ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2023–0401; FRL–9118–01–OAR]

RIN 2060–AV61

Clarifying the Scope of ''Applicable Requirements'' Under State Operating Permit Programs and the Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to update its title V operating permit program regulations to more clearly reflect the EPA's existing interpretations and policies concerning when and whether ''applicable requirements'' established in other Clean Air Act (CAA or the Act) programs should be reviewed, modified, and/or implemented through the title V operating permits program. Specifically, this action clarifies the limited situations in which requirements under the New Source Review (NSR) preconstruction permitting program would be reviewed using the EPA's unique title V oversight authorities. Additionally, this action clarifies that requirements related to an owner or operator's general duty to prevent accidental releases of hazardous substances are not ''applicable requirements'' for title V purposes and are not implemented through title V.

DATES: *Comments:* Comments must be received on or before March 11, 2024. *Public hearing:* If anyone contacts the EPA requesting a public hearing by January 15, 2024, the EPA will hold a virtual public hearing. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2023–0401, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2023–0401 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2023–0401.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OAR Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Spangler, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–0327; email address: *spangler.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: The Information presented in this document is organized as follows:

I. Public Participation in This Proposed Rulemaking

A. Does this action apply to me?

Entities potentially affected by this proposed rulemaking include state, local, and Tribal air pollution control agencies that administer title V operating permit programs (''permitting authorities''), owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits, and any person or group who participates in the title V permitting process.

B. Where can I get a copy of this document and other related information?

The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2023–0401. All documents in the docket pertaining to this action are listed on the *https://www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and may be viewed with prior arrangement with the EPA Docket Center. In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at *https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions.*

Additionally, a number of documents that are relevant to this proposed action—in particular, prior EPA orders responding to petitions challenging individual title V permits—are available through the EPA's website at *https://www.epa.gov/title-v-operating-permits/title-v-petition-database.*

C. What should I consider as I prepare my comments?

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2023–0401, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket.

Do not submit information containing CBI to the EPA through *https://www.regulations.gov.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in Instructions. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, *oaqpscbi@epa.gov,* and should include clear CBI markings as described later. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2023–0401. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

D. How do I request and participate in a virtual public hearing?

To request a virtual public hearing, contact Ms. Pam Long at (919) 541–0641 or by email at *long.pam@epa.gov* by January 15, 2024. If requested, the virtual hearing will be held on January 24, 2024. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/title-v-operating-permits.*

Upon publication of this document in the **Federal Register**, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/title-v-operating-permits* or contact Ms. Pam Long at (919) 541–0641 or by email at *long.pam@epa.gov.* The last day to pre-register to speak at the hearing will be January 22, 2024. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/title-v-operating-permits.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

Each commenter will have 3 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *long.pam@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/title-v-operating-permits.* While the EPA expects the hearing to go forward as set forth earlier, please monitor our website or contact Ms. Pam Long at (919) 541–0641 or by email at *long.pam@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with Ms. Pam Long and describe your needs by January 16, 2024. The EPA may not be able to arrange accommodations without advanced notice.

II. Purpose of This Regulatory Action

This rulemaking concerns the relationship between the CAA's title V operating permit program and certain types of ''applicable requirements'' established under different sections of the CAA. Many of the EPA's past statements on this topic are included within the EPA Administrator's responses to citizen petitions challenging title V permits issued to individual facilities. Though publicly available, these Orders may not be widely read by members of the public and/or permitting authorities. This rulemaking is intended to bring greater awareness to the EPA's current approach to ''applicable requirements'' within the context of title V so that the public, permitting authorities, and the EPA can focus their resources on using the title V permitting process to address issues that can be most effectively resolved through title V. Specifically, this proposed rule addresses three issues that have been the source of public interest and, at times, misunderstanding. This rule also proposes to update the EPA's regulations to better express the EPA's existing positions on these topics.

First, section III. of this preamble includes background on the EPA's existing position regarding general topics involving ''applicable requirements,'' which the EPA does not propose to change. In summary, the title V operating permit program is a vehicle for compiling air quality control requirements from other CAA programs and for providing conditions necessary to assure compliance with such requirements, but it is not a vehicle for creating or changing applicable requirements from those other programs. The EPA has a regulatory definition of the term ''applicable requirement'' that guides the interaction between title V and other CAA programs. Some programs establish ''self-implementing'' requirements that

can be incorporated into title V permits without further review. Other programs contain only general requirements that can, in certain circumstances, be further defined through title V. Section III.G. of this preamble summarizes existing EPA positions about how these concepts affect requirements related to the National Ambient Air Quality Standards (NAAQS) and State Implementation Plans (SIPs).

