

## ENVIRONMENT ALERT

### TITLE V PERMITS MUST ADDRESS *ALLEGED* NEW SOURCE REVIEW VIOLATIONS



#### DECISION AND ITS IMPLICATIONS

On October 24, 2005, the U.S. Court of Appeals for the 2nd Circuit remanded to the U.S. Environmental Protection Agency (EPA) a Title V Clean Air Act permit issued by the New York Department of Environmental Conservation (DEC) because the permit failed to address New Source Review allegations made by DEC against the applicant. *NYPIRG v. Johnson*, No. 03-40846(1) (2d Cir. October 24, 2005). This decision represents the first time a court of appeals has held that the mere issuance of a notice of violation and filing of a complaint by an agency must be addressed in Title V permit compliance schedules.

In effect, this decision means that a facility disputing the applicability of emissions limits and standards with federal or state regulatory agencies nevertheless will be required to include in its Title V permit application those disputed standards and a schedule for coming into compliance with standards with which the facility believes it need not comply. The case further provides citizen groups with a mechanism to attack a facility's Title V permit without necessarily incurring the burden or expense of proving violations in court. The decision thus gives citizens groups – and outside regulatory agencies – a new, powerful and much easier way to compel compliance with such controversial programs as New Source Review just as EPA begins to look at enforcement alternatives.

#### BACKGROUND

The Clean Air Act requires each major stationary source to obtain an operating permit, known as a Title V permit. 42 U.S.C. § 7661 *et seq.* The Title V permit consolidates in a single document all of the operating requirements imposed upon a facility. The permit must include all enforceable emission limitations and standards, including Prevention of Significant Deterioration and New Source Review (collectively, NSR) limits. *Id.* § 7661c(a). Indeed, the permit application must contain a plan for bringing the facility into compliance with all appli-

cable requirements and a schedule for achieving compliance. *Id.* § 7661(b)(1). The statute also requires the permittee to report any deviations from the permit’s requirements. *Id.* § 7661(b)(2).

## **INTERSECTION BETWEEN NSR AND TITLE V**

These requirements, however burdensome for applicants, seem reasonably straightforward. These requirements become far more complicated, however, when an applicant must determine “applicable” limits and standards and a dispute arises with a regulatory agency over NSR applicability. The facilities at issue here, the two largest coal-fired power plants in New York, had received from DEC notices of violation (NOVs) for upgrading the plants (i.e., performing “modifications”) without undergoing NSR review and permitting. DEC subsequently sued the facilities on these bases. In the interim, however, DEC issued draft Title V operating permits that did not include NSR emissions limits or a compliance schedule. New York Public Interest Research Group (NYPIRG), a citizens group, objected to the draft permits on the basis of these omissions. DEC rejected this objection, reasoning that issues related to the applicability of NSR to these plants remained unresolved.

As authorized by the Clean Air Act, NYPIRG petitioned EPA to object to the permits. EPA denied the petitions on the grounds that the applicant disputed the applicability of NSR to its facilities. EPA further reasoned that, if a court subsequently determined that NSR limits applied, the Title V permit could be amended. Finally, EPA concluded that DEC had discretion not to include in Title V permits emission limits, such as NSR limits, that it had not yet determined to be applicable.

To further complicate matters, the U.S. District Court dismissed DEC’s complaint against the current owner of the plant on the grounds that it had not owned or operated the plants at the times that the alleged NSR occurred. The District Court allowed DEC to amend its complaint, adding allegations that the current owner violated Title V by not including “applicable” NSR emissions limits in its permits.

## **PROCEEDINGS IN THE COURT OF APPEALS**

NYPIRG appealed EPA’s failure to object to the permits, arguing that the Clean Air Act requires the inclusion of NSR limits in the Title V permits and that EPA and DEC did not have discretion to enforce the statute through non-administrative channels such as enforcement litigation. NYPIRG argued that Section 7661d(b)(2) of the Act requires EPA to object to a permit if the petitioner (here, NYPIRG) demonstrates that the permit does not comply with the Title V requirements. The Court of Appeals held that “DEC’s issuance of the[] NOVs and commencement of the suit is a sufficient demonstration to [EPA] of noncompliance for purposes of the Title V permit review process.” Slip op. at 11. The court reasoned that the issuance of NOVs and the filing of complaints in court represented actions that are not taken lightly, and that “the agency is required to reach certain conclusions and to make certain findings before it may take enforcement action.” *Id.* at 13. Notably, however, that court indicated that it was not deciding “whether it is reasonable for EPA to exclude contested PSD limits from permits when the permitting authority has not yet determined those limits applicable.” *Id.*

The court next held that because it had ruled that EPA unlawfully denied NYPIRG’s petition that the permit failed to contain NSR emission limits, “EPA is obligated to include a compliance schedule.” *Id.* at 15. Finally, the court

addressed the statutory requirement that deviations from permit requirements be “promptly” reported. 42 U.S.C. § 7661b(b)(2). The court reasoned that EPA and DEC had discretion to interpret the length of time that would be considered prompt, holding that quarterly reporting was prompt for SO<sub>2</sub> and NO<sub>x</sub>, but that such a time period was not appropriate for opacity. Slip op. at 17-20. Accordingly, the court vacated EPA’s decision not to object to the permit and remanded the permit to EPA for further review consistent with the rulings contained in the court’s opinion.

## CONTACT INFORMATION

If you have questions about the implications of the 2nd Circuit’s decision or would like to learn more about this topic, please contact:

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