



GROUP AGAINST SMOG & POLLUTION

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May 17, 2013

Via Email

Laura M. Jennings
West Virginia Department of Environmental Protection
Division of Air Quality
601 57th Street, SE
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Laura.M.Jennings@wv.gov

Re: Comments Regarding the Draft Class II General Permit G70-A for the Operation of Natural Gas Production Facilities Located at Well Sites

Dear Ms. Jennings,

Please accept these comments regarding draft General Permit G70-A on behalf of the Group Against Smog and Pollution (GASP), Wetzel County Action Group, West Virginia Sierra Club, WV Surface Owners' Rights Organization, and Ohio Valley Environmental Coalition. If you have questions or require additional information, please feel free to contact us.

Sincerely,

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I. G70-A cannot establish individualized terms and conditions in general permit registrations.

WVDEP's air quality general permit program has been approved by EPA pursuant to Clean Air Act §§ 110(a)(2)(C) and 112(l) and has been incorporated into the West Virginia SIP as part of the minor NSR program.¹ EPA's minor NSR regulations require air permitting authorities to meet certain public participation requirements prior to issuing a construction permit.²

WVDEP's minor NSR rules provide public notice and comment opportunities prior to issuance of a new or revised class II general permit and at the time an applicant applies for a class II general permit registration for a specific facility;³ however, WVDEP does not provide a "Notice Level B" or "Notice Level C"⁴ opportunity for public comment prior to issuing a general permit registration.⁵ Because general permit registrations are not subject to notice level B or C, the public will not have an opportunity to review a draft of a facility-specific general permit registration or "an engineering evaluation supporting [DAQ's] intent to issue such a permit."⁶

¹ 72 FR 5932, 5933.

² 40 C.F.R. § 51.161.

³ 45 CSR 13 § 8.3 & 8.9.

⁴ 45 CSR 13 §§ 8.4 & 8.5.

⁵ 45 CSR 13 § 8.4.

⁶ 45 CSR 13 § 8.7.

In many circumstances, the limited opportunities for public participation WVDEP proposes would be sufficient to satisfy EPA's minor NSR program requirements. However, as detailed in the following sections, in the context of G70-A, WVDEP's proposed public participation requirements are insufficient and contrary to both state and federal regulations.

A. Individualized general permit registration terms and conditions are inconsistent with the rationale behind the federal general permit approval.

Typically, air permitting authorities need not provide an opportunity for public comment prior to allowing an individual source to construct pursuant to a general permit so long as the agency provided an opportunity public comment at the time the standardized general permit itself was created. The rationale for this policy is that such limited opportunity for public comment is sufficient to satisfy 40 C.F.R. § 51.161 because general permits are standardized documents that will not be tailored on a case-by-case basis to individual sources. Additional opportunity for public comment is unnecessary for facility-specific authorizations to construct pursuant to the general permit because such authorizations entail no new substantive conditions.⁷

However, WVDEP's proposed G70-A provides for individualized permit conditions and emission limits in facility-specific general permit registrations.⁸ Such a policy is inconsistent with the rationale for allowing facility-specific general permit issuances to avoid public review and deprives the public of its right to participate in agency permitting decisions.

⁷ 71 FR 5979, 5981 ("In cases where standardized permits have been adopted, EPA and the public need not be involved in their application to individual sources as long as the standard permits themselves have been subject to notice and opportunity to comment A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit provides for conditions limiting potential to emit in a one-time permitting process, and thus avoids the need to issue separate permits for each source within the covered source type or category.").

⁸ See e.g., WVDEP, Class II General Permit G70-A §§ 6.1.1-3, 7.1.1-3, 10.1.1-2, 11.1.1-3; further, the draft engineering evaluation includes numerous statements suggesting PTE limits would be specified in individual G70-A registrations: "[t]he G70-A general permit registration will include facility specific emission limits, throughputs, and specific air pollution control device information." WVDEP, Class II General Permit G70-A, Draft Engineering Evaluation/Fact Sheet at 2, *available at*: <http://www.dep.wv.gov/daq/permitting/Documents/G70-AFactSheet.pdf>; see also Fact Sheet at 4 ("The G70-A general permit registration application must include the basis of the emission calculations used to determine the potential emissions."); Fact Sheet at 5 ("The particulate matter emission standard set forth in 45CSR2 is generally less stringent than the potential emissions from the fuel burning unit utilizing natural gas; therefore, only the potential emissions from the fuel burning unit will be included in the general permit registration."); Fact Sheet at 6 ("The sulfur dioxide emission standard set forth in 45CSR10 is generally less stringent than the potential emissions from a fuel burning unit for natural gas. The SO2 emissions from fuel burning unit will be listed in the G70-A permit registration at the discretion of the permit engineer on a case-by-case basis.")

