INTERNATIONAL PAPER AND A BOILER FULL OF TIRES: THE TOO-PERMISSIVE PERMITTING SCHEME OF THE CLEAN AIR ACT'S TITLE V OPERATING PERMIT PROGRAM

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INTRODUCTION

On November 14, 2006, the International Paper Company (IP) concluded a test burn of tire-derived fuel (TDF) at its Ticonderoga Mill facility, which is located on the shores of Lake Champlain in Ticonderoga, New York.[1] The test, originally scheduled to last a full two weeks, ended after only five days when IP officials determined that the addition of TDF to IP's fuel mix was economically impracticable.[2] The move capped a three-year cross-border dispute between IP and Vermont residents and officials who argued that IP's use of TDF (and its failure to install the

1. *Tire Burn Called Off Before End of Scheduled Testing*, BOSTON GLOBE, Nov. 14, 2006, *available at* http://www.boston.com/news/local/vermont/articles/2006/11/14/tire_burn_called_off_before_end_of_scheduled_testing.

2. *Id.*

appropriate pollution-control technology) would significantly and unjustifiably increase air pollution in Vermont.[3]

The struggle between Vermont residents and IP seemed to take on a life of its own. It spawned lawsuits in both state and federal court[4] and challenges to permits granted by the New York Department of Environmental Conservation (NYDEC), which were allowed to stand by the United States Environmental Protection Agency (EPA).[5] Residents of the affected area in Vermont created their own advocacy group, People for Less Pollution, to fight IP's planned test burn.[6] Even state and federal political officials entered the fray, with Vermont officials denouncing the test burn and New York officials supporting it.[7] The public debate

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3. *Id.*

4. Opposition to IP's plans include challenges to the modification of its Clean Air Act Title V operating permit and challenges to the New York Department of Environmental Conservation's (NYDEC) classification of the test burn as a Type II action under the New York State Environmental Quality Act (SEQRA), which exempts the plan from comprehensive environmental review. On August 10, 2006, a New York court denied Vermont's SEQRA challenge. Vermont v. N.Y. Dep't of Envtl. Conservation, No. 01-05-ST6443, slip op. (N.Y. Sup. Ct. Aug. 2006) (dismissing the State of Vermont's petition to enjoin NYDEC from permitting the test burn and remanding the case back to NYDEC for a new determination of the environmental significance of the proposed burn). While the court did find that Vermont had standing to appeal the NYDEC decision under SEQRA, it found no error in the NYDEC's classification of the project as a Type II action requiring no comprehensive environmental review. *Id.* at 5–6, 9.

5. *See* Vt. Att'y Gen., Petition Requesting that the Administrator Object to the Issuance of the Proposed Title V Permit Modifications for the International Paper Ticonderoga Mill Facility at 1, 3, Int'l Paper Title V Permit (No. 5-1548-00008/00081) (N.Y. Dep't of Envtl. Conservation) [hereinafter Vermont Petition] *available at* http://www.epa.gov/rgytgrnj/programs/artd/air/title5/petitiondb/petitions/international_paper_petition2006.pdf (showing the Vermont Attorney General's objection to the permit modifications was based on the argument that the proposed tire burning is unlawful under Title V and § 401(2) of New York's State Administrative Procedures Act (SAPA) and would affect the "pristine quality of the air Vermonters breathe"). On September 11, 2006, the time frame lapsed for EPA to object to IP's proposed test burn and the NYDEC's permit was validated. VT. DEP'T OF ENVTL. CONSERVATION, INTERIM DRAFT REPORT, AIR QUALITY DATA AND OBSERVATIONS MADE IN VERMONT DURING THE NOVEMBER 2006 TRIAL BURN OF TIRE DERIVED FUEL AT THE INTERNATIONAL PAPER COMPANY, TICONDEROGA, NEW YORK 8 (2007) [hereinafter ANR, INTERIM REPORT].

6. Stephen Kiernan, *Burning Issue*, BOSTON GLOBE, Mar. 26, 2006, at 20, *available at* http://www.boston.com/news/globe/magazine/articles/2006/03/26/burning_issue/; *see also* People for Less Pollution, http://www.lesspollution.org (last visited Oct. 24, 2005) (providing a wealth of information about the IP test burn as well as more general information about TDF).

7. *See* Press Release, Sen. Patrick Leahy & Rep. Bernie Sanders, Leahy and Sanders Call on EPA to Reject IP Tire Burn (Aug. 31, 2006) (on file with Sen. Leahy) ("Allowing IP to begin burning tire-derived fuel without upgrading its emission control equipment is a very dangerous decision that could have serious consequences for Vermonters.") (quoting Rep. Sanders); Press Release, Governor Jim Douglas, Governor and Attorney General Announce Next Legal Action to Halt Proposed Tire Burn (Oct. 10, 2006) ("My resolve to pursue all available legal remedies is firm."). *But see, e.g.*, Letter from Rep. John E. Sweeney et al. to Denise M. Sheehan, Acting Comm'r, N.Y. Dep't Envtl. Conservation (Feb. 18, 2005) (on file with author) ("We are strongly committed to doing all we can to ensure that IP's

surrounding the IP test burn quickly devolved into that familiar dialogue which pits jobs and economics against environmental safeguards.[8]

Unfortunately, the overly simplistic public debate fails to reflect the many technical and nuanced issues raised by IP's test burn. One issue of fundamental importance is whether the air quality detriments of burning tires are outweighed by the land use benefits of disposing an ever-increasing number of discarded tires through energy-generating incineration.[9] Another basic issue involves the interplay between the specific fuel mix, the specific boiler type being used, and the emissions control technology employed on site.[10] These issues, among others, though critically important to the overall debate about the wisdom of using TDF, are reserved for another day. This Note will instead focus on a more discrete topic raised by IP's specific plan to burn TDF at the Ticonderoga Mill.

In order to begin its proposed TDF test burn, IP had to comply with both state and federal laws. Insofar as state law is concerned, IP had to comply with New York's State Environmental Quality Review Act (SEQRA).[11] The New York Supreme Court deferred to NYDEC's classification of the project as having no significant environmental impact and therefore requiring no further environmental review.[12] Although the SEQRA portion of the IP test burn raises significant state environmental law questions, this Note will instead focus on the federal aspect of the

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Ticonderoga mill continues to thrive and that they continue to provide hundreds of good paying jobs in Ticonderoga and the surrounding communities for generations to come.").

