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**THE NEW AIR PERMITTING PROGRAM:
THE ROLE OF THE STATES**

*Prepared by the Environmental Law Institute
for the Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
Permit Programs Branch (AQMD)
Research Triangle Park, N.C. 27711
EPA Contract #68-D00120*

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Although the information in this article has been funded wholly or in part by the Environmental Protection Agency under contract 68-D00120, subcontract EPA 90.8 to Environmental Law Institute, it does not necessarily reflect the views of the Agency and no official endorsement should be inferred.

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**PART I:
ENABLING AUTHORITIES FOR STATE AIR PROGRAMS
FOR OPERATING PERMITS**

Title V of the Clean Air Act Amendments of 1990 ("the Act") requires states to develop programs for issuing and enforcing operating permits for stationary sources of air pollution. New state permitting programs must be submitted to EPA by November 15, 1993. To receive approval from EPA to administer the Title V air permitting program, states need to have statutes that contain certain authorities both for state air agencies to administer the program and for citizens to participate in the process. The Act specifies the necessary elements for a state program and mandates that EPA issue regulations which establish in more detail the requirements for an approvable state air permitting program. Section 502(b). To assist states in modifying their enabling statutes, this summary of required authorities is based on the Act alone. Additional guidance on air permitting programs will to be provided to the states now that the Title V regulations have been finalized by EPA. This project was largely completed prior to publication of EPA's final rules.

This report summarizes the necessary elements of a state air program for operating permits as required by Title V of the Act. It does not discuss the requirements for other types of permits that may eventually be administered by the states, such as the acid rain program of Title IV, regulation of hazardous air emissions under section 112, state plans for regulating solid waste incinerators under section 129, or authority to control air pollution from sources located offshore under section 507. For purposes of this report, all references to the term "state" are also intended to include local or inter-governmental agencies which are responsible for enforcing ordinances or laws concerning prevention and control of air pollution. The Act explicitly authorizes such local agencies to obtain EPA approval to administer their own air permitting programs. See sections 302(b) and 501(4) of the Act.

I. PERMIT APPLICATIONS

A. Facilities for which Permits are Required

1. Major Sources

Approvable state permit programs must have authority to require permits for all major sources, defined to include:

- a. 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;
- b. Major stationary sources as defined in section 302, which are sources with the potential to emit 100 tpy of any air pollutant;

- c. Sources in nonattainment areas which are major stationary sources as defined in Title I, part D.

See sections 501 and 502(a).

2. Other Sources

Approvable permit programs must also have authority to require permits for the following types of non-major sources:

- a. Acid rain: Affected sources under the acid deposition provisions of Title IV;
- b. NESHAP: Sources subject to an hazardous air pollutant standard under section 112;
- c. NSPS: Sources subject to new source performance standards under section 111;
- d. PSD/NSR: Sources subject to preconstruction review pursuant to the prevention of significant deterioration program under Title I, part C or the nonattainment area new source review program under Title I, part D;
- e. Sources within categories designated by EPA in future rulemakings.

See section 502(a).

B. Facilities for which Permits are Discretionary

1. Temporary Sources

For similar facilities that are conducted at multiple temporary locations, states have discretion whether to issue a single permit, as long as the permit contains conditions that will ensure compliance with all applicable requirements at all authorized locations and requires advance notice to the state each time the location is changed. States may charge a separate permit fee for each location. See section 504(e).

2. Small Business Sources

States may choose whether to defer for five years after approval of their air permitting programs the applicability of the permit requirements to sources that are not major and qualify as "small business stationary sources." A state plan for implementing compliance by small businesses will be required and must be approved by EPA. See section 507.

3. General Permits for Similar Sources

Similar small businesses that qualify as major sources of air pollution may be allowed by the states to apply for a "general permit" that covers all sources within that category. If they choose to do so, states may eliminate the need to hold individual permit hearings on each facility that is covered by a general permit. See section 504(d).

4. Single Permit for One Facility

States have discretion whether to issue a single state permit to a facility that contains many different sources of air emissions. See section 502(c).

5. Exemptions of Certain Minor Sources

Under section 502(a), states are allowed to exempt from permitting requirements sources which are not major sources or acid rain sources for a period of up to 5 years after State program approval. EPA will conduct a rulemaking to determine whether it is appropriate to continue deferring permit requirements for, or to permanently exempt, some source categories. EPA has permanently exempted new residential woodheaters and asbestos removal operations from Title V permitting requirements. States retain the discretion to issue permits to these exempted sources as well as minor sources. See sections 116 and 506(a).

C. Information that Must Be in an Application

1. Standard Application Forms

States must provide a standard state Title V application form. Section 502(b)(1).

2. Information on Facility Processes

Each permit application must contain basic corporate information, and a description of products, fuels, raw materials, equipment and manufacturing or other processes that occur at the facility. This information is also necessary in order for a facility to be able to change its operations among a variety of pre-approved alternative operating scenarios, as provided in section 502(b)(10).

3. Information on Air Emissions

The permit application (and permit itself) must contain information on each air pollutant, its point source, rate of emission, and emission standards and limitations that apply to each pollutant and source, as defined in sections 302(k) and 304(f). See section 502(b)(5)(A and C).

4. Compliance Plan

Along with its permit application, a facility must submit a compliance plan which demonstrates how it will comply with all applicable emission standards and other requirements, and which includes a schedule for achieving or maintaining compliance and for submitting progress reports. See sections 302(p), 501(3) and 503(b)(1).

II. ANNUAL PERMIT FEES

A. Facilities Required to Pay Fees

1. Fees for all Sources

State law must authorize a State to collect annual permit fees from all sources of air emissions which are required to obtain permits (see item I A above). The amount of those fees must be sufficient to cover all reasonable direct and indirect costs necessary to develop and administer the state's Title V air permitting program. Section 502(b)(3)(A).