B. Individualized general permit registration terms and conditions are not federally enforceable because they are not subject to public review.

Further, WVDEP's minor NSR regulations and proposed G70-A both explicitly state that limitations on PTE must be federally enforceable;⁹ however, in order to be federally enforceable, PTE limits must be subjected to an opportunity for public review.¹⁰ According to USEPA:

A rule that allows sources to submit the specific parameters and associated limits to be monitored may not be enforceable because the rule itself does not set specific technical limits. The submission of these voluntarily accepted limits on parameters or monitoring requirements would need to be federally enforceable. Absent a source-specific permit and appropriate review and public participation of the limits, such a rule is not consistent with the EPA's enforceability principles.¹¹

C. The G70-A standard terms and conditions are unenforceable blanket emission limitations.

While G70-A includes language prohibiting G70-A sources from emitting or having a potential to emit sufficient to exceed major source thresholds,¹² such blanket or numerical limits on potential to emit are not enforceable per se. In order to be federally enforceable, a PTE limit must either:

- (1) reflect maximum emissions of the source operating at full capacity, or
- (2) be based on production limits or operational limits (e.g., hours of operation, fuel restrictions, pollution control requirements) sufficient to ensure the source will not exceed the numerical emission limit.¹³

Thus the G70-A standard conditions are insufficient to limit PTE because they do not establish pollution control efficiencies or limits on equipment capacity or hours of operation. Instead, to the extent this information is provided, it appears only in facility-specific G70-A registrations.

⁹ 45 CSR 13 § 2.19; WVDEP, Class II General Permit G70-A at 17, definition of "potential to emit."

¹⁰ 40 CFR 51.161; 71 FR 5979, 5981; USEPA, Guidance an Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits (Jan. 25, 1995) at 8, *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/potoem.pdf>.

¹¹ USEPA, Guidance an Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits (Jan. 25, 1995) at 8, *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/potoem.pdf>.

¹² WVDEP, Class II General Permit G70-A § 4.1.2-3.

¹³ U.S. EPA, Limiting Potential to Emit (PTE) in New Source Review (NSR) Permitting *available at* <http://www.epa.gov/reg3artd/permitting/limitPTEmmo.htm>; *see also U.S. v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) & 682 F. Supp. 1141 (D. Colo. Mar. 22, 1988).

As explained in section I.B above, information contained in G70-A registrations is not federally enforceable because it is not subject to public review.

D. As proposed, G70-A is contrary to 45 CSR 13 § 8.5.

45 CSR 13 § 8.5 requires WVDEP to provide a “Notice Level C” public participation opportunity for “sources for which the agency intends to issue a permit to limit physical and operational capacity below major stationary source thresholds.” Because the restrictions capable of limiting G70-A sources to below major source thresholds appears only in G70-A permit registrations, these registrations must meet notice level C public participation requirements pursuant to 45 CSR 13 § 8.5.

E. As proposed, G70-A is contrary to W. Va. Code §22-5-11(g)(2).

Proposed G70-A also appears to be contrary to W. Va. Code §22-5-11(g)(2), which indicates the legislature intended general permits to apply uniform terms and conditions to sources that are “the same or similar”:

General permits are permits authorizing the construction, modification or relocation of a category of sources by the same owner or operator or involving the same or similar processes or pollutants upon the terms and conditions specified in the general permit for those types of sources.¹⁴

F. Conclusion.

As proposed, G70-A would allow DAQ to create individualized permit conditions in G70-A registrations. Such a policy is inconsistent with USEPA’s rationale for allowing facility-specific general permit approvals to avoid public review, fails to meet the public participation requirements of the federal minor NSR program, fails to establish federally enforceable limits on PTE, fails to meet the notice requirements of 45 CSR 13 § 8.5, and conflicts with the legislative intent of W. Va. Code §22-5-11(g)(2). The final version of G70-A cannot provide for individualized permit conditions in G70-A registrations.

II. The General Permit should require greater setback distances.

¹⁴ W. Va. Code §22-5-11(g)(2).

The draft G70-A includes a requirement that “[n]o person shall construct, locate or relocate any facility, affected facility or emission unit within three hundred (300) feet of any occupied dwelling, business, public building, school, church, community, institutional building or public park.” Section 3.1.1(a). This 300 foot setback requirement does not adequately protect human health from emissions associated with this industry. WVDEP should include a greater setback distance of 1,000 feet in this general permit.

