

Appendix B

1993 and 1997 Attorney General's Certification of Legal Authority



State of California
Office of the Attorney General

Daniel E. Lungren
Attorney General

February 3, 1997

Ms. Felicia Marcus
Regional Administrator
Region IX, U.S. Environmental
Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Attention: Mr. David P. Howekamp

Dear Ms. Marcus and Mr. Howekamp:

You requested that the Office of the Attorney General of the State of California certify that state law contains certain necessary provisions under federal law. At my direction and under my control, this office has investigated those issues at the request of the California Integrated Waste Management Board.

I hereby certify pursuant to my authority as Attorney General of the State of California and in accordance with section 111(d) of the Federal Clean Air Act, as amended November 15, 1990 (42 U.S.C. §§7401-7671q) (hereinafter "FCAA"), and Subpart B of Part 60, 40 Code of Federal Regulations (hereinafter "CFR"), that in my opinion the laws of California provide adequate authority to (1) establish emission standards and enforceable permit conditions applicable to the designated facilities and pollutants identified under the Emission Guidelines for municipal solid waste landfills promulgated by the U.S. Environmental Protection Agency pursuant to section 111(d) of the FCAA on March 12, 1996 (61 Fed. Reg. 9905), (2) adopt compliance schedules applicable to the designated facilities, and (3) implement and enforce the relevant laws, regulations, standards and compliance schedules. The specific authorities provided are contained in statutes and regulations which are or will be fully effective by the time the State plan is approved, and include those identified below and those incorporated by reference from the enclosed letter dated November 12, 1993, addressing California's authority to implement Title V (Operating Permits) of the FCAA. All statutory references are to the California Health and Safety Code (hereinafter, "HSC") unless otherwise indicated.

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I. ADOPTION OF EMISSION STANDARDS AND ENFORCEABLE CONDITIONS.

State law provides authority for California's 34 air pollution control and air quality management districts to (1) adopt rules and regulations establishing emission standards and other requirements applicable to the designated facilities, and (2) issue operating permits to the designated facilities and to incorporate into permits and assure compliance with each applicable requirement of the FCAA. State law also provides for prohibition of permit issuance to facilities that do not comply with applicable requirements. **Applicable requirements include the requirements of emission guidelines promulgated under FCAA section 111(d). Applicable requirements also include district prohibitions against discharge of air contaminants under Health and Safety Code section 41700.** These authorities are cited in the enclosed November 12, 1993 letter, pages 1-3, "Authority to Issue Permits," page 7, "Incorporation of All Applicable Requirements into Permit," and as additionally specified below.

Additional Federal Authority: FCAA §§111(b)(1)(A), 111(d), 42 U.S.C. 7411(b)(1)(A), 7411(d); 40 CFR §§60.33c, 60.34c, 60.35c, 60.36c, 70.2, 70.3(a), 70.3(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §39600 (Stats. 1975, Ch. 957), HSC §39659 (Added by Stats. 1992, Ch. 1161 (AB 2728)), HSC §40001 (Stats. 1975, Ch. 957, last amended by Stats. 1992, Ch. 567 (AB 2848)), HSC §40506.1 (Added by Stats. 1992, Ch. 371), HSC §40507 (Added by Stats. 1976, Ch. 324, amended by Stats. 1993, Ch. 1166 (AB 2288)), HSC §40702 (Stats. 1975, Ch. 957), HSC §41700 (Stats. 1975, Ch. 957), HSC §41701 (Stats. 1975, Ch. 957, amended by Stats. 1977, Ch. 644), HSC §42300.1 (Added by Stats. 1992, Ch. 1126 (AB 3790)), HSC §42301.1 (Added by Stats. 1988, Ch. 1568), HSC §42301.6 (Added by Stats. 1988, Ch. 1589, last amended by Stats. 1991, Ch. 1183 (AB 928)), HSC §42315 (Added by Stats. 1986, Ch. 1134, amended by Gov. Reorg. Plan No. 1 of 1991, §140, effective July 17, 1991), HSC §42350 (Stats. 1975, Ch. 957, last amended by Stats. 1993, Ch. 1166 (AB 2288)), HSC §42353 (Stats. 1975, Ch. 957), HSC §42358 (Stats. 1975, Ch. 957).

II. ADOPTION OF COMPLIANCE SCHEDULES.

State law provides authority for the districts 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 through adoption of compliance schedules applicable to the designated facilities and pollutants. These authorities are cited in the enclosed November 12, 1993 letter, pages 3-4, "Authority to Issue Permits to Noncomplying Sources" and as additionally specified below.

Additional Federal Authority: 40 CFR §60.36c.

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Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §40702 (Stats. 1975, Ch. 957), HSC §41702 (Stats. 1975, Ch. 957), HSC §41703 (Stats. 1975, Ch. 957, amended by Stats. 1979, Ch. 239, effective July 10, 1979), HSC §42301.1 (Added by Stats. 1988, Ch. 1568), HSC §42301.5 (Added by Stats. 1981, Ch. 147, amended by Stats. 1987, Ch. 602), HSC §42315 (Added by Stats. 1986, Ch. 1134, amended by Gov. Reorg. Plan No. 1 of 1991, §140, eff. July 17, 1991), HSC §42351.5 (Added by Stats. 1976, Ch. 1113, last amended by Stats. 1990, Ch. 150 (AB 3124)), HSC §42353 (Stats. 1975, Ch. 957), HSC §42357 (Stats. 1975, Ch. 957), HSC §42358 (Stats. 1975, Ch. 957).

