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Where Does It Say I Need to Annually Certify Compliance with RMP?

R. Lee Vail

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Where Does It Say I Need to Annually Certify Compliance with RMP?

*R. Lee Vail**

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INTRODUCTION

The 1990 Clean Air Act Amendments added a requirement for operating permits in what is now Title V of the Act. Part 70 of the Code of Federal Regulations (CFR) applies to permits issued by a state. Major stationary sources must obtain and operate in compliance with Title V (also called Part 70) operating permits.¹ These operating permits contain a

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* Dr. Vail received a B.S. in Chemical Engineering from Louisiana State University and a PhD in Environmental Engineering from Tulane University. Dr. Vail held various engineering and management positions over thirty years prior to attending law school at Loyola University in New Orleans where he earned a J.D., *cum laude*. Dr. Vail holds the position of Of Counsel at Kean Miller LLP in New Orleans where he practices environmental regulatory and patent prosecution law.

1. 40 C.F.R. § 70.3(a).

requirement that the permit holder submit an annual compliance certification with permit terms and conditions, including emission limitations, standards, or work practices.² The certification requirement has not changed significantly since the original publication in 1992.³

In 1996, the Environmental Protection Agency (EPA) promulgated 40 CFR Part 68 (Chemical Accident Prevention Provisions), more commonly known as the Risk Management Program or "RMP."⁴ According to Part 68, Title V permits must contain a statement listing Part 68 as an applicable requirement.⁵ Title V permits must also contain a permit condition requiring that, "as part of the compliance certification submitted under 40 CFR 70.6(c)(5), a certification statement that the source is in compliance with all requirements of this part, including the registration and submission of the RMP," or in the alternative, a compliance plan.⁶

Some states incorporate the § 68.215 requirements as minimal, generic statements as included within the RMP rule. Other states, against the advice of the EPA, include a long list of individual RMP elements as specific requirements. Incorporation format within individual permits may vary in approach within a single state. The RMP rule is vague (at best) concerning annual certification of RMP requirements; and written guidance on the same is minimal to nonexistent. Instead of written guidance, the EPA employees have provided verbal opinions that it is necessary to certify compliance with RMP as part of the Part 70 certification. As a result, significant uncertainty exists in the regulated community concerning the relationship between Title V certification and RMP compliance.⁷

This Article examines the relationship between the Part 68 RMP rules and the Title V operating permit rules as they relate to certification of RMP compliance. No doubt exists that Title V permit holders must have either

2. See 42 U.S.C. § 7661.c(c) and 40 C.F.R. § 70.6(c)(5).

3. 57 Fed. Reg. 32250, 32305 (July 21, 1992).

4. Confusingly, RMP can both mean "Risk Management Program" and "Risk Management Plan." Unless otherwise indicated, this Article will use RMP to mean the entire Risk Management Program, not simply the Risk Management Plan required by 40 C.F.R. Part 68, Subpart G.

5. See 40 C.F.R. § 68.215(a)(1).

6. 40 C.F.R. § 68.215(a)(2).

7. This confusion is exacerbated as much of RMP follows the Occupational Safety and Health Administration's Process Safety Management ("PSM") rules which were developed as a performance-based standard where O.S.H.A. established the objective and the employer developed the required programs. Accordingly, compliance determinations are often not bright-lined as with numerical emission limitations and standards (or work practices to minimize emissions).

submitted an RMP certification statement or a compliance plan, but this submission would appear to be a one-time event. Further, the effect of declaring that all of Part 68 is an “applicable requirement” (which is a defined term) is questionable given that the defined term only relates to emissions units and RMP only regulates processes.

I. PART 70 - TITLE V CERTIFICATION

One of the statutory requirements located in section 504 of the Clean Air Act (CAA) is that “[e]ach permit . . . shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.”⁸ The Part 70 annual certification requirement is located at 40 CFR § 70.6(c)(5). All Title V permits shall contain requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices.⁹

Much of RMP is based on the Occupational Safety and Health Administration’s (OSHA) Process Safety Management regulation which OSHA promulgated four years before RMP and is found at 29 CFR § 1910.119. These non-emission related safety requirements are incorporated *en masse* to Part 68 and, to the extent consistent with the definition of “applicable requirement,” appear to be incorporated into Title V Permits. It remains unclear whether deviations from these requirements result in an obligation to report such deviations and certify compliance. At one point, the Texas Commission on Environmental Quality (TCEQ) offered guidance on this very question:

Q: What are my obligations for deviation reporting for the Risk Management Plan requirements from 40 CFR Part 68 related to Process Safety Management?

A: The following is quoted from an EPA letter dated May 30, 2006: “Violations of the Occupational Safety and Health Act (OSHA) Process Safety Management (PSM), including PSM audit findings which are violations of Risk Management Plan (RMP) requirements, should be Title V deviations subject to deviation reporting. Credible evidence of a violation of a PSM, that is also a violation of an applicable requirement RMP of the

8. 42 U.S.C. § 7661c(c).

9. Additional detail is provided in subparagraphs (i) – (iv) including: frequency at least annually, means for monitoring, appropriate cross references, and submission to Administrator and permitting agency.