Many states require larger setbacks for these facilities. For example, Pennsylvania requires that unconventional wells must be located at least:

- 500 feet from existing buildings or water wells
- 1,000 feet from a water supply extraction point used by a water purveyor
- 300 feet from certain streams or bodies of water.¹⁵

Pennsylvania’s setback requirements are more protective than West Virginia’s proposed setbacks. However, even Pennsylvania’s setbacks are not large enough to provide adequate protection to those living and working nearby. Colorado recently increased its setback distance from 350 feet to 500 feet, or 1,000 feet from certain “high occupancy buildings” such as schools, hospitals, day care centers, nursing homes, etc.¹⁶ California has considered what constitutes a protective distance for sensitive populations, such as children, from sources of pollution; California EPA and local air pollution control agencies have recommended that buildings like schools be located at least 1,000 feet to ¼ mile from sources of hazardous air pollutants, and 500 to 1,000 feet from sources of diesel pollution.¹⁷

For these reasons, a setback distance greater than 300 feet is required to protect human health from pollutants associated with these facilities. Commenters request that WVDEP increase the setback distance to 1,000 feet to provide the necessary protections.

III. Applicants must provide a facility’s SIC code, as Federal and state regulations require the use of SIC codes in making source determinations.

¹⁵ Pa. Dept. of Env’t Prot., *Act 13 Frequently Asked Questions, Are there new setback provisions?*, http://www.portal.state.pa.us/portal/server.pt/community/act_13/20789/act_13_faq/1127392.

¹⁶ Colorado Oil and Gas Conservation Commission, *Statement of Basis, Specific Statutory Authority, and Purpose of New Rules and Amendments, Setbacks*, http://cogcc.state.co.us/RR_HF2012/Setbacks/FinalRules/Final_SetbackRules-StatementOfBasisAndPurpose.pdf.

¹⁷ See South Coast Air Quality Management District (SCAQMD), *Air Quality Issues in School Site Selection* (June 2005), available at http://www.aqmd.gov/prdas/aqguide/doc/School_Guidance.pdf; California EPA, California Air Resources Board, *Air Quality and Land Use Handbook: A Community Health Perspective* (April 2005), available at <http://www.arb.ca.gov/ch/handbook.pdf>.

The instructions for submitting a registration application for this general permit requires the applicant to provide either the facility's NAICS or SIC code, and specifies that SIC code 1311 and NAICS code 211111 are the codes that will apply to these facilities.¹⁸ For the reasons described below, WVDEP must determine, or require the applicant to provide, the facility's SIC code. NAICS codes are not an adequate substitute for SIC codes for source determination analyses. Consideration of NAICS codes is contrary to state and federal regulation and may result in DAQ reaching incorrect conclusions when determining whether facilities are part of the "same industrial grouping."

A. The federal and state definitions of "source" reference the SIC code, not the NAICS code.

U.S. EPA's regulations define a stationary source as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."¹⁹ Further, a "building, structure, facility, or installation" is defined as:

all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the *Standard Industrial Classification Manual*. . .²⁰

(emphasis added). WVDEP's definition of stationary source in its non-major source, major source, and Title V permit regulations contain the same "building, structure, facility, or installation" language found in the federal regulations.²¹ This definition of "source" does not refer to the NAICS code; it refers only to the SIC code. As such, West Virginia must also use the SIC code in determining what constitutes a "source" under this general permit.

B. SIC and NAICS codes do not perfectly correspond with each other.

¹⁸ Instructions at 7, Sections 2.II.8, 8a, and 8b.

¹⁹ 40 C.F.R. §§ 51.165(a)(1)(i), 52.21(b)(5).

²⁰ 40 C.F.R. §§ 51.165(a)(1)(ii), 52.21(b)(6).

²¹ 45CSR13-2.24; 45CSR14-2.13; 45CSR19-2.12; 45CSR30-2.40.

Further, the use of SIC versus NAICS codes is not merely a legally technicality. Use of NAICS codes may lead to different conclusions regarding whether sources belong to the same industrial grouping. Although the SIC and NAICS classification systems often correspond, their respective codes do not always perfectly correlate with each other. For example, SIC code 1389, which covers “Oil and Gas Field Services, Not Elsewhere Classified,” corresponds to three different NAICS codes:

- 213112 – Support Activities for Oil and Gas Operations
- 237120 – Oil and Gas Pipeline and Related Structures Construction
- 238910 – Site Preparation Contractors²²

For this reason, allowing applicants to provide *either* the SIC code *or* the NAICS code is not useful. Applicants must be required to provide the SIC code for purposes of determining what sources are part of the “same industrial grouping” as part of an aggregation analysis.

