TITLE V OF THE CLEAN AIR ACT

WILL AMERICA'S INDUSTRIAL FUTURE BE PERMITTED?

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EXECUTIVE SUMMARY

The operating permits program under Title V is the most significant innovation in the 1990 Amendments to the Clean Air Act. Although it makes no changes to the substantive provisions contained in the rest of the Act, Title V requires "major" industrial sources of air pollution to incorporate all of these requirements into a single document or "permit." These permits, approved under state programs, will become the primary enforcement vehicle of the Clean Air Act, similar to the operating permits under the Clean Water Act.

Although ostensibly run by the states, the EPA retains ultimate control over the state permitting programs, giving the agency numerous opportunities to meddle in the process and micromanage industry when it so chooses. Environmental groups, exploiting the generous public participation and citizen suit provisions, will also acquire unprecedented power over industry.

Title V will impose substantial costs on industry. EPA puts the cost of Title V at $500 million annually, but others believe this estimate may be an order of magnitude too low. In addition to the high paperwork and compliance costs, Title V's extensive procedural requirements can result in costly delays lasting months or even years, both during the initial permitting process, and in the required revisions to existing permits to incorporate changes at a permitted facility. The potential delays will be particularly troublesome for fast moving industries where facility changes are frequent and it is necessary to quickly bring products to market.

Given the significant improvements in air quality since 1970, and the marked declines in emissions from the large industrial facilities Title V targets, it is difficult to justify the introduction of a new and expensive enforcement scheme at this time. EPA has not attempted to quantify the benefits, in terms of cleaner air, it expects from Title V, but they are likely to be marginal.

While a few legislative changes could make Title V considerably more tolerable than it currently is, there is no reason not to do more. No matter how modified, Title V will never achieve results at an acceptable cost. There now exists a unique window of opportunity to eliminate Title V before it becomes an entrenched part of the regulatory landscape. If all that is accomplished is the softening of a few of Title V's more onerous aspects, the current period may one day be looked back upon as a lost chance at getting rid of the most dispensable title in the Clean Air Act.

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INTRODUCTION

The operating permits program under Title V is the most significant innovation in the 1990 amendments to the Clean Air Act. It fundamentally changes the workings of state and federal air emission control. However, despite the recent focus on the Clean Air Act by reform-minded legislators, Title V has received relatively little public attention.

Although it makes no changes to the substantive provisions contained in the rest of the Act, Title V requires "major" sources of air pollution to incorporate all of these requirements in a single document or "permit." This permit must be approved through programs run by the states. Operating permits will become the primary enforcement vehicle of the Clean Air Act.

Title V exhibits many of the problematic characteristics of the current federal approach to environmental protection.

The stated purpose of Title V is to bring to the Clean Air Act an operating permits program similar to the one in the Clean Water Act. Permits are designed to clarify the requirements applicable to each emissions source and facilitate their enforcement.[1] Whether the operating permits program under the Clean Water Act can or should be duplicated in the realm air emissions was never seriously debated.

Title V exhibits many of the problematic characteristics of the current federal approach to environmental protection. It is a rigid and prescriptive system of command and control emphasizing process over substance and fostering an adversarial relationship between environmental regulators and industry. Most states already have air emission operating permit programs. Title V federalizes these state programs, making them considerably more complex and costly to implement.

It is difficult to justify the implementation of Title V at this time. With a twenty year record of substantial declines in air pollution, particularly among the large industrial emissions sources targeted by Title V, it is unclear why a radically new federal enforcement scheme targeting such sources is needed now. Moreover, Title V is unlikely to achieve additional improve-

ments in air quality. The EPA has never attempted to quantify the benefits it expects Title V to achieve, perhaps because they will be so meager.

With a twenty year record of substantial declines in air pollution, it is unclear why a radically new federal enforcement scheme targeting such sources is needed now.

While the benefits of Title V are questionable, the costs are not. Title V imposes startlingly high compliance costs. More ominously, industries are concerned about Title V's effect on timely operational flexibility. In addition to the initial delays in obtaining a permit, revising an existing permit to account for operational changes at a regulated facility or other post-permit events is a time consuming process, involving numerous precedural steps. Title V is replete with opportunities for the EPA and environmental groups to tie up these permit revisions with procedural delays, in effect giving them unprecedented power over industrial changes. In fast moving industries where changes are frequent, such as electronics or pharmaceuticals, such delays will make it difficult to stay competitive, and deliver new products to consumers in a timely fashion. Once issued, these permits will facilitate enforcement actions initiated by EPA, the states, and environmental groups, for violations of permit terms, including minor technical violations. No other nation has anything as onerous as Title V, giving foreign competitors and American-owned plants located abroad a significant competitive advantage.

At the very least, legislative changes should be made to Title V to reduce the costs and procedural delays imposed on American industry. Ideally, Title V would be completely eliminated. Although less well publicized than some of the other problems with the Clean Air Act[2], Title V, in its current form, provides a very good reason for an extensive overhaul of the Act.

