



LEGAL ISSUES



INVOLVED IN GETTING
(OR NOT GETTING)
AN AIR PERMIT





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TOPICS

- LEGAL FOUNDATIONS
- ROLES OF USEPA AND DHEC/DENR
- COMMON LEGAL ISSUES
- QUAGMIRES

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LEGAL FOUNDATIONS

Original intent of Clean Air Act (CAA
Amendments of 1970):

“COOPERATIVE
FEDERALISM”

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COOPERATIVE FEDERALISM

- USEPA promulgates national air pollution standards

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- States implement and achieve standards through EPA-approved State Implementation Plans (“SIP”)

COOPERATIVE FEDERALISM

- USEPA promulgates national air pollution standards
- States implement and achieve standards through EPA-approved State Implementation Plan
- Example: regulation of “criteria pollutants”

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CRITERIA POLLUTANTS

- Lead
- Carbon monoxide
- Ozone
- Nitrogen oxides
- Sulfur dioxide
- Particulate matter

COOPERATIVE FEDERALISM

- USEPA promulgates national air pollution standards
- States implement and achieve standards through EPA-approved State Implementation Plan (“SIP”)
- Most -- but not all -- State air pollution regulations are part of SIP

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LEGAL FOUNDATIONS

- Original intent of Clean Air Act:
“COOPERATIVE FEDERALISM”
- As amended in 1990: additional regulatory level of uniform national operating permit program

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LEGAL FOUNDATIONS

- Original intent of Clean Air Act:
“COOPERATIVE FEDERALISM”
- As amended in 1990: additional level of
uniform national operating permit program:

TITLE V OPERATING PERMIT PROGRAM

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TITLE V PERMIT PROGRAM

- EPA sets minimum standards; States issue permits in accordance with those standards.

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TITLE V PERMIT PROGRAM

- EPA sets minimum standards; States issue permits in accordance with those standards.
- Permits enforceable by: EPA.

TITLE V PERMIT PROGRAM

- EPA sets minimum standards; States issue permits in accordance with those standards.
- Permits enforceable by:
 - EPA; and
 - State (SCDHEC: Bureau of Air Quality)
(NCDENR: DAQ).

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TITLE V PERMIT PROGRAM

- EPA sets minimum standards; States issue permits in accordance with those standards.
- Permits enforceable by:
 - EPA;
 - State; and
 - citizens (through CAA sec. 304).

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TITLE V PERMIT PROGRAM

- Applicability: “MAJOR SOURCES”

TITLE V PERMIT PROGRAM

- Applicability: “MAJOR SOURCES:”
 - Potential to Emit (PTE) > 100 tons per year (“TPY”) of “criteria pollutants”

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TITLE V PERMIT PROGRAM

- Applicability: “MAJOR SOURCES:”
 - PTE > 100 TPY of criteria pollutants

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TITLE V PERMIT PROGRAM

- Applicability: “MAJOR SOURCES:”
 - PTE > 100 TPY of criteria pollutants OR
 - PTE > 10 TPY of ANY hazardous air pollutant (“HAP”)

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TITLE V PERMIT PROGRAM

- Applicability: “MAJOR SOURCES:”
 - PTE > 100 TPY of criteria pollutants;
 - PTE > 10 TPY of ANY HAP; OR
 - PTE > 25 TPY of ALL combined HAPs.

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STATE PERMITTING PROGRAMS

- State permitting continues for “minor sources”

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- State permitting for “synthetic minors”

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- State permits may be federally enforceable

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STATE PERMITTING PROGRAMS

- State permitting continues for “minor sources”
- State permitting for “synthetic minors”
- State permits may be federally enforceable
- Generally easier, cheaper, and less expensive permit application process

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ROLES OF USEPA AND STATES IN THE PERMITTING PROCESS

- USEPA reviews all Title V permits

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USEPA REVIEW OF TITLE V PERMITS

- 45-day review period allowed by law

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- BAQ/DAQ must respond to any USEPA objections within 90 days

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- Citizens may also petition USEPA to object to permit

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USEPA REVIEW OF TITLE V PERMITS

- 45-day review period allowed by law
- BAQ/DAQ must respond to any USEPA objections within 90 days
- Citizens may also petition USEPA to object to permit
- No USEPA review for non-Title V permits

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FREQUENT LEGAL ISSUES

- Confidentiality
- Who signs permit application
- When to begin construction
- Appeals

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CONFIDENTIALITY

- North Carolina:
 - Application presumed public unless entitled to confidentiality exception under applicable statutes

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 - Request for confidentiality must be made and justified at time of submittal

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CONFIDENTIALITY

- North Carolina:
 - Application presumed public unless entitled to confidentiality exception under applicable statutes
 - Request for confidentiality must be made and justified at time of submittal
 - DAQ (Director) has 180 days in which to decide, during which time application is confidential

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CONFIDENTIALITY

- South Carolina:
 - Must be stamped “CONFIDENTIAL”

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CONFIDENTIALITY

- South Carolina:
 - Must be stamped “CONFIDENTIAL”
 - Applicant must provide redacted version

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CONFIDENTIALITY

- South Carolina:
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 - Applicant must provide redacted version
 - emissions data may not be redacted

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CONFIDENTIALITY

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 - Applicant must provide redacted version
 - Confidentiality determination

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 - made at time of request to see full application

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 - Must be stamped “CONFIDENTIAL”
 - Applicant must provide redacted version
 - Confidentiality determination
 - made at time of request to see full application
 - applicant notified at time of request

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WHO SIGNS APPLICATION?

