

**American Bar Association  
Section on Environment, Energy, and Resources**

**Air Quality Mixed Bag: Four Hot Topics**

**The Maturing of Title V:  
Increased Scrutiny of Title V Compliance Certifications  
And How to Manage the Risk**

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**32<sup>nd</sup> Annual Conference on Environmental Law  
Keystone, Colorado  
March 13-16, 2003**

**INTRODUCTION**

At least once a year, a corporate officer or plant manager for every Title V facility puts himself and his company on the line by filing a Title V Compliance Certification with a state or local permitting agency, as well as US EPA. These certifications present new obligations – and new risks – for permitted facilities. They require a thorough and complete “certification” of a facility’s compliance status throughout the previous year and, in addition to exposing a company to possible enforcement for any reported noncompliance, they also carry the potential for separate liabilities for false reporting if not properly executed.

An annual compliance certification sounds deceptively simple in concept. However, it is anything but simple in practice. A compliance certification which satisfies the legal requirements for being *true, accurate and complete, based on information and belief formed after a reasonable inquiry*,<sup>1</sup> and which details a facility’s compliance status over the prior 12 months, inevitably requires a systematic review of thousands, and potentially hundreds of thousands, of monitoring records, as well as careful and sometimes laborious evaluations of what exactly constitutes “compliance.” It often requires the input of numerous plant personnel, as well as company environmental professionals and lawyers.

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<sup>1</sup> See Clean Air Act Section 503(b)(2), 504 and 40 CFR Section 70.5(d) and 70.66(c)(1).

Woe to the plant manager or corporate vice-president who signs a Title V compliance certification without fully understanding the information it contains (or more importantly, doesn't contain), the legal significance of the document, and the process which went into evaluating and reporting the facility's compliance status. US EPA enforcement personnel have indicated publicly in conferences and speeches that they intend to focus significant resources on the review and investigation of Title V compliance certifications. These prosecutors will be interested in not only reported instances of noncompliance, but have stated that they intend to look especially hard at whether a certification is true, accurate and complete.

To this end, these enforcement officials plan to focus especially on facilities that claim to be in 100% compliance. Fully understanding how difficult it is for a large manufacturing facility to be in 100% compliance with the numbingly complex air regulations, the prosecutors' statements reveal an underlying suspicion with any Title V facility that claims a full 12 months of compliance without a deviation. Implicit in their logic is that such a facility may not have performed a sufficiently "reasonable inquiry" into its compliance status, and thus may have filed a false certification, either intentionally or inadvertently. Prosecutors are likely to be more interested in pursuing an individual corporate officer or plant manager for submitting a false certification than in pursuing a traditional enforcement action for noncompliance with Clean Air Act requirements. Thus, facilities that claim 100% compliance may expect to face more scrutiny – and potentially more significant liabilities for the responsible official – than those that report some manner of deviations.

In light of this, all facilities should take great care that they conduct – and document – the reasonable inquiry that went into their certifications. There are numerous unresolved issues and potential pitfalls in completing Title V certifications. This paper describes some of these issues, and presents some strategies for managing the potential liabilities associated with them.

## **LEGAL REQUIREMENTS**

Every Title V permit issued pursuant to the Clean Air Act must contain a requirement for an annual compliance certification.<sup>2</sup> A "Responsible Official"<sup>3</sup> must sign this document

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<sup>2</sup> See Clean Air Act Section 504(c) and 40 CFR Section 70.6(c)(1).

<sup>3</sup> A "Responsible Official" is defined as "(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

and certify that, based on information and belief formed after “reasonable inquiry,” the certification is true, accurate and complete. Every certification must clearly identify the status of compliance with all terms and conditions of the permit, and must state whether compliance has been intermittent or continuous – over the entire period that the certification covers, which is typically 12 months.

Preparing for and completing a compliance certification after 12 months of operations at a major-emitting facility can be a daunting task, especially for large, complex manufacturing facilities. Typically there are tens-of-thousands to hundreds-of-thousands of individual monitoring records or data points that will form the basis for the certification, many of which must be reviewed and compared to permit requirements. Based on this data review, conclusions must be drawn and legal interpretations made regarding deviations or no deviations, and compliance or non-compliance.

### **WHAT CONSTITUTES “REASONABLE INQUIRY?”**

There is no definition of “reasonable inquiry” in either the Clean Air Act or the Title V regulations. EPA first mentioned this term in the initial Title V rule proposal in 1992, when the agency stated the following:

Section 70.5(b)(10) provides that the certification, as well as all other documents required under Part 70, must state that "to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the statements and information in the compliance certification are true, accurate and complete." This language is similar to that in Rule 11 of the Federal Rules of Civil Procedure, upon which it was modeled. The provision makes clear that the signer must make a reasonable (under the circumstances) inquiry before attesting to the truth, accuracy, and completeness of the information and statements.

56 Federal Register 21712, May 10, 1991.

Thus, EPA borrowed the concept of reasonable inquiry from the obligation imposed on attorneys who file civil complaints in court.<sup>4</sup> Rule 11 of the Federal Rules of Civil

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(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

- (i) The designated representative in so far as actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder are concerned; and
- (ii) The designated representative for any other purposes under part 70.”