III. ENFORCEMENT OF THE RELEVANT LAWS, REGULATIONS, STANDARDS, AND COMPLIANCE SCHEDULES.

State law provides civil and criminal enforcement authority, including authority to seek injunctive relief, as cited in the enclosed November 12, 1993 letter, page 11, "Enforcement of Permits Program Requirements" and as additionally specified below.

Additional Federal Authority: FCAA §§111(d), 42 U.S.C. 7411(d); 40 CFR §60.36c.

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §39659 (Added by Stats. 1992, Ch. 1161 (AB 2728)), HSC §42300.1 (Added by Stats. 1992, Ch. 1126 (AB 3790)), HSC §42301 (Stats. 1975, Ch. 957, last amended by Stats. 1994, Ch. 727 (AB 3119)), HSC §42301.7 (Added by Stats. 1988, Ch. 1589), HSC §42356 (Stats. 1975, Ch. 957), HSC §42362 (Stats. 1975, Ch. 957).

IV. AUTHORITY TO OBTAIN INFORMATION.

State law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into operating permits consistent with 40 CFR §70.6 and provides authority to request information from regulated sources regarding their compliance status as cited in the enclosed November 12, 1993 letter, page 6, "Monitoring, Recordkeeping, and Reporting," and as additionally specified below.

Additional Federal Authority: FCAA §114, 42 U.S.C. §7414; 40 CFR §60.35c.

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Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §39600 (Stats. 1975, Ch. 957), HSC §39605 (Stats. 1975, Ch. 957, last amended by Stats. 1981, Ch. 700, effective Sept. 23, 1981), HSC §39607 (Stats. 1975, Ch. 957, last amended by Stats 1995, Ch. 713 (AB 1027)), HSC §39659 (Added by Stats. 1992, Ch. 1161 (AB 2728)), HSC §42301.3 (Added by Stats. 1993, Ch. 1180, amended by Stats. 1994, Ch. 720 (AB 2090)), HSC §42303.5 (Added by Stats. 1976, Ch. 1063, effective Sept. 21, 1976), HSC §42336 (Added by Stats. 1991, Ch. 1209 (AB 158)), HSC §44341 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988), HSC §44344 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988, amended by Stats. 1993, Ch. 1041 (AB 1060)), HSC §44344.5 (Added by Stats. 1993, Ch. 1037 (AB 956), amended by Stats. 1996, Ch. 602 (AB564)), HSC §44344.7 (Added by Stats. 1993, Ch. 1037 (AB 956), amended by Stats. 1996, Ch. 602 (AB564)).

V. AUTHORITY TO REQUIRE RECORDKEEPING, MAKE INSPECTIONS, AND CONDUCT TESTS.

State law provides authority to incorporate recordkeeping requirements into operating permits, provides authority to inspect sources and any records required to determine a source's compliance status, and provides authority to conduct tests as cited in the enclosed November 12, 1993 letter, pages 6-7, "Monitoring, Recordkeeping, and Reporting," page 7, "Inspection/Entry Authority," and as additionally specified below.

Additional Federal Authority: Recordkeeping: FCAA §114, 42 U.S.C. §7414; 40 CFR §60.35c. Tests: FCAA §504, 42 U.S.C. 7661c; 40 CFR §§60.34c, 70.6(c)(1).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: Recordkeeping: HSC §40701 (Stats. 1975, Ch. 957, amended by Stats. 1990, Ch. 1034 (AB 4059)). Inspections: HSC §42707 (Stats. 1975, Ch. 957), HSC §44366 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988). Tests: HSC §39607 (Stats. 1975, Ch. 957, last amended by Stats 1995, Ch. 713 (AB 1027)), HSC §41511 (Stats. 1975, Ch. 957, amended by Stats. 1976, Ch. 1063, effective Sept. 21, 1976), HSC §42303 (Stats. 1975, Ch. 957); HSC §44340 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988), HSC §44342 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988).

VI. AUTHORITY TO REQUIRE USE OF MONITORS AND REQUIRE EMISSION REPORTS.

State law provides authority to incorporate monitoring and reporting requirements into operating permits consistent with 40 CFR §70.6 as cited in the enclosed November 12, 1993 letter, pages 6-7, "Monitoring, Recordkeeping, and Reporting" and as additionally specified below.

Additional Federal Authority: Monitors: 40 CFR §§60.34c, 70.6(c)(2). Reports: 40 CFR §§60.35c, 70.6(c)(4).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: Monitors: HSC §39659 (Added by Stats. 1992, Ch. 1161 (AB 2728)), HSC §42315 (Added by Stats. 1986, Ch. 1134, amended by Gov. Reorg. Plan No. 1 of 1991, §140, effective July 17, 1991). Reports: HSC §42303 (Stats. 1975, Ch. 957), HSC §44344.5 (Added by Stats. 1993, Ch. 1037 (AB 956), amended by Stats. 1996, Ch. 602 (AB564)), HSC §44344.7 (Added by Stats. 1993, Ch. 1037 (AB 956), amended by Stats. 1996, Ch. 602 (AB564)).

