

NEJAC PERMITTING CHARGE: BACKGROUND PAPER ON EPA PROGRAMS

A. Clean Air Act

1. NSR Permitting

Under the New Source Review (NSR) program in the Clean Air Act (CAA), a construction permit is required to build a new major stationary source or to make a modification to an existing major source that increases air pollutant emissions from the source. 42 U.S.C. §§ 7410(a)(2)(C); 7475(a); 7505(c)(5); and 7503. The NSR permit program for major sources has two different components – one for areas where the air is not meeting National Ambient Air Quality Standards established by EPA, and the other for areas where the air meets these health-based standards or is unclassified. Permits for sources located in attainment (or unclassifiable) areas are called Prevention of Significant Deterioration (PSD) permits and those for sources located in nonattainment areas are called nonattainment NSR permits. Under the CAA, states have primary responsibility for issuing permits, and they can customize their NSR programs within the limits of EPA regulations. EPA's primary role is to approve state programs, to review, comment on, and take any other necessary actions on draft and final permits, and to assure consistency with EPA's rules, the state's implementation plan, and the CAA. In addition, EPA directly issues permits in certain situations and, through the EPA Environmental Appeals Board, adjudicates appeals of EPA permits and permits issued by States and local districts with delegated federal programs.

A PSD permitting program may be administered within a state in one of the following three ways:

First, the program can be run by EPA pursuant to a Federal Implementation Plan ("FIP"). Second, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. Third, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state's "State Implementation Plan" ("SIP"). In this last instance, the state would conduct PSD permitting under its own authority.

In re Milford Power Plant, 8 E.A.D. 670, 673 (EAB 1999) (internal citation omitted). EPA has generally reserved the responsibility to issue PSD permits under the first mechanism in Indian country and the Outer Continental Shelf areas. See generally, 40 C.F.R. Part 52. If EPA determines that compliance with state law is insufficient to meet the PSD permitting requirements of the CAA, EPA may withhold approval of a state PSD permitting program. 40 C.F.R. § 52.21(a)(1). In these cases, either EPA (under the first form of program administration described above) or the state (through the second form of administration) must apply the federal regulations found at 40 C.F.R. § 52.21 and Part 124 to ensure compliance with federal law. In these circumstances, the federal law applicable to PSD permitting can operate in parallel with the state law governing construction permits because both forms of law are independently applicable. See, *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 707

(EAB 1996). The EPA Environmental Appeals Board hears appeals of permits issued under both the first and second forms of program administrations. 40 C.F.R. § 124.19.

Under the third form of PSD program administration discussed above, the state program must meet the requirements of 40 C.F.R. § 51.166 of EPA's regulations to be approved by the Agency. When EPA approves a state PSD program, it determines that compliance with the state law by the state permitting authority will be sufficient to ensure compliance with the PSD permitting requirements of the CAA. Upon SIP-approval, the state regulations that are approved as the State Implementation Plan have the force and effect of federal law and are federally-enforceable. 42 U.S.C. §§ 7410 and 7413; *see also, Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1363-1364 (D.C. Cir. 1995); *Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) *aff'd* 427 U.S. 256 (1976). After approval of a state program, if revisions to state program regulations are necessary to ensure compliance with the CAA, EPA can mandate such revisions through a "SIP call" under section 110(k)(5) of the CAA. The CAA also directs state permitting authorities to keep EPA informed of every PSD permit application and "of every action related to the consideration of such permit." 42 U.S.C. § 7475(d)(1).

