COMMENT

When Maybe Is Good Enough: The Title V Citizen Petition

by John C. Evans and Donald R. van der Vaart

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Much has been written on the Title V program since its inception in the 1990 Amendments to the Clean Air Act (CAA),[1] and even more if its ancestor, the national pollutant discharge elimination system (NPDES) permit program in the Clean Water Act,[2] is considered. Among the many improvements the Title V program was expected to bring was the increased participation of the public to the permitting process.[3] Virtually all new and modified permits are subjected to public notice to give the interested public an opportunity for comment. The culmination of the comment period is an additional 45-day review granted to the U.S. Environmental Protection Agency (EPA), during which the Agency reviews the state's proposed permit, with its statement of basis, alongside the comments the state received from the public. The U.S. Congress granted EPA far more oversight authority over the Title V operating permit program as compared with the then-to-fore state implementation plan (SIP) constructed in the 1970 CAA. Among its powers, EPA can object to an individual proposed permit and force the state, under threat of veto, to amend the permit to satisfy EPA's view of the CAA. However, Congress also provided oversight of EPA by the public through the public petition process. EPA is required to respond to the public petitioner, and EPA's response is reviewable in the U.S. courts of appeal. Unfortunately, the Title V objection process and the citizen petition have become increasingly used or possibly abused by environmental activists, both inside and outside EPA.[4] As a result, instead of the Title V permit process providing an orderly administration of CAA obligations, the process has become a politically infused and often litigated minefield.

Since the Barack Obama Administration appointed Lisa Jackson to lead EPA, established national environmental organizations have been successful in using the Title V public petition process to stop the issuance, or require revision, of many Title V operating permits. The Jackson-led Agency has found in favor of the environmental petitioners and against the state agencies in almost every decision made to date by this Agency.[5] While it is not particularly surprising, given the Administrator's pledge that "EPA is back on the job," what may be surprising to state and industry stakeholders is the basis for granting these petitions.[6] When developed, the EPA objection provision charged the Agency to make its determinations objectively, and to use the veto authority judiciously.[7] Instead, members of the established national environmentalist organizations, some of whom are now within the Agency, have found the Title V objection process to be a useful tool to either delay or strengthen permits.[8] Environmental groups have long used the judicial process to achieve what a deliberative legisla-

Authors' Note: The views expressed by both authors are solely those of the authors and do not represent the views or positions of the North Carolina Division of Air Quality.

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
3. *See* Donald R. van der Vaart & John C. Evans, *Compliance Under Title V: Yes, No, or I Don't Know?*, 21 Va. Envtl. L.J. 5 (2002).
4. Upon being appointed EPA Administrator, Lisa Jackson stated: "[W]hat I hope that we see at the end of this are activists who look like me—activists who represent the future demographic of our country because that's who's going to be the EPA in the future." Elaine Quijano, *New EPA Chief Says Agency "Back on the Job,"* CNN.com, Apr. 21, 2009, http://www.cnn.com/2009/POLITICS/04/21/lisa.jackson/index.html (last visited Jan. 6, 2011).
5. Approximately 18 of 19 decisions made under the Obama Administrator decisions have favored the Petitioners. *See* U.S. EPA, Region 7 Air Program, Title V Petition Database, http://www.epa.gov/Region7/air/title5/petitiondb/petitiondb2010.htm.
6. Lisa Jackson declared: "The EPA is back on the job." National Public Radio, Top Official: "The EPA Is Back on the Job," http://www.npr.org/templates/story/story.php?storyId=113884818 (last visited Jan. 6, 2011).
7. "While EPA has an important role of providing guidance and oversight, the agency should not unduly interfere with the states' implementation of the permit program." A Legislative History of the Clean Air Act Amendments of 1990, 1044 (1993).
8. The fast relationship between environmental nongovernmental organizations (NGOs) and the current EPA was recently evidenced in the Freedom of Information Act disclosure of e-mails between the Sierra Club and EPA. In a February 2009 e-mail, David Bookbinder, Chief Climate Counsel for the Sierra Club, provided a list of pending PSD permits and requested a meeting with EPA to discuss how the Sierra Club should object to these projects. In a response e-mail, written less than three hours after the question was posed, Robert Sussman, Senior Policy Counsel to the EPA Ad-

tive process would not.[9] However, even the judicial process can be expensive, fraught with due process, and less than certain. Therefore, environmental groups sought an alternative method to achieve their goals. What they have found is that the Title V petition process is a powerful tool to effectuate delays and implement policy.