<sup>4</sup> Rule 11 of the Federal Rules of Civil Procedure states:

**Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

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(b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

Procedure requires that attorneys investigate the facts and law supporting a claim before they file. It imposes on attorneys a personal obligation to certify to the truth and reasonableness of the pleading filed, and that there is an evidentiary basis to support it.

The adoption of this procedural obligation imposed on attorneys indicates EPA's intent to hold responsible officials to a tough evidentiary standard; a responsible official must fully and personally understand the factual basis for any certification he or she submits – certifications must be completed with the same care and diligence as would go into filing a legal complaint in federal court.

EPA further explained its intent in its 1995 proposed revisions to Title V:

Rule 11 provides that by presenting pleadings, motions, or other documents to Federal courts, a lawyer "is certifying that to the best of the person's knowledge, information, and belief, formed after *an inquiry reasonable under the circumstances*" that the ... factual contentions have or are likely to have reasonable evidentiary support.

...

The official signing the certification is being asked to take reasonable steps to ensure that what he or she signs is true, accurate, and complete....

60 Fed. Reg. 45530, 45561-45562 (August 31, 1995) (emphasis added).

Unfortunately, understanding the derivation and source of the term "reasonable inquiry" provides only limited help in clarifying what EPA expects of the responsible official. The scope of the reasonable inquiry obligation in any given situation remains unclear: an inquiry must be reasonable *under the circumstances*. This is a highly subjective standard, about which different people will draw different conclusions.

### **COMMON QUESTIONS**

The following are some questions relating to "reasonable inquiry" which commonly arise when completing compliance certifications. Many of these are unanswerable, but they help to frame the thought process that should go into every Title V compliance certification.

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- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
  - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
  - (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
  - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Rule 11 was intended to prevent the filing of frivolous lawsuits by exposing attorneys to sanctions if they failed to make a reasonable inquiry into the factual basis for a lawsuit.

- How many of a source’s monitoring records must be reviewed to satisfy the “reasonable inquiry” requirement? Must a source evaluate all monitoring data recorded over the prior 12 months? For some sources, this can encompass thousands or even tens of thousands of data points.<sup>5</sup> Generally, the extent of records reviewed will vary depending on the nature of the source, the number of records, the ease of review and the compliance margin maintained by the source (i.e., the degree to which the source is below an applicable limit). There is no absolute requirement to review every monitoring record for every source; such a requirement would be patently *unreasonable* in many circumstances.
- Is it reasonable to review a statistical sampling of records (e.g., every 10<sup>th</sup> record), and to reduce the number reviewed if there is no evidence of deviations? Often, the extent of review can reasonably be reduced if there is no evidence of deviations for some period of time. However, the corollary principle remains that where evidence of a deviation is discovered, in increased number of records may require review.
- Should the scope of review vary depending upon the absolute number of records? For example, if there are only 12 records for a source (one per month), is it “unreasonable” not to review every record when completing the compliance certification? What if there are 52 records (one per week) for a source? What if there are 365 records (one per day)? What if there are a thousand or more records? What is a “reasonable” number of records to review and how is this determined? At some point, the number of records becomes so large that it is unreasonable to expect every record to be reviewed to support a compliance certification. Exactly where this point will occur will vary depending on the circumstances.
- Should the scope of review vary depending upon whether records are maintained electronically or on paper? Clearly, electronic records are easier to review for deviations, both as to data outside a particular range, as well as for missing data points. This suggests a higher expectation for a more complete review of electronic records.
- How involved must the Responsible Official be in the records review? Must he or she personally participate in the review, or can this work be delegated? If delegated, how much oversight of the process must the Responsible Official have? A responsible official clearly does not need to review every record personally, especially considering that this person will often be a corporate officer or other high-ranking company official who would not normally or

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<sup>5</sup> For example, a single source for which a parameter is monitored and recorded once per hour will have 8760 recorded data points after one year. If multiple such sources exist at a facility, the number of monitoring requirements easily becomes tens of thousands. Other sources, such as thermal oxidizers, can be required to monitor parameters (such as temperature) every 15 minutes, which results in over 35,000 recorded data points per year for a single source alone.

“reasonably” be involved in the detailed record review. However, a responsible official must have a clear understanding of the review process that was conducted, and the results of that process. Clearly, the more involved the responsible official is in the process, the more certain he or she can be that the certification is true, accurate and complete, and based upon his or her own reasonable inquiry.

### **CONSIDER GOING ABOVE AND BEYOND**

Given the many unanswered questions regarding what constitutes reasonable inquiry, and the potential for personal liability on the part of the responsible official for an inaccurate certification, a prudent course is for the level of inquiry to be sufficiently extensive as to be *beyond reasonable*. If an extensive investigation is made into the compliance status of a source such that no one would question its “reasonableness,” and the responsible official fully understands the scope of that investigation and the results obtained, then the responsible official will have met his or her obligation. A certification signed under such circumstances will be above reproach, even if inaccuracies or errors in the certification are subsequently discovered.