Clean Air Act, is a Title V deviation subject to reporting requirements.” A copy of the letter that includes additional background material supporting this conclusion is available on file in the TCEQ Field Operations central office, Austin, Texas, MC 174.¹⁰

A few years later, TCEQ revised its guidance:

Part 68 Risk Management Plan

Contact the Surveillance Section of EPA Region 6 Dallas office for the latest guidance regarding what constitutes a deviation from Risk Management Plan requirements from 40 Code of Federal Regulations (CFR) Part 68.¹¹

Apparent from this revision in guidance, TCEQ does not know or does not want to take a position on the issue. The EPA has not followed up on the question nor provided further guidance. Whereas RMP elements are enforceable and the failure to comply with such constitutes a violation of a regulation, it is unclear whether the addition of these requirements to a Title V permit result in “terms and conditions” (e.g., emission limitations, standards, or work practices) subject to annual certification.

A. Terms and conditions

The phrase “terms and conditions” is well understood in a contract context. Terms and conditions are added to an agreement to ensure the parties comply with the agreement. Effectively, terms and conditions are provisions added to an air permit to ensure the permit holder complies with “applicable requirements.” Although the EPA has not defined “terms and conditions,” section 504 (Permit Requirements and Conditions) of the CAA requires that permits contain “conditions as are necessary to assure compliance with applicable requirements of this chapter.”¹²

Part 70 definitions indirectly add to the description of terms and conditions in describing section 502(b)(10) changes that do not require a permit change. These terms and conditions “include monitoring (including test methods), recordkeeping, reporting, or compliance certification

10. TEX. COMM’N ON ENVTL. EQUAL, DEVIATION REPORTING GUIDANCE VERSION 3 at 15 (2009), <https://perma.cc/5TQP-XTWN>.

11. TEX. COMM’N ON ENVTL. EQUAL, TCEQ FIELD OPERATIONS GUIDANCE 2012, TITLE V DEVIATION REPORTING AND PERMIT COMPLIANCE CERTIFICATION at 22 (2012), <https://perma.cc/6RGX-LKBQ>.

12. 42 U.S.C. § 7661c(a).

requirements.”¹³ Part 70 further explains that “terms and conditions” are based on “applicable requirements” by stating, “The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.”¹⁴

A direct tie between “terms and conditions” and “applicable regulations” is also provided in a Louisiana regulation.¹⁵ However it is noteworthy that this reference applies to compliance with air quality requirements. RMP does not regulate air quality or emissions from emission units.

Accordingly, “terms and conditions” are provisions incorporated into permits as are necessary to ensure that permit holders comply with “applicable regulations.” Louisiana regulation further connects terms and conditions to that necessary to comply with air quality requirements. As will be discussed in the following section of this Article, the definition of “applicable requirement” is similarly related to emissions units.

B. Applicable requirements

When issued, the Part 70 rule “imposed two types of compliance certifications on Part 70 sources.”¹⁶ First, in 40 CFR § 70.5(c)(9), each state was required to develop standard permit application forms that include a “certification of compliance with all applicable requirements” along with a certification schedule (no less than annual).¹⁷ The preamble to the initial Part 70 rule provided background for the statutory basis of the compliance certification requirement:

The second type of compliance certification is imposed by § 70.6(c)(5). This section states that every Title V permit must contain a requirement for the source to submit a compliance certification at least annually throughout the term of the permit. The contents of this compliance certification are drawn from Section 114(a)(3) and 503(b)(2) of the Act.¹⁸

13. 40 C.F.R. § 70.2.

14. 40 C.F.R. § 70.6(a)(1)(i).

15. *See* L.A.C. 33:III.501.C.6.

16. 57 Fed. Reg. at 32274.

17. *See* 40 C.F.R. § 70.5(c)(9). It is also noteworthy that § 70.5(c)(9) also included requirements for “statements indicating the source’s compliance status.” 40 C.F.R. § 70.5(c)(9)(iv). Arguably, a statement about compliance may be made independent of a compliance certification in accordance with § 70.6(c)(5).

18. *Id.*

Section 114(a)(3) of the CAA provides that the Administrator may “require enhanced monitoring and submission of compliance certifications” and mandates specific certification elements: identification of the applicable requirement, method to determine compliance, and compliance status (including continuous or intermittent).¹⁹ Section 503(b)(2) of the CAA requires that the EPA enact regulations requiring state Part 70 programs to require an annual certification “that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.”²⁰ The failure of an *emissions unit* to meet a permit “term or condition” is a deviation which is also defined in terms of emission limitations and standards.²¹ The Part 70 compliance certification expands the list of terms and conditions to include “work practices.”²²

When proposed, this “second type” of compliance certification required certification of compliance with “applicable requirements.”²³ Whereas the “first type” (i.e., 40 CFR § 70.5(c)(9)) of certification remained in relationship to applicable requirements, the second type of certification was revised by the EPA during rulemaking to be in relationship to terms and conditions as “the proposal required certification only for applicable requirements. This change is necessary to conform to the express requirements of section 503(b)(2).”²⁴

19. See 42 U.S.C. § 7414(a)(3).

20. 42 U.S.C. § 7661b(b)(2).

21. 40 C.F.R. § 71.6 (a)(3)(iii)(C). Deviation means any situation in which an emissions unit fails to meet a permit term or condition. A deviation is not always a violation. A deviation can be determined by observation or through review of data obtained from any testing, monitoring, or recordkeeping established in accordance with paragraphs (a)(3)(i) and (a)(3)(ii) of this section. For a situation lasting more than 24 hours which constitutes a deviation, each 24 hour period is considered a separate deviation. Included in the meaning of deviation are any of the following:

(1) A situation where emissions exceed an emission limitation or standard;

(2) A situation where process or emissions control device parameter values indicate that an emission limitation or standard has not been met;

(3) A situation in which observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit;

(4) A situation in which an exceedance or an excursion, as defined in part 64 of this chapter, occurs.

