

STATE OF NEW JERSEY
ATTORNEY GENERAL'S OPINION IN SUPPORT OF REQUEST BY
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR DELEGATION
OF THE FEDERAL PLAN FOR MUNICIPAL SOLID WASTE LANDFILLS THAT
COMMENCED CONSTRUCTION ON OR BEFORE JULY 17, 2014, AND HAVE NOT
BEEN MODIFIED OR RECONSTRUCTED SINCE JULY 17, 2014

October 4, 2022

Pursuant to the authority of the Attorney General of the State of New Jersey, and in accordance with the Final Rule of the United States Environmental Protection Agency (USEPA) titled Federal Plan for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014 (Subpart 000), I hereby opine that the laws of the State of New Jersey provide adequate legal and enforcement authority to the New Jersey Department of Environmental Protection (NJDEP) to administer and enforce the Subpart 000 program and therefore such laws support the NJDEP's application for delegation of the Subpart 000 Federal Plan.

This Opinion is comprised of two parts. Section I provides the specific citations required by 40 C.F.R. § 60.26 that demonstrate the State's legal authority to carry out a State Plan and that thereby demonstrate the State's authority to carry out the Subpart 000 by delegation. Section II is a two- part attachment comprised of the August 2, 1995 Attorney General Opinion submitted to USEPA by the NJDEP in support of the State's Title V Operating Permits Program submittal and the January 28, 1993 Attorney General Opinion which is referenced in and which accompanied the Title V Opinion. The August 2, 1995 Opinion and referenced January 28, 1993 Opinion provide the detailed legal analysis supporting the NJDEP's authority in many of the same areas required to be analyzed for NJDEP's application for delegation of the Subpart 000 program. Thus, Section I will rely upon, and therefore reference, those portions of the August 2, 1995 Opinion which are applicable to the NJDEP's current delegation request and will also provide a reference list of specific citations in support of the Subpart 000 delegation, as USEPA has required under 40 C.F.R. § 60.26.

SECTION I

Pursuant to 40 C.F.R. § 60.26(a) and (b), the following are specific citations to those legal authorities which demonstrate that the NJDEP has adequate authority to justify delegation of the Subpart 000 to the NJDEP.

A. Authority which allows the NJDEP to take delegation is provided

at N.J.S.A. 13:1D-9(r). See also Section II of the January 28, 1993 Opinion and Section I of the August 2, 1995 Opinion.

- B. Authority to adopt emission standards and compliance schedules applicable to designated facilities is pursuant to N.J.S.A. 26:2C-8, N.J.S.A. 26:2C-9, and N.J.S.A. 26:2C-9.2. For a more detailed discussion of the NJDEP's general authority to regulate air pollution, see Section I of the August 2, 1995 Opinion. For NJDEP's regulations implementing its compliance plan authority, see N.J.A.C. 7:27-8.13(d) and (e) and N.J.A.C. 7:27-22.9.
- C. Authority to enforce applicable laws, regulations, standards and compliance schedules, and to seek injunctive relief is provided at N.J.S.A. 13:1D-9(e), N.J.S.A. 13:1D-9(n), N.J.S.A. 26:2C-9(b)(4) and (5), N.J.S.A. 26:2C-14, and N.J.S.A. 26:2C-19. The authority to seek injunctive relief is specifically provided at N.J.S.A. 26:2C-19(a). The NJDEP's administrative regulations provide air administrative procedures and penalties at N.J.S.A. 7:27A. See also Sections VII and XIV of the August 2, 1995 Opinion and Section III of the January 28, 1993 Opinion.
- D. Authority to obtain information necessary to determine whether designated facilities are in compliance with applicable laws, regulations, standards and compliance schedules, including authority to require recordkeeping and to make inspections and conduct tests of designated facilities is provided at N.J.S.A. 13:1D-9(d), N.J.S.A. 26:2C-9, N.J.S.A. 26:2C-9.1, N.J.S.A. 26:2C-9.2(c)(5) and N.J.S.A. 26:2C-9.2(i). See also Sections I, VI and VII of the August 2, 1995 Opinion. For the NJDEP's regulations implementing these authorities, see N.J.A.C. 7:27-1.31, N.J.A.C. 7:27-8.3(d) and (m), N.J.A.C. 7:27-8.13(c), (d), (e) and (i), N.J.A.C. 7:27-22.16(b), (c) and (o), N.J.A.C. 7:27-22.18 and N.J.A.C. 7:27-22.19.
- E. Authority to require owners or operators of designated facilities to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such facilities is provided at N.J.S.A. 26:2C-9(b)(3), N.J.S.A. 26:2C-9.2(a), N.J.S.A. 26:2C-9.2(b), N.J.S.A. 26:2C-9.2(c)(5) and N.J.S.A. 26:2C-9.2(i). See also Sections I and VI of the August 2, 1995 Opinion. For the NJDEP's regulations implementing these authorities, see N.J.A.C. 7:27-8.3(c) and (d), N.J.A.C. 7:27-8.15, N.J.A.C. 7:27-22.16(b) and (o), N.J.A.C. 7:27-22.18 and N.J.A.C. 7:27-22.19.

F. Authority for the State to make the above referenced data available to the public as reported and as correlated with applicable emission standards is provided at N.J.S.A. 13:1D-9(d), N.J.S.A. 26:2C-9(b)(4), and N.J.S.A. 47:1A-1 to -13 (Open Public Records Act). For the NJDEP's regulations implementing these authorities, see N.J.A.C. 7:27-8.4(e) and N.J.A.C. 7:27-22.3(r). See also Section XIII of the August 2, 1995 Opinion, while noting that the reference in the August 2, 1995 Opinion to the State's open public records law has been updated in this paragraph to reflect current codification.

Section II

See following attachments: August 2, 1995 Title V Attorney General Opinion and January 8, 1993 Attorney General Opinion.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: 

Nicolas Seminoff
Deputy Attorney General

Dated: November 4, 2022

STATE OF NEW JERSEY
ATTORNEY GENERAL'S OPINION IN SUPPORT OF
TITLE V OPERATING PERMITS PROGRAM SUBMITTAL
OF STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

August 2, 1995

Pursuant to the authority of the Attorney General of the State of New Jersey, and in accordance with § 502(d) of the Clean Air Act (CAA), 42 U.S.C. § 7661a(d)(1), and 40 CFR § 70.4(b)(3), I hereby provide my opinion that the laws of the State of New Jersey provide adequate authority to carry out all aspects of the program submitted by the New Jersey Department of Environmental Protection ("NJDEP") to the United States Environmental Protection Agency ("EPA") for approval to administer and enforce the operating permits program under Title V of the CAA, 42 U.S.C. §§ 7661 to 7661f (sometimes "Title V"). The specific authorities provided, which are contained in statutes, regulations, judicial decisions and other legal authorities lawfully adopted and which shall be fully effective by the time the program is approved, include those identified below.

N.J.A.C. 7:27-22 (sometimes "subchapter 22") of NJDEP's administrative regulations provides the detailed legal requirements of NJDEP's operating permits program. Because that subchapter of the New Jersey Administrative Code constitutes a significant part of the submittal of which this opinion letter is also a part, and because that subchapter is also discussed in great detail in other parts of the submittal, this opinion generally will not discuss the subchapter in such detail. I do, however, opine that Subchapter 22 has been adopted in full accordance with the laws of New Jersey, including but not limited to the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq. ("the APCA"), and the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

I. AUTHORITY TO ISSUE PERMITS

State law provides authority for NJDEP to issue operating permits to all air pollution sources within the State that are required to have permits by CAA § 502(a), 42 U.S.C. 7661a(a), and 40 CFR Section 70.3. It also provides authority for NJDEP to incorporate into permits and assure compliance with each applicable requirement of the CAA and the requirements of 40 CFR Part 70 (sometimes "Part 70") (other than those requirements specifically identified in other portions of this opinion). State law also provides authority to issue operating permits for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e), 42 U.S.C. § 7429(e), that assure compliance

As used here and elsewhere in this opinion, the term "operating permits" means the operating permits required by Title V of the CAA and 40 CFR Part 70, unless the context clearly indicates otherwise.

, 1995 and shall become operative 60 days thereafter on
1995 in accordance with N.J.S.A. 26:2C-8.

II. AUTHORITY TO ISSUE PERMITS TO NONCOMPLYING SOURCES

State law provides authority for NJDEP to issue permits to sources that are not in compliance with applicable requirements, and to include compliance schedules in permits to bring sources into compliance.

Federal Authority: CAA §§502(b)(5)(A), 504(a), 42 U.S.C. §§7661a(b)(5)(A), 7661c(a); 40 CFR §§70.5(c)8, 70.6(c)(3).

Citation of State Laws and Regulations; Remarks of the Attorney General:

See N.J.A.C. 7:27-22.6(f)(8) and 7:27-22.9 and discussion at Part I above.

III. CONFLICTS OF INTEREST

State law provides that any potential conflicts of interest by the head of any executive agency be adequately disclosed. State law also provides that no permit for a solid waste incinerator unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

Federal Authority: CAA §§128(a)(1)-(2), 129(e), 42 U.S.C. §§7428(a)(1)-(2), 7429(e); 40 CFR §70.4(b)(3)(iv).

