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NEWS & ANALYSIS

New Frontiers for the Push and Pull of Federalism—Implementation of the Clean Air Act's Operating Permit Program in Southern California

by Ivan Tether and Robert S. Nicksin

Editors' Summary: The CAA Amendments of 1990 established the first federal operating permit program for major sources of air contaminants. The Title V program strikes southern California with particular ferocity because Los Angeles is an extreme nonattainment area. Thus, any source with the potential to emit over 10 tons per year is considered major and subject to permitting requirements. Because so many sources in southern California are impacted by the operating permit program, the area's experience with the federal operating permit program is instructive. This Article spotlights three issues that the southern California air quality management district has had to deal with in its implementation of the Title V program. The Article first discusses the region's implementation of the periodic monitoring requirements for major sources and next addresses the operating permit program's prompt reporting requirements. The Article then focuses on the region's experience with providing variances from the federal operating program. Although Title V does not provide for variances from the program per se, it allows "alternative operating scenarios" under which a source may operate if certain requirements are met. The Article concludes with a discussion on federalism issues raised by the federal operating permit program.

Almost a decade after the 1990 Clean Air Act (CAA)¹ Amendments were enacted, southern California, much like the rest of the country, is still in the early stages of

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The authors wish to thank Stephen A. Broiles, Esq., formerly district counsel of the SCAQMD, for his review and suggestions.

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

implementing the federal operating permit program, also known as Title V.² The operating permit program applies to a "major source" as defined under various provisions of the CAA.³ Consequently, Title V strikes Los Angeles with particular ferocity because while in some less air quality-challenged regions of the country a source must emit over 100 tons per year to be considered major, in Los Angeles, an extreme nonattainment area, any source with the potential to emit over 10 tons per year is considered major and is subject to the CAA's Title V and new source review requirements.⁴ Accordingly, Title V's impact on Los Angeles is much more pervasive than Title V's impact on other regions.

Title V was portrayed early on as a means for streamlining air quality regulation of individual sources because it places all of the operating requirements into a single permit. It was not intended to add any substantive requirements.⁵ Yet the line between procedural and substantive is eternally

2. *Id.* §§7661-7661f, ELR STAT. CAA §§501-507. The implementing regulations for the state operating permit programs are found at 40 C.F.R. pt. 70 (1998), and the implementing regulations for the federal operating permit programs are at 40 C.F.R. pt. 71.

3. *See* 42 U.S.C. §7661(2), ELR STAT. CAA §501(2), which refers to CAA §§7412, 7602, and 7501-7515, ELR STAT. CAA §§112, 302, and 171-193. *See also* 40 C.F.R. §§70.2 and 71.2.

4. *See* 42 U.S.C. §§7511a(e), ELR STAT. CAA §182(e) (new source review for extreme nonattainment areas), 7661(1) and (2), ELR STAT. CAA §501(1) and (2), and 7661a(a), ELR STAT. CAA §502(a) (Title V applicability to "major" and "affected" sources).

5. *See* Preamble to Operating Permit Program Final Rule, 47 Fed. Reg. 32250, 32251 (July 21, 1992).

blurred, as the way in which things are done inexorably affects what is done. After the last nine-plus years of debate over the permit provisions of the 1990 CAA Amendments, it would be difficult for anyone to argue that Title V has no substantive impact on individual sources' clean air requirements.

This Article spotlights three issues the southern coast of California is currently facing in its implementation of the operating permit program. The first two, "periodic monitoring" and "prompt reporting" are ubiquitous and are or recently have been working their way through the regulation processes of dozens of air quality agencies across the country. The third issue, "variances," touches an area of considerable experience in California, where the legislature has provided, along with stringent air quality requirements, a mechanism for permitting agencies to avoid or limit unfairness in particularly difficult cases. These three issues influence the air quality programs of every state in the nation. Further, they represent general shifts in the fabric of environmental regulation and raise federalism concerns. Southern California's approach, therefore, is of considerable interest to other parts of the United States, especially with respect to Title V.