22. See 40 C.F.R. § 70(c)5.

23. See 57 Fed. Reg. at 32274.

24. *Id.*

According to section 503(b)(2) of the CAA, “The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.” Counter to the EPA’s expressed reason to change the language, section 503(b)(2)’s express requirements is that the permittee certify compliance with applicable requirements and not terms and conditions.²⁵

Thus, critical to maintaining consistency between sections 114(a)(3), 503(b)(2), and 70.6(c)(5) is the understanding that “terms and conditions” relate to compliance with “applicable requirements,” which is a defined term: “Applicable requirement means all of the following *as they apply to emissions units* in a part 70 source ”²⁶ The definition of *applicable requirement* then provides a list of statutory CAA sections that includes “[a]ny standard or other requirement under section 112 of the Act, including *any requirement concerning accident prevention* under section 112(r)(7) of the Act ”

Here is where the confusion begins. Whereas “any requirement concerning accident prevention” is listed as an example of an applicable requirement, a proper textual construction would only include listed regulations to the extent they applied to an “emissions unit.”²⁷ As stated by Supreme Court Justice Antonin Scalia, “If possible, every word should be given effect; no word should be read as surplusage.”²⁸ Furthermore, examples within a list must be read in the context of the general statement they further describe.²⁹ Accordingly, to avoid creating surplusage and

25. A possible explanation is that permits also contain monitoring and recordkeeping requirements to demonstrate compliance with applicable requirements. *See* 40 C.F.R. § 70.6(a)(3) and 40 C.F.R. § 70.6(c)(5)(ii). EPA’s revision in the final rule would assure that these requirements are considered in the annual certification. In addition, reference (with some explanation) to § 504(a) would make more sense, as this section requires a permit to include “such other conditions as necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.”

26. 40 C.F.R. § 70.2 (emphasis added).

27. “Applicable requirement” is a defined term. Any declaration saying something is a defined term must be evaluated in a manner consistent with the definition.

28. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE* 44 (2008).

29. Consider the following statement: The planet Earth is comprised of everything on the planet including: the soil, the rivers, and any moon rocks. Examples are only included to the extent they are consistent with the initial general statement. Accordingly, moon rocks on the Earth are part of it whereas rocks on the moon are not.

reading reference to section 112(r)(7) as an example, requirements concerning accident prevention under section 112(r)(7) are “applicable requirements” to the extent they apply to emissions units.

C. Emissions Unit versus Process

The term emissions unit is defined in multiple locations, including Part 70:

Emissions unit means ***any part or activity of*** a stationary source ***that emits or has the potential to emit any regulated air pollutant*** or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term “unit” for purposes of title IV of the Act.³⁰

Unfortunately, the definition of “emissions unit” is not explicit as to which equipment comprises an “emissions unit” other than it is ***any part or activity that emits*** or has the potential to emit regulated air pollutants. According to EPA guidance related to Prevention of Significant Deterioration (PSD) regulations, an “emission unit” can be a single piece of equipment, or a group of equipment (as in an “affected facility”): “Although an emissions unit may consist of a single piece of equipment, here the appropriateness of applying controls over multiple units justifies viewing the affected facility as defined by NSPS HHH, to be the emissions unit.”³¹ However, whereas the EPA has agreed to aggregate pieces of equipment that are emissions units and create an enlarged emissions unit made up of multiple pieces of (emitting) equipment, such aggregation of emitting equipment should not include non-emitting equipment as such would make the phrase “any part or activity that emits” read as surplusage and meaningless.

Accordingly, whereas the EPA states that “an emission unit is assumed to be a single piece of process equipment or activity,” the EPA, on a case-by-case basis, has agreed to requests to consider “emissions

30. 40 C.F.R. § 70.2 (emphasis added). The term emissions unit is also defined in the PSD rules at 40 C.F.R. § 51.166(b)(7) and 40 C.F.R. § 52.21(b)(7).

31. Letter from Judith Katz, Director, EPA Region III, Air Protection Division, to John Daniel, Jr, Director, Air Program Coordinator, Commonwealth of Virginia, DEP’T OF ENVTL. QUALITY (Nov. 30, 2000), <https://perma.cc/C9R2-64BH>; see also Operating Permit Programs; Flexible Air Permitting Rule, 74 Fed. Reg. 51418, 51435 (Oct. 6, 2009) (“[T]he definition of “emissions unit” is elastic in its ability to include several types of situations, ranging from a single piece of equipment to a collection of them at the same site.”).

unit” to be a collection of equipment.³² In promulgation Part 68, the EPA failed to mention the term “emissions unit” and made no findings relating to the scope or size of RMP “emissions units.” RMP applies within a covered process (not an “emissions unit”).³³

The PSD term “replacement unit”³⁴ is defined in terms of “emissions units” and “process units.” PSD also defines “process units,”³⁵ which includes all the equipment required to manufacture a product, not just the parts or activities that emit. When defining a “replacement unit,” the terms “process unit” and “emissions unit” are presumably intended to identify a

32. Letter from Steven Page, E.P.A., Director, Office of Air Quality Planning and Standards, to David Isaacs, Vice President, Gov’t Policy, SEMICONDUCTOR INDUSTRY ASS’N (Aug. 26, 2011), <https://perma.cc/R9NS-UCM2>.