Citation of State Laws and Regulations; Remarks of the Attorney General:

According to state law, operating permits can be issued only by NJDEP, which is headed by its Commissioner. N.J.S.A. 26:2C-2, 2C-9 and 2C-9.2; 13:1D-1 and 1D-7. The Commissioner generally delegates his authority by administrative order or otherwise to the Assistant Commissioner for Environmental Regulation, who in turn generally delegates that authority to the Administrator for Air Quality Regulation. All of these persons are "state officers or employees" within the meaning of the State Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq., and "officers or employees" within the meaning of NJDEP's implementing Code of Ethics (a copy of which is attached hereto as Exhibit 2 for your information). As such, they are prohibited from "hav[ing] any interest, financial or otherwise, direct or indirect, or engag[ing] in any business or transaction or professional activity, which is in substantial conflict with the proper discharge of [their] duties in the public interest." N.J.S.A. 52:13D-23(e)(1). They are also precluded from accepting any

employment which "might reasonably be expected to impair [their] objectivity and independence of judgment in the exercise of [their] official duties." N.J.S.A. 52:13D-23(e)(5). Finally, they are subject to a variety of other ethical obligations pursuant to the above described law and code. As a result of these various obligations, they are precluded from deriving a significant portion of their income from persons subject to operating permits.

As to solid waste incinerator units, they are designed, constructed, and operated by governmental entities other than NJDEP or by private entities, or by both. NJDEP does issue necessary environmental permits for these units, and it at times administers grants that can be used for their design or construction. See N.J.S.A. 13:1E-148. However, in our opinion, this does not render NJDEP "responsible, in whole or in part, for the design and construction or operation of the unit" within the meaning of CAA §129(e).

IV. PERMIT FEES

State law provides authority for NJDEP to assess and collect annual permit fees from sources within the State which are subject to the requirements of Title V of the CAA and 40 CFR Part 70, in an amount determined by NJDEP to be sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the State's operating permits program.

Federal Authority: CAA §502(b)(3)(A), 42 U.S.C. §7661a(b)(3)(A); 40 CFR §§70.9(a)-(d).

Citation of State Laws and Regulations; Remarks of the Attorney General:

P.L. 19 , c. , §§3, 5 and 6, signed into law on August 2, 1995, amends NJDEP's existing fee authority, which is presently set forth at N.J.S.A. 26:2C-9(g), and supplements that authority with a comprehensive fee schedule for major facilities subject to Title V. The term "major facility" is defined at P.L. 19 , c. , §2 as:

... a major source, as that term is defined by the EPA in rules and regulations adopted pursuant to the federal Clean Air Act at 40 CFR §70.2 or any subsequent amendments thereto, that has the potential to emit any of the air contaminants listed below in an amount that is equal to or exceeds the applicable major facility threshold levels as follows:

Air Contaminant	Threshold level
Carbon monoxide	100 tons per year
Particulate matter (PM-10)	100 tons per year
Total suspended particulates	100 tons per year

Sulfur dioxide	100 tons per year
Oxides of nitrogen	25 tons per year
VOC	25 tons per year
Lead	10 tons per year
Any HAP	10 tons per year
All HAPs collectively	25 tons per year
Any other air contaminant	100 tons per year

NJDEP's general fee authority at N.J.S.A. 26:2C-9(g) is as follows:

The [NJDEP] shall control air pollution in accordance with the provisions of any applicable code, rule, or regulation promulgated by the [NJDEP] and for this purpose shall have power to:

...

(g) Charge, in accordance with a fee schedule that shall be adopted by the [NJDEP] pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.), (1) reasonable annual emission fees for major facilities as provided in section 5 of (this bill) and (2) administrative fees for any of the services the [NJDEP] performs or provides in connection with administering P.L. 1954, c. 212 (C.26:2C-1 et seq.). The administrative fees charged by the [NJDEP] pursuant to this subsection shall not exceed \$25,000 per application based on criteria contained in the fee schedule;

P.L. 19 , c. , \$3.

The specific major facility fees authorized by P.L. 19 , c. , are described and categorized below.

I. For State Fiscal Year (FY) 1995 (July 1, 1994 - June 30, 1995):
(P.L. 19 , c. , \$5(b)(1)-(4).

Emission Fee: \$25.00 (in 1989 dollars adjusted by the CPI) per ton of actual* emissions of regulated air contaminants (defined at §2 of P.L. 19 , c. , as "the same as the term 'regulated air pollutant' as defined by the EPA ... at 40 CFR §70.2 or any subsequent amendments thereto.") in the following manner:

~ "only on the first 4,000 tons of each regulated air contaminant, excluding carbon monoxide" [§5(b)(1)];

- "only on the first 8,000 tons of oxides of nitrogen and ... VOCs" [§5(b)(1)];

- "on 1/2 the total tons of carbon monoxide" [§5(b)(2)].

* Actual emissions shall be as reported in each facility's Emissions Statement (required pursuant to N.J.A.C. 7:27-21.1 et seq.) for the year two years prior to the relevant fee year. In the absence of such information, the fee shall be assessed on permitted emissions, or where a permit has not been issued, on the potential to emit.

Initial Operating Permit Application Fee: Each major facility shall pay "an initial operating permit application fee not to exceed \$25,000". This fee is to be calculated by multiplying the number of pieces of "significant equipment listed in the [facility's] operating permit application" by \$125 per piece of equipment. The fee is to "be submitted prior to the deadline for submittal of the operating permit application." P.L. 19 , c. , §5(b)(3).

Modification Fee: The fee for any facility modification is to be based upon the schedule of fees to be established by NJDEP in rules and regulations. "No fee for a modification review shall exceed \$25,000." §5(b)(4).

Certificate Fees: This fee is to be assessed in accordance with rules and regulations adopted by NJDEP. §5(b)(5).

Supplemental Surcharge: Each major facility shall be assessed a supplemental surcharge sufficient to raise \$1,500,000 which fee shall be deposited into the "Air Surcharge Reengineering Fund" created by §5(f). The Act provides that the fee:

shall be based upon actual annual emissions of each regulated air contaminant, excluding carbon monoxide, reported in the emission statement for that major facility, or, in the absence of such information, on permitted emissions, or where a permit has not been issued, on the potential to emit, but in no case shall a supplemental surcharge assessed of a major facility exceed \$20,000 per year per major facility. §5(e)(1).

II. For State FY96 (July 1, 1995 - June 30, 1996) and FY97 (July 1, 1996 - June 30, 1997) (P.L. 19 , c. , §5(c), §5(e)):

Emission Fee: Same as discussed above for FY95 except that "no major facility shall pay an emission fee less than \$1,000 for each of the State fiscal years 1996 and 1997." §5(c)(2).

Initial Operating Permit Application Fee: Same as for FY95 but the fee is to be submitted "at the time of submission of the operating permit application." §5(c)(1)(c).

Modification Fees: These fees are also to be assessed based upon a fee schedule adopted by NJDEP in rules and regulations. P.L. 19 , c. , §5(c)(1)(d) sets certain parameters for modification fees as follows:

A fee for any facility modification in an amount calculated using the fee schedule therefor set forth in rules and regulations adopted by [NJDEP]. The fee for a significant modification review for source operations such as solid or hazardous waste treatment and disposal, reciprocating engines, and fuel combustion processes with heat input greater than 100 million BTU/hour or that burn solid fuel shall not exceed \$25,000. All other modification fees shall be assessed based upon the amount of equipment modified and shall not exceed \$500 per piece of equipment and \$25,000 for an entire modification review.

Supplemental Surcharge (For FY96 only): Same as for FY95, described above.

III. For State FY1998 (July 1, 1997 - June 30, 1998) and thereafter (P.L. 19 , c. , §5(d)):

Emission fee: \$25 (in 1989 dollars adjusted by CPI) "per ton of each regulated air contaminant, excluding carbon monoxide." §5(d)(1)(a). "[N]o major facility shall pay an emission fee less than \$1,000 for each of the State fiscal years 1998 and thereafter." §5(d)(2).

Initial Operating Permit Application Fee: Same as for FYs96 and 97, discussed above. §5(d)(1)(b).

Significant Modification Fee: Assessed "in an amount calculated using a fee schedule therefor to be set forth in rules and regulations of [NJDEP] except that no fee for a significant modification review shall exceed \$25,000. §5(d)(1)(c).

In addition, on August 2, 1995, NJDEP adopted N.J.A.C. 7:27-22.31 which implements the fee authority granted by P.L. 19 , c. in order to comply with Title V of the CAA and 40 CFR Part 70. The regulation will be effective on the date of publication in the New Jersey Register on or before , 1995 and shall become operative 60 days after adoption, or , 1995 in accordance with N.J.S.A. 26:2C-8. Other portions of NJDEP's submittal package

establish that the amounts to be raised pursuant to N.J.A.C. 7:27-22.31 will be sufficient to comply with Title V of the CAA and 40 CFR 70.9. We express no opinion on that issue.

V. PERMIT TERM

State law provides authority to issue operating permits for a fixed term not to exceed 5 years. State law provides a fixed term not to exceed 12 years for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e) and a review of such permits at least every 5 years. State law provides authority to issue permits with acid rain provisions for a fixed term of 5 years.