The issuance of PSD permits and other actions by the State in the administration of the PSD program must conform to the requirements of the Act, applicable EPA regulations, and the SIP. 42 U.S.C. §§ 7477 and 7413. EPA often offers comments to state permitting authorities on permit applications, but EPA is not formally involved in most PSD permit decisions under approved state programs. However, EPA is authorized to take action to enforce the statutory PSD requirements. Section 113(a)(5) provides that if EPA "finds that a State is not acting in compliance with any requirement or prohibition" of the CAA "relating to the construction of new sources or the modification of existing sources," 42 U.S.C. § 7413(a)(5), EPA may (A) "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies," (B) "issue an administrative penalty order," or (C) "bring a civil action" in federal district court for an injunction or other relief. 42 U.S.C. § 7413(a)(5). Section 167, which is directed solely to the PSD program applicable to new sources in clean air areas, provides that EPA "shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of" the CAA specifically intended to prevent significant deterioration. 42 U.S.C. § 7477. *See also, Alaska Dept. of Env't'l Conservation v. EPA*, 124 S.Ct. 983 (2004).

When EPA is the permitting authority, it controls both the content of the permit and the permit review process. In permit and appeal decisions made by EPA, EPA currently has sufficient legal authority to consider environmental justice issues regarding potential disproportionate environmental burdens on a case-by-case basis, with no need to amend existing regulations or guidance documents. In fact, EPA already considers environmental justice issues on a case-by-case basis in issuing PSD permits consistent with its legal authority.

2. Title V Permits

All major stationary sources of air pollution and certain other sources are required to apply for CAA title V operating permits that include emission limitations and other conditions as necessary to assure sources' compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a) and 504(a) and (c). Unlike PSD/NSR permitting, the title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable requirements. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992)(EPA final action promulgating Part 70 rules). One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is complying with those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Section 502(d)(1) of the CAA calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. Under CAA section 505(a) and the relevant implementing regulations (40 C.F.R. § 70.8(a)), states and other permitting authorities are required to submit each proposed title V permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements of title V. 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the CAA provides that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. *See also* 40 C.F.R. § 70.8(d). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. CAA § 505(b)(2). EPA also has authority to reopen state-issued title V permits under certain circumstances. *See, e.g.*, 40 C.F.R. § 70.7(f) and (g).

Further, under EPA regulations, all state title V permit proceedings (except for modifications qualifying for minor permit modification procedures), must "provide adequate procedures for public notice including an opportunity for public comment and a hearing on the draft permit." See 40 C.F.R. § 70.7(h). This provision also identifies specific steps permitting authorities must take to allow for adequate public participation. State permitting authorities also have the flexibility to provide additional public participation.

B. Resource Conservation and Recovery Act (RCRA)

1. Subtitle C

RCRA Section 3005 requires owners and operators of facilities that "treat, store or dispose" of hazardous waste to obtain a RCRA permit. The permit is not only an authorization to operate but also the vehicle through which the general operating standards in the regulations are particularized for individual facilities. EPA, through regulation, has adopted general

operating standards (technical standards) that cover all aspects of permitted facilities' operations, including requirements for preparedness and prevention, closure, and financial assurance, as well as specific technical requirements that apply to each particular type of regulated unit (*e.g.*, containers, tanks, incinerators, etc.). See, 40 C.F.R. Part 264. RCRA section 3005(c)(3) (the so-called "omnibus provision") also provides EPA with the authority, on a case-by-case basis, to add conditions to a particular facility's permit that go beyond the Part 264 regulatory requirements for that facility, where the Agency determines that the additional conditions are "necessary to protect human health and the environment."

RCRA Section 3006 allows EPA to authorize states to operate their own hazardous waste programs, which operate in lieu of the federal permit program, and this includes the issuance and enforcement of hazardous waste permits. 42 U.S.C. § 6926(b) and (d). EPA reviews the state program, and authorizes the state requirement, where EPA determines that, among other requirements, the state requirement is "equivalent to the Federal program." 42 U.S.C. § 6926(b). See generally 40 C.F.R. Part 271. Although many states have received authorization to run the original or "base" RCRA hazardous waste permitting program (the program under the original statute and EPA's 1980 implementing regulations), many of those states have not received authorization to administer aspects of the 1984 HSWA (Hazardous and Solid Waste Amendments) requirements. In such cases, EPA and the State co-issue a permit to the facility, with the State issuing the "base portion" and EPA issuing the "HSWA portion."

