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AN OVERVIEW OF MISSOURI'S AIR PERMIT LAWS

by Robert J. Lambrechts¹

On December 2, 1993, the Missouri Air Conservation Commission (MACC) voted to approve the Missouri Department of Natural Resources' (MDNR) operating permits rule. Due to the adoption of this rule, along with numerous revisions to the construction and definitions rules, the Missouri air pollution control program has been significantly enhanced.

Under the terms of Title V² of the Clean Air Act Amendments of 1990 (Act, CAAA), state and local authorities are required to submit their own operating permit programs to the Environmental Protection Agency (EPA) for review on or before November 15, 1993.³ As mandated by Title V, EPA has developed rules setting forth the minimum elements of state permit programs. EPA issued these final operating permit rules on July 21, 1992.⁴ The Title V operating permit program must satisfy certain federal standards, but it is intended to be administered by state and local air pollution control authorities. MDNR has been developing its Title V operating permit program for several years.

The work began in earnest with the formation of the Missouri Air Law Advisory Group (MALAG) in July 1991, at the request of the then MDNR Director, G. Tracy Mehan III.⁵ This group was comprised of representatives from a number of organizations ex-

pected to be impacted by the Act, including industry, environmental public interest groups, and government agencies. The consensus which grew out of this group streamlined the passage of the Missouri Air Conservation Law in May 1992 and paved the way for operating permit rule development.

In March 1993, many of these same workgroup members began meeting again at the request of the Missouri Department of Natural Resources to develop the State operating permit rule. The goal of the workgroup was to reach consensus on many of the contentious issues prior to presenting the permit rule to the MACC. This article explores the requirements of the newly enhanced air laws in Missouri and provides the reader with a basic blueprint for surviving the permitting process.

THE MISSOURI AIR CONSERVATION LAW

One of the more extensively discussed provisions of the Missouri Air Conservation Law (MACL) can be found at Mo. REV. STAT. 643.078, RSMo.⁶ This section requires that operating permits be obtained after the effective date of the Department's operating permit rules. Previously, air contaminant sources were only required to obtain construction permits. The MACL further grants the Air Pollution Control Program the authority to require all facilities subject to feder-

ally-mandated air pollution control requirements to obtain operating permits that meet the requirements of the federal Act.⁷

This same statutory provision offers the source the opportunity to request in writing that construction and operating permit applications be reviewed separately, since otherwise they are to be reviewed together.⁸ There was strong support for the opportunity to obtain unified review at the MALAG meetings. The basis for this support stemmed from the premise that if a source underwent unified review for the construction and operating permit, it would be subject to only one public review opportunity.

In theory, unified review is an appealing prospect, but in practice there may be other factors which force an additional opportunity for review upon sources with long construction or modification intervals. In addition, the Missouri statute utilizes the term "validated"⁹ in relation to permits, which is distinct from the term "issuance" also used in the MACL. This complex area dealing with construction and operating permit interface will be more thoroughly discussed in section IV.¹⁰

As the Missouri Air Program develops and matures with the federal program, the regulation of hazardous air pollutants under Title III of the Act will likely demand considerable attention. The MACL allows the director of the MDNR to enforce all applicable federal rules, standards and requirements issued under the federal Act.¹¹ This provision allows the director to incorporate standards and any limitations established through Title III¹² into the operating permits as required under Title V of the federal Act.¹³ Title III contains numerous provisions that present significant issues for Missouri and all States. Specifically, provisions relating to modifica-

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² 42 U.S.C. § 7661-7661f (Supp. II 1990).

³ 42 U.S.C. § 7661a(d) (Supp. II 1990).

⁴ Operating Permit Program, 57 Fed. Reg. 32,250 (1992) (codified at 40 C.F.R. § 70).

⁵ MDNR provided a report to State Legislators titled: Final Report of Missouri Air Law Advisory Group. This document contains MALAG's recommendations for implementing the Clean Air Act in Missouri.

⁶ Mo. REV. STAT. § 643.078 (Supp. 1992).

⁷ Mo. REV. STAT. § 643.078 (Supp. 1992).

⁸ Mo. REV. STAT. § 643.078(3) (Supp. 1992).

⁹ Mo. REV. STAT. § 643.078(4) (Supp. 1992).

¹⁰ The preamble to the proposal of the federal operating permit rule stated that the title V program is not intended to interfere in any way with the expeditious processing of new source permits. See 56 Fed. Reg. 21,721 (1991) (proposed May 10, 1991).

¹¹ Mo. REV. STAT. § 643.078(12) (Supp. 1992).

¹² 42 U.S.C. § 7412 (Supp. II 1990). Title III of the Clean Air Act Amendments of 1990 provides authority to regulate hazardous air pollutants.

¹³ Mo. REV. STAT. § 643.078(12) (Supp. 1992).

tions,¹⁴ equivalent emission limitations by permit,¹⁵ exceptions to the compliance schedule,¹⁶ and emission standards under CAA §§ 112(d), 112(e) and 112(h)¹⁷, are extremely complex.

CONSTRUCTION PERMITTING

Construction permitting can be a complicated and challenging task even for the most sophisticated permit writer, and as such, deserves an overview to provide the reader with an appreciation of the requirements industry faces when pursuing a construction permit. There are three categories of permits within the Missouri construction permit program.