VII. AUTHORITY TO MAKE EMISSION DATA AVAILABLE TO THE PUBLIC.

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 as cited in the enclosed November 12, 1993 letter, pages 10-11, "Public Access to Permit Information" and as additionally specified below. State law also provides that the contents of an operating permit, except for trade secret information which is not emission data, shall not be entitled to confidential treatment as cited in the enclosed November 12, 1993, pages 10-11, "Public Access to Permit Information" and as additionally specified below.

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §42301.6 (Added by Stats. 1988, Ch. 1589, last amended by Stats. 1991, Ch. 1183 (AB 928)), HSC §42337 (Added by Stats. 1991, Ch. 1209 (AB 158)); Title 17, California Code of Regulations, section 93300.5 (operative Sept. 21, 1996).

VIII. RETENTION OF DELEGATED ENFORCEMENT AUTHORITY.

State law provides authority for the State to retain enforcement authority even when such authority is delegated to the districts as cited in the enclosed November 12, 1993 letter on page 11, "Enforcement of Permits Program Requirements." Additional authorities for retention of delegated enforcement authority are specified below.

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective

Ms. Felicia Marcus and Mr. David P. Howkamp

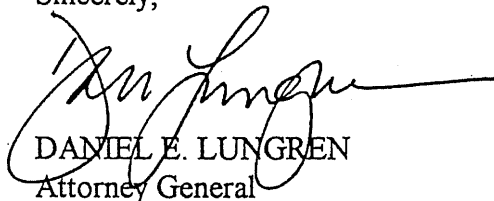
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Date: HSC §39002 (Stats. 1975, Ch. 957), HSC §39003 (Stats. 1975, Ch. 957), HSC §39500 (Stats. 1975, Ch. 957), §39600 (Stats. 1975, Ch. 957), HSC §39602 (Stats. 1975, Ch. 957, last amended by Stats. 1979, Ch. 810, effective Sept. 19, 1979), HSC §39605 (Stats. 1975, Ch. 957, last amended by Stats. 1981, Ch. 700, effective Sept. 23, 1981), HSC §41500 (Stats. 1975, Ch. 957, last amended by Stats. 1992, Ch. 945 (AB 2783)), HSC §42362 (Stats. 1975, Ch. 957), HSC §44365 (Added by Stats. 1987, Ch. 1252, operative July 1, 1988).

I trust that these provisions of law and this certification are responsive to your request. If you need additional information or if I can be of further service, please feel free to contact me in care of Senior Assistant Attorney General Charles W. Getz, IV, at (415) 356-6348.

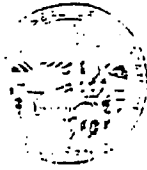
Sincerely,



DANIEL E. LUNGREN
Attorney General

Enclosure

cc: Charles W. Getz, IV
Kathryn Tobias, CIWMB



State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

November 12, 1993

The Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

RE: California's Authority to Implement Title V
(Operating Permits) of the Clean Air Act

Dear Ms. Browner:

Pursuant to my authority as Attorney General and in accordance with Clean Air Act §502(d) (hereinafter, "CAA"), as amended, (42 U.S.C. §7401, et seq.), and 40 CFR §70.4(b)(3), it is my opinion that the laws of the State of California provide adequate authority to carry out all aspects of the program submitted by the Air Resources Board to the Environmental Protection Agency (EPA) for approval to administer and enforce the operating permits program under Title V of the CAA. The specific authorities provided, which are contained in statutes, regulations, or caselaw, and which shall be fully effective by the time the program is approved, include those identified below. All statutory references are to the California Health and Safety Code (HSC) unless otherwise indicated.

I. AUTHORITY TO ISSUE PERMITS

State law provides authority for California's 34 air pollution control and air quality management districts (hereinafter, "districts") to issue operating permits to all air pollution sources within the State that are required to have permits pursuant to CAA §502(a) and 40 CFR §70.3, and to incorporate into permits and assure compliance with each applicable requirement of the CAA and the requirements of 40 CFR part 70. State law also provides authority to issue operating permits for solid waste incineration units combusting municipal waste pursuant to CAA §129(e) that assure compliance with all

applicable requirements of the CAA and the requirements of 40 CFR part 70.