Federal Authority: CAA §§ 129(e), 408(a), 502(b)(5)(B), 42 U.S.C. §§ 7429(e), 7651g(a), 7661a(b)(5)(B); 40 CFR §§ 70.4(b)93(iii)-(iv), 70.6(a)(2), 72.70(b), 72.72(a).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The ability to issue operating permits for a fixed term of five years is implicit in the authority to register persons engaged in activities which "may result in air pollution" granted to NJDEP by N.J.S.A. 26:2C-9(c) as discussed at Section I., above. Additional authority to issue permits for a fixed term is found at N.J.S.A. 26:2C-9.2(c)(7). N.J.S.A. 26:2C-9.2(c)(7), as recently amended by P.L. 19 , c. , §4, provides:

An operating permit and operating certificate or any renewal thereof shall be valid for a period of five years from the date of issuance, unless sooner revoked for cause by order of [NJDEP], and may be renewed upon application to [NJDEP].

The recent amendments to APCA clarified that the section applies to operating permits, as well as operating certificates, and added that revocation of such permits or certificates sooner than five years from issuance shall be "for cause." P.L. 19 , c. , §4.

In addition, N.J.A.C. 7:27-22.3(i) requires that all operating permits, including those for solid waste incineration units combusting municipal waste and those with acid rain provisions, will be issued for five-year terms. N.J.A.C. 7:27-22.16(s) further requires that "(e)ach operating permit shall specify an expiration date which shall be no later than five years from the date of issue."

VI. MONITORING, RECORDKEEPING, AND REPORTING

State law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into operating permits consistent with 40 CFR § 70.6. State law

provides authority to incorporate into the permit periodic monitoring or testing requirements where the existing State implementation plan or other applicable requirement does not contain such a requirement, consistent with 40 CFR § 70.6(a)(3)(i)(B).

Federal Authority: CAA §§ 502(b)(2), 503(b)(2), 504(a)-(c), 42 U.S.C. §§7661a(b)(2), 7661c(a)-(c); 40 CFR §§ 70.4(b)(3)(ii), 70.6(a)(3), 70.6(c)(1), 70.6(c)(5).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to impose these requirements is part of NJDEP's broad regulatory powers discussed at Part I above. NJDEP's specific requirements are set forth at N.J.A.C. 7:27-22.16(o), -22.18 and -22.19, which are consistent with 40 CFR §70.6(a)(3).

VII. INSPECTION/ENTRY AUTHORITY

State law provides authority to incorporate into permits inspection and entry requirements consistent with 40 CFR § 70.6(c)(2).

Federal Authority: CAA § 504(c), 42 U.S.C. §7661c(c); 40 CFR §§70.6(c)(2).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The statutory authority to impose these requirements is part of NJDEP's broad regulatory powers discussed at Part I above. It also stems from N.J.S.A. 26:2C-9.1, 26:2C-9(d) and 13:1D-9(d).

N.J.S.A. 26:2C-9.1 provides:

No person shall obstruct, hinder or delay, or interfere with by force or otherwise, the performance by [NJDEP] or its personnel of any duty under the provisions of [the APCA], or refuse to permit such personnel to perform their duties by refusing them, upon proper identification or presentation of a written order of [NJDEP] entrance to any premises at reasonable hours.

N.J.S.A. 26:2C-9(d) (as amended by P.L. 19 , c. , §3), in relevant part, provides that NJDEP has the power to:

Enter and inspect any building or place, except private residences, for the purpose of investigating an actual or suspected source of air pollution and ascertaining compliance or noncompliance with any codes, rules or regulations of [NJDEP]. Any information, other than actual or allowable air contaminant emissions,

relating to secret processes or methods of manufacture or production obtained in the course of an inspection, investigation, or determination, shall be kept confidential and shall not be admissible in evidence in any court or in any other proceeding except before [NJDEP]. If samples are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person suspected of causing air pollution.

The recent amendments to APCA added the exception to confidential treatment of information for "actual or allowable air contaminant emissions."

Finally, N.J.S.A. 13:1D-9(d) provides, in relevant part, that NJDEP shall have the power to:

Enter and inspect any building or place for the purpose of investigating an actual or suspected source of pollution of the environment and ascertaining compliance or noncompliance with any codes, rules and regulations of [NJDEP].

NJDEP's specific inspection and entry requirements are set forth at N.J.A.C. 7:27-1.31 and 7:27-22.16(g) (9) and are consistent with 40 CFR § 70.6(c) (2).

VIII. INCORPORATION OF ALL APPLICABLE REQUIREMENTS INTO PERMIT

State law provides authority to incorporate into an operating permit; upon issuance or renewal, all applicable requirements as defined in 40 CFR § 70.2.

Federal Authority: CAA §§502(b)(5)(C), 504(a), 42 U.S.C. §§7661a(b)(5)(C), 7661c(a); 40 CFR §§70.4(b)(3)(v), 70.6(a).

Citation of State Laws and Regulations; Remarks of the Attorney General:

See discussion at Part I above. N.J.A.C. 7:27-22.16(a)-(e) requires that all applicable requirements be incorporated into operating permits.

IX. PERMIT REOPENING

State law provides authority to revise operating permits to incorporate new applicable requirements which become effective after issuance of the permit. State law provides authority to reopen permits when additional acid rain requirements become applicable, regardless of the remaining permit term. State law provides authority

to terminate, modify, or revoke permits for cause at any time during the permit term consistent with 40 CFR §§ 70.7(f) and (g).

Federal Authority: CAA §§ 502(b)(5)(D), 502(b)(9), 42 U.S.C. §§7661a(b)(5)(D), 7661a(b)(9); 40 CFR §§70.4(b)(3)(vi), 70.6(a)(6)(iii), 70.7(f)-(g).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The statutory authority to reopen, revise, terminate, modify, or revoke permits is part of NJDEP's broad regulatory powers discussed at Part I above. Additional authority is found at N.J.S.A. 26:2C-9(h), P.L. 19 , C. , §3, (quoted at Section I, above) and at N.J.S.A. 26:2C-9.2(c)(7), P.L. 19 , C. , §4, which provision is quoted at Section V, above. The ability to issue or revoke a permit implies the ability to take the lesser actions of reopening, revising, modifying, or terminating the permit.

This statutory authority is implemented by N.J.A.C. 7:27-22.25 which provides that NJDEP shall revoke, or reopen and modify a permit for cause unless the permittee voluntarily acts to resolve the issue which is the subject of the revocation or reopening. The section contemplates that some permittees might voluntarily act to have new applicable requirements incorporated into their operating permits and that it might be possible to incorporate some of those new requirements through procedures less burdensome than a significant modification, e.g., through a minor modification procedure. This is consistent with the letter and spirit of 40 CFR 70.7(f) because N.J.A.C. 7:27-22.25(g) ensures that, regardless of whether the permittee voluntarily acts to incorporate the applicable requirement, the Department will have the requirement incorporated into the permit within 18 months of the requirement's promulgation.

X. OPERATIONAL FLEXIBILITY

State law provides authority to issue permits which allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of Title I of the CAA, and the changes do not exceed the emissions allowable under the permit, provided that the source provides at least 7 days' written notice to the State and to the EPA. State law provides authority for permits to include terms and conditions for reasonably anticipated, alternative operating scenarios in permits.

Federal Authority: CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10); 40 CFR 70.4(b)(12), 70.6(a)(9).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to issue such permits is part of NJDEP's broad regulatory powers discussed at Part I above. NJDEP's specific

requirements are set forth at N.J.A.C. 7:27-22.27 (operating scenarios) and at N.J.A.C. 7:27-22.22 (7-day notice changes). In N.J.A.C. 7:27-22.22, NJDEP satisfies the requirement of allowing changes that would not constitute a Title I modification by identifying the specific changes that it would allow to be made as a 7-day notice change.

XI. PERMIT MODIFICATIONS

State law provides authority to process permit modifications in a manner that conforms to, or is substantially equivalent to, the procedures set forth under 40 CFR § 70.7(e).

Federal Authority: CAA §502(b)(6), 42 U.S.C. §7661a(b)(6); 40 CFR §§70.4(b)(13), 70.7(e).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to process permit modifications is part of NJDEP's broad regulatory powers discussed at Part I above. NJDEP's specific requirements are set forth at N.J.A.C. 7:27-22.23 and 7:27-22.24. NJDEP identifies those changes which qualify as either minor modifications or significant modifications at N.J.A.C. 7:27-22.23(c) and -22.24(b), respectively.

XII. PUBLIC PARTICIPATION

State law provides authority for procedures to allow public participation in NJDEP's action to issue or deny an operating permit, to modify a permit [except as provided in 40 CFR §§ 70.7(e)(2) and (3)], or to renew a permit. Public participation under State law includes the opportunity for public comment and the opportunity for a hearing on draft permits in accordance with the requirements of the CAA and 40 CFR § 70.7(h). State law provides authority to allow affected States to review permit applications in accordance with the CAA and 40 CFR § 70.8(b).

Federal Authority: CAA §§ 502 (b) (6), 505 (a) (2), 42 U.S.C. §§ 7661a(b)(6), 7661d(a)(2); 40 CFR §§ 70.7(h), 70.8(b).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to allow public participation in NJDEP's actions to issue or deny an operating permit, to modify a permit (except as provided in 40 CFR §70.7(e)(2) and (3)) or to renew a permit is part of NJDEP's broad regulatory powers discussed at Part I above. NJDEP's specific requirements are set forth at N.J.A.C. 7:27-22.11.

XIII. PUBLIC ACCESS TO PERMIT INFORMATION

State law provides authority to make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report, except for information entitled to confidential treatment. State law provides that the contents of an operating permit shall not be entitled to confidential treatment.

Federal Authority: CAA §§ 114(c), 502(b) (8), 503(e), 42 U.S.C. §§ 7414(c), 7661a(b) (8), 7661b(e); 40 CFR § 70.4(b) (3) (viii).

