Appendix A. Copies of all written comments

northwest Clean Air agency

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September 17, 2015

Margo Thompson
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Thompson:

Proposed Amendments
Chapter 173-401 WAC Air Operating Permit (AOP) Regulation

This letter is in support of Ecology's proposed amendments to WAC 173-401, which were published for comment on August 2, 2015. The Northwest Clean Air Agency (NWCAA) appreciates this opportunity for involvement with the rulemaking.

The NWCAA is fully supportive of Ecology's proposed amendments to this regulation. In particular, we support the proposed amendments making the language in WAC 173-401-300 more clear and consistent with the EPA's Title V program language (found in 40 CFR Part 70 for state/local programs) with regard to Title V permits for nonmajor sources.

We believe that the proposed amendment to WAC 173-401-300 is necessary because the language in the current rule may raise questions as to whether an agency has the authority to issue a Title V permit for a nonmajor source in the manner discussed in 40 CFR Part 70. Specifically, 40 CFR 70(c)(2) states: *"For any nonmajor source subject to the part 70 program..., the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program."*

The current language in WAC 173-401-300 is unclear as to whether a permitting authority can issue a Title V permit for only the emission unit(s) that cause the source to be subject to Title V; or, whether the Title V permit must include other emission units located at the source. For nonmajor sources, EPA's Title V program language (40 CFR Part 70) allows for Title V permits for just the emission unit(s) that cause the source to be subject to Title V. We are concerned that the lack of clarity in WAC 173-401-300 with regard to the language in 40 CFR 70(c)(2) may lead to future misunderstandings about NWCAA's ability to issue such permits. NWCAA supports Ecology's proposed amendments to WAC 173-401-300 as they provide the necessary clarity.

We are aware of concerns that these proposed changes will limit the ability of agencies in Washington to include all of the emission units at a source that is nonmajor in the source's Title V permit. We disagree and think that the proposed language in WAC 173-300(3) does not limit an agency from including other emission units onsite in a Title V permit. The proposed language

states what shall be included in the permit for non-major sources. It does not exclude other emission units. We interpret that language to be the minimum requirement and thus, an agency could include additional emission units onsite in the permit and identify the purpose for that inclusion in the permit's statement of basis.

The proposed clarification to WAC 173-401-300 is also consistent with other recent EPA rulemaking actions which discussed the Title V requirements related to non-major sources. Examples of this include non-major secondary lead smelters (Federal Register, December 19, 2005) and the federal plan adoption for commercial-industrial solid waste incinerator (CISWI) units (Federal Register, October 3, 2003). The final rulemaking publication for sewage sludge incinerator units NSPS/Emission Guidelines (40 CFR 60, Subpart(s) LLLL/MMMM) also referred to the CISWI rulemaking citation referenced above for Title V requirements.

We appreciate the opportunity to provide comments on the proposed amendments. If you have questions about these comments, please feel free to contact me at 360-419-6834 or Agata McIntyre at 360-419-6848.

Sincerely,

Mark Asmundson

Mark Asmundson
Executive Director

Ebio, Tina (ECY)

From: G Brewer PTAW <ptawdirector@mailhaven.com>
Sent: Friday, September 18, 2015 5:06 PM
To: ECY RE AQ Rulemaking and SIPs
Subject: Comments - WAC 173-401 proposed amendments, 9-18-2015
Attachments: GBrewer comments re Ecy proposed AOP Amendments worksheet.xlsx; Crossroads for Federal Enforcement of the Clean Air Act.pdf

From: Gretchen Brewer, Director, PT AirWatchers

PO Box 1653, Port Townsend WA 98368

ptawdirector@mailhaven.com

To: AQComments@ecy.wa.gov

Attn: Margo Thompson

PO Box 47600

Olympia, WA 98504-7600

Date: September 18, 2015

Re: Proposed amendments to Chapter 173-401 WAC, Operating Permit Regulation

To Whom It May Concern:

Attached is a spreadsheet with my comments on specific proposed amendments to Chapter 173-401 WAC, Operating Permit Regulation.

Some highlights here:

My understanding is that some of the changes may serve to weaken federal enforceability of CAA laws. My understanding is also that federal enforceability serves as a "backstop" to enforcement by the State and other delegated agencies. If so, then it is critical to maintain that enforceability, full strength.

For a discussion on the importance of federal enforceability, please see an analysis by attorney Jocye M. Martin in "Crossroads for Federal Enforcement of the Clean Air Act", Duke Environmental Law & Policy Forum, Vol 6:77, 1996, quoted in part here, and attached:

Federal enforceability of state requirements, limits and controls serves important goals of the CAA:
1. Federal enforceability ensures that sources accurately determine if they are "major sources."

2. Federal enforceability provides a level playing field for industries and states and an important backstop to state and local enforcement efforts.

Many states recognize the role politics plays in environmental enforcement decisions and refer politically difficult cases to the EPA. One example is Marine Shale, the nation's largest incinerator of hazardous waste, who had operated for several years without air permits (as well as without waste and water permits). In 1986, Marine Shale applied to the State of Louisiana for a state operating permit. Louisiana granted the permit with limits of 89 tons per year (tpy) for carbon monoxide and 0.22 tons per year of nitrous oxide (NOx). Marine Shale's actual emissions were 250 tpy for carbon monoxide and over 1,000 tpy for NOx. The inability of the state to issue a credible permit caused the EPA to use its federal enforceability power to file an enforcement action in 1993.

3. Federal enforceability ensures that citizens will be able to enforce controls and limits. Citizen enforceability is intrinsically tied to federal enforceability and was seen by Congress as vitally important to the success of the CAA. 69

4. The requirement that provisions be federally enforceable provides meaningful incentives for compliance with CAA requirements. Even where state and local controls are technically sound and enforceable as a practical matter, there may not be sufficient incentive for sources to comply with those controls absent federal enforceability.

See spreadsheet for other concerns which include the audit process, audit committee composition.

Thank you for your attention,

Gretchen Brewer, PT AirWatchers

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Date September 18, 2015
See also Cover letter of G. Brewer

Comments Re Proposed amendments to Chapter 173-401 WAC, Operating Permit Regulation

Comment # assigned in Ecology's response to comments	ROW	WAC Section	Topic	Text, etc.	Note	My Comments	Additional comments
	1	WAC 173-401-200					
#3	2	(35)(a)	GHG-exemption, limitation	Definitions (35)(a) Subject to regulation	"under this chapter ... and the source is otherwise required to have an operating permit"	This section is problematic. If not here, then where will GHGs be regulated/limited? The AO date (July 1, 2011) should be eliminated - limits and oversight should apply regardless of when the facility was built; and likewise whether or not the facility is otherwise required to have an AOP.	
	3						
	4	WAC 173-401-300 Applicability	[of WA clean air laws and air operating/pollution permit program]				
	5	(1)(d)	Deferral until 2004= done/Irrelevant	Applicability (1)d -Deferral			
#4	6	(2)(a)(i), (II)	Changes how the law applies to non-major sources	Applicability (2) Source category exemptions (a) [non-major sources](i) tll Ecy completes a rulemaking re WHETHER & WHICH facilities ; (ii) til Ecy structures the program	q.v.	What is the effect of this change? We desire to see non-major sources held to at least the same standards as major sources.	
	7	(2)(b)	Fixes obvious typo=fine	EPS->EPA		Fixes obvious type=fine	
#5	8	(2)(d) (ii)	61.145 -> 61.145			No change, therefore what's the point? Please clarify.	
#6 & #7	9	(3)(a), (b)	Segments units at non-major sources	"For major sources ... For any nonmajor source..."		For non-major sources, rule should be same as (3)(a) as for major sources; should include emissions in the aggregate (facility wide), as well as less significant units. To do otherwise invites segmenting the operations to avoid regulation and the need to do better than pollution limits (i.e., invites gaming the system).	Three concerns: (1) exclusion of significant pollutants; (2) low enough triggers for inclusion;(3) trigger for combined amount of pollutants. (1) For non-major sources, does (b) exclude pollutants that may be significant (should be watched) even though they did not trigger inclusion? (2& 3) for non-major sources, are facility-wide emissions of a given pollutant or pollutants in total a trigger or is inclusion based on emissions of individual emission units? If the latter, does it allow or encourage "segmenting" to avoid regulation?
	10	(5)(a)	Fixes obvious typo=fine			No opinion.	
#8	11	(5)(b)	changes "class A or class B" TAPs to "any TAPs"			If it allows inclusion of more pollutants, then good. Or is the result/effect something else? Pls clarify.	
#9	12	(5)&ff	Threat to public health or welfare	(5) Process for determining threat to public health or welfare.		**Should have a provision for including the real effects on real people. When can we have such a provision? For instance, localy we have an area major source polluter - a kraft pulp mill - that is already included in the program, and thank you for that. However, the numbers don't tell a story that's protective of public health or welfare. The mill has a known and extensive history of complaints by citizens, a rich history of causing people ill or diminished health, yet according to modeling and measuring that's been done to date, everything is JUST FINE. Our experience, however, is that it IS NOT. The numbers are not helping us: we are still being made sick. Our real experiences need to be considered when regulating a pollution source. Now is a perfect time to include such a provision. Please do so.**	

Comments of	Gretchen Brewer, Director, PT AirWatchers PO Box 1653, Port Townsend WA 98368 ptawdirector@mailhaven.com		To: Attention:	AQComments@ecy.wa.gov Margo Thompson o PO Box 47600 o Olympia, WA 98504-7600			
Date	September 18, 2015						
See also	Cover letter of G. Brewer						
Comments Re	Proposed amendments to Chapter 173-401 WAC, Operating Permit Regulation						

Comment # assigned in Ecology's response to comments	ROW	WAC	Section	Topic	Text, etc.	Note	My Comments	Additional comments
#10	13		(7)&ff		(7(&ff [Re] Enforceable limits	out: "Federally" in: "Legally and practicably"	**What does it mean to be "legally & practicably" enforceable? What effect will this have on Ecy's, EPA's and citizens' ability to enforce compliance? Please clarify the intent and expected effect of the change. If this change, and similarly throughout, diminishes the federal backup to state enforcement of clean air laws, then it is detrimental to the intent of the clean air laws and should be rejected. If the change is to enhance state, local and/or citizen enforceability, then please include wording somewhere to explicitly maintain the federal backstop. If this change or any other diminshes or throws into question federal enforceability, please include wording somewhere to explcitly maintain the federal backstop.**	
#11	14		(7)(b)(i)	orders "at the request of the owner or operateor"	(7)(b)(i) Regulatory orders		Is it accurate that WAC 173-400-091 restricts such conditions to lower pollution levels than already allowed? If so, then, that would appear benefit cleaner air. Would that owners so request being held to better standards. Does this happen? "Upon request of the owner or operator" is a good limit against arbitrary abuse by regulators.	ASK ABOUT THIS!!
#12	15		(7)(b)(ii)	removes reference to SIP	NOC			ASK ABOUT THIS!!
#13	16		(7)(b)(iii)	removes "following EPA approval..."	General Permits		This Federal enforcement backstop MUST be maintained!	
	17							
	18	WAC 173-401-510 Permit application form.						
#14	19		(1)	exempts "unregulated emissions units at nonmajor sources, [etc.]"	Standard Application Form		Again, if the emissions at a nonmajor source considered in total would kick it above the minimum regulated levels, then it should have oversight.	
	20							
	21							
	22	WAC 173-401-531 Thresholds for hazardous air pollutants.						
#15	23			General comment:			When will the precautionary principle be implemented? It's time.	
	24							
	25							
	26	WAC 173-401-630 Compliance requirements.						
#16	27		(5)(c)(v)	Compliance certification: owner/operator must be proactive			Good addition, to direct owner/operators to be proactive in providing any additional relevant information.	
	28							
	29							
	30	WAC 173-401-724 Off-permit changes.						
	31		(3)	Appendix A -> WAC 173-401-530 (re IEUs)			no opinion.	
	32							
	33							
#17	34	WAC 173-401-800 Public involvement.						

