, locality, or compact provide adequate authority to carry out the program. Sec. 502(d)(1).

A. Program Coverage

Under section 502(a), fully approvable permitting programs must have authority to cover the following sources:

1. Acid Rain: Affected sources under the acid deposition provisions of Title IV;
2. Major sources: Defined as a stationary source or group

of stationary sources that are any of the following (see sec. 501(2)):

- a. For air toxics sources under sec. 112, sources with the potential to emit 10 tons per year ("TPY") of any hazardous air pollutant or 25 TPY of any combination of hazardous air pollutants (see sec. 112(a)(1));
- b. For all major stationary sources as defined in section 302 of the Act, which are sources with the potential to emit 100 TPY of any pollutant (see sec. 302(j)); and
- c. For sources subject to the nonattainment area provisions of Title I, part D, sources in the following type of nonattainment area with the potential to emit the following amount of pollutants:

Ozone (VOC and NOx) (see secs. 182(c)-(e) and 184(b)(Z))

	<u>TPY</u>
Serious	50
Severe	25
Extreme	10
Transport (for VOC)	50

Carbon Monoxide (see sec. 187(c)(1))

Serious (due to stationary sources)	50
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PM-IQ (see sec. 189(b)(3))

Serious	70
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- 3. NESHAP: Any other source, including an area source, subject to an hazardous air pollutant standard under sec. 112;
- 4. NSPS: Any source subject to new source performance standards under sec. 111;
- 5. PSD/NSR: Any source required to have a preconstruction review permit pursuant to the requirements of the prevention of significant deterioration program under Title I, part C or the nonattainment area new source review program under Title I, part D; and
- 6. Any other stationary source in a category EPA

designates in whole or in part by regulation, after notice and comment.

EPA has proposed that states may defer all sources, except major sources and affected sources under the acid rain program, from the Title V program for a period not to exceed five years after approval of the operating permit program in the state.

B. Permit Program Content

All approvable programs must have authority for each of the following provisions.

1. Applications and Completeness: Requirements for permit applications, including standard applications forms and criteria for determining the completeness of applications (sec. 502(b)(1)).
2. Monitoring: Monitoring and reporting requirements (sec. 502(b)(2J),
3. Fees: A permit fee system (sec. 502(b)(3); see discussion below for more detail).
4. Program Support: Provisions for adequate personnel and funding to administer the program (sec. 502(b)(4)).
5. Permit Issuance: Authority to Issue permits and assure that each permitted source complies with applicable requirements under the Act (sec. 502(b)(5)(A)). Note that sources must be permitted whether or not they are in compliance with the applicable requirements of the Act or state law.
6. Reopening Permits: Authority to terminate, modify, or revoke and reissue permits "for cause," which is not further defined (sec. 502(b)(5)(D)), and a requirement to reopen permits in certain circumstances (see discussion below for more detail on permit reopening).
7. Enforcement: Authority to enforce permits, permit fees, and the requirement to obtain a permit, including:
 - a. Civil penalty authority in a maximum amount of not less than \$10,000 per day; and
 - b. "appropriate criminal penalties" Sec. 502(b)(5)(E)

8. EPA Veto: Authority to assure that no permit will issue if EPA timely objects to its issuance (sec. 502(b)(5)(F)).
9. Public Participation: Procedures for processing applications and public notice, including offering an opportunity for public comment, a hearing on applications (sec. 502(b)(6); see also the discussion on the permit issuance process, below).
10. Judicial Review: Opportunity for the applicant or anyone who participated in the public comment process on a permit to obtain judicial review in state court of the permit action (Sec. 502(b)(6)).
11. Suits for Delay: Authority and procedures to provide that the permitting authority's failure to act on a permit or renewal application within the deadlines specified in the Act (see sec. 503 and the deadlines for permitting under acid deposition provisions in Title IV) shall be treated as a final permit action solely to allow judicial review by the applicant or anyone who participated in the public comment process to compel action on the application (sec. 502(b)(7)). States with provisions requiring a permit based on the application to issue "by default" as a result of the permitting authority's failure to act on the permit application must determine whether their procedures comply with all the requirements of title V, including public participation, permit review, and permit content. "Default" issuance is impermissible under title V.
12. Public Access to Information: Authority and procedures to make available to the public any permit application, compliance plan, permit, emissions or monitoring report, and compliance report or certification, subject to the confidentiality provisions of sec. 114© of the Act (sec. 502(b)(8)).
13. Access to Permit: The contents of the permit itself are not entitled to confidentiality protection (sec. 503(e)).
14. Operational Flexibility: Provisions to allow operational flexibility at the permitted facility (sec. 502(b)(10); see discussion below on operational flexibility).

