


Chapter Six

U.S. EPA Objection to a Title V Permit

A key feature of the Title V program is that the U.S. EPA Administrator has the authority (and sometimes the obligation) to object to a permit. The importance of U.S. EPA's oversight role is emphasized by the Clean Air Act mandate that every permit be subject to a 45-day U.S. EPA review period before it is finalized.

If you comment on a draft permit during the relevant public comment period and end up dissatisfied with the proposed permit that the Permitting Authority sends to U.S. EPA, you can ask the Administrator to object to the permit. This chapter explains why the Administrator might object to a permit, what happens after an objection, and how you can play a role in the process.

 A permit is called a **draft permit** once it is released for the required 30-day public comment period. A draft permit becomes a **proposed permit** when it is forwarded to U.S. EPA for U.S. EPA's 45-day review period. Note that in some states U.S. EPA's 45-day review period runs at the same time as the 30-day public comment period.

A. When can the U.S. EPA Administrator object to a permit?

The U.S. EPA Administrator can object to a Title V permit at two points. First, the Administrator may object to a proposed permit during U.S. EPA's 45-day review period. Second, the Administrator can object to a Title V permit in response to a public petition received within 60 days after the end of the 45-day review period. (It is important to keep track of when U.S. EPA receives the proposed permit because you need to know when the 60-day period for petitioning U.S. EPA begins and ends.)

B. Is the U.S. EPA Administrator ever required to object to a proposed Title V permit?

Yes. 40 CFR § 70.8(c)(1) provides that:

The [U.S. EPA] Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.

1. *How might a proposed permit not be “in compliance with applicable requirements”?*

A proposed permit violates an applicable requirement if the applicable requirement is improperly left out of the permit or if the applicable requirement is incorrectly described or applied in the permit. “Applicable requirements” are substantive requirements that are designed to achieve or maintain air quality standards under the Clean Air Act. For example, an applicable requirement might limit the amount of particulates that a facility is allowed to release into the air. Applicable requirements include SIP requirements (typically found in state statute or regulation) as well as air quality requirements mandated by federal regulations. “State-only” requirements (requirements in a state statute or regulation that are not part of the SIP) are not “applicable requirements.” The U.S. EPA Administrator cannot object to a proposed permit on the basis that it does not comply with a state-only requirement.

If the U.S. EPA Administrator determines that a proposed permit does not comply with legal requirements, he or she must object to the proposed permit.

2. *What does 40 CFR § 70.8(c)(1) mean when it says that the U.S. EPA Administrator will object to a proposed permit if it is not in compliance with “the requirements of this part”?*

By “the requirements of this part,” 40 CFR § 70.8(c)(1) is referring to the requirements of 40 CFR Part 70. Part 70 requirements are distinct from applicable requirements in that they are primarily procedural—they do not establish specific emission standards or limitations.

An example of a Part 70 requirement that sometimes leads to an objection by the U.S. EPA Administrator is 40 CFR § 70.6(a)(1), which mandates that a Title V permit “assure compliance with all applicable requirements.” 40 CFR § 70.6(a)(1) does not, by itself, require a facility to comply with any sort of emission standard or limitation. If no underlying applicable requirement applies to a particular facility (which of course, is highly unlikely) 40 CFR § 70.6(a)(1) is irrelevant. If an applicable requirement does apply to a facility and the facility’s proposed permit lacks monitoring, recordkeeping, and reporting that is sufficient to “assure compliance” with that requirement, the Administrator must object to the proposed permit.

C. Are there circumstances in which the U.S. EPA Administrator is not required to object to a proposed permit, but may object if he or she chooses to do so?

Yes. There are a few circumstances in which the U.S. EPA Administrator may object to a proposed permit even though he or she has not determined that the proposed permit violates applicable requirements or the requirements of Part 70. 40 CFR § 70.9(c)(3) provides that:

Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:

- (i) Comply with paragraphs (a) [requiring the Permitting Authority to transmit the proposed permit, the permit application, and other information needed to effectively review the proposed permit] or (b) [requiring the Permitting Authority to give notice of the proposed permit to any affected state] of this section;
- (ii) Submit any information necessary to review adequately the proposed permit; or
- (iii) Process the permit under the procedures approved to meet § 70.7(h) of this part [governing public participation] except for minor permit modifications.