Federal Authority: CAA §§129(e), 502(a)-(b), 503, 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), 70.4(b)(3)(v), 70.5(a), 70.6, 70.7(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §§39053.3 and 39053.5 (enacted by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994); HSC §42300 (enacted by Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994); HSC §42301 (enacted by Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994); HSC §42301.10 (enacted by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994); HSC §40752 (enacted by Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994). For the South Coast Air Quality Management District, additional authority is found in HSC §40506 (enacted by Stats. 1976, Ch. 324, amended by Stats. 1987, Ch. 1301, Sec. 19). Additional authority of the districts to incorporate the applicable requirements of CAA §112, regarding hazardous air pollutants, into Title V permits is found in HSC §§39650-39675 (enacted by Stats. 1983, Ch. 1047, Sec. 1, as amended by Stats. 1992, Ch. 1161, Sec. 3, effective January 1, 1993), HSC §40001(b) (Stats. 1975, Ch. 957), HSC §41700 (Stats. 1975, Ch. 957), and Western Oil & Gas Ass'n. v. Monterey Bay Unified APCD (1989) 49 Cal.3d 408; 261 Cal.Rptr. 384.

Remarks of the Attorney General: While California has for many years had an operating permit program implemented by the districts, AB 2288 was enacted to authorize the districts to comply fully with all of the Title V requirements, excluding equipment used in agricultural operations. As §1 of AB 2288 indicates,

"it is the intent of the Legislature that this act provide authority in state law for the implementation of the operating permit program required by Title V of the Federal Clean Air Act (42 U.S.C. 7661 et seq.) without affecting the issuance of permits as required by any other provision of state law."

With regard to toxic air contaminants, recent legislation provides that

"it is the intent of the Legislature that the state board and the districts implement a program to regulate toxic air contaminants that will enable the state to receive approval to implement and enforce emission

standards and other requirements for air pollutants subject to §112 of the federal act (42 U.S.C. Sec. 7412). The state board and the districts may establish a program that is consistent with the requirements for state programs set forth in subsection (1) of section 112 and section 502 of the federal act (42 U.S.C. Secs. 7412(1) and 7661a)," HSC §39656.

The authority cited above applies to solid waste incineration units combusting municipal waste (as opposed to hazardous waste) in the same manner as to other Title V sources.

II. AUTHORITY TO ISSUE PERMITS TO NONCOMPLYING SOURCES

State law provides authority for the districts to issue permits to Title V sources that are not in compliance with applicable requirements, and to include compliance schedules in permits to bring sources into compliance, through the State's variance process.

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; Date of Enactment or Adoption; Effective Date: HSC §42350 (enacted by Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994) and HSC §42301(d) (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994).

Remarks of the Attorney General: While some districts allow sources with preconstruction permits to obtain variances from the requirement to obtain a permit to operate, AB 2288 prohibits Title V sources from obtaining such variances and further amends state law to allow a district's air pollution control officer to grant a Title V permit to a source operator who presents a valid variance and to incorporate the terms and conditions of the variance, imposed by the hearing board pursuant to HSC §§42353, 42354, and 42358, into the Title V permit as a compliance schedule. Previously, districts could not issue operating permits to noncomplying sources (see HSC §42301(b)).

Even though state law requires a noncomplying source to have a variance in order to obtain a permit to operate, any variance obtained by a source does not affect or modify permit terms or conditions unless and until the Title V permit is amended to incorporate the terms of the variance, nor does it preclude federal enforcement of permit terms and conditions. Variances may be granted by a hearing board only if the six findings specified in HSC §42352 can be made, and protect the source only from state enforcement actions. The variance process is not part

of the Title V permitting process and does not affect federal enforcement for violations of requirements set forth in a Title V permit. Should the District follow Title V permitting procedures to modify or issue a Title V operating permit which incorporates a compliance schedule from a variance, the compliance schedule would then be part of the federally enforceable permit terms and conditions.

III. PERMIT BOARD MEMBERSHIP AND CONFLICTS OF INTEREST

State law provides that no state or local government agency which issues or decides appeals regarding operating permits shall be constituted of less than a majority of members who represent the public interest and who do not derive a significant portion of their income from persons subject to operating permits. State law also provides that any potential conflicts of interest by members and employees of such state or local government agencies 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 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; Date of Enactment or Adoption; Effective Date: Government Code §§87100, 87103, 87300, and 87302 (added by initiative measure adopted June 4, 1974; operative January 7, 1975, and last amended by Stats. 1985, Ch. 611, Sec. 1.5 [Gov't Code @§87103] and Stats. 1992, Ch. 214 [Gov't Code §87302]). See also, definitions in Gov't Code §§82019, 82030, 82041, 82048, and 82049 and regulations set forth in 2 Cal. Code of Regs. §18700 et seq.

Remarks of the Attorney General: The Political Reform Act of 1974 was a sweeping initiative measure intended to assure, among other purposes, that state and local government officials serve the needs and respond to the wishes of all citizens equally, without regard to wealth; that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or those of persons who have supported them; and that assets and income of public officials which may be materially affected by their official actions are disclosed and such officials disqualified from acting in appropriate circumstances to avoid conflicts of interest. The Political Reform Act is vigorously enforced by the Fair Political Practices Commission.