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Comment # assigned in Ecology's response to comments	ROW	WAC	Section	Topic	Text, etc.	Note	My Comments	Additional comments
	35		(2)(b)	Public Notice			Nice change in public notice requirement. Two examples in our experience of why we appreciate this change: (1) on at least one occasion we learned of publication -- only on Ecology's permit register -- AFTER comment closed (it was subsequently remedied); (2) in another proceeding (by another agency, but a good example), notice was posted in a small newspaper local to the activity but about 100 miles from where the main affected population lived, and was only discovered by accident. So we appreciate anything that makes the public notice more readily evident to the affected population.	
	36							
	37							
	38	WAC 173-401-820 Review by affected states.						
	39						[No change.]	
	40							
	41							
	42	WAC 173-401-900 Fee determination—Ecology.						
#18	43		(1)-(5)(b)				On first blush looks like good addition.	ASK ABOUT THIS!!
	44		(5)(c)	Federally->Legally & practicably enforceable limits			See comments above re changing Federally to Legally and practicably	
	45							
	46	WAC 173-401-920 Accountability—Ecology and delegated local authorities.						
#19	47		(1)(c)	includng data for determination			Good, that enhances transparency.	
#19	48		(3)	Performance audit-total replacement			This proposed change severely weakens the value of the audit: the proposals focus on billing, financial efficiencies and making sure that performance boxes are checked. In contrast, the existing audit asks relevant questions like: " (A) Is permitting authority issuing quality permits? (B) Is permitting authority issuing/renewing permits in timely fashion? (C) Is permitting authority ensuring that sources are in compliance with terms and conditions of permit?" And most importantly: "(D) Is permitting authority effectively using operating permit as a tool for securing environmental improvements?" It makes sense that the audit committee or the public should have a means to request a more intensive audit (proposed 4(b)), but a regular audit that answers these and other questions in the existing audit program SHOULD be conducted with reasonable frequency as a matter of course.	

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Comment # assigned in Ecology's response to comments	ROW	WAC	Section	Topic	Text, etc.	Note	My Comments	Additional comments
#19	49		existing (3)(c), (d)		Existing (3)(c) Annual random individual permit review and (d) Periodic extensive performance audits		These two existing provisions are chock full of relevant audit concerns centering on the key question: "(3)(d)(xiii)(D) Is permitting authority effectively using operating permit as a tool for securing environmental improvements?" The audit process should address fiscal efficiencies, but the focus needs to be on environmental improvements. Re Random review of permits: Permits from every department that writes permits should be reviewed at some point in the review cycle to ensure that the permits that they write are structured to effectively carry out the law and the mission of environmental improvement. Our question is, have improvements been made to the way any of Ecology's permits are written as a result of these audits? If Ecology throws out (or weakens) this part of the audit, what better way do you propose to ensure that permits are written timely, efficiently and in a way that enhances enforceability and environmental benefit?	
#19	50		(4)(b)	(Proposed) Intensive audit			(4) Overview and intensive audits: (4)(a) overview audit: seems to focus mainly on billing, financial efficiencies and checking off boxes. Intensive audit: Even the intensive audit does not address how well permits are written or enforced, or how effective they are in carrying out the mission of enhancing a cleaner environment.	
#19	51		(4)(b)(ii)	(Proposed) public req. for intensive audit			Thank you for including a clear avenue for the public to make a request.	
#19	52		(4)(b)(iii)	(Proposed) every six years or less			For an audit focusing on fiscal concerns around a given department or part of the program, once every six years might be enough (depending on outcome); to focus on actual content and effectiveness of permits and permitting, once every six years might be enough for a given permit, but is insufficient to review different permits written in different departments.	
#19	53		(4)(d)(iii)	(Proposed) Audit report			Report posted on website should be easy to locate by an average member of the public. Overall web design should enable this. Notice of report(s) with link should be sent to Ecology's mailing lists.	
#19	54		(5)	(Proposed) AOP audit advisory committee			I appreciate the detail about formation, mandate, composition and conduct of the committee.	
#19	55		(5)(e)(iv)	(Proposed) Audit advisory committee			Beyond being "desirable", one or more representatives of environmental groups(s) absolutely should be required. These are the people who spend significant amounts of time and energy observing real world consequences of policy put into action, and thus represent a necessary knowledge base for performing an accurate performance audit on permits.	
	56							
	57							
#20	58	WAC 173-401-925 Source data statements and petition for review of statements—Ecology and delegated local authorities.						
	59		(2)	"conclusions" -> "observations"			What is the effect of this change?	
	60							

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Comment # assigned in Ecology's response to comments	ROW	WAC	Section	Topic	Text, etc.	Note	My Comments	Additional comments
	61							
#21	62	WAC 173-401-935 Development and oversight remittance by local authorities—Ecology and delegated local authorities.						
	63		(2)			From 2 payment installments to a single one, from local authority to Ecology	No opinion.	
	64							
#22	65	WAC 173-401-940 Fee eligible activities—Ecology and delegated local authorities.						
	66		1(q)			Adds fee for assistance to small businesses. cf RCW 70.94.162	Fees to small business should be low enough to not create an obstacle to participation, and/or on a scale that diminishes rapidly as the size (perhaps in terms of $$) of the business decreases.	
	67							

-----END OF LIST-----

CROSSROADS FOR FEDERAL ENFORCEMENT OF THE CLEAN AIR ACT

JOYCE M. MARTIN*

A major goal of the Clean Air Act[1] (hereinafter CAA or "Act") is to "protect and enhance the quality of the Nation's air resources."[2] The Act uses a two tiered approach to accomplish this goal. First, the Act focuses on the national attainment and maintenance of National Ambient Air Quality Standards (NAAQS) for "criteria" pollutants,[3] and second, the Act also sets specific standards for known hazardous air pollutants (HAPS)[4]. The Act emphasizes throughout its text that air quality problems are national in scope and often cross state boundaries.[5]

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* The author is Director of the Office of Legal Counsel, Indiana Department of Environmental Management (IDEM) and teaches environmental law at the Indiana University School of Law—Indianapolis. She was on temporary assignment with the Air Enforcement Division, Office of Enforcement and Compliance Assistance, Environmental Protection Agency (EPA) in Washington, D.C. from July 1995-January 1996. The views expressed in this article are those of the author and not of IDEM or EPA.

1. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

2. 42 U.S.C. § 7401(b)(1) (1988).

3. 42 U.S.C. §§ 7407-7409 (1988 & Supp. V 1993). Criteria pollutants are defined as pollutants that "endanger public health or welfare" and result "from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1) (1988). The Clean Air Act required the Environmental Protection Agency (EPA) to set national ambient air quality standards (NAAQS) for six identified pollutants: ozone, carbon monoxide, particulate matter (PM-10), lead, sulfur dioxide and nitrogen dioxide. 42 U.S.C. §§ 7407-7409 (1988 & Supp. V 1993).

4. Hazardous air pollutants (HAPs) (also called "toxic air pollutants" or "air toxics") can cause serious illness or death. The Clean Air Act required the EPA to establish national emission standards within six (6) months for each pollutant the agency lists as a hazardous air pollutant. 42 U.S.C. § 7412(b)(1)(A)-(B) (1988).

5. *See* 42 U.S.C. §§ 7401(b)(1) (1988); 42 U.S.C. § 7470 (1988 & Supp. V 1993). Both the legislative history of the Clean Air Act of 1970 and the Clean Air Act Amendments of 1990 reflect this understanding.

Congress clearly intended that enforcement of programs to improve air quality be a cooperative effort of state and federal governments.[6] Courts also have recognized for decades the necessity of a federal enforcement presence in the effort to improve air quality nationally. As the D.C. Circuit Court noted,

> EPA . . . is the ultimate supervisor, responsible for approving state plans and for stepping in, should a state fail to develop or to enforce an acceptable plan. . . . EPA is to ensure national uniformity where needed, for example, to ensure that states do not compete unfairly for industry by offering air quality standards that are too lax to bring about needed improvement in the air we breathe.[7]

An important component of many federal environmental laws is federal enforceability. The federal enforceability[8] of state air quality limitations or controls on sources requires that the Administrator of the EPA, not solely state or local authorities, enforce emission requirements. Citizens also have the right to enforce federally enforceable provisions under the Act.[9] To be considered federally

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> The Clean Air Act . . . recognizes that primary responsibility for control of air pollution rests with State and local government. . . . If the Secretary should find that a State or local air pollution control agency is not acting to abate violations of implementation plans or to enforce certification requirements, he would be expected to use the full force of Federal law. Also, the Secretary should apply the penalty provisions of this section to the maximum extent necessary . . . .

S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970). "Air pollution recognizes no State or international borders. Aggressive controls in down-wind areas will do little to improve air quality if the quality of air entering the region is poor." S. Rep. No. 228, 101st Cong., 1st Sess. 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3389.

6. S. Rep. No. 228, *supra* note 5, at 3, *reprinted in* 1990 U.S.C.C.A.N. at 3389.

7. Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983).

8. The term "federally enforceable" is defined at three (3) places in the Federal Register. The definitions are identical:

> *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 C.F.R. parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 C.F.R. 52.21 or under regulations approved pursuant to 40 C.F.R. part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

40 C.F.R. §§ 51.165(a)(1)(xiv), 51.166(b)(17), 52.21(b)(17) (1995).

9. 42 U.S.C. § 7604 (1988 & Supp. V 1993). While state law may provide authority for citizens to enforce environmental provisions, many do not provide incentives for citizens to pursue enforcement. *See, e.g.*, IND. CODE ANN. § 13-6-1 (Burns 1990 & Supp. 1995)

enforceable, a permitting program must first be approved by the EPA as part of a State Implementation Plan (SIP) and include provisions for public participation. A federally enforceable requirement must have gone through a public participation process and must be enforceable as both as practical matter and as a legal matter.[10] The factors that comprise practicable enforceability are: specific applicability; reporting or notice to the permitting authority; specific technically accurate limits; specific compliance monitoring; practicably enforceable averaging times and clearly recognized enforcement.[11] The practical enforceability requirement ensures that limitations and controls are of sufficient quality and quantity to ensure accountability, *i.e.,* that federal authorities have the data and resources necessary to take enforcement action.[12] "Legal enforceability," on the other hand, means that the federal authorities have both the jurisdiction and the statutory or regulatory authority necessary to take enforcement actions. Federal enforceability is a provision of longstanding importance in the air regulatory system.