***Remember that the regulations do not require perfection, or even 100% compliance – they simply require that the responsible official conduct a “reasonable inquiry” into the compliance status of the facility, and truthfully and accurately report the results. Every person signing a Title V certification should be certain he or she could document that the inquiry undertaken was “reasonable under the circumstances.”***

### **A NOTE ON CREDIBLE EVIDENCE**

USEPA expressly recognized in the credible evidence rule provisions in 1997 that the Title V certification process can and should include the review of information beyond the monitoring and recordkeeping requirements of the permit. Thus, sources must consider information relating to permit compliance that is not contained in the records required by the permit. Fortunately, EPA clarified that sources need not search out this type of information; they need only consider and include it when they are aware of it. As EPA stated, a source “may not ignore obvious relevant information.”

[S]ources that are certifying compliance using properly conducted continuous reference methods may generally certify compliance based solely on the continuous reference method data, although naturally such sole reliance would be inappropriate in the face of *obvious contrary information or fraud* as discussed below.

Of course, if a source becomes aware of other material information that indicates that an emission unit has experienced deviations (as that term is defined in the draft CAM approach) or may otherwise be out of compliance with an applicable requirement even though the unit's permit-identified data indicates compliance, the source must consider this information, identify and address it in the compliance certification, and certify accordingly. This ensures, among other things, that sources will not certify compliance in circumstances where doing so would constitute a violation of CAA section 113(c) and 18 U.S.C. Section 1001,

which prohibits sources from knowingly making a false certification or omitting material information, or a violation of other prohibitions on fraud. EPA emphasizes, however, that its purpose here is to make clear that sources may not ignore obvious relevant information. *EPA does not view compliance certification requirements as imposing a duty on the source to search out and review every possible document to determine its relevance on the issue of the source's compliance.*

62 *Fed. Reg.* 8313, 8320 (Feb. 24, 1997) (emphasis added).

## **RESPONSIBILITY OF THE RESPONSIBLE OFFICIAL**

Ultimately, it is the responsible official who certifies to the truth, accuracy and completeness of the certification, based on information and belief formed after reasonable inquiry. *This individual makes the certification both personally and on behalf of the company.* The responsible official can face personal liability for filing a false certification if he or she signs the certification without having ensured the conduct of a reasonable inquiry.

A responsible official will normally not be personally liable for deviations or noncompliance identified in the certification (unless he or she has personal culpability for another reason). The personal liability that can result from a certification is for filing a false statement with the government.<sup>6</sup> On its face, the certification states that it has been executed after “reasonable inquiry.” Failure to actually conduct the reasonable inquiry arguably makes the certification false. Thus, the responsible official’s primary responsibility is to ensure that a reasonable inquiry has been conducted, and that the certification accurately reflects the results of that inquiry.

The responsible official clearly has a central role in the certification process. However, as stated above, that does not mean that the responsible official must personally review all compliance-related records and information. Large manufacturing facilities – which are precisely the type that require Title V permits – will have tens or hundreds of thousands of monitoring records each year. It is simply unreasonable to expect a responsible official to be personally involved in a detailed review of that information – some delegation of this responsibility must be permissible.

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<sup>6</sup> The standard provision creating liability for making a false statement or material misrepresentation to the government is:

**18 USC Sec. 1001. - Statements or entries generally**

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully -

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

The obligation of the responsible official is to ensure that the appropriate inquiry has been completed, and that the certification reflects the results. The responsible official must understand the review process that was performed, and any findings or conclusions that resulted. This can be accomplished by discussing the process with those persons responsible for carrying it out, and inquiring of them as to their actions, deliberations and conclusions. *The responsible official must be confident that the process of inquiring into the facility's compliance status was reasonably designed to discover any deviations, and that the certification truthfully, accurately and completely describes those deviations discovered.*

### **DISCOVERY OF NEW INFORMATION AFTER FILING**

If a reasonable inquiry has been conducted and the certification is true, accurate and complete based on the responsible official's information and belief, a responsible official should be protected from liability, even if errors in the certification are subsequently discovered. This is a critical point, since new information can easily come to light after the filing of a certification that either contradicts the certification, or suggests that it might have been incomplete. For example, a subsequent audit of a facility may indicate a few missing records, or turn up deviations which were in the records, but which were not noted on the certification. Does this mean that the certification was false or incomplete? Not if a reasonable inquiry was conducted at the time of the certification, and the deviations were simply not discovered at that time. *The obligation to certify based on information and belief formed after reasonable inquiry does not require PERFECTION, either in the facility's compliance status or the conduct of the inquiry; rather, it requires that the facility and responsible official take REASONABLE STEPS to understand and report their compliance history, truthfully, accurately and completely, to the best of their knowledge at the time.*

### **CERTIFYING COMPLIANCE WITH "BOILERPLATE" TERMS AND CONDITIONS, WHICH OFTEN DO NOT IMPOSE DIRECT OBLIGATIONS ON THE FACILITY**

Facilities should carefully consider how they will manage compliance certifications for "boilerplate" provisions which exist in almost every Title V permit. *Unless otherwise specified in the permit, regulations or state instructions, a compliance certification must address every term and condition of the permit, including "boilerplate" provisions.* This can present challenges when the boilerplate terms do not address a direct obligation of the permittee, or are so broad that there is no reasonable method for evaluating compliance. For example, it is common for Title V permits to contain generic terms and conditions such as the following:<sup>7</sup>

- The permittee shall comply with all terms and conditions of this permit. Any noncompliance with the federally enforceable terms and conditions of this permit constitutes a violation of the Act, and is grounds for enforcement action or for

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<sup>7</sup> These terms have been culled from actual Title V permits issued by state agencies.

permit revocation, revocation and reissuance, or modification, or for denial of a permit renewal application.