The Operating Permit Program's Impact on Southern California

The CAA Amendments of 1990 established the first federal operating permit program for major sources of air contaminants. The program was intended to coalesce all applicable requirements of the Act into one permit, with goals that included clarifying compliance responsibilities, providing the public with improved access to permit information, and streamlining enforcement of the Act. Some states, including California, had already adopted permitting programs that accomplished many of the goals of the federal operating permit program and included federal requirements as well as state and sometimes local requirements. California's South Coast Air Quality Management District (SCAQMD) has long required operating permits for "any equipment, the use of which may cause the issuance of air contaminants, or the use of which may reduce or control the issuance of air contaminants"⁶ This requirement has no minimum emissions quantity, and the definition of "air contaminant" is very broad, including "smoke, charred paper, dust, soot, grime, carbon, fumes, gases, odors, particulate matters, acids or any combination thereof."⁷ Obviously the long-standing SCAQMD permit requirement is not limited to regulated pollutants and is pervasive in reach. In addition, the SCAQMD had made much progress in the area of facilitywide permits, in part because of the adoption of its Regional Clean Air Incentives Market program and its emissions reduction and permitting program, which examines requirements from a facilitywide perspective, instead of emission unit by emission unit.

So why has Title V and its operating permit program generated concern and controversy? The issues discussed in this Article, the Title V requirements for periodic monitoring and prompt reporting, as well as the impact of Title V on state and local variances, help to explain the origin of this

angst. While Title V does not in itself impose new pollution control requirements, its procedures require new ways of monitoring emissions, impose new self-reporting requirements, and threaten the security of temporary compliance variances that may be granted under California law. Thus, while Title V may not add anything to the soup, it definitely stirs the pot.⁸ Sources located in the SCAQMD face myriad air quality regulations. As the nation's only extreme nonattainment area, regulation is thorough and stringent. With so many requirements, sources are understandably concerned about additional permit conditions imposed via the Title V program. The SCAQMD's experience in addressing these issues is instructive. Accordingly, southern California is the perfect model to demonstrate the slightly elusive impacts of Title V on a mature air quality program.

Periodic Monitoring

The CAA requires all Title V permits to include conditions that are necessary to demonstrate a source's compliance with the applicable requirements of the Act.⁹ The Act further requires "enhanced monitoring" at major stationary sources and authorizes the U.S. Environmental Protection Agency (EPA) to establish periodic monitoring, recordkeeping, and reporting requirements.¹⁰ In addition to the monitoring requirements, the Act places responsibility on source owners and operators to have sufficient knowledge to certify compliance with the requirements of the Act. Compliance certifications must include a listing of the applicable requirements, the compliance status of the source and the method used for determining the compliance status, and whether compliance is continuous or intermittent.¹¹ EPA's federal operating permit program also recognizes that some requirements of the Act or the applicable state implementation plan (SIP) may not provide sufficient monitoring. Ordinarily, these deficiencies are found in rules that require a certain level of emissions but provide no specific, regular monitoring requirement so that compliance is assured. It is in these cases that EPA may require additional "periodic monitoring."¹²

EPA has indicated that where an applicable requirement¹³

8. See, e.g., David P. Novello, *EPA's Proposed Air Permit Regulations: Implementing the 1990 Clean Air Act Amendments*, 21 ELR 10511, 10512 (Sept. 1991), where the author states:

EPA and many outside observers consider the operating permit program to be one of the most important, if not the most significant, changes to the CAA made by the 1990 Amendments. It will have a profound effect on how industry complies with air pollution control requirements. It also will fundamentally alter the CAA implementation scheme that has evolved during the 21 years since passage of the [CAA] in 1970.

This early observance has borne fruit.

9. 42 U.S.C. §7661c, ELR STAT. CAA §504.

10. *Id.* §7414, ELR STAT. CAA §114.

11. *Id.* §7661c, ELR STAT. CAA §504.

12. State Operating Permit Programs, 40 C.F.R. §70.6(a)(3)(B) (1998).

13. "Applicable requirement" is defined at 40 C.F.R. §70.2 as all of the following as they apply to emissions units in a Part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that imple-

6. SCAQMD Rule 203, Permit to Operate (amended Jan. 5, 1990).

7. SCAQMD Rule 102, Definitions of Terms (amended Apr. 9, 1999).

does not mandate periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), Title V requires that the source be subject to additional periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, and further requires that the method of periodic monitoring be included in the permit.¹⁴ The SCAQMD's Title V program has essentially adopted the federal requirement that periodic monitoring be imposed where there is insufficient monitoring required in the applicable rule.¹⁵

There exists an almost overwhelming number of Title V sources within the jurisdiction of the SCAQMD. Nearly 1,000 sources were initially applicable, and many more will become applicable as the definition of major source changes¹⁶ from 8 tons based on actual emissions to 10 tons based on potential to emit¹⁷ (it is envisioned that many sources that currently operate below the 8 ton actual emission threshold have a potential to emit of well in excess of 10 tons). In an effort to deal with this work load, the

ments the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(7) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(9) Any standard or other requirement for tank vessels under section 183(f) of the Act;

(10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(12) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

14. 40 C.F.R. §70.6.