2. Payment of Fees by Federal Facilities

A state has discretion to require federal facilities to pay permit fees in order to help "defray the costs of its air pollution regulatory program" to the same extent as any nongovernmental entity. Section 118(a)(2)(B).

3. Exclusion of Acid Rain Units

Affected units under the acid rain program of Title IV cannot be required to pay any permit fees from 1995 to 1999. Section 408(c)(4).

4. State Failure to Enforce Fee Requirements

If EPA determines that a state is not adequately administering or enforcing its permit fee program, EPA may impose sanctions, including collecting "reasonable fees" to cover EPA's costs of administering the inadequate portions of a state's permitting program. Section 502(b)(3)(C)(i). After allowing an 18-month grace period for a state to correct such deficiencies in its collection of fees or other aspects of its permitting program, if those corrections are not made, EPA is required to impose certain sanctions on the state.

Sections 173 and 179(b). During the grace period, EPA has discretion whether to impose those same sanctions. See sections 502(i)(1 and 2).

B. Calculation of Permit Fees

1. Dedicated Revenues for Operating Permit Programs

All fees, penalties and interest required to be collected under a state's Title V permitting program must be earmarked to be used solely for payment of all direct and indirect costs of developing and administering the operating permit program. Section 502(b)(3)(C)(iii).

2. Program Costs to be Covered by Fees

State permit fees must generate sufficient funding to cover all "reasonable costs" -- both salaries and all other operational expenses -- of the state agencies' work in implementing the permitting program, including:

- (1) hiring of adequate personnel to administer the program,
- (2) reviewing and action on permit applications.
- (3) implementing and enforcing permit terms (but not court costs or other costs associated with any enforcement action),
- (4) monitoring emissions and ambient air quality,
- (5) preparing regulations or general guidance
- (6) modeling, analyses and demonstrations,
- (7) preparing inventories and tracking emissions, and
- (8) providing the necessary funding to administer the program.

See sections 502(b)(3)(A)(i through vi) and 502(b)(4).

3. Presumptive Minimum Fees

States can rely on a rebuttable presumption that they are collecting adequate permit fees to cover all of their permitting program costs if they assess an aggregate amount from all sources which is "not less than \$25 per ton of each regulated pollutant." Section 502(b)(3)(B)(i). If states choose to collect an aggregate amount which is less than the \$25 per ton per year presumptive minimum fee, they must then assume the burden of

demonstrating to EPA that smaller amounts will still cover all of the required costs of administering the permit program. Section 502(b)(3)(B)(iv). A state's alternative fee must also be indexed to increase its per-ton amount each year by an amount equivalent to any increase in the Consumer Price Index. Section 502(b)(3)(B)(v).

4. Definition of "Regulated Pollutant"

The phrase "regulated pollutant," when used to calculate a state's alternative fees, must have a comprehensive definition that covers:

- (1) volatile organic compounds,
- (2) each air pollutant regulated under section 111, for new stationary sources,
- (3) each air pollutant regulated under section 112, for hazardous air pollutants, and
- (4) each air pollutant for which there is a NAAQS, except carbon monoxide is not covered.

Amounts of any particular regulated pollutant for a source that exceed 4,000 tons per year should not be covered in the fee calculation. Section 502(b)(3)(B)(ii).

5. Reduced Fees for Small Businesses

States have discretion to reduce the amount of permit or any other fees that are charged to stationary sources which qualify as small businesses. Section 507(c) and (f).

III. PERMIT REQUIREMENTS

A. Permit Terms and Conditions

1. Compliance with All Requirements

State permits must incorporate terms and conditions that require each source to comply with all emission standards, state regulations, requirements of state implementation plans (SIPs) and any other requirements of state or federal acts that are applicable to that source. See sections 502(b)(5)(A and C).

2. Compliance Plan and Schedule of Compliance

In order to ensure that a source will comply with all applicable emission standards and other requirements, its permit must include a compliance plan and "schedule of

compliance," as defined in sections 302(p) and 501(3). That compliance plan must also require the permittee to submit progress reports to the state at least as frequently as every six months. See section 503(b). Because EPA will require states to have authority to issue permits to noncomplying sources, it will be especially important for states to require that those sources have both a compliance plan and schedule for compliance.

3. Applicability of Future Requirements

Each permit must include provisions specifying the conditions under which the permit will be reopened prior to its expiration and must also require the source to apply to the state for a revision of its permit to incorporate any new federal or state emission standards and limitations that become applicable after the permit has been issued. See section 502(b)(9).

4. Length of Permit Term

Every permit must have a term of not longer than five years, and states may choose to issue permits for even shorter terms. Acid rain permits, however, must have a fixed term of five years; and municipal solid waste incinerators may have a permit term up to 12 years as long as the permit is subject to state review at least every five years.

5. Permit Shield

States have discretion whether to provide in the permit that a facility's compliance with the terms and conditions of its permit will shield it from claims of violating the requirements of the Act. See section 504(f). If a state decides to shield a facility from certain permit requirements, the permit must specify what those requirements are and why they are not applicable to the facility. Facilities may not, however, be shielded from compliance with emergency orders issued under section 303.

6. Operational Flexibility

Section 502(b)(10) requires that states adopt provisions to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of Title I and the changes do not exceed the emissions allowable under the permit. The Act requires that sources provide the states a minimum of 7 days notice of proposed changes (unless states choose to set a different time frame for emergencies.) EPA's final regulations require, as a minimum program element, that states provide this operational flexibility by:

- (a) Allowing section 502(b)(10) changes without requiring a permit revision; and

- (b) Issuing permits (upon request of the source) that allow for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements.

B. Operational Requirements

1. Monitoring and Sampling

State permits must specify conditions in the permit for monitoring and analyzing emissions of pollutants, including the equipment to be used, its location and the frequency of sampling. Permittees must be required to report the results of any required monitoring no less often than every six months. See sections 114(a and b), 502(b)(2), and 504(a and b).