8. *See* Kiernan, *supra* note 6, at 19 ("Is this one more chapter of the familiar story, one more time that the only apparent avenue for protecting threatened jobs is to compromise a public resource? In part, yes.").

9. *E.g.*, JOEL I. REISMAN, AIR EMISSIONS FROM SCRAP TIRE COMBUSTION, at vii–x (1997); *see also* Ragnar E. Löfstedt, *Evaluation of Siting Strategies: The Case of Two UK Waste Tire Incinerators*, 8 RISK 63, 65–66 (1997) (discussing policy concerns regarding siting tire incinerators).

10. *See generally* RIESMAN, *supra* note 9 (comparing different types of tire incinerators and their respective air emissions). *See also* GREENPEACE TOXICS & INFORMATION UNIT, TIRE INCINERATION AND TOXIC EMISSIONS: NEW DATA FROM THE MODESTO INCINERATOR, WESTELY, CA, *available at* http://www.energyjustice.net/tires/files/greenpeaceletter/html (last visited Sept. 6, 2007) (arguing that data from test burns of TDF inadequately represent emissions during actual plant operations due to tighter control of predictable variables during the test burns).

11. N.Y. ENVTL. CONSERV. LAW §§ 8-0105(4), 8-0109(2) (McKinney 2005) (requiring an environmental impact statement for any "project or activities involving the issuance to a person of a . . . permit . . . for use or permission to act by one or more agencies."). SEQRA is essentially the New York State analogue to the National Environmental Policy Act (NEPA), in which the level of pre-project environmental review depends on the legal classification of the project.

12. Vermont v. N.Y. Dep't of Envtl. Conservation, No. 01-05-ST6443, slip op. at 8–9 (N.Y. Sup. Ct. Aug. 2006) ("The petitioner . . . pleads this Court to remand this case back to NYSDEC for further determination under SEQRA. This Court finds that the determination by NYSDEC was not arbitrary and capricious and fully complied with the requirements of SEQRA.").

controversy—whether NYDEC's issuance (and the EPA's tacit approval) of IP's Title V Clean Air Act operating permits were scrutinized and granted in a legally tenable manner. Thus, this Note seeks to examine the Title V permitting process through the lens of the IP test burn controversy. Such a high profile and high stakes case study provides a unique opportunity to reevaluate the goals of the Title V program vis-à-vis its current implementation. Specifically, this Note seeks to determine whether Title V—as originally envisioned—contemplates the sort of testing that IP proposed with its two-week test burn, ultimately concluding that it does not.

Part I begins with a brief summary of the test burn controversy, focusing primarily on IP's efforts to obtain an operating permit under Title V of the Clean Air Act. Next, Part II discusses Title V, focusing on three areas: the legislative history of the Clean Air Act Amendments of 1990; the EPA's implementing regulations; and current implementation and practice. Part III identifies problems with the Title V permitting process. Specifically, it examines problems with IP's permit application and the permit subsequently issued by NYDEC. This Note concludes that this type of emissions testing, while lauded by industry as responsible and diligent business activity, is actually an attempt by large-scale polluters to roll back the intended environmental gains of the Clean Air Act in the name of economic efficiency.

I. INTERNATIONAL PAPER'S TICONDEROGA MILL AND TITLE V

In 1926, International Paper purchased the pulp mill in Ticonderoga, New York.[13] In 1970, the company moved to a new location—the site of the current facility—ten miles north of the old mill.[14] Since that time, IP has had a long—and some might say ignominious—history of sacrificing environmental quality for economic gain.[15] Such action on the part of a

13. People for Less Pollution, IP History of Law Suits and Permit Violations, http://www.lesspollution.org/ip_history.html (citing Bill Kovach, *Vermont Seeks Ruling Against New York and Paper Mill on Champlain Pollution*, N.Y TIMES, Dec. 6, 1970).

14. *Id.*

15. *See id.* (chronicling instances in which IP released untreated or partially treated wastewater into Lake Champlain); Int'l Paper v. Ouellette, 479 U.S. 481 (1987) (case originating from nuisance suit brought against company by Vermont landowners); Kiernan, *supra* note 6 at 20.

> Since the mill opened in 1970, IP has spilled waste water or fuel into Lake Champlain eight times, according to People for Less Pollution. Pipes have broken, collection ponds have overflowed, the landfill has been breached. In 1990, a burst pipe poured landfill leachate into wetlands, where they were trapped by a beaver dam.

Id.

major corporation has become a familiar tale in the history of environmental regulation in the United States. Economic prosperity is pitted directly against environmental gains, resulting in an awkward debate in which the parties fail to responsively address the other side's arguments.[16]

The current controversy began in September 2003, when IP first requested permission from NYDEC to conduct a test burn of TDF.[17] Although IP's long-term goal involved burning TDF on a permanent basis, IP initially applied for a permit to test the use of TDF as a fuel supplement for a two-week period.[18] Early in 2004, NYDEC informed IP that it would have to submit a formal application to amend its Clean Air Act Title V permit.[19] IP submitted a permit application early in 2005, and after an initial determination by NYDEC that the application was incomplete, resubmitted a satisfactory application on July 6, 2005.[20] After public hearings, NYDEC issued a "Draft" Title V Permit.[21] During the second round of public hearings, opponents of the draft permit filled the public hearings by presenting a laundry list of grievances about the draft permit's inadequacy.[22] The most common grievance was that if IP wants to burn

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16. One need only look to the debate among elected officials in New York and Vermont over the TDF test-burn for an example of this unresponsive debate. *See* Leahy & Sanders Press Release, *supra* note 7 (illustrating the Vermont contingent's single-minded focus on the environmental costs of performing the test burn and the New York contingent's equally single-minded focus on the economic and social costs of not performing the test burn). While this rhetorical battle between businesses and environmentalists is not the focus of this Note, it is a theme that will recur throughout. The author simply wishes to highlight the issue at this point in order to acknowledge that both sides of the debate have merit. The parties can fashion a reasonable political solution only when the arguments are addressed head on. *See* Bill McKibben, *Workers, Residents Should Both Breathe Easier*, NEWSLETTER 1 (People for Less Pollution, Middlebury, Vt.), Aug. 2005, at 2, *available at* http://www.lesspollution.org/pdf/PLP_News-1-Web.pdf.

> It's crucial that Vermonters campaigning for less pollution not insist that their air is more important than the jobs that support hundreds of families on the other side of the narrow lake. Instead, they need to stress that their campaign for plant modernization is the best chance those families have that those jobs will still be there a generation hence.

Id.

