

# Title V/Clean Air Act: Federal Appellate Court Addresses Challenge Based on Alleged Invalidity of Preconstruction Permit



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The United States Court of Appeals, Fifth Circuit (“Court”) addressed in a May 29th decision a challenge to a Clean Air Act (“Act”) Title V Permit issued to an ExxonMobil Baytown, Texas Olefin plant (“Plant”). See *Environmental Integrity Project v. United States Environmental Protection Agency*, 2020 WL 2781829.

The Environmental Integrity Project and Sierra Club (collectively “EIP”) challenged the Title V permit on the basis that the underlying Title I preconstruction permit was invalid.

The Act requires that the United States Environmental Protection Agency (“EPA”) set National Ambient Air Quality Standards (“NAAQS”). The states are then tasked with implementing those standards. Under Title I of the Act, operators of stationary sources must obtain a permit before constructing a new facility or modifying an existing one. These permits are issued through State Implementation Plans (“SIPs”), which must be approved by the EPA.

Congress in 1990 added Title V to the Act to ensure certain 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 assure compliance with applicable requirements of the 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 SIPs, states develop the Title V programs and submit them to the EPA for approval.

EIP challenged the EPA’s denial of their petition to reconsider its classification of a new ethylene production facility at an existing ExxonMobil plant as a “minor” new source. This classification was based on EPA’s interpretation that neither the federal agency nor state permitting agencies must determine if the facility received the appropriate preconstruction permit under Title I before incorporating it into a Title V permit. Under this interpretation, it is sufficient that the Title V permit reflect the result of the preconstruction permitting decision without reconsideration. Accordingly, the result of that decision defines the stationary source’s requirements for Title V.

EPA is stated to have recently returned to this interpretation—its original interpretation of the relationship between Title I and Title V—in 2017. The prior policy involved a review of preconstruction

permitting decisions for reasonableness and arbitrariness before incorporating them permits into the Title V permit. EIP argued a contrary interpretation was impermissible.

The Court disagreed. It upheld the current EPA interpretation. This holding was based on the Court's view that the Act does not require EPA to revisit the reasonableness of issuing a Title I preconstruction permit for purposes of Title V.

The Court noted that the text of the Act does not require the EPA or state permitting authority to double-check or reconsider preconstruction permits each time a permit is renewed. Consequently, the lack of any mandate to revisit the appropriateness of a Title I preconstruction permit was deemed to make EPA's most recent interpretation reasonable. Further, the Court reasoned that the purpose of Title V was to streamline the compliance process and not impose new substantive requirements. EIP's argument for revisiting the appropriateness of Title I permits was deemed not in harmony with Congress's intentions with the addition of Title V.

As a result, the Court upheld EPA's current practice of incorporating Title I permits into Title V permits without having to reconsider whether the Title I permit was appropriate. The appropriate place to challenge the adequacy of state permitting decisions was deemed the state administrative judicial forums, not to have the EPA second guess every permitting decision by the states. Although EPA has the authority to approve or disapprove of SIPs, that was held to be the extent of the agency's authority over improperly issued preconstruction permits.

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