IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 29, 2020
Lyle W. Cayce
Clerk

No. 18-60384

ENVIRONMENTAL INTEGRITY PROJECT; SIERRA CLUB,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency,

Respondents

Petition for Review of Final Administrative Action of the United States Environmental Protection Agency

Before HAYNES, GRAVES, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

We consider EPA's administration of the Title V permitting program under the Clean Air Act (the "Act"), 42 U.S.C. § 7401 *et seq*. Added to the Act in 1990, Title V is designed to consolidate in a single operating permit all substantive requirements a pollution source must comply with, including preconstruction permits previously issued under Title I of the Act. In this case, ExxonMobil sought a revised Title V permit concerning an expansion of a plant in Baytown, Texas. Petitioners Environmental Integrity Project and Sierra Club asked EPA to object on the grounds that, in their view, the underlying Title I preconstruction permit allowing the expansion was invalid. EPA

rejected Petitioners' arguments and declined to object. In so doing, EPA explained it has recently returned to its original view of Title V, under which the Title V permitting process is not the appropriate vehicle for re-examining the substantive validity of underlying Title I preconstruction permits. Petitioners ask us to review EPA's decision. Concluding EPA's interpretation of the Title V program is independently persuasive and therefore entitled to the mild form of deference recognized by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), we deny the petition.

I.

A.

The Act "establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). It does so through "[a]n experiment in cooperative federalism" that divides responsibilities between EPA and the states. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001)). EPA "formulat[es] national ambient air quality standards," *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 308 (2014), whereas the states bear the "primary responsibility" for implementing those standards, *id.*; *accord Michigan*, 268 F.3d at 1083 (EPA's "overarching role is in setting standards, not in implementation").

This case involves permits issued under Title I's New Source Review ("NSR") program, which Congress added to the Act in 1977. *See New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2015). The NSR program requires operators to obtain a preconstruction permit before building a new facility or modifying an old one. These permits are issued by the states, through mechanisms called state implementation plans ("SIPs"). Once a state has designed its SIP, the state must submit it to EPA. *See generally* 42 U.S.C. § 7410. EPA must review

the SIP to ensure its compliance with Title I and provide notice and an opportunity to comment regarding the SIP. *Id.* § 7410(a)(2). Only if the SIP complies with the Act must EPA approve it. *Id.* § 7410(k)(3)). States periodically revise their SIPs to keep up with EPA's new substantive regulations. As with their original SIPs, states have to submit revisions to EPA, which again subjects them to notice and comment and then approves them unless they "interfere" with attainment of Title I standards. *Id.* § 7410(*l*).

Title I contains provisions that apply to all SIPs. Under these provisions, before breaking ground on a new facility, an operator applies to the state for a new-source permit. The state must provide notice and an opportunity to comment before it approves individual preconstruction permits. *See* 40 C.F.R. § 51.161(a). The substantive requirements for preconstruction permits differ markedly depending on whether the new source is deemed "major" or "minor." A source is major if it has "the potential to emit 100 tons per year of any air pollutant." *Util. Air Regulatory Grp.*, 573 U.S. at 310 (citing 42 U.S.C. §§ 7661(2)(B), 7602(j) (cleaned up)). The Act specifies "in considerable detail" the requirements states must meet to grant preconstruction permits to major sources. *Luminant Generation Co.*, 675 F.3d at 922 (citing 42 U.S.C. §§ 7470–7503). In contrast, the Act's requirements for minor new-source review are "sparse," allowing for "wide[]" variation "from State to State." *Id.* (citing *inter alia* 40 C.F.R. §§ 51.160–64).

Ordinarily, states must evaluate and permit every new source and every new expansion of an existing source. But in 2002, EPA promulgated a rule that allows existing sources to expand without undergoing new-source review. *New York*, 413 F.3d at 36. Under the rule, an operator can obtain a ten-year Plantwide Applicability Limitation ("PAL") permit. *Id.* (citation omitted). The whole facility can avoid major new-source review for alterations if, as altered, the whole facility's emissions do not exceed levels specified in the PAL permit.