17. ANR, INTERIM REPORT, *supra* note 5, at 7.

18. *See* Kiernan, *supra* note 6, at 21 (noting that IP's ultimate goal was to replace ten percent of its fuel oil with TDF, saving almost $4 million per year).

19. ANR, INTERIM REPORT, *supra* note 5, at 7.

20. *Id.*

21. *Id.*

22. Kiernan, *supra* note 6, at 30; *see also* Holly D. Ferguson et al., *Serious Issues of Concern with IP's Draft Permit to Burn Tires*, NEWSLETTER 2 (People for Less Pollution, Middlebury, Vt.), Nov. 2005, at 2 (listing thirteen specific issues that the draft permit allegedly did not take into account, such as a failure to monitor for fine particulate matter, failure to specify the composition of TDF to be used, and failure to account for emissions of specific pollutants).

tires, it should install the most effective pollution control technology, i.e., an electrostatic precipitator.[23] In a surprise move, Vermont Governor Jim Douglas offered to help IP pay for an electrostatic precipitator.[24] IP rejected the offer.[25] As Governor Douglas stated: "We offered them an olive branch, and they burned it."[26]

On July 27, 2006, NYDEC issued a proposed permit to IP, which triggered a forty-five day review period during which the EPA could object to the permit.[27] The EPA did not object to IP's proposed permit, and NYDEC issued a final permit on September 20, 2006.[28] The final permit was the fifth modification of IP's currently-in-force Title V operating permit.[29]

> This modification authorizes a two week trial and testing period during which tire-derived fuel (TDF) will be combusted in the power boiler along with number 6 fuel oil and bark/wood. . . . During the first week, TDF will be added in gradually increasing amounts while the boiler operators adjust the boiler to achieve optimum combustion conditions. Particulate Matter emissions will be measured (using USEPA Method 5) when the TDF feed rate reaches 1 ton per hour, then again at 2 tons per hour and again at 3 tons per hour to ensure compliance with the permit limit during this period. During the second week, extensive stack testing will be performed to characterize emissions.[30]

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23. Ferguson et al., *supra* note 22, at 2; *see also* Brief of Amici Curiae Northeast Clean Air Council & People for Less Pollution, Inc., in Support of Petitioner State of Vermont at 5 n.1, *filed* Oct. 26, *In re* Vermont, No. 06-4704, slip op. (2d Cir. Nov. 2, 2006), *available at* http://www.lesspollution.org/pdf/PLP%20FINAL%20Final%20Draft%20Amici%20Brief.PDF ("No other U.S. plant burns as much tire derived fuel as IP intends to burn without [an electrostatic precipitator].").

24. Kiernan, *supra* note 6, at 30.

25. *Id.*

26. *Id.*

27. ANR, INTERIM REPORT, *supra* note 5, at 8. Under Title V of the Clean Air Act, the EPA has 45 days in which to object to a state-issued permit. Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2) (2006) ("If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45–day review period specified in paragraph (1) to take such action.").

28. *Id.*

29. Int'l Paper Title V Permit (No. 5-1548-00008/00081), at 1 (N.Y. State Dep't of Envtl. Conservation Sept. 20, 2006), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/tdffinal.pdf.

30. *Id.* at Description.

As noted above, Vermont continued to object to IP's test burn. The State took its case to federal court, seeking an injunction from the Court of Appeals for the Second Circuit to allow the EPA time to consider Vermont's petition to reject the final permit.[31] The court denied Vermont's request for an injunction.[32] With all of the legal impediments out of the way, IP began burning TDF on November 7, 2006.[33]

II. CLEAN AIR ACT'S TITLE V

Prior to 1990, the federal government did not require air polluters to obtain an operating permit.[34] In that year, however, Congress passed the Clean Air Act Amendments of 1990, which required that the EPA develop a comprehensive operating permit program.[35] The model for the program was the Clean Water Act's National Pollutant Discharge Elimination System.[36] The goal of the program is simple:

> [T]he permit issued under this Title is intended by the Administration to be the single document or source of all the requirements under the Act applicable to the source . . . . [T]he permittee, the permitting agency, and the citizen all should be able to look to the permit and know what are the requirements applicable to the source under the Act.[37]

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31. Press Release, Governor Jim Douglas, Governor and Attorney General Announce Next Legal Action to Halt Proposed Tire Burn (Oct. 10, 2006), *available at* http://www.vermont.gov/tools/whatsnew2/index.php?topic=GovPressReleases&id=2125&v=Article.

32. *In re* Vermont, No. 06-4704, slip op. (2d Cir. Nov. 2, 2006).

33. David Gram, *Tire Burn Bumps Up Against Pollution Limit, Is Scaled Back*, BOSTON GLOBE, Nov. 10, 2006, *available at* http://www.boston.com/news/local/vermont/articles/2006/11/10/tire_burn_bumps_up_against_pollution_limit_is_scaled_back/.

34. *See* ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT 209 (2001) [hereinafter REITZE, COMPLIANCE & ENFORCEMENT] (noting that in the absence of federal regulation, forty-eight states had stepped into the void and required polluters to obtain some form of operating permit).

35. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 501–507, 104 Stat. 2399, 2635–48 (codified as amended at 42 U.S.C. 7661–7661f (2006)).

36. REITZE, COMPLIANCE & ENFORCEMENT, *supra* note 34, at 209. *But see* D. R. Van der Vaart & John C. Evans, *Compliance under Title V: Yes, No, or I Don't Know?*, 21 VA. ENVTL. L.J. 1, 3 (2002) (stating that the program was based on the NPDES but noting the major differences between the corollary air and water programs).

37. Van der Vaart & Evans, *supra* note 36, at 4 (quoting H.R. REP. NO. 101-490, pt. 1, at 351 (1990)).

Although the Title V operating permit program may seem like an administrative formality insofar as it imposes no additional substantive requirements on polluters,[38] many senators saw the administrative nature of Title V as significantly advancing both the government's and the public's ability to enforce requirements of the Clean Air Act.[39] At the same time as ensuring compliance with other provisions of the Clean Air Act, Title V also was intended to, among other things: make the Clean Air Act more consistent with other federal environmental statutes; increase emissions data, including developing baseline data from air pollution sources; and provide money through permit fees to fund state air pollution control programs.[40]

A. Overview of Title V's Permit Program

When Congress passed the Clean Air Act Amendments of 1990, it required that states, the primary stewards of the Act's enforcement,[41] develop and implement an operating permit program.[42] The Act first required the EPA to promulgate guidelines for state implementation programs in order to give the states appropriate guidance in program development.[43] After the states submitted programs to the EPA, the Agency had one year to approve or reject the program.[44] "As of June 1997, the EPA

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38. *See* N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 320 (2d Cir. 2003) (explaining that "Title V Permits do not impose additional requirements").