- The permittee must comply with all applicable statutes and regulations of the United States and the State of \_\_\_\_\_. This permit does not relieve the permittee from compliance with applicable local laws, ordinances, and regulations.
- This permit does not convey any property right of any sort, or any exclusive privilege.
- No revision of this permit is required under any approved economic incentive, marketable permits, emissions trading, and other similar programs or processes for changes that are provided for in this permit.
- The air contaminants emitted by the emissions units covered by this permit shall not cause a public nuisance.
- Each insignificant activity that has one or more applicable requirements shall comply with those requirements.
- Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and hearing on the draft permit.
- No person shall allow or permit any air contamination source to emit air contaminants in quantities which alone or in combination with emissions from other air contamination sources would contravene any applicable ambient air quality standard and/or cause air pollution.

Consider the first of these permit terms, which states:

The permittee shall comply with all terms and conditions of this permit. Any noncompliance with the federally enforceable terms and conditions of this permit constitutes a violation of the Act, and is grounds for enforcement action or for permit revocation, revocation and reissuance, or modification, or for denial of a permit renewal application.

The first sentence is simple to address. If there has been any noncompliance during the year, then this term shall *not* have been complied with and an *additional deviation* must be recorded in the compliance certification.<sup>8</sup> However, the second sentence simply states

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<sup>8</sup> Note that this term, which is intended simply to expressly state the permittee's generic compliance obligations, acts as an additional requirement that automatically results in an additional deviation whenever there is any noncompliance with the permit, no matter how slight. Thus, missing a single monitoring

a fact, but does not impose any obligation. Therefore, there is really no way to certify compliance with the second sentence.<sup>9</sup> In such an instance, a permittee should indicate in the certification form that the particular provision does not impose compliance obligations, and therefore is not amenable to the compliance certification.<sup>10</sup>

A more difficult situation arises in the context of the following terms:

The permittee must comply with all applicable statutes and regulations of the United States and the State of \_\_\_\_\_. This permit does not relieve the permittee from compliance with applicable local laws, ordinances, and regulations.

No person shall allow or permit any air contamination source to emit air contaminants in quantities which alone or in combination with emissions from other air contamination sources would contravene any applicable ambient air quality standard and/or cause air pollution.

The first term is inordinately broad, and requires that the responsible official certify compliance with all applicable statutes and regulations, federal or state, that might apply to a facility, whether or not they are related to air compliance. Taken literally, this would impose an unmanageable burden on a facility and responsible official, as it would require some level of inquiry into all possibly applicable statutes and regulations, such as antitrust obligations, tax requirements, personnel requirements, and the like. Furthermore, it would require the reporting of a deviation in the event there was any noncompliance with any legal obligation whatsoever. Clearly that was not contemplated by Congress to be a requirement of Title V permits, and is beyond the statutory authority for the program.

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obligation out of 30,000 will require the reporting not only of the monitoring miss, but also of a second deviation due to the fact that there was some noncompliance during the year.

<sup>9</sup> Some states have recognized that many boilerplate terms and conditions do not impose a direct obligation on the source, and therefore are not amenable to a compliance certification. For example, the Ohio certification form contains the following instructions:

Ohio EPA realizes that a number of the General Terms and Conditions found in Part I. A. are explanatory in nature, and do not impose any affirmative compliance obligations on the permittee, i.e., Sections 5, 8, 10, 11, 13, 15, or 17. The permittee's compliance status expressed in Part II of this form should be based only on those General Terms and Conditions which impose an affirmative obligation of compliance upon the permittee.

New York has similarly excluded many of its boilerplate terms and conditions from the compliance certification requirement. However, many states have not addressed this issue, so permittees should carefully evaluate those terms that impose obligations and those that do not, and structure their certifications accordingly.

<sup>10</sup> Note that in *NRDC v. EPA*, 194 F.3d 130 (DC Cir. 1999), the US Court of Appeals for the DC Circuit explicitly held EPA to its stated position that caveats and qualifiers may be added to Title V certifications. ("At oral argument, EPA counsel agreed with the court's supposition that nothing precludes an owner from adding a caveat to its certification to the effect that, while it is providing other evidence which EPA might find material, the submitter disputes its materiality and reserves the right to challenge the use of the evidence in court.)

The only logical interpretation is that this term applies only to statutes and regulations relating to air compliance; in fact, some states have clarified that as their interpretation. Interpreted that way, this term become analogous to the term that requires compliance with the permit, albeit somewhat more broadly stated to include applicable statutes and regulations.

The second term merely restates a regulatory requirement – that no source shall cause or contribute to a violation of the NAAQS. Significantly, this term also requires that no source cause “air pollution.” Of course, the very nature of an air permit is to allow a source to legally cause “air pollution.” Thus, this term must be interpreted to disallow only *unpermitted* air pollution, making it analogous to a requirement to comply with all permitted emission levels.