15. SCAQMD Rule 3004(a)(4)(C), Permit Types and Content (amended Dec. 12, 1997).

16. SCAQMD Rule 3001(a), (b), Applicability (amended Nov. 14, 1997).

17. SCAQMD Rule 3000(b)(17), General (amended Nov. 14, 1997), defines "potential to emit" as the maximum capacity of a facility to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a facility 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 enforceable by the EPA Administrator.

SCAQMD has developed a list of generic periodic monitoring available for common emission units.¹⁸ While some of these periodic monitoring approaches were successfully incorporated in Title V permits, sources found others to be unworkable or onerous.

Initial attempts by the SCAQMD to have EPA Region IX approve this list of generic periodic monitoring have led to the convening of a Title V Periodic Monitoring Work Group, which includes representatives from California air districts, the California Air Resources Board (CARB), and EPA Region IX. This group has been meeting regularly since January 1998.¹⁹ While all of the agencies involved in the meeting agreed that expensive and time-consuming monitoring and recordkeeping make little sense for units that are unlikely to exceed emission limits, the air districts believe that some of EPA's suggested monitoring requirements for these emissions units are unnecessarily costly and burdensome. Examples include monitoring heat inputs on boilers and daily visible emissions readings where the fuel is predominately natural gas.

During the time that the Title V Periodic Monitoring Work Group was meeting, EPA issued its *Periodic Monitoring Guidance*.²⁰ This guidance addresses periodic monitoring decisions in general, however, it does not obviate the need to develop periodic monitoring guidance at the district level for specific types of sources.

Stakeholders have generally argued that rules adopted at the state or local level that are approved by EPA should not be subject to new periodic monitoring requirements. Such an imposition creates a two-tiered approach to regulation, where major sources have additional monitoring requirements. These arguments have not been met with much success.

In spite of efforts to streamline and make monitoring generic, sources must remember that it is often in the source's best interest to draft their own periodic monitoring requirements. Sources will often know what sorts of monitoring can be best performed with existing equipment, personnel, and resources, and, therefore, can minimize inconvenience and expense. Also, periodic monitoring can only be imposed on those requirements that are federally enforceable. Therefore, where there is a federally enforceable requirement to limit emissions to, for example 25 parts per million (ppm), and a more stringent revision of the rule that limits emissions to, for example 5 ppm, that is not yet approved by EPA, then periodic monitoring need only demonstrate compliance with the higher, EPA-approved limit, at least until the revised rule is federally approved.

Periodic monitoring has often added additional monitoring at major sources, increasing the chances for enforcement action. Consequently, diligence in monitoring both generic and source-specific requirements can pay off long into the future.

18. SCAQMD, PERIODIC MONITORING GUIDELINES FOR TITLE V FACILITIES (Oct. 1997).

19. Stakeholders have been given an opportunity to comment on periodic monitoring proposals being developed by the Title V Periodic Monitoring Work Group during April and May 1999.

20. U.S. EPA, PERIODIC MONITORING GUIDANCE FOR TITLE V OPERATING PERMITS PROGRAMS (Sept. 15, 1998) (available from the ELR Document Service, ELR Order No. AD-3936).

Prompt Reporting

While thorough internal monitoring and inspection programs can help a source quickly identify and remedy problems, CAA §503's requirement that deviations promptly be reported to the permitting authority adds yet another layer of regulation for the source to deal with, thereby increasing its potential for future violations.²¹ Two issues are necessarily raised by this requirement: what constitutes a "deviation" and what is "prompt"?