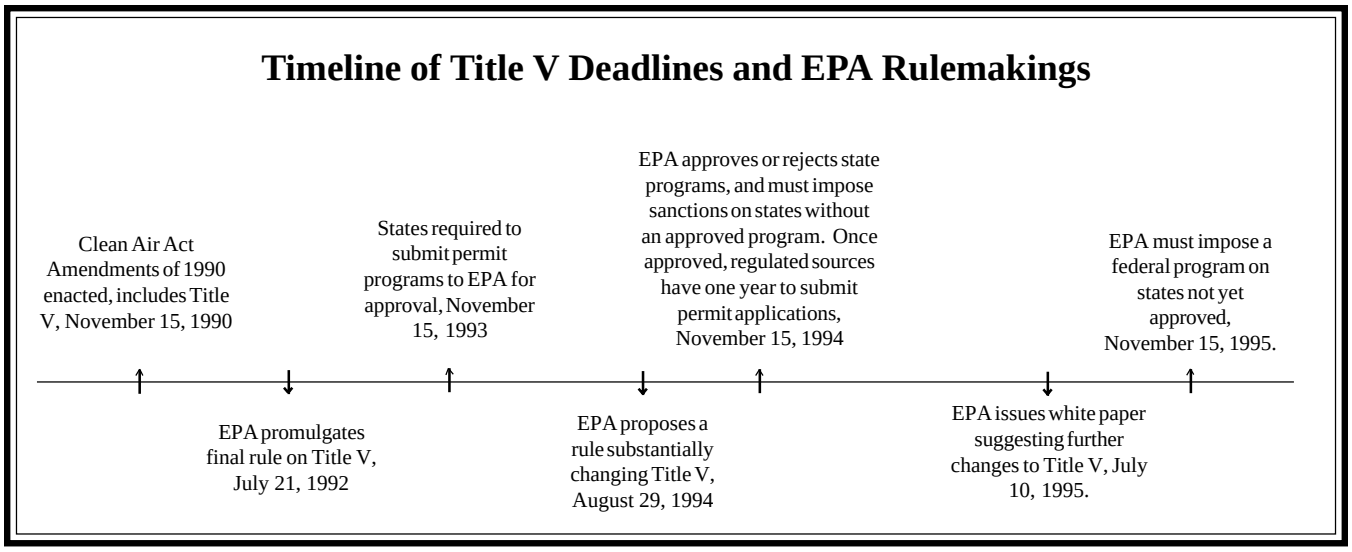
OVERVIEW OF TITLE V

Setting Up Title V: EPA Approval of State Programs

No other nation has anything as onerous as Title V.

The day to day operation of Title V will, at least in theory, be run by the states. Each state will review permit applications, issue final permits, and enforce them under its own program. But states must first submit their planned programs to EPA for approval. Before receiving approval, each state must demonstrate that its program will evaluate permit applications according to the minimum standards set out in Title V and the EPA regulations.[3] States are permitted some flexibility regarding the specifics of their programs, but only where EPA allows. State permit program requirements are described in the sections below.

States were supposed to submit their applications to EPA by November 15, 1993 and EPA was required to approve or reject, in whole or part, within one year. As is often the case with federal undertakings of this size, the



process has fallen severely behind schedule. Many states missed the deadline. EPA has contributed to the delays by repeatedly making substantial changes to the implementing regulations, including a new set of proposed rules due out in July 1995 (see the following figure). To date, less than half the states have obtained approval for their air permit programs. Nonetheless, EPA is required to impose sanctions on states that miss the deadline.[4]

If a state does not have an approved program in place by November 15, 1995, the EPA must impose a federal operating permit program on the air emissions sources in that state.[5] Once a state program is approved, or a federal program is imposed, existing sources of air emissions have one year to file a permit application.[6] States must act on at least one third of all permit applications each year.[7] As an inducement to the states, the law allows them to collect permit fees from the regulated sources, based on the quantity of emissions by the permittee.[8]

Each industrial source of air emissions must determine if it comes under Title V and is required to file a permit application.

Who Must Obtain a Permit

Each industrial source of air emissions must determine if it comes under Title V and is required to file a permit application. However, like nearly everything else in Title V, the standards are unclear. For now, EPA has allowed state programs to limit the Title V requirements to "major sources."[9] A major source is defined as a stationary source that:

- emits or has the potential to emit 10 tons per year of 179 listed hazardous air pollutants, or 25 tons per year of any combination of hazardous air pollutants under § 112 of the Clean Air Act;

- emits or has the potential to emit 100 tons per year of any air pollutant under §302 of the Clean Air Act; or

- emits or has the potential to emit certain criteria pollutants (volatile organic compounds, oxides of nitrogen, carbon monoxide, particulates) in nonattainment areas under Title I, part D, based on several sliding scales which depend on the severity of the nonattainment and the pollutant at issue.[10]

Approximately 34,000 industrial sites are "major," and must be permitted.

Additionally, there are complex rules designed to thwart efforts on the part of industry to split up sites into two or more sources in order to fall below the threshold levels.[11]

EPA initially limited the applicability of Title V to "major" sources until the program is up and running, but may later expand the universe of applicable entities when feasible. Approximately 34,000 industrial sites are "major," and must be permitted.[12] EPA currently allows states to exempt smaller, non-major sources.[13] Were this exemption narrowed or eliminated, as many as 350,000 additional sources, including small businesses such as gas stations and dry cleaners, would also need to obtain a Title V permit.[14] There is little in Title V that limits its reach in this regard. And, if EPA hopes to control most of the nation's industrial air emissions through Title V, much as it controls water emissions, it will have to expand the number of sources subject to Title V.[15]

Important to recognize is that Title V applicability thresholds are based on the "potential to emit," not on actual emissions. The "potential to emit" assumes that a source operates 24 hours a day, 365 days a year, and ignores any efforts to reduce actual emissions unless they are federally enforceable.[16] This standard has created irrational results for many types of entities with much more limited emissions.

Title V applicability thresholds are based on the "potential to emit," not on actual emissions.

"Potential to emit" ignores the seasonality of many kinds of emissions. For instance, many grain elevators will need to obtain a permit, based on the assumption that they are constantly being filled and emptied and emitting dust particles, though this is virtually impossible given the realities of the business.[17] Title V also covers types of equipment that make a negligible contribution to air pollution. Potential emissions from backup generators, for example, are calculated assuming they are in continuous operation throughout the year, but in reality such equipment is rarely if ever in operation. Also, sources whose emissions are below Title V threshold levels because of state or local requirements that are not federally enforceable, and sources that have voluntarily undertaken measures to reduce pollution will still have to comply. Nothing other than federally enforceable limits can be used in determining the potential to emit.

The result of the wide net cast by the "potential to emit" thresholds is the application of Title V permit requirements to a large number of sources with no regard for their actual air emissions. In recent months, EPA has, for the first time, shown some concern about Title V's extreme breadth. In a policy memorandum, EPA said they may allow states to exempt certain

sources whose actual emissions are considerably less than potential emissions. An EPA rule on this point may be forthcoming.