A second problem with this term is that there is no reasonable or obvious way to evaluate whether a source – in combination with other sources – might be causing a violation of the NAAQS. In order to definitively make such a determination, extensive air quality modeling would be required on a regional scale. Such modeling would clearly be beyond the scope of “reasonable inquiry” and therefore would not be required – which begs the question of how a source would certify compliance with this term. To date, this question has been avoided, as the one state that imposed this term has expressly excluded it from compliance certification requirements.<sup>11</sup> However, if one were required to certify compliance with this term annually, many assumptions would need to be made about the impact of a source’s emissions on the NAAQS, all of which would be subject to second-guessing as to their reasonableness.

The point of these examples is to highlight some of the difficulties encountered by the apparently simple concept of an annual compliance certification. Many terms do not lend themselves to a simple certification, and sources must carefully consider how to explain the process they used to evaluate compliance with such terms. Alternatively, sources must be prepared to explain that their certification does not include specific terms that do not impose compliance obligations. Some states have been willing to remove certain boilerplate terms from the compliance certification requirement; others have not. Sources cannot simply ignore permit terms that are not easily addressed in the compliance certification. At the very least, a compliance certification must explain those terms to which it relates, and identify any terms that are not part of the certification because they do not impose any compliance obligations.

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<sup>11</sup> This is a standard boilerplate term in New York permits. It was initially subject to the compliance certification requirements, but following extensive discussions between the State and industry, it was moved to a separate section of the permit, with other boilerplate terms, for which no certification is required.

## **THE POTENTIAL FOR MULTIPLE DEVIATIONS FROM A SINGLE EVENT**

In many instances, a single event (such as missing a monitoring requirement) can result in more than one deviation to be reported. This is because a single event can implicate more than one compliance obligation.

As mentioned above, whenever a permit includes a boilerplate requirement to “comply with all terms and conditions of this permit,” any deviation from any other permit requirement will also be a deviation from this boilerplate term. Fortunately, the boilerplate term will only result in a *single additional deviation*, regardless of the number of substantive deviations that may occur. Thus, this term will only add one additional deviation to be reported.

The State of Ohio expressly recognizes this issue in its Title V certification instructions, which state the following:

The general requirement in Section I. A. 6. of the Title V Permit requiring compliance with “all terms and conditions of the permit” is directed only at terms and conditions which are both State and federally enforceable.

In order to avoid duplicative reporting of excursions/deviations, if excursions/deviations of a State and federally enforceable term and condition are reported elsewhere on the certification form, the table in Part II of the form may be completed by simply identifying Section I. A. 6. and stating “See information provided for specific terms and conditions in the following sections.”

Note that the Ohio form still requires that an additional deviation be noted for failure to comply with the permit if there was any other deviation during the year, but also allows for cross-referencing deviations which are disclosed elsewhere on the form.

Another situation where multiple deviations can result from a single event is where a permit contains separate requirements to “monitor” and to “record” specific information. For example, permits often have separate paragraphs which detail monitoring requirements and reporting requirements. The failure to perform monitoring in such a situation will necessarily result in a failure to record, thus creating at least two deviations. An argument can be made that in the absence of monitoring, there is no obligation to record, so there is only one deviation; however, this interpretation remains to be tested. A stronger argument exists that the standard requirement to maintain records for 5 years does not apply in the absence of creating a record.

<b><u>Permit Term</u></b>	<b><u>Result of Failure to Perform Monitoring</u></b>
<b><u>Monitoring</u></b> The permittee shall monitor the pressure drop across the paint booth once per day.	<b><u>Deviation</u></b> – Monitoring was not performed.
<b><u>Recordkeeping</u></b> The permittee shall record the pressure drop reading across the paint booth once per day.	<b><u>Deviation</u></b> – Recordkeeping was not performed.
<b><u>Records Retention</u></b> All records required pursuant to this permit shall be retained for a period of five years from the date the record was created.	<b><u>No Deviation</u></b> – No record was created, so the records retention requirement never became effective.

This example highlights the need to critically review every permit term and condition as part of a Title V certification, and evaluate whether the responsible official can assert whether compliance was achieved or not. Given the personal certification of the responsible official, extreme care should be taken during this process to ensure that each and every term and condition is evaluated against the known facts of the situation.

### **STRATEGIES FOR MINIMIZING LEGAL LIABILITIES AND POTENTIAL FUTURE ENFORCEMENT, BOTH FOR PERMIT DEVIATIONS THAT MUST BE REPORTED, AS WELL AS FOR POTENTIAL ERRORS IN THE CERTIFICATION PROCESS**

The single most important action to limit liabilities relating to Title V compliance certifications is to ensure that the document is “based on information and belief formed after reasonable inquiry.” In short, completing and documenting a “reasonable inquiry” will essentially eliminate liability to both the responsible official and the company for any false certification, even if unintentional errors or omissions exist in the certification, whereas failure to perform a “reasonable inquiry” will create new liability for both the responsible official and the company.

In addition to performing a reasonable inquiry, there are other strategies that can help to minimize potential liabilities, such as:

- carefully documenting the actions taken to support a finding of reasonable inquiry,
- explaining any noncompliance issues which are reported in the best possible light,
- documenting that monitoring and recordkeeping misses do not necessarily indicate emission exceedences, and
- fully explaining corrective actions taken in response to deviations.