The structure of the Act also reveals the legislative intent of Congress to prevent a "rush to the bottom" where states compete for industry by offering lower environmental controls than those of their neighbors.[13] Federal enforceability of nationally applicable minimum

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(authorizing citizen suits, but not providing attorney fees for citizens who bring a citizen suit and prevail).

10. Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air Enforcement; Alan W. Eckert, Associate General Counsel for Air Enforcement; John Seitz, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, to Regional Administrators, Regions I-X et al. 1-2 (September 23, 1987) (on file with the *Duke Environmental Law and Policy Forum*).

11. Specific applicability means that the rule or permit designed to limit potential to emit must clearly identify the categories of sources that qualify for the rule's coverage. Reporting or notice to permitting authority indicates that the permittee should be required to provide specific reporting and monitoring information to the permitting authority. Scientific technically accurate limits are those that clearly specify the limits that apply, include the specific associated compliance monitoring and identify any allowed deviations. Specific compliance monitoring means that any rule concerning monitoring must state the monitoring requirements, recordkeeping requirements and test methods as well as clarify which methods are approriate for making a direct determination of compliance with potential to emit limitations. Memorandum from Kathie A. Stein, Director, Air Enforcement Division, to Director, Air, Pesticides & Toxics Management Division, Regions I & IV et al. 5 (January 25, 1995) (on file with the *Duke Environmental Law and Policy Forum*). *See also* S. Rep. No,. 228 *supra* note 5, at 195, 355, *reprinted in* 1990 U.S.C.C.A.N. at 3580, 3738.

12. *See* 54 Fed. Reg. 27,274 (1989). *See also* Stein, *supra* note 11 (memorandum at 2).

13. The legislative history of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, confirms that Congress intended for requirements to set a minimum standard to be met by all states to reduce economic competition between the states. H.R.Rep. No. 294, 95th Cong., 1st

standards also reduces the chance that industry will move from states that are actively controlling pollution to those with more relaxed standards. Section 113 of the Act expressly provides authority for federal enforcement of certain state requirements.[14]

Recent appellate cases[15] and congressional bills and proposals suggest that this important tool, federal enforceability, may be at risk. While all federal enforcement has not been challenged, the federal enforcement controls that limit emissions of a source below major thresholds is a current target of regulated industry. Any limitation on federal enforceability in that context could lead to even greater restrictions on federal enforceability in the future.[16]

This article argues that federal enforceability of the limits and controls which allow sources to avoid "major source" status has been critical to both achieving the legislative purposes[17] of the Act and to maintaining and improving air quality and should be preserved.[18] Part I explains the history and purposes of federal enforceability, as well as discussing the major programs affected by it. Part II describes the areas in which challenges to federal enforceability have recently occurred. Part III offers several possible agency reactions in response to court decisions on federal enforceability that would retain the benefits of federal enforceability while creating more flexibility for states and industries in the implementation of several important air programs.

Sess. 140 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1219.

14.

> The Administrator shall . . . in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both . . . .

42 U.S.C. § 7413(b) (Supp. V 1993).

15. *See infra* notes 21-44 and 77-98 and accompanying text.

16. *E.g.*, the title V operating permit program will be an all encompassing permit program and, as currently structured, requires that permits contain federally enforceable requirements. *See infra* notes 40-42 and accompanying text.

17. *See* 54 Fed. Reg. 27,274 (1989).

18. *See infra* notes 29-55 and accompanying text.

I. BACKGROUND: FEDERAL ENFORCEABILITY

A. *Programs in which Federal Enforceability Exists*

Federal enforceability of controls allows a source to avoid "major source" status. This currently exists in three (3) important air programs:

1. In the hazardous air pollutant (HAP) program,[19] the calculation of a source's effective controls in limiting its "potential to emit"[20] (PTE) for purposes of determining if it is a "major source"[21]
2. In the new source review (NSR) program in nonattainment[22] areas and the prevention of significant deterioration (PSD)[23] program in attainment areas, the calculation of a source's effective

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19. 42 U.S.C. § 7412 (Supp. V 1993). Under the CAA, "major sources" of hazardous air pollutants (HAPs) are potentially subject to stricter regulatory control than are "area sources." The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, ten (10) tons per year or more of any HAP or twenty-five (25) tons per year or more of any combination of HAPs. The Administrator (of the EPA) may establish a lesser quantity . . . for a major source . . . on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors. 42 U.S.C. § 7412(a)(1) (Supp V 1993). An "area source" is "any stationary source . . . that is not a major source," and does not include "motor vehicles or nonroad vehicles subject to regulation under [42 U.S.C. §§ 7521-7590]." 42 U.S.C. § 7412(a)(2) (Supp. V 1993).

20. "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is FEDERALLY ENFORCEABLE. Secondary emissions do not count in determining the potential to emit of a stationary source. 40 C.F.R. §§ 51.165(a)(1)(iii), 51.166(b)(4), and 52.21(4) (1995) (emphasis added).

21. Major sources are those sources whose emissions of air pollutants exceed threshold emission levels specified in the Act. Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards and Robert Van Heuvelen, Director, Office of Regulatory Enforcement, to Director, Air, Pesticides and Toxics, Management Division, Regions I and IV et al. 1 (January 25, 1995) (on file with the *Duke Environmental Law and Policy Forum*). For the regulatory definitions of "major source," *see infra* note 36.

22. 42 U.S.C. § 7503 (1988 & Supp. V 1993). Areas that are designated as nonattainment for a national ambient air quality standard (NAAQS) must meet certain requirements aimed at achieving the NAAQS in those areas. *See* 40 C.F.R. § 51.165(a) (formerly 40 C.F.R. §§ 51.18(j) and 52.24) (1995). The new source review program refers to permitting programs for new or modified sources in attainment and nonattainment areas.

23. 42 U.S.C. § 7475 (1988). The PSD program refers to requirements that must be met in an area designated as being in attainment of a NAAQS or as unclassifiable. *See* 40 C.F.R. §§ 51.166, 52.21 (1995).

controls in limiting its PTE for purposes of determining if it is a "major source;" and

3. In the Title V[24] operating permit program established by the Clean Air Act Amendments of 1990 (hereinafter CAAA of 1990 or "Amendments"),[25] the determination of "major source" status for inclusion in the program.

Industry groups who opposed federal enforceability challenged the final agency rules implementing the first two programs in the District of Columbia (D.C.) Circuit Court of Appeals. The court reached decisions in both cases in the summer of 1995.[26] The cases are discussed in detail in Part II of this Article. Additionally, the federal enforceability of some Title V permit conditions have been challenged by riders inserted by a House Subcommittee on the EPA's appropriations bill and in other congressional bills. As part of a broader litigation over rules implementing the Title V operating permit program,[27] the legality of requiring federal enforceability of terms, conditions and limits of Title V permits has been raised.[28]

B. *History of Federal Enforceability in the Clean Air Act*

The CAA establishes state implementation of air quality improvement programs with federal oversight of those programs. The primary mechanism for ensuring the integrity of this structure is the State Implementation Plan (SIP) through which each state is required

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24. 42 U.S.C. §§ 7661-7661f (Supp. V 1993). Not all terms and conditions in a state or locally-issued title V permit are federally enforceable (states may include state-only terms and conditions pursuant to 42 U.S.C. § 7661e(a) (Supp. V 1993)). Only those terms and conditions that are listed in the permit as federal applicable requirements are federally enforceable. However, many of the critical requirements are federal and, therefore, federally enforceable. *See* 42 U.S.C. §§ 7661(2), 7661a(a), and 7661c(a) (Supp. V 1993).

The legislative history of the CAAA of 1990 states that "[o]perating permits are needed to: (1) better enforce the requirements of the law by applying them more clearly to individual sources and allowing better tracking of compliance, and (2) provide an expedited process for implementing new control devices." S. Rep. No. 228, *supra* note 5, at 346, *reprinted in* 1990 U.S.C.C.A.N. at 3729.

25. CAAA of 1990, Pub. L. No. 101-549, 104 Stat. 2339 (codified as amended 42 U.S.C § 7429-7671q (Supp. V 1993)). The Amendments were signed into law by President Bush on November 15, 1990.

26. Chemical Mfrs. Ass'n. v. EPA, 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516) (CMA); National Mining Ass'n. v. E.P.A., 59 F.3d 1351 (D.C. Cir. 1995) (National Mining).

27. 42 U.S.C. §§ 7661-7661f (Supp. V 1993).

28. Clean Air Act Implementation Project v. EPA, No. 92-1303 (and consolidated cases) (D.C. Cir. 1995).

to develop a specific plan for accomplishing the Act's air quality goals within its borders.[29] In effect, the SIP dictates how the NAAQS are to be achieved in a particular state. The Act requires the SIP to establish control strategies for reducing emissions and to demonstrate that the measures proposed would actually achieve NAAQS.[30] A SIP must be approved by the EPA prior to its enactment, and the EPA retains an active role in revisions to the SIP.

Since the CAA was enacted in 1970, federal enforceability of limits, controls, and conditions has been widely accepted by states and regulated industries. If a pollution source wanted to avoid "major source" status by limiting its potential to emit to "minor" levels, those self-imposed controls or limitations had to be federally enforceable. However, EPA regulations, rather than the Clean Air Act itself, impose the requirement of federal enforceability. For example, the regulations state that: "[a] source may generally be credited with emissions reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below baseline levels . . . , if such reductions are permanent, quantifiable and *federally enforceable* . . . ." (emphasis added). [31]

In August 1980, however, the EPA extensively revised its regulations concerning preconstruction review of new and modified sources in response to the D.C. Circuit case, *Alabama Power Company v. Costle.*[32] Plaintiffs challenged, among other items, the EPA's plan to calculate potential to emit without considering controls installed on sources. In *Alabama Power*, the court held that the EPA's calculation had to consider such controls.[33]

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29. "Each state shall . . . adopt and submit to the Administrator, . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." 42 U.S.C. § 7410(a)(1) (Supp. V 1993).

For a further explanation of State Implementation Plans, *see* Stein, *supra* note 11 (memorandum at 5).

30. 42 U.S.C. § 7410(a)(1) (Supp. V 1993).

31. 40 C.F.R. Pt. 51, App. S (IV)(a)(3)(i) (1995).

32. 636 F.2d 323 (D.C. Cir. 1979).

33. *Id.* at 355. *See also* 45 Fed. Reg. 52,676 (1980) for the five (5) sets of regulations that resulted from those revisions:

(1) 40 C.F.R. §§ 51.165 (a) and (b) (formerly 40 C.F.R. §§ 51.18(j) and (k)) specify the elements of an approvable state permit program for preconstruction review in, or affecting, a nonattainment area;
(2) 40 C.F.R. § 51.166 (formerly 40 C.F.R. § 51.24) specifies the minimum requirements that a PSD program must contain to warrant approval by the EPA as a revision to a SIP under section 110 of the Act;

In the fall of 1980, numerous organizations petitioned the D.C. Circuit Court of Appeals for review of various provisions of the NSR regulations.[34] the EPA entered into a settlement of the case and the court subsequently entered a judicial stay, pending implementation of the settlement agreement.