Permit Applications and Permit Content

Sources required to obtain a permit must submit a timely and complete application.[18] Each application must include extremely detailed information about

the emissions at the source, a citation of all air pollution control requirements, a compliance plan, and certification of compliance with all applicable requirements.[19] Pending applications must be updated to include any relevant new information arising after the initial submission.[20] The permit application for a small iron foundry, for example, runs several hundred pages, and must list such minutiae as the estimated amount of dust kicked up by motor vehicles as they enter and leave the parking lot.[21] A responsible official must attest to the truth, accuracy, and completeness of each application, including the certification of compliance.[22]

Potential emissions from backup generators are calculated assuming they are in continuous operation throughout the year.

Each permit issued shall list all federally enforceable air emission limitations and standards.[23] The extensive monitoring, recordkeeping, reporting, and inspection requirements must also be included.[24] Permits are good for a maximum of five years,[25] though most permits will probably have to be revised several times during that span. A new permit does not provide much long-term certainty.

Existing facilities going through the permit application process for the first time as well as new facilities being planned or under construction will suffer extensive procedural delays, up to 18 months, during which they cannot be certain what their approved permit will or will not allow.[26] Long lag times before commencing operations are very costly and in some cases render a planned facility economically unfeasible.

Intel Corporation provides a clear example of a company that will be hurt if Title V causes procedural delays. Those familiar with personal computers know that Intel produces an entirely new generation microprocessor every few years. The 386 microprocessor was introduced in 1985. It was replaced by the 486 in 1989, followed by the Pentium in 1993. The Pentium's replacement is currently in the works.[27] Title V could prevent Intel from maintaining this pace. In a globally competitive field such as semiconductor production, Intel is only slightly ahead of other manufacturers and already must contend with numerous delays caused by other U.S. environmental laws and regulations, such as the New Source Review program. Now, Title V poses additional delays that may slow new product introductions. One of Title V's few purported benefits to industry is the so-called permit shield provisions, whereby the actions of a permitted source that come within the

permit terms would be shielded against enforcement by EPA, the states, or the public.[28] For example, a subsequent determination that a permit term allows more than it should have, or a post-permit change in EPA's interpretation of an existing rule could not be used in an enforcement action against a permitted facility.

Unfortunately, numerous exceptions reduce the permit shield's utility to industry.[29] For one, permit shield provisions are optional to states.[30] When adopted, they are limited to terms explicitly addressed in the permit, and do not include applicable requirements promulgated after the permit was issued.[31] Nor do they preclude EPA from reopening a permit to eliminate any perceived deficiencies.[32] In addition, the statutory and regulatory language describing the permit shield is so unclear that, in many cases, regulated sources cannot confidently rely on their protections.[33] In effect, the permit shield provisions do little to reduce the uncertainty of Title V.

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THE CLINTON EPA AND POST-PERMIT FACILITY CHANGES

Most regulated sources regularly make operational changes at their facilities that may affect emissions, such as manufacturing process or product design changes or increases in production levels. Title V subjects many such changes to review, making it a permanent bureaucratic imposition on industry.[34] The needs of industry to stay flexible and competitive, particularly in an increasingly globalized marketplace, is at odds with Title V.

To complicate matters further, last August the EPA proposed a new rule affecting facility changes, and is now in the process of proposing another rule.[35] Under the EPA rules currently in effect, there are three categories of operational changes, with different procedural requirements for each.[36] These categories were conceived so that environmentally unimportant changes, such as a minor rearrangement of an assembly line, the replacement of a broken or obsolete piece of equipment, or a switch to a slightly different fuel source, can be made relatively quickly and easily, while more serious changes, such as those likely to cause an overall increase in emissions beyond that which the permit currently allows, invoke a greater number of procedural steps.[37] Unfortunately, the regulations would impose procedural delays on some environmentally minor modifications. Companies must wait for approval before implementing changes, or risk the expense of undoing the change should it be subsequently rejected, as well as legal penalties in some cases.

The Clinton EPA rules proposed on August 29, 1994 will make matters worse. These rules expand the scope of operational changes subject to procedural requirements, including changes that are environmentally inconsequential and/or have already been subjected to considerable process at the state level, such as the tens of thousands of changes made each year

under minor New Source Review (NSR) program.[38] This complex proposal was strongly criticized by industry, and EPA is currently considering a revised proposal.

Whatever final rule on permit revisions emerges, it will significantly influence regulated industries' ability to compete, particularly in fields where changes are frequent and necessary. Thus, it is important for industry to take advantage of every opportunity under the law to maintain as much flexiblity as possible. Sources of air emissions, when applying for their initial permits, can, to an extent, reduce future problems by incorporating leeway into their applications. For example, a source can easily switch from one reasonably anticipated operating scenario to another if both are part of an approved permit.[39] But there are limits to what will be allowed in a permit, and what can be anticipated years in advance.

In addition to operational changes, Title V's procedural obstacle course must be repeated when EPA promulgates a new regulation or standard that applies to a permitted source, when EPA decides to reopen a permit "for cause," or when the five year permit term is up.[40]

Changes at a facility, even additions of new equipment that may lead to reduced emissions, must go through Title V's costly and time consuming process.

One concern is that the procedural guantlet may create perverse incentives. Technological advances continually give industry more efficient and less polluting means to operate. But because changes at a facility, even additions of new equipment that may lead to reduced emissions, must go through Title V's costly and time consuming process, owners and operators may choose to continue using existing equipment because it has already been approved. For example, energy intensive manufacturing facilities have the incentive to save on energy costs by periodically updating their equipment base with newer, more energy efficient systems. But such a change may now trigger Title V delays, providing a reason to maintain the status quo.