This Article briefly describes a new basis for the objection that EPA has employed whereby operating permits can be delayed for significant periods of time without the expenditure of significant resources by EPA or environmental groups. In many cases, its use has shifted resource-intensive enforcement questions to the states. This new scheme turns the Title V permit process into an iterative process by remanding the permit back to the states without clear direction as to the remedy EPA is seeking. Under this scheme, rather than making a determination on the merits of a petition, EPA objects to the permit on the basis that the state failed to adequately respond to public comments. In remanding the permit back to the state agency, EPA does not state what its opinion is on the substantive citizen petition claim, and in fact does not allege that the permit contains any provision inconsistent with the CAA or regulations. This new approach allows EPA to shift an enforcement question to the states, rather than addressing the alleged noncompliance themselves. While few would argue that public input is important to the process, the inquiry here is whether there is a legal duty to provide written responses, and furthermore, whether that duty is a requirement of the CAA. The inquiry is important because the Title V objection authority is limited to instances where the permit is not in compliance with the CAA.

I. The Title V Objection Process

Under §505(a) of the CAA and the relevant implementing regulations at 40 C.F.R. §70.8(a), states are required to submit each proposed Title V operating permit to EPA for review.[10] Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if EPA determines the permit is not in compliance with applicable requirements of the CAA or the requirements of Part 70.[11] If EPA objects to the permit, the state must satisfy the objections if it hopes to issue the permit itself. If it declines to so amend the permit, EPA must issue the permit, and does so under the rules promulgated at 40 C.F.R. Part 71. If EPA does not object to the permit within the 45-day review period, the state is free to issue the permit. However, CAA §505(b)(2) provides that any person may petition the Administrator, within 60 days of expiration of EPA's 45-day review period, to object to the permit.[12] The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)."[13]

In response to such a petition, the Administrator must issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act.[14] Under §505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to EPA.[15] If, in responding to a petition, EPA objects to a permit that has already been issued (as would be the case if EPA had not objected to the permit during their 45-day review), EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in Part 70.

The touchstone in the objection process is the facially objective standard whereby EPA can only object to a Title V permit if it is demonstrated that the permit is not in compliance with the requirements of the CAA. If EPA is convinced the proposed permit is not in compliance with the provisions of the CAA, it must object. However, the determination of compliance or noncompliance is entirely discretionary. EPA's decision on a petition, either granting or denying the petition, is final Agency action and is directly appealable to the U.S. courts of appeal under CAA §307(b)(2).[16]

Title V petitions have been filed for various reasons, ranging from claims of insufficient monitoring to ongoing violations of new source review (NSR).[17] For petitions that claim the source is currently in violation with the CAA, such as those that allege past NSR violations, EPA is faced with determining whether the permit is in violation with the CAA or not. This requires the Agency to determine the compliance status of the source. The response the current Agency has used to object to proposed permits allows EPA

ministrator, agreed to meet with the Sierra Club to "hear what issues he [Bookbinder] would like us to focus on."

9. For example, Earth Justice proudly recalls genesis of its organization when in 1965 the Sierra Club launched a campaign to stop Walt Disney from developing its property in Sierra Nevada, California. According to Earthjustice:

> After a number of unsuccessful attempts to halt the project through the political system, the Board of Directors of the Sierra Club authorized the filing of its first lawsuit—directed at preventing the development of [this land] . . . A San Francisco attorney working at a reduced rate took the case all the way to the Supreme Court, which heard the argument in 1971 and handed down the decision in 1972. The Sierra Club technically lost, but was allowed to return to the lower courts to try again. It did so; the project was again blocked pending completion of an environmental impact study. By this time, Disney had grown tired of the notoriety the case had generated and pulled out of the project.

Earthjustice, Our History, http://www.earthjustice.org/about/our_history. Environmental NGOs realized that judicially induced delay is often victory.