"Deviation" is defined neither in the CAA nor in EPA's Part 70 regulations for state operating permit programs. However, the Part 71 regulations on the federal operating permit program are somewhat helpful. Part 71 was promulgated by EPA as a Title V program that could be instituted in state, local, and tribal air agencies should they fail to develop a federally approved state operating permit program that sufficiently protects air quality.²² In Part 71, a deviation is defined as any situation in which an emissions unit fails to meet a permit term or condition, including a situation where emissions exceed an emission limitation or standard; a situation in which process or emissions control device parameter values indicate that an emissions limitation or standard has not been met; a situation in which observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit; a situation in which an exceedance²³ or an excursion as defined in the Compliance Assurance Monitoring Program at Part 64 occurs; or a situation where a permit condition prohibiting emissions exceeding any allowances that the source lawfully holds is not met. Part 71 also states that a deviation is not always a violation.²⁴

Implicit in the requirement that deviations be reported is the concept that only deviations from the CAA requirements, not deviations from local rules such as nuisance-related requirements, are reportable. Moreover, because the prompt reporting requirements only extend to applicable requirements appearing on a permit, sources with permits that combine federal and local requirements should closely examine the origin of the requirement before initiating a report.

As for the requirement to report promptly, the Act does not spell out exactly how much time a source has to report deviations, nor does it differentiate reporting times for different types of deviations. The Part 70 regulations shed little light on this requirement. Part 70 requires prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken.²⁵ EPA provides for some flexibility in this requirement by allowing the permitting authority to define "prompt" in relation to the applicable requirements and to the degree and type of deviation likely to

occur.²⁶ Thus, the permitting authority may differentiate between deviations that involve releases of excess emissions, deviations that involve no emissions increases (such as recordkeeping violations), and the range of deviations in between.

Part 71 is somewhat more helpful. Part 71, like Part 70, requires the prompt reporting of deviations from permit requirements, the probable cause of such deviations, and any corrective actions or preventive measures taken.²⁷ However, Part 71 provides a schedule for submitting deviation reports to the permitting authority in cases where the underlying applicable requirement fails to establish a time frame for reporting deviations. For emissions of a hazardous air pollutant or a toxic air pollutant that continue for more than 1 hour in excess of permit requirements, the report must be made within 24 hours of the occurrence²⁸; for emissions of any regulated, nonhazardous air pollutant that continue for more than 2 hours in excess of permit requirements, the report must be made within 48 hours²⁹; and for all other deviations from permit requirements the deviations must be reported in the source's semiannual monitoring report.³⁰

The SCAQMD, pursuant to the discretion afforded to it by Part 70, initially recommended that deviations involving emissions be reported by telephone within 24 hours of the deviation and by written notice within two weeks. For deviations not involving emissions, the SCAQMD recommended only two weeks' written notice. The Title V Ad Hoc Committee, a group of approximately 20 industry stakeholders interested in improving the South Coast district's Title V program, had two primary concerns with this approach. Their first concern was that the proposed deadlines under the prompt reporting requirements of Part 70 sometimes conflicted with existing SCAQMD rules that provide specific time frames for reporting deviations. For example, the SCAQMD's breakdown provisions rule requires telephonic reporting within 1 hour of any breakdown and requires written notice within 7 calendar days after a reported breakdown has been corrected but within 30 calendar days of the initial date of the breakdown.³¹ Second, the Ad Hoc Committee believes that deviations without accompanying emissions exceedances are better handled as suggested in Part 71, which requires notice only every six months.

The Ad Hoc Committee has sought to reduce possible confusion between the requirements of the SCAQMD rules and the SCAQMD's Title V program. As a result of these concerns, and after considerable discussion with the SCAQMD, the following compromise was reached between stakeholders and the district:

- Where there is an applicable rule for breakdowns, prompt reporting has to be completed per the requirements of the rule.
- Other deviations from permit or applicable rule emission limitations, equipment operating conditions, or work practice standards that result in emissions greater than those allowed by the permit or

21. 42 U.S.C. §7661b, ELR STAT. CAA §503.

22. State Operating Permit Programs, 40 C.F.R. §71.4 (1998).

23. 40 C.F.R. Part 64, Compliance Assurance Monitoring, defines "exceedance" as a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement), *id.* §64.1.

24. *Id.* §71.6(a)(3)(iii)(C).

25. *Id.* §70.6(a)(3)(iii)(B).

26. *Id.*

27. *Id.*

28. *Id.* §71.6(a)(3)(iii)(B)(1).

29. *Id.* §71.6(a)(3)(iii)(B)(2).

30. *Id.* §71.6(a)(3)(iii)(A).

31. SCAQMD Rule 430, Breakdown Provisions (amended July 12, 1996).

applicable rules shall be reported within 72 hours. A written report of such deviations including corrective actions or preventative measures taken shall be submitted within 14 days of the deviation.