Fast-to-market industries, already anticipating difficulties in complying with Title V in its original form, are particularly concerned about the EPA's proposed rule. An electronics company, for example, may make numerous process changes annually, any one of which could now cause administrative delays. Intel estimates it makes 30 to 60 such changes annually at each facility, and the Title V delays caused by just one of those changes could allow foreign competitors to beat them to market.[41] Tom Davis, Director of Environmental and Safety Affairs at AT&T, notes that "approval of every change and modification might take as long as the life cycle of many of our products."[42]

In effect, under the Clinton EPA's August proposal, Title V red tape could tie up a high tech product long enough for a global competitor, unhindered by Title V, to introduce it first. It could even delay the introduction of a product until it is obsolete. "Unless the proposed rules are changed, we will have to consider locating new facilities overseas," says Tim Mohin, Government Affairs Manager at Intel.[43]

In addition, changes as simple as stepping up production to meet an unexpected surge in demand for a particular product may require time consuming procedures. The pharmaceuticals industry is particularly concerned. Thomas White, Associate Vice President of the Pharmaceutical Research and Manufacturers of America, notes that the "administrative procedures hinder our response to natural disasters or epidemics which force us to shift production to meet the greater-than-expected need for [a] medicine."[44]

The August 29th proposed revisions came about in part as a result of legal pressure from environmental groups, claiming that the existing rules allowing industrial changes without public participation violate the statute.[45] But the Clinton EPA also seemed anxious to eliminate what it perceived as an anti-environmental leftover from the Bush years. The Bush Administration's Competitiveness Council, in one of the most heated debates over the Clean Air Act's implementation, fought hard for a modicum of operational flexibility in Title V. Under these rules, many environmentally insignificant facility changes could be implemented without procedural delays. However, in a July 1994 press release announcing the proposed rule, the EPA derided these efforts as a "Bush Administration Competitiveness Council decision to restrict the public's right to participate in environmental decision-making."[46]

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But now, as a result of strong industry opposition and the political consequences of the 1994 elections, EPA is in the process of promulgating another new proposal. Although it may restore some of the flexibility that the August 29th proposal would have taken from industry, it is not likely to eliminate all of the time consuming and costly procedural requirements imposed on environmentally minor facility changes.

PRIVATE INVOLVEMENT IN THE PERMITTING PROCESS

Title V is wide open to federal and environmental group involvement. Initial permits and renewals, reopenings of existing permits, and some revisions necessitated by operational changes at a source are subject to a period of public comment, and a public hearing if requested, giving environmental groups or local citizens the chance to inject themselves into the process.[47] Each state, in addition to its own review process, must submit all of the above actions to the EPA (as well as to other states that may be affected).[48] The EPA is given veto authority. States must remedy EPA objections, and the failure to do so will result in a denial of the application.[49] If EPA declines to object, any person may petition them to do so.[50] Denials of such petitions are subject to review in federal court.[51] EPA also retains oversight authority for all state programs, and can impose sanctions for failures in administration or enforcement.[52] In addition, interested parties may challenge a state's issuance of a permit in state court.[53] Thus, the EPA,

environmental organizations and NIMBY (not-in-my-backyard) groups have several opportunities under Title V to block industrial operations by petitioning and litigating for permit denials. This can extend the permitting process indefinitely and greatly increase uncertainty for businesses subjected to Title V (see the accompanying table).

Opportunities for EPA and Environmental Groups to Delay Initial Permits, Re-openings, Renewals, and Certain Facility Changes

Public comment period	30 days
Notice of Public Hearing	30 days
Opportunity for EPA to object	45 days
If EPA objects, state submital of a revision.	90 days
If EPA doesn't object, public petition for EPA to reconsider	60 days
Review of final state action in state court	up to 1 year
Review of EPA's failure to object in federal court	up to 1 year

Once issued, the permits will facilitate enforcement of the substantive provisions in the Clean Air Act by the states, the EPA, and citizen groups. These provisions are similar to those contained in the Clean Water Act. To assist the public, nearly all of the information in permit applications, final permits, and, most importantly, the data generated by subsequent self-monitoring, reporting, and recordkeeping requirements must be made available to members of the public upon request, giving these parties access to the evidence necessary to take advantage of the Clean Air Act's citizen suit provisions.[54] Any failure to provide the data is itself a violation of Title V.

Title V is designed to facilitate citizen suits under the Clean Air Act. The "standing" requirements are very broad — for practical purposes, standing is no barrier to environmental groups under Title V.[55] Also, as a result of a suit, civil penalties can be imposed in addition to injunctive relief.[56] Litigation expenses are also recoverable, sometimes in excess of the actual costs incurred by the litigating party.[57] In some cases, fines, rather than going to the U.S. Treasury, may go to environmental groups for use in what are termed "beneficial mitigation projects."[58]

Title V is designed to facilitate citizen suits under the Clean Air Act.

In many respects, Title V represents a shift away from the traditional presumption of innocence — industry is presumed guilty of violating the Clean Air Act, and must continually establish its innocence. Industrial sources are obligated by law to publicly demonstrate compliance, and anyone has the power to prosecute for non-compliance.

Proponents of such citizen suit provisions have held up the Clean Water Act as a successful model. The operating permits program under the Clean Water Act was designed to have a large private enforcement element. Some point to the large numbers of citizen suits as proof of their utility. More than 100 such suits are filed each year, comprising a significant part of Clean Water Act enforcement. As Title V was modeled on the Clean Water Act,

citizen suits will likely be common under Title V as well. However, the citizen suits under the Clean Water Act have proven an inefficient enforcement vehicle, and it is unlikely that they will fare better under the Clean Air Act.[59]

One problem with citizen suits under the Clean Water Act is that they tend to be misdirected.

One problem with citizen suits under the Clean Water Act is that they tend to be misdirected. Most of the suits are aimed at large industrial sources of water pollution, while such sources contribute less than 10 percent of current water pollution.[60] The dominant sources of water pollution today, municipalities and agriculture, are largely untouched. Industry is an attractive target for reasons that have nothing to do with environmental protection. For one, businesses, more often than municipalities, choose to quickly settle rather than go to court, providing environmental groups a financial incentive to litigate. Settlements can be expected to cover litigation expenses and mitigation projects. In addition, for ideological and public relations reasons, the environmental groups who bring most of these suits prefer to target large corporations.[61] The defendants in citizen suits under Title V will likely be chosen for the same reasons.