Id. Here, again, states' PAL programs must be approved by EPA, following notice and comment. *See generally* 42 U.S.C. § 7410. And once a state approves an individual PAL permit, EPA must again review the individual permit and provide for notice and comment. 40 C.F.R. § 52.21(aa)(5).

In 1990, Congress added Title V to the Act. Title V's purpose is to provide each source a single permit that contains and consolidates all the information it needs to comply with the Act.[1] Accordingly, "Title V does not generally impose new substantive air quality control requirements." *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008) (citations omitted; cleaned up). Instead, it provides for individual operating permits that "contain monitoring, record keeping, reporting, and other conditions" in one place. *Id.* (citations omitted). "In a sense," then, a Title V permit "is a source-specific bible for Clean Air Act compliance." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). Like Title I, Title V is administered mostly by the states. *La. Dep't of Envtl. Quality v. EPA* [*LDEQ*], 730 F.3d 446, 447 (5th Cir. 2013) (citations omitted). Accordingly, as with Title I, states develop their own Title V permitting programs and submit them to EPA for approval. *Id.* (citing 42 U.S.C.

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[1] *See, e.g.*, *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016) ("Title V does no more than consolidate existing . . . requirements into a single document . . . without imposing any new substantive requirements." (quoting *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302 (11th Cir. 2004)) (cleaned up)); *id.* (Title V's legislative history "indicates that permits' purpose is "so that the public might better determine the requirements to which the source is subject, and whether the source is meeting those requirements" (citation omitted; cleaned up)); *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008) ("The intent of Title V is to consolidate into a single document (the operating permit) all of the clean air requirements applicable to a particular source of air pollution." (citation omitted)); *id.* (describing the Title V amendments as adding "clarity and transparency . . . to the regulatory process" and noting that "Title V does not generally impose new substantive air quality control requirements"(citations omitted)); *Leavitt*, 368 F.3d at 1302 ("Title V imposes no new requirements on sources. Rather, it consolidates existing air pollution requirements into a single document, the Title V permit, to facilitate compliance monitoring."); *see also United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 280 (3d Cir. 2013) ("Title V 'does not generally impose new substantive air quality control requirements[]' . . . ." (quoting *Johnson*, 541 F.3d at 1261)).

§ 7661a(d)). A Title V permit usually contains all of the source's Title I preconstruction permits. Title V permits sometimes contain other state-approved preconstruction permits, issued pursuant to state-specific standards. Any such state permits must be designated as "state-only" or as not "federally enforceable" in the Title V operating permit. *See* 40 C.F.R. § 70.6(b)(2).

Once a state approves a Title V permit, it submits the permit to EPA for review. 42 U.S.C. § 7661d(a)(1). If the permit does not comply with Title V, EPA must object to it within forty-five days. *Id.* § 7661d(b)(1). If EPA does not object, "any person may petition" within sixty days of the end of the objection period for EPA to object. *Id.* § 7661d(b)(2). EPA then has sixty more days to decide whether to grant the petition. EPA must object to the permit "if the petitioner demonstrates to [EPA] that the permit is not in compliance with [Title V], including the requirements of the applicable implementation plan." *Id.* A denial of a petition constitutes a final agency action subject to judicial review. *Id.* Title V permits must be renewed every five years. *Id.* § 7661a(b)(5). Each renewal carries with it the petition process described above.

Title V requires each permit to include four kinds of contents: (1) "enforceable emission limitations and standards," (2) a compliance schedule, (3) a monitoring and recordkeeping requirement, and (4) "such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." *Id.* § 7661c(a).[2] The Act does not define "applicable requirements," but EPA has defined the term in implementing regulations to mean

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[2] The provision reads in whole:

> Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as

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