

BSEE Permits, Approvals, and Process Alternatives

U.S. Environmental Protection Agency

1. Overview of U.S. Environmental Protection Agency Permitting Programs

The U.S. Environmental Protection Agency (U.S. EPA) administers environmental permitting programs for stationary sources of air pollutants under the Clean Air Act. U.S. EPA regulations for permitting of major stationary air emissions sources involve multiple permits, generically referred to as a permit to construct and a permit to operate. Pre-construction review and a permit to construct is required for all proposed new stationary sources and all existing stationary sources proposing to add new air emissions units or modify existing air emissions units. Once the major source is constructed (or modified) a Title V operating permit is required for operation of the stationary source.

Permit to Construct and Permit to Operate Program

Permits to construct issued directly by U.S. EPA must be acted upon by the applicant within 18 months of issuance. If the applicant does not commence construction within 18 months of issuance the permit to construct expires and cannot be acted upon. The permit to construct typically authorizes the applicant to construct, or modify, the stationary source, and may also authorize the applicant to conduct a limited period of “shakedown” operation. Once constructed (or modified), major sources of air emissions including stationary air emissions sources are required to obtain operating permits. Title V Operating Permits are enforceable by the issuing agency, by U.S. EPA, and also by the public. Under the Clean Air Act both the permitting authority and the public can take action if a permitted air emissions source fails to comply with Title V Operating Permit conditions.

Air Emissions Permit to Construct and Permit to Operate Fee Schedules

Each Title V permitting authority collects fees from sources holding Title V operating permits. These fees, according to CAA Title V, must be sufficient to fund all reasonable Title V permit program costs.¹ The U.S. EPA has established “presumptive minimum fees” applicable to Title V permit holders. The presumptive fees were established in 1996 and are indexed for inflation. U.S. EPA updates and publishes the presumptive fees annually.² The U.S. EPA presumptive minimum fee is not directly related to the cost incurred by permitting agencies to implement the Title V Permit Program, but is rather an inflation-indexed value. State air permitting agencies are free to charge permit fees that exceed the presumptive minimum fee. U.S. EPA itself does not charge a separate permit application fee for U.S. EPA review of applications for permit to construct. State air permitting agencies are free to charge permit application fees for review of permits to construct; these fees range from nominal to significant depending upon the state agency.³

¹ <http://www.epa.gov/airquality/permits/fees.html>

² http://www.epa.gov/airquality/permits/pdfs/fee70_2015.pdf

³ <http://www.epa.gov/region9/air/permit/pmfaq.html#faq4>

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Other State Permitting Program Fee Schedules

Regulatory requirements for permit application fees exist under other permitting programs including permits issued under the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA.) As for the Title V operating permit program state permitting agencies can pursue different approaches to collecting permit fees. Under the Nevada Division of Environmental Protection, RCRA hazardous waste facility permitting program, NDEP requires a deposit to be submitted along with the permit application (e.g., the deposit required for a hazardous waste landfill application is \$50,000). The agency then invoices the applicant for the hourly cost for staff time to review the permit application, charged against the deposit rate. Staff time cost (as of October 2014) is invoiced at \$50/hour.⁴

Minor Source Permit by Rule

State air permitting agencies permit smaller sources of air emissions through a “permit by rule” program. For example, Texas Commission on Environmental Quality (TCEQ) regulations include a list of air emissions source types and “permit by rule” conditions for each source type. Source types included in the permit by rule list include sources for which air emissions are above de minimis but below levels that would warrant an individual source construction and operating permit. If the proposed air emissions source meets the general requirements of the “permit by rule” program and the specific “permit by rule” conditions for that source type, the source is deemed to be permitted by rule and no notification to the TCEQ is required.⁵ The TCEQ has developed checklists to assist applicants in determining whether their proposed smaller air emissions sources meet the “permit by rule” requirements.⁶

Implementation of permitting programs under the Clean Air Act is in large part delegated to state air permitting agencies. This review provides two examples of state-level programs related to permitting if air emissions sources: application of the time-bound agency review process under California regulations, and application of a permit fee program under New York State regulations.