The extensive monitoring and recordkeeping data made available to the public, combined with the Clean Air Act's numerous requirements, are conducive to citizen suits for relatively minor infractions. Such infractions can be spotted with minimal effort, often requiring no more than a few hours' effort from a student volunteer taught to scan the data, and a potentially money-making suit can be filed at low cost. Many suits under the Clean Water Act focus on insignificant technical violations. These suits have legal grounding, but do nothing to enhance environmental quality.[62] The problem of such "nuisance" citizen suits will likely occur under Title V as well. In fact, the EPA has indicated that a source in full compliance with all air emission limits is nonetheless subject to enforcement for a technical violation.[63]

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It should be noted that the generous public participation opportunities, both in the permitting process and in subsequent enforcement provisions, will likely be dominated by the large professional environmental advocacy groups such as the Natural Resources Defense Council and the Sierra Club Legal Defense Fund, with only minimal involvement from local grass roots organizations and community groups. While Title V is promoted by the EPA as a vehicle for direct participation by citizens concerned about the air quality in their communities, it is actually ill-suited for that purpose.[64] It is so legally and procedurally complicated that it will discourage (if not preclude) all but professional environmentalists from meaningful participation, except in those extreme cases where NIMBY groups are activated. Whether the involvement of professional environmentalists reflects the real interests and concerns of the local communities is a matter of considerable debate.

The prominent role of EPA and environmental groups in Title V also diminishes state control of operating permit programs. This is ironic, as Title V has actually been characterized by EPA officials as a program that gives

power back to the states. However, forty-five states, including most of the heavily industrialized ones, already have some type of state-run air emission operating permit programs. By most accounts, these programs are relatively efficient and effective, at least compared to federal programs. Title V brings these programs under EPA control, giving the federal agency the opportunity to meddle in the permitting process and micromanage industry when it so chooses. In effect, the EPA treats the state environmental agencies like subordinates, delegating extensive duties while retaining ultimate responsibility.

Special interest groups, exploiting the generous public participation opportunites and lax standing requirements discussed above, can also get into the act of second-guessing industrial decisions. Lawyers at the national environmental organizations can simply peruse the *Federal Register* each day, make a note of any pending new or revised permit applications they object to, and deny or delay them with public hearings, petitions, and/or lawsuits, even if they don't have a legitimate environmental concern. Activists who dislike a particular corporation or industry, or have a general anti-technology bias, will gain a powerful new weapon. Title V may also be misused by competitors or disgruntled former employees. Some see the permit program as little more than a costly vehicle for the EPA, large environmental groups and others to exert increased power over industry.

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TITLE V AND THE REST OF THE CLEAN AIR ACT

An operating permits program has been a part of the Clean Water Act since 1972. In contrast, the Clean Air Act evolved, since 1970, into an extremely complex and potent statute without such a program. Title V must now mesh with numerous Clean Air Act provisions, including some that may no longer be necessary once Title V is in place. But Title V was added to the Act without compensating deletions or streamlining of the other titles, despite the fact that it is supposed to be the single comprehensive enforcement vehicle for all of the Act's substantive provisions. As a result, Title V brings an additional layer of bureaucracy to a statute already notorious for massive red tape and redundancies.[65]

EPA has yet to explain precisely how Title V fits in with state implementation plans (SIPs), the new source review program (NSR), the air toxics program, enhanced monitoring, and others, let alone other pre-existing state-level requirements. The questions raised by the complex interface between these provisions and Title V is beyond the scope of this analysis. EPA clarification on these matters would be helpful.

LAST MINUTE REVISIONS TO TITLE V

At the time of this writing, the EPA is in the process of promulgating a new rule on Title V. While the proposed rule has not yet been published in the *Federal Register*, the EPA has released a white paper describing the suggested revisions.[66]

The costs of inital compliance can reach $200,000 per facility.

The white paper offers several measures to reduce the paperwork requirements associated with obtaining a Title V permit, clarify some ambiguities in previous rules, and streamline certification of compliance procedures. Most importantly, it reduces the number of environmentally insignificant changes under minor New Source Review that need to be included in Title V permits and permit revisions.