As part of the settlement, the EPA agreed to propose certain amendments to eight parts of the regulations pertaining to NSR, to provide guidance in three additional areas, and to take final action on the proposals.[35] On August 25, 1983, the EPA published a notice of proposed rulemaking in accordance with that agreement.[36] The EPA proposed deleting from certain provisions[37] the requirement that controls or limitations on a source's emissions must be "federally enforceable" to be considered in determining whether a new or modified source would be "major"[38] and, therefore, subject to NSR

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(3) 40 C.F.R., Pt. 51, App. S, specifies the nonattainment area emissions offset interpretive ruling;
(4) 40 C.F.R. § 52.21 establishes the federal PSD program; and
(5) 40 C.F.R. § 52.54 sets out the construction moratorium that applies in certain nonattainment areas.

34. Chemical Mfrs. Ass'n. v. EPA, 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516).

35. The settlement of CMA is discussed in the preamble to the EPA's final rules on HAPS 54 Fed. Reg. 27,274, 27,274 (1989). The final settlement agreement was entered into on February 22, 1982.

36. 48 Fed. Reg. 38,742 (August 25, 1983).

37. The provisions were five sets of PSD and nonattainment regulations at 40 C.F.R. §§ 51.24, 52.21, App. S, Pt. 51, 51.18(j), and 52.24 that defined "major stationary source" as any source that would have the potential to emit certain amounts of air pollution, *e.g.*, 40 C.F.R. § 52.21(b)(1). Each provision of the regulations defined "potential to emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." *See, e.g.*, 40 C.F.R. 52.21(b)(4). However, these controls would only limit potential to emit if the limitation is federally enforceable. *See, e.g.*, 40 C.F.R. § 52.21(b)(4).

38. "Major source" is defined differently for hazardous air pollutants and criteria pollutants. Hazardous air pollutants:

> The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons or more per year of any combination of hazardous air pollutants.

42 U.S.C. § 7412(a)(1) (Supp. V 1993).
Criteria pollutants:

> "[M]ajor stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant . . . .

requirements.[39] The proposed rule was subject to comments by all interested parties.

After receiving comments, on June 28, 1989, the EPA published a final rule on that part of the August 25, 1983 proposal dealing with "federal enforceability" of emission controls and limitations.[40] In this 1989 rulemaking, the EPA retained the existing federal enforceability requirement and merely clarified its regulation to specify the situations in which provisions of a state operating permit program would be treated as federally enforceable.[41] A rationale for federal enforceability was provided in the preamble to the June 28, 1989 Federal Register notice.[42] The major arguments advanced in the preamble in favor of retaining federal enforceability were that federal enforceability ensured that: (1) limits accepted during applicability determinations are really intended to be observed; (2) industries and states operate on a "level playing field"; (3) there is an effective backstop to state enforcement efforts; (4) citizens are able to enforce controls and limits; and (5) there are meaningful incentives for compliance.[43]

The EPA was sued by various industry groups over the federal enforceability provisions of these final rules in 1989.[44] Before that suit could be settled or resolved, Congress enacted the CAAA of 1990. Resolution of the *CMA* case was delayed by the court pending implementation of the Amendments.

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42 U.S.C. § 7602(j) (1988).

39. The EPA also proposed to delete a requirement that emissions reductions be obtained by one (1) source from another (offsets) to obtain a nonattainment permit that was federally enforceable. New emissions of a potential major source in a nonattainment area are required to be offset by emission reductions elsewhere. 42 U.S.C. § 7503(c)(1) (Supp. V 1993).

40. 54 Fed. Reg. 27,274 (1989).

41. *Id.* While the settlement agreement in the *CMA* case required that the EPA take comment on the possible deletions of federal enforceability, final adoption of a rule must follow the procedures of the Administrative Procedures Act, 5 U.S.C. §§ 551-551 (1994), and cannot be dictated through a settlement. Comments are received on a proposed rule and the final rule must be responsive to those comments. In this case, the EPA argued that comments received required it to promulgate rules retaining federal enforceability. *See* Fed. Reg. 27,274, 27,277 (1989).

42. *Id.* at 27,277-27,280. *See infra* pp. 10-15 and accompanying notes for a discussion of the rationale of federal enforceability.

43. *Id.*

44. Chemical Mfrs. Ass'n. v. EPA, 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516) (CMA case).

The CAAA of 1990 created an operating permit program through Title V of the Act.[45] The goal of the Title V permit program was to assemble in one document, the operating permit, virtually every standard, limitation, condition, or requirement specifically applicable to a source. Federal enforceability of limits, controls and conditions was incorporated as a basic component of the Title V permit program.[46]

Construction permits for new or modified sources of HAPs will be incorporated as part of the Title V operating permit program.[47] In August 1993, the EPA proposed a rule establishing general procedures for emission standards for all hazardous air pollutants.[48] The final "general provisions" rule was published on March 16, 1994.[49] Both the proposed and the final rule indicated that federal enforceability of controls on potential to emit would be required. Several interested industry groups challenged this rule in a separate litigation.[50]

In a January 25, 1995 memorandum[51] discussing various methods that states could make available to sources to limit their potential to emit, the EPA expanded on the June 25, 1989 final rule preamble.[52] The memo clarified that for sources with the capability to emit major amounts of pollutants but that wish to avoid major source requirements by restricting this capability, federal enforceability provided a credible system to ensure that sources adhere to those self-imposed restrictions.[53] In addition, the memo acknowledged several viable ways of creating federally enforceable limitations on potential to emit (*e.g.*, federally enforceable state operating permits (FESOPS); limitations established by rules; general permits; construction permits; and title V permits).[54] To qualify as federally enforceable, controls were required to be practically effective and incorporated into the

45. 42 U.S.C. §§ 7661-7661f (Supp. V 1993).

46. 42 U.S.C. § 7413(a)(2) (Supp. V 1993).

47. 42 U.S.C. § 7661(a) (Supp. V 1993).

48. 58 Fed. Reg. 42,760 (1993).

49. 59 Fed. Reg. 12,408 (1994).

50. National Mining Ass'n. v. E.P.A., 59 F.3d 1351 (D.C. Cir. 1995).

51. Memorandum from J. Seitz, R. Van Heuvelen, *supra* note 21.

52. 54 Fed. Reg. 27,274, *supra* note 12. *See also* memorandum from J. Seitz, *supra* note 12; memorandum from K. Stein, *supra* note 11. For a court discussion of federal enforceability, *see also* United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141 (D. Colo. 1988).

53. Memorandum from J. Seitz, R. Van Heuvelen, *supra* note 22.

54. *Id.*

state implementation plan (SIP) in a manner that allowed for public notice and comment, either generally (category-wide, such as a SIP rule) or through source-specific requirements.[55]

C. *Rationale for Retention of Federal Enforceability*

Although states have primary responsibility for controlling air pollution, they need the support a credible federal enforcement program offers in order to be most effective. In addition, federal enforcement provides consistency to state control, as well as, a minimum level of protection of a resource that cannot be confined within one state's borders. Federal enforceability of state requirements, limits and controls serves important goals of the CAA:

1. *Federal enforceability ensures that sources accurately determine if they are "major sources."* Federal enforceability is necessary to ensure that limitations and reductions agreed to by sources in their permits are actually implemented. Such limitations and reductions cannot merely exist on paper but must be actually incorporated in the source's design and followed in practice to have a positive impact on air quality.

Major sources are tracked by the HAPs, NSR and Title V programs. "Natural minors"[56] are not regulatory targets under the three programs as currently structured. EPA enforcement of controls on potential to emit is primarily aimed at so-called "synthetic minors" (those NSR sources with potential to emit above major source thresholds but whose controls allow the source to limit PTE and avoid major source status) as well as at area sources (those sources of HAPs with potential to emit above major source thresholds but whose controls allow the source to limit PTE and avoid major source status). The threat of enforcement action by federal authorities ensures that controls assumed by synthetic minor and area sources to avoid major source status are actually implemented. The EPA's ability to accurately track the emissions of these sources so that air quality can be maintained and improved is dependent on federal enforceability of controls taken on by these sources to avoid major source status.[57]

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55. *Id.*

56. Natural minors are those sources whose potential to emit as well as actual emissions fall below major source thresholds.

57. 54 Fed. Reg. 27,274, 27,277 (1989):

The integrity of a system that subjects major sources to stringent requirements depends on some level of regulation of the controls on synthetic minors and area sources regarding controls that keep them below major source emission levels and therefore free from the correspondingly stringent requirements.

2. *Federal enforceability provides a level playing field for industries and states and an important backstop to state and local enforcement efforts.* To maintain air quality in attainment areas and improve it in nonattainment areas, state and local limitations must be effectively implemented. States vary in their ability and willingness to impose effective controls on their state industries.[58] As a result, a source could avoid the federal requirements by merely receiving state or local controls that the source does not intend to fully implement and, in actuality, does not fully implement.[59]

The EPA's preamble to the NSR final rule recognized this problem and noted that:

> Federal enforceability is necessary to support State and local enforcement efforts. Although EPA believes that most State and local governments are committed to effective enforcement of their permit programs, it is true . . . that the level of State and local enforcement is uneven, and that some States and localities have been unwilling or unable to enforce their programs effectively. . . . [I]n the absence of a Federal enforcement capability to backup State and local efforts, there would be somewhat less incentive for sources to actually observe non-Federal limitations . . . .[60]

As the state and local air directors' association noted in the June 28, 1989 Federal Register:

> [A]bsent Federal enforcement capability, some State and local governments would be more susceptible to economic and other

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> [I]t is essential to the integrity of the PSD and nonattainment program that such State or local limitations be actually and effectively implemented. . . . Federal enforceability is both necessary and appropriate to ensure that such limitations and reductions are actually incorporated into a source's design and followed in practice.

58. *Id.*

59. The State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO) argued this very point in comments on the proposed rule to eliminate federal enforceability. 54 Fed.Reg. 27,274, 27,276 (1989). *See also supra* p. 10 and note 50.

60. 54 Fed. Reg. 27,274, 27,277 (1989).

> pressures from industry that could actually make State and local enforcement less effective than it currently is.[61]

In *United States v. City of Painesville*,[62] the court examined the role of the federal government in the context of a challenge to the lower court's holding that a Painesville boiler was a "new source under the CAA." The court observed that:

> The new source standards prevent industries from "shopping around" for "pollution havens" that might otherwise exist if states were allowed any flexibility in setting standards for new sources. *See* 116 Cong. Rec. 32902 (remarks of Senator Muskie), *reprinted in* Legislative History 227; Environmental Law Institute, Federal Environmental Law 1104 (1974). Such shopping around is foreclosed by the new source standard, because they set a nationwide "floor" on the permissible level of pollution from new sources.[63]

Many states recognize the role politics plays in environmental enforcement decisions and refer politically difficult cases to the EPA. One example is Marine Shale, the nation's largest incinerator of hazardous waste, who had operated for several years without air permits (as well as without waste and water permits). In 1986, Marine Shale applied to the State of Louisiana for a state operating permit. Louisiana granted the permit with limits of 89 tons per year (tpy) for carbon monoxide and 0.22 tons per year of nitrous oxide (NOx). Marine Shale's actual emissions were 250 tpy for carbon monoxide and over 1,000 tpy for NOx. The inability of the state to issue a credible permit caused the EPA to use its federal enforceability power to file an enforcement action in 1993. On August 30, 1995, the Western District of Louisiana issued a decision awarding $3.5 million in penalties for Clean Air Act violations. The court found that Marine Shale was operating a major source of air emissions without a PSD major source permit and that Marine Shale was operating twenty-nine minor sources of air emissions without appropriate Louisiana SIP minor permits.[64]

Similarly, Navistar International Transportation Corporation, an Ohio truck manufacturer, violated allowable emission limitations for

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61. *Id.*

62. 644 F.2d 1186 (6th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

63. *Id.* at 1192.

