

US EPA ARCHIVE DOCUMENT



December 31, 1999

By Facsimile (202) 260-5478

Deborah Dalton

United States Environmental Protection Agency
Washington, D.C.

**RE: Comments to the EPA Public Participation Workgroup Regarding the
“REVIEW OF ENVIRONMENTAL PROTECTION AGENCY PUBLIC
PARTICIPATION POLICIES,” Submitted on Behalf of the New York Public
Interest Research Group**

Dear Ms. Dalton:

As a staff attorney for the New York Public Interest Research Group (“NYPIRG”), much of my work focuses upon improving New York State’s implementation of the Clean Air Act Title V program. In addition, I am working with air quality advocates across the country to increase public participation in the Title V program. Based upon my experiences and the information I have been provided by others, I believe that there are serious barriers to public participation in this program. It is encouraging that your workgroup has been assigned the task of evaluating EPA’s public participation policies and recommending improvements. I hope that your work will result in improved opportunities for public participation in EPA’s environmental decision-making.

The Title V program was adopted by Congress as part of the Clean Air Act Amendments of 1990. Under Title V, all large sources of air pollution and many smaller sources of hazardous air pollutants are required to get a permit that includes all federally-enforceable air quality requirements. In addition, the permit must contain monitoring requirements that are sufficient to assure that the facility is complying with those requirements. Congress’ primary purpose in creating the Title V program was to allow the public, government officials, and industry to understand which requirements apply to each facility and whether a facility is complying with its requirements.

Unfortunately, thus far the Title V program has been implemented with almost no public participation. While the Clean Air Act and federal regulations include substantial public participation requirements, such as a 30-day public comment period on each draft permit and an opportunity to petition EPA to object to a flawed permit, most draft permits are not actually subject to public review

and comment. This lack of public participation is not due to lack of public interest in the regulation of individual facilities. Instead, it is most likely because:

- (1) EPA has made very little attempt to reach out to the public and provide training that would allow members of the public to participate effectively in the program,
- (2) EPA has failed to provide technical support for members of the public who are attempting to participate in public comment periods on draft permits,
- (3) EPA has failed to ensure that states are offering adequate opportunities for public participation.

In response to a petition submitted by NYPIRG and sixty-two other environmental and public health organizations last February, EPA is now making plans to offer Title V training. While air quality advocates from organizations that requested training are pleased by EPA's new plan for public outreach, many fear that the training is inadequately funded and that training will not take place soon enough (or not at all) in some areas of the country. (It is particularly important for the public to be involved when initial permits are drafted and released for public comment, but in some areas most of the initial permits have already been issued or will probably have been by the time training is available). Furthermore, EPA's plan for public outreach does not include technical support as mentioned in (2), above. The lack of technical support for members of the public participating in the Title V program is a serious problem. It is inappropriate for EPA to rely upon state and local permitting authorities to offer this assistance because it is permits that are drafted by the permitting authorities that the public is attempting to review. (In my situation, permit engineers working for the Department of Environmental Conservation are instructed not to talk to me about permit terms because the agency fears that I might sue the state over a bad permit).

As your workgroup reviews EPA's public participation policies, keep in mind the fact that it is state level agencies, not EPA, that have primary responsibility for implementing federal environmental programs. When EPA approves a state program, it retains the responsibility to ensure that the state is administering the program properly. This does not appear to be happening. Attached to this letter is a report written by a NYPIRG summer legal intern describing his informal investigation into public access to documents that theoretically must be available to the public. He concluded that in most states, the difficulty and expense involved in obtaining Title V documents heavily discourages public participation in the program. The report concludes with specific recommendations for how EPA can improve public access to Title V documents. Please take this report into consideration when developing your report for the U.S. EPA Administrator.

Please feel free to contact me at (212) 349-6460 or kpowell@nypirg.org for more information.

Sincerely,

Keri N. Powell
Staff Attorney

Attachment

Public Access to Permits, Compliance Certifications, and Periodic Monitoring Reports Under the Clean Air Act Title V Permitting Program

Brian Flack, Legal Intern
New York Public Interest Research Group
August 1999

I. Introduction

As the public becomes more aware of the health issues surrounding air quality, more people will become involved in monitoring air pollution in their communities. The Clean Air Act Amendments of 1990 recognized this in incorporating public participation into the Title V Permitting Program. The purpose of this study was to see how a member of the public could use the Title V Permitting Program to monitor a facility's compliance with the Clean Air Act. Twelve states were selected for the study. These states were: Texas, Illinois, Hawaii, Oregon, Colorado, Pennsylvania, Ohio, Michigan, New Mexico, Washington, Mississippi, and Montana. For each state, we contacted the permitting authority and requested the following documents:

(1) For a facility that utilizes Continuous Emissions Monitors ("CEMs"):

- a. the Title V permit,
- b. an annual compliance certification, and
- c. a six month monitoring report.