- All other deviations shall be reported at least twice per year.³²

The Ad Hoc Committee was pleased with the flexibility afforded by this proposal over initial proposals. While it is understood that other air districts may have more liberal approaches to reporting requirements, given the overall stringency of the SCAQMD's rules, this proposal proved acceptable to all parties.

Variances

While EPA has tolerated variances granted by local and regional air districts under California law, it has always insisted that it can, at any time, enforce the underlying air quality requirement as if no variance has been granted.³³ EPA has acted sparingly in its "overfiling" of such enforcement actions, and parties petitioning for and obtaining variances from air quality requirements have generally felt substantial comfort in knowing that neither the local air district nor the state would descend upon them with an enforcement action.

Title V, however, while not really altering the conditional nature of EPA's tolerance of variances, raises the visibility of the specific requirements to which regulated parties are subject. As a result, Title V has highlighted concerns that state and local variances are not an effective bar to federal or citizen enforcement of underlying requirements.

California law authorizes the hearing boards of local air districts to suspend temporarily specific air quality requirements for parties that demonstrate, generally, that they are unable to comply with the requirements through no fault of their own and that they will do all they can to mitigate envi-

ronmental effects and limit the duration of the temporary suspension or variance.³⁴ Notably, the California legislative provisions for variances are not merely a grant of legislative grace, but are also a mechanism for permitting authorities to avoid or limit unfairness in particularly hard cases.

The variance provisions of the California Code clearly evidence the link between variances and fundamental, constitutional rights. California variance petitioners must demonstrate, among other things, that due to conditions beyond their reasonable control, requiring them to comply immediately with the requirement at issue "would result in either (1) an arbitrary or unreasonable taking of property or (2) the practical closing and elimination of a lawful business."³⁵ Variances under California law, therefore, not only protect the petitioning owner or operator from arbitrary regulation, but also protect the regulatory system from constitutional challenge.

Although Title V does not provide for variances from the program per se, a permit may provide for "alternative operating scenarios" under which a source may operate if certain requirements are met.³⁶ In the SCAQMD, industry, environmental groups, and regulators have worked together to craft a local variance provision that could result in federal approval of a variance as an "alternative operating scenario" under the Title V regulations.³⁷ SCAQMD Rule 518.2,³⁸ entitled "Federal Alternative Operating Conditions," sets up a procedure whereby a source that petitions the SCAQMD Hearing Board for a variance can simultaneously give notice to EPA of the alternative operating condition. Under the rule, parties must petition for "regular variances"³⁹ at least 45 days before the Hearing Board will grant a hearing. At that time, the variance applicant must craft a proposed alternative operating condition that sets out in detail the conditions under which the applicant would wish to operate as a variance to the applicable rules. EPA is then notified by the Hearing Board of the alternative operating condition, and will approve it if the rule's requirements are met.

Rule 518.2's 45-day notice requirement coordinates the variance notice requirement of the SCAQMD with the procedures EPA has set up for amending Title V permits. The potential for pitfalls, however, remains. The variance re-

32. Letter from Mohsen Nazemi (SCAQMD), to Michael Carroll, attorney, Latham & Watkins (July 2, 1999).

33. The basis for EPA's assertion is somewhat unclear. The Agency points to 42 U.S.C. §7515, ELR STAT. CAA §193, the general savings clause, which is sometimes referred to as an "antibacksliding" provision:

Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990, shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater reductions of such air pollutant.

The authors have not found any case applying this provision to air quality variances. In an early CAA case in which the Natural Resources Defense Council challenged EPA's approval of Georgia's variance provisions, *Train v. Natural Resources Defense Council*, 421 U.S. 60, 72, 5 ELR 20264, 20267 (1975), the Court wrote: "We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply." (quoting *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 478 F.2d 875, 887, 3 ELR 20375, 20379 (1st Cir. 1973)).

34. CAL. HEALTH & SAFETY CODE §§42350 (authorizes parties to apply to hearing boards for variances, and sets limits on variances, including prohibiting variances from the requirement to obtain a Title V operating permit) and 42352 (sets out findings required before a hearing board can grant a variance) (West 1999).

35. *Id.* §42352.

36. *See* State Operating Permit Programs, 40 C.F.R. §70.6(a)(9) (1998).

37. Note that another statewide group, the California Coalition of Government and Business, including industry and state and local regulators, is in negotiations with EPA about a broader approach to providing variances under Title V. The coalition currently is revising its draft model rule to meet objections raised by EPA, and progress is uncertain at this time.

