

**When State and Federal Laws Are
Out of Sync
The "Ohio Review"
Experience**

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I. SCOPE

Clean Air Act

- Title V program
- Prevention of Significant Deterioration (PSD) program
- New Source Review (NSR) program
- New Source Performance Standards (NSPS) permit program
- Noncompliance penalties

Clean Water Act

- National Pollutant Discharge Elimination System (NPDES) permit program

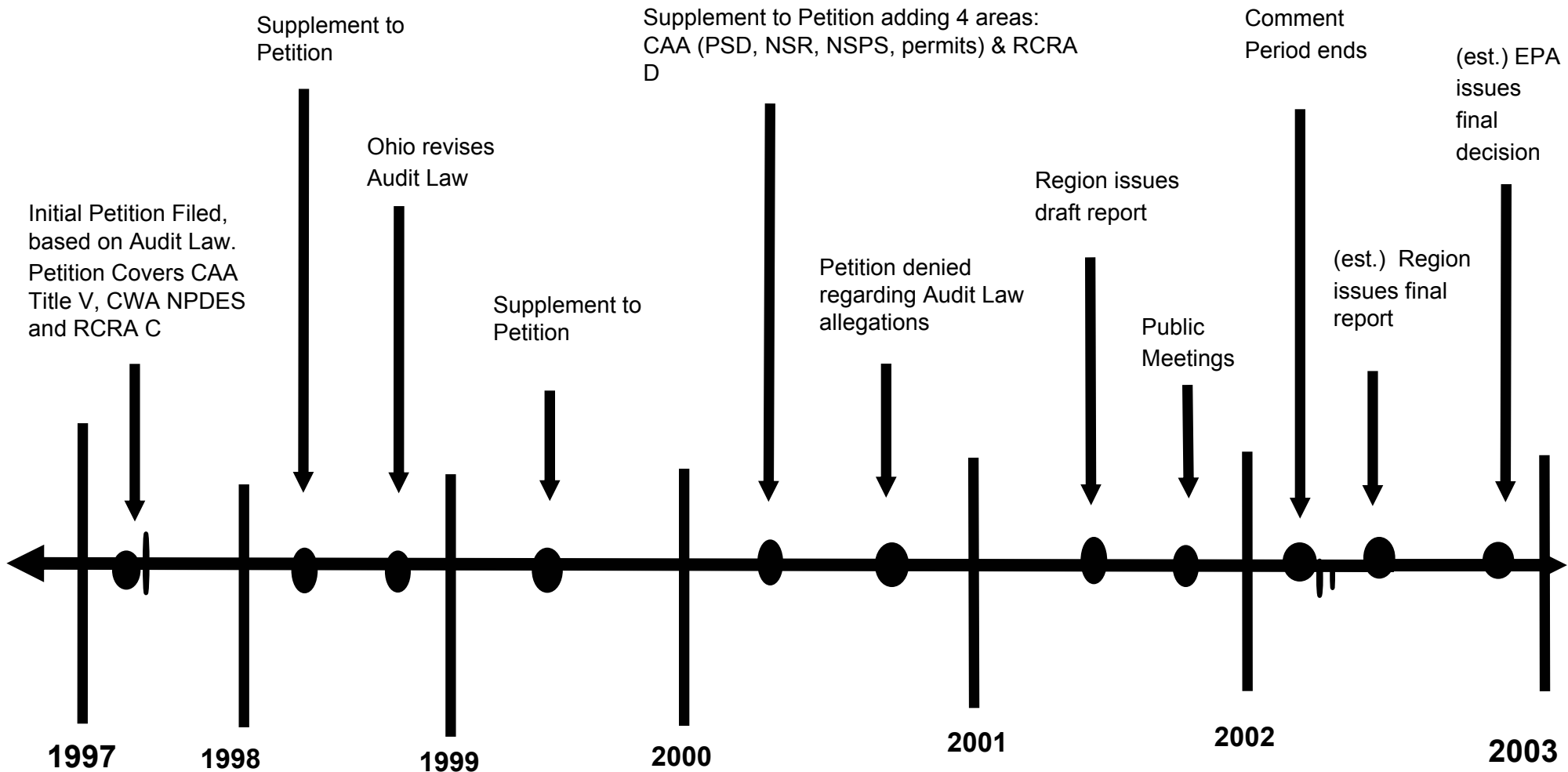
Resource Conservation and Recovery Act

- Hazardous Waste (Subtitle C) program
- Solid Waste (Subtitle D) program

II. BACKGROUND

PETITIONERS ARE:

- Ohio Citizen Action
- Ohio Environmental Council (later replaced by Ohio PIRG)
- Rivers Unlimited
- Ohio Sierra Club



TIMELINE

III. WITHDRAWAL/REVOCAION AUTHORITIES

- CAA

- Title V: Withdrawal of approved program

CAA § 502(i), 40 CFR § 70.10

- PSD: Revocation of delegated program EPA approved federal regulations as part of SIP, then delegated to State

Paragraph 3 of Delegation Document

- NSR: Withdrawal of approved (SIP) program

CAA § 110(k)(5), 40 CFR § 70.10

III. WITHDRAWAL/REVOCAATION AUTHORITIES

- CAA (continued)

- NSPS: Revocation of delegated program

- CAA §111(C), Delegation Document

- Noncompliance Penalties: Revocation of delegated program

- CAA § 120, Delegation Document, if any

- CWA NPDES:

- Withdrawal of approved program

- CWA § 318

- 40 CFR §§123.63, .64

III. WITHDRAWAL/REVOCATION AUTHORITIES

- RCRA

- Hazardous waste: withdrawal of authorized program

RCRA § 3006

40 CFR §§ 271.22, .23

- Solid (non-hazardous) waste: Withdrawal of approved program

RCRA § 4005

40 CFR § 239.13

IV. WHO MAY WITHDRAW/REVOKE A STATE PROGRAM?

or: Who may determine not to withdraw/revoke (i.e., "deny" the petition)

A. CAA (see materials)

Conclusion:

- The RA may not be able to "deny" a petition
- The RA may have authority to "grant" a petition and initiate withdrawal proceedings for Title V.

