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Federal Air Pollution Requirements

Figuring out what regulations apply can be challenging, but Helen Kang of Golden Gate University School of Law offers tips on finding relevant information.

Helen Kang

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The Clean Air Act is notoriously difficult to navigate and enforce. The difficulty is in part due to the act's regulatory scheme, which is inferior in critical ways to the Federal Water Pollution Control Act (commonly known as the Clean Water Act). Unlike the Waste Discharge Requirements covering discharges of pollution into water bodies issued by the Regional Water Quality Control Board, which contain both federal and state requirements in a single permit, the Clean Air Act does not require a single permit for all facilities that pollute the air. Also significant, the Clean Air Act does not require self-reporting of violations by all facilities that pollute the air.

For example, the permit that large sources are required to have, which are commonly known as Title V permits, do not generally contain state requirements; and the information required to be reported under the Title V program is more limited than the information contained in discharge monitoring reports required under the Clean Water Act. Whereas the discharge monitoring reports are required to identify each permit provision that a facility has violated, the dates of the violation, the cause of the violation, and any corrective actions that have been taken to cure the violation, Title V permits do not generally require those kinds of details that would aid in enforcement.

Despite these challenges, Clean Air Act enforcement remains an important part of the docket for both government and private enforcers. What are the tools for determining the requirements that apply to a specific facility? The most basic tools are knowing about the different types of federal permits that a facility is required to have; obtaining copies of such permits; investigating the facility's compliance through information obtained through the Freedom of Information Act and the California Public Records Act; and reviewing the provisions of the act to determine applicable requirements that are not contained in permits.

A FACILITY MAY BE REQUIRED TO HAVE SEVERAL PERMITS

Some, if not all, of the 35 air districts in California maintain a list of a facility's permitting history. Obtaining such a list through an informal request is a good way to start. If an informal request is not successful, use the PRA to request a list. If a list is not available, then go through a checklist of permits as follows. (Acid rain permits are not covered here.)

Title V Operating Permit. If the facility is a large source of emissions, check to see if it has a Title V permit. Title V permits for facilities within the jurisdiction of the Bay Area Air Quality Management District are accessible on its [website](#) — Title V and associated documents. If the permit is not available on the air district's website, obtain a copy from EPA Region IX's website. The website is quirky, so make sure you know how to navigate it.

Among the facilities that are required to obtain a Title V permit are those with a "potential to emit" at least 100 tons of "criteria pollutants," as are facilities that have a potential to emit at least 10 tons of any single hazardous air pollutant or 25 tons of a combination of hazardous air pollutants. Criteria pollutants that are covered by the Title V program are carbon monoxide, lead, nitrogen dioxide, precursors to ground-level ozone (such as volatile organic compounds), particulate matter and sulfur dioxide. Hazardous air pollutants are listed in §112(b) the Clean Air Act, 42 U.S.C. §7412(b). Of the 189 pollutants listed there, EPA removed one, caprolactam, in 1996. In addition to facilities that emit criteria or hazardous air pollutants, facilities emitting large amounts of greenhouse gases may also be covered under the Title V program.

A facility's "potential to emit" pollutants refers to "the maximum capacity of a stationary source to emit a pollutant under its

physical and operational design." 40 C.F.R. §52.21(b)(4). In other words, a Title V permit is required even if you do not actually emit the threshold amount. What matters is whether your facility is capable of emitting that amount. Calculating the potential to emit can be complicated and often disputed since the number determines whether a permit is required. The U.S. EPA thus [provides guidance](#) on calculating a facility's potential to emit.

Synthetic minor operating permit. If an apparently large operation does not have a Title V permit, it may be covered under a synthetic minor operating permit. "Synthetic" here refers to a major source operating as a minor source through enforceable limits on its operation, that is, by taking a permit limit to be regulated as a minor source. Sources sometimes choose this option to avoid the more rigorous requirements of a Title V permit. Information about synthetic minor facilities is sometimes also available on the web. BAAQMD lists the synthetic minor sources within its jurisdiction here. The permits are typically not available on the web and must be obtained through PRA requests.

Preconstruction permit for a modification to an existing facility. Even if the facility you are investigating has been in existence for a long time, it may have made modifications that increase potential emissions. If the modifications fall within the type that the Clean Air Act's new source review program covers, then the facility should have obtained a preconstruction permit. If an air district — and not the EPA — is issuing such a permit, it will be part of a "permit to construct" (also known as authorities to construct) that contains both federal and state requirements triggered by the modification.

These permits are required to contain emissions limits that reflect the application, in attainment areas, of best available control technology (BACT) for pollutants that the act regulates (including greenhouse gases) and the lowest achievable emission rate (LAER) for nonattainment pollutants. (My article from last year in *The Recorder*, "[Navigating Environmental Regulations](#)" (June 22, 2011)), covers the difference between the nonattainment and attainment programs.) BACT and LAER, in some air districts, are equivalent. Authorities to construct for nonattainment new source review are also required to provide emission offsets to ensure that the increase from the proposed modification does not interfere with the air district's plan to better the air quality.

When a facility makes modifications that the new source review program covers, they can trigger the requirement for both attainment and nonattainment new source review. That is, an area that is in attainment for one pollutant is often in nonattainment for another; and that status can lead to triggering both nonattainment and attainment new source review.

QUESTIONS TO ASK ABOUT THESE PERMITS

Review the permit and information about the facility's emissions that may be disclosed in the reports required by the permits. Other information you may want to review includes the emissions inventory for the facility, which is accessible through a California Air Resources Board website; permit applications that the facility may have submitted to the permitting authority; statements of basis that the air district has issued with the facility's proposed Title V permit; notices of violations that the facility may have received from either U.S. EPA (obtainable through a FOIA request) or the air district; copies of variances the facility may have received from the air district hearing board; and copies of enforcement agreements between the air district and the facility. In addition to these resources, if the facility is a power plant, there may be documents in the California Energy Commission and Public Utilities Commission dockets that may be helpful.

Once you have the documents, can you determine whether the facility is violating its emissions limits? Is the facility violating any monitoring, recordkeeping, and reporting requirements? Violations of those requirements and emissions limits are enforceable in federal court.

If the facility you are investigating has a Title V permit, look to see if the compliance reports are online. If they are not, seek those records from the air district to determine the status of the facility's compliance. If the facility does not have a Title V permit, ask whether it should have a Title V permit. This determination probably requires working with an expert.

EMISSIONS LIMITATIONS NOT IN PERMITS MAY APPLY TO THE FACILITY

As I said earlier, not all facilities that pollute the air are required to have permits. Moreover, not all permitted facilities are subject to Title V of the Clean Air Act. (Title V permits should contain at least all of the federal requirements in one place.) Thus, in addition to reviewing permitting requirements, you should review the applicability of State Implementation Plan rules (which are enforceable as federal law) and the regulations under the New Source Performance Standards and Hazardous Air Pollutants programs. My article from last year covered State Implementation Plans. Even if New Source Performance Standards refer to "new" sources, these standards also apply to sources that have been modified since the proposal of the standards. They are found in 40 C.F.R. Part 60. The regulations are accessible [here](#).

CONCLUSION

Determining all of the Clean Air Act requirements that apply to a facility you are investigating may not be an easy task. Obtaining all of the relevant documents may also take time. Knowing what to ask for in PRA and FOIA requests could also be challenging. But systematic review of publicly available records can lead to significant air quality benefits for the communities that you represent.

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