38. SCAQMD Rule 518.2, Federal Alternative Operating Conditions (adopted Jan. 12, 1996).

39. The California Health and Safety Code provides for "emergency variances," which may be obtained ex parte but are usually only available in response to breakdowns; for "short variances," which are available for 90 days or less; for "interim variances," available with minimal notice requirements if the petitioner can so justify; and for "regular variances," which are available for periods greater than 90 days, but only upon 45 days' notice. *See generally* CAL. HEALTH & SAFETY CODE §§42351 and 42359.5 (West 1999) and SCAQMD Rule 517, Emergency Variances Procedures, Breakdowns (adopted Feb. 5, 1988).

quest must be reviewed by the public, by any affected state, and by EPA.⁴⁰ Moreover, the 45-day period does not begin until EPA receives: (1) a copy of the proposed alternative operating condition; (2) information sufficient to support the Hearing Board's grant of the condition; and (3) the name of any affected state, as defined under Title V and local regulation.⁴¹ If the terms of the approved alternative operating condition deviate significantly from the proposal, the 45-day notice process starts anew.⁴² Accordingly, applicants are well advised to work in advance with the SCAQMD prosecutor and even with EPA before submitting their variance petitions and proposed alternative operating conditions for approval. This is further reinforced by the potential for EPA to object to the condition.

Because some variances produce excess emissions, Rule 518.2 sets up a SIP allowance program, which, in effect, is a bank account of available emissions credits that variance petitioners may draw from. If prior variances or other events have depleted the SIP allowance, a variance petitioner may only obtain a variance by providing emissions credits or otherwise avoiding excess emissions.⁴³ SCAQMD Rule 518.2 takes advantage of the approach provided by Title V's alternative operating scenarios to effect a temporary revision to the SIP.⁴⁴

While some view the provisions of Rule 518.2 as burdensome, it represents a breakthrough in flexibility for revising SIPs. The rule establishes a streamlined process for obtaining federal approval of alternative, short-term operating methods. The streamlined nature of the rule is particularly visible when compared to the federal SIP revision process, which sometimes delays approval of changes in state plans for years and may put individual sources at risk of being subject to both the old federally approved state rule and the new state-approved but not yet federally approved rule.⁴⁵

No party has yet submitted a petition for a variance under Rule 518.2 because EPA has yet to grant final approval of the rule. At a recent national environmental conference, however, discussions among EPA's chief of air quality enforcement, the director of CARB, and a senior air quality attorney for General Electric demonstrated that the debate endures, even for the relatively narrow provisions of Rule 518.2.⁴⁶ The General Electric attorney, based in Connecticut, called for a national variance procedure like Rule 518.2 or more flexible versions to be built into Title V itself, and the CARB director expressed optimism on the progress of EPA-approval of Rule 518.2. The EPA enforcement chief,

however, expressed concern over the open-endedness of the rule and suggested that EPA was not yet in alignment with the rule's approach.⁴⁷

If approved, the effectiveness of Rule 518.2 will depend on a source's thoughtful drafting of the variance petition and the alternative operating condition, as carefully written applications will increase the likelihood that EPA will not veto the condition. There appear to be a few more chapters if not tomes to be written on the variance debate. As experience unfolds, it will be interesting to see whether the SCAQMD's approach is more innovative than cumbersome.

Title V and Federalism Concerns

Some observers would opine that Title V is no different than any other federal regulatory program that demands negotiation, tailoring, and "swallowing hard" before adoption. Yet, as this Article demonstrates, Title V has brought up a particularly strong set of issues and negotiations, particularly for California and the South Coast.

Prior to the 1990 CAA Amendment's adoption of Title V, it was arguable that clean air regulation diverged from water quality regulation because under the permit system of water quality, only permitted discharges were allowed, while under clean air regulation, emissions generally were allowed unless prohibited by specific rules and regulations. Clean air regulation under Title V, however, adopts the Federal Water Pollution Control Act's "only if permitted" approach; an approach that the staff of the National Commission on Air Quality had discussed and chose not to recommend.