2. Recordkeeping and Reporting Requirements

Permits must include requirements (1) to establish and maintain records on emissions, sampling and monitoring; (2) to certify, at least annually, the facility's compliance with applicable emissions standards; (3) to report any deviations from those standards; and (4) for responsible corporate officials to certify the accuracy of any required reports. See sections 114(a), 502(b)(2), 503(b)(2), and 504(c).

3. Entry and Access to Facilities

States must have authority to include in permits a requirement that sources will give state and federal employees access to and the right of entry on a facility's premises, as well as access to and the right to copy any records, the right to sample emissions and the right to inspect monitoring equipment. See sections 504(c) and 114 (a, b and d).

IV. PROCEDURES FOR REVIEWING AND ISSUING PERMITS

The Act contains several requirements for state permit review procedures and deadlines for state action which are designed to ensure that states provide facilities with expedited decisions on their permit applications, revisions and renewals. See sections 502(b)(6 and 8) and 503(c). Although states may have the flexibility to adopt even shorter deadlines for processing permit applications, at a minimum states must establish permit review procedures that comply with the schedule below (section 503).

A. Schedule for Reviewing Permit Applications

- 1. Sources must submit complete permit applications to the states either:

- a. Within 12 months after EPA's approval of a state permitting program; or
 - b. 12 months prior to a facility's start-up, unless a state adopts some earlier date. Section 503(e).
2. States must establish criteria for determining "in a timely fashion" whether permit applications are complete. Sections 502(b)(1) and 502(b)(6).
 3. Final state action on a permit must occur within 18 months after determining that the application is complete. Section 503(c).
 4. A state transition plan to prevent a backlog of permit reviews must ensure final action on one-third of the applications each year for three years.
 5. States have discretion whether to provide an "application shield" for facilities that have submitted timely and complete permit applications on which a final decision has not been reached by the state prior to the expiration of an existing permit or of the period for obtaining an initial permit. See section 503(d).
 6. A separate schedule for state decisions on permits for affected sources under the acid rain program must require:
 - a. That phase I applications be submitted on or before February 15, 1993, with a decision six months after receipt of a complete submission;
 - b. That phase II permit applications for SO₂ sources be submitted by January 1, 1996, with action on them by December 31, 1997; and
 - c. Submission of applications for NO_x sources by January 1, 1998. Section 408(d).

B. Public Availability of Permit Information

States must provide authority to make available to the public "any permit application, compliance plan, permit and monitoring or compliance report." Section 502(b)(8) and 503(e). The only portions of a permit application or any other related information that a facility or state can properly withhold from public review are items that are entitled to protection as trade secrets under section 114(c). The contents of the permit, itself, however, are not entitled to trade secret protection. See section 503(e).

C. Public Participation in Permit Reviews

States are required to provide permit proceedings that include "[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing." Section 502(b)(6). As EPA interprets Title V, states are required to specify, by statute, that the public is allowed to review and comment on permit applications, renewals and significant modifications of permits. The details of these participation procedures can be spelled out in state regulations, and states have discretion to provide for more public participation than Title V requires. The basic Title V requirements for public participation are:

1. Public notice of an application for an initial permit or for a permit revision or renewal;
2. An opportunity for the public to review the application and to submit comments on it;
3. An opportunity for the public to request a hearing on the application.

D. Special Procedures for General Permits

For small businesses that are major sources of air pollution, a state may issue general permits that cover numerous similar sources, as long as the individual sources also obtain their own permits which cover all applicable air pollution control requirements. Section 504(d). These general permits may not be offered, however, to affected sources covered by the acid rain program. States should provide that each general permit will be subject to public comment and the opportunity for a public hearing, but may choose to eliminate the requirement for a hearing on each facility's coverage by the general permit.

E. Review by EPA and Affected States

States must have authority to submit all proposed permits, modifications and renewals to EPA and any affected states for their review and possible objection and to ensure that no permit will be issued, by default or otherwise, if EPA makes timely objections. Sections 502(b)(5)(f) and 505.

1. Notice to Affected States

States that are contiguous to the permitting state or that are within 50 miles of the facility must be notified in writing on or before the public receives notice of an application and must be given an opportunity to make recommendations on the permit. If the permitting state decides not to accept the recommendations of an affected state, it must provide a statement of the reasons for rejecting the recommendations at the time the permit is submitted to EPA. Section 505(a)(2).

2. EPA Review and Objections

Once EPA receives a proposed permit from a state, it has 45 days to object in writing, with a statement of reasons. If EPA objects to a proposed permit, the permitting state must revise it within 90 days to meet EPA's objections. Sections 505(b)(1) and 505(c). If the permitting state fails or refuses to make changes to satisfy EPA's objections, EPA itself will then issue or deny the permit. States must provide that the permitting authority may not issue permits to which EPA has objected. Section 505(b)(3).

F. Prohibition of Permit Issuance by Default

States are also required to prohibit the issuance of permits by default due to a state's failure to take action on the application within applicable time limits. Section 502(b)(5)(F).

G. Judicial Review in State Court

1. Reviewable State Actions

States must authorize judicial review in state court of final decisions on permit applications, as well as on permit renewals and revisions. Section 502(b)(6). Judicial review must also be available in state court for failure by the state to take final action on any permit application, revision or renewal within the required deadlines. See sections 502(b)(7) and 503(c).

2. Persons Who Can Obtain Review

State law must provide that such judicial review can be obtained by applicants, those who participated in the public comment process, and any other person who could obtain judicial review under applicable state law. Section 502(b)(6).

V. REVISIONS AND RENEWALS OF PERMITS

A. Permit Modifications

1. Minor Permit Modifications

Like initial permit applications, the Act requires that applications for permit revisions and renewals be given an "expeditious review" by the states. This general language leaves the states some degree of flexibility in deciding what procedures to follow in reviewing these applications. Section 502(b)(6) requires states to provide adequate, streamlined and reasonable procedures for expeditiously processing permit modifications. EPA's final regulations include a model two-track modification process, but states may develop their own procedures as long as their procedural requirements are matched to the significance of the changes in the permits.