Statutes and regulations relevant to air emissions source permitting referenced in this review include:

- *Clean Air Act, 40 CFR Part 70 and 40 CFR Part 71 Regulations*
- *California Permit Streamlining Act [California Government Code § 65920 et seq.]*
- *New York Subpart 482-2: Operating Permit Program Fee [Environmental Conservation Law, §§ 3-0301, 72-0201, 72-0303]*
- *Title 30 Texas Administrative Code §106.4 Requirements for Permitting by Rule.”*

⁴ http://ndep.nv.gov/bwm/Docs/RCRA_Permits_Fee_Summary-2014Nov.pdf

⁵ http://www.tceq.state.tx.us/permitting/air/nav/numerical_index.html

⁶ <http://www.tceq.state.tx.us/assets/public/permitting/air/Forms/PermitsByRule/Checklists/10149.pdf>

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1.1. Alternatives to BSEE Permits, Approvals, and Processes

1.1.1 Multi-Level Permit Structure

BSEE could potentially adopt a dual-permit approach in which BSEE first receives and acts upon an application for a permit to construct and then receives and acts upon a separate application for a permit to operate. BSEE could also adopt a permitting approach in which all requirements relevant to the proposed installation or activity are included a single permit application process and a single permit.

Title V operating permits include permit conditions, including air emissions limits and monitoring, control, recordkeeping, and reporting requirements, applicable to operation of the air emissions source. Typically Title V operating permits identify all relevant requirements applicable to the air emissions source in a single operating permit. BSEE's permitting program is not structured such that a single permit contains substantially all of the relevant permit conditions for the installation or activity.

1.1.2 Time-Bound Permit Application Review Process

BSEE could establish a program in which BSEE is required to determine the completeness of applicant submittals within a prescribed time frame and, once complete, then is required to issue a decision concerning the applicant submittal within a prescribed time frame.

State air permitting agencies may establish regulatory schedules for review of permit applications.⁷ For example, The California *Permit Streamlining Act*, applicable to review of air permit applications, requires agencies to determine within 30 days of submittal whether a permit application is "complete." If the agency does not issue a completeness determination within the 30 day timeframe the application is "deemed complete." Once deemed complete, agencies have 180 days to process the permit application and issue a decision to either approve or deny the application.^{8 9} If the agency does not issue a decision within the 180-day time frame, the application is subject to being "deemed approved." A permit may not be "deemed approved" until the agency is provided with notice of the applicant's intent to invoke the California Permit Streamlining Act, and not until the agency has holds a public hearing to decide whether to approve or deny the permit.¹⁰

1.1.3 Applicant-Provided Funding/Permit Fee Program

BSEE could adopt an approach by which permit application fees, in aggregate, are sufficient to fund BSEE's permit application review and facility inspection programs.

⁷ <http://www.epa.gov/region9/air/permit/pmfaq.html#faq4>

⁸ <http://www.arb.ca.gov/bact/docs/ppcalifornia.htm>

⁹ <http://www.arb.ca.gov/permits/airdisac.htm>

¹⁰ <http://www.multibriefs.com/briefs/csa/csapsa.pdf>

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State agencies authorized to administer Title V operating permit programs can set permit fees for their state programs that are higher than the presumptive minimum fee set by the U.S. EPA. For example, the New York Department of Environmental Conservation (NYSDEC) sets the permit fee for the New York Title V Program annually by regulation.¹¹ Title V permitted sources in New York are billed a per ton fee for their emissions of regulated air contaminants in the prior calendar year. The per-ton fee calculation is based on the actual NYSDEC Title V program account balance for each fiscal year and the fee collection rate for the prior fiscal year. The permit fee schedule is graduated based on the size of the air emissions source. The fee schedule calculation methodology is included in the NYSDEC regulations.¹²

BSEE could adopt an approach by which permit application fees, in aggregate, are sufficient to fund BSEE's programs by applying an approach similar to the NYSDEC approach, basing the aggregate permit application fees on the cost of operating the BSEE program and historical permit fee collection rates. BSEE could also adopt an approach similar to the NDEC approach in which permit applicants are invoiced directly for the hourly rate of agency staff review time.