Compliance with the Political Reform Act assures that the public officials who issue permits and review permit decisions

serve the public interest. District policy boards, which adopt the rules governing permits, are made up of elected officials (i.e., members of the County Board of Supervisors and City Councils) or a combination of elected officials and appointees (see HSC §40420 pertaining to the South Coast AQMD), and these boards appoint an air pollution control officer who issues operating permits in the first instance. The membership of district hearing boards, which are authorized to hear permit appeal consists of individuals with varied backgrounds, as provided in HSC §40801 (or HSC §40501.1 for the South Coast AQMD). Finally, the membership of the Air Resources Board, which does not issue permits or hear permit appeals but which has general oversight authority over the districts and their permit programs pursuant to HSC §§39002, 41500-41505, and 42362, is comprised of nine members with specified qualifications appointed by the Governor with the consent of the Senate "on the basis of their demonstrated interest and proven ability in the field of air pollution control and their understanding of the needs of the general public in connection with air pollution problems" (HSC §§39510 and 39511).

IV. PERMIT FEES

State law provides authority for the districts to assess and collect annual permit fees (or the equivalent amount of fees over some other period of time) 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 sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the State's Title V 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; Date of Enactment or Adoption; Effective Date: HSC §42311 (Stats. 1975, Ch. 957; amended by Stats. 1988, Ch. 1568, Sec. 29); HSC §§40506(b) (Stats. 1976, Ch. 324; amended by Stats. 1987, Ch. 1301, Sec. 19) and 40510 (enacted by Stats. 1976, Ch. 324; amended by Stats. 1988, Ch. 1568, Sec. 8.2) for the South Coast AQMD; HSC §41080 (Stats. 1988, Ch. 1541, Sec. 3) for the Sacramento Metropolitan AQMD; and San Diego Gas and Electric Co. v. San Diego County APCD (1988) 203 Cal.App.3d 1132.

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 2 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)(3)(iii)-(iv), 70.6(a)(2), 72.70(b), 72.72(a).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §42300 (Stats. 1975 Ch. 957; amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994) and HSC §40507 (Stats. 1976, Ch. 324; amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994) for the South Coast AQMD. Annual review of all permits provided by HSC §42301(e), formerly §42301(c) (Stats. 1975, Ch. 957, as amended by Stats. 1988, Ch. 1568, Sec. 27 and last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994).

Remarks of the Attorney General: HSC §42300(b) authorizes the districts to adopt regulations which provide that "a permit shall be valid only for a specified period." Therefore, the districts will be able to issue operating permits for a fixed term not to exceed five years, or, as the case may be for solid waste incineration units combusting municipal waste, for a fixed term not to exceed 12 years. While the statute somewhat contradictorily requires annual extension of the expiration date upon completion of the annual review to assure that the permit is up to date and upon payment of fees (unless action to revoke the permit has become final), §42300(c) specifies that this annual extension is for purposes of state law only and does not affect the renewal of the permit for Title V purposes. This point is further clarified by HSC §42301.11(d), added by AB 2288, which indicates the legislative intent that the districts encourage the issuance of Title V permits for five-year terms.

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; Date of Enactment or Adoption; Effective Date: HSC §41511 (Stats. 1975, Ch. 957, amended by Stats. 1976, Ch. 1063), HSC §42301 (enacted by Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42301.10 (enacted by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42303 (Stats. 1975, Ch. 957), HSC §§44300 et seq. regarding toxic air contaminants (Stats. 1987, Ch. 1252, Sec. 1), and HSC §§42700-42708 (Stats. 1975, Ch. 957).

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; Date of Enactment or Adoption; Effective Date: HSC §41510 (Stats. 1975, Ch. 957), HSC §42301 (Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994 and HSC §42301.10 (Added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994).

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, and as provided generally in the CAA and 40 CFR part 70.

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; Date of Enactment or Adoption; Effective Date: HSC §§42301(b) and (e) (Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), and HSC 42301.10 (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994)

IX. PERMIT REOPENING

State law provides authority to revise permits with remaining terms of 3 or more years 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. §§661a(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; Date of Enactment or Adoption; Effective Date: HSC §42301(e) [formerly 42301(c)] (enacted by Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42301.10 (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), and HSC §§42304, and 42307, 42309 (enacted by Stats. 1975, Ch. 957).

Remarks of the Attorney General: Section 42301(e) requires permits to be reviewed annually to ensure that the permit conditions continue to ensure compliance with, and the enforceability of, all district rules and regulations. The permit must be revised to specify appropriate permit conditions during this annual review. Since each district will have a Title V operating permit rule that will require the inclusion of and compliance with all applicable requirements, the permit may be updated annually to reflect new applicable requirements. Further, HSC §42301.10 authorizes the district to include all conditions necessary to ensure compliance with all applicable requirements.

In addition, permits may be terminated or revoked by the district hearing board upon application by the air pollution control officer if the permittee "is violating any applicable order, rule, or regulation of the district or any applicable provision of this division [26 of the HSC]", §42307. Since district Title V operating permit rules will provide that violation of any permit condition is violation of the rule, the hearing board would be able to revoke a permit for cause, as required.

Finally, with regard to acid rain requirements, operating permits are issued to subject sources by the districts (although construction permits are issued by the State Energy Resources Conservation and Development Commission ("Energy Commission" or "CEC"); see paragraph XXI, *infra*). The permits can be amended as described, although any provisions which conflict with CEC siting provisions would require coordination with the CEC, as explained in paragraph XXI, below.

