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A Guide to Air Quality Operating Permits in Wyoming

*Mary A. Throne**

INTRODUCTION

In Title V of the 1990 Clean Air Act (CAA) Amendments¹ Congress required the states to submit an operating permit program for sources of air pollution by November 15, 1993.² Title V does not establish new pollution control requirements or replace or alter existing air quality permitting programs.³ Rather, the purpose of the operating permit program is to consolidate a facility's existing air quality requirements in a stand alone document. The hope is that this will provide more certainty for the regulated community and at the same time, enhance enforcement of air quality requirements. Skeptics of the program predict that it will be nothing more than a bureaucratic and paper nightmare.

Wyoming passed the enabling legislation for its operating permit program during the 1992 budget session.⁴ Section 30 of the Wyoming Air Quality Standards and Regulations (WAQSR), the operating permit regulations, became effective on October 26, 1993.⁵ Wyoming submitted its operating permit program to the United States Environmental Protection

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1. 104 Stat. 2635, Pub. L. 101-549, Title V (codified at 42 U.S.C. § 7661a-7661f (1990)).
 2. 42 U.S.C. § 7661a(d)(1). The CAA provides for sanctions against states that fail to submit an approvable Title V program and authorizes EPA to implement a federal program. 42 U.S.C. § 7661a(d)(2)-(3).
 3. Facilities in Wyoming must still comply with the permitting and substantive standards in the New Source Review (NSR) program in section 21 of the Wyoming Air Quality Standards and Regulations (WAQSR), the New Source Performance Standards (NSPS) in section 22 of the WAQSR and the Prevention of Significant Deterioration (PSD) provisions in section 24.
 4. 1992 Wyo. Sess. Laws ch. 70, § 1 (codified at WYO. STAT. §§ 35-11-203 to -212 (1994 & Supp. 1995)).
 5. Wyoming's section 30 regulations closely parallel the federal requirements at 40 C.F.R. Part 70, as promulgated at 57 Fed. Reg. 32250 (July 21, 1992).
- Copies of the WAQSR are available from the Wyoming Air Quality Division (Division). Personnel from the Division are also available to answer questions about the program.

Agency (EPA) on November 22, 1993, and received final interim approval on January 19, 1995, establishing a federal effective date of February 21, 1995 for the program.⁶

This article explains the key provisions of the operating permit program and describes how the program is implemented in Wyoming. Specifically, it examines applicability and emission fees, the application process, and permit issuance and content before concluding with a discussion of the present and future of operating permits in Wyoming. Its goal is to provide practical tips for Wyoming attorneys to use in advising their clients about the operating permit program.

APPLICABILITY AND EMISSIONS FEES

The first question any owner or operator needs to ask is whether its facility is in or out of the operating permit program. Section 30 of the WAQSR requires major sources, affected sources subject to the acid rain program⁷ and any other sources that EPA may designate to obtain an operating permit.⁸ The Wyoming legislature has deferred the operating permit requirements for nonmajor sources until EPA mandates that states issue permits to those sources.⁹

6. 60 Fed. Reg. 3766 (Jan. 19, 1995). EPA grants interim approval when a program substantially meets the requirements of the federal operating permit program in 40 C.F.R. Part 70.40 C.F.R. § 70.4(d).

EPA identified eight deficiencies preventing Wyoming from obtaining full program approval. They included a variety of deficiencies in the enforcement provisions of Article 9 of the Wyoming Environmental Quality Act (WEQA), including failure to hold corporate officers and directors strictly liable for air quality violations. Article 9 was amended during the 1995 legislative session to correct the deficiencies identified by EPA. 1995 Wyo. Sess. Laws ch. 28. The Division is in the process of revising WASQR section 30 to address EPA's questions about Wyoming's treatment of insignificant activities, research and development facilities and general permits. The Division and EPA must also resolve questions relating to tribal jurisdiction.

Wyoming has until August 19, 1996 to submit a corrective program to EPA. 60 Fed. Reg. 3770. If EPA does not approve the program changes, EPA may develop a federal program for Wyoming and impose sanctions. *Id.*

7. Section 30 applies the same definition for affected sources as the acid rain program in Title IV of the CAA. WAQSR § 30(b)(ii); 42 U.S.C. § 7651a(1).

8. WYO. STAT. § 35-11-203; WAQSR § 30(a).

9. WYO. STAT. § 35-11-203(c). Section 30 only defers nonmajor sources until 1998. WAQSR § 30(c)(i)(D)(IV). The legislature negated this regulation with the statutory change at section 203(c) of the WEQA. 1994 Wyo. Sess. Laws ch. 11, § 1.

Major Source Definitions

Under section 30 of the WAQSR a source can be major for hazardous air pollutants under section 112 of the CAA¹⁰ and major for other pollutants under section 302 of the CAA.¹¹ A source or group of sources located within a contiguous area and under common control that emits or has the potential to emit¹² ten tons per year (tpy) of any hazardous pollutant or twenty-five tpy of any combination of hazardous air pollutants is major.¹³ For oil and gas exploration facilities, the regulations do not require aggregation of emissions from production wells and any associated pipeline compressor or pump station with emissions from similar units, regardless of whether they are under common control or are contiguous.¹⁴

A source is major under section 302 of the CAA, as applied in section 30 of the WAQSR, if it emits, or has the potential to emit, 100 tpy or more of any air pollutant. The source includes a single source or group of sources located on contiguous or adjacent properties that are under common control and have the same standard industrial code.¹⁵ Whether fugitive emissions¹⁶ are counted to determine applica-

10. 42 U.S.C. § 7412(a)(1).

11. 42 U.S.C. § 7602(j).