C. Required Permit Provisions

Within each program, each permit must contain certain provisions, as follows:

1. **Permit Term:** A fixed term, not to exceed five years (sec. 502(b)(53(B))). Permits for acid rain sources must have terms of five years, no more and no less (sec. 408(a)). Permits for solid waste incineration units shall have a term of up to 12 years, and shall be reviewed every 5 years after issuance. (sec. 129(e))
2. **Applicable Requirements;** Limits and conditions to assure compliance with all applicable requirements under the Act, including requirements of the applicable implementation plan and the sulfur dioxide allowance system under the acid rain program (sec. 504(a) and 408(a) and 408(d)). Note that the applicable implementation plan includes any applicable federal implementation plan.
3. **Schedule of Compliance:** A schedule of compliance, which is defined as a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with applicable requirements under the Act (sec. 504(a) and 501(3)). EPA has proposed to limit this requirement to permits for sources violating an applicable requirement under the Act.
4. **Compliance Determination:** Inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions, consistent with any monitoring and certification regulations EPA is authorized to promulgate under sections 504(b) and 114(a)(3) (sec 504(c)).

D. Permit Fees

Any fee which title V requires a permitting authority to collect must be used solely to support the permit program. Sec. 502(b)(3)(C)(iii). The permit program must collect adequate permit fees to meet one of the following tests.

1. Program Support

An approvable permit program must require permittees to pay an annual fee (or equivalent over some other period) sufficient to cover all "reasonable (direct and indirect) costs" required to develop and administer the permit program. Sec. 502(b)(3)(A).

These fees must cover the costs of the following :

- a. Reviewing and acting upon any application;
- b. Implementing and enforcing the permit, including any permit issued before enactment of the Amendments, but not any court costs or other costs associated with an enforcement action;
- c. Emissions and ambient monitoring;
- d. Preparing generally applicable regulations or guidance;
- e. Modeling, analyses, and demonstrations; and
- f. Preparing inventories and tracking emissions.

Sec. 502(b)(3)(A)(i)-(vi). The fees should be sufficient to cover not only the salaries for the state and local personnel responsible for carrying out the activities listed above, but other indirect costs such as training, equipment, data management systems, and facilities.

2. Cost per Ton

The program must also collect an amount from all sources equal to at least \$25 per ton of each regulated pollutant (not including carbon monoxide), unless the state can demonstrate that a lesser amount will support the direct and indirect costs of the program Sec. 502(b)(3)(B)(I), (ii), and (iv).

The state is not required to count emissions of any pollutant from any one source in excess of 4,000 tons per year. Sec. 502(b)(3)(B)(iii).

This amount is to be increased each year according the Consumer Price Index. Sec. 502(b)(3)(B)(v)

E. Application and Permitting Process

An approvable program must provide for an application and permitting process containing the following provisions.

1. Application Submission and Due Date

Covered sources must submit an application within twelve months after the date EPA approves or promulgates a program applicable to that source. The permitting authority may designate an earlier date. Sec. 504(c).

The application must include a compliance plan as necessary and be signed by a responsible official, who must certify the accuracy of the information submitted. Sec. 503(c).

2. State Action on Initial Applications

For the initial round of permit applications, the permitting authority must establish a phased schedule for acting on permit applications submitted within the first full year after program approval. This schedule must assure that the permitting authority will act on at least one-third of the permits each year over a period not to exceed three years after approval or promulgation of the program. Sec. 503(c).

3. State Action on Subsequent Applications

After acting on the initial applications, the permitting authority must act on a completed application and issue or deny a permit within 18 months after receiving the complete application. Sec. 503(c).

4. Priority for New Construction Permits

The permitting authority is required to have reasonable procedures to grant priority to acting on permits for new construction or modifications. Sec. 503(c).

5. Neighboring State Review of Permits

The permitting authority is required to notify all states whose air quality may be affected and that are contiguous to the state permitting the facility of each permit application or proposed permit submitted to EPA for review. See next paragraph for EPA review. The authority must also notify each state within 50 miles of the applicant source. Sec. 505(a)(2).

The permitting authority must give all such states an opportunity to submit written recommendations for the permit. If the authority refuses to accept those recommendations, it must provide written notice of its reasons to the state that submitted the recommendation and EPA. Sec. 505(a)(2).

