

(AR-18J)

November 30, 2001

Andy Buchsbaum, Water Quality Project Manager
Great Lakes Natural Resource Center
National Wildlife Federation
506 East Liberty Street
Ann Arbor, Michigan 48104-2210

Dear Mr. Buchsbaum:

Thank you for your March 12, 2001, letter regarding the National Wildlife Federation's comments on Minnesota's title V operating permit program. You submitted comments in response to the United States Environmental Protection Agency's (USEPA's) Notice of Comment Period on operating permit program deficiencies, published in the Federal Register on December 11, 2000. Pursuant to the settlement agreement discussed in that notice, USEPA is publishing notices of program deficiencies for individual operating permit programs based on the issues raised that USEPA agrees are deficiencies, and responding to other concerns that USEPA does not agree are deficiencies.

We reviewed the issues that you raised in your March 12, 2001, letter and determined that these issues do not indicate program deficiencies in Minnesota's title V operating permit program. USEPA's response to each of your program concerns is enclosed.

USEPA Region 5 will also post its response letters on the Internet at <http://yosemite.epa.gov/r5/ardcorre.nsf/Title+V+Program+Comments>. USEPA Region 5 includes the states of Michigan, Minnesota, Illinois, Indiana, Ohio, and Wisconsin. The USEPA will also be posting all response letters on the national USEPA website, and the Agency will publish a Federal Register notice of the availability of those response letters.

We appreciate your interest and efforts in ensuring that Minnesota's title V operating permit program meets all Federal

requirements. If you have any questions regarding our analysis, please contact Rachel Rineheart at (312) 886-7017 or Robert Miller at (312) 353-0396.

Sincerely yours,

/s/ George Czerniak for

Bharat Mathur, Director
Air and Radiation Division

Enclosures

cc: Karen Studders, Commissioner
Minnesota Pollution Control Agency

Enclosure 1
USEPA's Response to National Wildlife Federation Comments on
Minnesota's Title V Operating Permit Program

Comment 1: "Under Minnesota Rule 7007.0800 Subpart 13, '[e]ach permit shall specify the duration of the permit, or state that the permit is nonexpiring.' This provision is in direct violation of 40 CFR §70.6(a)(2), which states that the MPCA should 'issue permits for a **fixed term** of 5 years in the case of affected sources, and for a term **not to exceed** 5 years in the case of all other sources' (emphasis added). By not mandating the 5 year limit in its permit program, the MPCA has granted itself the ability to issue permits for a period longer than 5 years, which is a violation of title V."

Minnesota Rules Chapter 7007 contains the requirements for all air emission permit programs within the State of Minnesota. These permit programs include the title V program, the pre-construction permitting program, and the state operating permit program. Each program may have varying requirements that are identified in the sections of the rule describing and defining the program. In addition there are general requirements applicable to all programs throughout Chapter 7007. The permit content requirements of 7007.0800 are an example of a section that contains requirements that are generally applicable to all permit programs under Chapter 7007. The specific requirements for permit duration are found in Minn. R. 7007.1050 "Duration of Permits". Minn. R. 7007.1050 Subpart 1 "Part 70 permits" states:

A part 70 permit shall expire five years after issuance, except for title I conditions as provided in subpart 4. The agency may issue part 70 permits for stationary sources, other than affected sources, that expire in less than five years but not less than three years if necessary to evenly distribute the rate of reissuance applications in subsequent years and if the permittee consents.

The Minnesota title V Program does require that a permit issued under that program expires at least every five years. Note, also, that the Minnesota Pollution Control Agency (MPCA) issues combined pre-construction and operation permits. Mandatory pre-construction requirements are identified as title I conditions in the permit. To meet the Federal requirement of permanence for these conditions, MPCA designates certain permit conditions as non-expiring even though the permit itself may expire.

USEPA finds that the National Wildlife Federation has misinterpreted the requirements of the Minnesota title V Program with respect to duration of permits. Our conclusion from the review of the program is that the requirements for permit duration are consistent with the Clean Air Act (the Act) and the part 70 regulations.