39. *See* S. REP. NO. 101-228, at 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3729. ("Operating permits are needed to (1) better enforce the requirements of the law by applying them more clearly to individual sources and allowing better tracking of compliance, and (2) provide an expedited process for implementing new control requirements.").

40. REITZE, COMPLIANCE & ENFORCEMENT, *supra* note 34, at 209–10.

41. *See N.Y. Pub. Interest Research Group*, 321 F.3d at 320 ("[The Clean Air Act] places the primary responsibility for enforcement on the state and local governments, but it also provides for 'Federal financial assistance and leadership . . . for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollutions.'") (quoting Clean Air Act § 101(a), 42 U.S.C. § 7401(a)(3), (4) (2006)).

42. *See* Clean Air Act § 502(d)(1), 42 U.S.C. § 7661a(d)(1) ("Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter.").

43. *See* 42 U.S.C. § 7661(b) (allowing the EPA one year to develop these regulations).

44. 42 U.S.C. § 7661a(d)(1). The Clean Air Act required state plans to contain a specified list of components, among them:

> [A] standard permit application form (§ 502(b)(1)), adequately staff and fund the permit program (§ 502(b)(4)), develop a plan to ensure permit compliance (§ 502(b)(5)), provide public access to documents submitted in support of permit applications (§ 502(b)(8)), and provide for review in state courts of permitting decisions (§ 502(b)(6)).

Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996).

had approved permit programs for all 114 submissions by states, local agencies, and territories."[45]

1. Applicability: Whether a Polluting Source Must Obtain a Title V Permit

Title V establishes the sources that must obtain an operating permit by reference to other Clean Air Act sections.[46] As a general matter, sources must obtain an operating permit if they are a "major source" subject to regulation promulgated under New Source Performance Standards (NSPS); National Emission Standards for Hazardous Air Pollutants (NESHAP); Prevention of Significant Deterioration of Air Quality (PSD); and Plan Requirements for Nonattainment Areas (NSR).[47] "Major sources" are defined in the regulations as those that emit or have the "potential to emit" a certain threshold level of pollutants.[48]

> Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the Administrator.[49]

Thus, a polluter must obtain a Title V operating permit if it is subject to one of the Clean Air Act's other listed sections *and* it has the potential to emit a predetermined quantity of certain pollutants. Absent any physical or

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45. CLAUDIA COPELAND, CLEAN AIR PERMITTING: STATUS OF IMPLEMENTATION AND ISSUES 4 (2007), *available at* http://www.ncseonline.org/NLE/CRSreports/07Apr/RL33632.pdf. This report contains and informative and more in-depth summary of the decade-plus long process in which EPA and the states worked toward full (non-interim) approval of all plans. "Nationally, as of March 31, 2006—10 years after the first program approvals—97% of all original permits required for 16, 726 Title V sources had been issued." *Id.* at 6.

46. Clean Air Act § 502(a), 42 U.S.C. § 7661a(a).

47. *Id.*; *see also* DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 5:8 (16th ed. 2006) (providing a plain language discussion of sources that must comply with the provisions of Title V). The additional sources regulated under section 502, and those listed in text are not the relevant sources for the purposes of this Note. For additional information on exactly which sources are regulated, see State Operating Permit Programs 40 C.F.R. § 70.3 (2007), which provides detailed guidance on the applicability of the Title V permitting program.

48. State Operating Permit Programs, 40 C.F.R. § 70.2 (2007). Title I contains the "substantive" elements of the Clean Air Act's enforcement scheme. Because these aspects of the Clean Air Act are so lengthy and complex, a discussion of Title I programs is not included in this Note.

49. *Id.*

operational limitation, the potential to emit presumes that the facility is operating at full capacity, 24 hours a day, 365 days a year.[50]

The definition of "potential to emit" has generated much controversy throughout the years.[51] In recent guidance for the printing industry, the EPA has stated that "the [potential to emit] calculation should reflect the maximum hourly usage rate times the worst-case [volatile organic compound] / [hazardous air pollutant] content times the maximum feasible hours of operation. The PTE would be reduced after consideration of any enforceable limits on emissions, such as hours of operation and material throughput."[52]

2. Title V Application

Title V requires the sources described above to submit a timely and complete application for an operating permit.[53] Operating permit applications must contain a great deal of information, including: descriptions of the facilities' products and processes; "[a]ll emissions of pollutants for which the source is major, and all emissions of regulated air pollutants"; descriptions of all emissions points; emissions rates in terms of tons per year; descriptions of fuels, fuel use, and operating schedules; descriptions of air pollution control devices and limitations on source operation.[54] Additionally, the permit application must include descriptions of all applicable requirements, test methods for determining compliance, and any other specific information necessary to implement and enforce those requirements.[55]

As part of the application, sources must also submit "a compliance plan describing how the source will comply with all applicable requirements under [Title V]."[56] The regulations set out detailed guidance regarding the

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50. WOOLEY & MORSS, *supra* note 47, at 366.

51. *See, e.g.*, Nat'l Mining Ass'n v. U.S. Envtl. Prot. Agency, 59 F.3d 1351, 1363 (D.C. Cir. 1995) ("Congress thus acted in 1990 against a backdrop of over a decade of skirmishing between the agency and affected companies, during which the issue of whether and to what extent state and local controls were to be credited in calculating a source's 'potential to emit' was very much in the forefront.").

52. Memorandum from Stephen D. Page, Dir. Office of Air Quality Planning and Standards, Envtl. Prot. Agency to Air Division Dirs., Regions I–X, at 14 (Jan. 28, 2005), *available at* http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/20050128.pdf.

53. Clean Air Act § 503, 42 U.S.C. § 7661b(d) (2006).

54. 40 C.F.R. § 70.5(c)(2), (3) (2007).

55. *Id.* § 70.5(c)(4).

