BUSH EPA’S STANCE ON AIR POLLUTION:
DON’T ASK, DON’T TELL

EPA’s Monitoring Rule Inadequate to Protect Public Health

WHAT IS THE LAWSUIT ABOUT?
Challenging EPA’s bid to make air pollution limits all but meaningless

On January 22, 2004, EPA announced new rules that gut air monitoring requirements for large air pollution sources. 69 Fed. Reg. 3202. These new rules violate the Clean Air Act and, more importantly, will effectively shield polluters from enforcement by allowing illegal excess emissions to go undetected. EPA’s new rules will permit inadequate monitoring, such as allowing a facility employee to “eyeball” what’s coming out of a smokestack once a year and report whether too much pollution is being emitted.

The Clean Air Act requires air permits to include monitoring sufficient to determine whether large air pollution sources are complying with the law. Without such monitoring it is impossible to determine what sources are emitting and whether or not those emissions are violations of pollution limits.

EPA’s new rules allow companies to rely on outdated monitoring procedures that require monitoring as little as twice every five years. It is common sense that monitoring only twice in five years will reveal nothing about whether or not a source is in compliance the vast majority of the time. As a result, violations will undoubtedly go undetected and sources will have little incentive to comply with the law. The U.S. General Accounting Office has pointed out the shortcomings of relying on such infrequent monitoring (Air Pollution: EPA Should Improve Oversight of Emissions Reporting by Large Facilities (GAO-01-46) (April 2001)).

BACKGROUND
What the Clean Air Act says and how EPA’s rules undermine it

Title V of the 1990 Clean Air Act amendments required all major air pollution sources to obtain “operating permits.” These permits incorporate all of the emission limits that already apply to a source in one permit, and add monitoring and reporting where

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1 EPA’s new rules take the illogical position that, if an underlying requirement requires no monitoring or only a one time test, that monitoring must be upgraded so that it is sufficient to “yield reliable data from the relevant time period that are representative of the source’s compliance.” 40 CFR 70.6(a)(3)(B). If the permit contains some monitoring that occurs more than once, regardless whether that monitoring is reliable, relevant or representative, a state cannot upgrade that monitoring to make it sufficient for purposes of determining compliance.
necessary so the public and regulators can determine whether or not the source is complying with those standards. The Act requires that these permits include “monitoring … sufficient to assure compliance with the permit terms and conditions.” Clean Air Act § 504(a) & (c).

EPA has always taken the position that the sufficiency of monitoring must be judged based on a variety of site-specific factors, including the compliance history of the source, the toxicity of the emissions, the variability of the emissions, and the likelihood that the source will violate the emission standard. EPA has offered no justification for its current illogical and unsupported position that monitoring as infrequently as twice in five years is adequate to assure compliance.

EPA’s new rule appears to be yet another favor to the energy industry at the expense of public health. EPA originally proposed a rule that would have affirmed its long-standing position that operating permits must include monitoring determined on a case-by-case basis to be sufficient to assure compliance. The Utility Air Regulatory Group (UARG) filed suit in May 2001 challenging that rule and was thrown out of court. 320 F.3d 272 (D.C. Cir. 2003). Not to be deterred, UARG filed another lawsuit that was virtually identical to the first. Without challenging UARG, as it had in the first case, EPA agreed to settle, to withdraw its proposed rule and to dramatically change its long-standing interpretation of the Clean Air Act’s monitoring requirements.

WHY DOES IT MATTER?
Public health is being jeopardized in yet another Bush payback to corporate sponsors

Most air pollution is not visible. Unless it is routinely monitored, individuals may feel its adverse affects, but not know who what is causing it. Air pollution standards are generally set to protect public health and require either continuous compliance or compliance over short averaging periods, such as hourly. If facilities are emitting above legal levels, the public’s health is in jeopardy. It is important to know about excess emissions as soon as possible so that action can be taken to stop them. If a facility is only required to monitor as little as twice in five years, there is no way to determine whether or not the facility is in compliance on the other 363 days of the year, and excess emissions can continue undetected for long periods of time.

EPA has acknowledged that many of its existing pollution standards do not require adequate monitoring. In the past, EPA has used Title V operating permits as a vehicle to upgrade this monitoring consistent with the Clean Air Act. Monitoring incorporated in Title V permits has acted – until now – as a stopgap to ensure that pollution standards under the Clean Air Act could be enforced. EPA now takes the position that its rules neither authorize nor allow states to improve monitoring through Title V permits, except in very limited circumstances, essentially removing this crucial stopgap.

