

**Attachment to NACAA January 14, 2008 Comments on EPA's Flexible Permitting
Rule Proposed September 12, 2007 (72 Federal Register 52206)**

NACAA Opposes Green Groups, Which Allow Major Modifications without New
Source Review

If promulgated, the provisions for Green Groups will require states to revise their State Implementation Plans (SIPs) to allow facilities to make modifications, and increase their emissions, without triggering New Source Review (NSR). The relevant proposal language states, "...[W]e propose that the Green Groups, like PALs [plant-wide applicability limitations], should be a mandatory program element....Where States and local agencies would need implementation plan revisions to be able to issue permits establishing Green Groups, they must adopt and submit revisions to their Part 51 permitting programs implementing these minimum program elements no later than three years from the date of publication in the Federal Register of the final Green Group regulations in 40 CFR 51.165 and 51.166 [or, in delegated states, the changes would take effect 60 days from the date of publication]" (72 Federal Register 52240).

NACAA strongly opposes the Green Group provisions in their entirety, and urges that they not be promulgated. These regulatory changes proposed for Green Groups include the following, in summary form:

- The Green Group provisions are mandatory.
- Green Groups are exempted from NSR modification requirements that would otherwise be triggered by significant emissions increases.¹ The new regulatory language also states that physical changes or changes in the method of operation that do not exceed "the Green Group emission limit" and maintain compliance with BACT or LAER limits are not major modifications and need not be approved through NSR.
- Green Groups are excluded from the requirement that sources must commence construction 18 months after permit approval (including BACT and LAER review) (72 Federal Register 52235). The proposed rule allows sources to have 10 (or possibly 15) years to commence construction.

¹" If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase....(v) This definition shall not apply to approved physical changes or changes in the method of operation within a Green Group with respect to any Green Group pollutant when the major stationary source is complying with the [new Green Group requirements] under paragraph (z) of this section for a Green Group pollutant" (72 Federal Register 52248).

- Green Group emissions levels established by the reviewing authorities shall be adjusted to reflect “an additional amount of actual emissions consistent with the growth approved for the Green Group” as well as consistent with the application of BACT or LAER (72 *Federal Register* 52244, 52250).
- Green Groups in both attainment and nonattainment areas are allowed to meet BACT or LAER levels through pollution prevention (P2) measures “during certain [unspecified] periods of operation” (72 *Federal Register* 52244, 52250). The regulatory provision states further, “[t]he included emissions activities must have ductwork extending to the common air pollution control device, but the owner or operator would be allowed to bypass the control device during periods when the pollution prevention alternative is in use, consistent with the BACT determination. Emissions activities that exclusively use the [P2] alternative and never use the common air pollution control device may not be included in the Green Group.”
- An effective period for a Green Group permit is specified as 10 years in the proposed regulations, although EPA is taking comment on 15 years (72 *Federal Register* 52245, 52251).

NACAA Vigorously Opposes the Mandatory Nature of the Green Group Proposal

To require mandatory State Implementation Plan (SIP) revisions for a rule that eliminates NSR modification requirements poses serious problems for state and local permitting authorities. NSR has served us well as a tool to clean up the air. And because of the mandatory nature of this program, permitting authorities that have no intention of utilizing Green Group provisions would, nonetheless, be required to undertake the burdensome, lengthy effort to revise their SIPs to add authority to accommodate the program. It would be senseless for state and local air agencies to be forced to carry out rule revisions that they will never use. Many jurisdictions will simply choose not to implement the rule if it is promulgated, exercising their right to do so under section 116 of the Act

Serious Legal Issues Are Raised by the “Green Groups” Proposal

NACAA believes that the Green Group provisions may well be unlawful under *State of New York, et al., v. U.S. EPA*, 413 F.3d 3 at 40 (D.C. Cir. 2005). In that case, the D.C. Circuit Court of Appeals vacated EPA’s Clean Unit proposal on the grounds that the plain meaning of section 111(a)(4) of the Clean Air Act construes “modification” to refer to and include actual increases in emissions. EPA states that the legal rationale for Green Groups is based on the premise that the changes and emissions activities that occur within a Green Group are specifically authorized to occur as a result of undergoing, not avoiding, Major NSR. NACAA disagrees. Rather, EPA has proposed to initially require BACT at the beginning of the term of a permit, but then to allow increases in emissions without triggering NSR at any time during the

10-year term of the permit. Thus, a facility having a Green Group would be allowed to increase actual emissions without NSR requirements nine years after the initial installation of BACT. No air quality modeling, increment analysis, BACT technology review (and upgrade, if necessary), or NSR permitting would be required. This contravenes *New York v. EPA*.