56. Clean Air Act § 503(b)(1), 42 U.S.C. § 7661b(b)(1).

nature and scope of the compliance plan required in a permit application,[57] as well as requiring assurances and schedules of compliance for all applicable requirements.[58] Finally, the application must be signed by a "responsible official," certifying the "truth, accuracy, and completeness" of the application.[59]

These pieces of information represent the minimum requirements for any Title V program. States may augment these requirements in their individual permit programs.[60] Typically, states have developed their own standard application forms in order to aid polluting sources in complying with the program's requirements.[61]

Once the applicant submits a Title V application to the permitting authority, that authority has sixty days to determine whether the application is complete.[62] The application will be found to be "complete" only if it contains all of the information specifically required by 40 C.F.R. § 70.5(c).[63] Such information must be "sufficient to evaluate the subject source and its application and to determine all applicable requirements."[64]

3. Title V Permit

The EPA estimates that roughly 17,000 industrial sources are regulated under Title V, making these operating permits a significant tool in the enforcement of federal and state air pollution programs.[65] A permit must contain essentially all of the pieces of information that the application must contain,[66] and it is established for a fixed period of time, not to exceed five

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57. *See* 40 C.F.R. § 70.5(c)(8) (requiring that the compliance plan contain: "A description of the compliance status . . . a compliance schedule . . . [and] a schedule for submission of certified progress reports").

58. *Id.* § 70.5(c)(8)(iii)(C). The type and extent of these compliance plans and assurances differ according to whether the source: is already in compliance with the applicable requirement; out of compliance with the requirement; and whether the requirement will become effective during the permit period. *Id.*

59. *Id.* § 70.5(d).

60. WOOLEY & MORSS, *supra* note 47, at 367.

61. *Id.*

62. 40 C.F.R. § 70.5(a)(2).

63. *Id.*

64. *Id.*

65. COPELAND, *supra* note 45, at 2.

66. *See* Clean Air Act § 504(a), 42 U.S.C. § 7661c(a) (2006).

> Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary

years.[67] The permit has essentially two functions, depending on who is utilizing the permit and to what end it is being used. On the one hand, a permit can be used by citizens and regulators to enforce permit provisions to which the source is not in compliance.[68] On the other hand, a permit can be used by the polluting source as a shield against prosecution for any putative regulation not contained in a validly issued permit.[69] These aspects of Title V operating permits are generally recognized as a good thing, allowing for greater certainty for all concerned.[70]

The regulations describing permit requirements do so in excruciating detail. This Note will not discuss regulations concerning compliance and monitoring, as they are not relevant to the discussion of IP's Title V Permit modification below. It is sufficient to note that the regulations require that operating permits state "[a]ny permit noncompliance constitutes a violation of the Act and is grounds for enforcement action."[71] Thus, if a source violates any item contained in its permit, citizens and permitting authorities may maintain an enforcement action against the polluter.[72] Additionally, "[i]t shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit."[73]

Congress did give industry the benefit of an "operational flexibility" regulation.[74] The Clean Air Act requires that states include provisions in

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to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

Id.

67. *Id.* § 502(b)(5)(B), 42 U.S.C. § 7661a(b)(5)(B).

68. *See id.* § 504(a), 42 U.S.C. § 7661c(a) ("Each permit issued under this subchapter shall include enforceable emission limitations and standards . . . .").

69. *See id.* § 504(f), 42 U.S.C. § 7661c(f) ("Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title.").

70. *See* S. REP. NO. 101-228, at 347 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385.

> This system will enable the State, EPA, and the public to better determine the requirements to which the source is subject, and whether the source is meeting those requirements. Better enforcement will result for all air pollution requirements, including SIP limits, new source performance standards, hazardous air pollution requirements, and acid deposition limits. In addition, this system will benefit stationary sources by providing greater certainty as to what their pollution control obligations are. Permits will also clearly identify baseline requirements for each source, facilitating emissions trading.

Id. at 3730.

71. 40 C.F.R. § 70.6(a)(6)(i) (2007).

72. *See* 40 C.F.R. § 70.6(b)(1) ("All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.").

73. 40 C.F.R. § 70.6(a)(6)(ii).

74. Clean Air Act § 502(b)(10), 42 U.S.C. § 7661a(b)(10) (2006).

their implementation plans that allow sources to make internal changes as long as "the changes are not modifications under any provisions of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions)," if the facility provides timely notice of the change.[75]

Thus, the Title V permitting process, through its application requirements and the legal effect of a properly issued permit, strives to create a comprehensive document containing both an emissions inventory and a catalogue of relevant legal and operational limitations and requirements. Although operating permits contain no new substantive requirements, the value of the administrative function should not be underestimated. The increased access to detailed and accurate emissions information through the Title V program serves a valuable purpose in the form of increased government and citizen oversight.[76] After all, "[a]ccording to EPA officials, Title V was added to address existing shortfalls in compliance."[77]

Additionally, it is reasonable to infer that Congress highly valued the goal of increasing compliance with the Clean Air Act through the Title V program because it provided for the self-sufficiency of the program through a discrete funding mechanism.[78] Congress required states, through their implementation programs, to collect fees sufficient to fund the program.[79] Congress initially set the minimum fee at $25 per ton of each regulated

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75. *Id.*

76. *See* COPELAND, *supra* note 45, at 6 ("Incorporating applicable requirements in one document that consolidates duplicative and redundant requirements is beneficial to regulatory agencies, the public, and regulated sources.").

77. GOV'T ACCOUNTABILITY OFFICE, AIR POLLUTIONS: STATUS OF IMPLEMENTATIONS AND ISSUES OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 43 (2000), *available at* http://www.gao.gov/archive/2000/rc00072.pdf [hereinafter GAO, STATUS REPORT]; *see also* S. REP. NO. 101-228, at 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3729 ("Operating permits are needed to (1) better enforce the requirements of the law by applying them more clearly to individual sources and allowing better tracking of compliance . . . .").

78. *See* S. REP. NO. 101-228, at 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3731. Congress noted that this aspect of Title V would "greatly augment" state resources in enforcing the Clean Air Act. *Id.*

> Throughout the 20-year history of the current Clean Air Act, inadequate State and local agency resources have increasingly hampered pollution control efforts. The permit fees provisions of this title will ameliorate this problem by requiring sources of pollution to pay a share of the costs of state air pollution programs, including, as discussed below, the costs of issuing the permit as well as the costs of modeling, monitoring, and preparation of attainment demonstrations and regulations that form the basis for air pollution control requirements.

Id.

