

**MODEL ATTORNEY GENERAL'S OPINION TO ACCOMPANY STATE
OPERATING PERMITS PROGRAM SUBMITTALS
UNDER THE CLEAN AIR ACT AMENDMENTS OF 1990**

INTRODUCTION

A. Purpose and Use of the Model: This model attorney general's opinion is intended to assist State and local authorities in developing the attorney general's opinion, which must accompany operating permits program submittals made to the Environmental Protection Agency (EPA) pursuant to title V of the Clean Air Act (CAA) Amendments of 1990, 42 U.S.C. § 7661 et seq. Title V's implementing regulations require the attorney general's opinion to demonstrate that State law provides adequate authority for certain program elements necessary to administer and enforce a title V program [see 40 CFR §§ 70.4(b)(3)(i)-(xiii) and 70.8(e)]. These specific program elements are referenced in sections I, III (last sentence), V-VI, VIII-IX, XIII-XIV, XVI-XVII, and XIX-XXI of the model opinion. When submitted to EPA, the attorney general's opinion must demonstrate adequate legal authority for these elements, or the overall program submittal will be considered deficient. Sections II-IV (except the last sentence of III), VII, X-XII, XV, XVIII, and XXII of the model opinion reference additional program elements that, while not specifically required to be addressed in the attorney general's opinion, must in some manner be shown to be fully authorized under State law. The attorney general's opinion is the preferred method for demonstrating that adequate legal authority exists for these program elements, particularly where that authority derives from, or is influenced by, judicial case law or is otherwise not expressly provided for in the statutes and regulations contained in the program submittal.

The attorney general's opinion generally must affirmatively state that State laws and regulations are lawfully adopted as of the date of signature of the attorney general's opinion and will be fully effective by the date EPA approves the State program. While the model opinion most often references "State" authorities and the requirements for EPA's approval of "State" programs, local air pollution control agencies authorized to render such opinions should use the model opinion by substituting citations to local authorities for State authorities where necessary.

B. Organization of the Model: The model attorney general's opinion consists of the following three parts:

1. An introductory paragraph certifying that State law (presently adopted and to be effective by the date of program approval) provides adequate authority to carry out all aspects of the program submitted to EPA. This paragraph contains blanks and bracketed inserts which must be completed to specify the position of the person filling out the opinion and the State and State Agency submitting the opinion.

2. Sections I through XXII consist of subsections which briefly (1) describe areas where State authority is required for EPA's approval of a State's title V program, and (2) present the primary federal authority or authorities for these requirements. At the end of each subsection are the following two headings: "Citation of Laws and Regulations; Date of Enactment or Adoption" and "Remarks of the Attorney General." The attorney general rendering the opinion should provide the appropriate information under the first heading. If the authorities cited require some interpretation, especially if such interpretation is based on State case law or administrative practice, then the remarks section is designed for such explanation.

3. Signature and Seal of Office. In this section, the attorney general completing the opinion must include his/her seal of office if required as a matter of State law for formal legal opinions, his/her signature, a typed version of his/her name, his/her title, and the date the opinion was signed.

C. Who Signs the Attorney General's Opinion: CAA § 502(d), 42 U.S.C. § 7661a(d), and 40 CFR § 70.4(b)(3) require the legal opinion be signed by the State attorney general (or the attorney for those State, local, or interstate air pollution control agencies having independent legal counsel), or the chief legal officer of an interstate agency. If independent legal counsel signs the opinion, the attorney signing must have full authority to independently represent the State agency in court on all matters pertaining to the State program. The EPA interprets CAA § 502(d) to require the chief legal officer of the office authorized to render the opinion to sign the opinion.

D. Additional Topics: As discussed above, this model opinion addresses the topics enumerated for such opinions in 40 CFR §§ 70.4(b)(3) and 70.8(e), as well as other legal authorities which are required for the title V program. In specific instances, additional topics or a more detailed analysis of the topics addressed here may be required. If, during the program-development process, EPA raises particular issues of legal interpretation regarding the State's ability to implement an operating permits program consistent with title V of the CAA and 40 CFR part 70, the opinion should address those issues in addition to the items included in this model. This is especially true where the State is relying on a legal interpretation of its statutes or regulations to justify approval of its program. The EPA Regional Offices will work closely with individual State attorney general offices to identify such issues.