(2) For a facility that does not utilize CEMs:

- a. the Title V permit,
- b. an annual compliance certification, and
- c. a six month monitoring report.

II. Access to the Documents

A. EPA

NYPIRG began its search for information at the EPA's website. Under the Office of Air and Radiation (www.epa.gov/ttn/uatw/stprogs.html), we found links to each state's air quality office or similar division.

Each state's air quality regulations were found on line, and each state typically listed a contact name and number for further information. On a whole, however, the links identified on EPA's website were not altogether helpful. Some of them were incorrect. For the ones that were correct, the link was to the general information website and it was often difficult to navigate to the website that contained the information we were seeking.

B. Individual States

1. *Texas*

We began at the Texas Natural Resource Conservation Commission's Office of Compliance and Enforcement website (www.tnrcc.state.tx.us/homepgs/oce.html). Texas offers information on permits and allows people to apply for one online, but does not list any actual operating permits (<http://www.tnrcc.state.tx.us/air/opd/opdhmpg.htm>). After finding the names of several enforcement officers and speaking with them, we were directed to Jose Araiza, a member of the Air Quality Operating Permits Division. He said he would see if he could find the documents, but we did not hear back for a week. NYPIRG called him back several times and left messages each time. Finally, two weeks after our initial conversation, we spoke with Mr. Araiza again. He said he would refer us to someone higher and to wait for the call. After the phone call never came, and we moved on to a different state.

2. *Illinois*

Illinois offered a general contact number on their website (www.epa.state.il.us/air/index.html). This contact lead to two employees who work on FOIA requests. One employee, Marilyn Clarity, offered her help but needed to know the specific names of the facilities. Merely asking for permits from any two facilities did not suffice because she did not know what we wanted. This occurred with nearly every state, to a certain degree. Ms. Clarity directed us to Pat Laymen, who could supply us with the names of facilities. However, she did not know what I meant by "6-month monitoring reports" and said she would have trouble finding a facility without CEMs. She was going to call us back with the names of two facilities, but she did not and we moved to another state. NYPIRG later discovered that EPA Region 5 lists all operating permits on line (www.epa.gov/region5/air/permits/op.htm), but the state must not have known about this.

3. *Hawaii*

Hawaii's website (www.state.hi.us/health/permits/index.html) gave NYPIRG Nolan Hirai's number at the Air Quality division. Mr. Hirai lead us to a FOIA representative who faxed over a FOIA request sheet. We intended to return it until we read that Hawaii charges \$.50 per sheet for public records requests. Noting that this is an outrageous price for public information, we moved on to another state.

4. *Oregon*

Oregon's website (www.deq.state.or/default.html) had statutes online, but no regulations. We found our way to their Department of Environmental page, which gave George Davis as a contact. He directed us to a woman named Catherine who found the documents we requested. However, the state charged a fee of \$118.00. NYPIRG, however, was able to receive a deferment from Susan Greco, the Rules Coordinator, after sending a waiver request form.

5. Colorado

Colorado lists all its Title V information on the web, including issued permits (www.state.co.us/gov_dir/cdphe_dir/ap/titlev.html). We called one of the listed Title V contacts, Jim King, and he helped us choose two facilities. We were able to print out the permits, but we had to contact the state agency to access the monitoring reports and compliance certifications. Mr. King was able to help me access these, and he also waived the \$.50 per page fee. NYPIRG received one facility's annual compliance certification and 6-month monitoring report and we are waiting to receive the other facility's information.

6. Pennsylvania

Pennsylvania has permit information on its website, (www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/permits.html), but it is directed to businesses who wish to receive a permit. It has blank applications and model permits, but NYPIRG was unable to find any actual operating permits on-line. We called the Office of Pollution Prevention and Compliance Assistance, Deputy's Office, and spoke with Mike Safko. He directed us to Mary Ellen and Joan Luck in the Department Records Management Department who requested that we fill out a FOIA request form. She had the information, but would not copy over 100 pages. We would have to hire a copy service in Wilkes-Barre, PA if we needed over 100 pages. However, the documents turned out to be less than 100 pages and she sent them in the mail. NYPIRG was charged \$15.42 for 97 pages.

