Title V Petition to Object Rule Revisions/Impacts on Air Permitting: Stuart Spencer (Mitchell Williams Law Firm) Arkansas Environmental Federation Webinar Presentation

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Stuart Spencer and William K. Montgomery ("Will") undertook presentations as part of the Air Section of the Arkansas Environmental Federation webinar series addressing Title V of the Clean Air Act on June 18th.

Stuart Spencer is Counsel at Mitchell Williams Law Firm in Little Rock, Arkansas and Will serves as Associate Director of the Office of Air Quality at the Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ").

Both Stuart's and Will's presentations addressed separate Title V topics. This post will summarize Stuart's presentation.

Congress in 1990 added Title V to the Clean Air Act to ensure stationary sources were subject to a comprehensive air permit. All major stationary sources of air pollution are required to apply for Title V operating permits. These permits include emission limitations and other conditions as necessary to ensure compliance with applicable requirements of the Clean Air Act.

The Title V operating permit program generally does not impose new substantive air quality control requirements. It does require the Title V permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure sources' compliance with applicable requirements. Like State Implementation Plans, states develop the Title V programs and submit them to the United States Environmental Protection Agency ("EPA") for approval.

Arkansas has been delegated the Title V permitting program for many years.

Stuart noted the process for revising the Title V permitting process was originally proposed on August 24, 2016. It was finalized in 2020. The goal was to streamline and clarify the process of submission and review of Title V permits.

The presentation described those affected by the rule as:

. . . primarily people who would submit a petition on a proposed Title V permit, though state, local, and tribal permitting authorities, and businesses subject to Title V permits will also be indirectly affected by these changes.

Stuart describes three major changes to the permitting procedures as:

- First, EPA has developed an electronic submission service for petitions as its preferred method of filing.
- Second, there are new requirements for format and content of the petitions to describe information expected by, and necessary for, the agency to effectively review a petition objecting to a permit.
- Third, the EPA now requires permitting authorities to respond in writing to significant comments it receives during the comment period.

Also referenced are the requirements to provide a statement of basis and response to comments document to the United States Environmental Protection Agency ("EPA") along with the proposed permit. This triggers the 45-day review period. EPA is also stated to intend (where practical) to make key dates publically available on the EPA Regional website.

Stuart's presentation included what he described as a "Title V Petition to Object Refresher." The provisions for requiring the submission of Title V permits to EPA for review for a 45-day period were described along with the ability of the EPA Administrator to object to the issuance of the permit if there is a determination that it contains revisions that are not in compliance with the applicable requirements under the Clean Air Act. The failure of the Administrator to object during this period enables any person to petition the Administrator within 60 days after the expiration of the 45-day review period to take such action.

The key revisions are stated to include:

1. 40 C.F.R. 70.7 adds new regulatory language requiring the permitting authority to respond in writing to significant comments received during the public participation process for a draft Title V permit.
2. 40 C.F.R. 70.4(b), 70.7(h), and 70.8(a) identifying that the statement of basis document is a required document, to be included during the public comment period.
3. 40 C.F.R. 70 is revised to require that any proposed permit that is transmitted to the agency for its 45-day review must include both the statement of basis and the written response to comments.

The applicable Arkansas statutory provisions were discussed, which include § 8-4-230. Further, the applicable Arkansas Pollution Control and Ecology Commission regulatory provisions were discussed, such as:

- Reg. 8.207 Public Notice of Draft Permitting Decision
- Reg. 8.208 Public Comment on Draft Permitting Decision
- Reg. 8.211 Final Permitting Decision
- Reg. 26.602 Public Participation
- Reg. 26.603 Transmission of Permit Information to the Administrator
- Reg. 26.605 EPA Objection to Proposed Permit
- Reg. 26.606 Public Petitions to the Administrator

The duties of the permitting agency are stated to include:

- Response to Significant Comments (does not preclude the agency responding to insignificant comments)
- Sequential v. Concurrent Review (distinguishing between the two review processes)

Sequential review is noted to be the most common and agencies use concurrent review for permits that are not expected to receive significant public comment.

Provisions not finalized included what is described as the "Second Notice" requirement.

Certain comments that have been received on the revised permitting procedures are described such as involving the proposed Sun Bio facility. Concerns were submitted by organizations which included:

- Environmental Paper Network – North America
- Center for Biological Diversity
- Dogwood Alliance

The concerns were stated to be procedural deficiencies, particularly related to public comment.

Comments on a Georgia Pacific were also referenced in which Earthjustice raised issues concerning DEQ's concurrent review process. These comments were submitted by the Crossett Concerned Citizens for Environmental Justice.

A copy of the slides can be downloaded here.