ATTORNEY GENERAL'S OPINION

[DATE]

Pursuant to my authority as [attorney general or equivalent State/local attorney] and in accordance with CAA § 502(d), as amended, (42 U.S.C. § 7401, et seq.), and 40 CFR § 70.4(b)(3), it is my opinion that the laws of the State [Commonwealth] of _____ provide adequate authority to carry out all aspects of the program submitted by the [State agency] to the EPA for approval to administer and enforce the operating permits program under title V of the CAA. The specific authorities provided, which are contained in statutes, regulations, or other legal authorities lawfully adopted, and which shall be fully effective by the time the program is approved, include those identified below.

I. AUTHORITY TO ISSUE PERMITS

State law provides authority for [the permitting authority] to issue operating permits to all air pollution sources within the State that are required to have permits pursuant to CAA § 502(a) and 40 CFR section 70.3, and to incorporate into permits and assure compliance with each applicable requirement of the CAA and the requirements of 40 CFR part 70. State law also provides authority to issue operating permits for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e) that assure compliance with all applicable requirements of the CAA and the requirements of 40 CFR part 70.

Federal Authority: CAA §§ 129(e), 502(a)-(b), 503, 504(a), 42 U.S.C. §§ 7429(e), 7661a(a)-(b), 7661b, 7661c(a); 40 CFR §§ 70.4(b)(3)(i), 70.4(b)(3)(iv), 70.4(b)(3)(v), 70.5(a), 70.6, 70.7(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

II. AUTHORITY TO ISSUE PERMITS TO NONCOMPLYING SOURCES

State law provides authority for [the permitting authority] to issue permits to sources that are not in compliance with applicable

requirements, and to include compliance schedules in permits to bring sources into compliance.

Federal Authority: CAA §§ 502(b)(5)(A), 504(a), 42 U.S.C. §§ 7661a(b)(5)(A), 7661c(a); 40 CFR §§ 70.5(c)(8), 70.6(c)(3).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

III. PERMIT BOARD MEMBERSHIP AND CONFLICTS OF INTEREST

State law provides that no State board or body which approves operating permits, either in the first instance or upon appeal, shall be constituted of less than a majority of members who represent the public interest and who do not derive a significant portion of their income from persons subject to operating permits. State law also provides that any potential conflicts of interest by members of such board or body or the head of any executive agency with similar powers be adequately disclosed. State law also provides that no permit for a solid waste incinerator unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

Federal Authority: CAA §§ 128(a)(1)-(2), 129(e), 42 U.S.C. §§ 7428(a)(1)-(2), 7429(e); 40 CFR § 70.4(b)(3)(iv).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the attorney general:

IV. PERMIT FEES

State law provides authority for [the permitting authority] to assess and collect annual permit fees (or the equivalent amount of fees over some other period of time) from sources within the State which are subject to the requirements of title V of the CAA and 40 CFR part 70, in an amount sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the State's title V program.

Federal Authority: CAA § 502(b)(3)(A), 42 U.S.C. § 7661a(b)(3)(A); 40 CFR §§ 70.9(a)-(d).

**Citation of State Laws and Regulations; Date of Enactment or Adoption;
Effective Date:**

Remarks of the Attorney General:

V. PERMIT TERM

State law provides authority to issue operating permits for a fixed term not to exceed 5 years. State law provides a fixed term not to exceed 12 years for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e) and a review of such permits at least every 5 years. State law provides authority to issue permits with acid rain provisions for a fixed term of 5 years.

Federal Authority: CAA §§ 129(e), 408(a), 502(b)(5)(B), 42 U.S.C. §§ 7429(e), 7651g(a), 7661a(b)(5)(B); 40 CFR §§ 70.4(b)(3)(iii)-(iv), 70.6(a)(2), 72.70(b), 72.72(a).

**Citation of State Laws and Regulations; Date of Enactment or Adoption;
Effective Date:**

Remarks of the Attorney General:

VI. MONITORING, RECORDKEEPING, AND REPORTING

State law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into operating permits consistent with 40 CFR § 70.6. State law provides authority to incorporate into the permit periodic monitoring or testing requirements where the existing State implementation plan or other applicable requirement does not contain such a requirement, consistent with 40 CFR § 70.6(a)(3)(i)(B).