Second, Section IV. of this preamble addresses the intersection between title V operating permits and NSR preconstruction permits issued under title I of the CAA and focuses on the limited situations in which NSR requirements would be reviewed using the EPA's unique title V oversight authorities.

Section IV.A. discusses the EPA's historical and current positions on the intersection between permits issued under title I and title V, which have changed over time. Section IV.B. explains in more detail the EPA's existing position, which the EPA proposes to codify through this rulemaking. In summary, the EPA's current position is that provided a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, such NSR permit establishes the NSR-related ''applicable requirements'' of the SIP (or Federal Implementation Plan, FIP) for purposes of incorporation into a title V permit. As with ''applicable requirements'' established under other CAA authorities, the EPA would not revisit those NSR permitting decisions through the title V process. The EPA's framework applies similarly regardless of: (i) the stage of the title V permitting or oversight process at issue; (ii) the NSR permit's origin (*i.e.,* from a SIP or a FIP), (iii) the type of substantive NSR requirement at issue (*e.g.,* NSR permit terms or major NSR applicability); and (iv) the procedures by which the NSR permit is incorporated into the title V permit (*e.g.,* sequentially or concurrently issued permits). However, there are situations in which the title V permitting process is the appropriate venue for addressing NSR permitting issues, including where NSR requirements have not been established through a sufficient title I permitting process, or where NSR issues and title V issues involve substantive overlap. Although the EPA believes that the existing regulations may properly be read to support the EPA's existing position, the EPA proposes amendments to make this position more explicit. Updating the EPA's regulations will allow the agency to apply its existing approach nationwide and will resolve issues stemming from conflicting court decisions from two federal Courts of Appeals.

Section IV.C. discusses the extent to which this proposal will (or will not) impact NSR permitting, NSR oversight tools, and NSR enforcement tools. Section IV.D. further discusses the limited impacts this proposed rule is expected to have on the EPA, permitting authorities, regulated entities, and the public. Overall, this proposed rule is meant to provide clarity about the appropriate mechanisms that should be used to address concerns with NSR permits. This proposed rule should create an incentive for permitting authorities to offer opportunities for meaningful public involvement in NSR permitting actions, and should encourage the public to take advantage of those opportunities (instead of attempting to use title V oversight tools to resolve concerns with NSR permits).

Section IV.E. details the EPA's legal and policy rationale for the EPA's existing (and proposed to be codified) position. In sum, the EPA's interpretation is supported by the text of title V, the structure and purpose of title V, and the structure of the CAA as a whole. The EPA has the discretion under the statute to apply this approach, which reflects better policy than alternative approaches. This proposed rule ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting. The EPA's proposal better accounts for procedural, resource-related, and practical limitations associated with title V oversight tools while incentivizing the use of proper title I avenues of review. Lastly, this approach respects the finality of NSR permitting decisions.

Section IV.F. solicits comment on three alternative approaches that would involve using title V permits to address substantive NSR issues in additional, targeted situations, while explaining why these alternatives are not preferred by the EPA.

Third, Section V. of this preamble addresses a distinct and severable topic related to the ''General Duty Clause'' of CAA section 112(r)(1), which concerns the prevention of accidental releases of hazardous substances. This proposal seeks to codify the EPA's well-established position that this General Duty Clause is not an ''applicable requirement'' and is not implemented through title V.

III. Background on Title V Operating Permits and CAA ''Applicable Requirements''

This section of the preamble contains background information about the title V program and explains how different types of ''applicable requirements'' of the CAA are treated in title V permits. This discussion is intended to clarify multiple related topics that may have been a source of confusion to the public, regulated entities, and permitting authorities over the years. The EPA is not proposing any changes to the agency's longstanding interpretations or policies discussed in this section. The EPA also considers these interpretations and policies to be consistent with, and accurately reflected in, the EPA's existing regulations in 40 CFR parts 70 and 71. Thus, the EPA is not proposing to revise the EPA's regulations in order to reflect these existing interpretations and policies.[1]

A. The Title V Permitting Process, Public Participation, and the EPA's Oversight Role

Congress amended the CAA in 1990 to add, among other provisions, title V. CAA Amendments of 1990, Public Law 101–549, sections 501–507, 104 Stat. 2399, 2635–48 (1990) (codified at 42 U.S.C. 7661–7661f). Title V established an operating permit program for major sources of air pollution and certain other sources.