12. Potential to emit is defined as "the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design." WAQSR § 30(b)(xx). Any limitations that reduce emissions below the design capacity must be enforceable by EPA (federally-enforceable) and the Division to be considered part of the design. WAQSR § 30(b)(xx). This definition is consistent with the federal definition at 40 C.F.R. § 70.2.

Industry has succeeded recently in challenging EPA's federal enforceability requirement for determining potential to emit across a number of air programs. In *National Mining Assoc. v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), the Court remanded the potential to emit definition under section 112 of the CAA to give EPA the opportunity to justify why federal enforceability is necessary to insure the effectiveness of potential to emit limitations. Relying on *National Mining Assoc.*, the Court later vacated the federal enforceability requirement in the PSD and NSR programs in *Chemical Mfrs. Assoc. v. EPA*, 70 F.3d 637 (D.C. Cir. 1995). Industry challenges to the federal enforceability requirement under the Title V operating permit program are also pending.

In response to these court decisions, EPA has announced that it will continue to recognize a previous policy of accepting state-enforceable limits until it completes a rulemaking on potential to emit. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA INTERIM POLICY ON FEDERAL ENFORCEABILITY REQUIREMENT FOR LIMITATIONS ON POTENTIAL TO EMIT 1 (1996) *reprinted in* 26 *Env't Rep.* (BNA) 1859 (Feb. 2, 1996). An EPA paper issued Feb. 12 describes the EPA alternatives for rulemaking. 26 *Env't Rep.* (BNA) 1987 (Feb. 16, 1996).

13. WAQSR § 30(b)(xvi)(A)(I). EPA may also establish lower limits for major sources by rule. *Id.* Hazardous air pollutants are listed in section 112(b) of the CAA, 42 U.S.C. § 7412(b).

14. WAQSR 30(b)(xvi)(A)(I).

15. Sources have the same industrial code if they are in the same Major Group as described in the *Standard Industrial Classification Manual*, 1987. WAQSR § 30(b)(xvi).

16. Fugitive emissions are those that could not reasonably pass through a stack, chimney, vent or similar opening. 40 C.F.R. § 70.2.

bility under the section 30 definition is an important issue in Wyoming, due to the fact that surface coal mines, one of Wyoming's largest industries, have primarily fugitive emissions.¹⁷ When determining whether a source is major, fugitive emissions are not counted towards applicability unless required by EPA rule, the stationary source is listed under Prevention of Significant Deterioration (PSD) regulations in section 24(a)(i) of the WAQSR or the source belongs to a category regulated under section 111 or 112 of the CAA.¹⁸

Synthetic Minor Sources

A source owner or operator who consistently operates below the major source thresholds in section 30, but has a potential to emit higher than major source limits can apply for a "synthetic minor" to reduce its permitted emission limits below section 30 levels.¹⁹ Voluntary, non-enforceable reductions in emissions are not sufficient to avoid the section 30 requirements since the Wyoming Air Quality Division (Division) would have no means to guarantee compliance with the lower emission limits.

The typical way for a source to acquire synthetic minor status is to apply for a new or modified permit under section 21 of the WAQSR, the New Source Review Program (NSR).²⁰ Section 30 also allows a source to rely on a general permit issued under section 30(i) to permit similar synthetic minor sources.²¹ Finally, under section 30 a source may apply for a synthetic minor to avoid the controls imposed by a particular standard, even if the facility, as a whole, is subject to the section 30 permit requirements.²²

17. Including the fugitive emissions in an applicability determination can affect whether surface coal mines are major or minor for purposes of section 30.

18. WAQSR § 30(b)(xvi)(B)(I)-(II); 42 U.S.C. §§ 7411-7412. Section 111 of the CAA addresses new source performance standards, and section 112 addresses hazardous air pollutants.

19. WAQSR § 30(m).

20. WAQSR § 30(m)(iii). This provision also requires federal-enforceability for synthetic minors permits. Section 21 is part of Wyoming's State Implementation Plan (SIP), approved by EPA under section 110 of the CAA, 42 U.S.C. § 7410, and therefore, section 21 permits are federally-enforceable under section 113(b)(1) of the CAA, 42 U.S.C. § 7413(b)(1). Because of the federal-enforceability of section 21 permits, any changes in the federal definition of "potential to emit," discussed *supra* note 12, should not affect a source's ability to obtain a synthetic minor permit in Wyoming.

21. WAQSR § 30(m)(ii). Section 30(i) allows the Division to streamline the operating permit process by developing general permits for numerous similar sources. Initially, the general permit would go through a public review process and then sources that qualified could apply for the general permit without complying with the full section 30 requirements. Section 30(m) simply makes these available as synthetic minors. To date, the Division has not developed any general permits.

22. WAQSR § 30(m)(i). For example, this provision could be useful for a source that has an emissions unit with a potential to emit high enough to subject it to a maximum achievable control technology

Sources that are on the borderline of the applicability requirements of section 30 may want to consider carefully whether they will benefit from a synthetic minor designation. For a source, the decision becomes a trade-off between the burdens of keeping emissions below section 30 levels and the burdens associated with obtaining a section 30 permit. A source that produces ninety tpy of a pollutant may find that utilizing the additional monitoring and controls required to maintain its emissions just below major source status may be more difficult than meeting the section 30 requirements.

Emission Fees

Sources that meet the applicability requirements of the operating permit program must pay an annual fee based on their emissions of regulated pollutants.²³ Currently, the fee in Wyoming is only ten dollars per ton, well below the federal fee and other states' fees.²⁴ State law requires the Division to collect fees to fund the entire operating program.²⁵ The Division assesses fees based on annual emission inventories, submitted by sources within sixty days after the end of the calendar year.²⁶ Generally, a source only pays fees for its actual emissions, not its allowable emissions.²⁷ The WEQA establishes a cap of four thousand tpy per pollutant on emissions subject to fees from each source.²⁸

(MACT) standard under section 112 of the CAA. To avoid a particular requirement for that unit, the source can obtain a limit to control that unit, alone, below the emissions trigger for that standard.