33. RMP uses the term “process” which is similar to a PSD “process unit” except it is limited to equipment involving a regulated substance:

Process means any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities. For the purposes of this definition, any group of vessels that are interconnected, or separate vessels that are located such that a regulated substance could be involved in a potential release, shall be considered a single process.

40 C.F.R. § 68.3.

34. Replacement unit means an emissions unit for which all the criteria listed in paragraphs (b)(32)(i) through (iv) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(i) The emissions unit is a reconstructed unit within the meaning of §60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(iii) The replacement does not change the basic design parameter(s) (as discussed in paragraph (y)(2) of this section) of the process unit.

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

40 C.F.R. § 52.21.

35. In general, process unit means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material input to produce or store an intermediate or complete product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emission unit. 40 C.F.R. § 51.166(b)(53)(i) and 40 C.F.R.

§ 52.21(b)(55)(i).

different collection of equipment, otherwise there is no reason to have two terms. A “process unit” will never be smaller than an “emissions unit,” and an “emissions unit” may be a single piece of (emitting) equipment (or alternatively, on a case-by-case basis, a collection of equipment, such as an affected facility). For example, a petroleum refinery crude distillation unit is an RMP “process” or a PSD “process unit,” whereas process equipment like “fuel gas combustion devices” are “emissions units” and “affected facilities.”

D. Potential versus Accidental Release

Whereas both an “emissions unit” and a “process” are part of a “stationary source,” it is noteworthy that Part 68 and Part 70 have significantly different definitions of the term “stationary source.”³⁶ A Part 70 “stationary source” is a broadly defined thing (building, structure, facility, or installation) “that emits or may emit any regulated air pollutants.” A stationary source can be as large as the entire facility and it may contain many smaller emission units. A Part 68 “stationary source” is also a thing (building, structure, facility, or installation) or activity “from which an accidental release may occur.” As defined, there is no reason why a Part 68 stationary source needs to include any emission units.³⁷ An emissions unit, a relevant factor in defining an applicable requirement, is not a relevant factor when defining the scope of RMP.

Consider the non-contact, non-fired heat transfer equipment (i.e., heat exchangers) that is located upstream of the crude oil heater. Whereas the crude oil heater both emits and has the potential to emit air pollutants (i.e., an emission unit), the upstream heat exchanger³⁸ does not emit any pollutants. It certainly has the potential to be involved in an accidental

36. See 40 C.F.R. § 68.3 and 40 C.F.R. § 70.2.

37. Not to get distracted, but if a Part 68 stationary source contained no emission units, it would not need a Title V permit and would not need to certify compliance with it.

38. For argument’s sake, it should be recognized that connectors (e.g., flanges) that connect one piece of equipment to another are emissions units. Having an outer boundary from which regulated substances could possibly leak should not be considered to meet the element of “emits a regulated pollutant” for the heat exchange equipment. However, to simplify the discussion, one could assume that the heat exchanger is welded to the inlet and outlet piping and that no reasonable leak path exists to emit pollutants and that the only possibility is an accidental release. Regardless, whereas the connector is regulated elsewhere in the regulations (e.g., Part 60 and Part 63), it is not regulated by Part 68. Part 68 regulates inspections of the heat exchanger wall integrity. The heat exchanger wall and body have no emissions and are not emissions units.

release should the tubes or shell of the exchanger fail; but it is unclear whether this potential of an accidental release should be considered a “potential to emit a regulated pollutant.”

To be an emission unit, a part or activity (of the stationary source) must emit or have the potential to emit regulated pollutants. “Potential to emit” is a defined term:

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant *under its physical and operational design. Any physical or operational limitation* on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design *if the limitation is enforceable by the Administrator*. This term does not alter or affect the use of this term for any other purposes under the Act, or the term “capacity factor” as used in title IV of the Act or the regulations promulgated thereunder.³⁹

The physical and operational design of pipes and vessels is typically to have no emissions, and, accordingly, they have no authorized emissions. Just the same, equipment could fail, resulting in an unanticipated release. Such an unanticipated release, if it occurred, would be unauthorized by the permit and the exceedance of the implicit zero emission limitation would be enforceable by the Administrator. Further, if PSD applicability considered theoretically possible but unanticipated releases, no project would ever be considered insignificant.⁴⁰ It would be wholly inappropriate to consider the potential for an accidental release to be part of a stationary source’s potential to emit. Accordingly, considering the plain textual meaning of the definition of emissions unit, equipment that does not emit and has no potential to emit would not be part of an emissions unit. If equipment is not part of an emissions unit, RMP requirements should not be considered Part 70 applicable requirements.

39. 40 C.F.R. § 70.2 (emphasis added).

40. Although a stationary source’s potential to emit is not defined in Part 68, it is defined in 40 C.F.R. § 51.166(b)(4). Albeit an altogether different part of the air program, if emissions from accidental releases were considered under New Source Review, all changes to stationary sources would likely be major modifications.

