

ELI COMMUNITY LAWYERING FOR ENVIRONMENTAL JUSTICE

Part 9: Air Permitting



Nuts & Bolts of Clean Air Act Permitting

April 11, 2024

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Why get involved in air permitting?

- Ensure that requirements are accurately applied to individual facilities.
- Ensure that requirements can be enforced.
- Empower government regulators to stand up to **industry pressure** for weak enforcement and lax permit conditions.
- **Environmental injustice** cannot be addressed effectively without source-specific action.
- If a permit misstates an applicable requirement, you likely will be **blocked from enforcing that requirements**.

What is a Title V operating permit?

- Before 1990, interested parties “left to wander through this **regulatory maze** in search of emissions limits and monitoring requirements that might apply” *Sierra Club v. EPA*, 536 F.3d 673, 674 (D.C. Cir. 2008)
- In 1990, Congress enacted Title V (42 U.S.C. § 7661-7661f):
 - Consolidates all CAA obligations into one permit document (“operating” permit)
 - Permit program usually operated by states or local agencies
 - Generally, no new substantive requirements
 - Permit must be renewed every 5 years
 - Enforceable by Administrator and citizens

Title V permits are usually issued by state environmental agencies. Sometimes local agencies have authority. EPA is currently responsible for issuing permits to sources located in tribal areas and under a few other circumstances.

Who needs a Title V permit?

Major Source

- Has actual or potential emissions above major source threshold for any air pollutant:
 - Default 100 tons/year for regulated pollutants
 - Lower thresholds apply in nonattainment areas for the pollutant that is nonattainment
 - Major source for HAP is 10 tons/year for a single HAP or 25 tons/year for combination

Certain Other Sources

- Any source with a major source permit under NSR (note source can be “major” for Title V and minor for NSR)
- Non-major sources subject to NESHAP MACT or GACT standards

What does a Title V permit do?

Identify Requirements. Permit must identify all “applicable requirements.”

“Assure compliance.” Permit must require monitoring, recordkeeping, and reporting sufficient to assure the source’s compliance with requirements.

Compliance certification: at least annually a “responsible official” aka “designated felon” must certify compliance with the permit and certify the accuracy of every report they file.

Compliance Schedule: if applicant is violating applicable requirement when applying for Title V, the permit must include a schedule for how/when it will become compliant.

Key Opportunities Provided by Title V

30-day comment period on draft permits (both initial permits & 5-year renewals)

EPA 45-day review period (if EPA objects, state must correct the problem)

If EPA doesn't object, 60-day period for petitioning EPA to object

EPA must respond to a petition within 60 days.

If EPA denies all or part of your petition, you can challenge the denial in the U.S. Court of Appeals

What are the “Applicable Requirements?”

Permit shall include “[e]missions limitations and standards, including those *operational requirements and limitations* that assure compliance with all *applicable requirements* at the time of permit issuance.” 40 C.F.R. § 70.6.

Applicable requirements (defined at 40 C.F.R. § 70.2):

New Source Performance Standards (NSPS)

- § 111

National Emission Standards for Hazardous Air Pollutants (NESHAP) (applying MACT)

- § 112

State Implementation Plan (SIP) requirements

New Source Review (NSR) preconstruction requirements

- Title I (§§ 165 & 173)

How Title V “Assures Compliance”

Permit shall contain: “compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.”(40 C.F.R. § 70.6(c)(1)).

All monitoring & analysis procedures or test methods already specified in underlying requirements

Periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of compliance

Deviation Reporting: Must require “prompt reporting” of permit deviations

Six-Month Monitoring Report: Source must submit a report of any required monitoring at least every six months and identify deviations.

Statement of Basis: permitting authority must provide a narrative explaining the basis for the permit conditions, especially monitoring adequacy

Require the source to perform more accurate or more frequent monitoring



Example: EPA order [granted](#) petition to object for U.S. Steel Edgar Thompson plant (near Pittsburgh) for **inadequate monitoring**—specifically, failure to tie the time period for monitoring to the time period of the NAAQS

Obtain additional specificity

Ensure permit conditions will “assure compliance”



Example: EPA order granted petition to object for Georgia Power coal-fired electric generating facilities due to **failure to define the “reasonable precautions”** they must take to control fugitive dust emissions.

Obtain a compliance schedule

Requiring facility to correct an ongoing violation of an applicable requirement

Example: EPA granted a petition to object to the Title V permit for the coal-fired Fisk Generating Station (Chicago) based on state's failure to explain why a compliance schedule was not needed to bring the facility into compliance with New Source Review and opacity limits.



For further inspiration: Search the Title V Petition Database!