23. Regulated pollutants include any "regulated air pollutant" except carbon monoxide, some substances subject to a standard under Title VI of the CAA and any pollutant that is regulated solely because it is subject to the accidental release provisions under section 112(r) of the CAA. WAQSR § 30(b)(xxiii). "Regulated air pollutants" include nitrogen oxides, volatile organic compounds, pollutants subject to national ambient air quality standards, any pollutant regulated under section 111 of the CAA or section 22 of the WAQSR (NSPS), or hazardous air pollutants under section 112 of the CAA except that pollutants regulated solely under section 112(r) are included only for 112(r) purposes. WAQSR § 30(b)(xxii).

24. The CAA requires operating permit programs to be self-sufficient. EPA's presumptive minimum for this purpose is twenty-five dollars per ton, adjusted for inflation. 40 C.F.R. 70.9(b)(2)(i). Wyoming was able to demonstrate to EPA that it could charge less and adequately fund its program. See 60 Fed. Reg. 3766 (Jan. 19, 1995) (Final Interim Approval of Wyoming's Operating Permit Program). For comparison, Colorado is charging \$14.98 per ton of criteria pollutants (except carbon monoxide), \$100.00 per ton for hazardous air pollutants and chlorofluorocarbons and a permit processing fee. State Permitting Programs, [1996 Transfer Binder] Clean Air Permits (Thompson Pub. Group) ¶ 835, at 301 (Jan. 1996). Wyoming's fee may increase since it is based on the costs of operating the program. WAQSR 30(f)(iv).

25. WYO. STAT. § 35-11-211(b).

26. WAQSR § 30(f)(v)(G). The costs covered include not only the permit review process, but also the costs of implementing and enforcing permits, program development, air monitoring activities, funding the small business assistance program, required under section 209 of the WEQA, WYO. STAT. § 35-11-209, and a variety of other activities.

27. Section 30(f)(v) of the WAQSR establishes a hierarchy of methods for determining actual emissions, with emissions from a continuous emissions monitoring system presumed to be the most accurate. One of the options for the source is a presumption that actual emissions equal allowable emissions unless for some reason the actual emissions are higher. WAQSR § 30(f)(v)(C).

28. WYO. STAT. § 35-11-211(b). For large power plants this cap allows a significant savings

The Division's fee assessment is final unless appealed to the Environmental Quality Council (EQC)²⁹ within twenty days of receipt of the assessment.³⁰ A source cannot base its appeal on a challenge to the entire fee schedule, but can only allege that its particular assessment is excessive or erroneous.³¹ The abbreviated appeal process for fees is necessary to provide finality. Without it, the Division would be forced to devote a disproportionate share of resources to fee appeals and would have a less stable funding source.

APPLICATION PROCESS

Most major sources in Wyoming have submitted their applications which are now under review by the Division. The WEQA and the WAQSR established the initial deadline for the majority of operating permit applications as November 15, 1995.³² For other sources, applications for operating permits are not due until twelve months after the source becomes subject to the operating permit program.³³ Section 30 requires newly constructed or modified sources required to obtain permits under other air programs to file an application for an operating permit "within twelve (12) months of commencing operation."³⁴ Sources that began operating any time after the February 21, 1995 effective date of Wyoming's program have twelve months from the date operations "commenced" to file a section 30 application.³⁵

in fees since their emissions of both nitrogen oxides (NO_x) and sulfur dioxide (SO₂) generally exceed the cap. Despite the cap, however, power plants pay the highest fees to the operating permit program.

29. The EQC is the citizen hearing board for the Department of Environmental Quality, established under section 111 of the WEQA, WYO. STAT. § 35-11-111.

30. WYO. STAT. § 35-11-211(d).

31. *Id.*

32. WYO. STAT. § 35-11-204(c); WYO. STAT. § 35-11-205(a); WAQSR § 30(c)(D)(II). During the first year of the program, applications from natural gas compressor stations, natural gas processing plants and operating natural gas sweetening plants were due four months after EPA's approval of the operating permit program or by June 21, 1995. WAQSR § 30(c)(i)(D)(I).

33. WAQSR § 30(c)(i)(A).

34. WAQSR § 30(c)(i)(B). The other permit programs include the NSR program of section 21, the NSPS in section 22, the PSD program in section 24 of the WAQSR, or the section 112(g) requirements of the CAA. "Commencement of operations" is "the setting into operation of a new or modified source . . . for any purpose." WAQSR § 30(b)(vi).

Section 112(g) of the CAA, 42 U.S.C. § 7412, requires states to apply case-by-case MACT to modifications, reconstruction or construction of sources of hazardous air pollutants if EPA has not promulgated a MACT standard for controlling a particular source category of hazardous air pollutants. EPA has recently decided that it will not promulgate rules that apply to modification of sources of hazardous air pollutants, but will only propose rules applicable to construction and reconstruction of sources and will not apply section 112(g) to new major emissions units at existing sources if they are regulated by other existing controls. *Existing Controls Will Narrow Applicability of Major Air Toxics Rule*, INSIDE E.P.A., Mar. 15, 1996, at 1.

35. WAQSR § 30(c)(i)(B).

Completeness Determination and the Application Shield

Following receipt of a section 30 application, the Division has 60 days to review the application for completeness.³⁶ If the Division fails to notify the applicant of incompleteness within the sixty day window, the application is deemed complete.³⁷ Once the Division determines that the application is incomplete, it will request the additional information needed to address any deficiencies. The application remains incomplete if the source fails to submit the information by any deadline set by the Division in its request.