The first category encompasses the sources emitting the least pollutants and is termed the "*de minimis*" permit category.¹⁸ *De minimis* permits are required for any construction or modification which causes a "net emissions increase"¹⁹ in actual emissions and the net emissions increase is less than the *de minimis* levels.²⁰ Sources requiring a *de minimis* permit are to notify MDNR before commencing construction, provide information to MDNR sufficient to verify the annual emission rate, maintain emission levels below the *de minimis* level, and pay permit fees.²¹

The second category of construction

permits are triggered by greater than *de minimis* emissions, yet emissions levels less than those sufficient for major stationary source²² status resulting from construction or modification.²³ This category of permit requires more comprehensive information than the *de minimis* permit. Specifically, the Missouri rules require an application for authority to construct, an emissions inventory questionnaire, detailed site and design information, ambient air quality modeling data, and the submittal of fees for the filing and processing of the permit application.²⁴

The third category of Missouri construction permits requires new major stationary sources of air pollution and major modifications²⁵ to major stationary sources to obtain an air pollution permit before commencing construction. This process is called new source review (NSR) and is required whether the major source or modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded (nonattainment areas)²⁶ or an area where air quality is acceptable (attainment and unclassified areas). Permits for sources in attainment areas are referred to as prevention of significant air quality deterioration (PSD)²⁷ permits; while permits for sources located in nonattainment areas are referred to as nonattainment area

(NAA)²⁸ permits. The entire program, including both PSD and NAA permit reviews, is referred to as the NSR program. An issue which generated significant discussion at the MALAG meetings and during the permit rule development meetings was how to efficiently integrate the construction and operating permit review process in Missouri.

The PSD and NAA requirements are pollutant specific. For example, although a facility may emit many air pollutants, only one or a few may be subject to the PSD or NAA permit requirements, depending on the magnitude of the emissions of each pollutant. A source may have to obtain both PSD and NAA permits if located in an area which is designated nonattainment for one or more of the pollutants. PSD permitting requires a control technology review, wherein the permit application must contain an analysis of emission control techniques that would be used on the new or modified facility.²⁹ The source must also demonstrate in its application that the new facility or modification will not affect the attainment status of the area where the facility is located. Typically this is done through dispersion modeling analysis. Also, the facility's impact cannot exceed any applicable maximum allowable increase over the baseline concentration of regulated pollutants.³⁰ Another time-

¹⁴ 42 U.S.C. § 7412(g) (Supp. II 1990).

¹⁵ 42 U.S.C. § 7412(j) (Supp. II 1990).

¹⁶ 42 U.S.C. § 7412(i) (Supp. II 1990).

¹⁷ 42 U.S.C. §§ 7412(d), (e), (h) (Supp. II 1990).

¹⁸ Mo. CODE REGS. tit. 10, § 10-6.060(5)(1994).

¹⁹ "Net emissions increase" is defined at Mo. CODE REGS. tit. 10, § 10-6.020(2)(N)(2) (1994).

²⁰ Mo. CODE REGS. tit. 10, § 10-6.020(3)(A) Table 1 - *De Minimis* Emission Levels (1994).

²¹ Mo. CODE REGS. tit. 10, § 10-6.060(5)(B) (1994).

²² See 42 U.S.C. §§ 7602(j), § 7412(a)(1) (Supp. II 1990) regarding the definition of major source.

²³ Mo. CODE REGS. tit. 10, § 10-6.060(6) (1994).

²⁴ Mo. CODE REGS. tit. 10, § 10-6.060(6)(B) (1994).

²⁵ See Mo. CODE REGS. tit. 10, § 10-6.020(2)(M)(3) (1994). A "major modification" is generally a physical change or a change in the method of operation of a major stationary source which would result in a contemporaneous significant net emissions increase in the emissions of any regulated pollutant. *Id.*

²⁶ The Clean Air Act of 1970 set the foundation of national air quality management plans by developing a program to address wide-spread air pollution problems through establishing national ambient air quality standards (NAAQS). See 42 U.S.C. § 7409 (1988).

²⁷ The federal regulations at 40 C.F.R. § 51.166 specify the minimum requirements that a PSD air quality permit program under Part C of the Act must contain in order to obtain approval by EPA as a revision to a State implementation plan. 40 C.F.R. § 52.21 delineates the federal PSD permit program, which applies as part of the SIP for states that have not submitted a PSD program meeting the requirements of 40 C.F.R. § 51.166.

²⁸ The federal regulations at 40 C.F.R. § 51.165(a), (b) specify the elements of an approvable State permit program for preconstruction review for nonattainment purposes under Part D of the Act.

²⁹ See 40 C.F.R. § 52.21(j). This is commonly referred to as the Best Available Control Technology (BACT) analysis. A BACT analysis is done on a case-by-case basis and considers energy, environmental, and economic impacts in determining the maximum degree of reduction achievable for the proposed source or modification. In no event can the determination of BACT result in an emission limitation which would not meet any applicable standard of performance under 40 C.F.R. Parts 60 and 61.

intensive task that must be performed to obtain a PSD permit is an analysis of the ambient air quality in the area that the new or modified source would affect. If the state permitting authority does not have sufficient data the applicant may be required to collect data for this analysis, which may take up to a year to complete.³¹

Sources located in nonattainment areas which plan to construct a new source or make a modification may need to obtain a NAA permit from MDNR.³² NAA permits require the application of lowest achievable emission rate (LAER)³³ to ensure that air quality will not decrease as a result of new construction or modification. Any major source of pollutants for which an area is in nonattainment must institute LAER in construction of a new source or modification of an existing source. A NAA permit also requires a demonstration that the facility will obtain the required number of offsets.³⁴

A CAAA provision on construction permitting arising from the influence that nitrogen oxide (NO_x) emissions³⁵ have had upon ozone nonattainment areas is addressed in the newly adopted Missouri construction rule. Under the federal and state PSD rules, an "unnamed"³⁶ source is subject to a 250 ton-per-year major stationary source threshold for NO_x. However, under the Part D,³⁷

NSR nonattainment provisions, the same stationary source locating in an ozone nonattainment area, with a potential to emit 100 tons-per-year or greater of NO_x would be defined as major and subject to the full nonattainment permitting requirements. In addition, any Missouri source which is located in an ozone³⁸ nonattainment area for which the source is major for NO_x is now required to comply with requirements found in both §§ 7 and 8 of title 10 of the Code of State Regulations, § 10-6.060.