Comment 2: *"One of the important purposes of title V of the Clean Air Act Amendments of 1990 was to make it easier for the public to inform itself of the specific requirements a given source must meet by including all of those requirements in a single permit. Flying in the face of this purpose, Minnesota Rule 7007.1100 Subpart 1 allows the MPCA to 'issue general permit ... apply[ing] only to specific portions of stationary sources, including air pollution control equipment, if the specific portions are subject to the same or substantially similar regulatory requirements.' This provision could result in facilities that operate under several different title V permits, with requirements pursuant to general permits that are not immediately apparent from the source's individual title V permit. This practice is not authorized by the EPA regulations, either in the definition of a 'General Permit' found at 40 CFR §70.6(d), or anywhere else in Part 70."*

The definition of "Part 70 permit" at 40 C.F.R §70.2 is as follows:

Any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

This definition anticipates the issuance of multiple permits to a single source. The July 7, 1993, document "Questions and Answers on the Requirements of Operating Permits Program Regulations," prepared by USEPA contains the following discussion in relationship to general permits and the title V program:

6.7 General Permits

1. Can a general permit be incorporated into a larger permit?

Yes. Examples of general permits that might be incorporated would include those for small boilers, degreasers, and storage tanks that are part of a larger facility.

2. When general permits cover emission units at a facility that has an overall title V permit, how are the permits related?

The facility-specific permit should identify all units covered by general permits and cross-reference the general permits by number or source category.

This guidance clarifies USEPA's position that issuance of general permits covering portions of facilities in addition to the overall part 70 permit is acceptable. The Minnesota title V Program is consistent with the regulations and established guidance.

Comment 3: "It should also be brought to your attention that MPCA has yet to revise Minnesota Rule 7007.1400 Subpart 1G, which provides that the administrative amendment procedure may be used to 'clarify a permit term,' although such a revision was requested in the EPA's Notice of Final Interim Approval of Minnesota's Operating Permits Program on June 16, 1995. This ambiguous provision is not consistent with the requirements of 40 CFR §70.7(d), which spells out the specific situation in which an administrative permit amendment is appropriate."

The program originally submitted to USEPA for approval allowed the use of administrative amendment procedures to "clarify" a permit term. USEPA felt that the term "clarify" was ambiguous and that the state could be interpret its rule to include changes outside the scope of the administrative amendment procedures outlined in part 70. The following change to Minnesota Rule 7007.1400 was effective on January 19, 1998 (added text has been underlined), "An amendment to clarify the meaning of a permit term." By adding the phrase "the meaning of," MPCA has limited the scope of changes that could qualify for the administrative amendment process. It prevents changes in the limitation itself, and better reflects the types of permit revisions that the state had envisioned for this process. As an example, a permit might contain a requirement for daily monitoring of temperature for a unit stating that the temperature must be between 100 and 150 degrees Fahrenheit. The state could add language through the administrative amendment process clarifying that "daily" means "any day the unit is in operation." In contrast, if an error had been made in the permit such as the wrong temperature range or the limit should have been degrees Celsius rather than Fahrenheit, the state could not use the administrative amendment process because the correction of that error would result in a change in the meaning of the limitation.

Comment 4: "In Implementing its title V permit program, MPCA has violated the public comment provisions of both 40 CFR §70.7(h), 'Public Participation,' and Minnesota Rule 7007.0850 Subpart 2, 'Public Notice and Comment,' by allowing facilities to submit plans with enforceable permit provisions after the issuance of a permit. This effectively nullifies the public notice and comment procedures, as no additional public comment period is provided for review of these plans. For example, Minnesota Air Emission Permit No. 07100002-001 provides that the Boise Cascade Corporation is to submit both an Operation and Maintenance Plan and a Fugitives control Plan within 90 days of the issuance of its permit and that these plans 'will be made an enforceable part of the permit.' This means that neither the operation and maintenance requirements nor the requirements to control fugitive dust were ever subject to public review."

"Failure to provide the public with a notice and comment period for permit requirements to control fugitive dust is a particular problem in Northeastern Minnesota, which has high ambient levels of Particulate Matter (PM) due to mining operations. A large portion of the particulate matter emissions from the mining industry is in the form of fugitives. Omitting the permit provisions that apply to fugitive sources from public review denies the public the opportunity to address one of the largest air quality problems in the region."

The fugitives control plan required by the State of Minnesota is not an applicable requirement under title V and the implementing regulations. Because the fugitives control plan is not an applicable requirement, the state is not required to include the plan in a part 70 permit. If the State chooses to include the fugitives control plan in a part 70 permit, the permit should identify it as a "state-only" requirement to distinguish it from those requirements of the permit that are federally enforceable.