6. EPA Review and State Response

The permitting authority must submit to EPA a copy of the following:

- a. The application for any permit, renewal, or modification, including the compliance plan as necessary, or any portion EPA determines it needs to review the application and permit effectively; and

- b. Each permit proposed to be issued and issued as a final permit.

Sec. 505(a)(1).

If EPA objects within 45 days after receiving either the proposed permit or the notice that the permitting authority has refused to adopt a neighboring state's recommendations for the permit, the permitting authority must respond in writing. Sec. 505(b)(1).

The permitting authority may not issue the permit if EPA objects, unless it revises the permit to meet EPA's objections. If the authority has already issued the permit, EPA must modify, terminate, or revoke the permit, and the permitting authority must reissue it to meet EPA's objection. Sec. 505(b)(3). The permitting authority has 90 days after EPA's objection to revise the permit. If the permitting authority fails to do so, EPA must issue or deny the permit. Sec. 505(c).

7. Permit Reopening

a. Automatic Reopening

Any approvable program must require that the permitting authority will revise all permits for major sources with terms of three or more years to incorporate applicable requirements under the Act that are promulgated after issuance of the permit. EPA proposes to interpret this term as the remaining term in a permit with an initial term greater than three years. Such revisions must be made using the notice and comment procedures for permit issuance, and must be made within 18 months after the promulgation of the new requirement. No revision is required if the effective date of the requirement is after the expiration of the permit term. Sec. 502(b)(9).

b. Reopening for Cause

Any approvable program must require that the permitting authority may terminate, modify, or revoke permits for cause. Sec. 502(b)(5)(D).

8. Operational Flexibility

An approvable program must provide for changes within a permitted facility without requiring a permit revision. The changes may not be modifications under Title I of the Act and they may not exceed the total emissions or emission rates allowable under the permit. The facility must provide EPA and the permitting authority with written notification at least 7 days before the change, or a shorter time for emergencies. Sec. 502(b)(10).

E. Additional Elements of an Approvable Program

The following provisions are not mandatory for any approvable program, but are opportunities for flexibility in an approvable program, which a state may wish to accommodate in its program.

1. Single Permit: A permitting authority may issue one permit for a facility with multiple sources. Sec 502(c).
2. Temporary Sources: The authority may also issue one permit authorizing emissions from similar operations at multiple temporary locations, The permit must assure that the emissions from each location will comply with the Act, and require notice from the source owner or operator before each change in location, Sec, 504(e),
3. General Permits: The authority may, after notice and opportunity for a public hearing, issue a general permit covering numerous similar sources. General permits do not necessarily relieve source of the obligation to file permit applications, Sec. 504(d).
4. Permit Shield: If a source complies with its permit, permit may provide that the source is deemed to comply with other applicable provisions of the Act if:
 1. the permit includes the applicable requirements of the Act; or
 2. the permitting authority made an explicit determination referred to in the permit that other provisions are not applicable to the source. EPA may limit the scope of this permit compliance protection by rule. Sec. 504(f).
5. Application Protection: A source which files a timely and complete application for a permit or a renewal will not be liable under title V for failure to have a permit if the permitting authority delays in issuing or reissuing the permit, provided the delay in issuing the permit was not due to the applicant's failure to submit required or requested information. Sec. 503(d). States may choose to adopt similar application protection as a matter of state law.

F. Miscellaneous Provisions

1 Saving Clause

Permitting authorities are specifically authorized to

establish "additional permitting requirements not inconsistent with the Act." Sec. 506(a). There is a statement of the Conference Committee attempting to clarify this provision, explaining that a state may establish more stringent permitting requirements as long as they are not inconsistent with the national permitting requirements of the Act.

2. Acid and Rain Permits

The permitting provisions of Title V shall apply to permits implementing the acid deposition provisions of Title IV, except as modified by Title IV. sec. 506(b).

3. Hazardous Air pollution Permits

- a. Permitting authorities will be required to determine maximum achievable control technology (MACT) and to incorporate it into a new source permit. Sec. 112(g).
- b. Permitting authorities must also be able to determine MACT and impose it in a permit if EPA fails to promulgate a MACT standard. Sec 112(j).

4. Small Business Assistance

Section 507 of the Act requires the states to submit a Small Business Stationary Source Technical and Environmental Compliance Assistance Program as a state implementation plan revision within two years after enactment. This small business program is not a required element of a Title V permit program. The small business program is required, however, to offer certain assistance to qualified small businesses in obtaining permits. Therefore, states may wish to coordinate the development of the two programs.