Another area of significant change in the Missouri air law is the regulation of hazardous air pollutants.³⁹ The foundation upon which the federal hazardous air pollutant control strategy is built is the program mandating use of Maximum Achievable Control Technology (MACT)⁴⁰ to reduce emissions. The MACT standards allow the EPA and the states tremendous flexibility to require a variety of methods of pollution control. These measures include but are not limited to: reducing the volume of, or eliminating the emissions of pollutants through substitution of materials; enclosure of systems or processes to eliminate emissions; the collection, capture, or treatment of pollutants when released from a process, stack, or fugitive emissions point; design, equipment, work practice, or operational stan-

dards; or a combination of the preceding measures can be utilized.⁴¹

Under Title III of the Act, a modification⁴² is considered to be any physical or operational change of a major source that increases the actual emissions of any hazardous air pollutant emitted by a source by more than a *de minimis*⁴³ amount, or results in the emission of any hazardous air pollutants not previously emitted in more than a *de minimis* amount. Until the EPA establishes *de minimis* emission levels for hazardous air pollutants which will trigger permitting requirements, the Missouri rules have set *de minimis* levels at the 10 and 25 tons per year potential emissions levels identified in the federal CAAA for major sources of hazardous air pollutants.⁴⁴

THE MISSOURI OPERATING PERMIT RULE

The Missouri operating permit rule is divided into three permit categories: Part 70, intermediate, and basic. All three categories base applicability on the magnitude of emissions of air pollutants and require that all facilities with a potential to emit greater than *de minimis* levels obtain an operating permit.

• Part 70 Sources

The sources which will be subject to the

³⁰ 40 C.F.R. § 52.21(k) (1993).

³¹ 40 C.F.R. § 52.21(m) (1993).

³² See Mo. CODE REGS. tit. 10, § 10-6.060(7) (1994) and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 102(b), 172(c)(5) (codified at 42 U.S.C. §§ 7402(b), 7502(c)(5) (Supp. II 1990)). A new source is required to obtain a NAA permit if it will lead to an emissions increase equivalent to those listed for PSD review. However, if the source location is within a nonattainment area for one or more pollutants, the major source threshold may be reduced depending upon the classification of nonattainment. See §§ 182(a) through 182(e) of the Clean Air Act Amendments of 1990 for the tonnage values. 42 U.S.C. §§ 7511a(a)-7511a(e) (Supp. II 1990).

³³ See CAA § 172(a)(2), 42 U.S.C. § 7502(a)(2) (Supp. II 1990) and 40 C.F.R. § 165(a)(1)(xiii). LAER is the most stringent emission limitation among control technologies and is either the strictest limitation in the state implementation plan where the facility is located, or the strictest limitation achieved in practice by a source category in the same category.

³⁴ Clean Air Act Amendments of 1990, § 182(b)(5), codified at 42 U.S.C. § 7511a(b)(5). The offset ratio is a means of determining the weight that will be given a particular amount of pollution reduction. If a state reduces the emission of a pollutant by one unit and then adds a new source that emits one unit of pollution, then the state will not have increased its overall pollution. However, in order to assure that the emission of pollution declines rather than stays at a constant level, the 1990 Amendments establish a set of offset ratios. Thus, under the Clean Air Act Amendments of 1990, a source of volatile organic compounds (VOC), the precursors to ozone, in the City of St. Louis which is presently a moderate area, must reduce its VOC emissions by 1.15 units in order to add a new source that emits one unit of pollution. This ensures that the overall VOC emissions in the area decrease by 0.15 units even though a new source has been added.

³⁵ Section 182(f) (codified at 42 U.S.C. § 7511a(f)) mandates that all plan provisions required under Part D for VOC control at major stationary sources also apply to major stationary sources of NO_x. Requirements applying to a major NO_x source under this provision include, among others: the use of LAER technology at new and modified sources, offset ratios, the use of Reasonably Available Control Technology (RACT) at existing sources, permit procedures and new source review requirements.

³⁶ Prevention of Significant Deterioration of Air Quality which sets forth a list of 27 named facilities. 40 C.F.R. § 51.166 (1993).

³⁷ Part D - Plan Requirements for Nonattainment Areas, see Title I of the Clean Air Act Amendments of 1990.

³⁸ An ozone nonattainment area is technically distinct from a NO_x nonattainment area.

³⁹ Hazardous air pollutants are defined as "[a]ny of the air pollutants listed in subsection (3)(C) of this rule." Mo. CODE REGS. tit. 10, § 10-6.065(6).

⁴⁰ Mo. CODE REGS. tit. 10, § 10-6.020(2)(M)(1).

⁴¹ 42 U.S.C. § 7412(d)(2) (1990).