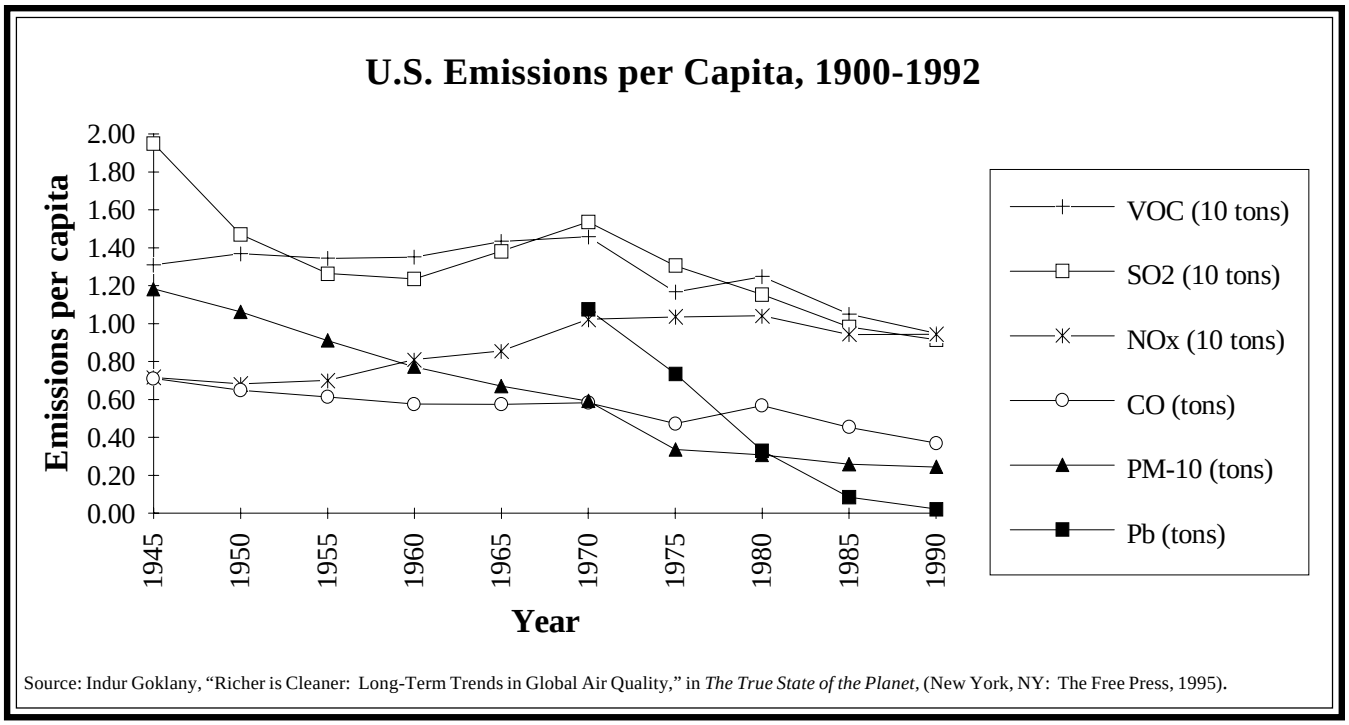
The white paper is a belated step in the right direction, but leaves the fundamental problems of Title V intact. Even if these changes become final rules, Title V will remain a program imposing costly delays and red tape while achieving few environmental gains. In addition, the white paper has no legal force, thus industry cannot be certain about the manner and extent that Title V will be changed until the final regulations have been promulgated — something that will not happen for several more months. EPA may choose to narrow some of the revisions in the final rule, and environmental groups will undoubtedly pressure them to do so. And, since EPA has substantially altered Title V rules several times already, it is not unreasonable to assume future changes in 1996 or 1997, perhaps ones that, political circumstances allowing, will eliminate the prospective concessions that the white paper suggests.

THE COSTS OF TITLE V

The EPA estimates that the total costs will exceed $500 million annually, including $14 million to expand its own bureaucracy.

As affected industries and state environmental agencies are preparing for their Title V deadlines, they are realizing how expensive implementing this program will be. Compiling the permit applications, which require an exhaustive amount of detail, running them through the gauntlet of procedural steps, and complying with the monitoring and other ongoing requirements is costly for regulated companies. Compliance is so complicated that few companies can handle it in-house, necessitating the use of consultants and lawyers. The costs of inital compliance can reach $200,000 per facility.[67] Even the smallest affected sources will typically pay tens of thousands to comply.[68] The impact will be particularly severe for single-facility manufacturers and other small entities that come under Title V, many of whom are already having difficulties absorbing high regulatory compliance costs, and cannot afford much more.

States are also going to expend significant resources on Title V. Many state environmental agencies are doubling their staffs to meet the deadlines. The Ohio Environemntal Protection Agency, for example, is adding 100 to 150 people and spending half its budget on Title V.[69]



Source: Indur Goklany, "Richer is Cleaner: Long-Term Trends in Global Air Quality," in *The True State of the Planet*, (New York, NY: The Free Press, 1995).

The EPA estimates that the total costs, public and private, will exceed $500 million annually, including $14 million to expand its own bureaucracy.[70] But the EPA concedes that the actual costs could be considerably higher.[71] By analogy, the operating permits program under the Clean Water Act has proven to be far more expensive than originally estimated.[72] Most recently, EPA's estimates of the cost of its storm water operating permits program are proving an order of magnitude too low.[73] It would not be surprising if the same occurred with estimates of direct costs associated with Title V. One analyst estimates the paperwork costs to industry alone at $34.1 billion dollars over the first five years of the program.[74]

There appear to be limits on how much Title V can really accomplish.

More than the direct dollar costs of complying with Title V, the delays and uncertainties created by its extensive procedural requirements pose the greatest threat to industry. The impact will be particularly severe in fast-to-market industries as well as companies facing stiff competition from foreign competitors.

Title V will exact a heavy price in terms of opportunities foregone or shipped overseas. Some companies are willing to limit future expansion in order to avoid Title V. Others fear losing market share to foreign competitors. Several are considering placing new facilities outside the U.S. And the burdens of initial compliance will become another regulatory barrier to entry, particularly for fledgling companies. While it is difficult to put the indirect costs in dollar terms at this early stage, especially since the EPA rules are still in a state of flux, they may be greater than the direct costs.

There may even be costs to the environment. Title V will delay the replacement of older equipment and facilities with newer, more environmentally benign ones. Its onerous paperwork requirements will also divert resources away from real pollution prevention.

It seems that Title V, despite its high costs, will achieve no more than marginal improvements at best.

THE BENEFITS OF TITLE V?

The only purpose of Title V is the attainment of cleaner air through improved enforcement of the substantive provisions in the Clean Air Act.[75] Unless Title V brings about significant improvements in air quality, the entire program will amount to nothing more than regulating for regulating's sake. While only time will tell, there appear to be limits on how much Title V can really accomplish.

By most measures, the air has been getting dramatically cleaner for the past several decades without the benefit of Title V, or any other of the 1990 Clean Air Act's new provisions (see the figure below). Some attribute this success to the 1970 Clean Air Act and 1977 amendments, pointing to significant declines in most regulated pollutants during the past two decades.[76] Others point to air quality improvements predating the modern environmental movement and attribute the gains to increasing wealth and technological progress, particularly among western nations during the 20th century.[77] Either way, the 1990 Clean Air Act can take no credit.

Progress has been particularly impressive for pollutants emitted by stationary industrial sources (as opposed to mobile sources or residences), the subject of Title V. There are significant downward trends for particulates and sulphur dioxide, for example.[78] All of this has occurred without a federal air operating permits program. The empirical evidence does not suggest a Clean Air Act under-enforcement problem, especially for the kinds of entities required to obtain a permit under Title V.