The title V program, like other provisions of the CAA, involves an exercise of cooperative federalism, meaning that responsibility for the program is divided between states and the EPA. Under title V, states were required to develop and submit to the EPA for approval title V permitting programs consistent with requirements promulgated by the EPA in 40 CFR part 70. 42 U.S.C. 7661a(b), (d).[2] Most states, certain local agencies, and one Tribe now have approved part 70 programs. Under these EPA-approved state programs, permitting authorities issue the vast majority of title V permits (this preamble refers to such permits as ''state-issued'' permits). The EPA directly issues title V permits only in limited circumstances.[3]

[1] By contrast, the EPA is proposing to revise the EPA's regulations to more clearly reflect the EPA's positions regarding the issues discussed in sections IV. and V. of this preamble.

[2] For information about EPA oversight over the content and implementation of EPA-approved state part 70 programs, *see* 42 U.S.C. 7661a(i) and 40 CFR 70.10.

[3] Under 40 CFR part 71, the EPA (or an agency delegated to issue permits on EPA's behalf) issues title V permits to sources in most areas of Indian Country, on the Outer Continental Shelf,

Most title V permit actions (including initial permits, renewal permits, and significant permit modifications) involve public notice and an opportunity for comment and a hearing on draft permits and revisions. *See* 42 U.S.C. 7661a(b)(6); 40 CFR 70.4(d)(3)(iv), 70.7(h). These opportunities are similar to those provided in other CAA programs.

Additionally, Congress provided the EPA and the public with unique oversight tools for state-issued title V permits. The CAA requires permitting authorities to submit a proposed title V permit to the EPA Administrator for review for a 45-day review period before issuing the permit as final. 42 U.S.C. 7661d(a)(1); 40 CFR 70.8(a). The Administrator shall object to issuance of a proposed permit within that 45-day review period if the Administrator determines that the permit does not satisfy applicable requirements of the CAA or the requirements of part 70. 42 U.S.C. 7661d(b)(1); 40 CFR 70.8(c). If the Administrator does not object to a permit during the 45-day EPA review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action (hereinafter ''title V petition'' or ''petition''). 42 U.S.C. 7661d(b)(2), 40 CFR 70.8(d), 70.12, 70.13, 70.14. Many of the issues concerning ''applicable requirements'' that are addressed in this rulemaking have been raised, and addressed, in title V petitions and the EPA's orders responding to such petitions.[4]

The CAA also provides the EPA with the authority—at the agency's discretion—to determine that cause exists to ''terminate, modify, or revoke and reissue'' a state-issued title V permit. 42 U.S.C. 7661d(e). This process is often called ''reopening for cause'' and is described in 40 CFR 70.7(f) and (g). Among other criteria, a permit may be reopened for cause when necessary to assure compliance with applicable requirements. 40 CFR 70.7(f)(1)(iv).

Although this proposed rule is primarily focused on the EPA's oversight of state-issued title V permits, the concepts discussed in this preamble related to ''applicable requirements'' are relevant to nearly all aspects of the title V permitting process in some shape or form. For example, these concepts guide the information that permittees must include in title V permit applications, the required content of title V permits drafted and issued by permitting authorities (including the EPA), the scope of issues properly subject to the public's input during the title V permitting process, and the scope of issues considered by the EPA in exercising its oversight roles (including the EPA's review of title V permits issued by states and consideration of citizen petitions on those permits).

B. Purpose and Function of Title V Permits

The title V permitting program was created to assist with compliance and enforcement of air pollution controls established under other CAA programs. Before this program existed, the CAA pollution control requirements that might apply to a particular source could be found in many different provisions of the Act along with various federal and state regulations and permits. One court opinion summarized the relationship between title V and other CAA programs as follows:

> Under the regulatory regime established by the [CAA], emission limits for pollutants and monitoring requirements that measure compliance applicable to any given stationary source of air pollution are scattered throughout rules promulgated by states or EPA, such as [SIPs], new source performance standards [NSPS], and national emission standards for hazardous air pollutants [NESHAP]. Before 1990, regulators and industry were left to wander through this regulatory maze in search of the emission limits and monitoring requirements that might apply to a particular source. Congress addressed this confusion in the 1990 Amendments by adding title V of the Act, which created a national permit program that requires many stationary sources of air pollution to obtain permits that include relevant emission limits and monitoring requirements.