Once an applicant files a "complete and timely" application, it is entitled to the protection of the "application shield."³⁸ The WEQA provides that it shall be a violation for a source to continue to operate after the effective date of the operating permit program without an operating permit. However, if the applicant has submitted a "timely and complete application . . . and final action has not been taken on the application," the source is not in violation for operating without a permit, unless the Division's delay in acting on an application resulted from the applicant's failure to supply information needed to process the application.³⁹ The regulations explain further that the shield "shall cease to apply" if the source fails to submit information requested within the time frame established by the Division, following a finding of an incomplete application.⁴⁰ Without the application shield, continued operation violates the operating permit program and may lead to an enforcement action by the Division.

The final determination of completeness does not end the application process. The regulations impose an ongoing duty to "promptly" supplement the application in the event that a source discovers that it has failed to submit relevant facts or has provided incorrect information.⁴¹ The applicant also must supply the Division with additional information if the source becomes subject to other applicable requirements during the pendency of the application review.⁴² The application is, in part, a work in progress since the review and issuance process could take as long as eighteen months.⁴³ During this period, changes could easily occur at a facility, rendering portions of an application inaccurate or unnecessary.

36. WAQSR § 30(d)(i)(C).

37. *Id.*

38. WYO. STAT. § 35-11-205(c); WAQSR § 30(d)(ii).

39. WYO. STAT. § 35-11-205(c).

40. WAQSR § 30(d)(ii).

41. WAQSR § 30(c)(iii).

42. *Id.*

43. The WEQA obligates the Division to issue or deny permits within eighteen months of receiving a complete application. WYO. STAT. § 35-11-205(a).

Application Content

The scope of the information required in a section 30 application combined with the loss of the application shield for failing to file a complete application make applying for an operating permit a daunting task. The section 30 application must contain identifying information about the company, a description of the facility's products and processes, comprehensive information about a facility's emissions and emission units, citations to any applicable requirements and test methods for determining compliance with applicable requirements, proposed exemptions, a compliance plan, certification of compliance with applicable requirements by a responsible official and other miscellaneous information.⁴⁴

The definition of "applicable requirements" covers the whole range of air quality standards, in order to insure that the operating permit, as a single document, contains all the requirements that apply to a facility. "Applicable requirements" include provisions that are enforceable by both EPA and the State and those that are state-enforceable only.⁴⁵

The state only requirements include any standards that are in the WAQSR, but are not a part of the State Implementation Plan (SIP).⁴⁶ In contrast to federal law, Wyoming includes state ambient air quality standards as applicable requirements.⁴⁷ Historically, Wyoming has

44. WAQSR § 30(c)(ii).

45. Federal and state enforceable requirements include any standard from the Wyoming State Implementation Plan (SIP), WAQSR § 30(b)(v)(A); terms or conditions of permits issued under regulations approved under Title I of the CAA, including permits issued under sections 21, 22 or 24 of the WAQSR, WAQSR § 30(b)(v)(C); NSPS promulgated under section 111 of the CAA or section 22 of the WAQSR, WAQSR § 30(b)(v)(D); any standards or requirements pertaining to hazardous air pollutants issued under section 112 of the CAA, WAQSR § 30(b)(v)(D); any enhanced monitoring or compliance certification requirements issued under section 504(b) or section 114(a)(3) of the CAA, WAQSR § 30(b)(v)(G); and any requirements of the acid rain program under Title IV of the CAA, WAQSR § 30(b)(v)(F).

Other federal and state applicable requirements less relevant to Wyoming include standards for solid waste incineration for facilities regulated under section 129 of the CAA, WAQSR § 30(b)(v)(H); standards for controlling volatile organic compounds under ozone control provision of section 183 of the CAA, WAQSR § 30(b)(v)(I); standards for stratospheric ozone protection under Title VI of the Act, WAQSR § 30(b)(v)(J) (EPA retains all authority for Title VI implementation); and national ambient air quality standards and similar requirements for temporary sources permitted under section 504(e) of the CAA, WAQSR § 30(b)(v)(K).

Once an operating permit has been issued, all of the federally-enforceable requirements are enforceable by EPA and citizens under the CAA. WAQSR § 30(h)(ii). Only Wyoming has the authority to enforce state-only requirements. *Id.*

46. WAQSR § 30(b)(v)(B). An example of a Wyoming standard that is not in the SIP is the ambient air quality standard for total suspended particulates (TSP). WAQSR § 3(b). When EPA adopted a PM₁₀ standard for particulate matter, Wyoming retained TSP and added PM₁₀.

47. WAQSR § 30(b)(v)(L). The federal definition of applicable requirements at 40 C.F.R.

enforced exceedances of the state ambient air quality standards against individual sources.

A compliance plan and certification of compliance with the applicable requirements by a responsible official⁴⁸ are key features of the section 30 application. The compliance plan must describe the compliance status of each applicable requirement, contain a commitment to meet new applicable requirements as they apply during the permit term, and set forth a compliance schedule for sources out of compliance with appropriate milestones and progress reports for coming into compliance.⁴⁹ The certification, as well as attesting to compliance with applicable requirements, consists of a statement describing the methods for determining compliance and a schedule for submitting compliance certification during the permit term.⁵⁰

Applications and the EPA White Paper

To address industry concerns about the complexity of the application process, EPA issued a "White Paper" intended to "enable states to take immediate steps to reduce the cost of preparing and reviewing initial Part 70 applications."⁵¹ The Division's ability to implement all the recommendations of the White Paper has been hampered by the fact that EPA issued the document over eighteen months after Wyoming had promulgated its section 30 regulations. As a result, where the White Paper conflicts with the stated language in section 30, the Division has no authority to imple-

§ 70.2 does not list ambient air quality standards.

