Implementation Guidance for Incorporating State Toxics Requirements in Air Permits

February 11, 2002
(amended January 20, 2010)

INTRODUCTION

On August 18, 1999, DEQ received a letter from EPA Region III stating that state regulated toxic conditions in new source review permits are federally enforceable. This opinion was in contrast to our previous understanding of the enforceability of state toxics regulations. EPA's Office of General Counsel has since decreed that all permit conditions in NSR permits (including minor NSR permits) issued under Virginia's current SIP are federally enforceable. This includes state toxics and even odor requirements. However, the pending changes to the minor NSR program will allow us to establish state-only enforceable conditions in minor NSR permits. After these changes to the minor NSR program have been approved, we will again revisit this issue.

The following procedural guidance vacates and supercedes the June 15, 2000 Policy Memo # 00-1001 "Incorporating State Toxics requirements in Title V Permits". The intent of this guidance is to address:

- inclusion of state toxics requirements in future NSR permits and SOP's (including language to be used in these permits),
- amending previously issued NSR permits for already-issued Title V permits containing state toxics requirements,
- addressing state toxics provisions in future Title V permits,
- addressing state toxics provisions in previously issued Title V permits,
- monitoring requirements for state toxics requirements in Title V permits, and
- "designated pollutants".

It is important to keep in mind that we need to evaluate why toxics conditions are in permits to determine whether these conditions should be only state enforceable or both state and federally enforceable. One example of a situation in which we would want toxics conditions to be federally enforceable (or to remain federally enforceable) would be one in which a source had accepted such a condition to limit its PTE to avoid applicability of a MACT standard.

All of the discussion in the remainder of this document assumes that federal enforceability of the toxics condition was not the original intent of DEQ when the permit was issued.

NSR PERMITS WITH VOC/TOXICS LIMITS

Until the minor NSR revisions have been finalized, this section provides guidance to permit writers for addressing state toxics regulations. Should it be necessary to issue a permit addressing state toxics conditions, the permit writer may either:

- issue a State Operating Permit including only the state toxics provisions and a separate NSR permit containing all other provisions, or
- issue an SOP containing all of the conditions (both state only enforceable and federally and state enforceable) instead of issuing an SOP with state toxics provisions only and all other provisions in the NSR permit.

Should the second option be chosen, the SOP would need to go through public notice for the provisions that would need to be federally enforceable.

* Current regulation citation as of January 20, 2010.

In some cases minor NSR permit conditions limit VOC emissions with the intention of limiting individual toxic constituents rather than VOC. As in the case above, the permit writer has two options. The first option is to issue an SOP specifically limiting the toxic constituents rather than VOC prior to issuance of the Title V permit and to reissue the original NSR permit without the toxics provision(s). The second alternative is to issue an SOP with all of the conditions in the original NSR permit. In this case, of course, the original NSR permit would need to be superceded and the SOP would need to go through public notice.

TITLE V PERMITS CLOSE TO ISSUANCE

When a Title V permit is being drafted for a source with state toxics provisions in underlying NSR permits, the following two options are available:

Option 1: List the state toxics conditions as federally enforceable conditions in the draft permit. The source may not be concerned about this issue and may accept the draft as written. If the source objects or proposes to make the conditions state enforceable, we may still include them in the Title V permit and make these conditions federally enforceable based on our documentation supporting this position. This option would likely be the best option when regional personnel are satisfied that the monitoring, recordkeeping, and reporting requirements relative to the toxics conditions in the NSR permit meet the test of periodic monitoring. Ensuring the permit meets the test of periodic monitoring means we will not have to add requirements to the Title V permit that may make issuance of the permit more contentious.

Option 2: If the regional office is convinced that including state toxics as federally enforceable conditions violates the original intent of the conditions then we need to eliminate the state toxics provision from the underlying NSR permit. As in the above cases, we have the choice of issuing a State Operating Permit to the facility that addresses only state toxics conditions and remove the conditions from the existing NSR permit or issuing an SOP addressing all of the issues in the original NSR permit.

If you choose to issue an SOP containing only state toxics provisions, you do not have to send the SOP to public notice because there is no intent to provide for federal enforceability. The obvious drawback to this approach is the source will now have two permits where we used to issue one.

In either case, the toxics provisions portion of the SOP should be similar in structure and format to the state-only section that is currently used in the Title V permit.

TITLE V PERMITS SENT TO PUBLIC NOTICE BUT NOT YET FINAL

At this time, these permits are to continue to go through the permitting process as written. Should they become final without objection, they will then be treated the same as those previously issued (see section above).