⁴² 42 U.S.C. § 7412(a)(5) (1990).

⁴³ *De minimis* is defined as "[a]ny emissions level less than or equal to the rates listed in Table 1, subsection (3)(A) of this rule." Mo. CODE REGS. tit. 10, § 10-6.020(2)(D)(4).

⁴⁴ See Mo. CODE REGS. tit. 10, § 10-6.020(3)(A) and 42 U.S.C. § 7412(a)(1) (1990).

most numerous permitting requirements are the Part 70 sources.⁴⁵ The applicability provisions for Part 70 sources provide that installations which emit or have the potential to emit,⁴⁶ in the aggregate, ten (10) tons per year or more of any hazardous air pollutant, or twenty-five (25) tons per year of any combination of these hazardous air pollutants or such lesser quantity as the Administrator may establish by rule, are to be considered Part 70 sources. In addition, sources which emit or have the potential to emit one hundred (100) tons per year or more of any air pollutant, including fugitive emissions of any regulated air pollutant⁴⁷ are to be considered Part 70 sources under the Missouri rule. The permit rule goes on to include certain sources in ozone nonattainment areas,⁴⁸ affected sources under Title IV of the 1990 Act,⁴⁹ solid waste incinerators subject to § 129(e) of the Act,⁵⁰ and as a catch-all, any installation in a source category designated by the Administrator as a Part 70 source pursuant to 40 C.F.R. § 70.3.⁵¹

Sources which initially meet the applicability criteria for obtaining a Part 70 permit must apply in writing to be placed on the MDNR permit registry within three months of the effective date of title 10 of the Code of State Regulations § 10-6.065.⁵² Sources may request, in writing, the year in which they seek to have initial issuance of their operating permit. For those sources which make no request, the permitting authority will assign a year as necessary to meet the

one-third per year for three years permit issuance schedule as required by the Act.⁵³

— Permit Applications

Installations scheduled to receive an operating permit within the first year of the registry are to file complete applications within the first two months following the Administrator's approval of the operating permit program.⁵⁴ This prompt application submittal will afford MDNR some time in which to process the applications in order to meet the one-third per year threshold established by the Act. The remaining installations are to file applications no later than twelve months following either the Administrator's approval of the operating permit program or the commencement of operations, whichever is later.⁵⁵ A one hundred dollar filing fee must also be submitted to MDNR with each application for processing of a Part 70 permit.⁵⁶

An application package will consist of the standard MDNR-supplied application form, emission inventory questionnaire, compliance plan, and compliance certification.⁵⁷ These applications are to contain information sufficient to allow the permitting authority to determine all applicable requirements with respect to the applicant. Because of the all-encompassing nature of the operating permit, MDNR permit reviewers must be provided with comprehensive plant descriptions in terms of identifying information, processes and products,⁵⁸ emissions-related

information,⁵⁹ and air pollution control information.⁶⁰

Information on all of the source's products and processes is a necessary check on the applicant's determination of which processes are regulated under the rule and which components of those processes are in fact emissions-related. This required information is broad in scope as illustrated by the numerous subsections of the rule pertaining to emissions-related information.⁶¹ When listing emissions-related information, all emissions of pollutants for which the installation is a Part 70 source, and all emissions of other regulated pollutants, with the exception of insignificant activities, must be incorporated into the application.

Finally, detailed information on air pollution control requirements may be one of the more complex tasks to be resolved by the applicant. This will require the source to cite and describe all the requirements applicable to the source and also to reference the applicable test methods for determining compliance with each applicable requirement.

In addition to the duty to submit an initial application, the source has an ongoing duty to submit supplementary facts once the applicant becomes aware of a failure to submit or if there is an incorrect submittal.⁶² Applications will automatically be deemed "complete" unless they are determined to be incomplete by the permitting authority within 60 days of receipt.⁶³ Also of great significance to the source is the "application shield"

⁴⁵ Mo. CODE REGS. tit. 10, § 10.6-065(6).

⁴⁶ Potential to emit is defined as "the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is federally enforceable by the Administrator. This term does not alter or affect the use of this term for any other purpose under the Act, or the term 'capacity factor' as used in title IV of the Act or the regulations promulgated thereunder." See 40 C.F.R. Part 70.2 (1993).

⁴⁷ Regulated air pollutant is defined as "[a]ll air pollutants or precursors for which any standard has been promulgated." Mo. CODE REGS. tit. 10, § 10.6-020(2)(R)(5).

⁴⁸ Mo. CODE REGS. tit. 10, § 10.6-065(1)(D)(3).

⁴⁹ Mo. CODE REGS. tit. 10, § 10.6-065(1)(D)(4).

⁵⁰ Mo. CODE REGS. tit. 10, § 10.6-065(1)(D)(5).

⁵¹ Mo. CODE REGS. tit. 10, § 10.6-065(1)(D)(6).

⁵² Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(1)(A)(i)(a).

⁵³ 42 U.S.C. § 7661b(c) (1990).

⁵⁴ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(1)(A)(i)(b)(i).

⁵⁵ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(1)(A)(ii).

⁵⁶ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(1)(D).

⁵⁷ See Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(3) which discusses the standard application form and required information.

⁵⁸ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(3)(B) requires that the description of the products and processes include the use of the two digit Standard Industrial Classification Code.

⁵⁹ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(3)(C).

⁶⁰ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(3)(D).

⁶¹ Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(3)(C).