EPA can review a state permit during the public comment period and provide comments, including comments that additional permit requirements are necessary. 40 C.F.R. § 261.19(a), (b), and (e). EPA can bring an enforcement action for violation of any condition that EPA, in its comments on the draft permit, indicated were "necessary to implement approved state program requirements" even if the state did not incorporate those conditions in the final permit. 40 C.F.R. § 261.19 (e). EPA coordinates with authorized states to ensure that either EPA or the state conducts all inspections required by the statute, including inspections of federal facilities and state-operated facilities, as well as a percentage of other RCRA-regulated facilities in the state. EPA takes enforcement action as appropriate following EPA inspections in authorized states and when a state asks EPA to take the lead on enforcement at a particular facility. EPA oversees the quality of each state's implementation of the authorized program. EPA can withdraw state authorization if the state is not administering and enforcing the program in accordance with RCRA and fails to correct identified deficiencies. 42 U.S.C. § 6926(e).

2. Subtitle D

Subtitle D of RCRA, at section 4005(c)(1)(B), 42 U.S.C. § 6945(c)(1)(B), requires each state to adopt and implement a permit program or other system of prior approval to ensure that facilities that receive household hazardous waste or conditionally exempt small quantity generator (CESQG) hazardous waste are in compliance with the federal revised criteria promulgated under section 4010(c) of Subtitle D of RCRA. Section 4005(c)(1)(C) further directs EPA to determine whether state permit programs are adequate to ensure compliance with the revised federal criteria. EPA's regulations for determining state program adequacy are at 40 C.F.R. Part 239.

EPA promulgated revised criteria for Municipal Solid Waste Landfill units (MSWLFs) in 1991 and for non-municipal, non-hazardous waste disposal units that take CESQG wastes in 1996. They are codified at 40 C.F.R. Part 258 and 40 C.F.R. Part 257, Subpart B, respectively. These criteria, the Subtitle D “federal revised criteria,” establish minimum federal standards that are designed to be implemented by the owner or operator, with or without oversight or participation by a regulatory agency (*e.g.*, an approved state permit program). However, under the terms of the federal revised criteria, facilities located in approved states have additional flexibilities to comply with the criteria.

EPA does not have authority to enforce the revised federal criteria in an approved state. Instead, the federal criteria are enforceable by citizen suit under RCRA section 7002. However, EPA may use the authorities available under RCRA sections 3007 and 3008 to enforce the federal revised criteria where it determines that the state permit program is not adequate. RCRA Section 4005(c)(2)(A).

C. Clean Water Act

1. Section 402 Permits

National Pollutant Discharge Elimination System (NPDES) permits are the primary way discharges of pollutants to waters of the United States are authorized. Currently, 46 states are authorized to issue NPDES permits in lieu of EPA, while EPA remains the permitting authority in four states and the District of Columbia. EPA is also the permitting authority on most tribal lands and for federal facilities in many states. Even in authorized states, EPA continues to have a role in the administration and enforcement of NPDES permits. Under Clean Water Act (CWA) section 402(d) and its implementing regulations (40 C.F.R. § 123.44), EPA reviews proposed state NPDES permits and, where EPA determines that the permit fails to be consistent with the requirements of the CWA, may assume the authority to issue permits to which it has raised objections. In addition, under CWA section 309, EPA may enforce conditions and limitations in state NPDES permits. NPDES permits must contain: (1) technology-based limitations that reflect the pollution reduction achieved through particular equipment or process changes, without reference to the effect on the receiving water and (2) where necessary, more stringent limitations representing that level of control necessary to ensure that the receiving waters achieve water quality standards.