Federal Authority: CAA §§ 502(b)(2), 503(b)(2), 504(a)-(c), 42 U.S.C. §§ 7661a(b)(2), 7661c(a)-(c); 40 CFR §§ 70.4(b)(3)(ii), 70.6(a)(3), 70.6(c)(1), 70.6(c)(5).

**Citation of State Laws and Regulations; Date of Enactment or Adoption;
Effective Date:**

Remarks of the Attorney General:

VII. INSPECTION/ENTRY AUTHORITY

State law provides authority to incorporate into permits inspection and entry requirements consistent with 40 CFR § 70.6(c)(2).

Federal Authority: CAA § 504(c), 42 U.S.C. § 7661c(c); 40 CFR §§ 70.6(c)(2).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

VIII. INCORPORATION OF ALL APPLICABLE REQUIREMENTS INTO PERMIT

State law provides authority to incorporate into an operating permit, upon issuance or renewal, all applicable requirements as defined in 40 CFR § 70.2, and as provided generally in the CAA and 40 CFR part 70.

Federal Authority: CAA §§ 502(b)(5)(C), 504(a), 42 U.S.C. §§ 7661a(b)(5)(C), 7661c(a); 40 CFR §§ 70.4(b)(3)(v), 70.6(a).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

IX. PERMIT REOPENING

State law provides authority to revise permits with remaining terms of 3 or more years to incorporate new applicable requirements which become effective after issuance of the permit. State law provides authority to reopen permits when additional acid rain requirements become applicable, regardless of the remaining permit term. State law provides authority to terminate, modify, or revoke permits for cause at any time during the permit term consistent with 40 CFR §§ 70.7(f) and (g).

Federal Authority: CAA §§ 502(b)(5)(D), 502(b)(9), 42 U.S.C. §§ 7661a(b)(5)(D), 7661a(b)(9); 40 CFR §§ 70.4(b)(3)(vi), 70.6(a)(6)(iii), 70.7(f)-(g).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

X. OPERATIONAL FLEXIBILITY

State law provides authority to issue permits which allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of title I of the CAA, and the changes do not exceed the emissions allowable under the permit, provided that the source provides at least 7 days' [or fewer days if the State requires less time in emergencies] written notice to the State and to the EPA. State law provides authority for permits to include terms and conditions for reasonably anticipated, alternative operating scenarios in permits.

Federal Authority: CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10); 40 CFR §§ 70.4(b)(12), 70.6(a)(9).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XI. PERMIT MODIFICATIONS

State law provides authority to process permit modifications in a manner that conforms to, or is substantially equivalent to, the procedures set forth under 40 CFR § 70.7(e).

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR §§ 70.4(b)(13), 70.7(e).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XII. PUBLIC PARTICIPATION

State law provides authority for procedures to allow public participation in [the permitting authority's] action to issue or deny an operating permit, to modify a permit [except as provided in 40 CFR §§ 70.7(e)(2) and (3)], or to renew a permit. Public participation under State law includes the opportunity for public comment and the opportunity for a hearing on draft permits in accordance with the requirements of the CAA and 40 CFR § 70.7(h). State law provides for affected States to review permit applications in accordance with the CAA and 40 CFR § 70.8(b).

Federal Authority: CAA §§ 502(b)(6), 505(a)(2), 42 U.S.C. §§ 7661a(b)(6), 7661d(a)(2); 40 CFR §§ 70.7(h), 70.8(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XIII. PUBLIC ACCESS TO PERMIT INFORMATION

State law provides authority to make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report, except for information entitled to confidential treatment. State law provides that the contents of an operating permit shall not be entitled to confidential treatment.

Federal Authority: CAA §§ 114(c), 502(b)(8), 503(e), 42 U.S.C. §§ 7414(c), 7661a(b)(8), 7661b(e); 40 CFR § 70.4(b)(3)(viii).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XIV. ENFORCEMENT OF PERMITS PROGRAM REQUIREMENTS

State law provides civil and criminal enforcement authority consistent with 40 CFR § 70.11, including authority to recover penalties and fines in a maximum amount of not less than \$10,000 per day per violation.

Federal Authority: CAA § 502(b)(5)(E), 42 U.S.C. § 7661a(b)(5)(E); 40 CFR §§ 70.4(b)(3)(vii), 70.11.