10. 42 U.S.C. §7661d(a); CAA §505(a).
11. *Id. See also* 40 C.F.R. §70.8(c).
12. 42 U.S.C. §7661d(b)(2). *See also* 40 C.F.R. §70.8(d).
13. *Id.*
14. *Id. See also* 40 C.F.R. §70.8(c)(1); New York Public Interest Research Group, Inc. v. Whitman, 321 F.3d 316, 333, 33 ELR 20154 (2d Cir. 2003).
15. Sierra Club v. Johnson, 541 F.3d 1257, 1266-67, 38 ELR 20224 (11th Cir. 2008); Citizens Against Ruining the Environment v. EPA, 535 F.3d 670, 677-78, 38 ELR 20189 (7th Cir. 2008); Sierra Club v. EPA, 557 F.3d 401, 406, 39 ELR 20043 (6th Cir. 2009); McClarence v. EPA, 596 F.3d 1123, 130-31 (9th Cir. 2010) (discussing the burden of proof in Title V petitions).
16. 42 U.S.C. §7607(b)(2).
17. *See generally* Donald R. van der Vaart & John C. Evans, Title V Objections, ABA SEER 2010.

to avoid making a compliance determination. Rather, EPA is alleging that states are failing to respond to comments submitted by the public during the permit's notice period. As discussed below, there are numerous problems with EPA's reliance on this reasoning. However, as a threshold matter, it should be noted that the issue of whether a state responds to public comment is of no moment to the legal inquiry before EPA in responding to a petition. That inquiry is limited to whether the "permit [not the permit agency] is in compliance with the requirements of this Act."

II. Missteps of the "Response to Comment" Scheme

There are several legal and practical shortcomings of EPA's use of the "response to comment" scheme to grant public petitions. In order to support an objection, Congress required EPA to make a very specific finding: that the permit is not in compliance with the CAA. Without that finding, the permit cannot be in noncompliance, and therefore EPA cannot object.[18] It is axiomatic that there must be a CAA obligation before there can be a failure to satisfy that obligation. There is no legal obligation under the CAA for the state to respond to public comments.[19] This fact is obvious in EPA's decisions where instead of citing to a CAA provision they cite to a generalized administrative principle.

> It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC,* 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public"). *See, e.g., In re Louisiana Pacific Corporation,* at 4-5 (Nov. 5, 2007).[20]

It is important to note that the Part 70 regulations, the set of regulations most states have adopted to form the basis of the state's Title V program, explicitly define the obligation of the state permitting authority where public comments are received. Specifically:

> (5) The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.[21]

The purpose of maintaining the comments is to allow EPA to carry out their duty to make the critical determination in response to a third-party petition under CAA §505(b)(2). In other words, provided the permitting authority keeps a record of the commenters and of the issues raised, the permitting authority has fulfilled its requirement under the CAA. At the same time, EPA, in fulfilling their duty under CAA §505, will satisfy the general administrative principle quoted above.

In contrast to the Part 70 rules, if EPA is the permitting authority, they issue Title V permits directly to sources pursuant to the rules under 40 C.F.R. Part 71. In the Part 71 rules, EPA has specifically included a provision—not present in the Part 70 rules—obligating themselves to respond to comments.

> (j) *Response to comments.* (1) At the time that any final permit decision is issued, the permitting authority shall issue a response to comments. This response shall: (i) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and (ii) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.[22]

EPA explained the purpose of this provision, stating that the obligation to respond to comments is to develop a sufficient record for the purposes of administrative review by the EPA Environmental Appeals Board (EAB).[23] Since this entire process is the duty of EPA (including the EAB), the Agency has necessarily fulfilled its requirements to itself, and there is no reference to §505(b)(2). In other words, no others could be blamed for a failure in their preparation of the record for the EAB review.

The second major legal problem with the "response to comment" scheme is that the CAA actually requires the petitioner to make the demonstration of noncompliance. The plain language of §505(b)(2) requires that "the petitioner demonstrates to the Administrator that the permit . . . [is not in compliance . . .]." The CAA does not transfer that obligation, or the obligation to better prepare the record so that EPA may make the determination. In fact, the state is not involved at all during this period. Under the guise of a state's failure to respond to comments, EPA's objection is nothing more than a nugatory remand back to the state agency. In those cases, some of which are discussed below, where EPA has so-called granted the petition, i.e., remanded the permit, EPA themselves provide a prima facie finding that that the petition must be denied. For example, in the JP Pulliam petition discussed below, EPA stated that it was "not clear" from Wisconsin's response to