79. Clean Air Act § 502(b)(3)(A), 42 U.S.C. § 7661a(b)(3)(A).

pollutant, to be adjusted annually according the Consumer Price Index.[80] Some states, however, charge fees in the $30 to $40 range.[81]

Yet, while Title V is often portrayed by industry as an administrative burden with costs exceeding its value, it is important to keep the costs of Title V in perspective. Total costs to industry imposed by the Clean Air Act Amendments of 1990 reached $19.4 billion (1990 dollars) in 2000.[82] At $300 million, the costs of Title V represented roughly 1.5% of total costs in 2000.[83] By 2010, those costs are projected to decrease to roughly 1.1% of total costs.[84] While $300 million is a considerable sum, the relatively low percentage cost is a reasonable price to pay in order to achieve the express goals of Title V, namely, increased compliance with the Clean Air Act.

III. INTERNATIONAL PAPER'S TITLE V PERMIT MODIFICATION

A brief chronology of IP's permit process has been provided above and will not be repeated here.[85] This section will discuss the arguments advanced by parties to the administrative actions and lawsuits regarding IP's Title V permit for the TDF test burn. The IP test burn presents a unique opportunity to revisit the fundamental precepts of Title V and the policies supporting them. The ultimate question that this section seeks to answer is whether Title V of the Clean Air Act envisions this manner of "testing" new processes, fuels, etc. on a temporary basis for planned permanent use.

As a preliminary matter, it should be noted that IP's application was not for a new permit, but for a modification (the fifth) to its current permit.[86]

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80. *Id.* § 7661a(b)(3)(B). The costs to industry of Title V are no small matter. EPA estimates that the total cost to industry was $300 million (1990 dollars) in 2000, estimated to stay constant through 2010. GOV'T ACCOUNTABILITY OFFICE, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM 26 (2006) [hereinafter GAO, AIR TOXICS PROGRAM]. More specifically, EPA estimates that the average cost to a polluting source is $10,000 per year, ranging to $100,000 for larger, more complex sources. GAO, STATUS REPORT, *supra* note 77, at 45–46.

81. ARNOLD W. REITZE, JR., STATIONARY SOURCE AIR POLLUTION CONTROL LAW 230 (2005) [hereinafter REITZE, STATIONARY SOURCE].

82. GAO, AIR TOXICS PROGRAM, *supra* note 80, at 26.

83. *Id.* (percentages calculated from Table 9).

84. *Id.*

85. *See supra* Part I.

86. Int'l Paper Title V Permit (Modification) (No. 5-1548-00008/00081), at 1 (N.Y. Dep't of Envtl. Conservation Sept. 20, 2006), *available at* http://www.dec.ny.gov/dardata/boss/afs/permits/515480000800081_r1.pdf. Interestingly, by the time the permit modification was finally authorized by NYDEC on September 20, 2006, a full three months had passed after the underlying permit it modified had expired. *Id.* Instead of including the TDF test burn in one comprehensive renewal permit application, IP applied for a renewal of its permit in addition to the permit modification, creating two parallel permitting proceedings. Int'l Paper (Renewal) (No. 5-1548-00008/00081) (N.Y. Dep't of Envtl. Conservation) (undated). The State of Vermont objected to this method of splitting the

Title V treats a modification in the same manner that it treats an initial or renewal permit application.[87] Thus, lessons learned from the IP experience should be applicable to Title V licensing in general. However, as a practical matter, such temporary test burns would typically arise only in the setting of a permit modification.

A. New Source Review and Title V

The core of the argument against both IP's application for a Title V permit modification and the subsequently issued permit is that they fail to adequately consider the applicability of other programs under the Clean Air Act's New Source Review (NSR) program, specifically, the New Source Performance Standards (NSPS) and the National Emissions Standards for Hazardous Air Pollutants (NESHAP).[88] If the project triggers NSR review, it would be forced to comply with the rigorous technological requirements of Title I.[89] Thus, opponents of the test burn tried to show that it would fall within the Title I definition of "modification."

By any measure, the process involved in IP's proposal to perform a two-week test burn under a Title V permit modification was a close legal call. In such situations, the fact that a polluting source can obtain a modification to its Title V permit provides a means by which polluters can obtain what amounts to administrative, rather than substantive, review, especially when the polluter is a keystone of the local economy.[90] The effect of this "administrative review" is to afford the polluter the appearance of legitimacy, insofar as it meets all the requirements of a valid (Title V) permitting process, while at the same time allowing the polluter to escape strict review under the substantive programs that may otherwise apply.

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application. Vermont Petition, *supra* note 5, at 3–4. However, IP's dual permit applications, while not the epitome of voluntary regulatory compliance, do seem legitimate, at least to the extent that a source may keep operating with an expired permit so long as a valid and timely renewal application has been submitted. 40 C.F.R. § 70.7(b) (2007).

87. 40 C.F.R. § 70.7(a).

88. *See* Vermont Petition, *supra* note 5, at 8 (referring to the NSPS, 40 C.F.R. pt. 60, subpt. Db, and NESHAP, 40 C.F.R. pt. 63, subpt. DDDDD).

89. *E.g.*, Clean Air Act § 173(a)(1), 42 U.S.C. § 7503(a)(1) (2006).

90. *See* Kiernan, *supra* note 6, at 30.

> "I represent for the working man and the working class," Patrick Robert McBride of Ticonderoga said at the December hearing. "I work for Christopher Chevrolet. If we lost this mill, we'll lose our business, too. We've been conducting a wasteful energy policy the last 30 years. That's why it has to go to a [tire-derived fuel] policy."

Id.

The manner in which it does so is complex. As stated above, the Clean Air Act requires that state Title V permitting programs incorporate an "operational flexibility" provision.[91] This provision allows polluters the flexibility to make minor changes in operating methods while remaining under the umbrella of the original permit.[92] Provisions also are included for administrative permit amendments and permit modifications.[93] These various methods of amending operating plans permitted in the original action all provide industry with operational flexibility by requiring incrementally more review as the nature of the modification increases.[94] This flexibility, however, can be a double-edged sword. While it rightfully allows businesses the flexibility to compete and adapt to current circumstances, it can also be abused. Such an abuse would involve a company that is permitted (literally) to bypass the substantive requirements of a Title I program because it was able to categorize a modified activity as "major" for one aspect and not "major" for another.

In the case of IP's test burn, NYDEC explained its decision to issue the Title V permit modification to IP in a Responsiveness Summary.[95] NYDEC explained that "[w]hile the test does not involve a 'major modification' under the Clean Air Act, [NY]DEC treated IP's application as a 'major project' under the U[niform] P[rocedures] A[ct]."[96] These initial classifications have serious consequences in terms of what pollution control equipment will be required if and when a permit is issued.