Debates on federalism between EPA and the states have arisen throughout the entire process for setting up state Title

47. More recently, the EPA Regional Administrator for Region IX laid down the following set of issues for the statewide Title V variance proposal to the CARB director:

1. How should districts account for excess emissions from variances to satisfy the requirements of CAA Section 111(1)?
2. Should the model rule contain short term limits?
3. Should additional criteria be added to the rule to ensure that the rule does not violate the [lowest achievable emissions rate] requirement of the Act and to ensure that the rule is consistent with EPA's enforcement policies?
4. When submitting a rule for approval, does a district need to make a special demonstration in order to ensure that the rule will not violate the new source review offset requirements in the Act?
5. When submitting a rule for approval, does a district need to make a special demonstration in order to ensure that the rule will not violate Section 193 of the Act [the Act's "general savings clause," sometimes interpreted by EPA to require that no individual rule ever be relaxed]?
6. Should the streamlined review process contained in the model rule apply to variances involving the emission of hazardous air pollutants?
7. Should the rule be submitted to [National Environmental Justice Advisory Council] for review?
8. Should applicants for variances be required to show that the variance will not pose a health risk, individually or cumulatively, to local communities?

Letter from Felicia Marcus, EPA Regional Administrator, Region IX, to Michael Kenny, Executive Director, CARB (May 26, 1999) (attachment at 1).

These are sound questions, and this negotiation has been pursued in good faith on all sides. These questions do illustrate, however, how the complexity of the CAA can breed further complexity, and how it can thwart efforts to reasonably accommodate the needs of particular situations, such as those raised by companies in need of variances.

40. SCAQMD Rule 518.2(f).

41. *Id.*

42. *Id.*

43. *Id.* §518.2(h).

44. See State Operating Permit Programs, 40 C.F.R. §§70.5(c)(7) and 70.6(a)(9) (1998).

45. See *United States v. General Motors Corp.*, 110 S. Ct. 2528, 20 ELR 20959 (1990) (in which the Court held that EPA is not barred from enforcing an existing federally approved SIP even though the state had amended the rule and EPA had missed the four-month deadline for acting on proposed state revisions to the SIP).

46. American Bar Association, 28th Annual Conference on Environmental Law, Saturday Session, Advanced Air Practice, The Increasing Rule of EPA in Air Permitting and Enforcement Actions (Mar. 13, 1999). Moderator: William F. Tyndall, Cinergy; Speakers: Shannon S. Broome, General Electric; Bruce E. Buckheit, U.S. EPA; Michael P. Kenny, CARB; Sharon F. Rubalcava, McClintock, Weston et al.

V programs, particularly in states with well-developed air quality permit programs such as California. EPA's approach has been quite prescriptive. Instead of allowing states to achieve approval of their existing programs as "equivalent" to the federal program, states must develop new programs that are approved according to EPA's detailed regulations. In addition, EPA is strongly influencing if not demanding more stringent monitoring requirements, which, in effect, cause the underlying emissions control requirements to become more stringent. Moreover, Title V's prompt reporting mandate, which goes hand-in-hand with the new requirements for compliance certification, requires that air emissions sources report their own deviations. Although EPA and the states have encouraged this sort of openness in the past by granting leniency for self-discovery and self-reporting and by promoting environmental auditing, never before have companies and other sources actually been required to report on themselves. Finally, by making control requirements more public and more understandable, Title V is thought to make sources more vulnerable to citizens suits—suits authorized under CAA §304⁴⁸ that could not be defended on the basis of state variances. This creates new interest in the federal government's recognition of state variances, and leads to interesting discussions between EPA, the states, local governments, and others, raising once again the agoniz-

ingly cumbersome process of amending requirements set forth in SIPs.⁴⁹

Conclusion

Title V is producing much interesting—and somewhat painful—debate. It remains to be seen whether its provisions, engrafted on the environmental law that has been compared in complexity to the Internal Revenue Code, will yield any streamlining or just more confusion. The SCAQMD's experience is instructive in this dialogue, as Title V's reach into the southern coast of California is much deeper than in other parts of the nation. Because Title V reaches much smaller sources in the South Coast, it has pulled more businesses and other interested and affected parties into the debate. While consensus over Title V is as much a goal as a reality, there has been consistent and productive debate with varying results. Some success has resulted from a determination of the business community to participate actively in regulatory development, while some has been sponsored or encouraged by the regulatory community itself. The one thing that is certain, however, is that this debate will not end with the implementation of Title V in the South Coast—or anywhere else.

48. 42 U.S.C. §7604, ELR STAT. CAA §304.

49. See William F. Pedersen, *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059 (1981) (discussing the "double-key" approach for amending SIPs). Mr. Pedersen is a former associate general counsel for EPA's Office of Air and Radiation.