BSEE could also adopt a "permit fee" structure that extends beyond only collecting fees from applicants for e.g., BSEE processing permit applications and conducting inspections, to a fee structure that provides BSEE with ongoing revenue from BSEE-issued permit holders.

Under the CAA air permitting agencies are authorized, and statutorily required, to levy an annual permit fee on holders of Title V Operating Permits. So in addition to permit application fees, the air permitting agencies achieve an ongoing source of revenue from permit holders from levying annual permit fees. According to the BSEE fee schedule BSEE only receives revenue from the applicants when the applicants take a specific action involving BSEE. Air permitting agencies receive annual fees from permit holders regardless of whether the permit holder takes any specific action involving the air permitting agency.

1.1.4 Permit by Rule Program

BSEE could adopt a permit by rule program in which BSEE identifies a list of installation components / activities that BSEE determines can be implemented by applicants without formal notification of BSEE by the applicant. The permit by rule items would thereby be excluded from applicant submittals and would not be subject to further review by BSEE.

1.1.5 Public Enforceability of Permits

BSEE could establish [by regulation or statute] that BSEE-issued permits are publicly enforceable.

¹¹ <http://www.dec.ny.gov/regs/15510.html>

¹² NYSDEC Subpart 482-2: *Operating Permit Program Fee*.

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1.2. Points for Further Research

1.2.1 Multi-Level Permit Structure

If a multi-level permit structure is considered as a potential alternative approach to BSEE permitting, assessment of the boundaries between BSEE's permitting jurisdiction and jurisdictions of other Federal agencies would be conducted to assess the viability of establishing a multi-level permit structure for BSEE.

1.2.2 Time-Bound Permit Application Review Process

If a time-limited applicant submittal review process is considered as a potential alternative approach, further investigation how time-limited processes are being applied in various states (e.g., California) would be conducted to assess how time limitations affect the efficiency, effectiveness, and suitability for purpose of the state permitting programs. This information would be used to assess the viability of applying various time-limited applicant submittal review approaches to the BSEE permitting program.

1.2.3 Applicant-provided Funding/Permit Fee Program

If a fee-based system for funding BSEE permitting and inspection program is considered as a potential alternative approach, further investigation of permit application fee and operating permit fee systems in various states would be conducted to assess whether, and how, these systems provide improvements to efficiency, effectiveness, and suitability for purpose of the permitting programs. This information would be used to assess the viability of applying various fee-based funding systems to BSEE.

1.2.4 Public Enforceability of Permits

If establishing public enforceability of BSEE-issued permits is considered as a potential alternative approach, assessment of the structure of BSEE's permitting program would be conducted to assess the viability of establishing public enforceability of BSEE-issued permits.

1.3. Implications for BSEE

1.3.1 Multi-Level Permit Program

Efficiency

Establishing a dual permit program in which BSEE receives and acts upon an application for permit to construct and then receives and acts upon an application for permit to operate may or may not improve efficiency. BSEE would need to review two sets of applicant-provided documentation for each activity / installation to be permitted, which could result in an extended time frame for the review process.

Effectiveness

Establishing a dual permit program could potentially improve effectiveness. Aggregating all permit conditions applicable to a permitted installation / activity in a single [operating] permit may improve efficiency by allowing BSEE to consider the permit requirements, and applicable environmental and safety controls, for the installation as a whole, rather than BSEE considering the requirements for

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individual installation components/activities to be permitted. BSEE could potentially establish a systems view of the installation as a whole and better understand how controls applied to one component of a proposed installation relate to other components of the installation.

