

# **NYPIRG v Johnson: Implications for Title V Permitting and Enforcement**

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June 14, 2006

# Recap from 2005 Presentation:

- Two large PSD settlements in January 2005:
  - NRG/NiMo (2 plants, 10 units, 1595 MW combined)
    - SO<sub>2</sub> reductions from 107,144 to 14,169 tpy 2005-2013;
    - NO<sub>x</sub> reductions from 17,005 to 3,241 tpy 2005-2012;
    - \$3M penalty, \$3 EBPs, preserve 2800 acres open space.
  - AES/NYSEG (4 plants, 8 units, 446 MW combined)
    - Clean coal project(s); annual limits on SO<sub>2</sub> tonnages or emission rates; deadlines for closing or converting plants;
    - \$700,000 penalty; \$1M EBPs.
- Combined impacts:
  - NO<sub>x</sub> reductions equate to removal of 1 in 5 cars (2.5 million) vehicles from the State's roads every year
  - SO<sub>2</sub> reductions equate to removal of 40% of the current total SO<sub>2</sub> emissions from every stationary source in NY
- Both settlements progressing on schedule; agreements in place to implement EBPs.

## Background of Huntley and Dunkirk Title V Permits:

- May 2000 - DEC issued NOV's to NRG and NiMo alleging violations of PSD permitting program at Huntley and Dunkirk facilities.
- 2001 – DEC noticed Huntley and Dunkirk draft Title V permits for public comment.
- NYPIRG objected to the lack of compliance schedules in the permits to address the alleged PSD violations.
- DEC sent draft permits to EPA without compliance schedules.
- EPA did not object to the permits and NYPIRG petitioned EPA.
- EPA denied the petition and NYPIRG appealed to the Second Circuit Court of Appeals.

## Basis for DEC Decisions:

- No final determination – through settlement or judgment – that PSD applied to the modifications at the Huntley and Dunkirk plants.
- NY regulations *allow* suspension of permit processing where enforcement is commenced that is related to the activity for which a permit is sought (6 NYCRR 621.3 [f]).
- Exception for Title V permits: 18 month deadline from complete application for making a final determination to issue or deny a Title V permit.
- Practice with Title V permits has been to resolve enforcement and then reopen the permit to include any resulting compliance schedule.

## Federal requirements for state Title V programs:

- Congress envisioned states would develop their own permitting programs (*see* Joint Explanatory Statement of the Committee of Conference H.R. Conf. Rep. No. 952, 101<sup>st</sup> Cong. 2d Sess. 335 [1990] at 345).
- In Part 70 final rule EPA discussed the intended Federal-State framework for enforcement under Title V (*see* 57 FR 32250, 1992 WL 167067 [1992]):
  - basic framework for effective enforcement of title V permits is to be in place in each State with an approved program;
  - State permitting authorities *encouraged but not required* to have administrative enforcement authority similar to CAA §113.
- Minimum elements for approved state Title V permit programs include (*see* CAA § 502 [b]; 40 CFR Part 70):
  - authority to issue/modify/revoke permits & determine compliance;
  - authority to enforce, including collection of civil penalties;
  - authority to assure no permit is issued if EPA objects in timely manner.

# Basic NY Procedural Law

- State Administrative Procedure Act mandates due process for both permitting and enforcement.
  - *see e.g.*, SAPA §§ 301(hearings); 302 (contents of record); 306 (evidence); 307 (decisions).
- An appeal from an administrative determination – permitting or enforcement – may only occur if that determination is *final* – *i.e.*, after all required administrative procedures have concluded.
  - *see* ECL § 19-0511 (review by courts);
  - *see* CPLR 7801 (1) (proceeding under this article “shall not be used to challenge a determination which is not final”).

# Title V Permitting in NY

- ECL § 19-0302 (permits and certificates) and ECL § 19-0311 (operating permit program for sources subject to Clean Air Act) contain statutory authority for substantive requirements.
- ECL § 70-0107 (3) (air permits are subject to the procedures of Part 70) contain statutory authority for procedural requirements:
  - prescribes timing of action on permit applications;
  - procedures for permit modifications, suspensions; revocations, renewals, emergency authorizations;
  - procedures for public hearings, among other things.
- Implementing regulations: 6 NYCRR Part 621 (uniform procedures); Part 624 (permit hearing procedures).

# Title V Enforcement in NY

- ECL Article 3: general power of the Department and Commissioner includes authority to conduct investigations and hold enforcement hearings.
- ECL Article 19, air pollution control:
  - ECL § 19-0505: mandates issuance of a notice where it *appears* to the Commissioner that a violation exists:
    - notice must include a *proposed* order;
    - notice “shall require such person to answer the *charges* of such complaint at a public hearing before the Commissioner”;
    - proposed order may be modified following a hearing or with the consent of the *alleged* violator.
  - ECL § 19-0507: authorized hearing procedure explicitly provides for right of a respondent to file an answer to the complaint and to appear at a quasi-judicial hearing.
  - ECL § 19-0509: authorizes issuance of a final determination following the hearing; includes authority to issue order compelling compliance.