Procedures for minor permit modification apply only to modifications which do not:

- (a) Violate applicable requirements;
- (b) Involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;
- (c) Require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;
- (d) Seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject;
- (e) Qualify as modifications under any provision of Title I of the Act; and
- (f) Qualify under the state program to be processed as significant modifications.

Under the final EPA regulations, public review is not required prior to minor permit modifications; but states may elect to require public participation as a matter of state law, and review by EPA and affected states is still required. See section 505.

2. Significant Permit Modifications

State programs must contain criteria for determining whether a permit change is significant. Every change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions which meet those criteria must be treated by the state as significant. State programs must also provide that the procedures for processing significant permit modifications comply with the same requirements for public participation and review by EPA and affected states that are applicable to initial permit applications. See item IV above.

B. Reopening Permits

States must also have authority to reopen permits for cause or to add new requirements prior to their normal expiration. Section 502(b)(5)(D). Once a state finds cause to reopen a permit, then the usual procedures for processing a permit application must be followed, including an opportunity for review and objection by the public, EPA and affected states. Section 502(b)(6). It is particularly important that states have authority to reopen a permit which has a remaining term or 3 years or longer to incorporate new federal and state standards and regulations that become applicable after the permit has been issued. Such revisions to incorporate new requirements must be made "as expeditiously as

practicable," must follow all of the applicable procedures for public participation and judicial review, and must be made by the states no later than 18 months after the new requirements have been promulgated. Section 502(b)(9).

VI. ENFORCEMENT AUTHORITIES

States must have adequate authority to enforce their permitting programs and to obtain administrative and judicial remedies which correspond to federal enforcement provisions. Sections 113, 303, 307 and 502(b)(5).

A. Administrative Enforcement

1. Orders

Like EPA's administrative orders, states must have authority to issue administrative orders in a number of situations. States should be able to order compliance with the conditions of a permit, to obtain information needed for administrative enforcement, to protect the public or the environment in an emergency or, where there is cause, to order that a permit be terminated, modified or revoked. See sections 303(b), 307(a) and 502(b)(5)(D and E).

2. Penalty Assessments

States also must have authority to issue orders assessing administrative civil penalties up to \$25,000 per day per violation. See section 113(d).

B. Judicial Enforcement

1. Injunctions

States must be able to obtain injunctive relief in at least three situations (sections 110(a)(2)(G), 113(a and b), and 303):

- a. To restrain immediately any person whose activity violates a permit and presents an imminent and substantial endangerment to public health, welfare or the environment;
- b. To obtain compliance with any requirement or prohibition in a permit or a state implementation plan; and
- c. To obtain immediate injunctive relief for violations of any requirement of the state air permitting program, without first revoking a permit.

2. Civil Penalties

States must be authorized to recover civil penalties "in a maximum amount of not less than \$10,000 per day for each violation." Section 502(b)(5)(E). The violations for which civil penalties must be assessed should include all applicable pollution control standards and emission limitations, any permit condition, any requirement for a fee or for filing a report, any regulation or order, and any duty to allow or carry out inspections, entry, sampling or monitoring. Section 113(d).

3. Criminal Fines

States must be able to recover criminal fines that are "appropriate" to the violation. Section 502(b)(5)(E). States must be able to recover these fines from any person who knowingly violates any applicable requirement, any permit condition, or any fee or filing requirement and from any person who knowingly makes any false statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. State criminal fines must be recoverable in a maximum amount of not less than \$10,000 per day per violation.

C. Other Enforcement Requirements

1. Continuing Violations

State civil penalties and criminal fines must be assessable for each instance of violation and for amounts up to maximum of not less than \$10,000 per day, for each day of a continuous violation. Sections 113(3)(2) and 502(b)(5)(E).

2. Burden of Proof, Defenses and "Scienter"

State requirements for showing knowledge or intent of the violator, for establishing the burden of proof and for asserting affirmative defenses by a preponderance of the evidence must correspond to those provided at the federal level. Recovery of civil penalties and other equitable relief by the state should not require proof of the violator's mental state. Section 113(b and c).

3. Penalty Assessment Criteria

In determining the "appropriate" level of civil and criminal penalties, state agencies and state courts should apply the same criteria for assessing those penalties that EPA must apply. Those criteria are the size of the firm, the economic impact of the penalty on the firm, the violator's compliance history, any good faith efforts to comply, the duration of the violation, payment of prior penalties for the same violation, the economic benefit to the firm from non-compliance, and the seriousness of the penalty. Section 113(e)(1).

D. Additional State Enforcement Tools

In addition to the requirements of EPA's regulations, sections 116 and 506(a) of the Act authorize the states to enact more stringent requirements and adopt additional enforcement tools. Consequently, states have discretion to strengthen their air permitting program by enacting the following:

1. Issuance of field citations for minor violations, up to \$5,000 per day, with an opportunity for an informal hearing (section 113(d)(3));
2. Awards or bounties up to \$10,000 for "any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty" (section 113(f));
3. Automatic assessment of an additional 10% penalty quarterly for nonpayment of penalties, plus interest, enforcement expenses and the state's attorneys' fees, for each quarter that the violator fails to make timely payment of a civil penalty (section 113(d)(5));
4. When facilities fail to pay their permit fees to the states, assessment of a non-payment penalty like EPA's penalty, which is 50% of the fee amount plus interest equivalent to that charged by the IRS for unpaid taxes (section 502(b)(3)(C)(ii));
5. A bar to obtaining state agency contracts for goods, materials, and services that applies to any person who is convicted of a criminal violation (section 306);
6. Protection for facility employees who assist or participate in any enforcement proceedings, similar to federal "whistleblower" protections in section 322;
7. Authority for citizens to bring suits in state court and to recover attorneys fees and costs, like the federal citizen suit provision in Section 304; such suits could cover both (1) enforcing the terms of permits, including stricter state permit conditions that are not federally enforceable, and (2) recovering penalties which would be paid into a special fund to finance air compliance and enforcement activities, as in sections 304(a) and (g);
8. A requirement for facility operators to retain all records for a minimum period -- at least 5 years -- so that state enforcers will have complete documentation of a facility's past operations and potential past violations;