### **ENSURE AND DOCUMENT THAT REASONABLE INQUIRY IS CONDUCTED**

All Title V facilities should carefully consider how they will ensure that a reasonable inquiry is made into their compliance status, and how they will document that activity. This planning should be done well before the deadline for submission of the annual certification, as the reasonable inquiry process can take quite a lot of time and resources.<sup>12</sup> For most Title V facilities, an annual certification is not something that can be (or should be) whipped together in a few days. In fact, the very act of carefully coordinating the reasonable inquiry across a facility provides evidence that the company and the responsible official took this obligation seriously, and carried it out properly.

The reasonable inquiry process is best performed as a “bottoms up” evaluation, relying initially on operations personnel who have direct involvement with emitting activities for an evaluation of compliance records. After all, facility operators are in the best position to know if operations were conducted as anticipated, or if deviations from normal operating conditions occurred. Every operating area should therefore be advised of its Title V compliance obligations, directed to maintain the necessary compliance records, and asked to provide a report of any deviations that may occur throughout the year.

Coordinating such a bottoms-up evaluation requires an investment of time to train operators on permit requirements, as well as to assign responsibility for permit compliance to specific operations. Operators will need to thoroughly understand relevant monitoring and recordkeeping requirements, and the consequences of failing to meet those requirements. They also need to be given ownership of their compliance obligations, and made responsible for any noncompliance. This all is best done *before* the final Title V permit is issued, in order to have these roles and responsibilities in place when the final permit obligations become enforceable.

*Two tools* are recommended to facilitate this bottoms-up approach: the first is a *simple table* that lists every compliance obligation in a permit, and identifies what activity will be performed to satisfy “reasonable inquiry.” Creating such a table will force a facility to consider what level of inquiry is reasonable for every compliance term. As discussed above, it is not necessary to review every record created over a 12-month period; some subset of information can provide a reasonable indication of compliance. A table will force an evaluation not only of *what* is reasonable to review, but also *who* should perform the review and *where* the supporting information can be found. The table will also provide important documentation of exactly what was done at the facility, and by whom, in the event the certification is ever challenged.

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<sup>12</sup> Preferably, this will be done before receipt of the final permit, based largely on requirements identified in the draft permit.

**EXAMPLE TABLE TO DOCUMENT REASONABLE INQUIRY**

<b>Permit Requirement</b>	<b>Reasonable Inquiry Activity</b>	<b>Person Responsible for Reasonable Inquiry</b>	<b>Supporting Data</b>	<b>Deviations Identified (describe)</b>	<b>Root Cause of Deviations</b>	<b>Corrective Actions in Response to Deviations</b>
Burn only natural gas in boiler	Document that boiler only capable of burning natural gas, and that no modifications made to unit.	Boiler Operations Manager	Facility fuel consumption records			
Comply with all applicable standards in 40 CFR Part 82 (Ozone Depleting Regulations)	Review ___% of ODS records to determine compliance with Part 82.	Third Party Auditors	ODS Records reviewed. No deviations identified			
Conduct weekly visible emissions observations; record abnormal emissions	Review 100% of VE records for missing data or abnormal VE's. Ensure any necessary corrective actions taken.	Environmental manager	Visible emission observation log			
Limit particulate matter emissions to not more than 0.03 grains/dscf, based on engineering estimates of controlled emissions	Document that control equipment operated properly (e.g. no abnormalities, operators trained in startup, shutdown, malfunction procedures). Review ___% of maintenance records to determine if regular maintenance conducted.	Equipment operators, maintenance personnel	Operating logs and maintenance records			

The second tool used to facilitate the bottoms-up reasonable inquiry, and to document that the inquiry was properly completed, is an *internal confirmation system* that the actions identified in the table were actually completed and that all deviations were properly reported. Such a system is nothing more than means of obtaining a signed statement from every person at the facility with Title V responsibility that they have performed their reasonable inquiry activity identified in the table (e.g., reviewed relevant records or confirmed no changes in operations), as well as considered any other material information,<sup>13</sup> and have reported all deviations known. These statements will provide the responsible official an assurance that the reasonable inquiry was conducted as detailed in the facility’s plan. They also provide physical evidence and documentation of the reasonable inquiry process.

The internal confirmation system can consist of a simple form such as the following:

**TITLE V – INTERNAL CONFIRMATION OF REASONABLE INQUIRY**

STATEMENT OF \_\_\_\_\_  
REGARDING THE TITLE V COMPLIANCE STATUS REVIEW  
FOR THE \_\_\_\_\_ OPERATIONS

My name is \_\_\_\_\_

I am the [operations manager] for the \_\_\_\_\_ process area, and as such I am familiar with the process operations conducted in this area. I am also familiar with the Title V compliance requirements for this area.

I have carefully performed the reasonable inquiry activity identified below relating to Title V compliance for this process area, to evaluate the compliance status of this process area with respect to Title V permit requirements.

Based upon my personal knowledge of the process operations and Title V compliance requirements in this process area, my review of relevant records, my inquiry of persons with additional knowledge which may be relevant and my review of other information, if any\*, to the best of my knowledge, information and belief, the following statement regarding the compliance status of this process area is true, accurate and complete.