64. United States v. Marine Shale Processors Inc., 1994 WL 279839 (W.D. La. 1994) *appeal docketed*, No. 94-30664 (5th Cir. Aug. 15, 1995).

volatile organic compounds (VOCs) under Ohio's SIP.[65] During its period of noncompliance, Navistar emitted an average of 640 tons of VOCs per year, exceeding its allowable emissions by 350 tons per year. Navistar was a major employer in Ohio and the State found it difficult to take enforcement action against a major employer and taxpayer of the state. Ohio referred the case to the EPA for enforcement.

The Sixth Circuit Court of Appeals affirmed the EPA, finding Navistar liable on all accounts.[66] Navistar agreed to settle the case for payment of $42,703,000 for past violations at its plants.

In cases involving federal enforceability actions against synthetic minors, the EPA has successfully argued that the source was either in violation of its minor source permit limits or was actually a major source operating without a permit. However, the holdings of *National Mining*[67] and *CMA*[68] would eliminate the first cause of action because effective limitations imposed by state or local authorities would no longer be enforceable by the EPA.

While these cases would not foreclose the EPA from bringing the second cause of action (i.e., claiming that the source was actually a major source operating without a major source permit), they could make proving the claim more difficult. For the EPA to prevail on this cause of action, the Agency would first have to show that the source had a potential to emit above major source thresholds and then would also have to prove that existing controls intended to bring its PTE below that threshold were ineffective. This is much more difficult in practice than showing that the source has exceeded a federally-enforceable short term emissions limitation.

Restricting the EPA's ability to enforce to only situations where the source failed to obtain proper major source permits would also have the undesirable effect of allowing more pollutants to be emitted. Instead of being able to enforce limits on potential to emit, which are generally short-term, measurable, and practically enforceable limits (*i.e.*, emissions allowed per day, hour, week or month), the EPA would have to accumulate one year of emission data in order to prove emissions were above major source thresholds. If the limits were

65. Lutz v. Navistar, 1994 WL 696244 (6th Cir. 1994).

66. *Id.*

67. National Mining Ass'n. v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

68. Chemical Mfrs. Ass'n. V. EPA, 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516).

directly federally enforceable, in contrast, the EPA could take action within weeks of finding the first period in which emissions exceeded allowable amounts, and would have a greater likelihood of stopping the excess emissions sooner.

Absent viable federal enforceability of controls, states would be placed in the unenviable position of either enforcing limits against economically powerful sources without a federal back-up or abdicating their enforcement role in those situations.

3. *Federal enforceability ensures that citizens will be able to enforce controls and limits.* Citizen enforceability is intrinsically tied to federal enforceability and was seen by Congress as vitally important to the success of the CAA.[69] Section 304 of the CAA provides the basic mechanism by which citizens can initiate suits under the Act.[70] It allows citizens to bring suit against any person who violates any limitation under the Act or any order issued by the Administrator or a State with respect to such limitation. Citizens can also bring suit against any person who proposes to construct or does construct a major new source without a PSD or nonattainment permit.[71] However, while violations of federally enforceable permit limitations are subject to citizen suits, violations of nonfederal limitations appear not to be.[72] State citizen suit statutes would provide an alternative enforcement mechanism, but many states have failed to enact such statutes and, other states that have citizen suit statutes may lack provisions which provide meaningful incentives for citizens' bringing such suits.[73]

4. *The requirement that provisions be federally enforceable provides meaningful incentives for compliance with CAA requirements.* Even where state and local controls are technically sound and enforceable as a practical matter, there may not be sufficient incentive

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69. *See, e.g.*, S.Rep. 1196, 91st Cong., 2d Sess. 21, 38 (September 17, 1970). ("[i]f the Secretary and State and local agencies should fail in their responsibility, the public would be guaranteed the right to seek vigorous enforcement action under the citizen suit provisions of section 304," and "[c]itizens would be performing a public service and in such instances the courts should award costs of litigation to such party.").

70. *See supra* note 9.

71. 42 U.S.C. § 7604(a)(1) (Supp. V 1993).

72. 54 Fed. Reg. 27,274, 27,777 (1989).

73. 42 U.S.C. § 7604 (1988 & Supp V 1993) (asserting that the lack of attorney fees provision serves as a disincentive for initiating suits).

for sources to comply with those controls absent federal enforceability. The incentive to comply with controls requires an adequate mechanism for assuring an effective enforcement presence.[74] In the past, limits enforceable by the EPA and citizens under the CAA have been the mechanism for assuring an adequate enforcement presence for all fifty states. The threat of enforcement by the EPA and citizens was seen as a better incentive for compliance than state enforcement alone. If those incentives were no longer viable, other methods of motivating sources to comply would have to be found or the statutes and regulations would become "dead letters."

II. CURRENT CHALLENGES TO FEDERAL ENFORCEABILITY

It is important to note that current challenges to federal enforceability, even if successful, do not mean that there will be no enforcement of air statutes and regulations by the federal government. Even if federal enforceability were removed from specific controls that allow sources to avoid the requirements of major source status, the EPA would still have a substantial role in enforcing federal requirements. The federal agency could:

> (1) enforce against permitted minor or area sources that were actually major sources by accumulating data to prove that the sources were major sources without permits;[75]
> (2) veto the state Title V permit into which the limits were written;[76] or
> (3) withdraw approval of the state program that allowed the source its minor source status.[77]

However, all these options are much more difficult for the EPA to take than an enforcement action against the source directly for violating its limits. Direct federal enforceability authority found in other CAA provisions would also remain.

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74. 54 Fed. Reg. 27,274, 27,283 (1989).
75. 42 U.S.C. § 7413 (1988); 42 U.S.C. § 7477 (1988).
76. 42 U.S.C. § 7661a(b)(5)(F) (1988 Supp. V 1993).
77. 42 U.S.C. § 7660(i) (1988 & Supp. V 1993).

A. *Federal Enforceability in the HAPs Context*

Section 112 of the Clean Air Act designates specific pollutants as "hazardous air pollutants."[78] The original design of the 1970 Act authorized the EPA to set nationally uniform emission standards for HAPs at a level that would provide an "ample margin of safety" to protect human health.[79] Scientific difficulties resulted in the promulgation of only seven standards between 1970 and 1989: arsenic, asbestos, benzene, beryllium, mercury, radionuclides and vinyl chloride. In 1990 Congress revised section 112 to mandate standards for 189 HAPs on a technology-based approach with the implementation of health-based standards for any remaining risk.[80] The CAAA of 1990 required the EPA to list all categories of major sources and area sources for each of 189 hazardous air pollutants and to develop a maximum achievable control technology (MACT) for all new and existing sources within specific time frames. All categories and subcategories must be regulated by November 15, 2000. If the EPA fails to meet the deadlines, states will have to make case-by-case determinations of what the federal standards would have been and make independent decisions on those conclusions, often referred to as the "MACT hammer".[81]

As discussed in Part I(B),[82] the EPA proposed and recently adopted "general provisions" applicable to future HAPs rules.[83] Industry groups challenged the rules in *National Mining*,[84] where plaintiffs raised three (3) specific challenges to the EPA's general provisions rule. The EPA actions being challenged were:

(1) that the EPA included emissions from all facilities on a contiguous plant site under common control;
(2) that the EPA included fugitive emissions in calculating aggregate source emissions; and

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78. 42 U.S.C. § 7412 (1988 & Supp. V 1993).

79. 42 U.S.C. §§ 7412(b)(2) (1988 & Supp. V 1993). Scientific difficulties resulted in the promulgation of only seven standards between 1970 and 1989: arsenic, asbestos, benzene, beryllium, mercury, radionuclides and vinyl chloride. In 1990 Congress revised section 112 to mandate standards for 189 HAPs on a technology-based approach with the implementation of health-based standards for any remaining risk. 42 U.S.C. § 7412(f)(2)(A) (Supp. V 1993).

80. 42 U.S.C. § 7412(f)(2)(A).

81. 42 U.S.C. § 7412(e) (Supp. V 1993).

82. *See supra* text accompanying notes 44-46.

83. 58 Fed Reg. 42,760 (1993) (proposed rules); 59 Fed. Reg. 12,408 (1994) (final rules).

84. National Mining Ass'n. v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

(3) that the EPA required that controls on a source's potential to emit must be federally enforceable to determine if a source is major.[85]

The EPA prevailed on the first two challenges. Regarding the third challenge to federal enforceability, the court held against the EPA on July 21, 1995.[86] The court stated that the "EPA has not explained . . . how its refusal to consider limitations other than those that are 'federally enforceable' serves the statute's directive to 'consider controls' when it results in a refusal to credit controls imposed by a state or locality even if they are unquestionably effective."[87] The court was not persuaded by the EPA's justifications for requiring federal enforceability, and granted the industry's appeal on this issue.

The EPA maintained in its brief and at oral argument that federal enforceability allowed the EPA to verify that a source's claimed controls were working as they were supposed to, and that federal enforceability provided the EPA with the means to ensure that any operational restrictions intended to limit emissions were actually implemented.[88]

The court was troubled that each of the regulatory methods identified by the EPA for establishing that a permit limitation was federally enforceable required conditions that went beyond evaluating the effectiveness of the particular constraint in controlling emissions.[89] The court concluded that the language of §112(a) that states that a source's potential to emit is limited through "considering controls" that can be placed on the source, does not give the EPA the authority to impose requirements that are not directly related to the specific goal of determining the level of effective control.[90] Specifically, the court stated:

> In doing so, EPA sacrifices a statutory objective in pursuit of ends that . . . have not been justified, either in terms of §112 or other

85. *Id.* at 1354-55.

86. *Id.* at 1351.

87. *Id.* at 1364.

88. Brief for the EPA at 12-13, 18-23, National Mining Ass'n v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

89. *National Mining*, 59 F.3d at 1363 (expressing problems with public notice of the proposed permit limitations; approval by the EPA and inclusion in the SIP).

90. *Id.* at 1364.