Citation of State Laws and Regulations; Remarks of the Attorney General:

As discussed at Part I, above, NJDEP is authorized by N.J.S.A. 26:2C-9 to require the registration of persons whose activities may cause air pollution. As part of that registration, NJDEP is authorized to require the filing of information and reports relative to the activities of that source. NJDEP's operating permit regulation requires the submission of the above type of information to NJDEP as part of the operating permit application, unless the applicant asserts a claim that the information is entitled to "confidential treatment" in accordance with N.J.A.C. 7:27-1.8 through 1.30, NJDEP's business confidentiality rules, which are generally consistent with EPA's Part 2 regulations. N.J.A.C. 7:27-22.3(r) sets forth the specific requirements regarding public accessibility to operating permit documents.

The New Jersey Right To Know Law, codified at N.J.S.A. 47:1A-2, states that "all records which are required by law to be made, maintained or kept on file by any agency ... shall be deemed to be public records...." The above described regulation is consistent with this law.

XIV. ENFORCEMENT OF PERMIT PROGRAM REQUIREMENTS

State law provides civil and criminal enforcement authority for violations of the APCA and its implementing regulations. This includes authority to recover penalties and fines in a maximum amount of \$10,000 per day per violation.

Federal Authority: CAA § 502(b) (5) (E), 42 U.S.C. § 7661a(b) (5) (E); 40 CFR §§ 70.4(b) (3) (vii), 70.11.

Citation of State Laws and Regulations; Remarks of the Attorney General:

The APCA provides NJDEP with the authority to seek "injunctive or any other appropriate relief to prohibit and prevent" violations of "[APCA] or any code, rule, regulation or order adopted or issued pursuant to [APCA]" by civil action in a court of competent jurisdiction. N.J.S.A. 26:2C-19(a); P.L. 19 , c. , §9. There is

no requirement that a permit be revoked prior to taking the above action.

As to the assessment of civil penalties, the APCA gives NJDEP authority to impose civil administrative penalties for violation of "[APCA], any code, rule, regulation or order adopted or issued pursuant thereto" as follows: "not more than \$10,000 for the first offense, not more than \$25,000 for the second offense, and not more than \$50,000 for the third and each subsequent offense." N.J.S.A. 26:2C-19(b) (as slightly amended by P.L. 19 , c. , §9.) For violations of a continuing nature, "each day during which it continues shall constitute an additional, separate and distinct offense." Ibid.

In addition, the APCA provides that "any person who violates the provisions of [APCA] or any code, rule, regulation or order adopted or issued pursuant thereto, or a court order issued pursuant to [APCA] or who fails to pay a civil administrative penalty in full pursuant to [APCA], is subject, upon order of the court, to a civil penalty" in the same amounts per offense as described above for civil administrative penalties. N.J.S.A. 26:2C-19d.

As to criminal penalty authority, the APCA provides that any person who purposely or knowingly violates "the [APCA], or any code, rule, regulation, administrative order, or court order adopted or issued pursuant thereto" is guilty of a crime of the third degree, and any person who recklessly violates any of the preceding provisions is guilty of a crime of the fourth degree. N.J.S.A. 26:2C-19(f)(1) and (4). If convicted of a crime of the third degree, a violator may be required to pay a fine of up to \$7,500, and may be sentenced to imprisonment for a term of between three (3) and five (5) years. N.J.S.A. 2C:43-3(b) and -6(a)(3). If convicted of a crime of the fourth degree, a violator may be required to pay a fine of up to \$7,500, and may be sentenced to imprisonment for a term of up to 18 months. N.J.S.A. 2C:43-3(b) and -6(a)(4).

P.L. 19 , c. , §9 provides the State with the additional criminal penalty authority required by Title V and Part 70. Specifically, N.J.S.A. 26:2C-19 has been supplemented to include the following:

f. Any person who:

(1) (discussed above);

(2) purposely or knowingly violates any federally mandated air pollution control requirement, any operating permit condition, or any fee or filing requirement imposed in connection with an operating permit is guilty of a crime of the third degree, the sentence for which may include, notwithstanding the provisions of N.J.S. 2C:43-3, an enhanced fine of \$10,000 per day per violation;

(3) purposely or knowingly makes any false material statement, representation, or certification in any form, notice, statement or report required in connection with an operating permit, or who purposely or knowingly renders inaccurate any monitoring device or method required by an operating permit, is guilty of a crime of the third degree the sentence for which may include, notwithstanding the provisions of N.J.S. 2C:43-3, an enhanced fine of \$10,000 per day per violation;

XV. AUTHORITY TO ENFORCE LAPSED PERMITS

State law provides authority to enforce the terms and conditions of a permit which has expired, if the source has filed a timely and complete application for renewal, so as to assure compliance with all applicable requirements.

Federal Authority: CAA § 502(b)(5)(A), 42 U.S.C. § 7661a(b)(5)(A); 40 CFR § 70.4(b)(10).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to enforce the terms and conditions of a permit which has expired is part of NJDEP's broad permitting authority discussed at Part I, above. The specific provision authorizing the enforcement of an expired permit is set forth at N.J.A.C. 7:27-22.30(j) which states that the expired operating permit will remain enforceable until the operating permit is reissued. A permit shield would apply to the renewal of a permit that has expired if the application for the renewal is determined by NJDEP to be administratively complete at least 12 months prior to the date that the operating permit expires. N.J.A.C. 7:27-22.30(g).

XVI. EPA PERMIT VETO

State law provides that an operating permit will not issue if the Administrator of EPA (or her designee) objects in a timely manner to its issuance pursuant to 40 CFR § 70.8(c) or, if the permit has been issued and the Administrator or her designee objects pursuant to 40 CFR § 70.8(d), a revised operating permit will not issue unless it satisfies the Administrator's objections.

Federal Authority: CAA §§ 502(b)(5)(F), 505(b), 42 U.S.C. §§ 7661a(b)(5)(F), 7661d(b); 40 CFR §§ 70.4(b)(3)(ix), 70.8(c) - (d).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The authority to either not issue a permit or to issue a revised permit due to EPA's objection is part of NJDEP's broad authority discussed at Part I above. The specific provisions which satisfy the requirements of 40 CFR §70.8(c) and (d) are set forth at N.J.A.C. 7:27-22.12.

XVII. FINAL AGENCY ACTION ON PERMITS

State law provides that, for the purposes of obtaining judicial review in State court for NJDEP's failure to take final action, "final permit action" shall include the failure of NJDEP to take final action on an application for a permit, permit renewal, or permit revision within the time specified in the State program for each type of application. (Note: If the State program allows sources to make changes using the minor permit modification process, the permitting authority's failure to take final action within 90 days of receipt of an application requesting a minor permit modification (or 180 days for minor modifications subject to group processing requirements) is subject to judicial review in State court.)

Federal Authority: CAA § 502 (b) (7), 42 U.S.C. §7661a(b) (7); 40 CFR §70.4(b) (3) (xi).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The APCA specifically provides that any final decision or action by NJDEP may be reviewed by procedure in lieu of prerogative writ. N.J.S.A. 26:2C-20. In addition, the New Jersey Courts have held that an action, in the nature of mandamus, will lie to compel the performance of ministerial duties. See our Opinion dated January 28, 1993 (copy attached) at page 16 for a discussion of relevant case law. The specific dates for issuance of permit decisions and other related requirements are set forth at N.J.A.C. 7:27-22.13.

XVIII. DEFAULT PERMIT ISSUANCE

State law does not authorize the issuance, modification, or renewal of any operating permit based on the passage of a specified time period when NJDEP has failed to take action on the application, and does not include any other similar provision providing for default issuance of a permit unless EPA has specifically waived the right of review for itself and affected States.

Federal Authority: CAA § 505(a)-(e), 42 U.S.C. § 7661d(a)-(e); 40 CFR §70.8(e)

Citation of State Laws and Regulations; Remarks of the Attorney General:

There is no requirement in New Jersey law that an initial operating permit, modification or renewal shall issue, regardless of NJDEP review status, once a specified amount of time has passed. As discussed at §XVII, above, a person's remedy to compel issuance of an operating permit, modification or renewal once the specified NJDEP review time set forth in the regulations has passed, is to compel action by NJDEP by action in lieu of prerogative writ or by a mandamus action. This principle is reflected at N.J.A.C. 7:27-22.32(e).

XIX. OPPORTUNITY FOR JUDICIAL REVIEW OF PERMIT ACTIONS

State law provides an opportunity for judicial review in State court of any final permit action by the applicant, any person who participated in the public-participation process provided pursuant to the CAA and 40 CFR § 70.7(h), or any other person who could obtain judicial review of such actions under State laws. Any provisions of State law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

Federal Authority: CAA § 502 (b) (6), 42 U.S.C. § 7661a(b) (6); 40 CFR § 70.4(b) (3) (x).

Citation of State Laws and Regulations; Remarks of the Attorney General:

The permit applicant is entitled to judicial review of a final permit action by the Department, initially in an administrative forum (Office of Administrative Law) by request for an adjudicatory hearing pursuant to N.J.S.A. 52:14B-9, as implemented at N.J.A.C. 7:27-8.12 and -22.32, and ultimately through an appeal "as of right" to state court; specifically, the Superior Court, Appellate Division pursuant to New Jersey COURT RULES R. 2:2-3(a) (2).