TITLE V PERMITS PREVIOUSLY ISSUED

If a Title V permit has been issued that contains state toxics requirements in the state-only section, then changes to that Title V permit (as well as the underlying NSR

* Current regulation citation as of January 20, 2010.

permit) will need to be made. Both the Title V permit and the underlying NSR permit(s) should be changed as expeditiously as practicable considering all existing priorities.

STATE OPERATING PERMITS

The following language should be incorporated into State Operating Permits containing state toxics requirements.

> State -Only requirements
>
> *The following terms and conditions are included in this permit to implement the requirements of 9 VAC 5-40-160 (9 VAC 5-60-200*) et seq. and/or 9 VAC 5-50-160 (9 VAC 5-60-300*) et seq. Neither their inclusion in this State Operating permit nor any resulting public comment period make these terms federally enforceable.*

The SOP would go to public notice for those terms and conditions not included in the state-only section. The above language specifies in the permit that the public notice is not intended for the state toxics conditions. The language in the public notice announcement should identify those specific conditions that are not to be considered federally enforceable. Of course, if the permit is only for state toxics conditions, public notice would not be required.

TITLE V AND PERIODIC MONITORING

If state toxics related conditions are placed in the federally enforceable section of the permit then additional MRR beyond that in the NSR permit may be required to meet periodic monitoring requirements. Because of a 2000 court decision, EPA's periodic monitoring guidance can no longer be used to determine what monitoring is appropriate, as explained below.

The April 17, 2000 court decision, *Appalachian Power Company et al. v. EPA,* addresses the 40 CFR Part 70 periodic monitoring requirements in general as they apply to Title V permitting. The court decision was based on a challenge of the September 1998 EPA Guidance, *Periodic Monitoring Guidance for Title V Operating Permits*, which interpreted 40 CFR 70.6(a)(3)(i)(B). Petitioners argued that the interpretation could lead to much more stringent monitoring and testing requirements and thus have the effect of amending state and federal standards without going through the regulatory process to create a rule. The 1998 guidance memo on periodic monitoring was set aside in its entirety by the Court's ruling. The Court decision applies to all standards/conditions/limits in Title V permits. All EPA appeals have been exhausted and this ruling now has the effect of law. This ruling applies to the guidance previously mentioned and does not mean that periodic monitoring is going away, but that the guidance cannot be used as the basis for requiring monitoring sufficient to assure compliance.

The current periodic monitoring required by a source's current permit should contain what is required by the applicable state or federal standard at a minimum. If that standard:

1) requires no periodic testing (instrumental or non-instrumental),
2) does not specify a frequency, or

* Current regulation citation as of January 20, 2010.

3) requires only a one-time test,

then additional MRR requirements (beyond that required by the standard itself) should be developed that would provide a reasonable assurance of compliance. Keep in mind that they must still meet the definition of practically enforceable. The permit writer may cite 9 VAC 5-80-110 E2 as the basis for any additional periodic monitoring requirements in the Title V permit.

DESIGNATED POLLUTANTS UNDER 111 (d) OF THE CAA

Federally "regulated pollutants" include "designated pollutants". Designated pollutants are defined in 40 CFR Part 60 Subpart B as any air pollutant, emissions of which are subject to a standard of performance for new stationary sources but for which air quality criteria have not been issued, and which is not included on a list published under section 108(a) or section 112(b)1(A). The EPA has thus far established recommended emission limits and federal plans for several types of facilities. Virginia is in the process of adopting regulations for these facilities based on the emissions guidelines, and is in the process of developing 111(d) plans. The status of EPA's 111(d) plans can be found at http://www.epa.gov/ttn/atw/eparules.html.

The emissions guidelines apply to designated facilities that emit designated pollutants. A designated facility is an existing facility which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the facility were new. Section 111(d) of the Clean Air Act requires EPA to establish procedures by which states submit plans to control facilities that emit designated pollutants. These procedures were established in 1975 for adoption and submittal of state plans for control of designated pollutants from designated facilities (Subpart B of 40 CFR Part 60). Therefore, when pollutants regulated under one of these emissions guidelines are also state toxics then any conditions based on these regulations cannot be placed in the state-only section. An example of such a pollutant is hydrogen chloride, which is also a designated pollutant (acid gases measured as sulfur dioxide and hydrogen chloride) under Virginia's hospital/medical/infectious waste incinerator regulation 9 VAC 5-40-6000 et seq., as well as a regulated pollutant under the state toxic regulations (9 VAC 5-40-160 (9 VAC 5-60-200*) et seq.). In such a situation HCl would not be included in the state-only section. It would remain federally enforceable and would go into the federal section of the Title V permit because it is an applicable federal requirement.

* Current regulation citation as of January 20, 2010.