> provisions of the Act. EPA has not explained why it is essential that a control be included within a SIP. . . . If there is a closer fit between the notion of 'federal enforceability' and § 112's concern with crediting effective controls it is not evident on this record.[91]

The court previously stated that "it is certainly permissible for EPA to have refused to take into account ineffective controls. . . . But is it also open to EPA under the statute to refuse to consider controls on grounds other than their lack of effectiveness?"[92]

The court answered its own rhetorical question in the negative and concluded that the "EPA has not explained why it is essential that a control be included within a SIP. . . . [or] why a state's or a locality's controls, when demonstrably effective, should not be credited in determining whether a source subject to those controls should be classified as a major or area source."[93]

In holding that state and local controls might be "effective" even without federal enforceability, the court appeared to use the concept of "effectiveness" in the purely technical sense, *i.e.*, whether controls are practicably enforceable. The opinion is problematic in that it does not contain a refutation or even an acknowledgement of the EPA's argument that federal enforceability is needed because controls might be effective in a technical sense, and yet might not actually be enforced as limitations on PTE in a practical sense.[94]

B. *Challenge to Federal Enforceability of Controls on Potential to Emit in the NSR 1989 Rules*

The preamble to the June 28, 1989 Federal Register notice of final rulemaking[95] stated the basic reasoning the EPA had used in deciding to retain federal enforceability of controls after the 1983 proposed rules had taken comments on the concept of abolishing the requirement.[96] Industry groups who opposed federal enforceability in the NSR context challenged this rulemaking in *CMA v. EPA*.[97]

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91. *Id.* at 1364.

92. *Id.* at 1363.

93. *Id.* at 1364.

94. The EPA's petition for rehearing to the D.C. Circuit Court of Appeals was denied on September 21, 1995.

95. 54 Fed. Reg. 27274, 27274-84 (1989).

96. *See supra* text accompanying notes 37-40.

97. Chemical Mfrs. Ass'n. v. E.P.A., 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516)

The EPA's brief in the *CMA* case did not present any new arguments for federal enforceability. The main difference between it and the *National Mining* brief was that the *CMA* brief devoted considerably more space to reiteration of the June 1989 preamble rationale. The CMA brief also included an explanation of why the EPA felt it was beneficial to have more flexible enforcement options under the CAA.

On September 15, 1995, the D.C. Circuit Court of Appeals issued a summary opinion vacating the 1989 rulemaking. It did so, however, with respect to the requirement that only federally enforceable limitations would be considered in determining PTE to limit a facility's emissions to minor source levels.[98]

The CMA court did not analyze federal enforceability in the particular context of construction permits for new or modified sources in attainment or nonattainment areas. Rather, the court merely noted:

> We recently decided a similar challenge in *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995). Accordingly, it is ordered and adjudged that the regulations are vacated and the case is remanded to the Environmental Protection Agency in light of *National Mining Association*.[99]

A question left unanswered by the court's *CMA* decision is how the court analyzed the 1989 preamble to the rule, in which the EPA set forth a comprehensive rationale for federal enforceability in the NSR context, a rationale which has been successfully applied in other contexts.[100] By addressing the latter case (*National Mining*) first and issuing a summary opinion in *CMA*, the court neglected to provide a response to the EPA's rationale or guidance to the agency on how to craft a future federal enforceability rule that would meet with the court's approval. Working without guidance, the EPA must now propose a rule, solicit and respond to public comment, promulgate a final rule and await a future court's ruling on the validity of that rule.

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98. *Id.*

99. *Id.*

100. An example of a use of this rationale can be found in the HAPs program, Title V.

C. *Congressional Challenges*

Congress became an additional forum for the attack on federal enforceability following the 1994 elections. The most vivid illustration of this fact is the proposed thirty three percent cut to the EPA's overall budget and the even more draconian fifty per cent cut to the EPA's enforcement budget in the bill passed by the House, H.R. 2099.[101] In justifying such a proposed massive reduction, the Committee on Appropriations stated:

> [T]he Agency is expected to eliminate dual jurisdiction problems wherever possible and is directed to curtail the practice of over-filing[102] on actions that have been previously filed by the States. In this regard, the Agency is asked to report by June 30, 1996 on the progress it has made in the reduction of dual jurisdictional problems as well as on the number and reasons for any overfilings it has undertaken during fiscal year 1996 . . . .[103]

This Congressional statement is a broad reference to federal enforceability and clearly indicates the House's displeasure with the EPA's practice of federal overfiling. Riders[104] to the appropriations bill also specifically prohibited the use of appropriated funds for various activities, many of them enforcement-related.[105]

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101. *House Appropriations Committee Report on EPA Funding, Programs for Fiscal 1996 Issued July 17, 1995*, Daily Environmental Report (BNA) No. 138, at D-40 (July 19, 1995) (discussing cuts to federal agencies and stating that the House had passed a bill appropriating EPA 4.89 billion dollars); *Excerpts from Senate Appropriations Committee Report on VA, HUD, and Independent Agencies Funding Bill (H.R. 2099) Dated September 13, 1995*, Daily Environmental Report (BNA) No. 180, at D-31 (September 18, 1995)(stating that the Senate had appropriated the EPA 5.66 billion dollars).

102. An overfiling is the initiation of an enforcement action by the EPA after the state has filed a state enforcement action. The EPA does not actually bring large numbers of overfilings or original enforcement actions against sources that violate permit limits; more important is the number of enforcement actions the EPA does not need to bring to have the sought-after impact. The mere possibility of federal action being brought deters many sources from violating these limits.

103. H.R. Rep. No. 201, 104th Cong., 1st Sess. 51 (1995).

104. A rider is a clause, normally dealing with an unrelated matter, added to a bill during its consideration. Riders are frequently added to appropriations bills.

105. *E.g.*, one rider would limit the use of funds for development or enforcement of operating permits under CAA sections 502(d)(2), 503(d)(3) and 502(I)(4), 42 U.S.C. §§ 7661a(d)(2), 7661b(d)(3) and 7661(I)(4). H.R.Rep. No. 185, 104th Cong., 1st Sess. 59 (1995).

The Regulatory Reform Bill,[106] introduced by Senator Dole, is a more subtle attack on federal enforceability. The primary thrust of the bill was to restructure the rulemaking process so that risk analysis would be performed on all rulemaking actions and opportunities for judicial review of the analysis would be provided at each juncture. The "look-back" provisions of the bill would deal with rulemakings completed prior to enactment of the bill. Section 623 of the bill would provide an exhaustive schedule for agencies to review existing rules based on the risk analysis principles outlined in other parts of the bill. In addition, the bill would establish the right of "any person" to petition the federal government for review of "an interpretive rule, a general statement of policy or guidance."[107] The impact this provision could have on federal enforceability is great, potentially subjecting it to intensive administrative and judicial review, possibly leading to the abolition of rules, policies and other guides issued over several decades which define and clarify federal enforceability. Several votes for closure of debate failed during the summer of 1995. It is anticipated that the bill or a compromise version will appear in the second session of the 104th Congress.

Several amendments to S. 343 would have had direct impact on federal enforceability. On July 14, 1995, Senator Hutchinson introduced an amendment to S. 343 as section 709 of the bill.[108] Although not abolishing federal enforceability, the amendment focused on providing exceptions to the imposition of civil or criminal penalties in the following situations:

> (1) if the defendant, prior to commencement of the violation, "reasonably in good faith determined, based upon a description, explanation, or interpretation of the rule contained in the rule's statement of basis and purpose, that the defendant was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule";[109] or
> (2) "reasonably relied" upon information provided by the agency that promulgated the rule, or by the State authority with delegated

106. S. 343, 104th Cong., 1st Sess. (1995).

107. S. 343, 104th Cong., 1st Sess. § 2(1) (1995).

108. Section 709 was adopted as an amendment to S. 343 by a vote of 80 to 0 on July 14, 1995. S. 343 was not passed by the Senate during the first session of the 104th Congress S. 343 may be introduced during the second session with or without the amendments.

109. Amendment No. 1795 and Amendment No. 1487, 141 Cong. Rec. S10247 (daily ed. July 18, 1995).

> authority, to the effect that "the defendant was in compliance with, exempt from, or otherwise not subject to the rule."[110]

A court would be prohibited from giving deference to subsequent agency explanations of the rule under the amendment. Protracted litigation and a shrinking of effective federal enforcement ability would have been significant concerns if S. 343 had been enacted with this amendment.

Senator Shelby and six co-sponsors submitted an additional amendment, attached to amendment No. 1437 proposed by Senator Dole, to S. 343.[111] This second amendment, entitled "Small Business Regulatory Bill of Rights," would provide the following "rights" to "small" businesses (defined as those with less than 500 employees):

- protection of small businesses from enforcement actions if they have voluntarily applied for a compliance audit;
- an abatement period of not less than sixty (60) days to allow small businesses to correct any violations before a penalty is assessed;
- freedom from inspections for 180 days after the small business obtains certification from the agency that it was in compliance with the regulation; and
- flexible payment plans for penalties with reduced installments that reflect the business's long-term ability to pay.

The agency would also be required by this amendment to provide implementation of a no-fault compliance audit program; a compliance assistance program; and a uniform, consistent, and nonarbitrary method to enforce regulations.[112]

The proposal would severely limit penalties for noncompliance by small businesses. Further, it would extend application of the EPA's small business compliance incentives currently available to businesses with 100 or fewer employees to businesses with 500 or fewer employees. This extension would provide small business protection from enforcement actions to approximately 4 million "small" businesses.

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110. *Id.*

111. Amendment No. 1551, 141 Cong. Rec. S10027 (daily ed. July 14, 1995). The "Small Business Regulatory Bill of Rights" was adopted as an amendment to S.343 by a vote of 96 to 0 on July 10, 1995.

112. Amendment No. 1551, Subchapter VI, 141 Cong. Rec. S10014 (daily ed. July 14, 1995).

III. PROPOSED OPTIONS

Because the time to seek a *writ of certiorari* to challenge the two recent court decisions has passed,[113] the agency must decide how to revise two rules in response to the D.C. Circuit's decisions on federal enforceability.[114] The EPA has articulated a rationale for federal enforceability that has not specifically been attacked by the court. The policy reasons articulated in the June 28, 1989 preamble to the final rule[115] on federal enforceability were not specifically briefed to the *National Mining* court. While the rationale was included in the *CMA* record, it was not addressed by the court in the court's summary opinion. Thus, the court in *CMA* provided no guidance to the agency in crafting a rule that would pass muster with the court.

A careful reading of the only decision that offers any guidance on federal enforceability, *National Mining*, reveals that the court did not abolish federally enforceable controls on potential to emit with respect to HAPs. Rather, the court held that the agency had not articulated reasons why other effective controls imposed by state or local officials would not also conform with the statutory language that potential to emit should be calculated "considering controls."[116]

There are any number of options available to the EPA to adjust federal enforceability of controls on PTE in light of the recent case decisions. These options should be presented to the public for comments through a Notice of Proposed Rulemaking (NPRM) in order to assess the prevailing attitudes toward these proposed reforms.

One possible option the EPA has in responding to *National Mining* and *CMA* that would retain federal enforceability is for the EPA simply to propose revising its regulations and explain the rationale for federal enforceability better than it was explained to the D.C. Circuit. The proposal could indicate that federal enforceability was being retained as one pathway for assuring "effective" controls and that states could submit proposed general controls to the EPA for pre-approval. This option would retain federal enforceability as

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113. Chemical Mfrs. Ass'n. v. E.P.A., 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516); National Mining Ass'n. v. E.P.A., 59 F.3d 1351 (D.C. Cir. 1995).