Persons who took part in the public participation process for a permit and all other persons who wish to seek judicial review of a final permit action are entitled to seek such review in the Superior Court, Appellate Division pursuant to R. 2:2-3(a) (2). The APCA also authorizes such persons to seek review of any final decision or action of NJDEP by an action in lieu of prerogative writ. See N.J.S.A. 26:2C-20. As discussed in our opinion of January 28, 1993 at pages 15-16, the New Jersey courts have taken a liberal view of standing issues. See those pages for a discussion of relevant case law.

As discussed at Section XVII, above, N.J.A.C. 7:27-22.13(c) specifies that applicants and persons who have commented on the draft operating permit during the public comment period, are entitled to bring an action to compel NJDEP to take final action on the application.

XX. LIMITATIONS ON JUDICIAL REVIEW

State law provides that the opportunity for judicial review of a final permit action in State court described in paragraph XIX of this opinion shall be the exclusive means for obtaining judicial review of the terms and conditions of permits. State law provides that petitions for judicial review must be filed no later than 45 days from the date of service of the final permit action. State law provides that where petitions for judicial review are based solely on grounds arising after the 45 day deadline for judicial review, such petitions may be filed no later than 45 days from the final action taken by NJDEP based upon the new grounds. State law further provides that if the final permit action being challenged is NJDEP's failure to take final action, a petition for judicial review may be filed at any time before NJDEP denies the permit or issues the final permit.

Federal Authority: CAA § 502 (b) (6), 42 U.S.C. §7661a(b)(6); 40 CFR § 70.4(k)(3)(xii).

Citation of State Laws and Regulations; Remarks of the Attorney General:

N.J. COURT RULES, R. 2:4-1(b) requires that appeals from final decisions or actions of state administrative agencies, including NJDEP, "shall be taken within 45 days from the date of service of the decision or notice of the action taken." This requirement applies equally to petitions seeking judicial review filed by permittees as well as other persons. The right to seek judicial review of NJDEP final permit action is reflected at N.J.A.C. 7:27-22.32. N.J.A.C. 7:27-22.13(c) sets forth that permit applicants and/or persons who commented during the public participation process can seek judicial review of NJDEP's failure to take final permit action if NJDEP has not acted within the deadlines set forth at N.J.A.C. 7:27-22.13(a).

XXI. COORDINATION WITH ACID RAIN PROGRAM REQUIREMENTS

State law is consistent with, and cannot be used to modify, the Acid Rain Program requirements of 40 CFR part 72.

Federal Authority: CAA §§ 408(a), 506(b), 42 U.S.C. §§ 7651g(a), 7661e(b); 40 CFR §§ 70.4(b)(3)(xiii), 72.70(b), 72.72(a).

Citation of State Laws and Regulations; Remarks of the Attorney General:

At N.J.A.C. 7:27-22.29, NJDEP has adopted and incorporated the federal acid rain program set forth at 40 CFR Part 72, and any subsequent amendments thereto, by reference as part of New Jersey's operating permits program. Thus, state law is identical to the federal program. The authority for NJDEP to adopt the federal program is part of New Jersey's broad regulatory powers discussed at Part I, above. Such incorporation by reference is also permitted pursuant to

the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.
and the implementing regulations of the Office of Administrative Law
set forth at N.J.A.C. 1:30-1 et seq.

XXII. AUTHORITY FOR LOCAL/INTERSTATE PROGRAMS
(WHERE APPLICABLE)

NOT APPLICABLE.

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

Seal of Office
(if required)

By: _____

Catherine A. Tormey

Catherine A. Tormey

Deputy Attorney General

August 2, 1995
Date



ROBERT J. DEL TUFO
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DEPARTMENT OF LAW AND PUBLIC SAFETY
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January 28, 1993

Commissioner Scott A. Weiner
NJDEPE
401 E. State Street
Trenton NJ 08625

Re: Federal Clean Air Act
Title V - Operating Permits
Agency Advice #92-0139

Dear Commissioner Weiner:

This letter will summarize our prior advice concerning whether the Department of Environmental Protection and Energy (DEPE) has the statutory authority to implement the various provisions of Title V of the 1990 Clean Air Act Amendments, 42 U.S.C. §7661 et seq. (Title V). We have advised you that except as set forth below (particularly relating to the issues of operating permit fees, the privilege associated with registration reports, and the Compliance Advisory Panel under the small business assistance program), it is our opinion that DEPE has the authority pursuant to the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., its general enabling legislation, N.J.S.A. 13:1D-1 et seq., and the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., to implement the programs required by Title V.

I. BACKGROUND

Unlike other permit programs administered by EPA and delegated to the states (e.g., the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act), prior to the 1990 amendments the Clean Air Act, 42 U.S.C. §7401 et seq. (CAA), did not require comprehensive "operating" permits for sources of air pollution. See, 1990 U.S. Code Cong. & Admin. News 3729. Section 501 of the 1990 amendments (codified at 42 U.S.C. §§7661 through 7661f), now mandates that states develop such a "whole operating permit" program and submit it to EPA by November 15, 1993. 42 U.S.C. §7661a(d). This "whole operating permit" program will require certain air pollution sources to obtain an operating permit as a condition of continued

operation. 42 U.S.C. §7661a(a). The operating permit program is, therefore, different from the existing air permit programs being implemented in New Jersey and on the Federal level, which basically require permits only for new or altered (or modified) sources. See, N.J.S.A. 26:2C-9.2; 42 U.S.C. §§7410(a)(2)(B) and (D), 7475(a), 7502(b)(6) and 7503.

In addition to creating a new permit program, Title V requires the establishment of an additional program, primarily to be implemented at the State level, which will provide assistance to small businesses in their efforts to comply with the various requirements of the CAA. See 42 U.S.C. §7661f. This new program is called the "small business stationary source technical and environmental compliance assistance program". Id.

A. Operating Permit Program

The air pollution sources covered by the Title V operating permit requirements basically include those sources defined as "major" sources, or as "affected" sources under the acid rain provisions of CAA Title IV. 42 U.S.C. §§7661 and 7661a(a). What is a "major" source in a particular state depends upon the degree of that state's non-attainment with the national ambient air quality standards (NAAQS). See, e.g., 42 U.S.C. §§7511a(c), (d) and (e) (ozone non-attainment), 7512a(c)(1) (carbon monoxide non-attainment), and 7513a(b)(3) (particulate matter non-attainment).

Title V specifies that the operating permit programs to be established by the states must include, at a minimum, the following elements:

- 1) permit application requirements;
- 2) requirements for monitoring and reporting of emissions;
- 3) requirements for the collection of fees from permittees, in aggregate amounts sufficient to cover the costs of developing and administering the operating permit program;
- 4) requirements for adequate personnel and funding;
- 5) requirements for the issuance and termination of the permits, and for enforcement of permit obligations including civil and criminal penalties for violations of permit provisions;
- 6) appropriate requirements for the processing and issuing of permit applications and permits, including requirements for public notice and comment and for judicial review of permit actions;

- 7) requirements for judicial review of a state's failure to timely act on permit applications;
- 8) requirements for public review of permit applications, compliance plans, permits, and monitoring or compliance reports;
- 9) provisions for revising permits to incorporate changes in emission standards and regulations; and
- 10) requirements to allow minor changes to a covered source without the need to apply for a permit amendment. 42 U.S.C. §§7661a(b)(1) through (10).

Operating permits are required to include enforceable emission limitations and standards, schedules of compliance, monitoring and reporting requirements, inspection and entry requirements, and any other conditions necessary to ensure the permittee's compliance with the CAA and the applicable state implementation plan (SIP). 42 U.S.C. §7661c(a) and (c). A state may issue a single permit for a facility with multiple sources, or may issue a general permit covering numerous similar sources. 42 U.S.C. §§7661a(c) and 7661c(d).

In effect, the operating permit program, as set forth in 42 U.S.C. §§7661 through 7661e, appears designed to require that all the CAA and SIP requirements applicable to a particular air pollution source be contained in a single document, rather than in the multitude of places the requirements are currently found (e.g., in Federal and state statutory language, in Federal and state regulations, in the applicable SIP, in any applicable consent orders). The Senate Report accompanying the 1990 Clean Air Act Amendments states that two of the benefits of the Title V program are that it "will clarify and make more readily enforceable a source's pollution control requirements," and that it "will ensure that all of a source's obligations with respect to each of the air pollutants it is required to control will be contained in one permit document." 1990 U.S. Code Cong. & Admin. News 3730. The Senate Report also indicates that the operating permit itself does not have to contain all the applicable requirements, but may incorporate by reference air pollution requirements from other sources. *Id.* When implemented, this program should clearly enhance a state's ability to enforce the various requirements applicable to a particular facility, resulting in increased compliance and a concomitant air quality benefit.

In addition to the above, the states are required to transmit a copy of each application for an operating permit, and a copy of each proposed and final operating permit to EPA for its review. 42 U.S.C. §7661d(a)(1). The state must also

provide notice and an opportunity to comment to each contiguous state whose air quality may be affected, and to each state which is within 50 miles of the air pollution source. 42 U.S.C. §7661d(a)(2). If EPA objects to the issuance of an operating permit, the state must revise and resubmit the proposed permit to EPA. 42 U.S.C. §7661d(b)(1) and (3). If a contiguous or nearby state submits recommendations regarding the issuance of the permit, then the state issuing the permit must provide in writing the reasons that it did not accept the recommendations from the other state. 42 U.S.C. §7661d(a)(2).