48. WAQSR § 30(b)(xxv)(A)(I). Responsible official is defined narrowly to guarantee that individuals high up the ladder in an organization are taking responsibility for the permit. For a corporation, the responsible official includes the president, secretary, treasurer or vice-president of the corporation "in charge of a principal business function." *Id.* A representative of any of these individuals is acceptable provided that he or she is in charge of all operations at a facility and the facility is of sufficient size or the Division approves the representative. In short, environmental managers are not left to shoulder the burden of certifying compliance or signing the application. This is not insignificant since under WYO. STAT. § 35-11-901(k), any person who knowingly files a false document may be subject to criminal prosecution.

49. WAQSR § 30(c)(ii)(A)(VIII).

50. WAQSR § 30(c)(ii)(A)(IX).

51. U.S. ENVIRONMENTAL PROTECTION AGENCY OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA WHITE PAPER FOR STREAMLINED DEVELOPMENT OF PART 70 PERMIT APPLICATIONS 1 (1995) [hereinafter WHITE PAPER]. EPA has recently issued WHITE PAPER NUMBER 2 FOR IMPROVED IMPLEMENTATION OF THE PART 70 OPERATING PERMITS PROGRAM (Mar. 5, 1996), reprinted in 26 Env't Rept. (BNA) 2156 (Mar. 15, 1996). The primary focus of the draft is to allow sources to streamline multiple applicable requirements that may be confusing or even conflicting. It also contains other suggestions for reducing the administrative burdens of the operating permit application process. As with the original WHITE PAPER, the Division will incorporate EPA's suggestions and build on them to the extent possible under Wyoming's program.

ment it. The Division's duty is to implement Wyoming laws and regulations, not EPA guidance. Still, to the extent possible, the Division is following the suggestions of the White Paper to make the application process less burdensome.⁵²

As a threshold matter, the Division interprets completeness as "administratively complete." In other words, during a completeness review, the Division will not analyze the substance of the application or begin a technical review, but simply will ascertain whether the applicant has supplied all the information needed to process the application. As discussed in the White Paper, the Division can make a finding of completeness if the application contains all the information necessary to determine applicability, identifies the applicable requirements and certifies compliance with respect to all the applicable requirements.⁵³ If, for example, an applicant completely omits applicable requirements for a particular emissions unit or fails to provide any emissions information (leaves the application blank), it is highly likely that the Division will find the application incomplete.

Although the application must identify emissions at the facility, the applicant does not need to provide detailed calculations of its emissions. The Division's position, supported by the White Paper, has always been that if the source concedes that it is major, detailed emissions are only needed to determine the applicability of particular requirements, such as a NSPS in section 22 of the WAQSR.⁵⁴ The White Paper, also recommends that the states provide checklists for insignificant activities that need not be included in the permit application.⁵⁵ This is inconsistent with Wyoming regulations which require an applicant to provide enough emission information to allow the Division to determine whether the activity is subject to an applicable requirement.⁵⁶ Similarly, the section 30 regulations do not provide a basis for excluding trivial activities, since the applicant must identify all emissions.⁵⁷

In addition to being flexible concerning emission calculations, the Division will allow group treatment of sources that are subject to the

52. Interview with Dan Olson, Operating Permits Program Manager for the Wyoming Air Quality Division, in Cheyenne, Wyoming (Jan. 19, 1996). Throughout this section, statements about Division policy are based on the author's interview with Mr. Olson.

53. WHITE PAPER, *supra* note 51, at 18.

54. *Id.* at 6-7.

55. WHITE PAPER, *supra* note 51, at 8-9.

56. WAQSR § 30(c)(ii)(III).

57. EPA reasons that applicants can eliminate certain activities even if they are not part of an insignificant activities list since they may have extremely small emissions and there is no possibility of being covered by an applicable requirement. See WHITE PAPER, *supra* note 51, at 8-9. The Division's position is that permit application must contain the emissions, although the Division will not specifically include trivial emissions in the final permit.

same applicable requirement in the application.⁵⁸ For example, since line heaters at natural gas compressor stations are all subject to section 10 of the WAQSR, the applicant can group the heaters as subject to the same applicable requirement, although the application must still identify each unit. In a similar vein, the Division will accept cross-referencing to applicable requirements. Rather than describing each applicable requirement in detail, the source can simply reference the appropriate regulation. Terms from existing NSR permits will require more specificity.

Consistent with EPA's analysis in the White Paper, the Division will not require a source to revisit previous applicability determinations in order to satisfy the compliance certification requirement in its application. For example, the Division will not ask a source to review a previous permitting decision, such as a PSD determination, and certify that it was correct in order to provide a complete compliance certification. However, if during the course of the application review process it becomes apparent that a previous permitting action was incorrect,⁵⁹ the Division will endeavor to correct the problem prior to issuing the final section 30 operating permit.

Another issue addressed in detail in the White Paper and considered by the Division during review of applications is how best to deal with NSR requirements that are so dated they have become insignificant or obsolete.⁶⁰ Section 30 defines all existing permit provisions as applicable requirements, required in the application and as a result, subject to compliance certification. To eliminate requirements that may not be current or significant, the White Paper suggests that states use a parallel revision process to modify the NSR permit concurrent with issuing the operating permit.⁶¹ The Division plans to use this approach as necessary to eliminate NSR requirements that "are still on the books," but no longer relevant.⁶² Incorporating ineffectual or outdated NSR terms in a section 30 permit would not only impose absurd demands on industry, it would make the permit less effective. Wyoming, as much as the regulated community, has an interest in avoiding an overly technical application of the section 30 requirements that will only result in poorly crafted permits.

