



Scared of What Your Air Permit Really Means?: Top 5 Pitfalls

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It is a universal truth that closely reviewing an air permit will cure the worst case of insomnia. Isn't that why you hire a lawyer? The pages are dense with legalese and technical jargon that make no practical sense. There are nuances that require Clean Air Act experience and a course of dealing with the permitting authority to determine what can be changed, how, and when.

Close inspection of an air permit often highlights problematic areas. For example, the plant engineer may say, "Oh, but our inspector knows what this requirement really means even if the permit doesn't spell it out." But, what if that local inspector leaves, a third party files a lawsuit alleging that the source is out of compliance, or EPA enters the scene? For these reasons, regular review of your air permit should be part of your risk reduction protocol.

The air permit world lives by the mantra that a permit should contain a regulatory requirement, a corresponding measure of compliance, and a means of monitoring compliance. Compliance should be documented by reporting and recordkeeping requirements. Following this basic formula benefits the source by keeping the source's obligations definable, achievable, and immune to adverse interpretation.

Despite the state's preferred format, local requirements, permit complexity, or facility-type, primary flaws in permits fall into basic categories. Here are five categories of flaws that we often identify when performing a legal audit of air permits:

1. An emissions limitation is present, but there is no achievable compliance measure There is an emission limitation, but the permit fails to identify a corresponding way to measure compliance with the limitation, such as through a continuous emissions monitor or stack testing. The source could be exposed by this ambiguity. For example, a third party may assert that the emission limitation is instantaneous, rather than measured over a typical averaging period, or in another instance, the source may be measuring compliance via fuel records when the state anticipates compliance measurement by emissions monitors.
2. There are emission units at the plant that are not in the permit or vice versa The emission units

governed by the permit should be unmistakable. Each emission unit should be identified explicitly in the permit, and the equipment on-site should match the description in the permit. Over time, plants will commission and decommission emission units. Sometimes units are renamed. These housekeeping updates should be made in the permit to avoid a concern that an emission unit is not permitted. The source should also closely review equipment description ratings, often originating from the original equipment manufacturer, as discussed with regard to the next concern.

3. The description of the emission unit should not be viewed as an emissions limitation Third parties, EPA or the permitting authority may assert that the description of the emission unit is a limit. For example, if the emission unit description contains a unit rating, is it possible to say that the rating is a cap on unit operation? Some rating descriptions were derived from a number provided by the original equipment manufacturer. Many times this OEM rating is lower than the unit's designed capabilities. Ratings in permit descriptions have been used as a basis for New Source Review lawsuits, arguing that the source modified the unit to enable it to operate above the descriptive rating. Sources should consider building a record to defuse any such concerns.

4. Are there recitations of regulations that have been updated, repealed and replaced? Regulatory agencies may choose to recite regulations in the permit to which the source is subject. These recitations are user friendly because the permit clearly encompasses all of the requirements in its four corners. However, the benefit to these recitations ends when the regulations frequently change via federal and state regulatory activity. The source must then update its permit to fix the recital to match the underlying regulation. For this reason, a citation referencing and incorporating the regulation may be preferable.

5. Do emissions limitations or work practice requirements in the permit have an underlying federal or state regulatory requirement? Air permits, by design, compile the source's regulatory requirements. However, an audit may reveal permit requirements with no basis in statute or regulation, or there may be an all-purpose regulation cited as the basis, even though the emissions requirement is much more specific. Sources should recognize emissions limitations and work practice standards that have a thin legal basis. If the requirement is nonsensical, impractical or problematic to meet, the source should consider a discussion with the permitting authority regarding the requirement at issue.

Using these tips, you should review your permit with an eye for detail. Evaluate the flaws you find and assign risk to them. That process will help you decide whether to approach your permitting authority. Reopening a permit is a significant step that carries its own risks, such as new, unwanted permit changes that you did not request or adverse public comments. Therefore, the flaws must justify the risks of reopening.

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