



Petitions Gone Wild

LDEQ, EPA, Nucor, NSA & You

Air & Waste Management Association
Louisiana Section

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A large, red, distressed-style stamp with the word "CENSORED" in bold, capital letters. The stamp has a rough, ink-like texture and is positioned horizontally across the middle of the slide.





EPA Action on Title V Petitions

According to Section 505(b)(2) of the Clean Air Act (CAA), EPA “shall grant or deny [a] petition within 60 days after the petition is filed.”

However, processing times are typically much longer.

- Woodside: ~ 1 year, 4.5 months
- Noranda Alumina: ~ 1 year, 8.5 months
- Murphy Oil USA: ~ 1 year, 9 months
- Nucor: ~ 1 year, 9 months (Order 1)
~ 2 years, 1.5 months (Order 2)

LEAN/Sierra Club’s June 2010 Nucor petition is still pending ... 3 years and 4 months later.



EPA Action on Title V Petitions

In June 2012, LDEQ calculated EPA's average response time since 2008 to be just over 19 months.

EPA action is typically prompted only by a mandamus suit from the petitioner.

- EPA's MO is to then enter into settlement negotiations with the petitioner to determine the date by which EPA will respond.
- LDEQ often learns of such agreements only after notice of the settlement has been published in the *Federal Register*.



EPA's Responses Don't Identify Violations

In its recent orders granting (or granting in part) Title V petitions, EPA has not identified any defect in the permits themselves.

EPA has **not** found any LDEQ permit to:

- “not ... be in compliance with applicable requirements”*; or
- contain an “unambiguous violation of the Act.”**

Instead, EPA has asked for further explanation or justification. Several examples follow.

* 40 CFR 70.8(c)(1)

** 136 Cong. Rec. 3675



EPA's Responses Don't Identify Violations

- “Explain how the monitoring ... is sufficient ...”
- “Explain why it is not necessary to continuously monitor ...”
- “Provide a sound technical rationale ...”
- “Review ... and better explain its determination ...”
- “Respond ... explaining why the selected method or emission factor is appropriate ...”
- “Fully respond to the Petitioner’s comment ...”
- “Provide an adequate basis for its decision to ...”



Are Petition Responses Permits?

EPA and DOJ consider a petition response to be “a new proposed permit,” even if LDEQ specifically determines that a modification to the permit is not warranted.

- As a result, the petitioners are provided with another opportunity to submit a petition.
- This merry-go-round of filings could conceivably go on for many years.
 - Woodside: 4 years, 10 months ... and counting.
- LDEQ believes EPA’s interpretation of the CAA is improper and clearly contradicts Congressional intent.



Title V Petitions and PSD Permits

EPA believes it can use the Title V petition process to object to a PSD permit.

- Nucor Order: “[I]f a PSD permit that is incorporated into a title V does not meet the requirements of the SIP [State Implementation Plan], the title V permit will not be in compliance with all applicable requirements.”
- LDEQ asserts that the CAA provides EPA with separate basis for objecting to a PSD permit, that being Section 167.



Challenging EPA Objections

Section 505(c) of the CAA expressly bars judicial review of an objection to a Title V permit until EPA “takes final action to issue or deny a permit.”

Conversely, an action issued pursuant to Section 167 is subject to immediate judicial review.

- In this circumstance, EPA would also bear the burden of proof.



Abbreviated Background on Nucor Order

In March 2012, EPA issued an order granting two petitions for objection to Nucor's Title V permits.

The order:

- did not identify a single violation of the Act or Louisiana's SIP;
- addressed two "threshold" issues centered on whether Nucor's pig iron and DRI plants could be permitted as separate projects for PSD purposes; and
- invited Zen-Noh and LEAN/Sierra Club to submit follow-up petitions concerning LDEQ's response.



5th Circuit Litigation

After responding to the petition, LDEQ brought a suit against EPA in the United States 5th Circuit Court of Appeals. LDEQ argued:

- EPA acted contrary to law in objecting to the permits based solely on its policy preferences rather than the Act, its implementing regulations, or Louisiana's SIP.
- EPA's statutory authority does not allow it to object to a PSD permit in the guise of a Title V objection.
- Section 505(c) did not bar judicial review due to the deficiencies noted above and because EPA's 60-day window provided by the CAA had passed.



5th Circuit Litigation

On September 13, 2013, the Court determined that it lacked subject matter jurisdiction.

- “We conclude that review in this forum is not proper until the Administrator takes final action issuing or denying a permit.”
- Section 505(c)

LDEQ is contemplating its next step.

- Petition for rehearing *en banc* is possible.



LDEQ's Permitting Program

LDEQ currently requires a Title V permit to be issued prior to the commencement of construction of a new major source.

- LAC 33:III.507.C.2

However, the federal programs under 40 CFR 70 and 71 provide an owner/operator up to 12 months after the facility has commenced **operation** to submit a Title V application.

- 40 CFR 70.5(a)(1)(ii); 40 CFR 71.5(a)(1)(ii)



LDEQ's Permitting Program

One way to avoid the potential consequences of a petition process “gone wild” is to issue separate preconstruction and operating permits.

- An NSR permit (if required) could serve as the preconstruction permit required by LAC 33:III.501.C.2.
- Where an NSR permit is not required (e.g., a 250 TPY source category), LDEQ may craft a non-Title V state preconstruction permit.
- Of course, any such change would require revisions to Chapter 5.



LDEQ's Permitting Program

LDEQ has not made any decision regarding whether to pursue such a programmatic change; however, we believe the topic is worthy of consideration.

- One possibility may be to provide applicants with either option – to apply for a preconstruction Title V permit or otherwise apply for a Title V permit no later than 12 months after the facility has commenced operation.
- Feel free to communicate your thoughts (positive or negative) to me.



Questions / Comments?



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