9. Authority for the state agency to require, by rule or otherwise, that facilities must monitor and analyze their emissions by continuous emissions monitoring or some other method that the agency determines will provide the most timely and accurate information on emissions of pollutants (section 114(a)(3));
10. Imposition of prison terms, like the federal requirements, for violations of the Act, with liability extending to the same "persons" and "operators," as well as doubled fines and prison terms for second and repeated convictions (sections 113(c) and (h) and 302(e)); and
11. A permit bar or block to prevent facilities from obtaining either initial air permits or permit revisions or renewals, which requires that applicants submit to the state information about any violations of the state air act and other state environmental statutes, rules, orders, or permit terms and authorizes the state to deny a permit, revision or renewal unless and until the applicant has proved that those violations have been corrected.

PART II:
STATE OPERATING PERMIT PROGRAMS
UNDER TITLE V OF THE CLEAN AIR ACT:
A PRELIMINARY IDENTIFICATION OF
POTENTIAL ISSUES AND STRATEGIES

In order to understand the problems facing the states in enacting enabling legislation to implement Title V of the Clean Air Act Amendments of 1990, EPA requested that ELI solicit comments from selected state and local air agency officials. This report is a preliminary identification of the legal and operational difficulties that their agencies may encounter as perceived by those officials. The commentators included officials from both state and local air agencies which already have well-established permit requirements and thus have extensive experience in administering air permitting programs. These officials have identified a number of issues that may arise in implementing Title V. Many suggested strategies which may help them to overcome these difficulties. For this preliminary report to EPA, ELI did not attempt to contact a representative sample of all states, nor did we attempt to make an independent analysis of these issues and proposed solutions. Rather, this report reflects the contacted officials' own interpretations of what is required by Title V and by EPA's proposed regulations for 40 CFR Part 70, dated October 14, 1991.

I. PERMIT TERMS AND CONDITIONS

Section 502(b)(5)(A) requires that states have authority to issue permits which "assure compliance by all sources required to have a permit with each applicable standard, regulation or requirement under this Act."

A. Exclusion of Insignificant Activities or Emissions

Some states already have authority to require operating permits for sources of air pollution, and their statutes specify which sources and emissions must be covered by permits and which are exempt. These states may need to revise their current statutes to satisfy the provision in EPA's rules for excluding "insignificant" emissions or activities. States vary in the way that they anticipate applying this provision, and they are concerned that application of this "insignificant" exclusion may vary significantly from state to state. Absent additional EPA criteria about what qualifies as "insignificant," some states may not be able to adopt standards which will meet EPA's approval. Other states may choose to be more stringent than federal law under sections 116 and 506(a) of the Act, and not enact such a broad exemption from their permitting requirements.

Texas plans to continue imposing comprehensive requirements to file a permit application on any source that emits air pollutants, but will adopt "general permits" that will cover those emission sources which qualify as "insignificant." Texas may rely upon the list generated by the South Coast Air Quality Management District to help it determine

what is considered "insignificant." That list contains detailed descriptions of 14 categories of equipment which are not required to obtain permits unless the District finds that they may not operate in compliance with its rules. Minnesota is currently examining this issue and is anxious to avoid this potential loophole in designating "insignificant" activities or emissions. The Minnesota agency believes that some facilities will attempt to be included in this category if they have no increase in emissions due to "netting out."

B. General Permits

States recognize that general permits provided by section 504(d) may be a useful tool for saving time in the implementation of the Title V program, particularly for sources that previously were exempt from state permitting requirements, such as dry cleaners. However, some states whose statutes currently require individual source-by-source permits may need new statutory authority either to authorize general permits or to adopt a more stringent approach and require by statute that all sources obtain individual permits, rather than offer the option of general permits.

In order to expand the coverage of its air permitting program, Texas will now consider issuing a general permit for some of its "standard exemption" sources such as concrete batch plants, pilot projects, small ceramic kilns, natural gas fires and domestic heaters.

In the last few years, Indianapolis has instituted a program to issue general operating permits to approximately 300 gas stations, and is contemplating the same program for dry cleaners. Four field staff from the mobile source enforcement program visited the gas stations to notify the owners of the requirement and helped them to fill out the application form. By assisting the station owners with their permit applications and by exempting small stations (sales of less than 300,000 gallons throughput per year), Indianapolis was effectively able to overcome potential opposition and eliminate the owners' arguments about paperwork burdens and excess costs. The Indianapolis agency has sent a questionnaire to the dry cleaners in its jurisdiction in anticipation of bringing them into the permit program in a similar fashion.

C. Delineation of Federal/State Permit Requirements

State and local agencies are concerned about their authority to draft conditions of an operating permit which will satisfy EPA's regulation requiring that a permit contain provisions designating which permit conditions are not federally enforceable. States do not currently have statutory authority to make this distinction, and will need legislation giving them the power to designate permit conditions as federally enforceable. Because EPA is not going to require that states enact authority for citizen's suits to enforce state air statutes, only federally enforceable provisions will be subject to adjudication by citizens in federal court. In such circumstances, facilities will have a strong incentive to seek to have as many permit requirements as possible designated as state-only.

According to state and local officials, this provision could create much delay and controversy at the time of permit issuance. Moreover, delineation between state and federal requirements is not necessarily clear-cut. For example, a state provision that is covered by a federal requirement but is written somewhat differently may present a problem for the state in deciding whether it is federally enforceable. Determining which provisions are federally enforceable will be particularly difficult if the state implementation plan is still under EPA review.