NYDEC treated IP's test burn application as a "major project" under its Uniform Procedures regulations.[97] The Department stated, however, that "[w]hen used in connection with the NSPS, PSD, and NNSR programs, the term 'modification' contemplates a physical change or change in the

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91. Clean Air Act § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

92. *Id.*

93. *See* 40 C.F.R. § 70.7(d) (applying to areas such as typographical mistakes in the original permit, more frequent monitoring, change in ownership, additions resulting in compliance with other air permits, etc.); § 70.7(e) (describing two categories of permit modification (minor and significant) and requiring greater amounts of scrutiny as the categorization of the modification changes).

94. *Id.*

95. N.Y. DEP'T ENVTL. CONSERVATION, RESPONSIVENESS SUMMARY, INT'L PAPER TICONDEROGA MILL, PROPOSED TIRE DERIVED FUEL TEST (DEC # 5-1548-00008/00081) (2006) *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/responsivenesssummary.pdf.

96. *Id.* at 6.

97. *Id.* at 5 (citing N.Y. COMP. CODES R. & REGS. tit. 6, pt. 621 (2007)). As explained in the Responsiveness Summary, "[w]hile IP's permit application to conduct the . . . test does not involve a 'major modification,' as envisioned by the Clean Air Act, it is being processed by the Department as a 'major project' under . . . 6 NYCRR Part 621 given the degree of public interest." *Id.* at 6. Once treating the application as "major" insofar as it required a hearing, the regulations required that it be treated as "major" for the duration of the application process. *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 6, §§ 621.3(e), 621.7(e)).

method of operation at a facility which is of a permanent nature and which results in a threshold increase in emissions of specified pollutants."[98] Interestingly, NYDEC's definition of modification distorts somewhat the meaning of the regulations cited, at least to the extent that there is no mention of the word "permanent" in the regulations.[99] The result of these initial classifications is that the polluting source triggers Title V review, but avoids Title I review. As a general matter, this is not an unsurprising result. Not every Title V permit modification should undergo a comprehensive Title I NSR review. In the case of IP's test burn, however, these initial classifications may have led to perverse results.

The controversy surrounding the definition of "modification" in the NSR program is now almost legendary.[100] A classic example of this debate is a recent case decided by the D.C. Circuit, which rejected an attempt by the EPA to exempt "the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters."[101] The court focused on a couple of key aspects of the definition, including the fact that the EPA's rule neglected to account for emissions increases for those projects under the 20 % cap.[102] "Indeed, the EPA's interpretation would produce a 'strange,' if not an 'indeterminate,' result: a law intended to limit increases in air pollution would allow sources operating below applicable emission limits to increase significantly the pollution they emit without government review."[103]

The logic used by the court in *New York v. U.S. Environmental Protection Agency* echoes the arguments made by the State of Vermont in opposition to the IP test burn.[104] Vermont argued that IP should not be allowed to perform the test burn because not only was it a "modification," the simple fact that it increased emissions merited substantive review under

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98. *Id.* at 5 (citing definitions of modification under the PSD program (40 C.F.R. § 52.21(b)(2)(i)), the NSPS program (40 C.F.R. § 60.14(a)), and New York's definition under N.Y. COMP. CODES R. & REGS. tit. 6, § 200.1(a)).

99. *Id.*

100. *See* WOOLEY & MORSS, *supra* note 47, § 1:125 (discussing the history of how increased enforcement actions by the EPA resulted in years of litigation and debate as to the proper meaning of "modification").

101. New York v. U.S. Envtl. Prot. Agency, 443 F.3d 880, 883, 890 (D.C. Cir. 2006).

102. *Id.* at 890 (referring to the definition of modification in the Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4) (2006)).

103. *Id.* at 886.

104. *See* Vermont Petition, *supra* note 5, at 9 ("As acknowledged by IP's application, IP's Proposed Project constitutes a physical change and an operational change that is expected to result in increased emissions and the emissions of regulated pollutants not previously emitted at the facility.").

the Clean Air Act's definition of the term.[105] Quoting the EPA's own language, Vermont argued:

> Any other construction of the statute would turn the preconstruction permitting program on its head and would allow sources to construct (modify) without a permit while they wait to see if it would be proven that emissions would increase. Clearly Congress did not intend such an outcome, which would eviscerate the preconstruction dimension of the program.[106]

Vermont went on to argue that IP should provide the permitting authority (NYDEC) with projections and estimates of emissions from the use of TDF as a fuel, rather than test TDF on a temporary basis to assess the level of pollution.[107] Vermont also argued that NYDEC should not allow IP to apply for a temporary test burn permit when its stated plans involved burning TDF on a permanent basis.[108]

Thus, Vermont's arguments, both legal and political, sought to require more of IP than simple assurances that it would comply with the terms of its currently issued permit. Neither the NYDEC, EPA, nor state and federal courts agreed with this assessment.[109] Although none say as much, the sense throughout the decisions by these agencies is that the project is too small to merit substantial Title I review.[110] The NYDEC saw the benefits in the permit modification, on the other hand, as significant.[111]

> Importantly, the test burn is expected to provide valuable information with respect to: (1) whether the power boiler can handle TDF under its current configuration; (2) whether the use of TDF will require the installation of additional pollution control measures or equipment; (3) the maximum feed rate at which the boiler can burn TDF without causing an exceedance of applicable emission limits or violating air quality standards; and (4) the type

105. *Id.* at 10.

106. *Id.* at 10–11 (quoting Tennessee Valley Auth., 9 E.A.D. 357, 438–39 (Envtl. App. Ct. Sept. 15, 2000) (Final Order on Reconsideration), *available at* http://www.epa.gov/eab/disk11/tva.pdf.

107. *Id.* (citing in support United States v. Louisiana Pacific Corp., 682 F. Supp. 1141, 1166 (D. Colo. 1988)).

108. *Id.* at 12–13.

109. *See, e.g.*, N.Y. DEP'T ENVTL. CONSERVATION, RESPONSIVENESS SUMMARY, INT'L PAPER TICONDEROGA MILL, PROPOSED TIRE DERIVED FUEL TEST 6, 7 (DEC # 5-1548-00008/00081) (2006) (referring to the project as a "temporary" and "one-time" test).

110. *Id.*

111. *Id.* at 8.