Suitability for Purpose

Establishing a dual permit program could potentially improve safety and environmental performance. BSEE would have the opportunity to consider applicability of permit requirements during the review of the application for permit to construct and then would have the opportunity to consider applicability of permit requirements during review of the application for permit to operate. BSEE could potentially implement changes to permit requirements during the application review process. BSEE would have the opportunity to, e.g., physically inspect the installation under construction prior to finalizing operating permit conditions. BSEE's ability to consider separately construction and operation of a proposed installation could potentially provide BSEE with the opportunity for more detailed consideration of application of safety and environmental controls to the installation.

Implementation

BSEE would need to reorganize their approach to permitting and their current method of applying standards to individual activities/components of an installation in order to implement a dual permit approach in which all of the relevant requirements for the installation or activity being permitted are incorporated into a single [operating] permit. BSEE would not issue permits for individual components of an installation or individual activities. Applicants could therefore have less flexibility to request changes to permit conditions during construction (e.g., well drilling).

1.3.2 Applicant-Provided Funding/Permit Fee Program

Efficiency and Effectiveness

If BSEE adopted a permit fee program approach the agency could potentially increase the level of funding available such that the permit fees are sufficient to fund the entire program. This could improve both the efficiency and effectiveness of the program by enabling BSEE to obtain additional technical, management, and administrative staff to administer the program, including processing applicant submittals and conducting inspections. The additional funding could also enable BSEE to provide additional technical development training to BSEE staff. The additional staff and associated training could enable BSEE to process applicant submittals in a more timely manner, and also could enable BSEE to conduct more detailed technical reviews and more frequent and more detailed facility inspections.

Suitability for Purpose

With respect to suitability for purpose, a permit fee program similar to that under the CAA in which permit fees are sufficient to fund the BSEE program could potentially result in improved safety and environmental performance, as BSEE could potentially conduct more detailed technical reviews of applicant submittals and conduct more detailed and more frequent inspections.

Implementation

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The structure of the permit fee program under the CAA is required by statute and regulation. As BSEE's applicant fee structure is established by regulation, BSEE could potentially need to conduct a rulemaking to establish a permit fee structure in which the aggregate fees are sufficient to fund the entire BSEE program. Legislation could also potentially be needed to support the establishment of a permit fee structure similar to that under the CAA. A legislative approach could provide BSEE with the statutory authority to ensure that the BSEE program remains adequately funded through applicant permit fees, similar to how the CAA provides air permitting agencies with statutory authority for applicant fees. Applicants would incur additional costs if BSEE established a permit fee structure to fund the program, but applicants also could benefit from BSEE providing more timely reviews of applicant submittals.

BSEE could potentially establish an operating permit fee approach similar to that implemented under CAA authority by the NYSDEC, in which applicant permit fees provide annual [ongoing] revenue to the agency. The program would not be limited to a "fee-for-service" approach applicable to only applicant-specific actions such as submittals and inspections. In this case the financial burden of using the permit fee program to entirely or substantially fund BSEE's activities could be distributed over a larger segment of applicants, thereby reducing the cost per applicant. This approach may not be feasible if there are not sufficient BSEE-issued operating permits (as opposed to installation permits) to support this approach.

1.3.3 Time-Bound Permit Application Review Process

Efficiency

A time-bound BSEE review process approach could potentially improve efficiency for both the agency and the applicant. BSEE staff could potentially spend less time reviewing each submittal because the review process is time bound, i.e., applicant submittals would not be under review for many weeks, or months, where they would be subject to an inefficient review cycle of "up time" and "down time" as BSEE staff conduct the review. However, under a system similar to California's system, if BSEE did not meet the established time frame for issuing a decision concerning the applicant submittal, BSEE would need to schedule and conduct a public hearing concerning issuance or denial of the submittal. This could reduce efficiency if BSEE routinely misses deadlines and therefore needs to spend time preparing for and conducting public hearings on applicant submittals. Application of a time-bound review process could provide the applicant with an increased level of certainty that their submittal will be reviewed and a decision made in a timely manner, which could improve the applicant's ability to plan projects and reduce the time applicant staff need to spend supporting the submittal review process.