The Part 71 definition of deviation⁴¹ includes the failure of an emissions unit to meet an emission limitation or emission standard or any work practice or operating condition⁴² required by the permit, whereas Part 70 requires the certification of terms and conditions, including emission limitations, emission standards, and work practices. Part 68 does not include any emission authorizations or limits. According to the EPA, “[t]he risk management program . . . does not set emission standards.”⁴³ Thus to be a deviation, at the minimum, the RMP requirement would need to be a work practice.

II. WORK PRACTICES

What is a “work practice?” Given the term’s importance, it is surprising that no explicit definition exists. Perhaps the meaning of the term is so obvious, it need not be defined. In the absence of a statutory definition, the Ninth Circuit defined “work practice” as no more than a description of the manner in which a work task is performed by an employee or contractor.⁴⁴ Safe work practices include steps and methods that allow an employee to perform the task in a safe manner.⁴⁵ Typically,

41. Individual states have developed their own definitions of deviations. For example, Texas defines a deviation as “any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.” 30 T.A.C. § 122.10(5). Texas does not provide a list of examples of “terms and conditions” but limits the definition to noncompliance determined through compliance method data required by the permit or credible evidence. In contrast to emission limitations, standards and work practices, Title V permits do not include “means for monitoring the compliance of the source with” RMP elements (work practices or not). Arguably, the failure to include compliance means for RMP elements in Title V permits implies that these elements are not work practices.

42. Operating conditions refer to operating limits included in a permit that are necessary to demonstrate control of emissions. Examples might include minimum combustion temperature of an incinerator or pH of a scrubber liquid or maximum throughput.

43. EPA, May 24, 1996. Risk Management Plan Rule: Summary and Response to Comments. Volume 10, p. 28-36. Docket No. A-91-73, Document No. IX-C-1.

44. See *United States v. Pearson*, 274 F.3d 1225, 1231 (9th Cir. 2001).

45. Typically, work practices apply to repetitive and often transferrable tasks. As will be discussed, a detailed operating procedure relating to a specific operation of a specific piece of equipment would not be considered a work practice.

work practices are repetitive and capable of description, either in writing or verbally.

The EPA's authority to promulgate federal operating permit regulations is found in sections 501-507 of the CAA.⁴⁶ Whereas these sections require certification of Title V permits, the term "work practice" does not appear in context of a permit requirement or condition.⁴⁷ Permit conditions required by the CAA include emission limitations and standards, but no mention is made of work practices.⁴⁸

Accordingly, although the basis for compliance certification is located in sections 114(a)(3), 503(a)(3), and 504(c) of the Act, nowhere in sections 114 or 501-507 is the term "work practice" used in connection with Title V requirements. Nonetheless, the EPA has authority to impose work practice standards pursuant to sections 111 and 112 of the CAA.

The term "work practice" appears three times in section 111⁴⁹ and six times in section 112 of the CAA. All of the references in sections 111 and 112, except those in section 112(r)(7), relate to work practice standards that minimize emissions and that were promulgated in lieu of an emissions standard based on a determination that such a numeric standard was not feasible.

Pursuant to section 111(h) and section 112(h) of the CAA, work practice standards are allowed if it is not feasible to prescribe or enforce an emission standard. In this context, a "work standard" is a method of accomplishing a task in such a way as to minimize emissions and can only be required where it is not possible to develop a quantitative emission limit. For example, New Source Performance Standards (NSPS) Subpart Ja requires that the owner develop procedures and a flare management plan to minimize emissions associated with flaring.⁵⁰ Another example of a work practice standard can be found in asbestos regulations. In upholding

46. 42 U.S.C. § 7661-7661(f); Clean Air Act Title V – Permits, found at <https://perma.cc/72DB-T9Q7> (last visited Jan. 29, 2018).

47. The term "work practice" is not connected with any owner/operator requirements and only mentioned in connection with establishing a small business stationary source assistance program. *See* 42 U.S.C. § 7661f(a)(7).

48. *See* 42 U.S.C. § 7661c(a).

49. Reference to "work practice" is located at 42 U.S.C. § 7411(h). An example of "design, equipment, work practice or operational standards" promulgated based on authority in § 111(h) of the CAA would be the flare management plan required by NSPS Subpart Ja as found in 40 C.F.R.

§ 60.103a(a). Flare management plan procedures are required to "minimiz[e] flow (which minimizes emissions)." 77 Fed. Reg. 56422, 56430 (Sept. 12, 2012).

50. *See* 40 C.F.R. § 60.103(a) promulgated under the authority of § 111(h) of the CAA.

a violation of the original asbestos NESHAP regulations located at 40 CFR Part 61 (formally Subpart B), the Environmental Appeals Board recited the statutory history of work practice standards.⁵¹ The salient point was that work practices were authorized where emission standards for control of a hazardous air pollutant were infeasible.

Accordingly, one meaning provided for the term “work practice” or “work practice standard” is a prescribed method of performing a task to minimize emissions. Although it is the most common and best understood meaning of the term “work practice,” this meaning is not relevant to RMP. RMP requirements are not work practices authorized pursuant to sections 111(h) and 112(h) of the CAA. Instead, promulgation of RMP work practice is authorized to prevent accidental releases pursuant to section 112(r)(7). This second meaning for the term “work practice” is found in the final CAA reference to the term as found in section 112(r)(7)(A) of the CAA which states:

In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include *monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements*. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source. Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.⁵²

As with sections 111(h) and 112(h) of the CAA, the EPA is authorized to promulgate “design, equipment, work practices, and operations requirements,” but this time the objective is to prevent accidental releases. But what is an RMP “work practice” and how might it differ from RMP design, equipment, and operational requirements? Unfortunately, the EPA did not discuss such during promulgation of the RMP rule, nor has the EPA discussed such in guidance.

