

8/20/2007

A-18J

Keith Harley, Esq.  
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205 West Monroe, Fourth Floor  
Chicago, Illinois 60606

Dear Mr. Harley:

This letter is in response to your February 13, 2007, letter requesting the United States Environmental Protection Agency (U.S. EPA) to require the Illinois Environmental Protection Agency (IEPA) change its State rules and State Implementation Plan (SIP) to include third party appeals for its minor new source review (NSR) permits. U.S. EPA has reviewed the arguments you made in your letter and have concluded that we have no authority to require Illinois to include a provision to allow a third party appeal of any minor NSR permit issued by IEPA.

In your letter you make several arguments for why IEPA should be required to provide for third party appeals of minor NSR permits. First, you state that the absence of third party appeal rights impedes meaningful public participation, contrary to a policy goal of the Clean Air Act. Second, the air quality is endangered by the extensive use of synthetic minor permitting to avoid third party review. And, finally, several of the other Region 5 States' SIPs provide for review of minor source permits. You recognized in your letter that third parties do have the opportunity to bring a citizen enforcement suit. However, you believe this remedy is "expensive, unwieldy and inefficient."

Pursuant to authority granted by Congress in Section 110(a)(2)(C) of the Clean Air Act ("CAA"), 42 U.S.C. § 7410(a)(2)(C), the Administrator promulgated criteria to be met by the various States, to allow the Administrator to approve a NSR Program submitted by a State as a component of the State's CAA implementation plan. 51 Fed. Reg. 40669 (Nov. 7, 1986), codified at 40 C.F.R. Subpart I. The State of Illinois has developed and submitted to the Administrator such a program, and the Administrator has approved the program as a component of Illinois' CAA implementation plan.

In Section 110(a)(2)(C) of the CAA, Congress does not make third party administrative appeals of any minor NSR permit a requirement for the Administrator's approval of any State NSR permitting program. The Administrator does not require that a State NSR program provide for administrative review of minor NSR permits issued. (40 C.F.R. § 51.161)

The Illinois NSR permitting program was approved by the Administrator as that program is consistent with all statutory and regulatory requirements Illinois was required to meet for approval. In that Illinois' implementing and enforcing standards met all approval requirements, neither the Administrator nor any of his delegated officers or employees can now issue any deficiency notice to Illinois for its failure to incorporate a third party review process of minor NSR permits, a process not required by statute or regulation. See Paralyzed Veterans of America v. West, 138 F.3d 1434, 1436 (Fed. Cir. 1998), citing Berkovitz v. United States, 486 U.S. 531, 544 (1998) (“[i]t is axiomatic that an agency must act in accordance with applicable statutes and its regulations[,]” and an “agency has no discretion to deviate’ from the procedure mandated by its regulatory scheme.”)

As you recognize in your letter, citizens do have avenues for judicial review through citizen suits and enforcement. That such avenues may be difficult to manage and expensive to use, does not allow the Administrator or his delegated officers or employees to deviate from the law.

If you have any questions please feel free to contact Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Stephen Rothblatt, Director  
Air and Radiation Division

cc. Laurel Kroack, Chief  
Bureau of Air  
Illinois Environmental Protection Agency