NACAA notes as well that the provisions in the proposal for Pollution Prevention may also be problematic. The proposed regulations allow the owner or operator to bypass the [BACT or LAER] control device during periods when the pollution prevention alternative is in use. However, pollution prevention and work practice measures should, ideally, complement, rather than replace, controls. In addition, in nonattainment areas, Green Group permitting—and increases in emissions without NSR—are likely to result in violations of the antibacksliding provisions of the Act.

EPA premises much of its proposal on its belief that that permitting authorities need not accept sources' request for Green Group permitting. However, NACAA believes that this rule should not be promulgated in the first instance. It sets the stage for struggles between permitting authorities protecting air quality and sources urging ill-advised, and arguably illegal, flexibilities. It may also expose state and local agencies to citizens' suits alleging that we have allowed emissions increases under Green Group regulations that contravene the Act.

Elimination of the Requirement that Construction Be Contemporaneous with Permitting Raises a Number of Serious Policy and Technical Concerns

As a matter of sound environmental policy, NACAA opposes EPA's proposed elimination of requirements designed to insure that NSR permitting decisions (including BACT and LAER technology decisions) would be contemporaneous with commencement by the source of construction or modification. Specifically, EPA has proposed to eliminate the provisions in 40 CFR section 52.21(r) (2) and 40 CFR sections 51.166(j) (4) that invalidate approvals to construct if projects are not commenced within 18 months and 52.21(j) (4), requiring BACT review and modification no later than 18 months before commencement of construction before each phase of the project (72 *Federal Register* 52235).

NACAA believes that excluding Green Groups from these requirements and allowing construction to occur as long as 10 or 15 years after permitting raises serious concerns: First, the revisions would allow Green Group sources to "hoard" increment allocations for at least 10 years, raising issues of fairness to other, ready-to-construct sources that would be unable to commence projects because of lack of increment. Second, NACAA believes that technology advances occur more frequently than every 10 years. Furthermore, there is a synergistic relationship between regulatory requirements and technology advances that would likely be affected by a widespread 10- to 15-year freeze in technology. Third, as National Ambient Air Quality Standards (NAAQS) are revised, the emissions locked in by Green Groups at the beginning of a 10-to 15-year permit term could, when utilized, have far more serious negative

repercussions for air quality than could have originally been foreseen at the time of permitting. Fourth, we are concerned that no air quality modeling and analysis would occur near the actual time of construction. Fifth, we believe that the public should have a right to comment on construction near the time that it commences—taking into account contemporaneous air quality, as well as factors relating to population, land use, and economic trends,

First, EPA notes that the agency originally stated as reasons for the current 18-month commence construction requirement and the requirement for BACT review and modification in phased projects that “[t]he Administrator is concerned about the issuance of permits for phased construction projects that would have the effect of ‘reserving’ the increment for a single source, thereby limiting growth options in the area.” EPA states further in the regulation that, when plans for a phased project are “certain and well-defined,” an increment can be reserved, but that the BACT determination must be reassessed prior to construction “to ensure that the most up-to-date control technology will be used” (*Id.*). NACAA sees no reason to exempt any source or source category from these requirements, and finds EPA’s current reasons for doing so unpersuasive.² The state and local permitting authorities agree with the previous EPA Administrator that locking up emissions for lengthy time periods could limit growth options in an area, and deprive other sources of their right to construct. The level playing field for industry would, in effect, become tilted. Particularly problematic situations could be expected to arise in areas of the country experiencing rapid growth that are near Class I areas, and have little available increment for some pollutants.

Second, NACAA disagrees that improvements in technology do not occur within a 10-year period. EPA states, “...we do not believe that significant additional environmental benefits will be gained by requiring the source to revisit the source to revisit the BACT or LAER determination for the changes that are approved as part of the Green Group.... [because] we do not believe that there will be significant incremental improvements in state-of-the-art control technology over a 10-year period.” On the contrary, many dramatic improvements in control technology are made within a 10-year time frame. Examples include the following:

- BACT for gas turbines has changed markedly in a 10-year period. In 1997, the BACT requirement of one large western permitting authority for a natural gas-fired turbine was nine parts per million (ppm) NO_x. Ten years later, the BACT requirement for a natural gas-fired turbine was 2 ppm for combined cycle, and 2.5 ppm for simple cycle, both measured at 15 percent oxygen. The BACT requirement is thus 78 percent and 72 percent, respectively, lower than that of 10 years ago.

² EPA states that it is within its discretion to remove Green Groups from these requirements, that sources will complete the construction of an air pollution device quickly to maximize the time of the permit, and that no new environmental benefits would be gained by revisiting BACT or LAER determinations.