States are concerned that they are likely to encounter this battle at every permit issuance, because most sources will want to reduce the number of permit conditions that are federally enforceable, especially since EPA has indicated that it will not require states to authorize citizens' suits in state courts. In theory, states can solve this problem by asserting that all state permit requirements are federally enforceable because their underlying basis is the federally approved SIP and state Title V permitting program, but they will need state statutory authority to make this designation.

To overcome this problem, Minnesota currently issues a "SIP order" which includes the same requirements as the permit, so that they can be included in the federally approved SIP. A SIP order is issued by the Commissioner and Board Chair of Minnesota's Pollution Control Agency and, like the source's permit, the order specifies in detail the emission limitations, operating requirements, compliance demonstrations, recordkeeping and reporting requirements, and modification procedures that a source must satisfy in order to operate its equipment and to comply with all applicable local, state and federal laws and regulations. In addition, Minnesota anticipates designating federal and state requirements by rule, with the permits referencing the appropriate rule.

The Indianapolis air agency intends to avoid this problem by designating all of its permit requirements as federally enforceable to the extent that sources do not object. For sources that do object, Indianapolis may issue a permit with separate federal and state or local conditions, probably by including the state-only or local-only items in an appendix to the permit. However, Indianapolis expects that they will be able to review and issue much more expeditiously proposed permits for which all conditions are designated as federally enforceable.

D. Issuing Permits to Noncomplying Sources

EPA's final rules will require that states have authority to issue permits to sources which are not in compliance with all applicable requirements, and those sources must submit compliance plans along with their applications. See sections 502(b)(5)(A) and 504(a). EPA interprets this requirement as meaning that states which do not have authority to issue permits to noncomplying sources will not be able to obtain approval of their Title V programs. Several state agencies expressed serious concern about this provision and noted that their present statutes likely prohibit issuance of an operating permit to a noncomplying source. As a result, states may insist that they have discretion to be more strict than federal law and not grant such permits to noncomplying sources, relying upon sections 116 and 506(a) of the Act which allow more stringent state laws.

The South Coast Air Quality Management District expects to seek legislation authorizing it to issue such permits to noncomplying sources. Pennsylvania's amended air statute does allow the state air agency to issue a permit to a non-complying source but requires that the permit contain an enforceable compliance schedule which may include milestone dates, a final compliance date, and stipulated penalties for failure to meet that schedule. Moreover, Pennsylvania specifically provides that, if the permittee fails to achieve compliance with any stage of the compliance schedule, the permit is automatically terminated. The Pennsylvania agency also has discretion to refuse to issue permits to sources that have a history of non-compliance.

In Texas, the agency believes that the Texas Air Board may be reluctant to allow issuance of permits to non-complying sources. Thus, Texas may choose to maintain its more stringent requirement that permits can be issued only to complying sources.

II. PERMIT REVISIONS AND RENEWALS

Section 502(b)(6) of the Act requires that applications for permits and any revisions or renewals be given "expeditious review" by the states and that the states provide "adequate, streamlined, and reasonable procedures" for expeditiously processing permit applications, as well as permit modifications. Section 502(b)(10) further requires states to provide "operational flexibility" for permitted facilities to make certain changes without having to obtain a permit revision.

A. Operational Flexibility

The operational flexibility requirement of Title V presents one of the most troublesome and confusing problems for state and local air agencies. EPA takes the position that operational flexibility is a minimum state program element which states must provide in order to obtain approval of their Title V programs. However, many states maintain that sections 116 and 506(a) authorize them to enact more stringent requirements and thus enable them not to allow for operational flexibility. Because state officials recognize that industry will urge adoption of this provision which is favorable to air pollution sources, they foresee difficult legislative battles to pass the necessary authorizing legislation.

As a result, states remain uncertain as to how this requirement should be implemented and how it will work in practice. Most are concerned that the operational flexibility provisions of EPA's rules are vague as to what changes sources should be allowed to make without being required to obtain a permit revision. The states identified this provision as one which sources will want to use frequently to obtain approval for favorable and flexible operating scenarios in their permit conditions. Yet the states recognize that their staffs will need additional time and expertise to be able to review properly all the permit applications which contain such operational change scenarios.

The states also are concerned that they will not have enough time for a thorough review of proposed operational changes. States are reluctant to give sources unlimited authority to trade emissions within a facility under an operational flexibility permit condition because they will have great difficulty determining compliance within the seven-day deadline. Moreover, state regulators will be forced to devote their limited time to examining the operational flexibility applications and their attention will be diverted from reviewing other operating permits.

Because of this time constraint, states may be more likely to invoke their authority to be more stringent than federal law, and refuse to approve operational flexibility in permits. Accordingly, they are likely to require that sources apply for permit modifications, which will allow more time for states to review the changes and determine compliance with applicable emission standards. This approach would ultimately defeat the purpose of the operational flexibility provision, but would satisfy the states' concerns about keeping all sources in compliance with their permits.

Generally, states intend to implement this requirement by encouraging sources to provide detailed information on each of their proposed operating scenarios. The Indianapolis agency is considering establishing categorical standards to provide flexibility for sources to operate various pieces of equipment within a facility. These standards would establish a range of allowable emissions, placing an upper limit on the type and amount of emissions, and would enable a source to alternate its operations among the specified equipment so long as these upper limits are not exceeded.

B. Permit Modifications

While legislative authority exists in most states with respect to permit modification procedures, regulatory changes will be required for states to institute procedures that are "substantially equivalent" to the federal Act and EPA's rules. Again, some states are concerned that they will not be allowed to deviate much from those rules in order to obtain EPA's approval. Many state officials believe that the permit modification scheme in EPA's regulations is unnecessarily complicated.