⁶² Mo. CODE REGS. tit. 10, § 10.6-065(6)(B)(2).

which protects the source from any allegation that it is in violation of the requirement to have a permit as long as the application is timely and complete and the applicant meets the deadlines for submitting additional information.⁶⁴

Compliance plans containing schedules of compliance are also required of all sources as part of the permit application.⁶⁵ The compliance plans are to contain a statement of the status of each applicable requirement, a description of how the source will maintain or achieve compliance with each requirement, and a schedule of compliance. Finally, the permit application must include a certification by a responsible official which attests to the truthfulness, accuracy and completeness of the application.⁶⁶

— Permit Content

In many respects the standard permit content requirements mirror the requirements for information to be included in permit applications. These requirements include, but are not limited to: (1) emission limitations and standards;⁶⁷ (2) for alternative emissions limits, an assurance that such limits are demonstrated to be “quantifiable, accountable, enforceable, and based on replicable procedures;”⁶⁸ (3) a fixed permit term not to exceed five years;⁶⁹ (4) detailed monitoring, recordkeeping, and reporting

requirements, including requirements that records be kept for five years,⁷⁰ that monitoring reports be submitted at least once every six months,⁷¹ that any deviations from permit requirements be reported either as soon as practicable or as the permit requires depending upon the level of danger posed to the public health, safety and the environment;⁷² and (5) provisions making clear that any action which constitutes noncompliance with a permit is a violation of the Act and is grounds for an enforcement action, or for permit modification or termination.⁷³

An overview of the operating permit rule leads the reader to believe that few larger sources of emissions will escape the requirements of a Part 70 permit. The rule does provide for permit deferral until November 15, 1999, or until EPA promulgates a rule making them subject, for sources that would be Part 70 sources only because they are subject to a standard, limitation, or other requirement under § 111⁷⁴ of the Act, including area sources.⁷⁵ This is not to be interpreted that a source which has emissions in excess of the major source threshold but is only subject to a § 111 standard will be granted a deferral. Once a source is major it is subject to the full range of Part 70 requirements. Additionally, sources subject solely to a standard or other requirement under § 112⁷⁶ of the Act are deferred until Novem-

ber 15, 1999, or until EPA promulgates a rule making them subject to a standard, unless they are major. Finally, sources (including area sources) are not required to obtain a permit solely because they are subject to regulations or requirements under § 112(r)⁷⁷ of the Act.⁷⁸

— Operational Flexibility, Alternative Scenarios and Off-Permit Activities

Operational flexibility is a controversial subject area and has been incorporated by MDNR into its operating permit rule, as required by the Act.⁷⁹ This provision provides that sources which have been issued a Part 70 permit are not required to obtain a permit revision in order to make a change, unless the change would violate applicable requirements of the Act or contravene federally-enforceable monitoring, recordkeeping, reporting or compliance requirements of the permit.⁸⁰ However, before making a change under this provision, the permittee is required to provide written notice at least seven days in advance to the permitting authority and to the administrator, describing the change and the proposed date of the change in operations.⁸¹

A provision that is somewhat akin to operational flexibility, in that it reduces production constraints, is the provision allowing for reasonably anticipated operating sce-

⁶³ Mo. CODE REGS. tit. 10, § 10-6.065(6)(B)(1)(B).

⁶⁴ Mo. CODE REGS. tit. 10, § 10-6.065(6)(E)(2)(A).

⁶⁵ Mo. CODE REGS. tit. 10, § 10-6.065(6)(B)(3).

⁶⁶ Mo. CODE REGS. tit. 10, § 10-6.065(6)(B)(4).

⁶⁷ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(A).

⁶⁸ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(A)(III).

⁶⁹ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(B).

⁷⁰ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(C)(II)(b).

⁷¹ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(C)(III)(a).

⁷² Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(C)(III)(c).

⁷³ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(G)(f).

⁷⁴ 42 U.S.C. § 7411 (1990), Standards of Performance for new stationary sources.

⁷⁵ See 42 U.S.C. § 7412(a)(2); “The term area source means any stationary source of hazardous air pollutants that is not a major source.” *Id.*

⁷⁶ 42 U.S.C. § 7412 (1990), Hazardous Air Pollutants.

⁷⁷ See 42 U.S.C. § 7412(r) (1990) and Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(D). The requirements of § 112, Prevention of Accidental Releases, are applicable requirements. The activities required under this section include the preparation and registration of a risk management plan (RMP). The EPA recognizes that an RMP is not in any sense a permit to release substances addressed therein, and that § 112(r) was not intended to be primarily implemented or enforced through title V. The EPA therefore believes it sufficient for purposes of title V to require only that the source indicate in its permit that it has complied with any requirements to register an RMP. The RMP need not be included in the title V permit.

⁷⁸ Mo. CODE REGS. tit. 10, § 10-6.065(1)(D)(7)(B).

⁷⁹ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(8). The EPA Technical Support document for Title V Operating Permits Program prepared by the Air Quality Management Division and released in May of 1992 states on page 6-20 that, “Nothing in this section is meant to imply any limit on the inherent flexibility sources have under their permits. A permittee can always make changes, including physical and production changes, that are not constrained under the permit. For example, a facility could physically move equipment without providing notice or obtaining a permit modification if the move does not change or affect applicable requirements or federally enforceable permit terms or conditions. Or a painting facility with a permit that limits the VOC content of its paints can switch paint colors or formulations freely as long as each paint complies with the VOC limit in the permit.”

⁸⁰ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(8)(A).