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' [or fewer days if the State requires less time in emergencies] 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; Date of Enactment or Adoption; Effective Date: HSC §§42300 and 42301 (Stats. 1975, Ch. 957; amended by AB 2288, Stats. 1993 Ch. 1166, effective January 1, 1994) and HSC §42301.12 (a)(11) (added by AB 2288, above).

Remarks of the Attorney General: The broad language of the legislation authorizing district permit programs does not pose an impediment to a district rule allowing the inclusion in a permit of alternative operating scenarios, as long as such scenarios comply with the statutory provisions and all applicable requirements. Similarly, the language is broad enough to allow changes within a facility without a permit revision as long as there is compliance with the "emissions allowable under the permit" (i.e., permit terms that establish an emissions limit pursuant to an "applicable requirement" of the Clean Air Act).

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; Date of Enactment or Adoption; Effective Date: HSC §42300 (enacted by Stats. 1975, Ch. 957), HSC §40702 (Stats. 1975, Ch. 957), and HSC 42320-42323 (added by Stats. 1992, Ch. 1096, Sec. 3, effective September 29, 1992).

Remarks of the Attorney General: Nothing in State law prohibits a district from adopting appropriate permit modification procedures into district rules and regulations.

XII. PUBLIC PARTICIPATION

State law provides authority for procedures to allow public participation in district 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. 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 for 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. §§661a(b)(6), 7661d(a)(2); 40 CFR §§70.7(h), 70.8(b).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §40702 (Stats. 1975, Ch. 957), HSC §42300 (Stats. 1975, Ch. 957), HSC §42301 (Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994); and HSC §§42320-42323 (Stats. 1992, Ch. 1906, Sec. 3).

Remarks of the Attorney General: The districts are authorized by state law to incorporate appropriate notice and public review procedures into their permit programs. As a matter of practice, the districts currently allow public participation in the more significant permit actions. The process can be expanded as necessary to comply with federal law by amending district rules and regulations. Similarly, the district rules may provide for permit review and comment by effected states.

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, except for trade secret information which is not emission data, 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; Date of Enactment or Adoption; Effective Date: Government Code §6250 et seq. (California Public Records Act, enacted by Stats. 1968, Ch. 39). See especially Gov't Code §6252 (added by Stats. 1968, Ch. 1473, Sec. 39; last amended by Stats. 1991, Ch. 181, Sec. 1); Gov't Code §6253 (added by Stats. 1968, Ch. 1473, Sec. 39; last amended by Stats. 1988, Ch. 409, Sec. 1); Gov't Code §6254 (added by

Stats. 1981, Ch. 684, Sec. 1.5; last amended by Stats. 1992, Ch. 1128, Sec. 2, operative July 1, 1993); Gov't Code §6254.7 (Added by stats. 1970, Ch. 1295, Sec. 2; last amended by Stats. 1992, Ch. 612, Sec. 1, effective January 1, 1993); and HSC §44346 (enacted by Stats. 1987, Ch. 1252, Sec. 1). See ARB regulations in Title 17, Cal. Code Regs. §§91000-91022 and Title 17, Cal. Code Regs. §§93321, 93322, and 93339.

XIV. ENFORCEMENT OF PERMITS PROGRAM REQUIREMENTS

State law provides civil and criminal enforcement authority consistent with 40 CFR §70.11, including authority to recover penalties and fines in a maximum amount of not less than \$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; Date of Enactment or Adoption; Effective Date: HSC §40752 (Stats. 1975, Ch. 957 last amended by AB 2288, Stats. 1993, Ch. 1166, effective Jan. 1, 1994;); HSC §§39674 and 38675 (Stats. 1983, Ch. 1047, Sec. 1; amended by Stats. 1992, Ch. 1161, Sec. 12, effective January 1, 1993); HSC §42303 (Stats. 1975, Ch. 957); HSC §42303.5 (Stats. 1976, Ch. 1063); HSC §42304 (Stats. 1975, Ch. 957); HSC §§42300-42339 (Stats. 1991, Ch. 1209, Sec. 3); HSC §§42300-42339 (Stats. 1991, Ch. 1209, Sec. 3); HSC §42450-42454 (Added by Stats. 1975, Ch. 957, amended by Stats. 1988, Ch. 183, Sec. 1; HSC §40506.1 (Stats. 1992, Ch. 371, Sec. 8, effective Jan. 1, 1993); HSC §41510 (Stats. 1975, Ch. 957), HSC §41511 (Stats. 1976, Ch. 1063).