Except as identified herein, the above-referenced process area has been in continuous compliance with its Title V compliance requirements, including monitoring, record keeping and reporting requirements, as indicated by the reasonable inquiry activity performed.

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<sup>13</sup> Remember that a source must consider “other relevant information” when completing a compliance certification. See discussion above on credible evidence.

Signature

Date

Permit Requirement	Reasonable Inquiry Activity	Person Responsible for Reasonable Inquiry	Supporting Data	Deviations Identified (describe)	Root Cause of Deviations	Corrective Actions in Response to Deviations
[FILL IN REQUIREMENTS FOR THIS PROCESS AREA]						

• Other information reviewed includes: \_\_\_\_\_.

Finally, at the time of executing the compliance certification, it is recommended that a “memo to file” also be completed which explains in detail the reasonable inquiry process that was completed. Such a memo to file will be invaluable if the validity of the certification is ever subsequently challenged. Remember, an enforcement action challenging a compliance certification is likely to arise years after the document is filed, when memories have grown dim and individuals may have moved on to other locations or responsibilities. It is at this future date that explicit evidence of the reasonableness of the review will be most important. The memo-to-file should be viewed as the responsible official’s security blanket, allowing him or her to sleep easily at night with the knowledge that they can prove they met their reasonable inquiry obligation.

The memo-to-file should clearly delineate *who, what, where, when and how* for the compliance certification:

- *Who* was involved;
- *What* was reviewed;
- *Where* relevant information can be found;
- *When* these activities occurred; and
- *How* the process was organized and verified, and *how* the responsible official actively participated and performed his or her individual reasonable inquiry.

The memo should also explain any difficult judgment calls that were made, and how they were resolved. A contemporaneous explanation of the decision-making process for close calls will confirm honorable behavior and prevent future speculation as to motives.

**ERR IN FAVOR OF OVERDISCLOSURE**

The most significant risk associated with a compliance certification is a charge of submitting false or misleading information to the government. That charge carries the weight of both personal and criminal liability for a responsible official and a company. Therefore, it is much more significant than the civil liability that ordinarily flows from

permit noncompliance, and a much bigger and sexier case for a prosecutor to bring. The most likely foundation for such a charge is a compliance certification that does not disclose obvious deviations that would have been discovered through a reasonable inquiry process.

Prosecutors know this, and will be looking for cases where responsible officials submitted Title V certifications without conducting a reasonable inquiry. The prosecutor's vision is of the responsible official who is handed a blank certification form to sign, as though it were a payroll check or other routine document, and who certifies 100% compliance without making any inquiry into records or other relevant information. Even if that facility were fortuitously in 100% compliance, the prosecutor would still have a case against the responsible official for submitting a false certification, since the document would state that a reasonable inquiry was performed when, in fact, it wasn't. Even better for the prosecutor is a case where the certification affirms 100% compliance, but readily available operating records indicate a pattern of deviations that were obvious, but were not identified or disclosed.

On the other hand, a company that properly discloses a variety of deviations (hopefully none too serious), and perhaps additional information demonstrating that no emission violation occurred, or perhaps details about a malfunction that occurred that is not technically a deviation, is much less attractive as an enforcement target. That company's certification suggests on its face that a careful review of compliance records was performed, largely precluding a claim of false certification. This leaves the prosecutor to consider enforcement for the underlying reported deviations, which in many cases will not be sufficiently egregious to merit formal action by the agency.<sup>14</sup>

Given that the most significant risk presented by compliance certifications is a claim for false certification, it is prudent to provide more, rather than less, disclosure in these submissions. Certainly when close judgment calls arise as to whether a particular situation involves a deviation or not, it is prudent to disclose the facts and to characterize them in the light most favorable to the facility. Failure to disclose such facts might provide an opportunity for a prosecutor to charge false certification, alleging the omission of material information. On the other hand, disclosing the facts – which are likely to be evident in the facility's Title V records and available to the agency in any event – will prevent such an allegation and allow the facility to explain the situation in its own terms.

As long as the information disclosed in a Title V certification is not misleading, more information can act to preclude a charge of false certification. More information will demonstrate the facility's good faith effort to fully disclose issues to the government. More information will suggest a careful review of facility records by facility personnel and the responsible official. And finally, more information will strongly suggest proper preparation of the compliance certification.

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<sup>14</sup> Experience suggests that the majority of deviations reported by Title V facilities are monitoring and recordkeeping misses, probably because of the extensive number of MRR requirements at Title V facilities.

### **EXPLAIN ANY NONCOMPLIANCE ISSUES**

Whenever any deviations are reported in a compliance certification, the facility should take care to explain any extenuating circumstances or mitigating factors. For example, if monitoring was not performed because a monitor failed, or records are missing because of a computer malfunction, these circumstances should be carefully described. Similarly, if information exists which confirms that emission limits were not exceeded, even though monitoring data may be missing, that information should also be provided.