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XV. AUTHORITY TO ENFORCE LAPSED PERMITS

State law provides authority to enforce the terms and conditions of a permit which has expired, if the source has filed a timely and

complete application for renewal, so as to assure compliance with all applicable requirements.

Federal Authority: CAA § 502(b)(5)(A), 42 U.S.C. § 7661a(b)(5)(A); 40 CFR § 70.4(b)(10).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XVI. EPA PERMIT VETO

State law provides that an operating permit will not issue if the Administrator of EPA (or her designee) objects in a timely manner to its issuance pursuant to 40 CFR § 70.8(c) or, if the permit has been issued, but the Administrator or her designee objects pursuant to 40 CFR § 70.8(d).

Federal Authority: CAA §§ 502(b)(5)(F), 505(b), 42 U.S.C. §§ 7661a(b)(5)(F), 7661d(b); 40 CFR §§ 70.4(b)(3)(ix), 70.8(c)-(d).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XVII. FINAL AGENCY ACTION ON PERMITS

State law provides that, solely for the purposes of obtaining judicial review in State court for [the permitting authority's] failure to take final action, "final permit action" shall include the failure of [the permitting authority] to take final action on an application for a permit, permit renewal, or permit revision within [the time specified in the State program]. [Note: If the State program allows sources to make changes using the minor permit modification process, the permitting authority's failure to take final action within 90 days of receipt of an application requesting a minor permit modification (or 180 days for minor modifications subject to group processing requirements) is subject to judicial review in State court.]

Federal Authority: CAA § 502(b)(7), 42 U.S.C. § 7661a(b)(7); 40 CFR § 70.4(b)(3)(xi).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XVIII. DEFAULT PERMIT ISSUANCE

State law [prohibits or does not authorize] the issuance, modification, or renewal of any permit based on the passage of a specified time period when [the permitting authority] has failed to take action on the application, and does not include any other similar provision providing for default issuance of a permit unless EPA has specifically waived the right of review for itself and affected States.

Federal Authority: CAA § 505(a)-(e), 42 U.S.C. § 7661d(a)-(e); 40 CFR § 70.8(e)

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XIX. OPPORTUNITY FOR JUDICIAL REVIEW OF PERMIT ACTIONS

State law provides an opportunity for judicial review in State court of any final permit action by the applicant, any person who participated in the public-participation process provided pursuant to the CAA and 40 CFR § 70.7(h), or any other person who could obtain judicial review of such actions under State laws, including [specify State laws affording such judicial review]. Any provisions of State law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR § 70.4(b)(3)(x).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XX. LIMITATIONS ON JUDICIAL REVIEW

State law provides that the opportunity for judicial review of a final permit action in State court described in paragraph [] of this opinion shall be the exclusive means for obtaining judicial review of the terms and conditions of permits. State law provides that

petitions for judicial review must be filed no later than [90 days, or less, if required by the State] after the final permit action. State law provides that where petitions for judicial review are based solely on grounds arising after the [90 days or less] deadline for judicial review, such petitions may be filed no later than [90 days or less] after the new grounds for review arise. State law further provides that if the final permit action being challenged is [the permitting authority's] failure to take final action, a petition for judicial review may be filed at any time before [the permitting authority] denies the permit or issues the final permit.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR § 70.4(b)(3)(xii).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XXI. COORDINATION WITH ACID RAIN PROGRAM REQUIREMENTS

State law is consistent with, and cannot be used to modify, the Acid Rain Program requirements of 40 CFR part 72.

Federal Authority: CAA §§ 408(a), 506(b), 42 U.S.C. §§ 7651g(a), 7661e(b); 40 CFR §§ 70.4(b)(3)(xiii), 72.70(b), 72.72(a).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

XXII. AUTHORITY FOR LOCAL/INTERSTATE PROGRAMS [WHERE APPLICABLE]

[NOTE: Where a local or interstate air pollution control agency geographically situated within or partially within the State or Commonwealth will submit a separate title V program to EPA for approval, the attorney general should specify the basis under State law for the local or inter-state agency to administer such a program.] State and [local or interstate] law provides authority for [the local or interstate permitting authority] to develop, administer, and enforce an air operating permits program under the CAA and 40 CFR part 70.

Citation of State/Local/Interstate Laws and Regulations; Date of Enactment or Adoption; Effective Date:

Remarks of the Attorney General:

Seal of Office
(if required)

Signature

Name (Type or Print)

Title

Date