> and quantity of pollutants that will be emitted as a result of including TDF in the fuel mix.[112]

Although these goals are laudable when viewed in isolation, the way in which NYDEC used them allowed the polluting source to modify its operations in the hopes that a new permit would not be needed.[113]

With the unclear state of the law regarding the term "modification," it is desirable for industry and permitting authorities to avoid the issue altogether. In the case at hand, NYDEC determined that this modification was significant enough to classify it as a "major project" for administrative purposes, yet it did not rise to the level of "modification" under the Clean Air Act. [114] These classifications allowed IP to proceed with its test burn while avoiding the technological requirements, which likely would have required an expensive electrostatic precipitator. Of course, it is perfectly rational for different Clean Air Act programs to be triggered by specific circumstances. However, in the case at hand, the very existence of the Title V operating permit regime allowed IP the opportunity to undergo a purely administrative review, thereby gaining the legitimacy afforded by the administrative process, while avoiding a significant inquiry into different technological choices that could significantly decrease emissions. As will be noted in the next section, this decision goes against the intent of the Clean Air Act and sound environmental policy.

B. Initial Classifications Lead to Poor Procedural Choices

The abovementioned arguments are not the extent of the objections that the State of Vermont and citizens groups raised with regard to the IP test burn. However, they were the most emphasized and most repeated arguments advanced by opponents of the test burn. It is important now to recall the policy reasons supporting the Clean Air Act's passage and its subsequent amendments, as well as EPA and court guidance in implementation of the Act. The following is an excerpt of the Senate Report from the Clean Air Act Amendments of 1990:

> Except under narrow circumstances, section 353(f) provides that a permit may not be issued or revised in a manner that results in a relaxation from the previous

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112. *Id.*

113. Tennessee Valley Auth., 9 E.A.D. 357, 438–39 (Envtl. App. Ct. Sept. 15, 2000) (Final Order on Reconsideration), *available at* http://www.epa.gov/eab/disk11/tva.pdf.

114. N.Y. DEP'T ENVTL. CONSERVATION, RESPONSIVENESS SUMMARY, INT'L PAPER TICONDEROGA MILL, PROPOSED TIRE DERIVED FUEL TEST 5–7 (DEC # 5-1548-00008/00081) (2006).

> permit, the applicable implementation plan, or any federal requirement under the Act. Such a relaxation is allowed only if the applicant demonstrates that the relaxation is consistent with any attainment demonstration, progress requirement, or new source permit requirement, and does not interfere with any other requirement under the Act. The applicant must also demonstrate that the existing limitation is not approprite [sic] because changes occurred at the source, new information became available, the existing limitation resulted from a mistake, or the permittee demonstrates, in accordance with procedures prescribed by EPA, that it is unable to achieve the emissions limitation notwithstanding the proper installation, operation, and testing of all required controls.[115]

This language from the Senate Report to the Clean Air Act Amendments of 1990 clearly shows that Congress intended air regulation in the United States to be of a forward-moving character. Once permitting schemes were established and sources received their initial permits, Congress generally intended that regulations would be revised to become more strict, and that as a market for pollution reducing technology grew, overall pollution would decrease. Thus, in the language quoted above, Congress stated that permit conditions should not be relaxed unless pursuant to some kind of exigent circumstance.

To be clear, in IP's situation, the NYDEC was not relaxing any permit conditions and IP's new permit required that it remain within its current emissions limitations.[116] However, despite the rhetoric, IP's test burn had essentially one goal—to see how much TDF the company could burn before it reached the maximum allowable under the company's current Title I and V permits. In IP's case, that is not an insignificant amount.[117] Thus, IP's action, as sanctioned by the NYDEC through the Title V permitting scheme, has the overall effect of increasing actual air pollution largely because it might result in a costs savings to the industry.

The company complied with the process prescribed by the Act and the permitting authority found that "it [was] both appropriate and necessary for IP to conduct a test burn prior to submitting any application for a permanent

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115. S. REP. NO. 101-228, at 355–56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3738–39.

116. Int'l Paper Title V Permit (Modification) (No. 5-1548-00008/00081), at 1 (N.Y. Dep't of Envtl. Conservation Sept. 20, 2006) *available at* http://www.dec.ny.gov/dardata/boss/afs/permits/515480000800081_r1.pdf.

117. *See* Kiernan, *supra* note 6, at 20 ("The [Ticonderoga] mill reported releasing 436,078 pounds of regulated materials into the air in 2004, more that all of Vermont's emissions sources combined, including vehicles.").

permit modification."[118] However, one need only play out the alternative scenario to see what is wrong with using the Title V permitting process to turn communities into what is essentially a laboratory for large-scale polluters intent on profit maximization. If IP had found a way to burn enough fuel to make the endeavor economically viable, while at the same time remaining within its current emissions limitations, NYDEC would have effectively been forced to grant an application for permanent use of TDF. This result would have two problems. First, it would likely produce a relaxed permitting regime when IP applies to burn TDF on a permanent basis. Second, it would yield an overall increase in net emissions.

The problem with both of these results is plain to see. As stated numerous times in discussions about the Clean Air Act's requirements, the overall goal of the Act is to reduce the amount of pollution in the air. Allowing a polluting source to increase its overall emissions limitations through an administrative permitting system does not achieve the goals of increasing compliance with the Act. Rather, it simply waters down those requirements already in existence. Additionally, if IP were to return to NYDEC with successful results from its test burn ("success" being measured in terms of pollution maximization under the current permit), NYDEC would have little, if any, choice but to approve the project. After all, one of the reasons NYDEC approved the test burn was to determine "whether the use of TDF will require the installation of additional pollution control measures or equipment."[119] However, determining what type of pollution control equipment should be based on the permitting regimes of Title I and Title V, not the results of a test burn. Thus, the risk of bootstrapping the permanent TDF permit off of the test burn is both very real and very dangerous.

CONCLUSION

This Note has discussed the IP test burn as a case study under Title V of the Clean Air Act. While acknowledging that this is but one example of a widespread program, its high-profile nature serves to isolate and highlight problems with the current system. This Note concludes that Title V, as an administrative permitting scheme, can actually undercut the effectiveness of the substantive Title I programs. It does so by providing the industry with the appearance of legitimacy by virtue of the fact that a government agency

118. N.Y. DEP'T ENVTL. CONSERVATION, RESPONSIVENESS SUMMARY, INT'L PAPER TICONDEROGA MILL, PROPOSED TIRE DERIVED FUEL TEST 7–8 (DEC # 5-1548-00008/00081) (2006).

119. *Id.* at 8.

authorizes the permit. However, the danger still exists that even permitted sources can undercut congressional policy in emissions limitations and increased compliance with air pollution laws.