Enforcement and Permitting Coordination
Purpose

- Explore if there is a disconnect between enforcement and permits
- Discuss opportunities for better coordination
- Highlight “best practices” to ensure effective coordination
- Set the overall context for the workshop
Enforcement/Permitting

- Inextricably linked . . .

- Permits
  - Not just a license to operate
  - Establishes legal obligations of the source
  - Assures compliance
  - Notifies public of source’s obligations
  - Operations/environmental performance must be transparent
Enforcement/Permitting (cont’d)

- Enforceability should be a paramount concern
  - Clarity of Standards
    - notice to regulated community and public
  - Recordkeeping, Reporting, Monitoring

- National consistency and a level playing field are critical

- But . . . historic disconnect between permitting and enforcement?

- Why?
Coordination Disconnect?

- **Possible Reasons:**
  - Lack of familiarity with enforcement and permits policies?
    - Misunderstanding of commingling policies?
  - Policy framework for State/EPA Enforcement Agreements?
  - Enforcement has an adverse relationship with source?
  - Structural differences?
  - Competing priorities?

- **Concerned about the response from enforcement?**
  - Skunk-at-the-Garden Party?
Why an issue now?

- Some permits issued/sought in an “attempt” to paper over violations
- For example:
  - After-the-fact NSR permits issued for changes made years earlier
  - Permit “strategies” developed with source to evade NSR requirements (allowing a source to take minor status although actual emissions over major source thresholds)
  - Permit conditions modified or removed in response to ongoing enforcement (heat input, SO2)
  - Violations unaddressed when properly raised in the context of Title V reviews
Do structural differences matter?

- Not sure . . . .
- EPA
  - Unified division approach vs. separate division approach
- State/Local
  - Are there issues that thwart coordination? (e.g., independent departments -- Attorney General’s Office)
Where can enforcement and permits better coordinate?

- NSR permits
- Title V operating permits
- Applicability determinations
- Priorities
- SIP review and approval
- Rulemaking
- Citizen suits/Environmental Justice issues
NSR Permits and Challenges

- Do enforcement staff know of pending NSR permits, and NSR permit staff know of enforcement matters?
- Are the permitting and enforcement staffs exchanging information?
  - Note: No commingling
<table>
<thead>
<tr>
<th>NSR Permits and Challenges</th>
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<td>▪ Are the permit terms enforceable?</td>
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<td>▪ Do the permits assure compliance?</td>
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<td>▪ Are we objecting to permits that shield enforcement?</td>
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<td>▪ Are we taking permit enforcement actions?</td>
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Title V Permits and Petitions

- Do enforcement staff know of pending Title V matters, and Title V staff know of enforcement matters?
  - Compliance schedules
  - Placeholder language
  - Permit shield language
Title V Permits and Petitions

- Are the permitting and enforcement staff exchanging information?
  - Note: No commingling
- Are the permit terms enforceable?
- Does the petition present information meriting EPA action?
- Are we recognizing or inadvertently restructuring permit priorities in our enforcement settlements?
- Are there Environmental Justice issues?
Caution—Commingling Issues

- EPA has dual role –
  - Addressing non-compliance
  - Issuing permits
- Permit actions are adjudicatory in nature
  - Implicates due process
- Enforcement cannot unduly influence permitting decisions (fact specific)
- Enforcement officials may provide information to independent permit decision makers
Caution—Commingling Issues

**Recommendations:**

- Document significant interactions between enforcement and permit staff.
- Avoid having the same staff person be substantially involved in both enforcement and permit decisions (different for management).
- Avoid actions that could be perceived as unfairly biasing another office’s decision making authority.
Caution—Commingling Issues

- See:
  - Bethlehem Steel Corp. v. U.S. EPA, 638 F. 2d 994 (7th Cir. 1980)
  - Due Process Considerations Raised by Agency “Commingling” or Enforcement and Regulatory Functions (9/21/99)
Applicability Determinations

- Coordination within and between Regions is critical
  - NSPS delegation is with OECA and the Regions (consultation with OAR)
  - NSR delegation is with the Regions (consultation role for both OECA and OAR)
- Do the positions offered reflect the views of the Region, Division or staff?
- Do the positions represent enforcement and permits views?
Reconciling Priorities

- Do we have different priorities? Are they consistent, complementary, or conflicting?
- Do the Regions, States and Locals have different priorities?
  - Are they consistent, complementary, or conflicting?
- Are there reasons for differences (e.g., resource issues);
- Are the priorities coordinated between offices?
SIP Review and Approval

- Enforceability should be a paramount concern
  - Clarity of Standards (notice to regulated community)
  - Recordkeeping, Reporting, Monitoring
- Frequently implicate national enforcement policies
  - e.g., Excess Emissions/SSM, Credible Evidence, preconstruction activities before permits are issued
- Are you charting new territory?
  - SIP Consistency Policy
Rulemaking

- Do the comments you offer reflect the views of the Region, Division or staff?
- Do the positions represent enforcement and permits views?
Environmental Justice Issues

- EJ Communities play a role in both permits and enforcement
- EJ Office is located within OECA
- EJ issues include:
  - Public review/opportunity for meaningful input
  - Transparency
  - Reporting, recordkeeping, monitoring
- Are we communicating with EJ communities before we take action?
Regional/State/Local District Coordination

- The same principals for coordination between enforcement and permits apply to coordination between and amongst levels of government.
What are some “Best Practices” to Improve Coordination?

- Pick up the phone
- Have regular meetings
- Establish process to allow for coordination
- Highlight specific areas or issues of concern (e.g., NSR permits in non-attainment areas, enforcement priorities)
What are some “Best Practices” to Improve Coordination?

- Keep lines of communication open at all times
- Debate and discussion allow for critical thinking, and, hopefully . . .
  - better work product