⁸¹ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(8)(A)(I).

narios.⁸² This provision authorizes the permittee to make changes among alternative operating scenarios as long as the permit includes the terms and conditions of these alternatives. Understandably, all such scenarios and emissions trading provisions must comply with the permit requirements set forth in Mo. CODE REGS. tit. 10, § 10-6.065. In addition, the source will be required to keep a contemporaneous record of any change in operating scenarios.

The Missouri Part 70 permit rule also provides for off-permit changes.⁸³ This provision allows a permitted facility to make any change in its permitted operations, activities, or emissions that is not addressed in, constrained by, or prohibited by the permit without having to obtain a permit revision, as long as it is not a Title I modification. An example of this type of an activity would be when a permit specifies emission limits and monitoring for the burning of oil, but it does not prohibit the use of another fuel, such as natural gas.⁸⁴ The obvious advantage of an off-permit change is that it can avoid the lengthy Part 70 process until renewal. To utilize the off-permit option the permittee must provide notice to the administrator and the permitting authority describing the change.⁸⁵

— Permit Shield

According to the Act, the permit shield provision allows MDNR to include a provision in permits that “shields” the permitted

source from potential liability under the Act.⁸⁶ The Missouri permit shield provisions can only be utilized by Part 70 sources and provide that a permit “shall” include express provisions stating that compliance with the conditions of the permit shall be deemed compliance with all applicable requirements as of the date of permit issuance. To obtain the shield, the permitting authority in acting on the permit application must make a determination relating to the permittee that certain provisions are not applicable and the permit expressly includes that determination.⁸⁷

— Unified v. Segregated Review

As mentioned earlier, unified review is a mechanism primarily sought by industry for minimizing the number of opportunities for public comment and EPA review that an installation must undergo to receive its construction and operating permits. There were a number of competing concerns which were addressed in the rule development process and which initially created some difficulty in resolving the rule language. First, as required by the Act, MDNR must issue or deny the operating permit within 18 months of the submission of a complete application.⁸⁸ Second, a Title V permit will only be “issued,” when it contains all of the applicable requirements for the source and there has been an opportunity for public participation upon all the applicable requirements.⁸⁹ And third, a Title V permit may only be

issued for a term not to exceed five years.⁹⁰

Missouri’s permit rule requires that an operating permit application submitted for concurrent processing (unified review) is to be submitted with the applicant’s construction permit application, or at a later time as the permitting authority allows, provided that the total review period does not extend beyond 18 months.⁹¹ Even though construction may extend beyond 18 months, an operating permit must be issued or denied within 18 months of the submittal of a complete application. As soon as the unified review process is completed, and the applicant has complied with all applicable requirements,⁹² the construction permit and the operating permit or its amendments are issued and the applicant can commence operation. The operating permit, however, is retained by MDNR until it is validated.⁹³

Within 180 days of commencing operation, the permittee is required to submit to MDNR all the information required to demonstrate compliance with the terms and conditions of the issued permit.⁹⁴ In addition, if any requirements have become applicable to the source subsequent to issuance of the permit, the permittee must also provide information identifying these requirements.⁹⁵ Within thirty days of the request for validation, assuming the permittee demonstrates compliance with both the construction and the operating permits, and with all the requirements for permit issuance, MDNR will take action approving validation of the is-

⁸² Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(1)(A)(i). Section 70.6(a)(9) of 40 C.F.R. 70 requires Part 70 sources to include terms and conditions for reasonably anticipated operating permit scenarios identified by the source in its application as approved by the permitting authorities. The submittal of such information by the source is advantageous to it because the permit application and the permit will be more representative of source operation and therefore lead to less need for permit modifications to accommodate different operations at the facility.

⁸³ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(9).

⁸⁴ Off-permit activities might also apply to the addition of a new piece of equipment to an existing production line, substituting one raw material for another, or moving equipment to another part of the plant. At the same time a source must be careful to keep emission limits of an activity within permitted emission limits, as well as perform the stated monitoring when performing the permitted activity.

⁸⁵ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(9)(B). EPA believes it is critical that the permitting authority and EPA should receive contemporaneous written notification for off-permit types of changes. This notice will provide a record of activity at the facility without inhibiting the source’s ability to make the change. If notification were not required, sources could make substantial changes without notifying the permitting authority or EPA of changes that might implicate Federal requirements. This would defeat one of the purposes of an operating permit system. The final rule also requires the source to keep certain records of these changes. These records may consist of copies of the notices sent to EPA and the permitting authority when the change is made.

⁸⁶ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(6)(A). See also 42 U.S.C. § 7661c(f) (1990) and 40 C.F.R. § 70.6(f) (1993).

⁸⁷ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(6)(A)(ii).

⁸⁸ 42 U.S.C. § 7661b(c) (1990). The exception to this requirement is that during the first three years of the program there exists a transition mechanism for easing the workload of the permitting authority. *Id.*

⁸⁹ 40 C.F.R. §§ 70.6(a)(1) and 70.7(h) (1993).

⁹⁰ 42 U.S.C. § 7661a(b)(5)(B) (1990).

⁹¹ See Mo. CODE REGS. tit. 10, § 10-6.065(6)(D)(1).

⁹² Inclusion of all the source’s applicable requirements is one of the cornerstones of the Title V operating permit program.

⁹³ Mo. CODE REGS. tit. 10, § 10-6.065(6)(D)(2).

⁹⁴ Mo. CODE REGS. tit. 10, § 10-6.065(6)(D)(3).