Title V further states that copies "of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit" shall be available to the public. 42 U.S.C. §7661b(e). If the information required to be submitted by an applicant constitutes a trade secret, the information may be submitted by the applicant separately and must be kept confidential. 42 U.S.C. §§7414(c) and 7661b(e). The contents of the permit itself are not entitled to confidential treatment. 42 U.S.C. §7661b(e).

Title V explicitly provides that nothing contained therein shall be interpreted as altering the CAA's pre-construction or modification permit requirements, or as preventing a state from establishing additional permitting requirements "not inconsistent with" the CAA. 42 U.S.C. §§7661a(a) and 7661e(a).

B. Small Business Assistance Program

In addition to the operating permit program requirements contained in 42 U.S.C. §§7661 through 7661e, Title V contains the requirement that each state establish a "small business stationary source technical and environmental compliance assistance program" (small business program). 42 U.S.C. §7661f(a). This small business program, which applies to all of the Clean Air Act requirements and not just the Title V operating permit requirements, is to be part of the state implementation plan revisions which must be submitted to EPA by November 15, 1992. *Id.* "Small business stationary sources" are essentially those that have 100 or fewer employees, and are not "major" sources of air pollution, although both EPA and the states have the authority to exempt certain categories of sources. 42 U.S.C. §7661f(c).

The small business assistance programs to be implemented by the states must include the following:

- (1) mechanisms for developing, collecting, and coordinating information concerning compliance methods and technologies for small business sources, and programs to encourage cooperation among such sources to further compliance with the CAA;
- (2) assistance to small business sources regarding pollution prevention and accidental release detection and prevention;
- (3) a designated ombudsman for such sources in connection with the implementation of the CAA;
- (4) assistance to small business sources in determining the applicable CAA requirements and in receiving CAA permits in a timely and efficient manner;
- (5) adequate notice to such sources of their rights under the CAA, providing adequate time for such sources to evaluate compliance methods and any proposed or final regulations or standards;
- (6) mechanisms for informing such sources of their obligations under the CAA, including conducting audits of the operations of such sources to determine compliance with the CAA, or for referring such sources to qualified auditors; and
- (7) procedures for considering requests from such sources to modify their work practices or technological methods of compliance, or associated implementation schedules, based on the technological and financial capabilities of such source. 42 U.S.C. §7661f(a)(1) through (7).

The state may reduce any fee required under the CAA to take into account the financial resources of small business stationary sources. 42 U.S.C. §7661f(f).

In addition to establishing a small business assistance program which meets the above requirements, each state is required to establish a Compliance Advisory Panel. 42 U.S.C. §7661f(e)(1). The functions of the Panel are to:

- (1) render advisory opinions regarding the effectiveness of the small business program, any difficulties that are encountered, and the degree and severity of enforcement;
- (2) periodically report to the EPA regarding compliance of the small business assistance program with the requirements of the Federal Paperwork Reduction Act (44 U.S.C. §3501 et seq.), the Regulatory Flexibility Act (5 U.S.C. §601 et seq.), and the Equal Access to Justice Act;

- (3) ensure that information for small business sources is understandable. 42 U.S.C. §7661f(e)(1)(A) through (C).

The small business assistance program established by the state is to act as the secretariat for the development and distribution of the Panel's reports and advisory opinions. 42 U.S.C. §7661f(e)(1)(D).

The Panel must consist of not less than seven individuals. 42 U.S.C. §7661f(e)(1). These seven individuals shall be selected as follows: two (2) individuals, selected by the Governor to represent the general public, who are not owners or representatives of owners of small business stationary sources; four (4) individuals, selected by the state legislature, who are owners or who represent owners of such sources; and one individual selected by the state air pollution control agency, to represent the agency. 42 U.S.C. §7661f(e)(2)(A) through (D).

II. STATE AUTHORITY TO IMPLEMENT OPERATING PERMIT AND SMALL BUSINESS ASSISTANCE PROGRAMS IN NEW JERSEY

As a general matter, the powers of an administrative agency such as the Department are derived from authority delegated to it by the Legislature in the form of enabling statutes. As such, administrative agencies have limited jurisdiction, and actions of an agency which are beyond the jurisdictional limits of its enabling statutes are ultra vires and void. Swede v. City of Clifton, 22 N.J. 303, 312 (1956); D.S. v. Board of Educ. of East Brunswick Tp. Bd. of Ed., 188 N.J. Super. 592, 597 (App. Div. 1983), certif. den. 94 N.J. 529 (1983).

However, administrative agencies have been held to have such implied or incidental authority as is reasonably necessary or appropriate to make the grant of express powers effective. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). The absence of express statutory authority in enabling legislation will not be held to preclude agency action where, by reasonable implication, that action can be said to promote or advance policies and findings that served as driving forces for enactment of the legislation. A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't, 90 N.J. at 683-84. In addition, where an agency is concerned with protection of public health and welfare, the grant of authority is to be liberally construed so as to enable it to accomplish the Legislature's goals. Barry v. Arrow Pontiac, Inc., 100

with all applicable requirements of the CAA and the requirements of 40 CFR Part 70 (other than those requirements specifically identified in other portions of this opinion).

Federal Authority: CAA §§ 129(e), 502(a)-(b), 504(a), 42 U.S.C. §§7429(e), 7661a(a)-(b), 7661b, 7661c(a); 40 CFR §§70.4(b)(3)(i), 70.4(b)(3)(iv), 70.5(a), 70.6, 70.7(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date; Remarks of the Attorney General:

As set forth in our opinion of January 28, 1993 (a copy of which is attached to this opinion as Exhibit 1), the APCA (including recently passed amendments and supplements thereto set forth at P.L. 19 , c. , signed by Governor Christine Todd Whitman on August 2, 1995) grants NJDEP broad authority to regulate air pollution, which authority includes the implicit or incidental authority to issue the operating permits required by Title V of the CAA and 40 CFR Part 70 (with the exception of those requirements specifically identified in other portions of this opinion). Of particular import are N.J.S.A. 26:2C-8, authorizing NJDEP to promulgate rules "preventing, controlling and prohibiting air pollution;" N.J.S.A. 26:2C-9(c), which authorizes NJDEP to "require the registration of persons engaged in operations that may result in air pollution;" and N.J.S.A. 26:2C-9(h), recently enacted by P.L. 19 , c. , §3, which authorizes NJDEP to:

h. Issue, renew, reopen, and revise operating permits, and require any person who is required to obtain an operating permit under the provisions of the federal Clean Air Act to obtain an operating permit and to certify compliance therewith for all air pollution sources;

The relevant portions of the APCA were originally adopted and effective prior to November 15, 1993, with amendments and supplements recently passed, as noted above. Those recent amendments will be noted in this opinion, as appropriate.

N.J.A.C. 7:27-22, originally adopted on September 1, 1994, effective on October 3, 1994 and operable on October 31, 1994, implements that authority as to the operating permits required by Title V and Part 70. That regulation, sometimes known as "Subchapter 22," was recently amended and supplemented by DEP to include requirements regarding operating flexibility, public input in the permit review process, modeling and risk assessment, MACT and GACT standards, emissions averaging, permit renewals and fees. Those amendments and new rules were adopted on August 2, 1995, will become effective upon publication in the New Jersey Register on or before

Unless otherwise indicated, and except for N.J.A.C. 7:27-22, all other legal authorities cited in this opinion similarly were enacted and effective prior to November 15, 1993.

N.J. 57, 70 (1985); N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79 (1980) (citations omitted).

The Department's primary authority* to implement the various requirements of the CAA, including the Title V operating permit and small business assistance programs, stems from the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq. (APCA). The APCA grants the Department very broad authority to regulate air pollution in the State. The APCA states that the Department "shall have power to formulate and promulgate, amend and repeal codes and rules and regulations preventing, controlling and prohibiting air pollution throughout the State...." N.J.S.A. 26:2C-8. This broad grant of authority to handle the serious problem of air pollution has been recognized and accepted by the New Jersey courts. See, e.g., N.J. Dep't of Health v. Roselle, 34 N.J. 331, 347 (1961) (the Department is given "wide powers to meet the pressing dangers of air pollution"); Matter of Adoption of Amendments to N.J.A.C. 7:27-16, 244 N.J. Super. 334, 340-41 (App. Div. 1990) (upholding regulations limiting volatile organic substance emissions from automobile refinishing activities); Dept. of Health v. Concrete Specialties, Inc., 112 N.J. Super. 407, 410 (App. Div. 1970) ("[t]he Legislature has decreed in no uncertain terms that air pollution is to be stopped...."); Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104, 109, 111-12 (App. Div. 1969) (the Department has been granted "broad powers to abate the air pollution menace to public health") (upholding regulations limiting the sale and/or use of coal containing sulphur).

The APCA was "[t]he first legislation attacking the air-pollution menace in this State on a comprehensive basis...." Shamoon Indus. Inc. v. Dept. of Health, N.J., 93 N.J. Super. 272, 275 (App. Div. 1966). As such, as a statute where the clear purpose is to protect the public health and welfare, the APCA "is entitled to a liberal construction for the accomplishment of its obvious beneficent objective." State v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 382 (App. Div. 1968) (citation omitted), aff'd per curiam, 53 N.J. 248 (1969). "The menace to public health by air pollution is so much a matter of common experience as properly to be a subject of judicial notice". Id. at 381 (citation omitted).

* As set forth later in this opinion, the Department also derives authority to implement the requirements of Title V from its enabling legislation, N.J.S.A. 13:1D-1 et seq., from the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., and from case law.