Sierra Club v. *EPA,* 536 F.3d 673, 674 (D.C. Cir. 2008) (citations omitted).

Thus, one key function of title V is to consolidate applicable requirements established under other CAA programs. This consolidation function is embodied in CAA section 504(a), which states, in part: ''Each permit issued under this subchapter shall include enforceable emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' 42 U.S.C. 7661c(a). The EPA's regulations implementing title V contain language similar to the statute. *See* 40 CFR 70.6(a)(1), 71.6(a)(1).[5] The EPA's regulations also require that ''The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.'' 40 CFR 70.1(a)(1)(i), 71.1(a)(1)(i).

In addition to consolidating existing applicable requirements, CAA section 504 provides the EPA with the authority to use title V permits to establish additional requirements necessary to assure compliance with existing applicable requirements. For example, it is well established that title V permits may be used to create or supplement monitoring requirements when necessary in order to assure compliance with underlying applicable requirements that do not themselves contain sufficient monitoring provisions.[6] Various compliance assurance requirements are included within title V and the EPA's implementing regulations; not all are restricted to monitoring.[7]

Beyond title V's consolidation and compliance assurance functions, title V generally does not impose new pollution control requirements on sources or provide a vehicle to modify such requirements established under other CAA programs. Thus, the EPA's regulations expressly provide: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While *title V does not impose substantive new requirements,* it does require that . . . certain procedural measures be adopted especially with respect to compliance.'' 40 CFR 70.1(b) (emphasis added). For

jurisdictions where the EPA has determined that a state has not adequately implemented its part 70 program, and for specific sources where a state has not satisfied an EPA objection to, or reopening of, a state-issued permit. *See* 40 CFR 71.4.

[4] For more information about title V petitions, *see* the preambles of the proposed and final petitions rule, 81 FR 57822 (Aug. 24, 2016) and 85 FR 6431 (Feb. 5, 2020). Copies of petitions and the EPA's petition orders are available on the EPA's public title V petitions database, *https://www.epa.gov/title-v-operating-permits/title-v-petition-database.*

[5] The EPA's regulations also define the specific ''applicable requirements'' with which each title V permit must assure compliance. 40 CFR 70.2, 71.2. The definition and concept of ''applicable requirements'' are discussed in more detail later in this preamble.

[6] *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d 673, 674–45, 680 (D.C. Cir. 2008) (''Title V did more than require the compilation in a single document of existing applicable emission limits and monitoring requirements. It also mandated that '[e]ach permit issued under [Title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.' . . . [T]he Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.' '' (citations omitted)); *see also, e.g., In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant,* Order on Petition No. VI–2007–01 at 6–8 (May 28, 2009).

[7] *See* 42 U.S.C. 7661c(a), (b), (c); 40 CFR 70.6(a)(1), (a)(3), (c), 71.6(a)(1), (a)(3), (c); *see also, e.g., In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East),* Order on Petition Nos. VIII–2022–13 & VIII–2022–14 at 13–17 (July 31, 2023) (*Suncor East Order*).

additional information about the purpose and function of title V, see section IV.E.2. of this preamble.

In summary, the title V operating permit program is a vehicle for compiling air quality control requirements from other CAA programs and for providing requirements necessary to assure compliance with such requirements, but not for creating or changing applicable requirements. Put simply, title V is a catch-all, not a cure-all. The discussion throughout the remainder of this preamble builds upon these longstanding general principles, which the EPA does not propose to change through this rulemaking.

C. Regulatory Definition of ''Applicable Requirements''

As previously explained, CAA section 504(a) requires that title V permits ''include enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' 42 U.S.C. 7661c(a).[8] However, the term ''applicable requirements'' is not defined in the Act and the statute does not otherwise specify how to determine the ''applicable requirements of this chapter'' for a particular source. When the EPA developed regulations to implement the title V program, the agency specifically defined the term ''applicable requirement'' as it relates to title V permitting. This subsection of the preamble addresses general topics associated with this regulatory definition. The subsections that follow elaborate on these general concepts with more specific examples about how these concepts impact different types of requirements.

