

April 10, 2024

U.S. Environmental Protection Agency
Docket ID No. EPA-HQ-OAR-2023-0401

Submitted electronically via the Federal eRulemaking Portal at <https://www.regulations.gov>

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the U.S. Environmental Protection Agency’s (EPA’s) proposed rule, “Clarifying the Scope of ‘Applicable Requirements’ Under State Operating Permit Programs and the Federal Operating Permit Program,” 89 Fed. Reg. 1150 (Jan. 9, 2024). NACAA is the national, nonpartisan, non-profit association of 157 air pollution control agencies in 40 states, including 117 local air agencies, the District of Columbia and five territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

The proposed rule seeks to “clarify” the circumstances under which EPA will review New Source Review (NSR) preconstruction permitting decisions by state and local permitting authorities. It would accomplish this by adding language to the definition of “applicable requirement” in 40 C.F.R. § 70.2. The effect of the proposed change would be to codify a policy position that EPA has taken since 2017: that EPA will not “revisit” NSR decisions made by state and local permitting authorities through the Title V process so long as the decision was made “*with public notice and the opportunity for comment and judicial review*” (emphasis added). Currently, EPA is unable to apply this policy uniformly across the nation because of a conflicting decision of the U.S. Court of Appeals for the 10th Circuit. The proposed rule is designed to eliminate the conflict and allow EPA to apply a uniform policy interpretation nationwide.

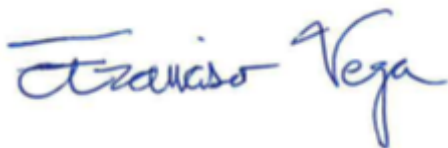
EPA also proposes to add an explicit reference to “section 110(a)(2)(C) of the Act” to part (2) of the “applicable requirement” definition. The purpose of the addition, according to EPA, is to make more explicit that minor NSR permit requirements issued under a State Implementation Plan (SIP) are “applicable requirements” that must be included in a Title V permit. This proposed change relates to another stated goal of the proposed rule, which is to “incentivize” state and local agencies to offer “robust opportunities for public involvement on NSR permit actions.” The proposed rule will, in EPA’s words, “reinforce existing requirements governing public participation on NSR permits and will *complement the EPA’s ongoing efforts to improve public participation in minor NSR permitting decisions*” (emphasis added).

NACAA’s chief concern with the proposed rule centers on how the new definitional reference to “public notice and the opportunity for comment and judicial review” would intersect with state and local minor NSR programs. As EPA is well aware, there is considerable variation among state and local programs with respect to the public notice and comment and judicial review opportunities associated with minor NSR permitting. Many permitting authorities have SIP-approved public notice requirements for their minor NSR programs that differ from the 30-day public notice and comment periods required for major NSR permit decisions. In fall 2022, EPA began work on development of a non-binding minor NSR policy that will, among other things, address the important issue of what constitutes adequate public participation in these programs – which must be balanced with efficiency and practicality concerns associated with the many thousands of minor NSR permit decisions issued by state and local agencies each year. The draft minor NSR policy is not expected to be released until later this year. When it is finalized, the policy may provide some clarity as to what EPA considers to be sufficient “public notice and the opportunity for public comment and judicial review” in minor NSR permitting. For now, there is no consensus as to what that term means with respect to minor NSR.

In NACAA’s view, adding the term “public notice and the opportunity for public comment and judicial review” into the regulatory definition of “applicable requirement” is, at a minimum, premature. EPA is essentially proposing to codify an ambiguous term in its Part 70 rules. It makes little sense to do so when a guidance document that will help dispel that very ambiguity remains under development. It is critically important that EPA’s two efforts related to minor NSR be closely coordinated. In the meantime, the proposed Title V applicable requirements rule should not be finalized. Furthermore, EPA should continue to accept public comments on the applicable requirements proposal *after* the release of the minor NSR guidance document.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please do not hesitate to contact either of us or Karen Mongoven of NACAA at kmongoven@4cleanair.org.

Sincerely,



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