As a member of the public, it is unlikely that you will know whether U.S. EPA has a reason to object to a proposed permit based upon § 70.9(c)(3)(i) or § 70.9(c)(3)(ii). As for whether the Permitting Authority follows the required procedures for public participation, U.S. EPA might not be aware of a problem unless you bring it to the agency's attention. As discussed earlier in this handbook, if you believe that the Permitting Authority is not complying with the public participation requirements of 40 CFR § 70.7(h), you should describe the problem in any comments that you submit during the relevant public comment period. If the Permitting Authority does not take action to remedy the problem after being notified, you can raise these issues with U.S. EPA through the petition process as discussed below.

D. On what basis is the Administrator most likely to object to a proposed permit?

The most common reason for the Administrator to object to a proposed permit is that it lacks sufficient periodic monitoring to assure compliance with applicable requirements. The Administrator has also objected to a proposed

permit because it did not include applicable New Source Review requirements and New Source Performance Standards.

E. What happens if the Administrator objects to a proposed permit?

A permit cannot be issued if U.S. EPA objects to it within the 45-day U.S. EPA review period. If U.S. EPA chooses to object to a permit, it must give the Permitting Authority a written explanation for the objection that identifies the terms or conditions that need to be changed or added to the permit. U.S. EPA must allow the Permitting Authority 90 days to submit a revised version of the proposed permit. If the Permitting Authority misses the 90 day deadline, U.S. EPA will either deny the permit, or develop a new permit for the facility independent of the state or local Permitting Authority.

F. Is it common for the Administrator to object to a proposed Title V permit?

It has been relatively uncommon for the Administrator to object to a permit. But the Title V program is still new and members of the public have not yet asked the agency to object to many permits. U.S. EPA is under pressure from state and local permitting authorities to restrict the number of objections that it makes to proposed Title V permits. Thus, U.S. EPA tries to resolve any problems with a permit without resorting to a formal objection. The Administrator is unlikely to formally object to a proposed Title V permit unless U.S. EPA and the Permitting Authority fail to reach an agreement on permit terms prior to the end of U.S. EPA's 45-day review period.

G. Do my comments on a draft Title V permit increase the likelihood that U.S. EPA will object to a proposed Title V permit?

Yes. When the Permitting Authority forwards a proposed permit to U.S. EPA for review, it also forwards its response to any public comments. As you might remember from earlier in this handbook, U.S. EPA does not actually review every proposed permit. Because U.S. EPA is more likely to review a proposed permit that generated public comment during the public comment period, public comments increase the likelihood that U.S. EPA will object to a proposed permit. Once the Permitting Authority forwards a proposed permit to U.S. EPA for review, you might want to contact the Chief of Permitting¹ at your U.S. EPA regional office to find out if he or she has a copy of your

¹ Staff titles and division names vary among the ten U.S. EPA regional offices.

comments. If not, provide a copy. This way, you can be certain that U.S. EPA is aware of your interest in the proposed permit.

H. What can I do if the U.S. EPA Administrator fails to object to a proposed permit that I believe violates legal requirements?

If U.S. EPA fails to object to a proposed permit that you believe is legally defective, you have the right to petition U.S. EPA to reconsider its failure to object to the permit so long as your petition is based upon comments that you submitted to the Permitting Authority during the public comment period. ***You have no right to petition U.S. EPA to object to a permit if you failed to submit comments on the draft permit during the applicable public comment period.*** The only exceptions to this rule are (1) when you can demonstrate that it was impracticable for you to raise your objection within the public comment period, or (2) when grounds for your objection arose after the public comment period. Exceptions will be rare.

There are several reasons for you to file a petition with U.S. EPA. First, it is possible that U.S. EPA did not actually review the proposed permit during the review period, and therefore was not aware of any problems with the permit. Second, even if the proposed permit was reviewed, U.S. EPA might rethink its position on the permit in light of your petition. Third, you should file a petition if there is any chance that you might want to take advantage of your right to sue U.S. EPA in federal court for failing to object to the proposed permit.

I. What is the procedure for petitioning U.S. EPA to object to a permit?

At the close of EPA's 45-day review period, any person who submitted comments during the relevant public comment period (either in written form or at a public hearing) has a right to petition U.S. EPA to reconsider its decision not to object to the permit. You have *sixty days* from the end of U.S. EPA's 45-day review period to file your petition.

The most difficult aspect of the petition process is knowing when to submit the petition. Unfortunately, federal law does not require U.S. EPA to announce the end of the U.S. EPA review period, and it does not specifically require the state Permitting Authority to notify the public when the proposed permit is submitted to U.S. EPA for review. In a few states, EPA's 45-day review period starts at the beginning of the 30-day public comment period. If

you are interested in petitioning U.S. EPA to reject a permit, you should contact U.S. EPA and your Permitting Authority frequently to monitor their progress in processing the permit. Ask when U.S. EPA's 45-day review period will end.