- NO_x emissions from heaters and boilers have dropped to the .05-.06 lb/MM Btu range to .02-.04 lb/MM Btu range in the last 10 years. In the 10 years prior to that (1987-1997), NO_x emissions were in the .1-.2 lb/MM Btu range. Much of this dramatic improvement is attributable to industry's desire to avoid PSD/NSR, according to a permitting authority in the Southeast.
- NO_x emissions from fluidized catalytic cracking units at petroleum refineries are dropping rapidly. Fifteen years ago, NO_x limits were in the 400-600 ppm range. Around 2000, NO_x emissions began dropping to the 100-200 ppm range. Now they are in the 20-40 ppm range. Some of this drop is being pushed by EPA's refinery consent decrees, according to several permitting authorities.³
- When EPA delisted acetone from the VOC list, many printers and surface coating companies replaced other VOCs with acetone. If BACT had consisted of a requirement to use low-VOC coatings, and the term of the permit had been for 10 to 15 years, there would have been no incentive on the part of printing facilities to replace the VOCs with acetone.

Further examples of technology advances exceeding a 10-year cycle are included in the *Appendix on Control Technology Advances* accompanying these comments.

Moreover, not only have there been many significant advances in control technology within the last 10-year period (and the previous one), but such industry advances respond, in large part, to statutory and regulatory Clean Air Act requirements—or the desire to avoid such requirements. Congress intended the Act to force technology improvements. NSR enforcement, the Refinery Settlements, and PSD Increment requirements all have resulted in improvements in emissions controls as sources demand greater control efficiencies in order to maintain and expand production within the Act and its regulations. Green Groups, on the other hand, remove the incentive to improve technology and reduce emissions by locking in controls for 10 years and possibly longer. EPA itself aptly summed up this concept in its PM_{2.5} Increments proposed rule, stating, “Increments establish an incentive to apply improved control technologies in order to avoid violating the increment and to ‘free-up’ available increment to promote continued economic growth. These control technologies may become the basis of BACT determinations elsewhere, as the technologies become more commonplace and the costs tend to decline. *See also* S. Rep. 95-127 at 18, 30 (3 LH at 1392, 1404) (‘the incremental ceiling should serve as an incentive to technology, as a potential source may wish to push the frontiers of technology in a particular case to obtain greater productive capacity within the limits of the increments.’)” (72 *Federal Register* 54124) “Freezing” controls for 10- or 15-year periods is likely to retard this process, and will result in a slow-down of technological advances. Industry will have little

³ *See also*: NACAA's comments on EPA's proposed NSPS for Petroleum Refineries, August 24, 2007, (Docket ID No. EPA-HQ-OAR-2007-0011).

incentive to continue to improve emissions controls to meet increments when BACT has been approved for a decade or more.

Third, NACAA is also concerned about the interplay between this proposed regulation and revisions of the NAAQS. Currently, revisions have been proposed for ozone, and an Advance Notice of Proposed Rulemaking has been released for lead. SO_x and NO_x revisions are under development. Green Groups—intended by EPA to be exempt from NSR modification provisions—may cause unanticipated, inflated emissions impact when they occur after the tightening of a particular NAAQS. Rip Van Winkle-like, Green Groups are likely to wake up to a different regulatory landscape upon the expiration of their permits. Meanwhile, their increases in emissions over the years, which were based upon the former NAAQS, will have created serious difficulties for permitting authorities as they attempt to meet new, more stringent air quality standards.

Fourth, we are concerned not only about outdated BACT controls, but about the lack of any proposed regulatory requirement for air quality analysis and modeling at the time of actual construction. If the advance-approved NSR project occurs nine years after permit issuance, how will a contemporaneous “snapshot” of air quality be taken at the time of construction in order that increments and NAAQS are protected? Yet the proposed regulations include no contemporaneous air quality modeling or analysis requirements. Unanticipated changes in transported air pollution, increases or decreases in mobile source emissions, or natural events, such as wildfires, all could have occurred since the time of permitting. But the increases in emissions from the advance-approved construction, in conjunction with these new emission events, will not be analyzed, understood, or subject to mitigation.

Finally, NACAA believes that opportunity for public involvement is necessary at the time of construction. The proposed regulations suggest that permitting authorities use their discretion to enhance the public participation process when warranted for a particular flexible permit. In addition, the proposal suggests that the written comment period for a Title V permit renewal or significant permit modification should be expanded from 30 to 45 days (*72 Federal Register 52232*). NACAA believes, however, that these proposals do not address the problem.