As an initial matter, it is important to recognize that ''applicable requirement'' is a legal term of art with a precise meaning that is unique to title V. Its meaning is closely aligned with the primary function of title V permits: to consolidate and assure compliance with the substantive requirements established under other CAA programs. Thus, in general, the EPA's definition of ''applicable requirement'' focuses on those substantive requirements of other CAA programs that must be incorporated into a source's title V permit, and with which the title V permit must assure compliance. This means that not all CAA requirements are considered ''applicable requirements'' for title V purposes. However, the fact that some CAA requirements are not considered ''applicable requirements'' for title V purposes does not diminish the independent enforceability or importance of those requirements. It simply means that those requirements are not primarily implemented or enforced using title V permits.

The EPA's regulations define ''applicable requirement'' to mean ''all of the of the following as they apply to emissions units in a part 70 source,'' [9] followed by a list of 13 types of CAA-based requirements that qualify. 40 CFR 70.2; *see* 40 CFR 71.2 (similar definition).[10]

Perhaps the most straightforward aspect of this definition is that, in order to qualify as an ''applicable requirement'' for title V purposes, the requirement must be based on the CAA and, more specifically, one of the CAA sections specifically identified in this definition. Requirements that are not based on (*i.e.,* derived from) the CAA are not ''applicable requirements'' of the CAA with which a title V permit must assure compliance. Further, not all CAA requirements qualify as ''applicable requirements'' for title V purposes. Some sections of the CAA were intentionally omitted from the list of 13 types of ''applicable requirements'' because these sections either do not apply to stationary sources that must obtain title V permits, or these sections are not implemented through title V for other reasons. See section III.D.2. of this preamble for more information.

A similarly important definitional element is that ''applicable requirements'' only include the listed types of CAA requirements ''as they apply to emission units in a part 70 source.'' Requirements of the CAA that do not directly apply to a source's emission units are not ''applicable requirements'' for title V purposes, as discussed in section III.D.3. of this preamble.

Additionally, the requirements of title V itself (and the EPA's part 70 and 71 implementing regulations) are not technically considered ''applicable requirements'' but are nonetheless centrally important to title V permitting. See section III.D.4. of this preamble for more information.

The definition of ''applicable requirement'' can also affect the manner in which requirements that *are* considered applicable requirements are implemented through title V. In summary, some applicable requirements can be described as ''self-implementing.'' Once established, those requirements should entail little to no review through the title V permitting process. Other applicable requirements may require further site-specific evaluation in order to define the precise requirements that apply to individual emission units. In certain circumstances, the latter type of applicable requirements may be further defined using the title V permitting process. These topics are discussed in more detail in sections III.E. and III.F. of this preamble.

D. Requirements That Are Not ''Applicable Requirements'' for Purposes of Title V Permitting

Sources subject to title V may be subject to a variety of requirements both within and beyond the CAA. Not all of these requirements are ''applicable requirements'' that must be included in a title V permit and with which the title V permit must assure compliance. Requirements that are not applicable requirements fall into several categories, discussed in the following subsections.

[8] Similar requirements appear in other parts of title V. ''Schedule of compliance. The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition'' 42 U.S.C. 7661(3). ''Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.'' 42 U.S.C. 7661a(a). Permitting authorities ''have adequate authority to . . . issue permits and assure compliance . . . with each applicable standard, regulation, or requirement under this chapter.'' 42 U.S.C. 7661a(b)(5). The regulations to implement the program shall include a ''requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter.'' 42 U.S.C. 7661b(b). However, like section 504, these sections do not specify the scope of the term ''applicable requirements'' or how the permitting authority or the EPA is to determine what the applicable requirements are for an individual source as part of its title V permit.

[9] This definition also indicates that requirements that have been promulgated or approved at the time of permit issuance, but with which the source is not yet required to comply, are applicable requirements that must be included in a title V permit. 40 CFR 70.2, 71.2. The EPA is not aware of any issues or confusion concerning this element of the definition, which is not discussed further in this preamble.

[10] The list includes, in summary, requirements from: (1) SIPs and FIPs under CAA title I; (2) preconstruction permits under CAA title I; (3) CAA section 111 (NSPS and existing source rules); (4) CAA section 112 (NESHAP); (5) title IV (acid rain); (6) CAA sections 504(b) or 114(a)(3) (certain types of enhanced monitoring); (7) CAA sections 126(a)(1) and (c) (interstate pollution); (8) CAA section 129 (solid waste incineration); (9) CAA section 183(e) (consumer and commercial products); (10) CAA section 193(f) (tank vessels); (11) CAA section 328 (outer continental shelf permits); (12) CAA title VI (stratospheric ozone); and (13) any NAAQS, but only as it would apply to temporary sources under CAA section 504(e).