The screenshot shows a web browser window with the URL <https://www.epa.gov/caa-permitting/search-air-permit-policy-guidance-databases>. The browser's taskbar includes icons for ELC Intranet, SELC Team, PTO/Sick Leave, OneDrive, SharePoint, Monday, Westlaw, Hein, Bluebook, SCV Rules, and Orion. The page content features a left-hand navigation menu with links: CAA Permitting Home, Clean Air Act Permitting Around the Nation, Environmental Justice and Permitting, CAA Permitting Tools & Related Resources, and Outer Continental Shelf Air Permits. The main heading is "Search Air Permit Policy & Guidance Databases". Below the heading is a paragraph explaining that since 1978, EPA has provided guidance to Regions, States, and Permittees, and that this page allows searching almost 1,500 documents by keyword or phrase. The "Search areas:" section contains three checkboxes: "NSR Policy & Guidance Database" (unchecked), "Title V Policy & Guidance Database" (unchecked), and "Title V Petition Database" (checked). A search input field contains the text "wood pellet" and is preceded by the label "What are you looking for?". A "Submit Search" button is located below the input field.

CAA Permitting Home

Clean Air Act Permitting Around the Nation

Environmental Justice and Permitting

CAA Permitting Tools & Related Resources

Outer Continental Shelf Air Permits

Search Air Permit Policy & Guidance Databases

Since 1978, EPA has provided guidance to Regions, States and Permittees to assist in the implementation of its Clean Air Act permitting programs. This page provides the ability to search almost 1,500 documents by keyword or phrase. You can select one or more individual compilations or search all. See "Search Tips" below for suggestions on how to build your query.

Search areas:

NSR Policy & Guidance Database

Title V Policy & Guidance Database

Title V Petition Database

What are you looking for?

What is New Source Review (NSR)?

- Preconstruction permitting for new and modified stationary sources.
- Intended to ensure that new sources and modifications to existing sources utilize up-to-date air pollution controls and do not degrade air quality (or interfere with attaining ambient standards).
- Requirements vary depending on whether project is “major” or “minor” and the area’s status regarding attainment of the national ambient air quality standards.

Different Kinds of NSR

1. **Prevention of Significant Deterioration (PSD)** requirements apply to major new sources and major modifications in areas that are attaining federal ambient standards. These sources must utilize “best available control technology” (BACT).
2. **Nonattainment NSR** applies to major new sources and major modifications in areas that are not attaining an ambient standard (but applies only to the non-attaining pollutant). For these pollutants, a source must achieve the “Lowest Achievable Emissions Rate” (LAER).
3. **Minor NSR** applies to new sources and modifications with potential emissions that are below the major source threshold. Sources often accept limits on their operations so that they can qualify as “minor.” These limits are called “potential to emit” limits, or “synthetic minor” limits.

A source can be subject to PSD for some pollutants and NNSR for others.

PSD Requires “Best Available Control Technology” (BACT)

“an emissions limitation...based on the maximum degree of reduction...which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable....”
See, e.g., 40 C.F.R. § 51.166(b)(12).

To determine BACT, states generally perform a “top-down” analysis:

- (1) Identify all potential control technologies
- (2) Eliminate technically infeasible options
- (3) Rank remaining options by effectiveness
- (4) Case-by-case consideration of energy, environmental, and economic impacts
- (5) Most effective option not rejected is BACT

PSD Air Quality Impacts Analysis

Applicant must show project's emissions “will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase ... for any pollutant ... more than one time per year [or] (B) national ambient air quality standard”

42 USC § 7475(a)(3).

You generally will need a professional air pollution modeler to comment on this aspect of the PSD permit.

Nonattainment NSR Requires “Lowest Achievable Emissions Rate” (LAER) and Source Must Offset its Emissions Increase With Emission Reductions Elsewhere

“the more stringent [of]...: (A) The most stringent emissions limitation which is contained in [any SIP] for such class or category ..., unless the owner or operator ... demonstrates that such limitations are not achievable; or (B) The most stringent emissions limitation which is achieved in practice by such class or category” 40 C.F.R. § 51.165(a)(1)(xiii).



You may force a new source or modification that has been improperly classified as “minor” to undergo “major” NSR, resulting in much more stringent control requirements.

Example: Drax Morehouse Wood Pellet Plant, LA



You may force a source seeking “minor” source status to install more controls or accept more stringent limits.

Example: Enviva Northampton Wood Pellet Plant, NC

At present, you can often address deficiencies in synthetic minor limits via Title V.



You may succeed in showing that BACT or LAER for a “major” source requires greater emission reductions than proposed, e.g., by using a different control technology.

Example: Woodville Pellets, Texas

Occasionally, you may raise issues that derail a project altogether.

Example: Proposed Highland Pellets South Wood Pellet Plant, Arkansas

- Draft combined Title V/state construction permit proposed to permit the source as a “synthetic minor” source for PSD.
- Advocates commented that the facility either needed to take a dramatically lower production limit or utilize far more effective pollution controls to reduce its potential emissions to below the PSD threshold.
- Arkansas agreed and company withdrew application.