The Flexible Permits of the Pilot Program Cannot Be Considered the “Basis” for Green Groups

EPA states in the proposal that the lessons learned through the pilot program served as the basis for the rule, and that it seeks to build upon existing regulatory provisions that afford operational flexibility (*72 Federal Register 52208*). NACAA disagrees that the pilot programs can be considered a basis for this rule. Comparing the pilot permits to the Green Group proposal is to compare apples and oranges. Six pilot flexible permits were analyzed by EPA, and were characterized as the basis for the proposed rule: Intel (Aloha, OR); 3M (St. Paul, MN); Lasco Bathware (Yelm, WA); DaimlerChrysler (Newark, DE); Saturn (Spring Hill, TN); and Imation

(Weatherford, OK) (72 *Federal Register* 52212). Significant differences, however, separate the permits for these facilities from the Green Group proposal: The permits for the six facilities were in effect for five—not 10 or 15—years. Moreover, the permits all specified that increases in emissions that caused a PAL cap to be exceeded would trigger NSR modification requirements.⁴ And, when changes that had been advance-approved were undertaken, contemporaneous notice was given to the state or local air agency. In contrast, Green Group provisions exempt sources from NSR modification requirements, allowing increases in emissions beyond significance levels without triggering NSR. They also set the permit term at 10 (or possibly 15) years, only after which time the BACT or LAER decision would be revisited.

EPA should not justify this arguably illegal, environmentally harmful program by comparing it to a limited pilot program that established procedures that did not conflict with the Act. The Chart below, which is based on EPA’s Flexible Permit Implementation Review of the six facilities, compares the permitting provisions of the six pilot program sources with the proposed Green Group rule.⁵ The differences are apparent.

Moreover, what was done in the pilot program on an experimental basis—emissions capping under a PAL—is currently already available to many sources due to the adoption of PAL provisions in the 2002 NSR Reforms (and the fact that PALs were upheld by the D.C. Circuit Court of Appeals in *New York v. EPA (New York I)*). Alternative Operating Scenarios (AOSs) are also an available regulatory tool, as are advance approvals under Minor NSR in many jurisdictions. Permits similar to those in the pilot flexible permit program require expanded obligations on the recipient of flexibilities to comply with supplemental monitoring, recordkeeping and other safeguards (as in the pilot programs), and may be unsuitable for sources. However, our permitting authorities currently have the authority to undertake them.

⁴ Several of the facilities in the pilot program viewed the P2 activities and emissions reductions carried out by the permittee as “earning” the flexibilities in the permits. Although all jurisdictions that responded to questions about their permits felt that they were successful, several also noted the importance of granting these types of permits very selectively to only the most sophisticated sources. One respondent stated that he would not issue this type of permit again because, in his opinion, the facility environmental staff had such difficulty understanding it. He stated that, when there is turnover in such staff, the permitting authority must attempt to educate each new facility employee concerning the permit complexities.

⁵ A copy of the “Evaluation of the Implementation Experience with Innovative Air Permits” is in the docket for EPA’s rulemaking, or can be found at http://www.epa.gov/ttn/oarpg/15/memoranda/iap_eier.pdf.

Pilot Program	Term of Permit	Emission Limits	Exemption from NSR	Pollution Prevention	Time to Issue Permit	Attainment
Intel	5 years	PAL Cap of 160 tpy VOCs	NO	RACT and P2	24 months	Marginal Nonattainment
Saturn	5 years	PAL Cap of 1319-1563 tpy tied to production	NO	BACT and P2	25 months	Attainment
3M	5 years	PAL Allowables Emissions Cap of 4283 tpy VOCs	NO	P2	26 months/1000 hours	Attainment
Chrysler	5 years	PAL Allowables Emissions Cap of 1112.8 tpy	NO	LAER and P2	99 days	Severe Nonattainment
Imation	5 years (and BACT review every 18 months)	PAL PTE Emissions Cap of 249 tpy VOCs	NO	BACT and P2	18 months	Attainment
Lasco	5 years	PAL PTE Emissions Cap of 249 tpy VOCs	NO	BACT and P2	16 months	Attainment
GREEN GROUP PROPOSAL	10 years (comment to be taken on 15)	Green Group Emission Limits (Growth Amount Added)	YES Exempt from NSR Modification	BACT and P2 (bypass of controls and P2 as BACT alone OK)		Available in Attainment and Nonattainment Areas

The Voluntary Provisions Generally Propose What Is Already Available and, If Promulgated, Some Provisions Will Result in Difficulties for State and Local Permitting Authorities

EPA's Flexible Permit proposal addresses (in addition to Green Groups) 1) alternative replicable methodologies (ARMs) for monitoring compliance and revising operating limitations; 2) allowing sources to make changes by implementing AOSs without permit modifications; and 3) advance approval of changes under state Minor NSR programs. As the proposal itself points out, these flexibilities already exist. 40 CFR 70.6(a)(9) provides that any permit issued under Part 70 must include terms and conditions for reasonably anticipated operating scenarios approved by the permitting authority (72 *Federal Register* 52209). Moreover, Minor NSR regulations in most states already allow permitting authorities to include, at their discretion, construction approvals established up front in the Minor NSR permit and alternative operating scenarios.