With respect to the Operation and Maintenance (O&M) plans, Minnesota Rules Chapter 7007.0800, subpart 14 reads as follows:

Operation of control equipment. If the commissioner determines that such provisions would substantially improve the likelihood of future permit compliance, the permit may specify operating and maintenance requirements for each piece of control equipment located at the stationary source or require the permittee to maintain an operation and maintenance plan on site.

USEPA has approved this language as both part of the state's title V program and as part of the Minnesota SIP. Therefore, if the commissioner of MPCA determines that a source must maintain an O&M plan on site, the requirement to do so is an applicable requirement that the permitting authority must include in the part 70 permit. MPCA has consistently done this. The approved rule neither defines the contents of an O&M plan nor requires compliance with the plans. When the State decides that specific operating and maintenance requirements must be specified in the permit these requirements become applicable requirements. USEPA agrees with the commenter that MPCA must then allow for public participation in establishing these requirements. Keeping in mind that the State of Minnesota has a merged construction and operating permit program, it is not always possible to establish these requirements at the time of permit issuance. Because the source is issued its part 70 permit prior to construction of new units, the permitting authority cannot always establish appropriate operating parameters at permit issuance. The permittee must first construct the unit, then perform appropriate testing to determine the operating requirements. Due to this fact, USEPA believes that for such new units it is appropriate to include only the testing schedule and associated submittal requirements in the initial permit or permit modification, as MPCA has done in practice. However, MPCA's current practice of establishing the operating requirements through the administrative amendment process is not consistent with the requirements of title V, the implementing regulations, or Minnesota's approved program. MPCA has made a commitment to incorporate these requirements into a source's part 70 permit through the State's major permit amendment procedures for all future permits. A copy of MPCA's November 15, 2001, letter is enclosed. USEPA is, therefore, not publishing a notice of program deficiency with respect to this issue at this time.

USEPA will monitor this process as part of its permit review activities. If USEPA ever finds that MPCA is not operating in accordance with the commitment, USEPA will publish a notice of deficiency for failure to implement its program in accordance with the approved requirements.

Although not specifically identified by the commenter, there is a similar issue with implementation of program requirements in Minnesota with respect to the periodic monitoring requirements of 40 C.F.R. §70.6 (a)(3)(B). In 1998 MPCA approached USEPA with a question concerning the appropriate method of incorporating periodic monitoring requirements of this type for new units. As in the discretionary requirement discussed above, accurate parameter ranges cannot be established until the unit is

constructed and testing is performed. USEPA informed MPCA that including a requirement to monitor a given parameter periodically and a requirement to conduct a performance test to determine and establish the appropriate parameter ranges in the initial permit would meet the periodic monitoring requirements of 40 C.F.R. §70.6 (a)(3)(B). Furthermore, USEPA informed MPCA that using the administrative amendment procedures or the minor modification process to establish the parameter ranges developed in conjunction with the performance test as enforceable permit requirements was consistent with part 70 and the approved Minnesota program. The basis for this conclusion was that adding the specific operating ranges was resulting in more stringent monitoring requirements than originally required by the permit. USEPA has re-evaluated its position in light of the comment received from the National Wildlife Federation, and we believe we were incorrect in our original analysis. Therefore, MPCA's commitment also extends to this situation, and MPCA will use its major amendment process to incorporate these ranges into part 70 permits in the future.

Comment 5: "Consistent with 40 CFR §70.6(a)(3), 'Monitoring ... Requirements,' Minnesota Rule 7007.0800 Subpart 4B requires that all monitoring requirements be 'designed to yield reliable data from the relevant time period that are representative of the stationary source's obligation.' However, in practice the MPCA does not always require testing with enough frequency to provide such data. For instance, the Boise Cascade permit requires testing for Volatile Organic Compounds (VOCs) and Total Reduced Sulfur (TRS) produced by the SV 173 Brown Stock Washing System at only three-year intervals. VOC emissions from the SV 322 S melt Dissolving Tank are measured for the first time some three years after the permit is issued, and a Sulfur Dioxide test is performed only every five years. The EU 320 Recovery Furnace is to have its PM and PM₁₀ emissions measured only every three years and VOC emissions every five years. These numerous examples from a single permit indicate that the MPCA is unwilling to require the testing needed to sufficiently gauge emission levels during the course of a source's operation, effectively violating 40 CFR §70.6(a)(3)."