18. EPA maintains a website that provides guidance to citizens regarding how to review Title V permits. In one of the document hosted by EPA, it is admitted: "While federal regulations do not require the Permitting Authority to provide a written response to your comments, many state laws do require such a response." http://www.epa.gov/oar/oaqps/permits/partic/proof1.pdf.
19. EPA has acknowledged that there is no requirement for states to respond to comments. This very issue was addressed in EPA's Title V Task Force. The Task Force debated the benefit of changing the existing law to include a requirement for states to respond in writing to public comments. *See* http://www.epa.gov/air/oaqps/permits/taskforcedocs/200604_report.pdf.
20. In re Alliant Energy–WP Edgewater Power, Wisconsin, Petition No. V-2009-02, Order Responding to Petitioner's Request, at 8 (Aug. 17, 2010).
21. 40 C.F.R. §70.7(h)(5).
22. 40 C.F.R. §71.11(j). The reference to permitting authority is meant to be the Administrator. The term is used for instances where the Administrator delegates the actual permitting to another government entity.
23. *See* 61 Fed. Reg. 34202 (Preamble to Part 71 final rule).

comments whether an error had been made. If the response were not clear, then "clearly" the petitioner had not met its burden of demonstrating noncompliance and the petition could not, as a matter of law, have been granted.

Turning to other problems with EPA's new scheme, the CAA and implementing Part 70 regulations provide deadlines for resolution of objections.[24] In cases where EPA "remands" the proposed Title V permit with instructions that the state respond to comments, the process of responding cannot practically be completed within the 180-day time period prescribed by law.[25] Take as an example a case where EPA grants a citizen petition and remands a proposed permit to the state agency on the basis the state failed to adequately address an EPA or citizen allegation of NSR violations from years gone by. By EPA's own experience, complex issues of allegations of past NSR violations take several years to litigate. It is impractical, and perhaps impossible, to expect a state to independently develop such a record within 180 days.

Another legal question with EPA's "response to comment" objection is the potential for concurrent litigation. Using the same NSR example, if a state, in response to an objection, finds that the NSR violation did occur, the state must reissue the permit with a compliance schedule to bring the source into compliance. The Permittee, if so moved, would then challenge that permit in state court. In many of the petitions received to date, the petitioner is relying on past allegations made by EPA in the form of notices of violations and/or civil suits. In this situation, there would be a civil case in federal district court for the same NSR allegation, and the exact same NSR allegation would be under review in the state court system. It is entirely possible that the state court would arrive at an entirely different decision than the federal district court where EPA had brought their original action. The result could be that the two courts could, from the same facts, arrive at two different binding judicial endpoints.[26]

Finally, beyond the legal and practical infirmities of the new "response to comment" scheme, the resulting objection is effectively a meaningless, or nugatory, remand to the state permitting agency. The salient point here is that in most of the cases where EPA has relied on this scheme, the state had in fact responded to the public comment and issued the permit based on response. Having EPA opine that the response was not clear enough will typically not result in an amended permit. At best, the state will simply enhance the existing statement of basis (the record). Because only the record and not the actual permit would be revised, the 90-day period the states have to cure the alleged noncompliance is meaningless. Even to the extent that the state withdrew the permit, then reproposed the permit with a more detailed response to the comment, EPA could employ the same scheme, i.e., find that the response to comment was not satisfactory, and the process would repeat itself. The remand could degrade to a Sisyphean task as the state agency would repropose the permit in repeated attempts to develop a record satisfactory to EPA. During the prolonged pendency of this back and forth, the Title V permit is held hostage, and industry is forced to wait.

Alternatively, EPA may actually be using this scheme to coerce states to alter their position on the substantive question or interpretation of a CAA requirement. The administrative process was clearly not what Congress had in mind when it authorized EPA to object to Title V operating permits, as Sen. Max Baucus (D-Mont.) explained:

> While EPA has an important role of providing guidance and general oversight, the agency should not unduly interfere with States' implementation of the permit program.[27]

III. Applying the "Response to Comment" Scheme

The TVA Paradise citizen petition best illustrates many of the missteps of the Obama EPA scheme.[28] The background of this case is important. EPA spent several years pursuing their allegation that the TVA Paradise plant had violated the CAA NSR requirements.[29] EPA issued an Administrative Compliance Order (ACO) to TVA based on alleged NSR violations. TVA challenged the ACO, and it was initially reviewed by the EAB. The record in front of the EAB was by EPA's own admission "substantial."[30] The EAB upheld the ACO, at which time TVA appealed to the U.S. Court of Appeals for the Eleventh Circuit. The Eleventh Circuit held that the statutory scheme for the issuance of an ACO under the CAA is inconsistent with due process and separation-of-powers principles and invalidated the ACO.[31] EPA had, and continues to have, the option of filing an action in district court. About the same time, several citizen petitions for Title V objections had already been filed alleging past NSR violations. The petitions had offered as their basis notice of violations (NOVs) issued by EPA to the other facilities. At the time, the Bush EPA denied those petitions, reasoning that an NOV alone, even if issued by EPA, is insufficient to demonstrate noncompliance.[32]