B. CWA

NPDES: HQ Delegation #2-34(1)(g): "Authority... to deny, in whole or in part, petitions to withdraw approval of State NPDES programs... delegated to Regional Administrators." Does not mention authority to withdraw the program

Conclusion:

- RA can deny a petition to withdraw a State NPDES program.
- RA may not be able to "grant" a petition and initiate withdrawal proceedings.

IV. WHO MAY WITHDRAW/REVOKE A STATE PROGRAM?

• RCRA

RCRA C: HQ Delegation #8-7: "Authority... to perform all actions necessary to approve, disapprove or withdraw interim or final authorization of State hazardous waste programs...delegated to Regional Administrators."

Conclusion:

- RA may not be able to "deny" a petition.
- RA can "grant" the petition and initiate withdrawal proceedings.

RCRA D: HQ Delegations #8-1, 8-46

Does not specifically mention authority to withdraw or to deny petition.

Conclusion:

- RA may not be able to "deny" a petition.
- RA may not be able to "grant" a petition.

V. PROCESS FOR INVESTIGATION

A. PEOPLE

- Over 40 regional employees conducted the reviews
- Media-specific program personnel took on work in their media-specific area of expertise
- Media-specific counseling attorneys worked with their program counterparts
- Each media-specific EPA team worked with a media-specific state team, with a primary state point of contact
- Office of Public Affairs was heavily involved
- Periodic briefings were held for the RA

V. PROCESS FOR INVESTIGATION

• PLACES

- EPA program staff developed a protocol for investigation of the allegations, which included: (1) file reviews in the Ohio offices (including state headquarters, regional and district offices); (2) interviews with state personnel; and (3) written information requests to the state.
- EPA civil legal staff met in Ohio with the Ohio Attorney General and OEPA legal staff to assess enforcement authorities, legal staffing levels, and enforcement performance over the five years before the amended petition was submitted. The legal review of the criminal program did not include face-to-face meetings.
- EPA set up repositories of the administrative record throughout Ohio.
- Numerous EPA staff attended the two November 13, 2001, public meetings in Columbus.
- EPA received over 6,000 comments, mainly from concerned Ohio citizens, during the 60-day public comment period.

V. PROCESS FOR INVESTIGATION

• Things

- EPA created an electronic index to the administrative record that was updated as items were added to administrative record.
- EPA created a web site for the Ohio review: www.epa.gov/region5/ohioreview. The web site includes key documents, the administrative record index, a projected schedule of activities, links to the State's and petitioners' web sites, notices of the public meetings, locations of the repositories, and so on.
- The administrative record so far consists mainly of:
 - the petition(s)
 - the protocols
 - trip reports, including results of file reviews
 - Ohio's written response
 - EPA's draft report with initial findings and recommendations
 - Ohio's response to EPA's draft report
 - public comments

VI. PRACTICE TIPS

- Administrative Record Management

➤ Issues are fairly common to compilation of any administrative record:

-What goes in?

-What stays out?

-Who decides?

VI. PRACTICE TIPS

•Consistency Among Programs

- withdrawal criteria different, but similar criteria must be applied similarly
- level of detail required from the state should be consistent
- level of detail in trip reports and depth of file reviews should be consistent
- same format should be used for all media in draft and final "reports and recommendations"

VI. PRACTICE TIPS

- **Relationship to Regularly Scheduled Program Reviews**

➤ To what extent if any, should preliminary findings made during the Ohio review influence mid-year and end-of-year reviews under MOAs, MOUs, etc.?

VI. PRACTICE TIPS

•"Findings Regarding Withdrawal Criteria" v. "Recommendations for Improvement"

➤ During the reviews, technical staff identified a number of areas where the state might improve its programs. While these concerns did not justify program withdrawal, Region 5 still wanted to communicate these concerns. To avoid confusion, the Region did so in a separate letter to the state, and not in the "draft recommendations and findings" document that specifically addressed the program withdrawal/revocation criteria.

VI. PRACTICE TIPS

E. Approaches to Avoid Program Withdrawal

- "Contingent" Withdrawal: If OEPA addresses certain identified concerns under the CAA, EPA will not recommend further investigation or possible commencement of withdrawal or revocation proceedings.
- Clarify State's Interpretation of Authority: If the Ohio Attorney General issues an Opinion interpreting Ohio's voluntary clean-up program (VAP) as not affecting commencement of withdrawal or revocation proceedings.

VI. PRACTICE TIPS

•Scope of Review

➤ What level of detail should a petition for withdrawal/revocation contain in order to require an investigation into program adequacy?

Brief petitions with bare-bone conclusions are probably not enough to merit an initial investigation.

VII. Conclusion/Next Steps