58. WHITE PAPER, *supra* note 51, at 9-10.

59. If, for example, a source modification was incorrectly found to be insignificant for PSD purposes, the Division would work with the owner or operator to meet the PSD requirements in section 24 of the WAQSR.

60. An example of an insignificant or outmoded requirement in Wyoming permits are the hydrocarbon emission limits for some oil and gas facilities. Currently, it is the volatile organic compound portion of hydrocarbons that are regulated, making the hydrocarbon standard irrelevant.

61. WHITE PAPER, *supra* note 51, at 12.

62. Interview with Dan Olson, Program Manager for the Operating Permits Program of the Wyoming Air Quality Division, Cheyenne, Wyoming (Jan. 19, 1996).

The White Paper also suggests that sources propose NSR requirements for deletion in the application.⁶³ For most Wyoming sources subject to 1995 deadlines, this advice arrived too late. The Division, during its review of operating permit applications, is independently identifying needless NSR terms. When the section 30 permit goes to public notice, the Division will list the NSR requirements that are proposed for deletion. Since the section 30 public participation process is as extensive as that for section 21, the section 30 revision will satisfy the requirements for both sections.⁶⁴

During the application review, the Division will also work with sources to adjust emission limits from NSR permits, when possible, through the section 30 process. These emission limits may still be relevant, but perhaps are no longer workable. If a source needs an emission limit increase, the Division will make the adjustment as it issues the section 30 permit unless the emission increases are significant. For significant increases the source would have to modify its NSR permit under section 21 and as necessary, under sections 22 and 24, after which, the Division could incorporate the changes into the section 30 permit.⁶⁵ The Division has yet to determine the minimum emission increase that it would consider significant enough to require NSR review. At the upper end of the scale, the Division cannot accommodate any increase that is significant for PSD purposes through the section 30 process alone.⁶⁶

The White Paper, although issued too late to be of much value to programs that were already underway, such as Wyoming's, describes the outer boundaries of what is acceptable to EPA for the operating permit program. As a result, Wyoming has a better understanding of how flexible it can be in implementing its program, consistent with federal law, without encountering an EPA objection down the road. With or without the White Paper, Wyoming intended to make its program as flexible as possible in order to implement it more efficiently and effectively. The White Paper simply allows Wyoming to be reasonable with less risk of an EPA veto.

63. WHITE PAPER, *supra* note 51, at 14.

64. See WAQSR § 21(m) and WAQSR § 30(d)(ix) for public participation requirements. For a more detailed discussion of EPA's approach for the treatment of obsolete terms in the operating permit application, see WHITE PAPER, *supra* note 51, at 14-15.

65. Under the existing revision provisions in section 30, if section 21 and section 24 modifications follow procedures "substantially equivalent" to the public participation procedures in section 30(d) and (e), the section 21 requirements can be incorporated into the section 30 permit through an administrative amendment rather than a permit revision. WAQSR § 30(d)(v)(A)(V).

66. "Significant" modifications for PSD are defined at WAQSR § 24(a)(xxi).

PERMIT ISSUANCE AND CONTENT

Although most sources are currently absorbed with the application review process, they should also look ahead to permit issuance and to consider the scope of the final content of their operating permit. Sources need to understand the role of the public, EPA and affected states in the permit review process and to prepare to operate under a permit that is likely to govern their operations in the future.

Permit Issuance

The permit issuance process includes a public participation process similar to what is provided for permits issued under section 21 of the WAQSR. The added features in the operating permit program are review by affected states and EPA, including the possibility of an EPA veto.

Following the Division's completion of a draft permit,⁶⁷ the regulations require public notice and an opportunity for public comment and a hearing.⁶⁸ There is no automatic right to a public hearing. Section 30 simply requires the public notice to identify the procedure for requesting a hearing.⁶⁹ Under section 21, the Division Administrator has the discretion to hold public hearings when a permit generates sufficient interest or an aggrieved party requests a hearing prior to the close of the public comment period.⁷⁰ The Division will follow the same process in determining whether to hold a public hearing for a section 30 operating permit.

After the Division reaches a decision on a proposed permit,⁷¹ both the applicant and the public have a right of appeal to the EQC. The applicant has the right to appeal the terms of the permit, any refusal to grant a permit or any failure to act on an application within eighteen months.⁷² Any member of the public who participated in the public comment process and "who is aggrieved" by any final permit decision has access to judicial review under section 1001 of the WEQA, following final action by the EQC.⁷³

67. A "draft permit" is the version sent to public notice. WAQSR § 30(b)(x).

68. WAQSR § 30(d)(ix). In addition to providing notice in a newspaper of general circulation, section 30 also requires notice to those on the Division's mailing list. WAQSR § 30(d)(ix)(A). In contrast, section 21 does not require notice to a mailing list. WAQSR § 21(m).

69. WAQSR § 30(d)(ix)(B).

70. WAQSR § 21(m).

71. A "proposed permit" is the version the Division plans to issue and submits to EPA. WAQSR § 30(b)(xxi).

72. WYO. STAT. § 35-11-208(a). Section 208(a) references section 802 of the WEQA which provides for a right of appeal to the Environmental Quality Council. WYO. STAT. § 35-11-802.