114. 40 C.F.R. Pts. 60, 61 and 63 (HAPs general provisions); and 40 C.F.R. Pts. 51 and 52 (PSD/NSR rules).

115. 54 Fed. Reg. 27,274 (1989).

116. *National Mining*, 59 F.3d at 1362.

currently structured. A disadvantage of this approach is that it would establish a new approval bureaucracy for determining "effective" controls rather than relying on the SIP process. There is no guarantee that the new bureaucracy would be superior to the old or that the D.C. Circuit's concerns would be addressed by this method. Also, industry would oppose this option because it would retain the federal enforcement presence and would not streamline the permitting process.

Another reform option would also retain federal enforceability as one means of assuring "effective" controls. This option would allow sources to choose between federal enforceability and state-only controls. Sources who chose not to seek federally enforceable controls would then need to seek case-by-case approval from the EPA prior to installing the controls. Instead of general, statewide approval of proposed state controls as in the first option, this option would allow each individual control to be approved in its specific context. This approach has several practical problems, the greatest being the extraordinary resource commitment that would be required from the EPA. From industry's perspective, rather than streamlining the process, this option would lengthen the permitting process and be more bureaucratic.

A third reform option would be for the EPA to retain federal enforceability as an essential element of effective controls while revising the administrative process for achieving federal enforceability. For example, the agency could drop or revise the requirement for public review of controls on emissions to reduce the PTE below major source thresholds, could eliminate or reduce the public participation process or could accept certification by a responsible official of the source that the source accepts restrictions as reasonable. Such efforts to reduce public participation and stream-line the process would satisfy long-standing criticisms of the federal enforceability requirement. Such action would also be responsive to industry's concern that the process of making requirements federally enforceable is too lengthy. In addition, if coordinated properly, this option would parallel a similar policy in the title V context.[117] However, such

117. 60 Fed. Reg. 45,530, 45,438 (August 31, 1995) ("States would have the flexibility to vary the process provided for the changes in this second category with the relative significance of the change. . . . For changes that fall in these de minimis categories, the State may forego prior public, affected State, or EPA review altogether.") (to be codified at 40 C.F.R. 7.7(e)(ii) and (f)(ii)) (proposed August 31, 1995) 60 Fed. Reg. 45,530, 45,567-45,568).

reforms could have the adverse effect of diminishing the potential for citizen enforcement. It is impossible for citizens to have access to data about a source's potential to emit and the controls that have been placed on that potential without receiving notice of the permitting authority's action and being given an opportunity to comment. In a time of diminishing enforcement resources for both the EPA and state authorities, citizen enforcement becomes an increasingly important element of the enforcement process. Additionally, industry would not be completely satisfied with this option because it does not address their primary concern of EPA overfiling. Further, certification by a responsible official is a source's second-hand way to achieve enforcement requirements.

As a final option, the EPA could retain federally enforceable controls that have gone through the SIP process or other required approval while also agreeing to accept other controls imposed by state and local air authorities with which the source is in compliance. This approach would be responsive to the D.C. Circuit's concerns in *CMA* and *National Mining*[118] while not abandoning the benefits of federal enforceability that existed prior to the decisions. In its NPRM, the EPA would also have to delineate the various requirements of "effective" state controls. These requirements could be: state or source notice to the EPA that a source plans to use effective state controls to limit its potential to emit to minor or area source levels; descriptions of the amount and quality of information available to the regulating authorities after permitting; procedures to ensure that information to authorities is adequate and accurate; and the level of public participation provided for in the process. In the past, the EPA has provided guidance to sources and states on factors that it considers to comprise an effective limit or control, including: a clear statement as to the applicability; specificity as to the standard that must be met; explicit statements of the compliance time frames (*e.g.*, hourly, daily, monthly or 12 month); a statement that the time frames will protect the standard; adequate record keeping requirements; equivalent provisions to meet certain requirements; and timely notice to the permitting authority.[119]

These factors could be addressed as a part of this or any of the other reform options proposed above and should be subject to

118. Chemical Mfrs. Ass'n. v. EPA, 70 F.3d 637 (D.C. Cir. 1995) (consolidated cases Nos. 89-1514 to 89-1516); National Mining Ass'n. v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

119. Stein, *supra* note 11, (memorandum at 5-11).

comment within the proposed rulemaking. By analyzing the benefits of retaining federal enforcement and the advantages and disadvantages of each option, the public, regulated industry and environmentalists could assist the agency in redrafting these rules to comport with the D.C. Circuit's recent *National Mining* and *CMA* decisions.

CONCLUSION

Court challenges to federal enforceability of CAA provisions are not new.[120] The present rash of lawsuits aimed at specific aspects of federal enforceability are not surprising given the political and regulatory climate established by the 1994 election. As a result, the EPA cannot ignore the court's decisions in *National Mining* and *CMA* by refusing to alter its now disapproved concept of federal enforceability of controls on potential to emit. Several reform options suggested above are available to the EPA to respond to the court's decisions in *National Mining* and *CMA*, and to also respond to all interested parties' desire for input into the decision-making process on federal enforceability. The reforms would also offer states and sources some flexibility in attempting to avoid major source status while retaining some of the desirable benefits of federal enforceability. The agency should approach this rulemaking task cautiously, however, being careful not to overreact to the *National Mining* and *CMA* decisions, and thereby sacrificing the cornerstone upon which the Clean Air Act is founded - achieving national air quality standards through a uniform enforcement mechanism.

120. *See, e.g.*, Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979); Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983).

Ebio, Tina (ECY)

From: Faust, Eric T <Eric.Faust@rl.doe.gov>
Sent: Thursday, September 17, 2015 7:38 AM
To: ECY RE AQ Rulemaking and SIPs
Subject: Rule proposal for Chapter 173-401 WAC Operating Permit Regulation

Provided below for your consideration is a comment on the subject rule proposal.

Section/Reference	Comment	Recommended Action/ Requested Change
WAC 173-401-900(5)(b)(iv)(A)	Text should be added to this paragraph to ensure adequate information is provided on the basis for the complexity level determination to ensure a permittee or any member of the public can clearly understand and completely evaluate the determination. A lack of information will be a barrier to meaningful public comment.	The requested change is shown below in red font. (A) Ecology must post on Ecology's website on or about October 31 of each year the basis for the complexity level determination. The basis shall provide adequate detail such that a permittee or any member of the public can clearly understand and completely evaluate the appropriateness of the complexity level determination.

I respectfully request and will appreciate a reply confirmation that you have received these comments and we have met Ecology's September 18, 2015 deadline.

Thank you for the opportunity to provide comment on the proposed rule changes. We look forward to receiving Ecology's responses to our comment. Please contact me at the number below if you have questions or would like to discuss this comment.

Sincerely,

Eric Faust

Weyerhaeuser

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PO Box 9777
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Mobile: (253) 279-4073
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September 18, 2015

Sent by Electronic Mail to Margo.Thompson@ecy.wa.gov

Margo Thompson
Air Quality Program
Washington Department of Ecology

Enclosed are the Weyerhaeuser Company comments on proposed amendments to WAC 173-401 *Operating Permit Regulation*.

RCW 70.94.162(6)(c) specifies that "fiscal audits," "routine performance audits" and "periodic intensive performance audits" be performed, but does not define the content or frequency for these audits. This gives the Department of Ecology latitude to define these details in regulation. The agency has done this in WAC 173-401-920(3) and (4) where it specifies a fiscal audit will occur on a two-year frequency, a performance audit on a three year cycle, and an intensive performance audit not more once every six years. The distinction between a routine and periodic intensive performance audit is a bit murky.

Two comments emerge from this background:

1) This performance audit schedule seems too intensive and not likely to provide much value to the regulatory agencies, permittees, or to the overall delivery of the program. The AOP program is mature and stable, and not much would be expected to change with the over a three year period. It is also hard to imagine what new information would be revealed between a "routine" and "periodic intensive" performance audit activity. We suggest these two performance audit be collapsed into a single effort and scheduled to occur every four or six years. The report would be called a called a "Routine and Periodic Intensive Performance Audit" to satisfy the statutory requirement.

2) Permittees care most about the WAC 173-401-900(3) *Workload analysis* and the permit fee estimates that emerge from that process. This workload analysis supports development of a forward-looking/prospective budget. The budget which emerges from this effort would presumably be informed by and synched to the data from the WAC 173-401-920(2) *Tracking of revenues, time and expenditures* effort. This doesn't seem to be the case, however. The perception (and we think reality) is that the workload estimate yields a bloated budget (against which fees are allocated and collected), that then is not supported by the actual staff time expended in the succeeding biennium. The agency has repeatedly heard this criticism and in response included new rule language in a preliminary draft of this regulation

amendment. It was intended to be an element of the fiscal audit process and located at WAC 173-401-920(3)(b)(ii). The language read:

> (ii) Determine if the time accounting summary of actual work performed in the prior fiscal year reasonably matches the workload estimates on which the biennial budget was based.

We are disappointed Ecology chose to remove this subsection in the formal rule proposal. It should be added back. This is a reasonable and valuable element of any fiscal audit.

Thank you for considering these comments.

Sincerely,

Ken Johnson
Corporate Environmental Manager

pscleanair.org
Puget Sound Clean Air Agency

September 17, 2015

Clean healthy air for everyone, everywhere, all the time.

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Margo Thompson
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Thompson:

Proposed Amendments
Chapter 173-401 WAC Air Operating Permit (AOP) Regulation

This letter is submitted in response to the proposed amendments to WAC 173-401, which were published for comment on August 2, 2015. This Agency has participated in the stakeholder process leading up to this proposal and appreciates that opportunity for involvement.

We are fully supportive of the amendments proposed by Ecology on this regulation. In particular, the proposed amendments making the applicability language in WAC 173-401-300 more consistent with the EPA's Title V program language (found in both 40 CFR Part 70 for state/local programs and 40 CFR Part 71 for EPA issued operating permits), is clear and helpful. The existing rule includes the term "relevant emission units" that is not defined. The existing language also uses that term without distinction for both major sources and non-major sources. With the language proposed for addition to WAC 173-401-300(3), the required permit applicability is clear and consistent with the EPA Title V program elements.

The proposed amendment is also consistent with other recent EPA rulemaking actions which discussed the Title V requirements related to non-major sources. Examples include non-major secondary lead smelters (Federal Register, December 19, 2005) and the federal plan adoption for commercial-industrial solid waste incinerator (CISWI) units (Federal Register, October 3, 2003). The final rulemaking publication for sewage sludge incinerator units NSPS/Emission Guidelines (40 CFR 60, Subpart(s) LLLL/MMMM) also referred to the CISWI rulemaking citation referenced above for Title V requirements.

We are aware that some agencies have concerns that the proposed amendments will limit the ability of agencies in Washington to include all of the emission units at a source that is not "major" as defined in the Title V program. We disagree with that view and believe the proposed amendment to WAC 173-401-300(3) does not limit an agency from including other emission units onsite into a final permit. The proposed amendment states what shall be included in the permit for non-major sources. We interpret that amendment as the minimum requirement and thus, an agency could

include additional emission units onsite in the permit and identify the purpose for that inclusion in the permit's statement of basis.

We appreciate the opportunity to provide comments on the proposed amendments. If you have questions about these comments, please feel free to contact me or Steve Van Slyke.