24. 42 U.S.C. §7661d(c); CAA §505(c). *See also* 40 C.F.R. §70.8.
25. *Id.*
26. A similar dilemma was recently obviated when the U.S. Court of Appeals for the Eighth Circuit limited the judicial routes available to third parties under the CAA. *See* Sierra Club v. Otter Tail Power Co., No. 09-2862 (Aug. 12, 2010). The court also expressed concerns resulting from an alternative interpretation of CAA, whereby simultaneous suits raising the same or similar issues would be a waste of judicial resources and could result in inconsistent decisions.
27. A Legislative History of the Clean Air Act Amendments of 1990, *supra* note 7, at 1044.
28. In re Tennessee Valley Authority, Paradise Fossil Fuel Plant, Drakesboro, Kentucky, Petition No. IV-2007-3, Order Responding to Petition to Object to Title V Permit (July 13, 2009).
29. In re Tennessee Valley Authority, Environmental Appeals Board, 2000, Final Order on Reconsideration.
30. *Id.*
31. Tennessee Valley Authority v. Whitman, 336 F.3d 1236, 33 ELR 20231 (11th Cir. 2003).
32. *See generally* van der Vaart & Evans, *supra* note 17. EPA argued the issuance of an NOV, and reference to information contained therein, alone is not sufficient to satisfy the demonstration requirement under §505(b)(2). *See generally* In the Matter of Georgia Power Company, Bowen Steam–Electric Generating Plant et al., Final Order (Jan. 8, 2007), at 5-9; and *Spurlock Final Order,* at 13-18.5. Under §113(a)(1), "[w]henever, on the basis of any

In the TVA Paradise case, however, the result was quite different. The petitioners, attempting to stop the issuance of the TVA's Title V permit, quite rationally submitted EPA's own administrative record to both the state during the comment period and again to EPA as part of its CAA §505(b)(2) petition. This record was much more than a mere NOV—it was the entire record EPA had developed as presented to the EAB and the Eleventh Circuit. EPA could hardly dismiss the alleged noncompliance at the TVA plant as an enforcement case in the early stages. It would be difficult for EPA to respond by saying that the Petitioners had failed to demonstrate noncompliance, given the fact the record upon which the petition was based was exactly the record EPA developed in their EAB hearing. Had EPA granted the petition on the substantive issue, i.e., the past NSR violations, their decision would have been directly reviewable in the courts of appeal. EPA demurred. Instead, EPA used the "response to comment" approach to avoid the question and force the question to Kentucky.[33] Notwithstanding the legal impediment that the petitioner is required to demonstrate noncompliance and the legal obligation for EPA to make a finding, EPA defended its attack on Kentucky, finding:

> It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC,* 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public"). Accordingly, KDAQ has an obligation to respond to significant public comments.[34]

Having alleged that the "response to comment" was a CAA requirement, EPA still had one seemingly insurmountable hurdle.[35] That hurdle was the fact that Kentucky had (documented in the administrative record) responded to the public comment directly stating:

> "The Division is aware of the current enforcement action against TVA . . . To date, there is no judicial determination of the merits of TVA's alleged NSR violations." KDAQ Response to Comments (RTC) at 3-4. KDAQ concludes by stating that, "The U.S. EPA considers this an active enforcement case and is proceeding. Upon settlement or judicial ruling the Division will incorporate those terms and conditions into this permit."[36]

Kentucky's response was eminently reasonable, based on the fact that EPA has not withdrawn its NOV nor did it state that they had changed its opinion that TVA was in violation of NSR. To this response, EPA summarily concluded:

> KDAQ's response is not adequate because it does not address the substance of the comment. EPA concludes that KDAQ's failure to respond to this significant comment may have resulted in one or more deficiencies in the TVA Paradise renewal permit.[37]

EPA is actually directing Kentucky to make a substantive determination of NSR applicability based on EPA's record. Note that EPA could easily have objected to the permit on the same question. In other words, EPA directed Kentucky to do what they would not do—despite having established a "substantial" record supporting noncompliance in the first place. Even with this record, the best EPA could do was to conclude that there "may" be violations of the CAA. As noted earlier, a demonstration of "maybe" is insufficient to support granting a petition.