Effectiveness

Application of a time-bound review process by BSEE could potentially improve effectiveness on the part of the agency, depending upon the design and the efficiency of the time-bound review process put in place by BSEE. Time-bound review could potentially result in improvement in the quality of reviews conducted by BSEE if the review process is designed and staffed such that the reviews can be routinely conducted by BSEE in a focused manner within the allotted time frame. However, if the review process is not efficient and not adequately staffed, BSEE may not be able to routinely complete reviews within the allotted timeframe and thereby (under a system similar to California's system) would be required to

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conduct a public hearing concerning the applicant submittal, which could reduce effectiveness of agency decision making.

Application of a time-bound review process could improve effectiveness on the part of the applicant. Applicants could have more incentive to ensure that their submittals are administratively complete and technically accurate when first submitted in order to take advantage of the set review time process for agency completeness review and agency decision to issue or deny a permit. Either an administratively incomplete submittal or a technically deficient submittal would derail the set review time and diminish the advantage to the applicant of the time-bound agency review process resulting in a timely agency decision on the submittal. A time-bound review process could potentially result in the applicant having to spend less staff time supporting the review process; applicant staff could potentially be able to work more effectively to improve the level of completeness and technical accuracy of the submittals.

Suitability for Purpose

Application of time-bound processes could potentially result in improved safety and environmental performance, or could be neutral or detrimental to performance. Achieving performance improvement would depend in part on BSEE achieving efficiency and effectiveness in the review process.

Implementation

Implementing time-bound BSEE review processes would require a fundamental change in how BSEE manages staff time and work flow within the agency. BSEE would need to establish standardized work processes that will allow BSEE to anticipate and accommodate time-bound reviews of submittals within the established time frames. The successful implementation of time-bound BSEE review processes will depend upon the efficiency of the established review process.

1.3.4 Permit by Rule Program

Efficiency

A permit by rule program could potentially improve efficiency for both the agency and the applicant. The applicant would only be required to identify the permit by rule items and certify that each item meets the pre-established conditions for permit by rule. This could be accomplished through a checklist approach as is implemented by the TCEQ. Permit by rule items would then be excluded from applicant submittals, and BSEE would not conduct further review of permit by rule items in the review process, thereby saving time for both the applicant and the agency in the review process.

Effectiveness

A permit by rule program could potentially improve effectiveness for both the agency and the applicant. The applicant could focus staff time on preparing more detailed submittals that address items that BSEE would need to review rather than focusing staff time on describing each and every item including permit by rule items that represent low potential risk. BSEE could conduct a focused review of items included in applicant submittals that present potentially higher risk; lower risk items included in the permit by rule list would not need to be further reviewed.

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Suitability for Purpose

A permit by rule program could potentially improve safety and environmental performance by allowing both the applicant and the agency to focus the review on items that represent higher potential risk.

Implementation

BSEE would need to identify specific items that merit inclusion in a permit by rule list and develop specific criteria by which applicants can certify that items meet the general requirements and item-specific requirements for coverage under permit by rule. This would involve changing the BSEE's standards-based approach to permitting, in which individual installation components and activities are associated with specific standards.

1.3.5 Public Enforceability of Permits

Efficiency

Public enforceability may not represent an advantage to the agency or the applicant with respect to efficiency. BSEE would need to respond to public enforcement actions that could distract BSEE staff from other aspects of the BSEE program.

Effectiveness

Public enforceability could potentially improve effectiveness if BSEE responds to public enforcement of permits with improved enforcement on their own part.

Suitability for Purpose

Public enforceability has the potential to improve environmental and safety performance if BSEE responds to public enforcement of permits with improved enforcement on their own part and/or if applicants respond by taking actions to improve environmental and safety performance.

Implementation

If BSEE-issued permits are not already publicly enforceable BSEE may need legislation to establish public enforceability. Such legislation would likely be opposed by applicants.