The Permit Engineer for the Lasco Bathware Title V operating permit in the Olympic Regional Clean Air Agency (ORCAA), one of the pilot project flexible permits upon which the proposed rule is based, summarized his concerns about this proposed rule:

My understanding is that the other permits developed and issued as part of the Pollution Prevention in Permitting Project did not require any new regulatory authority or non-standard permitting techniques. The existing laws and regulations provided the framework and tools needed to create a flexible permit. Therefore, I do not see the need for a federal regulation mandating state programs to insure such permitting.... The proposed amendments are not likely to improve permitting efficiency or flexibility of permits in ORCAA's jurisdiction since AOSs are already required to be incorporated in Title V permits and ORCAA's authority to include ARMs already exists. In other words, we already have the authority and tools we need to issue "flexible" Title V permits under the Washington Title V regulations. Given the already complex nature of Title V, I believe that requiring state programs to distinguish and handle AOSs and ARMs will unnecessarily complicate the Title V program in ORCAA's region and undermine the very thing the amendments were intended to promote—flexible Title V permits. (Emphasis added)⁶

NACAA shares these concerns about the proposed rule. The association believes that state and local clean air agencies already have the authority and tools needed to issue flexible Title V permits. The AOS and ARM provisions proposed will unnecessarily complicate an already complex Title V program. Moreover, as the Permit Engineer points out, a rule addressing specific flexibilities actually undermines, rather than enhances, flexibility in permitting. In the words of an Environmental Engineer from a mid-Atlantic state, "by going forward with this proposed rule, EPA will stifle creativity by forcing everyone into the same mold....We believe that the operating details of a particular source, the interests of local (as

⁶ Email from Mark V. Goodin, Professional Engineer, Olympic Regional Clean Air Agency (WA) to Mary Stewart Douglas (NACAA), December 12, 2007.

opposed to national) stakeholders and local air quality conditions are unique to each situation—and not conducive to this federal rule.”⁷ NACAA encourages EPA to rethink codification of the flexibility provisions proposed, as they are likely to unnecessarily complicate our Title V operating permit programs, resulting in delays and frustrations for both sources and permitting authorities.

Moreover, some state and local air agencies are simply unable to carry out aspects of this proposed rule. For example, some permitting authorities have stated that advance-approved Minor NSR changes would be impossible for them to implement because their Minor NSR programs require BACT or LAER to be installed contemporaneously on an emissions-unit basis. In these jurisdictions, permitting authorities are unlikely to make changes in their Minor Source NSR programs, as they believe that such changes would have detrimental impacts on their clean air obligations. Some of our programs have also pointed out that they lack an integrated Title V-NSR permitting program, and would have difficulty with advance-approved Minor NSR changes.

The Proposal for Codifying Alternative Replicable Methodologies (ARMs) Raises Serious Questions and Concerns

NACAA is troubled that the ARMs appear to be intended both to monitor compliance with existing permit requirements and to allow revision of permit requirements without permitting authority review: “The ARM provides a method for obtaining and updating information consistent with the intent of applicable requirement(s) or requirement(s) of Part 70 in such a manner so as to avoid the need to reopen or revise the permit to incorporate the updated information” (72 *Federal Register* 52221). The explanation of ARMs in the Preamble emphasizes that they are to provide a method of updating information so as to avoid the need to reopen or revise the permit.

Theoretically, ARMs do not appear problematic if they rely on objective repeatable protocols. However, as a practical matter, the use of ARMs may allow changes to operating parameters that will result in increases in actual emissions that should trigger NSR. Specifically, since NSR is triggered by changes to physical or operating parameters that increase actual emissions, a change in operating parameters from those currently in the permit cannot be allowed without a Minor or Major NSR permit, as applicable. For example, in the proposed rule, EPA describes use of an ARM protocol to determine compliance with a Maximum Achievable Control Technology (MACT) standard that would allow *de minimis* changes to the minimum afterburner temperature. As long as such changes do not increase actual emissions, this use of an ARM may be acceptable to permitting authorities. However, if the temperature were reduced to

⁷ Email from Gene Pettingill, Delaware Department of Natural Resources, to Mary Stewart Douglas (NACAA), December 16, 2007.

the extent that actual emissions increases result, an NSR modification would have occurred and BACT and other requirements would apply.

To give a hypothetical example, a typical minimum temperature requirement of 1500° F. is in a permit—a typical design parameter that results in about 99 percent actual reduction of VOCs. The ARM test could average 1510° F one year and 1515° F the next since actual emissions would not be increasing. Using the ARM to determine a slightly lower temperature, and operating at that minimum temperature without a permit modification appears reasonable to our permitting authorities. However, significantly reducing the temperature to, for example, 1400° F would increase VOC emissions and may trigger the NSR modification provisions of the Act. Such temperature reduction for a unit having a potential to emit of 1000 tons per year without control could result in an emission increase of 40 tons per year, the significance level for VOCs without exceeding the MACT 95 percent minimum control efficiency.