1. Requirements Not Derived From the CAA

Many sources subject to title V are also subject to federal laws beyond the CAA, including environmental laws administered by the EPA or other federal agencies (*e.g.,* the Clean Water Act (CWA); Safe Drinking Water Act; Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response, Compensation, and Liability Act; National Environmental Policy Act, Emergency Planning and Community Right-to-Know Act, Endangered Species Act, and other statutes). Other federal laws may also impact the decision-making of state permitting authorities (*e.g.,* the Civil Rights Act of 1964). These other federal laws—including the statutes and any implementing regulations—are not ''applicable requirements'' for title V purposes. Such requirements do not need to be included in title V permits, and title V permits do not need to assure compliance with these requirements. Further, whether a permittee or permitting authority has satisfied those requirements is beyond the scope of issues that the EPA can address through its title V-based oversight authorities, including the EPA's objection authority and public petition opportunity.[11] This is self-evident from the plain language of the CAA and the EPA's regulations, which limit the EPA's objection authority to permits that ''are not in compliance with the applicable requirements of [the CAA].'' 42 U.S.C. 7661b(1), (2); *see* 40 CFR 70.8(c)(1), 70.12(a)(2). Nonetheless, the EPA sometimes receives title V petitions requesting the EPA's objection to the issuance of operating permits on the basis of alleged violations of laws other than the CAA. The EPA has denied all of those petition claims.[12]

Other federal authorities are sometimes invoked in the context of title V permitting (and in particular, title V petitions), including presidential executive orders. Because executive orders are not legally binding on state permitting authorities and are generally not based on the CAA, they do not establish ''applicable requirements'' that states must implement through title V permitting. Accordingly, the EPA has denied title V petition claims alleging that state permitting authorities failed to satisfy executive orders.[13]

Many state permitting authorities have air quality laws that are not derived from the CAA and/or are not included as part of an EPA-approved state program.[14] These ''state-only'' requirements are not, standing alone, enforceable by the EPA and are not applicable requirements for title V purposes. Thus, these requirements do not need to be included in title V permits, title V permits do not need to assure compliance with these requirements, and these requirements are beyond the scope of the EPA's title V oversight tools. For these reasons, the EPA has denied numerous title V petition claims alleging that title V permits fail to satisfy state-only laws and requirements.[15]

State permitting authorities may, at their discretion, include requirements based on state-only enforceable laws within title V permits, but they are required to designate such permit terms as ''state-only'' or ''not federally enforceable.'' 40 CFR 70.6(b)(2). Again, these requirements are not ''applicable requirements'' for purposes of title V permitting. Thus, from the EPA's perspective, properly labeled state-only permit terms are not considered part of the title V permit; they may be physically present in the document, but they are not legally present for purposes of federal enforceability and oversight. As such, these permit terms are not subject to the EPA's objection authority nor the title V petition process. 40 CFR 70.6(b)(2). The EPA has denied many title V petition claims challenging the content of state-only permit terms.[16] Note, however, that there are some limited situations in which state-only requirements intersect with title V requirements.[17] Additionally, the CAA requires states to provide the public with an opportunity to raise concerns with any conditions of a title V permit, including state-only conditions, through judicial review in state court systems. *See* 42 U.S.C. 7661a(b)(6); 40 CFR 70.4(b)(3)(x)–(xii). This opportunity exists in parallel to the unique oversight authorities (*e.g.,* the EPA's objection authority and public petition opportunity) that extend only to federally enforceable requirements of title V permits.

2. CAA Requirements That Are Not Specifically Identified in 40 CFR 70.2

The CAA is a large and complex statute, composed of many different programs. Not all of these programs are implemented in the same manner through title V or establish ''applicable requirements'' for title V purposes.

One notable example is title II of the CAA, which concerns emission standards for internal combustion engines in mobile sources and nonroad engines. Even if such emission units are located at a stationary source, they are not regulated as a stationary source because they are excluded from the definition of ''stationary source.'' *See* 42 U.S.C. 7602(z).[18] Thus, title II requirements with which a stationary source must comply are not included within the EPA's title V-focused

[11] The EPA's regulations provide that title V permit issuance may be coordinated with the issuance of permits under the CWA and RCRA, but that does not mean those other requirements are subject to review through title V. 40 CFR 70.1(e), 71.1(d).