51. *See In Re: Allegheny Power Serv. Corp. & Choice Insulation, Inc.*, 9 E.A.D. 636, FN 24 (E.P.A. Feb. 15, 2001).

52. (emphasis added).

The term “work practice” appears in the Part 68 regulations six times. The first two times are located in 40 CFR § 68.69(d)(4):

The owner or operator shall develop and implement safe work practices to provide for the control of hazards during operations such as lockout/tagout; confined space entry; opening process equipment or piping; and control over entrance into a stationary source by maintenance, contractor, laboratory, or other support personnel. These safe work practices shall apply to employees and contractor employees.

The third reference to work practices is found in 40 CFR § 68.71 and requires employee training in safe work practices relate to the employee’s job task. The other three references to “work practices” are similar to the first three, except they apply to contract employees. Here, the salient point is that all references to “work practices” in RMP relate to safety rules created by OSHA to assure employees and contractors perform “work practices” safely. These “work practices” comprise a very small amount of the RMP requirements.

RMP contains many non-emission, safety rules adopted nearly verbatim from OSHA’s PSM. Whereas section 112(7)(r) grants the EPA authority to promulgate methods (e.g., design, equipment, work practices, operational requirements, etc.) to prevent accidental releases, the EPA did not associate any specific RMP rule or element with a specific method to prevent accidents. The only time that the EPA stated its authority to adopt such rules was in the initial proposal where it was expressed in broad, non-specific terms.⁵³ The phrase “work practices” does not appear in the March 13, 1995 Supplemental Notice of Proposed Rulemaking.⁵⁴ Other than the regulations themselves (i.e., safe work practices), the term “work practice” does not appear in the June 20, 1996 publication in the Federal Register. Nowhere in the proposals, rules, or follow-up guidance has the EPA distinguished between design, equipment, operational and work practice requirements. As a result, many in industry certify what arguably could be viewed as a work practice requirement the same as what could arguably be called an operational or design requirement. Even if RMP operational and design requirements relate to an emissions unit, such are not provided

53. See 58 Fed. Reg. 54190, 54192 (Oct. 20, 1993).

54. The EPA makes reference of safety practices in the Supplemental Notice of Proposed Rulemaking and provides PSM as an example (“The VPP is a voluntary program sponsored by OSHA and industry that recognizes strong safety practices, including process safety management.”), see 60 Fed. Reg. 13526, 13530 (Mar. 13, 1995).

as examples of terms or conditions that require certification, and the EPA has never said that they should be.

Although the EPA did not discuss or distinguish between the various potential types of requirements, one knowledgeable in unit operations could attempt to parse them out and connect the dots with the RMP requirements:

- **Design or equipment-** “The owner or operator shall document that equipment complies with recognized and generally accepted good engineering practices.”⁵⁵ “The owner or operator shall correct deficiencies in equipment that are outside acceptable limits (defined by the process safety information in §68.65) before further use or in a safe and timely manner when necessary means are taken to assure safe operation.”⁵⁶
- **Operational-** “The owner or operator shall develop and implement written operating procedures that provide clear instructions for safely conducting activities involved in each covered process consistent with the process safety information . . .”⁵⁷
- **Work practice-** “The owner or operator shall develop and implement safe work practices to provide for the control of hazards during operations such as lockout/tagout; confined space entry; opening process equipment or piping; and control over entrance into a stationary source by maintenance, contractor, laboratory, or other support personnel. These safe work practices shall apply to employees and contractor employees.”⁵⁸

Further, The Fifth Circuit Court of Appeals agreed with the Occupational Safety & Health Review Commission (“OSHRC”) that operating procedures required under 40 CFR § 68.69(d)(1)-(3) are separate and distinct from safe work practices required by § 68.69(d)(4) when it said, “Requiring the safe work practice to be ‘written’ is not found in subpart (f)(4). On the other hand, subpart (f)(1) does require ‘written operating procedures.’ Obviously, if work practices covered by subpart (f)(4) were also to be written, the regulation could—and would—have so stated.”⁵⁹

Effectively, the court concluded in *Albemarle Corp v. Herman* that work practices are not operating procedures. This conclusion was significant as operating procedures had to be written, whereas work

55. 40 C.F.R. § 68.65 (b)(2).

56. 40 C.F.R. § 68.73(e).

57. 40 C.F.R. § 68.69(a).

58. 40 C.F.R. § 68.69 (d).

59. *Albemarle Corp. v. Herman*, 221 F.3d 782, 785–86 (5th Cir. 2000).

practices did not need to be written. Here, citations were ultimately upheld based on the employer having an insufficient work practice (i.e., line clearing and slip blinding).⁶⁰ Citations were also upheld for the failure to sufficiently describe every step (i.e., activating the “block and bleed system” in the olefins unit) in the operating procedure.⁶¹ Therefore, it would be reasonable to conclude that operating procedures include steps that are specific to the operation of specific equipment, whereas work practices are generic and can be used to safely perform common tasks required in multiple locations in a standardized manner. The salient point here is that design, equipment, and operating procedures are not work practices and if not work practices, the failure to implement such is not an omission of one of the specifically listed examples of a term or condition requiring certification (e.g., emission limitation or standard or any work practice) or of a deviation.