In the TVA case, Kentucky accepted what was effectively EPA's remand of the Title V permit and started the process of evaluating NSR applicability.[38] By avoiding the compliance question themselves, EPA has turned what was intended to be a binary determination in response to a citizen petition into a redundant exercise for the state leading to uncertainty for the facility. In cases where the Title V process is combined with the construction permitting process, such uncertainty could impact the financing of the project. To EPA and third-party petitioners, this was a victory, in that the Title V permit objection was granted. Having observed the efficacy of this approach, EPA, encouraged by third-party petitioners, began making the frequent objections to state-issued permits based on the "response to comment" scheme.

EPA invoked this scheme again when granting a 2009 Sierra Club petition challenging the Title V permit for

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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 [issue an NOV]." An NOV is simply one early step in EPA's process of determining whether a violation has, in fact, occurred. These steps are commonly followed by additional investigation or discovery, information-gathering, and exchange of views that occur in the context of an enforcement proceeding, and are considered important means of fact-finding under our system of civil litigation. An NOV is not a final agency action and is not subject to judicial review. It is well-recognized that no binding legal consequences flow from an NOV, and an NOV does not have the force or effect of law. *See* PacifiCorp v. Thomas, 883 F.2d 661, 20 ELR 20086 (9th Cir. 1989); Absetec Constr. Servs. v. EPA, 849 F.2d 765, 768-69 (2d Cir. 1988); Union Elec. Co. v. EPA, 593 F.2d 299, 304-06, 9 ELR 20154 (8th Cir. 1979); and West Penn Power Co. v. Train, 522 F.2d 302, 310-11, 5 ELR 20557 (3d Cir. 1975).

33. The Obama EPA has shown its creative willingness to explore completely the legal interstices of the CAA and administrative law. The use of the absurdity, administrative necessity, and one-step-at-a-time doctrines in tailoring the NSR rule is one example. *See* 75 Fed. Reg. 31514 (June 3, 2010).
34. In re Tennessee Valley Authority, Paradise Fossil Fuel Plant, Drakesboro, Kentucky, Petition No. IV-2007-3.
35. While most states do not have as part of their Title V programs a specific requirement to respond to comment, Kentucky does have a regulation stating that they are to prepare a response to comments. *See* 401 KAR 52:100. However, this regulation is not part of an approved SIP under CAA §110 and therefore is arguably not an applicable requirement of the CAA.
36. In re Tennessee Valley Authority, Paradise Fossil Fuel Plant, Drakesboro, Kentucky, Petition No. IV-2007-3.
37. In re Tennessee Valley Authority, Paradise Fossil Fuel Plant, Drakesboro, Kentucky, Petition No. IV-2007-3.
38. Kentucky ultimately found TVA had not violated PSD and reproposed the permit. The Sierra Club again objected to EPA, but EPA has not yet responded. Sierra Club's Petition to Have the Administrator Object to the Tennessee Valley Authority's Paradise Fossil Plant's Title V Permit and/or to Reopen for Cause, http://www.epa.gov/Region7/air/title5/petitiondb/petitions/tva_paradise_petition2010.pdf.

Alliant Energy in Wisconsin.[39] As in the TVA case discussed above, Wisconsin had in fact responded specifically to the Sierra Club's comment. Sierra Club had commented on permit conditions from a prior construction permit, as well as the monitoring provisions the state had imposed as a method of determining compliance with emission standards. EPA made contradictory conclusions at one point claiming the state "failed to respond" and later discussed Wisconsin's "response to the comment." EPA did not find that the permit conditions were in violation of any objective standard and made no explicit finding of compliance or noncompliance.

In response to another Sierra Club Title V petition, EPA objected to a Wisconsin permit for the JP Pulliam coal-fired power plant.[40] The petitioner claimed the permit did not include applicable particulate matter (PM) limits and heat inputs, and also claimed the monitoring for various PM sources was insufficient. The issue upon review of the petition is whether Sierra Club had adequately demonstrated the permit was not in compliance. EPA made no finding of compliance or noncompliance, instead claiming that it was "not clear" from Wisconsin's response to comments whether an error had been made. EPA's own conclusion that it was not clear that the permit was in violation of the CAA should have ended the matter and resulted in a denial of the petition. However, instead of denying the petition, EPA turned on Wisconsin, applying the "response to comment" scheme and sending the permit back to the state to essentially have Wisconsin perform the substantive review EPA was avoiding.

