

7.3 Writing the Draft Permit

A permit is a legally binding document; as a result, the permit conditions must be explicitly clear and understandable for all stakeholders. Enforceable language is critical to both the Agency and the Permittee. Both parties must have a clear understanding of what is required under the permit. If the language of the permit is too vague, the Agency enforcing the permit might not have the legal strength to require compliance. The Permittee also may have problems understanding the intent of what is required from permit conditions. Over the 5 to 10 year term of the permit, there may be staff changes at Agency, facility or both. The permit should be written to ensure that there is no confusion regarding the intent when the original parties are no longer involved.

Conditions in the permit should require everything the Agency needs to evaluate the Permittee's compliance with the applicable regulations. This includes any data collected as part of ongoing or proposed environmental monitoring. If the data is not adequate, it is up to the Permittee to defend the plan and data. 40 CFR §270.14(c) requires the Permittee to submit all required data, or have it available for inspection. If the Agency does not require data, the Permittee is unlikely to volunteer it. The permit conditions need to be in place at issuance in order to avoid permit modifications.

By using terms that are mandatory, the language will be explicit in identifying the substantive tasks for Permittee compliance. Good enforceable language will retain Agency flexibility while constraining that of the Permittee. The permit writer should provide the

rationale why a permit condition is necessary. “Based on . . . EPA guidance . . .” is not appropriate for justifying a permit condition. It is important to keep in mind that guidance is not law or regulation, and therefore is not enforceable. The rationale discussion should reference the underlying regulation that the guidance was based upon.

In order to ease the job of the inspector, the language in the permit should provide clear details of what the Permittee must do, what records need to be maintained, a compliance schedule and enforcement triggers (e.g., the Permittee can not burn in excess of 50 pounds of ignitable waste in each burn pan). If the specified level is exceeded, non-compliance is triggered. Record keeping is used to verify that these values are being met. Site inspections during a treatment event will also verify compliance. General inspection items can be created for Subpart X facilities. Inspection checklists will need to be formed on a site by site basis so the permit language needs to be clear for the inspector to understand compliance requirements. Specifics will include areas such as weather operating conditions, feed rates that will comply with risk assessments, and inspection points.

It is the responsibility of the permit writer to organize standard conditions required of all facilities, and recommendations from other Agency review team members such as the toxicologist, ecologist, meteorologist, chemist, engineer, geologist, inspector, and legal counsel. Combining recommended conditions and resolving conflicts in conditions is one of the hardest tasks of permit writing. An example might be that the geologist requests a ground water monitoring well within 20 feet of the unit, but the engineer recommends further distances because the operation of the unit could potentially destroy the integrity of the well under worst case treatment conditions. It is up to the permit writer to resolve the conflict. In many cases the permit writer might be making the decisions for several scientific areas due to staffing restrictions. Justifications for decisions should be included in the permit fact sheet or within the record. Areas to justify may include environmental monitoring, extra

Keys to Enforceable Permit Conditions

- Avoid words/phrases such as “substantially”, “reasonably”, “should”, “may”, “as appropriate”, and “after considering”. These are unenforceable terms.
- Avoid vague or general language
- Conditions should identify enforcement triggers (i.e., “if this level is exceeded then the facility is out of compliance”)
- Specify the data needed to demonstrate compliance
- Cite the underlying regulation to justify the permit condition, not the guidance. Guidance is not a regulation.

provisions for safety or maintenance. When finalizing environmental monitoring based on risk assessments, make sure everyone understands what the numbers mean and what triggers non-compliance and further corrective action or shut down. This may mean technical experts in human, ecological, and air assessments should be involved in meetings to discuss final goals. The permit writer has the final decision of conditions in the permit. Make sure the numbers can realistically be monitored and enforced.

It also helps to bring together the Agency and the Permittee early on in the permit writing process to make sure that obligations on both sides are clearly understood. This does not mean that the Permittee must be shown the entire draft permit, since the public comment period gives them the same opportunity as the general public to view and comment on the draft. Conditions where there are operational or monitoring concerns would be areas that could be discussed to ensure future compliance, reduce conflicts, and obtain realistic reporting and scheduling requirements. Major conflict resolution is easier prior to public notice but may not be avoidable in all cases.

When a draft of the permit has been prepared, it is a good idea to visit the facility with an experience inspector and conduct an inspection of the Subpart X unit(s) based upon the draft permit. This will help identify any ambiguous language or any additional conditions that may need to be added. After the inspection, the draft permit can be revised to improve the clarity and enforceability.

Once the draft permit is approved by the Agency, the public comment period begins and changes are made in relation to any significant comments to the final permit. If there are public groups concerned about the facility, the permit writer may decide to use a broader public information exchange during the permit writing and public comment periods. RCRA public information guidance can be utilized for expanded programs.

Additional information regarding drafting Subpart X permits is outlined in the [Subpart X Case Study](#) presentation from the March 2002 RCRA Organic Air Emission Standards Permit and Compliance Training.