When we received the documents, we did not have monitoring reports or a compliance certification. Instead, we received inspection reports done by the agency and two daily CEM reports from the larger facility. The FOIL officers apparently mistook these inspection reports for monitoring reports. Also, we only received the even-numbered pages of one of the permits. We called Ms. Luck and informed her of the mistakes. She said that she would send us a new copy of the permit but that she would not be able to find and copy the monitoring reports or the compliance certification. Ms. Luck said that Pennsylvania has a state wide policy on FOIA: (1) the agency will identify the file and will copy the first 100 pages, (2) the requests must be very specific so they can find the information, and (3) citizens can either come in by appointment or hire one of the copy services the agency recommends. When we received the new copy of the permit, we discovered that Ms. Luck had once again sent us a only the even-numbered pages of the permit. NYPIRG moved on to another state.

7. Ohio

Karen Gonzalez of the Division of Air Pollution Control directed us to Mike Mansour, who showed us that Ohio's permits are on-line at www.epa.state.oh.us/dapc/title_v/titlev.html#major. For the compliance certification and 6-month monitoring reports, we had to ask the district in which the facility is located to send us the documents. We received both documents from one district but are still waiting to hear from the contact at the other district office.

8. Michigan

Michigan was one of only a few states where we were unable to access the state air regulations off of their home page (www.deq.state.mi.us). However, we were able to find the permits on the internet at ftp://ftp.deq.state.mi.us/pub/aqd/rop/pub_ntce/finalpmt with the help of Julia Heiller. She informed us that to obtain compliance and monitoring information, we would have to FOIA the districts where the facilities are located. NYPIRG faxed FOIA requests to both districts, and they sent us the documents and waived the charges.

9. New Mexico

We found Patrick Josey's number on New Mexico's Air Quality Bureau website at www.nmenv.state.nm.us/aqb/aqb_home.html. We spoke to him and he sent us the information. This was the easiest state we contacted.

10. Washington

We found the number of Tom Todd, the Stationary Source Unit Leader, Air Quality Program, on the Washington Air Quality Division's homepage (www.wa.gov/ecology/air/airhome.html). He gave us the names of two facilities, but we had to contact the districts they were located in to obtain copies. A contact at one district, Marely McCall, sent us a copy of the requested permit and monitoring report immediately. The compliance certification had not yet been received, but Mr. McCall expected it shortly. It has not been sent to us, but we did not inquire further. The second district's contacts, Roger Johnson and Bob Swackhamer, required us to fax a request for public records, which we did. We sent in a check for \$11.75 and received the documents.

11. Mississippi

Mississippi was one of the more troubling states. Their website, www.deq.state.ms.us/newweb/homepages.nsf, led us to Wayne Anderson, the Title V contact. He led us to Tonya Stanley, who directed us to Betty Smith in the Public Records Department. She said that she would only be able to help us unless we knew the exact name of the facility. This was typical for most states and did not pose a problem. The problem arose because she would not make copies for us. She actually laughed at us when we suggested such an idea. When asked about the state FOIA, she said that we were more than welcome to go down to Mississippi and look at the documents, but it was not her job to make copies for us. This created a roadblock for NYPIRG because Ms. Smith controlled the records department.

NYPIRG tried a different avenue by asking Lynn Haynes, an EPA contact, for help. Mr. Haynes assisted us and emailed two permits to us. However, we still had to go through Betty Smith to obtain the compliance certification and monitoring reports. Another attempt with her sent us to her

supervisor, Jennifer Griffin. She politely told us to contact Don Watts for compliance reports. She said that after we had as specific information as possible, all we had to do was send a FOIA request on line. We could not get in touch with Mr. Watts and moved to another state.

12. Montana

Montana's website (www.deq.mt.gov) led us to Dave Klemp. After leaving a message for him, we received a phone call from Angela Haller, an environmental engineer. She emailed us two permits, each with technical review documents, and mailed us one Compliance Monitoring/Certification report. The other facility's report was due shortly and she told us she would send it when it arrived. We never received it and did not press it further.

III. Recommendations

The net result of this research proves that the annual compliance certification forms, the 6-month monitoring reports, and to a lesser degree the permits, are too difficult to obtain. Although the state agencies are following the FOIA laws, they are constructively denying access to these documents by making the process so frustrating. One of Congress' major goals in creating the Title V program was to allow the public to understand which air quality requirements apply to each facility and whether each facility is complying with those requirements. This goal is not met if the public is denied easy access to Title V permits, compliance certifications, and monitoring reports.