⁹⁵ *Id.*

sued operating permit.⁹⁶ There are two important conditions, either of which must be satisfied before the unified review operating permit can be validated. The first condition is that at the time of validation, the permitting authority certifies that the issued permit contains all applicable requirements. The second and alternative condition is that the procedures for permit renewal "have occurred prior to validation to insure the inclusion of any new applicable requirements to which the Part 70 permit is subject."⁹⁷

– General Permits

The Missouri permit regulations allow MDNR, following notice and the opportunity for public participation, to issue "general permits" covering numerous similar sources.⁹⁸ Under these provisions, MDNR will provide application forms for coverage under a general permit. The Missouri regulations set forth three basic criteria for authorization to operate under a general permit.⁹⁹ These criteria are: (1) categories of sources covered by the general permit must be homogenous in terms of operations, processes and emissions; (2) sources are not subject to case-by-case standards or requirements; and (3) sources must be subject to substantially similar requirements governing operations, emissions, monitoring, reporting, and recordkeeping.¹⁰⁰

The preamble to the federal Part 70

rule suggests that to avoid classification as a major source, a general permit may be used as an enforceable means of restricting the source's emissions so that it will not be classified as a major source, and will not have to obtain a source specific permit or be subject to the substantive Clean Air Act rules.¹⁰¹ By this mechanism the source would select coverage under a general permit to provide that other rules do not apply.

• Intermediate Sources

The second category of permitted sources, the "intermediates,"¹⁰² are installations that would be Part 70 installations except for the imposition of voluntarily agreed to federally enforceable limitations on the type of materials combusted or processed, operating rates, or hours of operation.¹⁰³ EPA has authority to enforce limitations in certain types of operating permits and to consider operating permits as federally enforceable if they are issued pursuant to permitting programs that meet particular criteria.¹⁰⁴ Missouri has therefore structured its intermediate program to meet these particular criteria and consequently can issue permits with federally enforceable limitations in place. The motivation for installations to seek an intermediate permit over the Part 70 permit is the reduced complexity of the permitting and compliance requirements under the intermediate permit alternative.¹⁰⁵ According to MDNR's own statistics, the

intermediate program will allow approximately 314 out of 533 major installations in Missouri to be regulated under the intermediate program that would otherwise require treatment as a Part 70 source.¹⁰⁶

The Missouri intermediate program will not be effective until EPA approves a SIP revision for criteria pollutants or, pursuant to § 112(l), for air toxics. This SIP revision is the mechanism by which the intermediate program will become federally enforceable. All intermediate installations are to file initial notifications within the first two months following the Administrator's approval of the Missouri Part 70 permit program.¹⁰⁷ The notifications will be similar to the Part 70 applications in that they will require a general description of the installation, its processes and products, emissions-related information and all applicable emission limitations and control requirements. The notification will also require a statement of the installation's compliance status with respect to these requirements.¹⁰⁸ As with the Part 70 permit application, a responsible official must certify the notification and a one hundred dollar filing fee must accompany the notification.¹⁰⁹ Intermediate permits shall have a term of five years which will commence on the date of receipt or acceptance of the notification, whichever is later.¹¹⁰

• Basic Sources

The third category of permitted instal-

⁹⁶ *Id.*

⁹⁷ Mo. CODE REGS. tit. 10, § 10-6.065(6)(D)(3)(B).

⁹⁸ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(4)(A).

⁹⁹ Mo. CODE REGS. tit. 10, § 10-6.065(6)(C)(4)(A).

¹⁰⁰ EPA has started to develop "model" general permits. The Agency is seeking to develop a model permit and application package for five source categories likely to be covered by general permits. These include degreasers, small boilers, storage tanks, sheet fed printers, and dry cleaners.

¹⁰¹ 57 Fed. Reg. at 32279.

¹⁰² Mo. CODE REGS. tit. 10, § 10-6.065(1)(C).

¹⁰³ *Id.*

¹⁰⁴ See 54 Fed. Reg. 27274, 27282 (1989). The five required criteria are as follows: (1) The State operating permit program is submitted to and approved by EPA into the State Implementation Plan (SIP). (2) The SIP imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits and provides that permits which do not conform to the operating permit program requirements of EPA's underlying regulations may be deemed not federally enforceable. (3) The State operating permit program requires that all emissions limitations, controls, and other requirements imposed by such permits will be at least as stringent as any other applicable limitations and requirements contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the SIP, or that are otherwise "federally enforceable." (4) The limitations, controls, and requirements in the operating permits are permanent, quantifiable, and otherwise enforceable as a practical matter. (5) The permits are issued subject to public participation. This means that the State agrees, as part of its program, to provide EPA and the public with timely notice of the proposal and issuance of such permits, and to provide EPA, on a timely basis, with a copy of each proposed (or draft) and final permit intended to be federally enforceable.

¹⁰⁵ The intermediate permit rule does not address many of the provisions found in the Part 70 rule. There is no mention of off-permit activities, administrative permit amendments or the permit shield, for example.

¹⁰⁶ See the October 28, 1993, Missouri Air Conservation Commission Briefing Document prepared by the Missouri Air Pollution Control Program at page 44.

¹⁰⁷ Mo. CODE REGS. tit. 10, § 10-6.065(5)(A).

¹⁰⁸ Mo. CODE REGS. tit. 10, § 10-6.065(4)(G). The "Intermediate State Operating Permits" rule at Mo. CODE REGS. tit. 10, § 10-6.065(5) references the "Basic State Operating Permits" rule at Mo. CODE REGS. tit. 10, § 10-6.065(4)(C)-(P).

