

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 2, 2020

Christopher M. Wolpert
Clerk of Court

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; ANDREW
WHEELER, Administrator, United
States Environmental Protection
Agency,

Respondents,

No. 18-9507

STATE OF UTAH, on behalf of the Utah
Department of Environmental Quality,
Division of Air Quality; PACIFICORP
ENERGY,

Respondents - Intervenors,

and

AIR PERMITTING FORUM,

Amicus Curiae.

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

Keri N. Powell, Powell Environmental Law, LLC, Decatur, Georgia (Patton Dycus, Environmental Integrity Project, Decatur, Georgia, with her on the briefs), for Petitioner.

David J. Kaplan, United States Department of Justice, Environmental Defense Section, Washington, D.C. (Jeffrey Bossert Clark, Assistant Attorney General; Jonathan D. Brightbill, Principal Deputy Assistant Attorney General; and John T. Krallman, United States Environmental Protection Agency, with him on the briefs), for Respondents.

E. Blaine Rawson, Ray Quinney & Nebeker P.C., Salt Lake City, Utah (Marie Bradshaw Durrant, PacifiCorp, Salt Lake City, Utah, with him on the briefs), for Respondent-Intervenor PacifiCorp Energy.

Sean D. Reyes, Utah Attorney General; Tyler R. Green, Utah Solicitor General; Christian C. Stephens and Marina V. Thomas, Assistant Utah Attorneys General; Salt Lake City, Utah, for Respondent-Intervenor State of Utah.

Charles H. Knauss, Hunton Andrews Kurth LLP, Washington, D.C.; and Shannon S. Broome, Hunton Andrews Kurth LLP, San Francisco, CA, for Amicus Curiae Air Permitting Forum.

Before **BACHARACH, BALDOCK**, and **MURPHY**, Circuit Judges.

BACHARACH, Circuit Judge.

This petition involves interpretation of an environmental regulation addressing the renewal of permits under Title V of the Clean Air Act. The statute and accompanying regulation allow renewal of these permits only if they ensure “compliance with” all of the “applicable requirements.” 42 U.S.C. § 7661c(a); 40 C.F.R. 70.7(a)(1)(iv). The term “applicable requirements” is defined in the regulation, but not the statute. *Env’tl.*

Integrity Project v. EPA, No. 18-60384, ___ F.3d ___, slip op. at 5–6 (5th

Cir. May 29, 2020). The Sierra Club interprets the regulatory definition to require compliance with all existing statutory requirements; the EPA interprets the regulatory definition more narrowly, arguing that the applicability of certain requirements is determined by the state permit issued under a separate part of the Clean Air Act (Title I).

We agree with the Sierra Club’s interpretation. The regulatory definition of “applicable requirements” includes all requirements in the state’s implementation plan, and Utah’s implementation plan broadly requires compliance with the Clean Air Act. So all of the Act’s requirements constitute “applicable requirements” under the regulation.

I. The Clean Air Act’s Requirements

To interpret the term “applicable requirements,” we must consider the underlying statute (the Clean Air Act). Two of the statutory parts, Titles I and V, bear on the meaning of “applicable requirements” under the regulation. *See Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 752 (9th Cir. 2008).

A. Title I

The Clean Air Act calls for federal and state cooperation. *Texas v. EPA*, 690 F.3d 670, 677 (5th Cir. 2012). For its part, the EPA sets national air quality standards and provides oversight and enforcement. 42 U.S.C. § 7409. To achieve compliance with these national air quality standards,

states must develop implementation plans and submit them to the EPA for approval. *Id.*

These plans require many industrial sources of pollution to obtain preconstruction permits through a process called “New Source Review” (NSR). *Id.* § 7475(a). The states conduct NSR under their implementation plans. *Id.* §§ 7410(a)(2)(C), 7471.

The required NSR differs for “major” or “minor” sources of pollution. *See Env'tl. Integrity Project v. EPA*, No. 18-60384, ___ F.3d ___, slip op. at 3 (5th Cir. May 29, 2020) (“The substantive requirements for preconstruction permits differ markedly depending on whether the new source is deemed ‘major’ or ‘minor.’”). Major NSR is required if a new or modified source would emit pollutants above certain thresholds. 42 U.S.C. §§ 7475(a), 7479(1), 7502(c)(5); 40 C.F.R. §§ 51.165(a)(1)(iv)(A), (1)(v)(A), 51.166(b)(1)(i), (b)(2)(i). Only minor NSR is required if emissions would fall below the applicable thresholds. 42 U.S.C. § 7410(a)(2)(C); 40 C.F.R. §§ 51.160–51.164. Minor NSR entails “only the barest of requirements.” *Luminant Generation Co. v. EPA*, 675 F.3d 917, 922 (5th Cir. 2012).

B. Title V

Title V is designed to enhance compliance and improve enforcement. *See S. Rep. No. 101-228*, at 346 (1993). Under Title V, the operating permit must include the various statutory limitations on emissions that

apply to a given source. 42 U.S.C. § 7661c(c). Some limitations may be self-executing; others may be source-specific and defined in other permits. *Compare id.* § 7411 (establishing New Source Performance Standards that are self-executing limitations on certain sources), *with id.* § 7475 (requiring certain sources to obtain a permit for Prevention of Significant Deterioration, which entails source-specific limitations). The Title V permit must include all applicable self-executing and source-specific limitations. *Id.* § 7661c(a); *see Env'tl. Integrity Project v. EPA*, No. 18-60384, ___ F.3d ___, slip op. at 4 (5th Cir. May 29, 2020) (stating that Title V permits must consolidate all of the information that the source needs to comply with the Clean Air Act).

States are responsible for issuing Title V permits. 42 U.S.C. § 7661a(b), (d). Before issuing a Title V permit, the state must propose the permit to the EPA. *Id.* § 7661d(a), (b). If the proposed permit does not comply with Title V's "applicable requirements," the EPA must object. *Id.* § 7661d(b)(1). If the EPA does not object, others can petition the EPA to compel it to object. *Id.* § 7661d(b)(2). If a petition is filed, the EPA must respond. *Id.* In responding, the EPA must object to the proposed permit upon a demonstration that the source failed to comply with the applicable requirements. *Id.*

Once Title V permits are issued, they are enforceable by the EPA and the public. *Id.* § 7413(a), (b) (by the EPA); *id.* § 7604(a)(1), (f)(4) (by the

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