EPA took the same approach with the Baltimore Harbor Waterkeeper's 2009 Title V citizen petition against the state of Maryland for its permit to a municipal waste combustor.[41] The Petitioners claimed that the permit included "relaxed" limits. No determination was made as to whether the Petitioner had satisfied its burden of demonstrating that the alleged "relaxed" limits resulted in noncompliance. EPA applied the "response to comment" approach and found that Maryland's "technical and practical reasons for expanding the averaging times do not address the central issue."[42] Maryland had provided technical and practical reasons for taking that action they did. However, EPA was not satisfied that the "central" issue of the petition had been addressed by the state. To the extent that EPA was able to determine what was "central" to the petition, EPA did not explain what it was about Maryland's technical and practical reason that was in error.

IV. State Response to Objections

The ultimate fate of many of these objections is not readily available. General observations suggest that most states are averse to even receiving an objection, whether it is the result of EPA 45-day review or the result of a citizen petition. When an objection is made, the law provides that the state has 180 days to submit a revised permit that addresses the objection.[43] As discussed above, one of the flaws with EPA's scheme is that the state would not have originally proposed the permit and EPA would not have approved the permit during its 45-day review period if either party felt the permit was not in compliance with requirements of the Act.[44]

It would be unreasonable for a state, when faced with an objection for failure to include an applicable requirement, e.g., NSR, in a revised permit, to investigate, conclude, litigate, and include a compliance schedule all within the 180 days to cure the objection allowed under the statute. The TVA case is illustrative. EPA actually granted the petition and directed the state of Kentucky to determine NSR applicability—and by law, they were required to do so within 180 days, while most NSR litigation cases take several years to resolve. EPA themselves took years to develop their substantial administrative record, and the NOV is still not resolved. EPA was unwilling to rely on its own record to conclude the permit was legally deficient for failure to include NSR requirements.

V. Conclusion

EPA appears to be using the Title V objection and veto authority to force states to address, in a substantive manner, the allegations made by third-party petitioners about the deficiencies of proposed Title V permits. While EPA's own rules only require the state to record the names of commenters and their issues to allow EPA to "fulfill his obligations under [the CAA] . . . ,"[45] EPA is now deferring its ultimate responsibility to the states. In addition to the apparent contradiction with the Part 70 rules, the "response to comment" requirement would lead to numerous legal and practical difficulties. These include: (1) the reading out of the petitioner's burden to make the demonstration to EPA under the CAA; (2) the extremely short time frame that would be granted to the state during which to develop a record sufficient to pursue or defend a compliance determination; (3) the possible development of a dual judicial track for a single enforcement issue; and (4) the result is an amendment not of the permit, but of the record, unless the state actually changes its position on enforcement. These difficulties would argue that the objection process is being called upon to do more than it was intended.

39. In re Alliant Energy–WP Edgewater Power, Wisconsin, Petition No. V-2009-02, Order Responding to Petitioner's Request (Aug. 17, 2010).
40. In re Wisconsin Public Service Corporation JP Pulliam Power Plant, Wisconsin, Petition No. V-2009-01, Order Responding to Petitioner's Request (June 21, 2010).
41. In re Wheelabrator Baltimore, Maryland, Order Responding to Petitioner's Request (Apr. 14, 2010).
42. *Id.*
43. 42 U.S.C. §7661d(c); CAA §505(c). *See also* 40 C.F.R. §70.8.
44. EPA's claim that failing to object during the 45-day review period is not "actionable" was specifically rejected. Sierra Club v. Otter Tail Power Co., No. 09-2862 (Aug. 12, 2010).
45. 40 C.F.R. §70.7(h)(5).

From the viewpoint of third-party plaintiffs, the new scheme offers perhaps the most efficient, in terms of cost and time, method of delaying the issuance of a Title V operation permit, or at the very minimum, increasing the stringency of requirements of permitted facilities. The process is administrative, thus avoiding judicial formalities, and includes extremely tight deadlines for EPA response. With EPA's new "response to comment" scheme, EPA and the environmental community are wresting power away from the states and are tightening their centralized control of the CAA.