73. WYO. STAT. § 35-11-208(b). Section 1001 of the WEQA allows any aggrieved party to

Concurrent with the public participation process, the Division must provide notice and an opportunity to comment by affected states and then, must provide EPA and the affected state with a written explanation for any recommendation it fails to adopt.⁷⁴ The Division, however, is not obligated to accept suggestions that are not based on applicable requirements.⁷⁵

If the public participation process and affected states review were the end of the story, the operating permit process would be less time consuming and most likely, less of a concern to the regulated community. Added to these is another layer of review by the EPA, with the potential to delay significantly the issuance of the operating permit. The Division cannot issue a permit if EPA objects to the proposed permit within forty-five days after receiving it from the Division.⁷⁶ If the Division does not revise the permit as requested by EPA and resubmit it within ninety days after the date of the objection, the EPA has the authority to issue or deny the permit.⁷⁷

The public also has additional rights during the EPA review process. Within sixty days after the expiration of the EPA review period, members of the public can file an objection if EPA has not.⁷⁸ In general, members of the public must base their petitions on objections raised during the state public comment period.⁷⁹ The good news for the regulated community is that if the permit has already been issued following the initial EPA review period and EPA then objects based on the public petition, the public petition does not stay the effectiveness of the permit.⁸⁰ The burden will be on the Division to resolve EPA objections raised by a public petition through a revised permit.

The specter of an EPA veto may be one of the regulated community's major concerns about the operating permit program. The existing air programs in sections 21, 22 or 24 of the WAQSR do not give EPA the right of

seek judicial review of any final action under the Administrative Procedure Act [WYO. STAT. §§ 16-3-101 through 16-3-115]. WYO. STAT. § 35-11-1001(a). Before an action is subject to judicial review under the Administrative Procedure Act, the party must exhaust all administrative remedies. WYO. STAT. § 16-3-114. The DEQ provides an administrative remedy through an appeal to the EQC within 60 days of a final permit decision. Dept. of Env. Qual. Rules of Prac. & Proc. ch. I, § 16.

74. WAQSR § 30(e)(ii)(A)-(B).

75. WAQSR § 30(e)(ii)(B).

76. WAQSR § 30(e)(ii)(C)(I).

77. WAQSR § 30(e)(ii)(C)(IV).

78. WAQSR § 30(e)(ii)(D).

79. *Id.* If the petitioner attempts to raise issues not made during the original public comment period, he or she must demonstrate that it was either impracticable to do so or that the grounds for the objection arose after the public comment period.

80. WAQSR § 30(e)(ii)(D).

veto. Although EPA reviews current permit applications and provides comments, it does not have the authority to delay or object to the final issuance of the permit through the state review process.⁸¹ On its face, the industry concern is understandable. Yet, industry should not overreact to the threat of the EPA veto. Since EPA may not have the resources to micromanage a state's operating permit program, it seems more likely that EPA will only veto permits when it has major objections.⁸²

Moreover, EPA will have the opportunity to review permits prior to the objection period. Under the regulations, the Division must provide EPA with all permit applications⁸³ and the Division can also ask EPA to review draft permits prior to issuing the proposed permit for formal EPA review. Reviewing the application and the draft permit should give the Division and the EPA an opportunity to resolve most disagreements prior to the veto period. EPA will retain its veto authority, but the reality may prove to be less of a concern than the veto threat.

Permit Content

The permit content, in most circumstances, will flow directly from the information provided in the operating permit application. The heart of the operating permit will be the emission limitations and any controls necessary to insure compliance with applicable requirements.⁸⁴ The permit will also separately list applicable requirements from the WAQSR that are more stringent than federal requirements.⁸⁵ The term of most operating permits will be five years.⁸⁶

The operating permit will also contain several provisions designed to enhance compliance assurance—one of the chief objectives of the operating

81. Under section 21(m) of the WAQSR, the Division's only obligation is to provide the EPA with a copy of the public notice.

82. Although EPA will have wide discretion in its objections, section 30 provides some specific grounds, including failure of the Division to provide EPA with copies of applications and proposed permits, to submit adequate information to review the proposed permit, to adequately notify affected states and respond to them, or to process the permit in compliance with section 30's public participation procedures. WAQSR § 30(e)(ii)(C)(III).

83. WAQSR § 30(e)(i)(A).

84. WAQSR § 30(h)(i)(A).

85. WAQSR § 30(h)(i)(A)(III). The state-only standards are not federally-enforceable. WAQSR § 30(h)(ii)(B).

86. WAQSR § 30(h)(i)(B). The WEQA provides that permits may be issued for a shorter term if necessary to protect the public health, unless they are for an acid rain source. WYO. STAT. § 35-11-206(f)(i).

Other general content provisions include a duty to comply with all provisions of the permit, a warning that the permit may be modified, revoked, reopened, reissued or terminated for cause, and a duty to provide information upon request from the Division to determine whether cause exists for modification, revocation, reopening, termination or reissuance. WAQSR § 30(h)(i)(F).

permit program. Operating permits will contain all monitoring and test procedures required under any of the applicable requirements.⁸⁷ In the event that a particular applicable requirement does not contain any testing or monitoring requirements, the permit must require sufficient periodic monitoring to demonstrate compliance.⁸⁸ Under some circumstances, recordkeeping may satisfy the regulation.⁸⁹ To further promote compliance, the operating permit will require “prompt reporting of deviations” from its terms.⁹⁰

The most important additional permit provision is the compliance certification. No less than annually, facilities must certify their compliance status with regard to each term or condition of the permit.⁹¹ The requirement that a responsible official sign the compliance certification, thereby becoming personally liable for any false information, gives the certification added weight.⁹²

The source may take advantage of provisions designed to allow operational flexibility without changing the permit, provided that the proposals are in compliance with the regulations.⁹³ These options include “reasonably anticipated alternative operating scenarios”⁹⁴ and terms and conditions for trading emission increases and decreases in a source.⁹⁵ In both these circumstances, the provisions must meet the applicable requirements. The source must show that it has previously permitted the proposed alternatives, so that the Division has a mechanism for evaluating the air quality impact of each operating scenario or emissions trade. The permit may also contain any emissions trading provisions authorized by market incentives and other similar programs.⁹⁶

87. WAQSR § 30(h)(i)(C).

88. WAQSR § 30(h)(i)(C)(I)(2).

89. *Id.* Permits will also mandate that facilities record all data and supporting information documenting compliance and that the facility retain records for five years. WAQSR § 30(h)(i)(C)(II).