Such an emissions increase would trigger nonattainment NSR in many ozone nonattainment areas. EPA's proposal would exempt this operating change from NSR, and that is not consistent with the decision in *New York v. EPA (New York I)*, which held that "...the plain language of the Clean Air Act indicates that Congress intended to apply NSR to changes that increase actual emissions..." Moreover, if the minimum 1500° F operating temperature had been the basis for approval of the original Major or Minor NSR permit, a significant drop in temperature would alter a condition precedent for permit issuance—even if emissions were to remain within the 95- percent control efficiency required by the state.⁸

NACAA is also concerned that ARMs establish monitoring procedures that arguably conflict with (or, at least, overlap with) the requirements for Compliance Assurance Monitoring (CAM). Under 40 CFR Part 64, CAM monitoring at Title V facilities requires sources to select representative control device operational parameters (e.g., temperature, flow, pressure drop, electrical voltages, component concentration), and establish indicator ranges that assure compliance. The source (and state and local agencies) must ensure that site-specific factors such as margins of compliance, emissions control variability, and correlation with emissions are taken into account.

The purpose of CAM monitoring, however, is to demonstrate by application of the performance indicators that control device systems are being properly operated and maintained—and to take corrective action in the event of malfunctions to avoid excursions

⁸ One state permitting director explained that air agencies have historically been liberal with compliance margins. Allowable emissions are generally set at levels well above the actual emissions expected so that there is assurance of compliance (with a 95- percent control requirement, for example). At the same time, operating and design parameters are approved that are reasonable to minimize emissions (99 percent control, for example) consistent with mandates for major and minor source BACT. If, subsequently, there is an operating change that increases actual emissions, NSR is triggered whether or not the unit continues to be within its minimum required control efficiency.

beyond emissions limits. ARMs, on the other hand, appear to similarly involve an analysis, or check, of the effectiveness of operating parameters, but are intended to avoid the need for permit revisions rather than to correct emissions deviations caused by operational problems. As EPA states in the Preamble, an ARM used by one of the pilot flexible permits allowed the source to change its operating parameter values (for a thermal oxidizer) without obtaining a permit revision “each time it repeated the testing procedures and the operating parameter values changed” (72 *Federal Register* 52223). The goal of ARMs and CAM do not appear to mesh, with ARM monitoring aimed at effectuating changes that may increase actual emissions without permit revisions, and CAM aimed at correcting control devices that are not functioning properly so that emissions are minimized consistent with the control technology being used and there is an adequate compliance margin. The association is troubled that EPA’s codification of ARMs may lead to operating procedures that deviate from the original permit conditions without our knowledge or approval—leading to widespread problems in achieving the goals of our SIP planning. Moreover, we are concerned that EPA is layering another monitoring procedure on top of CAM procedures and the pending Periodic Monitoring rule without considering that complexity, duplication, and conflicts among monitoring requirements and methods may ensue.

In the Preamble of the Proposed Rule, EPA Should Only Explain the Regulatory Provisions Rather Than Set Forth Suggestions That May Be Conflated with Regulatory Provisions

Although we oppose final promulgation of this rule, we feel compelled to comment on the troubling, expansive language of the Preamble of the proposed rule regarding the kind of advance-approved Minor NSR and AOS changes envisioned by EPA. The Preamble, which, under the Administrative Procedures Act, should be used only to explain regulations and regulatory changes rather than to set forth regulatory requirements, includes various “clarifications” and “recommendations” regarding AOSs that are bound to be interpreted by sources as having regulatory import and effect. These quasi-regulatory provisions in the Preamble are inappropriate and will cause confusion and delay. For example, the proposal states, “...where advance approval of changes subject to minor NSR is available, we encourage its incorporation into the title V permit after or concurrent with obtaining the necessary minor NSR approvals in order to provide a permitting strategy with greater operational flexibility, certainty, and permitting efficiency than does a conditional approval approach [wherein a title V permit revision is undertaken after issuance of a minor NSR permit].” (72 *Federal Register* 52211, footnote 11). Although this “encouragement” is not a proposed regulatory change, many are apt to interpret it as a requirement of sorts when it is not. In addition, EPA states in the Preamble, “we suggest that States provide a principal point of contact for responding to technical questions and ensure the availability of draft permits, applications, and technical support documents on an Internet web site (72 *Federal Register* 52214).” Such “suggestions” are likely to be considered regulatory requirements, even though they appear only in the Preamble.