Sincerely,

Craig T. Kenworthy
Executive Director

Ebio, Tina (ECY)

From: Patty Martin <martin@nwi.net>
Sent: Wednesday, November 18, 2015 7:56 AM
To: ECY RE AQComments
Subject: WAC 173-401 rulemaking

To Whom It May Concern,

Please accept my comments regarding changes to WAC 173-401-300 removing the requirement to consider Class A and B toxic air pollutants regulated under WAC 173-460. This provision is currently adopted under the state's Title V program at 40 CFR Part 70 and references WAC 173-460 that existed at the time of WAC 173-401's adoption and not the gutted version of WAC 173-460 that exists after 2009.

Because WAC 173-401 is a federally enforceable program I don't believe that the state can backslide on its regulations.

Thank you for considering my comments.

Patricia Martin
Quincy, WA

Clark
Cowlitz
Lewis
Skamania
Wahkiakum

Southwest Clean Air Agency
11815 NE 99th Street, Suite 1294 • Vancouver, WA 98682-2322
(360) 574-3058 • Fax: (360) 576-0925
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September 17, 2015

Via E-mail: QComments@ecy.wa.gov

Margo Thompson
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Proposed Rule Making – WAC 173-401-300

Dear Ms. Thompson:

This letter provides comments on behalf of the Southwest Clean Air Agency (SWCAA) concerning proposed rules that amend WAC 173-401-300 concerning the Title V permitting for sources of air pollution. The statute adopting authority to issue Clean Air Act Title V permits is found in RCW 70.94.161. The statute establishes two key principles which underlie SWCAA's concerns with the proposed rule.

First, the Federal Clean Air Act authorizes Washington law to be more stringent than the Federal Clean Air Act. In adopting rules and delegating authority to issue permits pursuant to the Title V program, state law recognizes that the permit program is to be administered both by the department and delegated local air authorities, which includes SWCAA. Local authorities have express authority to adopt more stringent regulations implementing the Title V program than state or federal law provides (RCW 70.94.161(2)).

Secondly, Washington Administrative Rules adopted under the Washington Clean Air Act (RCW 70.94.161) must be consistent with the Act. Rules which are adopted that are inconsistent with state law are not valid, and are void, which could impact EPA program approvability and delegation.

In proposing amendments to WAC 173-401-300 (3), Ecology's proposed rule amends longstanding regulatory language to differentiate between major sources and non-major sources and whether all emissions units would be incorporated under the Title V Air Operating Permit (AOP). Ecology's rulemaking is unclear whether it requires or allows a local air authority to include only specific emissions units at affected non-major sources within the AOP. One possible interpretation of Ecology's proposed rule is that the local air authority would be prohibited from requiring that all emissions units at these non-major sources be incorporated into the AOP. The literal language of the rule suggests that the permitting authority is required to include all relevant emission units from major sources and for non-major sources it is required to include only the emission units that caused them to be subject to Title V permitting. This

language does not preclude a local agency from continuing its current practice of including all emissions units in the AOP regardless of whether it is a major or non-major source.

The proposed rulemaking is silent and ambiguous as to whether a local agency acting as the permitting authority may include all emissions units for a source regardless of whether it is classified as a major or non-major source. SWCAA interprets the existing provisions of the State Clean Air Act as allowing it to regulate all emissions units at a source under an AOP regardless of whether it is a major or non-major source. This rule should not limit or derogate the authority of local agencies, which may be more stringent than state or federal regulations.

SWCAA's interpretation is consistent with the current language of Ecology's regulation, as well as its longstanding rules and interpretation of the authority granted under RCW 70.94.161. To effectuate that longstanding interpretation, SWCAA has required Title V permitees to incorporate all emission units at a "source" within their AOP. SWCAA believes that the language proposed by Ecology allows the permitting authority to include only the emissions units which cause the source to be subject to Title V permitting for non-major sources but does not require it to do so. This belief is based upon the language of the proposed rule and the language in the SBEIS accompanying the rule that it would "allow" non-major sources to have permits only for emissions units that make them subject to Title V AOP permitting (SBEIS, §1.2). In other words, SWCAA and other local delegated air agencies would retain the option to require the entire source to be subject to the Title V air operating permit including all relevant emissions units.

SWCAA believes that a contrary interpretation of the proposed amendment to WAC 173-401-300 (3) would render the rule inconsistent with the language of RCW 70.94.161(4) which requires that operating permits shall apply to all "sources". It would also be contrary to Ecology's twenty year interpretation that allows local air agencies to regulate all emissions units within a source. This result is compelled by the very definition of a "source" within the Washington Clean Air Act. RCW 70.94.030(22) defines a "source" to mean:

> "all of the emissions units including quantifiable fugitive emissions that are located on one or more continuous or adjacent properties and are under the control of the same person, or persons under common control, these activities are insular to the production of a single product or function of a group of products."

The State's statutory definition of a "source" in conjuction with RCW 70.94.161(4) specifies that "Operating permits shall apply to…["all of the emissions units..." - source definition]…" and the language does not allow segregation of some emission units from the air operating permit. The language of RCW 70.94.161(4) and definition of "source" provide for inclusion of all emissions units within AOPs regardless of whether they are major or non-major.

We understand that some may desire consistency with federal regulatory language. However, that is not the policy adopted by the Washington Clean Air Act, which requires permits to be issued to sources and is intended to allow both the state and local air agencies to be more stringent than the federal program. SWCAA understands that this proposed amendment is not a condition of continued federal approval and delegation of the AOP program. The federal language has not changed and the existing WAC language has already been approved by EPA despite being slightly different than the federal language. In fact, when Ecology originally adopted the WAC 173-401-300 it varied slightly from the federal language in a manner which aligns with Washington's Clean Air Act. Other states have also chosen to vary from the federal language with regard to these provisions.

Ecology should either remove the proposed new language in WAC 173-401-300(3) or clearly confirm that local air agencies may continue to include in the AOP all emissions units at major and non-major sources required to have an AOP.

Allowing local agencies to regulate in this fashion has several major policy advantages that promote clean air. It promotes the efficient and effective regulation of air pollution sources which could have detrimental effects on public health and welfare. As Ecology is aware, "sources" subject to Title V permitting are exempt from registration fees under WAC 173-400-101(7). If particular emissions units are segregated under the proposed rulemaking it would have adverse consquences to SWCAA by requiring SWCAA to adopt independent regulatory structures for non-Title V emissions units and different fees for affected sources. This would require duplicative administrative effort, increase red tape, and confusion, making it more difficult to regulate air emissions from these units. It would impose administrative burdens upon local agencies with non-major sources of this type to segregate their activities concerning Title V units from those which are not regulated under Title V.

This duplicative regulatory system does not promote cleaner air nor does it promote efficient and effective government. Indeed it creates a more bureaucratic duplicative approach. One of the primary purposes and benefits of a Title V air operating permit is having a single document containing all of a sources regulatory requirements in one place. Splitting a source into Title V and non-Title V units would increase the cost of regulation and would require regulated entities to pay multiple fees. Such fees may need to be increased to cover additional administrative costs caused by the inefficiency of applying multiple regulatory programs instead of combining all units within the AOP. SWCAA is the agency most affected by these proposed amendments and would bear the largest burden if current permitting practices were resticted.

If segregation of emissions units is mandated for local agencies, Ecology's proposed regulations would conflict with the statutory rights of local air agencies to be more stringent in their regulation of air pollution sources under the Title V program. The Washington Clean Air Act provides the right for local agencies to continue regulating as has previously been the case under the current version of WAC 173-401. If Ecology intends to require authorities to segregate such

emissions units it would conflict with local air agencies authority to operate a more stringent program under RCW 70.94.161 (2)(a).

Finally SWCAA is opposed to this proposed amendment to WAC 173-401-300 because it could call into question the validity of air operating permits which include all emissions units. This is because the language and consequences of the proposed rule changes are unclear and ambigious. Under RCW 70.94.161(10), such permits are to be based on the most stringent requirements including where permits are issued by local air agencies pursuant to the requirements of local air regulations. This confirms the authority of local air agencies, such as SWCAA, to apply more stringent regulations or orders, such as the requirement that all emissions units within a source be contained within the AOP.

The existing permit orders, both notice to construct air discharge permits and air operating permits, issued by SWCAA contain all the emission units at a source. RCW 70.94.161(10) states that "Every requirement in an operating permit shall be based upon the most stringent of the following requirements…(c) in permits issued by a local air pollution control authority, the requirements of any order or regulation adopted by that authority." Since SWCAA's existing orders set requirements that apply to all emission units, those orders becomes the basis, under this statute, for having those same requirements in the AOP. Any interpretation that would limit this authority also conflicts with these provisions in RCW 70.94.161.

Please remove the proposed new language or revise your proposed amendments to WAC 173-401-300 (3) to ensure that it is clear that local agencies retain the authority to require all sources to include all emissions units, as may be designated by the local air agency.

Sincerly,

Uri Papish
Executive Director
Southwest Clean Air Agency

Northwest Pulp & Paper
ASSOCIATION

Submitted to: AQComments@ecy.wa.gov

September 18, 2015

Margo Thompson
Air Quality Program, Department of Ecology
P.O. Box 47600
Olympia WA 98504-7600

RE: Chapter 173-401 WAC Operating Permit Regulation

Dear Ms. Thompson:

Northwest Pulp & Paper Association (NWPPA) appreciates the opportunity to offer comments on the Washington Department of Ecology's rulemaking on WAC Chapter 173-401 Operating Permit Regulation.

NWPPA is a 59-year old regional trade association representing 13 member companies and 16 pulp and paper mills in Washington, Oregon and Idaho. NWPPA members produce over 8 million tons of paper products each year and provide approximately 12,000 predominantly union-backed jobs that pay an average of more than $75,000 a year, plus benefits. As one of the largest members of Washington's forest products sector, pulp and paper mills contribute approximately 40,000 direct jobs and 107,500 direct, indirect and induced jobs. Because many NWPPA members are located in economically stressed rural communities, these family-wage manufacturing jobs help sustain the local economy, with each mill supporting three to five additional jobs in the community. On behalf of our members, NWPPA routinely participates in air quality rule proceedings before the Department.

NWPPA's long-held policy is that there should be a provable and transparent nexus between agency fees and amount of agency work performed for a fee. This rule proposal falls short of meeting NWPPA's policy. NWPPA suggests the rule should be changed to reinstate the draft rule language regarding fiscal audit processes in WAC 173-401-920(3)(b)(ii), "Determine if the time accounting summary of actual work performed in the prior fiscal year reasonably matches the workload estimates on which the biennial budget was based." NWPPA believes the fiscal audit should be transparent about whether agency workload levels met prior fee levels – to inform future budget activities. NWPPA suggests that Ecology evaluate the final rule for whether it is transparent to all stakeholders if workload estimates, work performed, agency budget and fees charged are of an appropriate magnitude and cover the costs of the air operating permit program.

NWPPA thanks the Department for the opportunity to comment on this important matter. I can be contacted at 503-844-9540 to answer any questions.

Sincerely,

Kathryn VanNatta
Director of Government and Regulatory Affairs
Northwest Pulp and Paper Association