2. Section 404 Permits

CWA section 404 permits authorize the discharge of “dredged or fill material” to waters of the United States. The types of activities regulated under section 404 include filling of wetlands to create dry land for development, construction of berms or dams to create water impoundments and discharges of material dredged from waterways to maintain or improve navigation. Section 404 permits issued by the Corps of Engineers must satisfy two sets of standards: the Corps’ “public interest review” and the CWA section 404(b)(1) guidelines promulgated by EPA. The public interest review is a balancing test which requires the Corps to consider a number of factors, including economics, fish and wildlife values, safety, food and fiber production and, in general, the needs and welfare of the people. 33 C.F.R. § 320.4(a). The section 404(b)(1) guidelines provide that no permit shall issue if: (1) there are practicable, environmentally less damaging alternatives; (2) the discharge would violate water quality standards or jeopardize threatened or endangered species; (3) the discharge would cause

significant degradation to the aquatic ecosystem; or (4) if all reasonable steps have not been taken to avoid and minimize adverse effects of the discharge. EPA and the Corps entered into a Memorandum of Understanding in 1992 specifying EPA's role in the Corps' permitting process. That MOA is available at <http://www.epa.gov/owow/wetlands/regs/dispmoa.html>. Ultimately, EPA retains the right under section 404(c) to prohibit, deny, or restrict the use of any particular site as a disposal site for dredged or fill material.

States and tribes can assume the federal Section 404 program only in certain “nonnavigable” waters. When states or tribes assume administration of the Section 404 program, the Corps no longer processes Section 404 permits in waters under state or tribal jurisdiction. The state or tribe assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, and carries out enforcement activities. EPA reviews the program annually to ensure the state or tribe is operating its program in compliance with requirements of the law and regulations. In addition, for some activities, which generally include larger discharges with serious impacts, EPA and other federal agencies review the permit application and provide comments to the state or tribe; the state or tribe cannot issue a permit over EPA's objection. To date, only Michigan and New Jersey have assumed administration of the federal permit program.

D. Safe Drinking Water Act – Underground Injection Control Permits

Underground injection control (UIC) permits are issued under Safe Drinking Water Act (SDWA) section 1421. Under the UIC permitting program, EPA approves state or tribal programs by rule. That approved program becomes the federally-enforceable program, codified in 40 C.F.R. Part 147. Once approved, the state or tribe has primary enforcement and implementation responsibility, at least with respect to the classes of wells for which it has been approved (*e.g.*, some States are only approved for Class 2 (oil and gas) permits). To the extent that a state or tribe has primacy, EPA cannot issue permits, but EPA can bring enforcement actions (to enforce applicable state or tribal law) if the state or tribe has not acted pursuant to SDWA section 1423.

E. FIFRA – Pesticide Registration

EPA regulates the use of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In general, FIFRA authorizes EPA to register (or license) each pesticide product intended for distribution or sale in the United States. To register a pesticide, the Agency must determine that its use in accordance with the label will not cause “unreasonable adverse effects on the environment.” (*see, e.g.*, FIFRA section 3(c)(5)). FIFRA defines that term to mean, in part, “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide” (FIFRA section 2(bb)). The “unreasonable adverse effects” standard requires EPA, in effect, to balance the human health and ecological risks of using a pesticide against its economic, social, human health, and ecological benefits. Pesticides are registered for sale and distribution only if EPA determines that the benefits outweigh the risks. In making decisions on whether to register a pesticide, EPA considers the use directions on proposed product labeling and evaluates data on product chemistry, human health, ecological effects, and environmental fate to assess the

potential risks associated with the use(s) proposed by the applicants for registration and expressed on the labeling.

F. TSCA Approvals for PCB-Related Activities

Section 6(e) of the Toxic Substances Control Act (TSCA) gives EPA the authority to prescribe methods for the disposal of polychlorinated biphenyls (PCBs). EPA's PCB regulations at 40 C.F.R. Part 761 provides for a process whereby EPA approves certain facilities to conduct PCB disposal and other related activities. These approvals are not delegated to the States.