Furthermore, EPA states in the Preamble, “we are...not proposing any revisions to the Minor NSR regulations...[but] we encourage States to implement advance approvals in response to requests by sources under their existing Minor NSR programs as appropriate and to seek additional authority where they do not currently have such discretion” (72 *Federal Register* 52215). Again, states do not want or need federal “encouragement” to use and revise our Minor NSR programs. If EPA retains some or all of this rule, which NACAA recommends withdrawing, EPA should expunge the Preamble of this and other ambiguous language that could be misinterpreted as having regulatory force.

Moreover, if EPA were to promulgate this proposed rule despite our opposition, the association does not agree that Performance Track (PT) members are necessarily “exemplary performers who should be the beneficiaries of EPA’s resources for technical assistance with flexible air permits on a priority basis” (72 *Federal Register* 52214). Nor are permitting authorities likely to “prioritize resources when issuing flexible air permits to sources that are similarly situated to Performance Track companies,” as EPA recommends (*Id.*). Clearly, there are outstanding companies that are members of PT. NACAA nonetheless believes that, by and large, membership in PT alone should not confer any special status or priority on a particular facility under this proposal or any other. NACAA set forth its concerns about the PT program in an October 2005 letter.⁹ Since that time, the PT continues to appear to the association to include the range of environmental performers that exists in the general industrial population.¹⁰

Finally, EPA states in the Preamble that “the primary purpose of the revisions to Parts 70 and 71 is to build upon the existing regulatory framework and ensure the flexible permitting approaches with which we have experience are more readily and widely used” (72 *Federal Register* 52211). Thus, the proposed rule is intended to ensure that state and local agencies use existing flexibilities that some feel are underused. We do not believe, however, that codification of provisions for AOSs and ARMs as well as promulgation of the many “suggestions” in the Preamble will benefit sources, permitting authorities, or, most importantly, public health. Rather, promulgation of the rule is likely to tie up already-overburdened permitting staff, requiring them to cull those suited for these flexibilities from the many not suited for them. NACAA wishes to be as sensitive as possible to the need for industrial sources to operate

⁹ Letter to the Docket (ID No. Oa-2005-003) from the Presidents of STAPPA, Eddie Terrill (OK), and ALAPCO, John Paul (Dayton, OH), October 31, 2005.

¹⁰ In fact, since NACAA voiced its concerns, the compliance status of the PT members has been closely examined by the EPA Office of Inspector General (OIG). A March 2007 report by the OIG concluded that, of 500 PT facilities, 133 facilities, or 27 percent, did not comply with an aspect of environmental regulation for one or more quarters for the three years ending in November 2006. During the same time period, 13 percent had significant violations and more than one year of noncompliance. The OIG also cited in its report a Harvard University study of PT that concluded that the members’ environmental performance did not exceed that of comparable facilities that did not apply for membership. Thus, questions continue to surface about whether the bar to enter and stay in this program is particularly high.

efficiently and flexibly. To that end, state and local air agencies are undertaking many reforms and permit streamlining efforts, which are described below. The proposed Part 70 revisions, however, create complexities, redundancies, and problems for our permitting authorities.

Increasing Numbers of States Are Undertaking Permit Streamlining Efforts and Are Achieving Dramatic Improvements in Speed, Efficiency, and Relations with Industry

NACAA applauds EPA's efforts to advance innovative approaches to air permitting through its Air Innovations Workshops, grant and assistance programs, development of electronic permitting, and information on permitting techniques as lean, Kaizen, Six Sigma, and Value Stream Mapping in various states. In light of the need expressed by many industry sectors to respond as rapidly as possible to changing market conditions and in order to make the most of our resources, our permitting authorities are embracing these streamlining principles and methods. Dramatic improvements are resulting. EPA's April 2006 report titled "Air Permit Program Implementation: A Roadmap for Innovation" ("the Roadmap")¹¹ summarized some of the program improvements from use of lean and other streamlining techniques:

- The Delaware Department of Natural Resources (DNR) reduced the time to issue an air quality construction permit from 180 to 61 days and has eliminated its permit backlog.
- The Iowa DNR reduced the average time to issue standard air quality construction permits from 62 days to 12 days (an 81-percent reduction) and eliminated 70 percent of the process steps (from 23 to seven).
- The Nebraska Department of Environmental Quality (DEQ), in response to a dramatic increase in the number of air construction permit applications submitted, especially those for ethanol production facilities, held a week-long Kaizen rapid process improvement event in February 2005, aimed at improving its air quality construction permitting process. The DEQ reduced its permit review time by 50 percent and its permit backlog by 55 percent.
- The Michigan DEQ decreased the time needed to process air construction permits by 66 percent in the year following their Lean improvement event.
- The Minnesota Pollution Control Agency (MPCA) improved permitting timeliness by issuing 75 percent of air construction permits within 150 days. The MPCA has used Six Sigma methodologies to improve at least 21 agency processes.
- The Illinois Environmental Protection Agency held a Kaizen event for minor source construction permitting in June 2007.