- Title V: “responsible official”

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- NC: officer of at least VP level OR person responsible for overall operation of facility

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WHO SIGNS APPLICATION?

- Title V: “responsible official”
- NC: officer of at least VP level OR person responsible for overall operation of facility
 - PE seal? Check rule

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WHO SIGNS APPLICATION?

- Title V: “responsible official”
- NC: officer of at least VP level OR person responsible for overall operation of facility
- SC: may be project manager or facility environmental manager
 - PLUS PE

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WHO SIGNS APPLICATION?

Signing false or deliberately incomplete application could subject signer to personal liability

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WHO SIGNS APPLICATION?

Signing false or deliberately incomplete application could subject signer to personal **CRIMINAL** liability

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WHEN TO BEGIN?

- NC: Under 2003 statute, prior to receiving permit, may:
 - clear and grade

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 - clear and grade
 - construct roads, driveways, and parking lots

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 - clear and grade
 - construct roads, driveways, and parking lots
 - install underground pipes

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WHEN TO BEGIN?

- NC: Under 2003 statute, prior to receiving permit, may:
 - clear and grade
 - construct roads, driveways, and parking lots
 - install underground pipes and
 - “construct ancillary structures” (fences, offices, etc.) for which air permit not required

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WHEN TO BEGIN?

- SC: may:
 - If PSD/112(g) avoidance:

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WHEN TO BEGIN?

- SC: may:
 - If PSD/112(g) avoidance:
 - clear and grade land

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WHEN TO BEGIN?

- SC: may:
 - If PSD/112(g) avoidance:
 - clear and grade land
 - construct roads

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WHEN TO BEGIN?

- SC: may:
 - If PSD/112(g) avoidance:
 - clear and grade land
 - construct roads
 - Others:
 - construct below grade (footings, etc.)

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APPEALS

- NC: Any “person aggrieved” by non-issuance or terms of air permit may commence “contested case” in Office of Administrative Hearings

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 - may be permit holder dissatisfied with restrictions

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 - may be permit holder dissatisfied with restrictions
 - may be third party, such as facility neighbor or environmental advocacy group

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APPEALS

- NC: Any “person aggrieved” by non-issuance or terms of air permit may commence “contested case” in Office of Administrative Hearings
 - may be permit holder dissatisfied with restrictions
 - may be third party, such as facility neighbor or environmental advocacy group
 - 30-day SOL, but application to others than applicant is unclear

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APPEALS

- SC: may petition Administrative Law Judge Division

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 - DHEC rule = 15 days

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APPEALS

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 - DHEC SOL = 15 days (by rule)
 - ALJD SOL = 30 days (unless otherwise specified by statute)

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 - prudent petitioner complies with shorter deadline

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 - prudent petitioner complies with shorter deadline
 - runs from actual OR constructive notice

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APPEALS

- SC: may petition Administrative Law Judge Division
 - DHEC SOL = 15 days (by rule)
 - ALJD SOL = 30 days (unless otherwise specified by statute)
 - prudent petitioner complies with shorter deadline
 - runs from actual OR constructive notice
 - ALL petitions tardy after 90 days except for “substantial cause shown”

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QUAGMIRES

- NC: Proof of zoning consistency
- NC: Public notice and participation

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ZONING CONSISTENCY

- Formerly: had to obtain certificate from local government that permitted activity was consistent with zoning

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ZONING CONSISTENCY

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 - take out legal notice in newspaper

ZONING CONSISTENCY

- Formerly: had to obtain certificate from local government that permitted activity was consistent with zoning IF facility was in zoned area
- April 1, 2004 amendment: if no zoning, applicant must
 - take out legal notice in newspaper
 - erect sign on site within 10 feet of road

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PUBLIC NOTICE AND PARTICIPATION

- Public notice requirements

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PUBLIC NOTICE AND PARTICIPATION

- Public notice requirements: publication in newspaper of general circulation and at least 30 days allowed for public comments if

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 - PSD

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 - Source in non-attainment area

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 - PSD
 - Source in non-attainment area
 - etc.

PUBLIC NOTICE AND PARTICIPATION

- Public notice requirements: publication in newspaper of general circulation and at least 30 days allowed for public comments if
 - PSD
 - Source in non-attainment area
 - etc.
 - Director's call

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PUBLIC NOTICE AND PARTICIPATION

- Best practice: plan for publication and 30-day comment period and request if necessary

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PUBLIC NOTICE AND PARTICIPATION

- Public hearing required?

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PUBLIC NOTICE AND PARTICIPATION

- Public hearing required?
- Director's call -- but director will be rightly influenced by quantity and quality of public comments and degree of controversy

PUBLIC NOTICE AND PARTICIPATION

- Public hearing required?
- Director's call -- but director will be rightly influenced by quantity and quality of public comments and degree of controversy
- Best practice: avoid delay by requesting public hearing at start of comment period if permit will be controversial