While some states may attempt to find legal authority in their state laws for making improvements to monitoring, many states have laws and/or policies which prevent them
from adopting rules that are more stringent than federal standards. According to the association of state and local air pollution control administrators (STAPPA/ALAPCO), 26 state and local agencies report being completely or partially precluded from adopting air standards more stringent than federal standards. These states will, therefore, likely be forced to accept EPA’s weakened monitoring requirement. (See, www.4cleanair.org/stringency-report.pdf)

Further, EPA’s new rule will drastically limits the public’s ability to ensure that operating permits require adequate monitoring. Under the Clean Air Act, members of the public are allowed to petition EPA to object to operating permits that contain inadequate monitoring. EPA has an obligation to prevent the issuance of any permit that does not include monitoring sufficient to assure compliance with all federal air pollution standards. Under EPA’s new rules, however, EPA will not object unless a permit includes no monitoring or only a one-time test.

EPA’s new rule will, therefore, limit the monitoring states can require when they issue a Title V air permit, and will limit citizen’s ability to challenge inadequate monitoring in state and EPA issued permits.

Examples:

Particulate Matter: *once-a-year look or continuous computer monitoring*? Opacity is the amount of light obscured by pollution in the air. Opacity is used as a measure of particulate matter (PM). PM is a mixture of materials that can include smoke, soot, dust, salt, acids, and metals and is among the most harmful of all air pollutants. When inhaled, PM can increase the number and severity of asthma attacks, cause or aggravate bronchitis and other lung diseases, and reduce the body's ability to fight infections.²

Despite the fact that many facilities have continuous computerized opacity monitors, they are often only required to conduct a “Method 9” test, which involves an employee looking at the emissions and deciding whether or not they think the emissions violate the standard. Sometimes this “look” is required only once per year.

Title V permits have frequently been used in the past to improve opacity monitoring where existing monitoring was inadequate. Under EPA’s new rules, much of the existing inadequate opacity monitoring will not be upgraded. Examples of EPA requiring improved opacity monitoring in the past include the following:

- **Gainsville Regional Utilities – Deerhaven Generating Station**: EPA objected to this permit because the only opacity monitoring required was a visual inspection once per year. EPA stated “Condition D.7 only requires an annual one-hour Method 9 visible emissions reading. In most cases, this does not constitute adequate periodic monitoring to show continuous compliance with

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² [http://www.arb.ca.gov/html/brochure/pm10.htm](http://www.arb.ca.gov/html/brochure/pm10.htm)
the opacity standard.” EPA suggested daily monitoring when the facility was burning fuel oil.3

- **Pacificorp – Jim Bridger and Naughton Electric Utility Steam Generating Plants**: EPA objected to a Wyoming and found that quarterly Method 9 tests for opacity were insufficient to assure compliance.

**VOCs: check for holes once a year?** Major sources of Volatile Organic Compounds (VOCs) from refineries are tanks, where volatile materials are stored, and flares, where volatile materials are combusted. VOCs include toxic and carcinogenic compounds, including benzene, toluene and butadiene. VOCs also contribute to the formation of ozone. EPA’s new rule limits the improvements to flare and tank monitoring that can be made through Title V permits.

- Tanks – leaking storage tanks can be a significant source of VOCs. Federal rules require that the roofs on the tanks be visually inspected before they are filled, each time the tank is emptied and degassed, and once per year or once every five years, depending upon the type of roof. 40 CFR 60.110b. If a tear or hole occurs in a tank and is not discovered for up to five years, significant quantities of VOCs will be emitted. Under EPA’s old monitoring rules, more frequent monitoring of tanks could have been added in a Title V permit applying to such tanks. Under the new rules, the existing monitoring in the federal rule will be considered adequate, even though it is not sufficient to detect noncompliance.

- Flaring – flares are open flames used at refineries to burn off gases. Flares can result in significant VOC emissions. The federal rule for flares requires limited monitoring of flares. 40 CFR 60.18. Improved monitoring, including monitoring of the composition of the gas being sent to the flare and video monitoring of the flare have been required in some states.4 Because some monitoring for flares, although inadequate, is already required by the federal rules, EPA’s new rule will not allow upgrading of flare monitoring in Title V permits.

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4 See, for example Bay Area Air Quality Management District Regulation 12, Rule 11 at http://www.baaqmd.gov/dst/regs/rg1211.pdf.