Some states are considering whether it would be more practical and appropriate simply to rely on their authority under sections 116 and 506(a) to be more stringent than the federal Act. Because the Act specifies that a state may impose additional permitting requirements and because the two-track permit modification scheme in EPA's regulations is simply a model for states to follow, at least one state agency is considering the possibility of seeking EPA's approval for simpler, but more stringent modification procedures. Another state is contemplating a requirement that all permit modifications go through a more detailed review until the state can determine that some more expedited process is adequate to ensure compliance with applicable emission standards and other requirements.

Existing state permit programs often have regulatory provisions that allow for administrative permit amendments, such as correcting typographical errors, without public participation. Some states are considering enhancing the public participation requirements in their preconstruction review procedures in order to take advantage of the ability to incorporate those preconstruction permit requirements into an operating permit as administrative amendments.

III. PUBLIC PARTICIPATION IN PERMIT PROCEEDINGS

Section 502(b)(6) requires that all state permit proceedings, including initial permit issuance, modifications and renewals, must provide adequate procedures for public participation, including offering an opportunity for public comment and a hearing on permit applications. While most states have legislative authority for public participation in permit decisions, they vary as to how that authority is implemented.

For example, Pennsylvania provides for public notice, comment and an opportunity for a hearing on all permits; but New York only requires public notice, comment and opportunity for a hearing on major permits (such as PSD and NESHAP) and currently holds very few hearings. New York likely will define all Title V permits as major to allow for public participation as required by federal law. The South Coast Air Quality Management District is also required to give public notice only for new projects that increase emissions and for sources of toxic emissions. Minnesota's current regulations provides for public notice only of permits for major sources of air emissions, but they do allow anyone to make comments and request a hearing before the Citizens Board on any permit action, including actions regarding minor sources.

Some states have several concerns about the public participation requirements mandated by the Act. A few states claim that requiring public notice on every permit decision, including those for minor sources such as dry cleaners, will unduly alarm people who are afraid of any permitted facility in their neighborhood. They are concerned that responding to public comment on all of these permit decisions will consume a large amount of staff time. To alleviate this concern, states expect to make extensive initial efforts to educate the public about the impact of the new Act and its permit notification requirements and to ensure that the public is informed about potential emission sources of the greatest concern.

Indianapolis is still evaluating various methods to involve the public in the operating permit program. They plan to discuss with environmental and community organizations their public outreach program. Indianapolis may adopt both public forums with the local air board to discuss permit applications that are being reviewed or proposed for issuance and informal meetings with neighborhood groups to discuss permits for sources in their areas. Under California law, sources are required to test their emissions for toxicity and perform risk assessments, then notify the public in their immediate vicinity about their emissions. The Southcoast Air Quality Management District is currently working with other

California air districts to develop guidelines for sources on how to write these public notices in laymen's language so that they are not too technical. These Public Notification Guidelines themselves are being circulated for public comment at several workshops and include sample notice letters, messages and fact sheets. Similarly, Minnesota holds public information meetings on individual sources' permits and, prior to the meetings, circulates fact sheets to all interested parties, which includes anyone who has complained about the source or called the agency to express an interest.

To reduce the burden on the state to provide public notice, the Texas Clean Air Act requires permit applicants to bear the responsibility for notifying the public of their applications. A publisher's affidavit must be submitted showing that public notice was published in the appropriate newspapers. Thus, the Texas agency is able to avoid spending time and money in fulfilling the public notice requirements.

States are also unclear as to what criteria EPA will apply to determine whether state public participation requirements are "substantially equivalent" to the requirements of the Act. Only a few states already have the extensive requirements detailed in Part 124. This issue is also important in determining whether state requirements imposed during the preconstruction permitting process may be incorporated into the operating permit as administrative amendments without notice and comment. Many states are skeptical whether any of their proposals will be accepted by EPA. Based on past experience, they believe that EPA will allow very little, if any, flexibility in determining what state provisions are "substantially equivalent" to federal requirements for public participation.

IV. PERMIT FEES

Section 502(b)(3) of the Act requires that state air agencies have authority to collect sufficient revenues from permit fees and earmark them to cover all reasonable direct and indirect costs required to develop and administer the Title V operating permits program. The Act also establishes a presumptive minimum permit fee of \$25 per ton of pollutants, and requires that it be adjusted annually consistent with the Consumer Price Index.

Many states have already adopted enabling legislation for the Title V fee program or are in the process of proposing it for enactment. However, a few states anticipate great difficulty in achieving passage of this legislation. For those agencies whose fee statute is already in place, one common approach is a phased-in plan to increase gradually the fees for actual emissions up to the \$25 per ton presumptive minimum of the Act. For example, the Texas legislature adopted a graduated fee schedule last year that would enable the agency to collect \$3 per ton of actual emissions in FY 1992, \$5 per ton in FY 1993, then jump to \$25 per ton in FY 1994. Once the revenues in the first fiscal year have been calculated, Texas plans to project those figures to determine the revenue that will be generated by the \$25 per ton presumptive minimum fee.

Most states anticipate difficulty in determining the amount of actual emissions in order to calculate the fee owed by each source. Many agencies with emissions-based fees generally have based their fee schedules on allowable emissions figures. Calculating actual emissions will take staff time and effort. The Indianapolis agency is currently establishing an emissions inventory system that will help in the process. Texas will require the sources themselves to determine what their actual emissions are or will be, and is considering adopting a requirement for continuous emissions monitoring as a check on these figures.

States which charge fees that produce a sum less than the \$25 per ton presumptive minimum will have to submit a detailed fee demonstration to show that their revenues exceed their direct and indirect program costs. Some states anticipate problems in demonstrating to EPA that their fee schedule will generate sufficient revenue to cover "all reasonable costs" of their air permitting programs. Minnesota, which will phase in its fee schedule over the next three years to reach a maximum of \$25 per ton, will seek to improve its accounting procedures in order to provide this demonstration.