There is little hope for a regulatory fix to Title V.

Against this backdrop of continuing success, Title V is now substantially tightening Clean Air Act enforcement. EPA has stated that Title V "may result in an improvement in air quality," but has not attempted to quantify the expected additional reductions in air emissions.[79] It seems that Title V, despite its high costs, will achieve no more than marginal improvements at best. At worst, it will impose tremendous costs for no environmental benefits whatsoever, and may frustrate efforts to implement environmental improvements.

POSSIBLE SOLUTIONS

There are two approaches to improving Title V — keeping the law intact and allowing EPA to make changes through the regulatory process, or changing the underlying legislation. The latter is far preferable. Despite the seemingly new attitude at EPA expressed in its white paper, there is little hope for a regulatory fix to Title V.

Some of Title V's problems are written into the law itself, such as the excessive public participation requirements and opportunities for judicial review.[80] Further, EPA is not genuinely interested in alleviating industry concerns. In its August 29th proposed rule, the agency tipped its hand regarding its philosophy towards Title V. EPA was clearly bent on making Title V as onerous as possible, to the shock of many in industry who thought that the overall parameters of Title V had been agreed upon. Only after a severe backlash from industry and political changes in Congress did EPA express regret about its proposal and recognize that industry may be adversely affected. EPA did not have a change of heart. It is simply adjusting to new political realities. If the political winds shift once again, EPA will undoubtedly take advantage of any opportunity to tighten the screws on Title V. And, in its current form, the underlying statute gives EPA the latitude to do so. Unless legislatively constrained, the EPA is unlikely to make Title V workable and keep it that way.

The real question is not whether legislative change is needed but how much.

Moreover, environmental groups could frustrate attempts at moderation by the EPA. Under Title V, these groups will be capable of tying up industry in procedural and legal knots, with or without the help of the EPA. As the law currently exists, there are few checks on their interference in the permitting process, and they have given every indication that they will make full use of Title V's public participation opportunities. Lack of resources may not be a limitation, since citizen suits could become profit centers, as they have under the Clean Water Act. Legislative change is necessary if reasonable limits are to be placed on the degree of involvement from environmental groups.

The real question is not whether legislative change is needed but how much. The options are either making a few specific modifications to eliminate Title V's most objectional elements (such as the constraints on timely operational flexiblity caused by excessive and frequent procedural delays) or the total elimination of Title V from the law.

While a few targeted changes, such as the ones in the EPA's white paper, can make Title V more tolerable than it currently is, there is no reason not to do more. No matter how modified, Title V will never achieve worthwhile results at an acceptable cost. Giving the federal government (and by extension, environmental groups) that much discretion over industrial decisions is incompatible with a free marketplace. There now exists a unique window of opportunity to eliminate Title V before it becomes an entrenched part of the regulatory landscape. If all that is accomplished is the softening

of a handful of Title V's more onerous aspects, the current period may one day be looked back upon as a lost chance at getting rid of the most dispensable title in the Clean Air Act.

ABOUT THE AUTHOR

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END NOTES

[1] 56 *Federal Register* 21713-4 (1991).

[2] For example, the provisions of the Clean Air Act that affect automobiles (reformulated fuels, vehicle emission inspections, mandatory carpooling, zero-emission vehicles) have received considerably more media coverage than Title V.

[3] 40 Code of Federal Regulations (C.F.R.) § 70.4.

[4] 40 C.F.R. §70.10(a).

[5] 40 C.F.R. §70.10(2).

[6] 40 C.F.R. §70.5(a)(1)(i).

[7] 40 C.F.R. §70.4(b)(11).

[8] 40 C.F.R. §70.9.

[9] 40 C.F.R. §70.3.

[10] 40 C.F.R. §70.2 ("Major source").

[11] *Id*.

[12] 56 *Federal Register* 21,725 (1991).

[13] 40 C.F.R. §70.3(b).

[14] 57 *Federal Register* 32,263 (1992).

[15] There is a fundamental difference between water and air permitting. Water, by its very nature, is conducive to a permitting system. Typically, the numerous small sources of water emissions at a locality flow into one large source, and only the large sources need to be permitted. Thus, a manageably low number of permits can cover most water emissions. Air emissions, however, are much more diffuse. They are immediately released at the hundreds of thousands of points where they are created. Compared to water permits, it will take a much larger number of air permits to account for the same percentage of total emissions. Although no figures exist, the percentage of emissions covered by the approximately 34,000 sources being initially permitted is probably small. This is one reason air permits are unlikely to achieve results worth the costs.

[16] 40 C.F.R. §70.2 ("Potential to emit").

[17] 99 percent of the grain elevators in Iowa, if constantly being filled and emptied throughout the year, would emit more than 100 tons of dust, thus requiring a permit. In reality, elevators operate far less frequently, and emit considerably less than 100 tons of dust. They are filled during the harvest, and slowly emptied throughout the rest of the year. In fact, a single mid-sized elevator, if constantly operated throughout the year as hypothesized in the "potential to emit" definition, could handle more than the entire U.S. corn crop. Compliance with Title V, for a typical grain elevator requires filling out a 280 page form, which is beyond

the capabilities of most elevator owners, necessitating the hiring of consultants who charge $25,000 to $40,000. (Testimony of Rick Keith, Manager of the West Bend Elevator Company, before the United States Senate Subcommittee on Administrative Oversight and the Courts, February 22, 1995).

[18] 40 C.F.R. §70.5.

[19] 40 C.F.R. §70.5(c).

[20] 40 C.F.R. §70.5(b).

[21] Testimony of Charles E. Mitchell Rentschler, President and CEO of the Hamilton Foundry and Machine Co., before the House Commerce Oversight and Investigations Subcommittee, May 18, 1995.

[22] 40 C.F.R. §70.5(c)(9)(i), §70.5(d). This is a matter of some concern to the responsible officials involved, because Title V and the rest of the Clean Air Act is so complicated that it is virtually impossible to know if the submissions are correct and the source is in compliance.

