Circuits Battle Over EPA’s Review Role under Title V of CAA

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In Envtl. Integrity Project v. EPA, 2020 WL 278829 (5th Cir. 2020), the court ruled that the US Environmental Protection Agency (EPA) did not have to object to a Clean Air Act (CAA) Title V Air Operating (Title V) permit modification issued to ExxonMobil in Baytown, Texas. ExxonMobil sought to revise its Title V permit to incorporate a minor source air pre-construction permit previously issued by the Texas Commission on Environmental Quality (TCEQ) for its plant’s expansion, and the Environmental Integrity Project, Sierra Club, et al. (collectively, EIP) asked EPA to object on the grounds that ExxonMobil’s underlying state air pre-construction permit was invalid.

In 1990, the CAA authorized operating permits in order to consolidate all requirements to comply with the CAA. Other than monitoring, record-keeping, and reporting, the Title V permit does not typically establish any new emission control requirements. In Texas, TCEQ initially issues Title V permits, subject to comments and EPA objection. Citizens can petition EPA to object to a given Title V permit, and can seek judicial review if EPA fails to object, as here. State implementation plans also allow states to establish annual emission levels called Plantwide Applicability Limits (PALs) in permits for major sources where applicable. And as long as the facility emissions remain under the PAL, the source can make changes to its facility without undergoing the rigorous New Source Review (NSR) of a major modification.

Here, ExxonMobil in 2005 obtained a PAL for its Baytown Olefins Plant (PAL6), which was incorporated into the facility’s Title V permit in 2006. In 2012, ExxonMobil applied for a Title I pre-construction permit to build a new ethylene facility, and since the emission limits established by the PAL were not exceeded, the facility was required only to obtain a minor source air permit and was able to avoid NSR of a major modification. The challengers filed for and received a contested case hearing on the issuance of the permit but were unsuccessful at the hearing, allowing TCEQ to issue the permit. When ExxonMobil sought to modify its Title V permit to incorporate the new minor source permit for the ethylene facility, EPA did not object and TCEQ issued the modified Title V permit.

In challenging the Title V permit using the appeal procedure specific to the Title V program, EIP petitioned EPA to object to the modified Title V permit on the basis that TCEQ did not properly determine whether the minor source air permit for the ethylene facility triggered NSR review. EPA denied the petition by relying on a previous permit denial[1] and stated that “where the EPA has approved a state’s Title I permitting program, duly issued preconstruction permits will establish the
‘applicable requirements’ and the terms and conditions of those permits should be incorporated into a source’s Title V permit without further review … because any such challenges should be raised through the appropriate Title I permitting procedures and enforcement authorities.”[2]

EPA has changed its interpretation of Title V over the years. In 1990, the agency reviewed substantively the underlying state pre-construction permits; and in 2017, the EPA changed its definition of “applicable requirements” for a Title V permit to be only those that are contained in its Title I state pre-construction permits, whether or not the right kind (i.e., minor vs. major). EPA here denied EIP’s petition for review of whether the minor source pre-construction permit was proper. The court held that EPA’s decision on a petition will be overturned only if it is arbitrary and capricious. *Chevron* statutory deference to EPA’s interpretation was not clear to the court over any statutory ambiguity — the key to that deferential analysis. The court used *Skidmore*’s last-resort deference to EPA, because its interpretation was “persuasive.” The court held that Title V’s text does not mandate review of the substantive adequacy or double-checking of the state pre-construction permit and stated it will not rewrite a specific statute to fill in gaps. The court found that EPA’s revised view was consistent with Title V’s intended scope (1) to not add new requirements but to consolidate and clarify permits, and (2) to respect the finality of the state pre-construction permit. However, petitioners can still participate in future permitting or compliance with the CAA by ExxonMobil.

It is interesting that in the Fifth Circuit case, EPA did not argue for *Auer* regulatory interpretation (of 40 C.F.R. § 52.2270) deference, because we imagine the US Supreme Court largely gutted that doctrine in the *Kisor v. Wilke* case (2019), relegating it to *Skidmore*’s minimal “persuasiveness” deference.

A similar issue is pending before the Tenth Circuit in *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020). That case deals with a Title V permit issued in 1998 by Utah to PacifiCorp Energy for the Hunter Plant (which Sierra Cub objected to in state court), as well as a permit renewal. The 1998 Title V permit incorporated minor source pre-construction permit modifications completed between 1997 and 1999 that went unchallenged. In 2001, PacifiCorp submitted its application to renew the Title V permit that ultimately was approved in 2015. During EPA’s review of the 2015 Title V permit that incorporated the minor source modifications in the late 1990s, EPA did not object. Sierra Club petitioned for further EPA review on the applicability of major source requirements under the CAA. EPA denied the petition in 2017, finding that the Title V permit incorporated the requirements of the minor source NSR permit and that major NSR requirements were not considered applicable requirements. Sierra Club then sued.

The Tenth Circuit interpreted 42 U.S.C. § 7661c(a), and in particular 40 C.F.R. § 70.7(a)(1)(iv), as requiring a state, when issuing a Title V permit, to “ensure compliance” with all applicable requirements of the CAA. The court held that “all applicable requirements” includes a state implementation plan plus, broadly, all requirements of the CAA, including major source NSR review.

The court first ruled that Sierra Club had organizational standing (injury, causation, and redressability) because members had visibility impairment from the permitted plant, and despite delays, they showed that major source standards would still have reduced the air pollution beyond the minor source permit limits. The court further ruled that Sierra Club did not cause its own injury due to delay.

The court then disagreed with the Fifth Circuit in the above-mentioned EIP case. The court said the Fifth Circuit interpreted only the statute on its own, and not the EPA regulation. The court found the
EPA regulation was clear and contradicted the EPA’s interpretation (the so-called Hunter Memo) under the Auer doctrine. EPA interpreted the regulation narrowly as not allowing EPA to second-guess state application of minor versus major source applicability. The court found that Auer deference did not apply because the regulation was not ambiguous and did not call for a separate agency interpretation over the plain language. The conflict between circuits could lead to US Supreme Court review.


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