¹¹ "Air Permit Program Implementation: A Roadmap for Innovation," prepared for EPA OPEI/OPAR/OAQPS Partners at p. 19 (April 17, 2006).

- The Idaho DEQ held an event combining concepts of Lean, Kaizen and Six Sigma for air permitting. In order to lower the error rate in air permitting applications, Idaho's permitting authority revised its permit application forms, set up a hotline for permitting assistance, and developed web-based assistance. The error rate from applicants was reduced by 90 percent within three months.
- The Indiana Department of Environmental Management held a kaizen event for significant source modifications to their air permitting program in early October 2007.
- The Virginia DEQ recently completed permit program reviews that included its air program, and identified numerous opportunities for process improvements.
- The Wyoming DEQ held a Kaizen event for NSR oil and gas permits in June 2007.

NACAA is pleased that EPA has supported some of these efforts with Innovation Grants and technical support. Recently, the agency has assisted states with air permitting improvements through development of a publication, "Working Smart for Environmental Protection: Improving State Agency Processes with Lean and Six Sigma." Described as "a primer," it recounts the implementation experiences and results of five states that have used lean, Kaizen, and Six Sigma methods to improve the effectiveness and efficiency of agency processes.¹²

Nonetheless, it appears that EPA's efforts to assist states with permit innovations have waned while, simultaneously, the flexible permit proposal has gained agency attention and resources. EPA has not followed up on the detailed recommendations and time lines contained in the "Roadmap" document for assisting states with electronic permitting, development of permits by rule and general permits, and other streamlining outreach and support proposals. In fact, just at the point that states and localities appear to be building momentum and enthusiasm for utilizing streamlining techniques modifications, EPA has apparently lost interest. NACAA encourages EPA to reorder its priorities by renewing support for streamlining and flexibilities that are wanted and needed by air agencies and the industrial customers whom we serve, and withdrawing the Flexible Permit rule, which permitting authorities oppose for the reasons that we have given.

States Have Also Initiated Flexible Permit Rules under Their Own Authority

Not only have an increasing number of states been working to streamline their permitting procedures, but many states have fashioned their own flexible permit programs. Minnesota, for example, offers minor sources several flexible permitting options under its Minor NSR program, including Registration Permits, FlexCap Permits, PreCap Permits, and General Permits. Registration permits, available only to a specified list of New Source Performance Standard-

¹² <http://www.epa.gov/lean/pubs.htm>

regulated units having low emissions, allow sources to add new units and modify existing units if such changes are preauthorized. FlexCap permits advance-approve specific change. PreCap Permits include emissions caps to cover any new or modified equipment as long as changes under the emissions caps do not trigger NSR. General permits for different kinds of source categories are also offered for certain source categories. The Minnesota permit engineers who described these flexible permits at NACAA's 2004 Permit Workshop stated that these options were intended to make the permitting process faster and more efficient, and were also intended to motivate some sources to move from Part 70 to the capped option, thereby reducing emissions.

Michigan has also allowed flexible permitting since 1998 under its Clean Corporate Citizen program. Under Michigan's Rule 1415, a PAL for a Clean Corporate Citizen may be extended to exclude changes from the requirement to obtain a minor modification permit to install pursuant to Rule 201.¹³ The Michigan DEQ provides advance approval in PAL permits for minor modifications that would be subject to Rule 201 on a case-by-case basis.¹⁴ Advance-approval options range from approval of specific changes that can be anticipated and accommodated in the conditions of the permit at the time of issuance to more general approval for a wider variety of changes that only affect the air contaminants regulated by the PAL.¹⁵

Wisconsin's Air Permit Improvement Initiative, or APII, is another example of a large-scale effort to improve the way a state air program issues permits. In the words of the state, "the idea is to create a more streamlined and less complicated permitting system so that staff can spend less time writing permits and more time assisting companies with compliance issues."¹⁶ Streamlining and flexibility innovations have included bubble permits, general and registration permits, and the state's Environmental Results Program for Printers, which is designed to help printers understand and comply with all of their environmental requirements across several programs.

NACAA believes that these and many other state and local programs respond to industry's complaints about air permitting in an appropriately informed and tailor-made way. The state and local permitting authorities know their industries, their air quality problems, and their public—and can best determine the structure of their own permitting programs. Their efforts should be encouraged by federal support—not destabilized and complicated by unnecessary and duplicative federal regulation.

¹³ Michigan DEQ, Air Quality Division, Operational Memorandum No. 16, "Procedure for evaluating Plantwide Applicability Limits," p. 2 (October 28, 1998).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ <http://www.dnr.state.wi.us/air/permits/streamlining/index.html>