[23] 40 C.F.R. §70.6(a)(1).

[24] 40 C.F.R. §70.6(a)(3), §70.6(c).

[25] 40 C.F.R. § 70.6(a)(2).

[26] 40 C.F.R. §70(a)(2).

[27] Comments submitted to EPA by Intel Corporation on the proposed operating permit program revisions, January 31, 1995.

[28] 40 C.F.R. §70.6(f).

[29] David P. Novello, The New Clean Air Act Operating Permit Program: EPA's Final Rules, 23 Environmental Law Reporter 10080, 10088-89 (1993).

[30] 40 C.F.R. §70.6(f).

[31] 40 C.F.R. §70.6(f).

[32] 40 C.F.R. §70.7(g).

[33] 42 United States Code (U.S.C.) §7661c(f), 40 C.F.R. §70.6(f).

[34] 42 U.S.C. §7661a(b)(10), 40 C.F.R. §70.7, § 70.4(b)(12).

[35] 59 *Federal Register* 44,460 (1994).

[36] 40 C.F.R. §70.7.

[37] 42 U.S.C. §7661a(b)(10).

[38] 59 *Federal Register* 44,460 (1994); EPA Press Release, "EPA Amends Clean Air Act Rule To Fully Involve Citizens", July 11, 1994.

[39] 40 C.F.R. §70.6(a)(9).

[40] 40 C.F.R. §70.7.

[41] Testimony of Bill Sheppard on behalf of Intel Corporation Regarding the Operating Permit Program Requirements of The Clean Air Act, Before the Subcommittee on Oversight and Investigations of the House Committee on Commerce, May 18, 1995.

[42] Telephone conversation with Thomas Davis, AT&T, February 16, 1995.

[43] Telephone conversation with Tim Mohin, Intel, March 8, 1995.

[44] Comments submitted to EPA by Thomas White, Associate Vice President, Pharmaceutical Research and Manufacturers of America on proposed operating permit program rule revisions, January 31, 1995.

[45] *Clean Air Act Implementation Project v. EPA*, 92-1303, 1993 U.S. App. Lexis 36928 (D.C. Cir., Dec. 10, 1993).

[46] EPA Press Release, "EPA Amends Clean Air Act Rule To Fully Involve Citizens", July 11, 1994.

[47] 42 U.S.C. 7661a(b)(6), 40 C.F.R. §70.7.

[48] 42 U.S.C. §7661d, 40 C.F.R. §70.8.

[49] 40 C.F.R. §70.8(c)(4).

[50] 42 U.S.C. §7661d(b)(2), 40 C.F.R. §70.8(d).

[51] 42 U.S.C. §7661d(b)(2), §7607.

[52] 40 C.F.R. §70.10(b).
[53] 42 U.S.C. §7661a(b)(6), 40 C.F.R. 70.4(b)(3)(x).
[54] 40 C.F.R. §70.4(b)(viii), 42 U.S.C. §7604.
[55] 42 U.S.C. §7604(a).
[56] 42 U.S.C. §7604(a).
[57] 42 U.S.C. §7604(d).
[58] 42 U.S.C. §7604(g)(2).
[59] Michael S. Greve, "Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program," in *Environmental Politics: Public Costs, Private Rewards,* ed. M. S. Greve and F. L. Smith (New York: Prager, 1992).
[60] Greve, p. 116.
[61] Greve, p. 111.
[62] Greve, p. 111.
[63] Environmental Protection Agency Letter from Mary D. Nichols, Assistant Administrator for Air and Radiation, to Senator Lauch Faircloth, July 20, 1995.
[64] EPA Press Release, "EPA Amends Clean Air Act Rule To Fully Involve Citizens", July 11, 1994. EPA Administrator Carol Browner refers to "the Clinton Administration's commitment to fully involve citizens in decisions that directly affect them.
[65] Kent Jeffreys, "Rethinking the Clean Air Act Amendments," *NCPA Policy Backgrounder* No. 107, October 16, 1990.
[66] White Paper For Streamlined Development Of Part 70 Permit Applications, Environmental Protection Agency, Washington, D. C., July 10, 1995.
[67] Pat Goodman, "Take Five: A Revised Operating Permit Rule Makes Title V Even Tougher," *Resources*, January 1995, p. 13.
[68] Testimony of Rentschler and Keith
[69] Telephone conversation with Bob Hodenbosi, Ohio Environmental Protection Agency, February 8, 1995.
[70] 57 *Federal Register* 32,293-94 (1992).
[71] *Id*.
[72] President Clinton's Clean Water Initiative: An Analysis of Benefits and Costs, Environmental Protection Agency, Washington, D.C., 1994.
[73] "City, Local Officials Urge Clinton To Veto Unfunded Federal Mandates," *BNA National Environment Daily*, August, 13, 1993; "Mayors Say Cities Face Fiscal Crisis Due To Cost Of U.S. Environmental Rules," *BNA National Environment Daily*, January 22, 1993.
[74] Michael Becker, Comments of the Citizens for a Sound Economy Foundation, before the Office of Information and Regulatory Affairs, Washington, D.C., 1991.
[75] 57 *Federal Register* 32,294 (1992). ("The benefits of this rule include more efficient and greater compliance with emission standards. Greater compliance may result in an improvement in air quality. This rule is not otherwise expected to yield gains in air quality since the rule does not affect ambient air standards or emission standards).
[76] 22nd Annual Report on Environmental Quality, Council on Environmental Quality, Washington, D.C., March 1992, pp. 273-275.
[77] Indur M. Goklany, "Richer is Cleaner: Long-Term Trends in Global Air Quality," in *The True State of the Planet*, ed. Ron Bailey (New York: Simon & Schuster, 1995).
[78] EPA, National Air Pollutant Emission Trends, 1900-1992.
[79] 57 *Federal Register* 32,294 (1992).
[80] 42 U.S.C. §7661a(b)(6), §7661d(b)(2).