# Title V Enforcement, continued

- ECL Article 71, titles 17 and 21, authorize enforcement for violations of Article 19:
  - ECL § 71-1709 (2), (7): also explicitly states the right of a respondent to a quasi-judicial hearing.
  - ECL § 71-2103: authorizes imposition of civil penalties:
    - \$375 minimum, \$15,000 maximum per first violation for every day that violation continues;
    - maximum of \$22,500 per day for a second or “further” violation.
  - ECL § 71-2115: sets forth mitigation criteria that may be considered by Department staff in calculating penalties.
- Other titles of Article 71 address commissioner’s general enforcement authority, including authority to pursue administrative enforcement or refer cases to the Office of the NY Attorney General.
- Implementing regulations: 6 NYCRR Part 622 (Uniform Enforcement Hearing Procedures)

## *NYPIRG v Johnson* holding re Federal law:

- 42 U.S.C. § 7661d (b) (2) mandates that the Administrator object to a permit if a petitioner demonstrates the permit is not in compliance with the requirements of the CAA.
- EPA is authorized to issue NOVs under 42 U.S.C. § 7413 (a) (1) which provides:
  - “Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding” \* \* \*.
- This provision requires that as a condition to issuing a NOV, the Administrator must first find that a source is in violation.

## *NYPIRG v Johnson* holding re NY law:

- The NY SIP, through 6 NYCRR 201-6.5 (a) (2), authorizes DEC to enforce Title V permits and to issue a NOV “or when the Act is violated, to commence other enforcement proceedings” (*NYPIRG v Johnson*, 427 F.3d 172, 180).

# *NYPIRG v Johnson* holding re relationship between Federal and State law, and compliance schedule requirements for Huntley and Dunkirk Title V permits:

- The Act and NY's SIP direct enforcement for a "violation", and not mere allegations;
- DEC's issuing a NOV under 6 NYCRR 201-6.5 (a) (2) suffices to demonstrate noncompliance for purposes of objection under 42 USC § 7661d (b) (1);
- By issuing the NOVs and filing suit in this case DEC determined that the PSD standards were applicable to the Huntley and Dunkirk facilities;
- EPA was required to object to the Huntley and Dunkirk permits, and to include "a compliance schedule" to address the PSD violations.

# Problems with the decision:

- Erroneous analysis of federal-state relationship in Title V implementation;
- No analysis of applicable NY statutes and regulations;
- NY's "SIP" does not authorize enforcement;
- DEC's NOV's are the beginning of the enforcement process, not the end;
- Creating a scheme where a DEC NOV is "final" for permitting but not for enforcement is arbitrary;
- The decision potentially creates significant practical problems for DEC permitting and enforcement;
- It is not clear what the court held or under what circumstances the court's decision applies.

# Other problems with the decision: 5.

“[O]rdinarily we may understand a complaint as a series of allegations whose truth is ascertained over the course of a proceeding. But in this case, the agency is required to reach certain conclusions and to make certain findings before it may take enforcement action” (*NYPIRG v Johnson*, at 181).

## 4.

“The EPA also considers it premature to include PSD limits in a permit before they are determined by the permitting authority to be applicable \* \* \* the EPA’s position places it during the permitting process and subsequent appeals in the rather strange role of minimizing – if not outright denying – the legal significance of the DEC’s NOV’s and complaint” (*NYPIRG v Johnson*, at 181).

### 3.

“Also, the [DEC] is in a privileged position to monitor and regulate. For instance, in addition to receiving regular auditing reports, DEC ‘representatives must be granted access to any facility regulated by this [act], during normal operating hours, for the purpose of determining compliance with this and any other state and federal air pollution control requirements, regulations, or law’ 6 N.Y.C.R.R. 201-7.2(d). With this access, the DEC was able to compile specific allegations in the NOV’s, which listed in considerable detail thirty-one modifications, ‘[each] of [which] resulted in a significant net emission increase for NO<sub>x</sub> and SO<sub>2</sub>’ (*NYPIRG v Johnson*, at 181).



## 2.

“In reaching [the conclusion that DEC has determined that the PSD standards are applicable to the Huntley and Dunkirk facilities], we are not called on to determine whether it is reasonable for the EPA to exclude contested PSD limits from permits when the permitting authority has not yet determined those limits applicable – this case does not present that problem” (*NYPIRG v Johnson*, at 181).

1.

“The Act also contains a **grandmothering** clause. (*NYPIRG v Johnson*, 176).