

# Title V Air Permit: New Jersey Appellate Court Addresses Whether Modification Required Public Emergency Response Plan



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The Supreme Court of New Jersey (Appellate Division) (“Court”) addressed in a December 1st opinion whether the New Jersey Department of Environmental Protection (“DEP”) issuance of a modified air pollution control operating permit (“Air Permit”) first required the permittee to provide a:

- Public Emergency Response Plan
- Public Notification Plan
- Detailed Public Reports

Two organizations challenging the Air Permit argued that the issuance of the modified Air Permit violated the:

- . . . Emergency Planning and Community Right-To-Know Act of 1986 (“EPCRA”)
- New Jersey Spill Compensation and Control Act
- Clean Air Act

Newark Energy Center (“NEC”) holds a Title V Air Permit allowing it to use contaminated water obtained from the Passaic Valley Sewerage Commission in its cooling tower. The Permit also allows NEC to use sulfuric acid to lower the water’s pH level. Sulfuric acid emissions were limited to 10.57 tons per year.

NEC filed an application with DEP for a significant modification to the Air Permit. The requested modification would increase the amount of sulfuric acid used in the cooling tower. The company’s application indicated that the increased use of sulfuric acid would not increase the allowable sulfuric acid emission rate.

DEP provided certain notifications to various interested parties, including Ironbound Community Corporation and the New Jersey Environmental Justice Alliance (collectively “Alliance”) of the proposed modification. A public meeting was also held to discuss the modification.

DEP subsequently published notice of its intent to approve the proposed significant modification. A public hearing was held to discuss the decision.

DEP issued a report addressing certain public comments and proposed to approve the application’s requested increase. The agency stated that its calculations showed that emissions would remain unchanged even with the additional chemical use. As a result, the state agency determined that the modification would not result in any permitted emissions increase.

As to public comments expressing concern about public safety, DEP referenced various state and federal laws and regulations that it cited as protecting “people and the environment from incidents at facilities storing, handling, or processing hazardous chemicals.” It also noted that NEC attempted to contact the local Emergency Planning Committee to provide certain plans required by EPCRA. However, the state agency noted that the plans contained security-sensitive information and are not generally available to the public pursuant to a New Jersey statute.

DEP subsequently issued the modified Permit.

Alliance appealed the modified Permit arguing that DEP is required to obtain:

- A complete Public Emergency Response Plan
- Emergency Notification Plan
- Detailed Public Reports

Such reports were argued to have been required to be obtained prior to approving the modification. It was argued that the emergency planning documents are prerequisites to approval of the modification pursuant to the New Jersey Spill Compensation and Control Act, EPCRA, and Section 112(r) of the Clean Air Act. The alleged lack of compliance with the statutes was argued to render issuance of the modified Permit void.

DEP and NEC responded that the modified Permit complied with all applicable statutes.

The Court referenced the Title V Clean Air Act requirements and noted that they do not impose “substantive pollution-control requirements. . .” noting instead that Title V is “designed to facilitate compliance and enforcement by consolidating into a single document all of [a] facility’s obligations under the [CAA].” DEP operates the Title V program in the State of New Jersey.

The Court, in reviewing the challenge to the modified Air Permit, concluded that there was sufficient credible evidence in the record to support DEP’s determination. It noted the rationale for the increase in the amount of sulfuric acid and the determination that it would not result in additional acid emissions. In addition, the modified Air Permit is stated to maintain the same allowable emission limits and the permit application process complied with all procedural and notification requirements. As a result, DEP’s decision to grant the Permit was held to be not arbitrary, capricious, or unreasonable.

The Court also rejected the contention that DEP was required to determine whether NEC was in compliance with the New Jersey Spill Compensation and Control Act, CRA, or the Clean Air Act before approving the modification. It held that these statutory and regulatory provisions were “outside the air pollution control approval process.”

The Court, therefore, upheld DEP’s issuance of the permit modification.

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