After you submit a petition, the U.S. EPA Administrator has 60 days to respond.

J. What issues should I include in my petition to U.S. EPA?

You generally are not allowed to raise issues in your petition that you failed to mention in the comments you submitted to the Permitting Authority during the public comment period. However, so long as you at least brought up the issue in your public comments, you can expand upon the issue in your petition. For example, you might submit a comment during the comment period similar to the following:

The Environmental Protection Division must determine whether Apollo Corp. is required to comply with new source performance standards ("NSPS"). If these standards apply to ABC Corp, they must be incorporated into the permit.

After the public comment period ends, you may uncover particular facts about Apollo Corp. that indicates that NSPS requirements, in fact, apply to the facility. If you raised the NSPS issue in your comments on the draft permit as suggested above, you could include these newly discovered facts in a petition to U.S. EPA.

The only exception to the rule that the issues raised in your petition must have been included in your public comments is when you can demonstrate that it wasn't reasonable to expect you to raise a particular objection during the public comment period. For example, if the final permit is so drastically different from the draft permit that you could not have anticipated the new issue, you will most likely be allowed to include these new issues in your petition to U.S. EPA.

There may be some issues that you choose not to include in your petition to U.S. EPA even though you included them in comments that you submitted during the public comment period. The Permitting Authority has a tremendous amount of discretion as to the content of a permit. Thus, when deciding what to include in comments that you make during the public

comment period, it makes sense to include anything that might positively influence the way the Permitting Authority exercises its discretion. Some of the recommendations that you make to the Permitting Authority may be entirely within the Permitting Authority's discretion. For example, some of your comments might relate to state-only requirements. U.S. EPA cannot object to a proposed permit on the basis that it does not assure compliance with a state-only requirement. Thus, it won't do much good to include such comments in your petition to U.S. EPA.

K. Do I need a lawyer to petition the U.S. EPA Administrator to object to a permit?

No. It is not necessary to retain a lawyer to petition U.S. EPA to object to a permit. Petitioning U.S. EPA is fairly simple, particularly since the issues you raise in your petition must be based upon the comments that you submitted to the Permitting Authority during the public comment period.

Though you aren't required to retain a lawyer to petition U.S. EPA to object to a permit, a lawyer may be helpful. If U.S. EPA denies your petition and you decide to bring a lawsuit against U.S. EPA challenging this denial, your petition forms part of the "record" that serves as the basis for your lawsuit. A lawyer can assist you in making sure that your petition adequately covers critical issues. A petition signed by a lawyer also suggests that you may file a lawsuit against U.S. EPA if your petition is denied.

L. Where do I send my petition?

You must send a copy of your petition to the Permitting Authority and the applicant, as well as to the U.S. EPA Administrator at 401 M Street, S.W., Washington, D.C. 20460. It is also a good idea to send your petition to the Regional U.S. EPA Administrator for the region in which the permit applicant's facility is located.

M. What happens if U.S. EPA grants my petition and objects to the permit?

If U.S. EPA grants your petition, then the Permitting Authority must revise and resubmit a proposed permit to U.S. EPA for review just as it would have been required to do if U.S. EPA objected to the permit during the 45-day review period.

N. What can I do if the Administrator denies my petition?

If the Administrator denies your petition, the denial must be accompanied by a statement of the reasons for the denial. The Administrator cannot arbitrarily deny a petition. Nevertheless, the Administrator has a lot of discretion over whether to make a determination that a permit violates applicable requirements or the requirements of Part 70. If you believe that your petition was improperly denied, you can sue U.S. EPA in the federal Court of Appeals. Refer to Chapter Three in Part Two of this handbook for introductory information on citizen enforcement of the Clean Air Act.

Box 6.1: Taking the Permitting Authority to State Court

Unless U.S. EPA objects, the Permitting Authority will issue a final permit at the end of U.S. EPA's 45-day review period. Once a permit becomes final, any person who participated in the public comment period may sue the Permitting Authority in state court on the basis that the Permitting Authority issued a permit that violates the law. Most people who challenge the decisions of state environmental agencies in court decide to get a lawyer.

A lawsuit brought in state court challenging a Title V permit must be filed by a deadline that begins when the permit becomes a final permit. The deadline will be no later than 90 days after final action on the permit. The time limit may be even shorter depending upon the law in your state. In most cases, U.S. EPA will not have responded to your petition before the state appeal deadline runs out. If this is the case, you will need to decide whether you want to bear the expense of filing an appeal in state court. If U.S. EPA accepts your petition after you file in state court, you can then consider dropping the case.