

Big River Steel, LLC (Osceola, Ark.) Title V Permit Challenge: U.S. Environmental Protection Agency October 31st Order Denying Nucor Petition



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

11/09/2017

The United States Environmental Protection Agency (“EPA”) Administrator issued an October 31st Order responding to a 2013 Petition from Nucor Steel – Arkansas and Nucor-Yamato Steel Company (collectively, “Nucor”) objecting to a Clean Air Act Title V Permit issued to the Big River Steel, LLC (“Big River”) steel mill in Osceola, Arkansas by the Arkansas Department of Environmental Quality (“ADEQ”).

The EPA Administrator’s Order denies Nucor’s Petition.

42 U.S.C. § 7661a(d) requires that states submit each proposed Clean Air Act Title V Operating Permit to EPA for review. Section 505(b)(1) of the federal statute requires that EPA object to the issuance of a proposed Title V Permit in writing within 45 days of the receipt of the proposed permit (and all necessary supporting information) if the federal agency determines that it is not in compliance with the applicable requirements under the Clean Air Act. If EPA does not object to a permit, Section 505(b)(2) provides that any person may petition the EPA Administrator, within 60 days of the expiration of the 45 day review period, to object to the permit.

Nucor’s Petition requested that EPA object to the Title V Permit issued by the ADEQ to Big River for operation of the Osceola steel mill.

Prior to addressing the specific issues raised by the Nucor Petition, the Administrator’s Order analyzes:

- Federal/Arkansas Title V Operating Programs
- EPA’s Review of Petition issues
- Issues that can be reviewed
- Basis for Administrator’s issuance of an objection (i.e., petitioner demonstrates that a permit is not in compliance with the requirements of the Clean Air Act)
- Petitioner’s burden
- Criteria for determining whether a petitioner demonstrates noncompliance with the Clean Air Act
- Clean Air Act New Source Review process
- Overview of the Big River Steel Facility
- Review of Applicable Permitting

The Order then assesses the 12 claims raised by Nucor which were aggregated as:

1. Challenges to Prevention of Significant Deterioration (“PSD”) Determinations

EPA’s Order stated four of the claims involve the adequacy of PSD air quality impacts modeling undertaken to demonstrate that the Big River facility would not cause or contribute to a violation of the National Ambient Air Quality Standard (“NAAQS”) PM 2.5. Two of the PSD-related claims address the PSD additional impact analyses. Finally, EPA places seven “loosely related claims” under a heading Nucor titles:

The permit and permit application does not contain source information necessary to perform the analyses required for PSD review, does not contain the information required by Part 70 for operating permits, and was not processed properly.

The Order states that these claims involve determinations made by ADEQ based exclusively on requirements under the PSD provisions in Part C of Title I of the Clean Air Act and ADEQ’s corresponding SIP regulations. It notes:

Notwithstanding that ADEQ issued a PSD permit within the same permit documents as the Facility’s initial Title V permit, the Petitioner’s claims discussed above relate exclusively to Title I permitting requirements – including preconstruction and monitoring requirements, additional impacts analyses and BACT determinations – rather than Title V permitting requirements.

The Order then asks whether in the context of this particular type of permit Title V review by EPA is appropriate, stating:

This presents the fundamental issue of whether decisions made in issuing Title I preconstruction permit, like the PSD permit issued to BRS, should be considered by the EPA in reviewing or considering a petition to object to a Title V operating permit.

The Administrator states that similar preconstruction permitting issues have been considered when raised in petitions for an EPA objection to a state-issued Title V permit. Nevertheless, the Order states that the federal agency has “recently reviewed this past practice.” In the Matter of PacifiCorp Energy Hunter Power Plant, Order on Petition No. VIII-2016-4 (October 16, 2017) is cited in support of this statement.

Citing this decision the Administrator concludes:

After review of the structure and text of the CAA and the EPA’s regulations in Part 70, and in light of the circumstances presented by the petition at issue in the PacifiCorp-Hunter Order, the EPA concluded in the PacifiCorp-Hunter Order that the title V permitting process is not the appropriate forum to review preconstruction permitting decision when a preconstruction permit has been duly issued. After considering the situation presented in the Petition regarding the BRS facility, the EPA has concluded that a title V petition to object is likewise not the appropriate forum for reviewing the merits of the preconstruction permitting requirements derived under title I of the Act in the context of a merged title I and title V program.

The Administrator acknowledges that this decision strays from prior agency position but states “for the legal and policy reasons discussed below and in the PacifiCorp-Hunter Order, the EPA believes this position better aligns with the structure of the Act and the EPA’s original understanding of the relationship between the operating and construction permitting programs under the CAA after the enactment of title V.”

As a result, the Administrator denies the request for an objection on this claim.

2. Permit does not contain enforceable permit conditions that lead to compliance

Nucor also challenges the permit conditions related to Big River’s two dust control plans arguing that the permit “should specify when the dust control plan must be prepared and should list the minimum required Plan elements or criteria.” The objection includes an argument that while the permit contains a requirement to record water and materials throughput data, the recording of this information does not

necessarily demonstrate the emissions are well controlled. It asserts that ADEQ must include in the public record any element required to determine compliance and explain how the proposed monitoring will lead to compliance.

The Administrator responds that Nucor did not cite legal authority for its claim. It is acknowledged that the dust control plans are cited but states Nucor's Petition "lacks any discussion of the relationship between the dust control plans and the cited permit conditions or any applicable requirement to which such plans might relate." General assertions are deemed insufficient to demonstrate the permit is not in compliance and that the Petitioner must "clearly explain, with citation and analysis, why a particular permit term does not comply with, or assure compliance with, a specific applicable requirement."

The Order concludes:

Overall, the Petitioner has not demonstrated, with respect to the dust control plans required by the Permit, that the Permit omits any applicable requirement or that the Permit fails to assure compliance with any applicable requirement.

As a result, the Administrator denies the request for an objection on this claim.

3. Permit does not contain adequate monitoring, recordkeeping, and reporting requirements to comply with requirements of 40 C.F.R. 70.6(a)(3)(i)(B)

The Nucor Petition references what is described as an "updated Specific Condition 93" and states it is impossible to determine from the record how TDS compliance will be determined. It is noted that ADEQ has postponed resolution of the issue to "beyond the title V permitting process," citing language from the Petition:

. . . permitting authorities do not have the discretion to issue a permit without specifying the monitoring methodology needed to assure compliance with applicable requirements in the title V permit. . .

The Administrator responds that Nucor did not demonstrate that a TDS test method must be specified in the Permit in order to assure compliance with any applicable requirement. It is further stated that:

. . . it is unclear from the abbreviated information on this claim in the Petition why specifying a TDS test method is "an essential part of the monitoring requirements." . . . the Petitioner has not claimed any particular TDS test method would be more or less reliable or accurate than another available method, or even whether multiple TDS test methods exist, nor how any potential differences between such test methods would materially affect a demonstration of compliance.

As a result, the Administrator denies the request for an objection on this claim.

The Administrator therefore denies the Petition.

[A copy of the Order can be downloaded here.](#)