In light of the results of this informal investigation, NYPIRG makes the following recommendations regarding how public access to Title V information should be improved:

- **Title V documents relating to individual facilities must be posted on the Internet.**

NYPIRG's experience is that federal air quality regulations and policies are available on the Internet (primarily made available at www.epa.gov), but very little information that pertains to individual facilities is available. Some states post Title V permits on-line, but exceedingly few post draft permits on line. Because draft permits are not online, a member of the public who wishes to submit comments on a draft permit during the 30 day public comment period loses valuable time trying to obtain the draft permit. Furthermore, once a final permit is issued, it is frustratingly difficult to obtain copies of monitoring reports and compliance certifications from the state permitting authority. Making this information available on-line would be a huge step towards providing the public with a realistic opportunity to participate in the Title V program. (CAVEAT: Even if information is available on-line, it still needs to be available in hard copy from the permitting authority for those who lack Internet access).

- **EPA must ensure that state and local permitting authorities are making Title V information available to the public in a timely, straight-forward manner.**

Some state permitting authorities do an excellent job of making Title V information available to the public, but many do not. EPA has a responsibility to ensure that state and local permitting authorities

provide the public with correct Title V information in a timely fashion. In situations where this is not happening, EPA must assume the responsibility itself. If a state refuses to make information easily accessible to the public, EPA must withdraw its approval of the state's Title V program.

- **EPA Headquarters must coordinate the information that it provides with information provided by EPA regional offices and state and local permitting authorities.**

As demonstrated by the fact that our contact at Illinois had no idea that EPA Region V was posting all permits on-line, it appears that EPA is not doing a good job coordinating with state permitting authorities about what information is publicly available on the Internet. Not only do the people involved need to be coordinated on this issue so that they can provide the public with accurate information, but the various websites also need to be coordinated. It is insufficient for the EPA website to simply provide a generic link to the relevant state agency website. The EPA site should also indicate where Title V information is posted on the site. Frequently, it is not obvious how to get to Title V information from the main page of a state agency website--particularly when the information on the site is more geared to facility owners who are applying for a Title V permit than for members of the public who wish to participate in the process.

- **Permitting Authorities must be required to keep Title V information organized in a way that makes it easy for government employees to respond to information requests.**

Both the Clean Air Act and 40 CFR Part 70 are clear that draft permits, final permits, compliance certifications, and monitoring reports must be made available to the public. Even so, when a member of the public wants this information, he or she must file a formal freedom of information request and then wait for the government employee to obtain approval from supervisors before distributing the requested information. As revealed by NYPIRG's investigation, employees frequently cannot locate the information or aren't familiar with what the information is. Lengthy delays result--and sometimes the information is never provided at all. Clearly, a better system for maintaining this information is necessary. NYPIRG suggests that permit applications, draft permits, final permits, compliance certifications and monitoring reports be placed in a separate file from other facility information and made available immediately upon either a written or an oral request by a member of the public.

- **The public should not be required to pay copying fees for copies of draft permits, final permits, permit applications, monitoring reports, and compliance certifications.**

As demonstrated by NYPIRG's investigation, permitting authorities often charge exorbitant fees for copies of Title V documents. In addition to NYPIRG's experience during this investigation, NYPIRG also has experience participating in the public comment periods for draft Title V permits developed by the New York State Department of Environmental Conservation. Even during the public comment period on a draft permit, the public must pay \$0.25 per page to receive a copy of a draft permit. At times, NYPIRG has been required to pay \$100.00 to obtain a copy of just the draft permit and the permit application for a facility. As demonstrated by NYPIRG's investigation, many state permitting authorities waive these fees for not-for-profit organizations or others who can demonstrate that the

information will not be used for private gain. New York does not. Some state permitting authorities are far worse, charging \$0.50 per page for this information and refusing to waive fees under any circumstance. And then, of course, there are states like Mississippi where it isn't possible to obtain copies of relevant documents, no matter how much you are willing to pay.

Charging for copies of relevant documents leads to yet another problem--delay. This is a particularly thorny problem if a member of the public is requesting information so that he or she can participate in a public comment period for a draft permit. If a member of the public must mail in a check before the permitting authority mails out the information requested, yet a few more days are shaved from the 30-day public comment period.

- **EPA should designate a person in every EPA regional office to monitor issues surrounding public access to information.**

There needs to be someone in each regional office who serves as the contact point for people who are having difficulty obtaining information. In addition, that person should have an affirmative duty to investigate public access issues and bring problems to EPA's attention. Presently, members of the public only get help solving access problems if they are lucky enough to locate an EPA staffperson who is willing to help. This is simply not good enough. EPA is responsible for ensuring that the Title V program is administered properly, and that includes ensuring that information is easily available to the public. To fulfill its responsibility, EPA needs to assign someone in each EPA region to take affirmative action to locate problems and design solutions. That may include reaching out to air quality advocates and asking about any problems they might have experienced, requesting information from permitting authorities as a "layperson" to determine how well the process is working, and exploring ways to provide more comprehensive access to information over the Internet.