In conclusion, terms and conditions are added by the permitting authority to Title V permits to ensure compliance with applicable requirements. Applicable requirements, by definition, relate to emissions units. Emission units are limited to the part or activity of a stationary source that emits or has the potential to emit. A Title V permit holder must certify compliance with terms and conditions including emission limitations, standards and work practices. Not surprisingly, emissions units have emissions limitations and standards, and where such is not possible, EPA developed work practice standards to minimize emissions. RMP does not regulate emission units, but instead regulates processes.

Title V certifications include several mandatory elements. One of these elements is “a means for monitoring the compliance of the source with its emission limitations, standards, and work practices.”⁶² Title V permits lack such “means for monitoring” requirements for compliance with RMP. As RMP requirements do not include emission limitations and standards, and few, if any, are work practices, this mandatory element cannot be met. Accordingly, the Part 70 certification rule and process (including methods of determining compliance) did not anticipate certification of non-emission related requirements.

60. *Id.* at 785.

61. *Id.* at 787-8. The steps for shutting down the SWAG reactor were many and specific to this equipment. *Herman*, 221 F.3d at 787 (“the system consists of ‘a series of switches that shut actuated valves that block water to and from exchangers, as well as open[ing] actuated valves that drain any water trapped on the exchanger to the sewer. On a couple of exchangers it is necessary to use hand operated chain valves.’”).

62. 40 C.F.R. § 70.6(c)(5)(ii).

III. RMP CERTIFICATION

A. Proposed Rule

The concept of periodically certifying compliance with RMP provisions evolved during the rule making process from the initial proposal in 1993 of every three years based on a safety audit (as provided in PSM),⁶³ to an annual compliance certification in a supplemental notice of proposed rulemaking in 1995:

(a) Each part 70 permit shall contain conditions requiring the following provisions, for **any activity** and/or **emission unit** subject to this part:

(3) The source shall **annually certify compliance** with, and implementation of, risk management program requirements described in this part as described by the submitted RMP or revised plan.⁶⁴

The proposed language was very broad (i.e., any activity) and would have effectively addressed the concern raised by the author regarding the significance of “emissions units.” Here the proposed regulation, in very plain language, requires annual certification of any Part 68 activity. The EPA provided no rationale in the final rule for deleting the plain language requiring annual certification of any activity required by Part 68 and provided no explanation that such would be covered by other provisions. Arguably, the EPA considered and quietly rejected annual certification of any Part 70 requirement in the final rule.

B. Final Rule

The connection to the Part 70 compliance certification (i.e., “a certification statement” made by the owner “as part of”) did not occur until the final rule, and it was provided as an alternative: compliance statement or schedule.⁶⁵ Structurally, the text requires only one response.

63. See former 40 C.F.R. § 68.38(b); see 58 Fed. Reg. 54190, 54217 (Oct. 20, 1993).

64. (Emphasis added). Former 40 C.F.R. § 68.58(a)(3), see 60 Fed. Reg. 13526, 13545 (Mar. 13, 1995).

65. See 40 C.F.R. § 68.215(a)(2). The 40 C.F.R. part 70 or part 71 permit for the stationary source shall contain two conditions that require the source owner or operator to submit:

Accordingly, based on this text and structure, an owner that submitted a compliance schedule need not ever submit a certification statement. Furthermore, given that the compliance schedule is clearly identified to be a one-time event (“by the date provided in § 68.10(a)”), it would be expected that the alternative, a compliance statement, was likewise a one-time event.

Such alternative language is common to Part 70 application requirements. For example, according to 40 CFR § 70.5(c)(8), each application must, as appropriate, have compliance statements⁶⁶ and schedules.⁶⁷ More to the point, nowhere within 40 CFR § 70.6 (the section that requires annual certification) does it use the word “statement.” This is in contrast to 40 CFR § 70.5 (Application Contents) that uses the word “statement” thirteen times. Part 70 requires statements in applications, which are discrete events, and does not mention statements for annual certifications.

The final rule also required that Title V permits contain “a statement listing this part as an applicable requirement.”⁶⁸ The EPA justified the adoption of 40 CFR § 68.215(a)(1) by stating, “EPA further states in part 70.2 that ‘Applicable Requirement means * * * (4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act’”⁶⁹ In doing so, the EPA omitted a critically important part of the definition of applicable requirement and substituted ellipsis points for the omitted language. Ellipsis should only be used where the omission will not alter the original meaning of the quote. The EPA’s use here arguably attempted to alter the meaning of the term by deeming the omitted language to be surplusage. As previously discussed, the missing words were “all of the following *as they apply to emissions units* in a part 70 source.” Without changing the underlying definition in Part 70, the EPA appeared to be effectively arguing that the omitted words were not relevant. However, while establishing more specific terms in permits, the EPA provided no

(i) A compliance schedule for meeting the requirements of this part by the date provided in § 68.10(a) or;

(ii) As part of the compliance certification submitted under 40 C.F.R. 70.6(c)(5), a certification statement that the source is in compliance with all requirements of this part, including the registration and submission of the RMP.

40 C.F.R. § 68.215(a).

66. 40 C.F.R. § 70.5(c)(8)(A).

67. 40 C.F.R. § 70.5(c)(8)(C).

68. 40 C.F.R. § 68.215(a)(1).