90. WAQSR § 30(h)(i)(C)(III)(2). The definition of “prompt” used by the Division will depend on the type of deviation most likely to occur and the applicable requirements. *Id.*

91. The certification must describe whether the compliance was continuous or intermittent, the method for determining compliance and other facts that the Division may require. WAQSR § 30(h)(iii)(E).

Operating permits will also contain provisions guaranteeing right of access for Division inspectors to inspect all equipment and to copy any records. WAQSR § 30(h)(iii)(B).

92. WAQSR § 30(h)(iii)(A). In fact, any reports submitted under the operating permit must be certified by a responsible official. WAQSR § 30(c)(iv). The definition of the “responsible official” certification is discussed *supra* note 48.

93. Other provisions relevant to operational flexibility for the source are the permit modification, amendment and revision provisions in WAQSR § 30(d). Because, as discussed *infra* note 105, EPA is in the process of significantly modifying these features, I have elected not to discuss revision procedures here.

94. WAQSR § 30(h)(i)(I).

95. WAQSR § 30(h)(i)(J).

96. WAQSR § 30(h)(i)(H).

The operational flexibility set forth in section 30 is no different than what is provided in the federal operating permit requirements. It remains to be seen how useful the provisions will be for facilities in Wyoming. At this point, some sources have proposed alternative operating scenarios in their applications.⁹⁷

A permit shield is another optional feature of the operating permit. Briefly stated, a permit shield provides that compliance with the permit will be deemed compliance with any "applicable requirement as of the date of permit issuance."⁹⁸ In simple terms, if the permit shield applies and a source violates a requirement that is not included as applicable in the permit, there is no enforceable violation. For the full force of the shield to apply, however, the permit must identify the applicable requirements or the Division must determine in writing that certain applicable requirements do not apply to the source and include a summary of the inapplicable requirements in the permit.⁹⁹

Permits that do not contain express permit shields are presumed not to provide the protection.¹⁰⁰ If a source wants to take advantage of the permit shield, it must request the shield.

THE PRESENT AND FUTURE FOR OPERATING PERMITS IN WYOMING

Even though Wyoming has yet to send its first operating permit to public notice, the Division is seeing substantial benefits from the program. Wyoming has received 210 applications for operating permits, approximately fifty to sixty more than expected.¹⁰¹ This indicates that the program is identifying facilities that have "fallen through the cracks" in the permitting process and perhaps have had uncontrolled sources of air pollution. The program is also leading to an overall reduction in emissions of air pollutants in Wyoming as sources reduce emissions to qualify as synthetic minors and as previously uncontrolled sources take steps to reduce emissions in order to comply with air quality standards.¹⁰² Finally, the emission fees are providing substantial funding, thereby reducing the Division's dependence on both Wyoming general funds and EPA funds.¹⁰³

97. Interview with Dan Olson, Operating Permits Program Manger for the Wyoming Air Quality Division, in Cheyenne, Wyoming (Jan. 19, 1996).

98. WAQSR § 30(k)(i).

99. WAQSR § 30(k)(i)(A)-(B).

100. WAQSR § 30(k)(ii).

101. Comments of Dan Olson, Operating Permits Program Manager, to the Wyoming Air Quality Advisory Board, January 17, 1996.

102. *Id.*

103. Division Administrator, Charles Collins, estimates that the emission fees will allow Wyo-

Emission fees not only require those responsible for the emissions of air contaminants to pay for the right to pollute, they provide another incentive for a source to reduce its emissions.

Upcoming changes to the operating permit program will alter its scope and impact. To maintain federal program approval, the Division must have authority to implement new applicable requirements as they develop. The Division is developing regulations consistent with section 112(I) of the CAA that will give Wyoming authority to implement MACT standards for hazardous air pollutants and regulations required for acid rain sources under Title IV of the CAA.¹⁰⁴ Changes in the federal requirements in 40 C.F.R. Part 70, if adopted by EPA, will require Wyoming to amend its program, particularly its requirements for permit revisions in section 30(d).¹⁰⁵

Given the potential for changes to the program and the early stage of the permit process, it is too soon to tell whether the operating permits themselves will achieve the objective of effectively consolidating air quality requirements in a single document and whether this, in turn, will result in greater compliance with air quality standards. There is no question that the duty to obtain an operating permit is a substantial obligation for the regulated community and that implementing the operating permit program places new demands on the Division. Yet, the basic framework is in place to develop an operating permit program where the benefits will eventually outweigh the burdens. For the first few transitional years of the program, this may not be apparent to either the regulated community or the Division.

ming to use 75% less state and federal funds. Comments to the Wyoming Air Quality Advisory Board, January 17, 1996.

104. The Division proposed a new section 33, National Emission Standards for Hazardous Air Pollutants, a new section 34, Acid Rain Program, and revisions to section 30 at the September 14-15, 1994 Air Quality Advisory Board meeting. See *supra* note 6 for section 30 revisions needed for final EPA program approval.

105. 60 Fed. Reg. 45530 (Aug. 31, 1995). In August 1994, EPA proposed changes to the permit revision process that were immediately rejected by permitting agencies and industry. *Id.* at 45531. EPA's pending proposal is intended to streamline the revision process so that industry will have the flexibility to respond to market conditions consistent with operating permit requirements. *Id.*