Part 70 requires monitoring necessary to assure compliance, which can include parametric monitoring in lieu of or supplemental to stack testing. It is Region 5's practice to focus our review on monitoring included in title V permits to ensure compliance with the Act and implementing regulations. In our review of Minnesota permits, we have not found a significant problem with the required monitoring. While stack testing is not often required

yearly, Minnesota permits typically require sufficient parametric monitoring to assure compliance. Citizens are, of course, free to petition the Administrator to object to any particular permit that they believe fails to assure compliance with applicable requirements, including the requirement for monitoring adequate to assure compliance.

Comment 6: "MPCA is in violation of 42 U.S.C. §7661b(c) because it has failed to issue a title V permit to all facilities required to operate under such a permit by the June 16, 1998 deadline, three years after interim approval of Minnesota's Operating Permits Program. Therefore, EPA has the authority to withdraw program approval under 40 CFR §70.11(c)(1)(ii)(A), which provides that the Administrator may withdraw program approval for 'failure to issue permits.' NWF urges the EPA to exercise this authority unless Minnesota increases its fees as discussed below to ensure that the remaining permit applications are addressed within the next year. At the very least, EPA should deny final approval because Minnesota is in violation of this critical statutory deadline."

"Because the statutory deadline for MPCA to issue title V permits to all facilities required to have such permits is long past, MPCA is clearly in violation of 40 CFR §70.4(d)(3)(i), which provides that MPCA's permit program 'must provide for collecting permit fees adequate for it to meet the requirements of §70.9 of this part.' Section 70.9(b) states that state programs 'shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs.' The deadline for permit issuance passed almost three years ago, and MPCA is nowhere near completing its initial round of permitting. Minnesota clearly does not have sufficient staff or resources to complete and monitor the permitting process. Additional program fees are necessary."

USEPA does not agree with the conclusion drawn by the commenter that failure to issue permits alone is evidence that program fees are inadequate. However, both program fees and permit issuance are areas of great concern for USEPA.

In our review of the Minnesota program, USEPA has found that MPCA is collecting an amount equivalent to the presumptive minimum. Without evidence that this amount is inadequate, USEPA has no basis to either deny full approval of the Minnesota program or to initiate the process of withdrawing program approval based on the level of fees. USEPA plans to conduct program audits for Region 5 states next year. As part of this audit, we intend to evaluate

the states' program fees. USEPA intends to complete these program audits by December 1, 2002. If USEPA finds through the audit that the fees collected are insufficient, USEPA will publish a notice of program deficiency.

USEPA believes that failure to issue permits within the time frame established by the Act merits special consideration. A number of permitting authorities including Minnesota, have not issued permits at the rate required by the Act. Because of the sheer number of permits that remain to be issued, USEPA believes that many permitting authorities will need up to two years to issue the remaining initial permits to fully comply with the permit issuance requirements of the Act. If the permitting authority has submitted a commitment to correct this, USEPA believes that the permitting authority has already taken "significant action" to correct the problem and thus does not consider the failure to have issued all initial permits a deficiency at this time. To be acceptable to USEPA, the commitment must establish semi-annual milestones for expeditious permit issuance. The permitting authority must commit to issue all outstanding permits as expeditiously as practicable, but no later than December 1, 2003. Minnesota committed to do so in a letter to USEPA, dated November 16, 2001. USEPA will monitor the permitting authority's compliance with its commitment by performing semiannual evaluations. As long as the permitting authority issues permits consistent with its semi-annual commitments, USEPA will continue to consider that the permitting authority has taken "significant action" such that a notice of deficiency is not warranted. If the permitting authority fails to meet its commitments, USEPA will issue a notice of deficiency and determine the appropriate time necessary for the state to issue the outstanding permits.

MPCA has submitted a commitment and a schedule for issuing the remaining 133 initial permits. This schedule is as follows:

Date	Number of Remaining Permits to be Issued
06/01/02	113
12/01/02	67
06/01/03	35
12/01/03	0

A copy of the permitting authority's commitment is enclosed.