69. 61 Fed. Reg. at 31688 (ellipsis in original).

doubt that it was not altering the definition under 40 CFR § 70.2 by stating, “EPA’s action today does not alter the definition of ‘applicable requirements’ under 40 CFR 70.2 which already includes ‘any requirement concerning accident prevention under section 112(r)(7).’ Rather, the EPA is establishing very simple permit terms and flexible, minimal oversight responsibilities that will assure compliance with part 68.”⁷⁰ To the contrary, the EPA appeared to recognize the issue in the 1995 draft rule when it said:

EPA also intends to revise the definition in part 70 of “applicable requirement” relative to section 112(r). This definition will include the requirements of part 68 when promulgated, to which part 70 sources are subject. EPA expects to define this term to mean §§ 68.10 to §§ 68.58 or specific sections within those sections.⁷¹

Instead, the EPA chose not to alter the Part 70 definition of applicable requirement while obscuring the meaning of the term by dropping critical text. Given the prior recognition of the issue and apparent lack of transparency, the EPA should not now be allowed to argue that all Part 68 requirements are Part 70 applicable requirements.

C. RMP Elements as Permit Conditions

Some states incorporate the 40 CFR § 68.215 requirements in Title V permits as minimal, generic statements. Other states, like Louisiana, include a long list of individual RMP elements as specific requirements. While acknowledging that states could add additional specific requirements, the EPA advised against listing individual portion of Part 68 as permit conditions:

Except for the provisions of § 68.215(a), ***EPA does not believe that the RMP or all or any portion of the remainder of part 68 should become permit conditions*** because the RMP and part 68 elements will be highly source specific and subject to frequent change introducing unnecessary complexity and delaying permit implementation.⁷²

70. 61 Fed. Reg. at 31689.

71. 60 Fed. Reg. at 13535-36.

72. 61 Fed. Reg. at 31690 (emphasis added).

EPA notes, however, that states have the authority, under the CAA, to impose more, but not less, stringent standards than EPA (see CAA section 112(r)(11)). As a result, states do have the authority to choose to incorporate detailed part 68 requirements into Title V permits, although EPA would discourage such a practice.⁷³

The EPA's plan to incorporate Part 68 into Title V permits was simply stated: "[C]ompliance with applicable requirements could be assured by including generic terms in permits and certain minimal oversight activities."⁷⁴ The EPA could not have expected or required a complete 40 CFR § 70.6(c)(5) certification for a generic term. Furthermore, it would not be possible to have a means for monitoring an entire program.

If the EPA did not intend for Part 68 elements to be included in Title V permits as permit conditions, it is arguably unreasonable to believe that the EPA was simultaneously mandating an annual compliance certification apply to RMP elements it advocated should not be included.

D. Enforcement

Whereas the EPA has never said that it will not enforce RMP through the Part 70 process, as a practical matter, they appear not to use this as the primary mechanism for triggering inspections and enforcement. This observation is consistent with the EPA's statements in the preamble of the final 1996 RMP rule:

EPA agrees that Congress did not intend for section 112(r) to be implemented and enforced primarily through Title V and recognizes the potential for confusion and burden on sources and air permitting authorities associated with section 112(r). EPA believes that the requirements in today's rule are flexible, impose minimal burden, address the concerns raised by commenters and satisfy the CAA requirement for assurance of compliance with section 112(r) as an applicable requirement for permitting.⁷⁵

Within this statement, the EPA acknowledges that enforcement of RMP via Title V could cause confusion. Yet confusion over Title V certification, as it relates to RMP, exists to this day. Few regulated entities would consider the burden minimal. Both PSM and RMP are performance-based

73. Summary and Response to Comments, p. 139 of Section 28.

74. 61 Fed. Reg. at 31689.

75. 61 Fed. Reg. at 31688.

regulations and there are no bright line emission limitations and standards. As a result, it is often difficult to determine if a deviation or violation has occurred. Not having bright line standards, it is not reasonably possible to have a means for monitoring. Furthermore, according to the rule, a facility must audit its program every three years, not every year.⁷⁶ As a result, full certification on an annual basis would be a major burden.

E. RMP - Conclusions

As it relates to the specific question concerning certification of RMP elements in the annual compliance certification, the requirements changed significantly between the 1995 draft and the 1996 final rules. First, the 1995 draft explicitly required annual certification of any activity required by the rule and the final rule obscurely declares that Part 68 is an applicable requirement. Second, the 1995 draft anticipates a change in the definition of “applicable requirement” to facilitate that objective. This did not occur. Finally, the EPA effectively distorted the definition of applicable requirement by quietly determining that the phrase “as it relates to emission units” was surplusage.

CONCLUSION

Around the same time the EPA issued permit requirements for Part 70 facilities, OSHA promulgated a safety regulation called PSM in 1992. Whereas Part 70 was designed to consolidate emission authorizations and restrictions from emission units, OSHA’s regulation relates to processes and in no way relates to emissions of regulated pollutants. Emission units and processes are not the same thing. Whereas the EPA appeared to realize the disconnect in its 1995 proposal, the 1996 final rule included vague language the EPA now says, albeit not in writing, requires annual certification of RMP elements. Only RMP requirements that relate to emission units can be applicable requirements. Deviations can only include the failure to meet an emission-related requirement from an emission unit.

76. See 40 C.F.R. § 68.79(a).