HSC §41700 (Stats. 1975, Ch. 957), HSC §41701 (Stats. 1975, Ch. 957), HSC §42400 (Stats. 1975, Ch. 957, last amended by AB 2288, Stats. 1993, ch. 1166, effective January 1, 1994), HSC §42400.1 (Stats. 1986, Ch. 1453), HSC §42400.2 (Stats. 1986, Ch. 1453), HSC §42400.3 (Stats. 1992, Ch. 1252, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42400.4 (Added by AB 2288, Stats 1993, Ch. 1166, effective January 1, 1994), HSC §42401 (Stats. 1975, Ch. 957), HSC §42402 (Stats 1975, Ch. 957, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42402.1 (Stats. 1986, Ch. 1453), HSC §42402.2 (Stats. 1986, Ch. 1453), HSC §42402.3 (Stats. 1992, Ch. 1252, last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42402.5 (Stats. 1988, Ch. 1568), HSC §42403 (Stats. 1975, Ch. 957, HSC §42404 (Stats. 1975, Ch. 957), HSC §42404.5 (Stats. 1987, Ch. 260), Code of Civil Procedure §526 (enacted in 1872 based on the Practice Act §112, Stats. 1851, Ch. 5).

Remarks of the Attorney General: AB 2288 increased civil and criminal penalties from one thousand dollars (\$1,000) to ten thousand dollars (\$10,000) for those sources subject to the requirements of Title V of the federal Clean Air Act. Since the adoption of these amendments, a question of interpretation has arisen as to whether the newly added section 42400.4 would limit the extent to which penalties can be recovered. In the 1994 legislative session, it is expected that the section will be amended to eliminate the potential for questions of interpretation.

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; Date of Enactment or Adoption; Effective Date: HSC §40702 (Stats. 1975, Ch. 857), HSC §42300(a) (Stats. 1975, Ch. 957), HSC §42301 (Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42301.10 (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994) and HSC §42322 (added by Stats. 1992, Ch. 1096, Sec. 3, effective Sept. 29, 1992).

Remarks of the Attorney General: State law does not impede the permit program adopted by the districts from providing for the continued applicability of permit terms and conditions pending permit renewal. Such permit conditions would be enforced pursuant to the penalty provisions cited in paragraph XIV above. This conclusion is further supported by the uncodified intent language in §1 of AB 2288 that "[i]t is the intent of the Legislature that this act provide authority in state law for the implementation of the operating permit program required by Title V of the federal Clean Air Act...."

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) and (d).

Federal Authority: CAA §§502(b)(5)(F), 505(b), 42 U.S.C. §§661a(b)(5)(F), 7661d(b); 40 CFR §§70.4(b)(3)(ix), 70.8(c)-(d).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §42301(c) (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994).

XVII. FINAL AGENCY ACTION ON PERMITS

State law provides that, solely for the purposes of obtaining judicial review in State court for failure of the air pollution control districts to take final action, "final permit action" shall include the failure of the districts to take final action on an application for a permit, permit renewal, or permit revision within the time required by Title V and the EPA regulations, as incorporated into district permit rules. [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; Date of Enactment or Adoption; Effective Date: HSC §40702 (Stats. 1975, Ch. 957), HSC §§42300 and 42301 (Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42301.10 (added by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), HSC §42322(a)(3) and (a)(7) (Enacted by Stats. 1992, Ch. 1096, Sec. 3), and Code of Civil Procedures §1085 (Enacted in 1872, based on (Stats. 1851, Ch. 5, Sec. 467) and last amended by Stats. 1951, Ch. 1737, Sec. 148).

Remarks of the Attorney General: Section 1085 of the Code of Civil Procedure can be used to compel performance of a mandatory duty by a public officer or to command the exercise of discretion. Thus, if the district rules require action on a permit application within a specified time period, traditional mandamus will lie to compel performance. Further, given the intent of the Legislature expressed in AB 2288 that state law provides authority for compliance with Title V, we believe the districts are authorized to include the required provision regarding "final action" in district rules and regulations. Finally, the Legislature has recently expressed its intent in the Air Pollution Permit Streamlining Act of 1992 that permits be acted upon expeditiously, that a permit action schedule with specific deadlines must be established, and that appeals of nonaction on a permit within the specified deadlines may be taken to the district policy board, in districts with a population of 250,000 or more, which is where most of the Title V sources are

located. The smaller districts are not prohibited from adopting similar provisions into their permit programs.

XVIII. DEFAULT PERMIT ISSUANCE

State law does not authorize the issuance, modification, or renewal of any permit based on the passage of a specified time period when the permit agency 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; Date of Enactment or Adoption; Effective Date: No state law authorizes default operating permit issuance. While a writ of mandate could be obtained to require the air pollution control officer to act on the permit application, the writ could not compel performance in a particular manner, such as default issuance. Finally, Title V sets forth procedures for review by any person, EPA, and any affected state prior to issuance of a permit to operate, which would preclude default issuance.

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, including the air pollution control officer. 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; Date of Enactment or Adoption; Effective Date: HSC §42302 (enacted by Stats. 1975, Ch. 957), HSC @§42302.1 (added by Stats. 1988, Ch. 1568, Sec. 28.5), HSC §42308 (enacted by Stats. 1975, Ch. 957), HSC §§40864 and 40865 (added by Stats. 1975, Ch. 957; amended by Stats. 1976, Ch. 1113). See also, Code of Civil Procedure §1094.5 (enacted by Stats. 1945, Ch. 868, Sec. 1; last amended by Stats. 1992, Ch. 72, Sec. 1, effective May 28, 1992).