¹⁰⁹ Mo. CODE REGS. tit. 10, § 10-6.065(4)(E) and (F).

¹¹⁰ Mo. CODE REGS. tit. 10, § 10-6.065(4)(I).

lation is the "Basic State Operating Permit."¹¹¹ To qualify as a basic installation the facility must have the potential to emit any air pollutant in an amount greater than *de minimis* levels.¹¹² Installations subject to a standard or limitation under §§ 111¹¹³ or 112¹¹⁴ of the Act may also be considered basic sources, as long as they are not major. As with the intermediate permits, facilities falling into this category are required to provide the permitting authority with a notification giving a general description of the installation and the installation's processes and products, emissions-related information and all applicable emission limitations and control requirements for each emissions unit at the installation.¹¹⁵

Basic installations are required to file complete operating permit notifications before December 31, 1995, and these permits are also valid for a term of five years. As with the other two categories of permits, a filing fee of one hundred dollars must accompany the notification and a responsible official must certify the accuracy, truthfulness and completeness of the notification.¹¹⁶

• Insignificant Activities and Exempt Emission Units

The preamble to the proposed federal Part 70 operating permit rule¹¹⁷ solicited comment on the comprehensiveness of the information to be required on application forms. The final federal permit rule provides that exemptions for insignificant activities or emission levels can be developed by states as a component of Part 70 programs and these activities can be exempt because of size,

emission levels, or production rate; or an entire category of sources can be exempted.¹¹⁸ An insignificant activity under the new Missouri rule is defined as where an applicant whose aggregate emission levels for the installation do not exceed that of the *de minimis* levels and do not have any applicable requirements associated with them.¹¹⁹

Missouri's new operating permit rule also lists fourteen categories of installations and emission units which are exempt from the requirements of the permitting rule.¹²⁰ These exemptions range from residential fireplaces and odor produced from livestock handling systems to sewer gas vents. In addition, the rule provides for exempt emission levels. Under this provision, emissions units which meet specific criteria set forth in the rule are exempt from many of the reporting requirements.¹²¹ As required by the federal rule, for insignificant activities which are exempt because of size or production rate, a list of these activities must be included in the permit application.¹²²

• Permit Fees

Sources required to obtain a permit under Mo. REV. STAT. §§ 643.010-643.190 are required to pay an annual emission fee based on their annual emissions of regulated pollutants.¹²³ The exception to the regular fee rule are sources that produce charcoal from wood.¹²⁴ The fees are due April 1 of each year for emissions produced during the previous calendar year.¹²⁵ This fee will be reviewed by MDNR on an annual basis to determine if sufficient revenues to cover all permit program costs are being generated by

the permit program. The MACC will vote to approve or disapprove the fee recommendation of MDNR on an annual basis.

• Penalties

The penalty provisions and fines in the Missouri statute have been greatly increased with the passage of the amended Missouri Air Conservation Law in 1992. The statute now provides that upon conviction, any person who knowingly violates an applicable standard, limitation, permit condition, or any fee or filing requirement, is subject to a fine of not more than ten thousand dollars per day of violation.¹²⁶

CONCLUSION

By establishing these new air program requirements, Missouri has created an important vehicle for the control of air pollution. Without question, the Missouri Air Conservation Law and the recently adopted permit rule and revisions to the construction rule create a maze of rules for industry to sort through. There will undoubtedly be many future permitting situations which will be difficult to resolve, whether they be initial applications, amendments, or modifications, simply because of the novelty of the operating permit program and the infinitely large universe of complex industrial variations.

EPA is presently reviewing the Missouri SIP-based operating permit program to determine if it meets the requirements of the Clean Air Act Amendments of 1990. EPA is also awaiting the submittal of the Missouri Title V operating permit program.

¹¹¹ Mo. CODE REGS. tit. 10, § 10-6.065(1)(B).

¹¹² Mo. CODE REGS. tit. 10, § 10-6.065(1)(B)(1).

¹¹³ Standards of Performance for New Stationary Sources, 42 U.S.C. § 7411 (1990).

¹¹⁴ Hazardous Air Pollutants, 42 U.S.C. § 7412 (1990).

¹¹⁵ Mo. CODE REGS. tit. 10, § 10-6.065(4)(G).

¹¹⁶ Mo. CODE REGS. tit. 10, § 10-6.065(4)(E) and (F).

¹¹⁷ 56 Fed. Reg. 21712 (1991).

¹¹⁸ 40 C.F.R. § 70.5(c).

¹¹⁹ Mo. CODE REGS. tit. 10, § 10-6.020(1)(5).

¹²⁰ See Mo. CODE REGS. tit. 10, § 10-6.065(3)(D). The first two installations on this list are exempt as long as they are the sole basis for obtaining a permit. Once an installation has additional applicable requirements to which it must comply, these emission points must be included in the permit and the appropriate performance or work standard must also be included in the permit.

¹²¹ Mo. CODE REGS. tit. 10, § 10-6.065(3)(E).

¹²² 40 C.F.R. § 70.5(c).

¹²³ Mo. CODE REGS. tit. 10, § 10-6.110(5). For the calendar year 1994, the Missouri Air Conservation set the fee at \$25.70 per ton of actual emissions.

¹²⁴ The Missouri legislature put the charcoal kilns on a sliding scale for payment of fees. See Mo. REV. STAT. § 643.079 (1992).

¹²⁵ Mo. CODE REGS. tit. 10, § 10-6.110(5)(C)(5).

¹²⁶ Mo. REV. STAT. § 643.191 (1992).