C. SIC code 1311 is not the only SIC code that may apply to affected facilities.

The instructions suggest that SIC code 1311 is the only SIC code that will apply to facilities that will be covered under G70-A. This is not accurate. SIC code 1311 applies to “Crude Petroleum and Natural Gas,” which includes:

[e]stablishments primarily engaged in operating oil and gas field properties. Such activities may include exploration for crude petroleum or natural gas; drilling, completing, and equipping wells . . . and all other activities in the preparation of oil and gas up to the point of shipment from the producing property.²³

This covers many of the sources that will be covered by G70-A; however, SIC code 1389 may also apply. SIC code 1389, “Oil and Gas Field Services, Not Elsewhere Classified” includes “[e]stablishments primarily engaged in performing oil and gas field services, not elsewhere classified, for others on a contract or fee basis.”²⁴ This is a broad category, but includes activities such as “compressing natural gas at the field on a contract basis.” Because SIC code 1389 may

²² See NAICS Association, www.naics.com/search.htm (search engine allows comparison of corresponding SIC and NAICS codes).

²³ U.S. Department of Labor, Occupational Safety and Health Administration, *1311 Crude Petroleum and Natural Gas*, http://www.osha.gov/pls/imis/sic_manual.display?id=387&tab=description.

²⁴ U.S. Department of Labor, Occupational Safety and Health Administration, *1389 Oil and Gas Field Services, Not Elsewhere Classified*, http://www.osha.gov/pls/imis/sic_manual.display?id=391&tab=description.

also apply, WVDEP should not suggest that 1311 is the only SIC code that will apply to sources covered by G70-A.

D. Proper use of these codes is vital to determining whether sources are part of the “same industrial grouping” for purposes of an aggregation analysis.

Correct use of the SIC code is important because it must be considered when WVDEP conducts an aggregation analysis and determines whether facilities are part of a single source for air permitting purposes. Multiple pollutant-emitting activities are part of the same “source” if they are under common control or under control of the same person, contiguous or adjacent to each other, and are part of the same SIC Major Group.²⁵ Facilities are part of the same SIC Major Group if their SIC codes share the same first two digits. Inaccurately determining a facility’s SIC code, or attempting to correlate an NAICS code with a SIC code will lead to errors in WVDEP’s aggregation analyses. The corrections discussed above will help ensure that such errors are not made, and one step of the aggregation analysis will be completed accurately.

IV. The final G70-A should include a finite time period for authorization validity.

Section 2.6.2 states that “General Permit registration granted by the Secretary shall remain valid, continuous and in effect unless it is suspended or revoked by the Secretary . . .” WVDEP should not authorize the use of this general permit indefinitely, but should instead set time periods during which the authorization will be valid, and then must be renewed if the permittee wishes. For example, the Pennsylvania Department of Environmental Protection’s General Permit 5 (GP-5), which applies to natural gas compression and/or processing facilities, provides authorization for a term of five (5) years, after which time the permittee must re-apply.²⁶ However, if construction has not commenced within eighteen (18) months, the authorization will expire.²⁷

West Virginia should take an approach similar to Pennsylvania’s and set time limits on authorization validity. This will allow WVDEP to ensure that the general permit continues to apply and is being properly used by the permittee.

²⁵ 40 C.F.R. §§ 51.165(a)(1)(ii), 52.21(b)(6).

²⁶ Pa. Department of Environmental Protection, *General Plan Approval and/or General Operating Permit BAQ-GPA/GP-5, Natural Gas Compression and/or Processing Facilities*, Section A.12, http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/gp/GP-5_2-25-2013.pdf.

²⁷ *Id.*

V. The General Permit must acknowledge that a facility is ineligible for a general permit if it is a major source of greenhouse gases.

The final version of G70-A should acknowledge that a facility cannot receive this general permit if it is a major source of greenhouse gas emissions. Section 2.3.1.a of the draft general permit states that “[a]ny natural gas well affected facility which is a major source as defined in 45CSR14, 45CSR19, or 45CSR30” is not eligible to receive this general permit. The cited regulations do not mention greenhouse gas emissions. However, under Step 2 of the federal Greenhouse Gas Tailoring Rule, new sources with the potential to emit 100,000 tons per year of carbon dioxide equivalent (CO₂e) emissions or more will be subject to PSD and Title V permitting requirements.²⁸ The general permit should specify that G70-A does not apply to major sources of greenhouse gas emissions.

²⁸ See U.S. EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-06-03/pdf/2010-11974.pdf#page=1>; U.S. EPA, *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Fact Sheet*, <http://www.epa.gov/nsr/documents/20100413fs.pdf>.