In order to implement and enforce the provisions of the various regulations it promulgates, the Department has been granted the further power to conduct and supervise research and educational programs, require the registration of and reporting by air pollution sources, enter and inspect actual or suspected sources of air pollution, institute legal proceedings for injunctive relief and the recovery of penalties, cooperate with and receive money from outside sources for the study and control of air pollution, and to charge fees ranging between \$10 and \$500 for any of the services it performs. N.J.S.A. 26:2C-9(a) through (g).

Although the broad powers of the Department in the area of air pollution are clearly established, the specific requirements mandated to be in the state programs by Title V must be examined to determine whether each of them are within the ambit of such broad powers.

III. ANALYSIS

A. Operating Permit Program

In analyzing the specific operating permit program requirements mandated by Title V, two fundamental and interrelated questions of the Department's authority arise: (1) do the "broad powers" granted by the Legislature in the APCA provide sufficient authority for DEPE to establish an operating permit system; and (2) does the language in N.J.S.A. 26:2C-9.2, establishing a pre-construction permit program, limit the Department's authority to establishing and implementing a permit system which will apply only to those air pollution sources which seek to install new equipment or alter existing equipment. See, N.J.S.A. 26:2C-9.2(a). Since many of the specific Title V program requirements are associated with or relate to the issuance of an operating permit, the resolution of these questions will dictate the answer concerning the Department's authority to implement many of these specific requirements.

After reviewing the legislative history and the purpose of the APCA, together with the specific language in N.J.S.A. 26:2C-9.2, it is our opinion that the Department is empowered to establish and implement an "operating permit" program, applicable to all sources of air pollution, and is not limited by the APCA to implementing a pre-construction permit and operating certificate program.

The APCA provides that DEPE is empowered to promulgate rules "preventing, controlling and prohibiting air pollution...." N.J.S.A. 26:2C-8. It is clear that the intent of the Legislature in enacting the APCA was to grant the Department broad powers to control the menace of air pollution, and the Act is to be interpreted liberally to accomplish this purpose. N.J. Dep't of Health v. Roselle, 34 N.J. at 347; Dept. of Health v. Concrete Specialties, Inc., 112 N.J. Super. at 410; Consolidation Coal Co. v. Kandle, 105 N.J. Super. at 109; State v. Owens-Corning Fiberglass Corp., 100 N.J. Super. at 382. The courts will accord substantial deference to the Department's interpretation of the APCA, since the Department is the agency charged with enforcement of the APCA. Matter of Pennsauken Solid Waste Mgt., 238 N.J. Super. 233, 251 (App. Div. 1990).

Pursuant to section 9(c) of the APCA, the Department has the authority to:

[r]equire the registration of persons engaged in operations which may result in air pollution and the filing of reports by them containing information relating to location, size of outlet, height of outlet, rate and period of emission and composition of effluent, and such other information as the department shall prescribe to be filed.... Registration reports filed with the department shall be privileged and not admissible in evidence in any court. N.J.S.A. 26:2C-9(c).

The Department has historically interpreted a grant of authority to require "registration" as equivalent to a permitting program, empowering it to make registration a condition of continued operation, and empowering it to disapprove of an application for registration. For example, the Department has since 1970 required solid waste collection and disposal facilities and operations to have operating permits based upon the requirement of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., that such facilities and operations file a "registration statement." N.J.S.A. 13:1E-5(a). This is consistent with the definition of "license" in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., which includes "permit" and "registration" as being synonymous with "license." N.J.S.A. 52:14B-2(f). Indeed, the information which section 9(c) of the APCA allows DEPE to require is similar to the types of information that presumably will be required as part of the operating permit program

mandated by Title V, e.g., applications including detailed information on an air pollution source's facility and equipment, emission types and rates, etc., and compliance and monitoring reports. See, 42 U.S.C. §§7661a(b)(1) and (2), 7661b, and 7661c(a) and (b). In addition, given the liberal construction and substantial deference accorded by the Courts, the "preventing, controlling and prohibiting" language in N.J.S.A. 26:2C-8 clearly supports the interpretation that the Department is authorized to implement an operating permit program.

Section 9.2 of the APCA (which was added to the Act by the 1967 amendments) mandates that anyone seeking to construct, install or alter any equipment or control apparatus, or to operate any such new or altered equipment or control apparatus, must first obtain an installation or alteration permit and an operating certificate from the Department. N.J.S.A. 26:2C-9.2. Specifically, in pertinent part section 9.2 provides that

- (a) [n]o person shall construct, install or alter any equipment or control apparatus...until an application including plans and specifications has been filed with the department and an installation or alteration permit issued by the department, in accordance with any codes, rules and regulations of the department except that subject to any such codes, rules and regulations the department may dispense with the filing of applications, plans and specifications. Information relating to secret processes or methods of manufacture or production is exempted from the plans and specifications and other pertinent information to which the department is entitled under this section.
- (b) No person shall use or cause to be used any such new or altered equipment or control apparatus for which an installation or alteration permit is required or issued until an operating certificate has been issued by the Department. N.J.S.A. 26:2C-9.2(a) and (b).

Section 9.2 sets forth additional requirements and departmental authority regarding issuance of an operating certificate, including that the equipment must incorporate "advances in the art of air pollution control," that the Department may require the conducting of emissions testing prior to issuing an operating certificate, that the operating

certificates are to be issued for a period of five (5) years unless sooner revoked by Departmental order, and that the Department may issue a temporary operating certificate for a period of up to ninety (90) days. N.J.S.A. 26:2C-9.2(c)(1) through (3). The Governor's statement accompanying the permit and certificate amendments to the APCA states that a "significant contribution of [L.1967, c.106] is the establishment of a permit and operation certificate system of prior approval by the State for the construction or installation of equipment which may potentially pollute the atmosphere." Statement by Governor Richard J. Hughes on Signing the Air and Water Pollution Bills, June 15, 1967, p.1. The purpose of the permit and certificate requirements was to afford the Department knowledge of new or altered equipment capable of exacerbating air pollution before the potential for pollution was realized, in order to permit adequate controls. State, Dept. Env. Pro. v. Midland Glass Co., 145 N.J. Super. 108, 116 (App. Div. 1976).

Because of this explicit language in the APCA regarding a permit and certificate program for new or altered equipment, the question which arises is whether this language precludes the establishment of, or evidences a legislative intent that the Department does not have the power to establish, a more comprehensive "operating permit" program for all potential air pollution sources. The applicable principle of statutory construction in this context is the doctrine referred to as expressio unius est exclusio alterius, meaning that the express mention of one thing implies the exclusion of another. Gangemi v. Berry, 25 N.J. 1, 11 (1957); Masel v. Paramus, 180 N.J. Super. 32, 41 (App. Div. 1981); Squires v. Atlantic Cty. Freeholder Bd., 200 N.J. Super. 496, 503 (Law Div. 1985). However, this maxim is merely an aid to interpretation, and is to be used with great caution. Resnick v. E. Brunswick Tp. Bd. of Ed., 77 N.J. 88, 99 (1978); Reilly v. Ozzard, 33 N.J. 529, 539 (1960); Gangemi v. Berry, 25 N.J. at 11; Masel v. Paramus, 180 N.J. Super. at 41; Esso Standard Oil Co. v. Holderman, 75 N.J. Super. 455, 471 (App. Div. 1962), aff'd 39 N.J. 355 (1963), app. diss. sub. nom. Humble Oil & Refining Co. v. Male, 375 U.S. 43 (1963). "The final question is whether in a given context an express provision with respect to a portion of an area reveals by implication a decision with respect to the remainder. The issue is one of intention. The answer resides in the common sense of the situation." Reilly v. Ozzard, 33 N.J. at 539.

We do not believe that the mention by the Legislature in N.J.S.A. 26:2C-9.2 of a mandatory permit and operating certificate program for new or altered sources precludes the

Department from establishing, or evidences a Legislative intent that the Department does not have the power to establish, a broader or more comprehensive permit program such as that contained in Title V. The language of section 9.2 which establishes a mandatory pre-construction permit system is directed at those persons who seek to install or alter equipment, and is not directed at the Department's powers to prevent, control or prohibit air pollution. N.J.S.A. 26:2C-9.2(a) provides that "[n]o person shall construct, install or alter any equipment or control apparatus" until an application has been filed and a permit issued by the Department. (Emphasis added). N.J.S.A. 26:2C-9.2(b) provides that "[n]o person shall use or cause to be used any such new or altered equipment or control apparatus...until an operating certificate has been issued by the department." (Emphasis added). Although section 9.2 does reference certain Department powers (e.g., the power to change application requirements, and the power to require emissions testing before the issuance of an operating certificate -- see, N.J.S.A. 26:2C-9.2(a) and (c)(1)), these references are in the context of implementing the legislatively-mandated permit and operating certificate requirements. Cf. Esso Standard Oil Co. v. Holderman, 75 N.J. Super. at 471.

The legislative history supports our opinion that the permit and certificate requirements were intended as a legislative mandate, requiring that a specific program be implemented, and not as any indication concerning the Department's authority. The Statement by Governor Hughes states that a "significant contribution of [L.1967;c:106] is the establishment of a permit and certificate system..." Statement by Governor Richard J. Hughes, June 15, 1967, p.1. (Emphasis added). This language contrasts with the language used in the Statement concerning two other bills signed by the Governor at the same time. Regarding Assembly Bill No. 677, Governor Hughes stated that "a construction grant program is established by this measure to enable the [Department] to match federal funds...." Id., p.2. (Emphasis added). In addition, regarding Assembly Bill No. 228, he stated that the Bill "provides for emergency air pollution alerts and grants power to the [Commissioner] to determine that an air pollution emergency may exist within the State or in a particular locality." Id. (Emphasis added).