It is important to remember that compliance certifications will exist for many years, and may be viewed by many different people. These certifications should therefore contain enough information to fully characterize deviations on the face of the document, including any exculpatory information.<sup>15</sup> Such exculpatory information may head off an inquiry or investigation by enforcement personnel, before it gets started. Similarly, such information may dissuade a citizen's group from filing a citizen's suit if a reasonable explanation exists for any deviations, or if only monitoring or recordkeeping deviations are noted with strong evidence indicating that no emission limits were exceeded.

There is no prohibition against including additional information with compliance certifications. In fact, as noted above, the US Court of Appeals for the DC Circuit expressly recognized that permittees may add supporting information and exculpatory explanations to Title V certifications. In *NRDC v. EPA*,<sup>16</sup> the court explained, "nothing precludes an owner from adding a caveat to its certification". Even where specific state forms don't provide space for such additional information, permittees are advised to add footnotes or additional pages to the forms when necessary to explain their situations properly.

### **ENSURE CORRECTIVE ACTIONS ARE IMPLEMENTED**

After filing a compliance certification that identifies deviations, as well as corrective actions taken in response, it is critical to ensure that those corrective actions are implemented fully and effectively. The purpose of the corrective actions is to prevent the deviations from recurring. If they are not implemented effectively, the facility might have additional deviations in the next reporting period identical to those just reported. This would produce a record of ongoing deviations that will not look good to the permitting agency, enforcement personnel, or citizens. Fully implementing the appropriate corrective actions should prevent the recurrence of those deviations.

Furthermore, the failure to fully implement corrective actions that are explained in a compliance certification could also result in liability for false certification. In short, if the certification states that certain actions are being (or will be) implemented, and they are not, the certification could be construed as a false statement. Such facts could suggest that there was no intent to follow through on the corrective actions, especially given that

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<sup>15</sup> In addition to explaining mitigating factors, the compliance certification must also note the probable cause and any corrective actions that were taken in response to deviations. See 40 CFR Section 70.6(a)(3)(iii)(B) (Title V deviation reports must specifically contain both "the probable cause of any deviations, and any corrective or preventive measures taken.").

<sup>16</sup> 194 F.3d 130 (DC Cir. 1999).

the responsible official is clearly in a position to ensure that any corrective actions are completed.<sup>17</sup> At the very least, such facts cast doubt on the compliance ethic of the company, which may make enforcement more likely or appealing.

## **CONCLUSION**

In conclusion, all Title V facilities will forevermore be required to submit annual compliance certifications and semi-annual deviation reports. These are continuing obligations that will exist as long as a facility operates. A responsible official (generally a corporate officer or plant manager) must sign the certification, subject to a legal obligation to make a reasonable inquiry into the compliance status of the facility. This obligation creates potential liabilities for both the individual, as well as for the company, if the document is subsequently found to be inaccurate or incomplete.

There are many unanswered questions regarding the scope of the “reasonable inquiry” requirement. This term is not defined and, as US EPA has expressly acknowledged, what is “reasonable” will vary depending on the circumstances. Therefore, the level of inquiry performed in any situation will be susceptible to second-guessing by zealous prosecutors and aggressive citizens intent on bringing enforcement actions. Further compounding the risk is the fact that many permit terms are not amenable to a certification of compliance, as many terms do not impose affirmative obligations on the facility (e.g., boilerplate statements). This requires the facility to explain and limit the certification to those terms that impose specific obligations.

In addition to this uncertainty, many Title V facilities will have tens or hundreds of thousands of individual monitoring records per year, which will require some level of reasonable inquiry. In most situations, it will not be possible to review every record for compliance, or even determine that every record was collected. Fortunately, a reasonable inquiry does not require that every record be investigated; rather, facilities need to determine what subset of records can be reviewed to satisfy the reasonable inquiry mandate. Responsible officials must be fully informed regarding these decisions and the entire inquiry process, in order to properly and honestly complete the annual certification based upon their own reasonable inquiry.

This paper describes these concerns and presents some useful strategies for managing the potential liabilities associated with compliance certifications. Title V permittees are urged to ensure that every certification and deviation report is supported by a sufficient review that will easily satisfy the reasonable inquiry standard. Prudent companies will develop systematic processes for these reviews, and take actions that are considered *beyond reasonable* so there can be no second-guessing as to whether a reasonable inquiry was conducted. The process should be carefully documented with regard to who, what, where, when and how it was completed, to provide a record for future questions which could potentially arise years later.

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<sup>17</sup> Of course, if the responsible official has a reasonable belief that the corrective actions are being implemented, there would be no false statement.

Companies should err in favor of over-disclosure of issues, as the greatest risk with compliance certifications is an allegation of submitting a false certification. Over-disclosure ameliorates any such risk, as any known potential issues will be disclosed rather than withheld, and over-disclosure helps demonstrate a reasonable inquiry into a facility's compliance status. Companies should also carefully explain any deviations, and provide any exculpatory evidence. Finally, any stated corrective actions must be fully implemented, to prevent the subsequent recurrence of deviations that might require reporting in the next six or twelve months.

Compliance certifications must be viewed as an ongoing historical *public record* of a facility's compliance status, and therefore be managed with significant thought and care. These certifications impose new legal obligations on the responsible official and the company to fully understand the compliance status of the facility, every day of every year. Completed properly, the recurring nature of these certifications will drive an increased scrutiny into existing compliance obligations, ultimately leading to improved compliance.