Remarks of the Attorney General: Appeal to the district hearing board of a permit decision made by the air pollution control officer appears to be an administrative remedy which must be exhausted prior to seeking judicial review. Both the permit applicant and "any aggrieved person who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in the action before the district" may request a hearing on the issuance or denial of the permit, or by implication, of the terms and conditions of the permit. The hearing board must hold a hearing on the matter within 30 days, and the decision of the hearing board is subject to judicial review by writ of administrative mandamus in accordance with §1094.5 of the Code of Civil Procedure. The control officer, as the party defending the permit action before the hearing board, may also seek judicial review.

XX. LIMITATIONS ON JUDICIAL REVIEW

State law provides that the opportunity for judicial review of a final permit action in State court, as 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 30 days after the final permit action (or 35 days, under specified circumstances). State law further provides that if the final permit action being challenged is the district's failure to take final action, a petition for judicial review may be filed at any time before the control officer 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(b)(3)(xii).

Citation of State Laws and Regulations; Date of Enactment or Adoption; Effective Date: HSC §42302 (Stats. 1975, Ch. 957), HSC §42302.1 (Stats. 1988, Ch. 1568, Sec 28.5), HSC §§40864(a) and (d) (Stats. 1975, Ch. 957; amended by Stats. 1976, Ch. 1113), Code of Civil Procedure §1094.5 (Stats. 1945, Ch. 868, Sec. 1; last amended by Stats. 1992, Ch. 72, Sec. 1), and Code of Civil Procedure §1085 (enacted 1872 based on Stats. 1851, Ch. 5, Sec. 467; last amended by Stats. 1951, Ch. 1737, Sec. 148) to compel performance of a mandatory duty by a public officer.

Remarks of the Attorney General: As previously stated, appeal of the control officer's decision on a permit to the hearing board appears to be an exhaustion requirement prior to seeking judicial review pursuant to CCP §1094.5. However, it should be noted that in its role of reviewing permit decisions initially made by the APCO, the hearing board is confined to examining whether the permit was properly issued or denied, i.e., whether the control

officer correctly applied the law and district rules to the facts presented by the particular source. We believe that this review function does not entail the exercise of independent judgment, as in a variance or abatement order proceeding, but rather involves a determination of whether the control officer acted reasonably and in accordance with the law. Thus, if the control officer has denied a permit due to an objection by the EPA Administrator, we do not believe the hearing board could countermand that decision on equity or other grounds, for the purposes of the federal aspects of the permit, since the statute (HSC §42301(c)) prohibits the issuance of a permit to a Title V source if the Administrator objects in a timely manner. We have addressed this issue here in order to respond to questions by EPA on the role of the hearing board and the scope of its review authority with regard to Title V permit actions.

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; Date of Enactment or Adoption; Effective Date: HSC §§42300 and 42301 (Enacted by Stats. 1975, Ch. 957; last amended by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994), and HSC §42301.10 (enacted by AB 2288, Stats. 1993, Ch. 1166, effective January 1, 1994).

Remarks of the Attorney General: Power plants that significantly affect air quality will be subject to Title V, and these plants are "affected sources" pursuant to Title IV (Acid Deposition Control) and Title V of the federal Clean Air Act. The CEC is endowed with plenary authority to certify sites for power plant construction (see Public Resources Code §25500 et. seq. and 20 Cal.Code Regs. §1701 et. seq.).

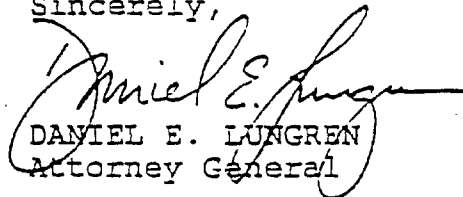
In practice, power plant sitings follow a sequence of events in which the actions of the Energy Commission and the districts are coordinated. The authority to construct issued by the district is forwarded to the CEC and serves as the determination of compliance with applicable air quality standards required by 20 CCR §§1714.9 and 1744.5. The Commission adopts the conditions specified in the authority to construct in its final siting decision. The district then issues the facility a permit to operate. The CEC does not review permits to operate unless their conditions differ from those set forth in the authority to construct. A memorandum of understanding between the CEC and the ARB sets forth a timetable for these actions. The CEC has never

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had occasion to exercise its power to override an air district's permit denial, although the CEC and the districts have negotiated changes in permit conditions. Public Resources Code §25525 expressly provides that "[i]n no event shall the commission make any findings in conflict with applicable federal law or regulations," including Title V requirements.

Thus, the CEC does not have authority to site a power plant that cannot obtain a Title V permit. The Supremacy Clause of Article VI of the federal Constitution and Public Resources Code §§25500 and 25525 prohibit the Commission from making a finding in conflict with federal law; such a conflict would exist were the CEC to certify and site a plant that required a Title V permit and did not possess it (Clean Air Act §502(a)), or if the CEC objected to permit conditions necessary to assure compliance with applicable requirements, as provided in Clean Air Act §504. Therefore, CEC certification cannot shield power plants from having to obtain Title V permits which meet the Acid Rain Program requirements of 40 CFR part 72.

Sincerely,



DANIEL E. LUNGREN
Attorney General