Given that a permit program can be a very effective tool in the implementation or enforcement of a statutory scheme, that the Legislature in enacting the APCA was clearly intending that the Department have broad authority to control the menace of air pollution, and that the Legislature expressly

granted the authority to require registration, we do not believe that the Legislature intended by the enactment of section 9.2 to limit the Department's authority or discretion in this regard, or to imply that a permit program had not been among the potential tools at the Department's disposal in the original APCA.

With the fundamental questions regarding the Department's authority to establish and implement a "whole operating permit program" resolved, the question of the Department's authority to implement specific Title V operating permit requirements can be addressed. As previously stated, the question of the Department's statutory authority regarding many of these various requirements was dependent upon the resolution of these fundamental issues. In general, except as specifically set forth below, it is our opinion that the Department has sufficient authority to implement or to satisfy the various operating permit program requirements set forth in 42 U.S.C. §7661 through 7661e.

Regarding the mandatory Title V program element dealing with requirements for: permit applications (42 U.S.C. §7661a(b)(1)); monitoring and reporting (§7661a(b)(2)); issuance and termination of permits (§7661a(b)(5)(A) through (D), and (F)); review and processing of permit applications, providing public notice and opportunity for public comment and public hearings (§7661a(b)(6)); permit revisions to incorporate changes in emission standards and regulations (§7661a(b)(9)); changes not requiring a permit or revision (§7661a(b)(10)); and including in an operating permit enforceable emission limitations and standards, a schedule of compliance, and periodic reporting of emissions (§7661c(a)), it is our opinion that these requirements are clearly authorized by the Department's broad general authority to promulgate regulations "preventing, controlling and prohibiting air pollution," N.J.S.A. 26:2C-8, and by its specific authority to require the registration of potential air pollution sources and the filing of reports by such registrants, N.J.S.A. 26:2C-9(c). We believe these cited authorities also encompass the ability to issue a single permit for a facility with multiple sources, or a general permit covering numerous similar sources (as allowed by 42 U.S.C. §§7661a(c) and 7661c(d)), and the requirements to transmit permit applications and proposed permits to nearby states and the EPA, and to revise and resubmit the proposed permits in accordance with any EPA objections. 42 U.S.C. §§7661d(a) and (b).

However, regarding the Title V requirement for public review of permit applications, compliance plans and monitoring

or compliance reports, 42 U.S.C. §§7661a(b)(8) and 7661b(e), we believe the language of N.J.S.A. 26:2C-9(c) will be interpreted as limiting public access to at least the latter of these documents, the monitoring or compliance reports. Section 9(c) provides that "[r]egistration reports filed with the department shall be privileged and not admissible in evidence in any court." N.J.S.A. 26:2C-9(c). We believe that because much of the submitted information must be treated as privileged, the Department will not be able to meet all the public review requirements of 42 U.S.C. §§7661a(b)(8) and 7661b(e).

Concerning the mandate for enforcement of permit obligations, Title V provides that the permitting authority must be able to "enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation, and provide appropriate criminal penalties." 42 U.S.C. §7661a(b)(5)(E). In our opinion, the APCA provides sufficient authority for the Department to implement these Title V enforcement mandates, subject to our concern, as discussed below, regarding the interpretation of the requirement for "appropriate criminal penalties." Provided that the Department's regulations are clear that the failure to pay a permit fee, obtain a permit, or comply with the terms of the permit are violations of the APCA, the Department is empowered to "institute a civil action...for injunctive or any other appropriate relief to prohibit and prevent" such violations. N.J.S.A. 26:2C-19(a). Further, any person who violates the Act is liable to either a civil penalty or a civil administrative penalty of "not more than \$10,000 for the first offense, not more than \$25,000 for the second offense, and not more than \$50,000 for the third and each subsequent offense." N.J.S.A. 26:2C-19(b) and (d).

Regarding the requirement to provide "appropriate criminal penalties," the APCA provides that any person who purposely or knowingly violates the Act is guilty of a crime of the third degree, and any person who recklessly violates the provisions of the Act is guilty of a crime of the fourth degree. N.J.S.A. 26:2C-19(f)(1) and (2). If convicted of a crime of the third degree, a violator may be required to pay a fine of up to \$7,500, and may be sentenced to imprisonment for a term of between three (3) and five (5) years. N.J.S.A. 2C:43-3(b) and -6(a)(3). If convicted of a crime of the fourth degree, a violator may be required to pay a fine of up to \$7,500, and may be sentenced to imprisonment for a term of up to 18 months. N.J.S.A. 2C:43-3(b) and -6(a)(4). All these would certainly appear to be "appropriate criminal penalties." Two potential problems arise, however. First, Title V does not

define "appropriate" criminal penalties, apparently leaving it to EPA to define the term. Whether the State's criminal penalties are "appropriate" will therefore depend upon EPA's interpretation. Second, the language of Title V appears to require that the "permitting authority," i.e., the Department, be able to pursue the criminal penalties. Title V provides that "the permitting authority [shall] have adequate authority to...provide appropriate criminal penalties...." 42 U.S.C. §7661a(b)(5). Under New Jersey's system, criminal actions are not pursued by the Department, but are pursued by a separate state agency, the Department of Law and Public Safety, in the name of the State. Since Title V also does not define the term "provide," whether New Jersey's system is sufficient to satisfy this requirement will depend upon EPA's interpretation of this Title V provision.

Title V establishes two requirements for state operating permit programs regarding judicial review. 42 U.S.C. §7661a(b)(6) requires that the state program include "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." Title V also requires that the state program provide that the failure of the permitting agency to act on a permit application or renewal within the specified time frame be considered final permit action, for the purposes of obtaining judicial review to require that action be taken by the agency without additional delay. 42 U.S.C. §7661a(b)(7). We believe that there exists sufficient authority for the Department to be able to satisfy both of these requirements.

In general, the New Jersey courts have taken a liberal view on the issue of standing. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 101 (1971); Elizabeth Federal S. & L. Assn. v. Howell, 24 N.J. 488, 500-01 (1957); Urban League of Essex Cty. v. Tp. of Mahwah, 147 N.J. Super. 28, 33 (App. Div. 1977), certif. den. 74 N.J. 278 (1977). The courts have routinely held that where an important public interest is involved even a slight private interest is sufficient to grant standing. Elizabeth Federal S. & L. Assn. v. Howell, 24 N.J. at 499; In re Waterfront Dev. Permit, 244 N.J. Super. 426, 437-38 (App. Div. 1990) (granting standing to a marine conservation group challenging the issuance of a waterfront development permit to a developer); North Bergen Tp. v. Jersey City, 232 N.J. Super. 219, 223 (App. Div. 1989). The New Jersey court rules provide that appeals may be taken to the Appellate Division as of right to review final agency actions. R. 2:2-3(a)(2). Further, the APCA specifically provides for

judicial review of any final decision or action by the Department, by an action in lieu of prerogative writs. N.J.S.A. 26:2C-20. Based upon the above, it is our opinion that New Jersey has sufficient authority to satisfy the judicial review requirements set forth in 42 U.S.C. §7661a(b)(6).

Regarding the Title V requirement for judicial review of the permitting authority's failure to act (42 U.S.C. § 7661a(b)(7)), we also believe there is sufficient authority to satisfy this requirement. The New Jersey Courts have held that an action, in the nature of mandamus, will lie to compel the performance of ministerial duties. Reid Development Court v. Parsippany-Troy Hills Tp., 10 N.J. 229, 237 (1952) ("[w]here there is an omission to do what the law clearly and unmistakably directs as an absolute duty, mandamus is an appropriate remedy"). See, also, Enertron Industries, Inc. v. Mack, 242 N.J. Super. 83, 89 (App. Div. 1990) (action to compel Spill Fund Administrator to submit claim to arbitration); Pfleger v. N.J. State Highway Dept., 104 N.J. Super. 289, 291-93 (App. Div. 1968) (action to compel Department of Transportation to institute condemnation proceedings); Colon v. Tedesco, 125 N.J. Super. 446, 455 (Law. Div. 1973) (complaint to compel Department of Labor to perform investigation).

Concerning the requirement for assessment of an annual fee against those who are subject to the operating permit requirements, Title V provides that the fees shall be "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer" the operating permit program. 42 U.S.C. §7661a(b)(3)(A). These costs are to include the costs of reviewing permit applications, enforcing permit terms and conditions, monitoring, preparing regulations, modeling and analysis, and preparing inventories and tracking emissions. 42 U.S.C. §7661a(b)(3)(A)(i) through (vi). Title V sets a presumption that the fees will at least be in the amount of \$25 per ton, and that the fees will be increased each year in accordance with the consumer price index. 42 U.S.C. §7661a(b)(3)(B)(i) and (v).

It is clear that the Department does not have the authority to satisfy the Title V requirements regarding fees. The APCA grants the Department the power to establish and charge fees for any of the services it performs, but limits those fees to a range of only \$10 to \$500 for the services performed. N.J.S.A. 26:2C-9(g). Department staff has indicated that even charging permittees the maximum of \$500 per service would be insufficient to enable the Department to recover all of its direct and indirect costs.