Petitions Gone Wild
LDEQ, EPA, Nucor, NSA & You

Air & Waste Management Association
Louisiana Section

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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.
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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