Most states expect to obtain additional revenue for their air programs from sources other than permit fees. For example, many states will generate revenue from fees on air pollution sources not covered by the Title V program. This will necessitate separate accounting systems to assure that revenue from sources covered by Title V is spent on the program requirements of Title V, and revenue from other air pollution sources is spent on the additional state air program requirements. Other potential state revenue sources include fees on motor vehicles, such as for inspection and maintenance, and fees for asbestos removal.

V. ENFORCEMENT

Under section 502(b)(5)(E), states must have authority to enforce their permit terms, permit fees and the requirement to obtain a permit, as well as to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation and to assess "appropriate" criminal fines.

A. Civil Penalties and Criminal Sanctions

Several states anticipate some difficulty in obtaining the necessary legislation for Title V enforcement authority. The New York agency has tried for six years to increase its enforcement penalties without success. New York law currently allows civil penalties of \$500 per day, up to a total of \$10,000 per violation. Local agencies, such as Indianapolis, are seeking to raise the civil penalty amount allowed to be assessed by local governments. Indianapolis is also asking the state legislature to grant local agencies criminal enforcement authority. If this legislation is not enacted, Indianapolis plans to rely on the state agency for the larger civil penalties and for criminal enforcement, and hopes that such a scheme will be acceptable to EPA in obtaining Title V approval.

Pennsylvania's statute explicitly addresses this problem by providing that the same state penalties and civil and criminal remedies shall be available for enforcement by any municipal air pollution agency through its local ordinances or regulations. Pennsylvania's new law also authorizes citizen suits in state court to compel sources to comply with their permits and any other requirements of either the state or federal act, and it allows citizens to recover civil damages to be paid into a Clean Air Fund for remedial action, as well as their costs of litigation including attorney and expert witness fees.

B. Permit Shield

Few states, if any, currently include a permit shield provision in their permits. In reliance on their authority to be more stringent than federal law, some states do not plan to include such a provision in Title V operating permits. However, despite EPA's recognition that states without the permit shield can still receive Title V program approval, states anticipate there will be intense pressure from industry for state legislatures to adopt the shield. The states' major difficulty in including a shield provision will be determining the precise language to use in applying the shield to specific permit requirements. Because inclusion of the permit shield in an operating permit limits the enforcement authority of the permitting agency, states are wary that the shield will require extensive staff time to draft more detailed permit conditions. States are extremely concerned both about the pressure from industry sources to include a shield in each permit, about the lack of the necessary staff time and expertise to ascertain all of the consequences of a shield for each permit, and about its detrimental effect on their ability to enforce the law rigorously and expeditiously.

C. Cause of Action for Unreasonable Delay

Section 502(b)(7) requires a state program to provide for judicial review in state court when action on a permit is unreasonably delayed by the permitting authority. Such review can be obtained by either industry or citizens, and almost all states will require new legislation to authorize such interim judicial review. For those states that do not already have citizens' suit statutes, enactment of this provision may be particularly difficult.

For example, in Texas, which does not currently have a citizens' suit provision for any of its environmental statutes, the state legislature refused to include such a provision in its Clean Air Act revisions during the summer of 1991, despite lobbying by the agency. Minnesota plans to seek a legislative amendment next year to include an "unreasonable delay" cause of action in its citizens' suit provisions. Pennsylvania's new air statute provides for an appeal to the state hearing board when the agency refuses to take action on a permit, presumably to provide an expedited review and avoid the time and expense of court action.

Current New York law specifically precludes the state clean air legislation from creating a cause of action for any person other than the state. N.Y. Stat. §19-0705. Instead of creating a cause of action for judicial review, the New York statute allows the permit applicant to send a "five day letter" if the agency delays in issuing a permit decision which

requires the agency to respond within five days or have the permit deemed granted by default. N.Y. Stat. §70-0109(3)(b). This provision thus also runs afoul of the federal Act's prohibition against default issuance of permits, and will likewise require new state legislation in order to satisfy the requirements of Title V.

Because this opportunity for judicial review of agency delays may also prove beneficial to applicants that want to force a final decision on their permits, states may be able to gain support from industry for adopting this legislative change. On the other hand, some states may argue that, by not authorizing interim judicial review, their programs qualify as more stringent than federal law because the state agency cannot be forced to issue a final decision on a permit until it is satisfied that the source will comply with all emission standards and other requirements. However, EPA maintains that judicial review of agency delays is a minimum element for state program approval.

As a partial solution to the problem of long delays in processing permit applications, Texas is drafting a standardized application form with sections that can be transferred directly to the final permit, thereby saving staff time. For example, the agency is developing an emission identification point system for sources that will accompany the application form. The application will have a table listing the allowable emission rate and method for compliance and monitoring for each pollutant, along with a reference to the rule establishing the requirements. In filling out the application, sources can also determine what requirements will apply to them in the final permit. Texas expects that this method of getting applicants to write their own draft permits will help the air agency deal with its vast number of potential applicants.

Texas recognizes, however, that great care will still have to be taken in reviewing the information supplied by permit applicants. Other states also recognize, in some cases, that their ability to review permit applications successfully within the deadlines set by the Act may require them to spread out the application and renewal dates, instead of making them all due at the same time.

D. Additional State Enforcement Tools

Although not required by EPA, some states are planning to enact additional enforcement tools that will strengthen their air permitting programs. The Texas legislature has enacted a "permit block" that will allow the agency to review information about a source's compliance with other Texas laws in determining whether to grant permit renewals. The Texas agency is currently drafting rules on how to utilize this compliance data. Minnesota has instituted a pilot program that would allow field citations at solid waste facilities. Following a report back to the legislature in two years, the program may be expanded to the air program. Pennsylvania's new air statute provides both for field citations with fines ranging from \$100 to \$2,500 and a potential prison term of 90 days, and for a permit block which authorizes the agency to deny or revoke permits for sources with any past or present violations, including even those of a partner, parent or subsidiary corporation, whenever they or the applicant "has shown a lack of intention or ability to comply . . . as indicated by past or present violations" of the air program.