[12] *See, e.g., In The Matter of Gateway Generating Station,* Order on Petition No. IX–2013–1 at 12–14 (Oct. 15, 2014); *In the Matter of Monroe Electric Generating Plant,* Order on Petition No. 6–99–2 at 27 (June 11, 1999).

[13] *See, e.g., In the Matter of AK Steel Dearborn Works,* Order on Petition No. V–2016–16 at 17–19 (Jan. 15, 2021) (*AK Steel Order*); *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,* Order on Petition No. II–2000–07 at 32–33 (May 2, 2001) (*Pencor-Masada I Order*). Note that federal executive orders may be more directly relevant to EPA-issued title V permits under part 71 (as well as other types of EPA-issued permits).

[14] This includes requirements that may be designed to implement a CAA requirement, but which the EPA has not yet approved (including SIPs, state plans under CAA section 111(d), and state programs under CAA section 112(l), and part 70 programs).

[15] *See, e.g., In the Matter of Salt River Project Agricultural Improvement & Power District, Agua Fria Generating Station,* Order on Petition No. IX–2022–4 at 14 (July 28, 2022) (*SRP Agua Fria Order*); In *the Matter of Shintech, Inc.,* Order on Petition at 14 (Sept. 10, 1997) (*Shintech I Order*).

[16] *See, e.g., In the Matter of Harquahala Generating Station Project,* Order on Petition at 5 (July 2, 2003) (*Harquahala Order*).

[17] For example, the EPA has used and will use title V oversight tools to assess whether state laws should be considered federally enforceable ''applicable requirements'' with which a title V permit must assure compliance. *See, e.g., In the Matter of Georgia-Pacific Consumer Operations LLC, Crossett Paper Operations,* Order on Petition Nos. VI–2018–3 & VI–2019–12 at 14–15 (Feb. 22, 2023). The EPA has also considered whether title V permit terms are appropriately designated as federally enforceable requirements or state-only requirements. *See, e.g., In the Matter of ExxonMobil Corp., Baytown Chemical Plant,* Order on Petition No. VI–2020–9 at 24–26 (Mar. 18, 2022) (*ExxonMobil Baytown Chemical Order*). Additionally, the EPA will consider whether state-only requirements or permit terms would impair the effectiveness or enforceability of applicable requirements or other federally enforceable title V permit terms. *See, e.g., Harquahala Order* at 5. Finally, note that any terms of a title V permit that are *not* designated as ''state only'' or ''not federally enforceable'' (or similar) become federally enforceable upon permit issuance and are subject to the part 70 requirements that govern federally enforceable terms of title V permits, including requirements related to monitoring, recordkeeping, and reporting. 40 CFR 70.6(b)(1)–(2); *see, e.g., In the Matter of ExxonMobil Fuels & Lubricant Co., Baton Rouge Refinery, Reforming Complex and Utilities Unit,* Order on Petition Nos. VI–2020–4, VI–2020–6, VI–2021–1, & VI–2021–2 at 16 & 16 n.26 (Mar. 18, 2022).

[18] Questions sometimes arise regarding whether an internal combustion engine used at a stationary source should be considered a nonroad engine or a part of the stationary source. *See, e.g.,* 42 U.S.C. 7550(10); 7602(z); 40 CFR 1068.30. This topic is beyond the scope of the current rulemaking.

regulatory definition of ''applicable requirement.''

Other substantive CAA programs relevant to stationary sources are similarly not identified in the EPA's regulatory definition of ''applicable requirement'' for title V purposes because Congress did not intend for them to be implemented through the title V program. For further information about one example—the ''General Duty Clause'' concerning the prevention of accidental releases of hazardous substances under CAA section 112(r)(1)—*see* section V. of this preamble. Another example is the Greenhouse Gas Reporting Program in 40 CFR part 98. That program applies to stationary sources and uses the authorities provided in CAA sections 114 and 208 to collect greenhouse gas emissions information, but it is not an applicable requirement for title V purposes. Similarly, the Air Emissions Reporting Requirements program in 40 CFR part 51, subpart A imposes information-gathering requirements that are generally not implemented through title V.

Some CAA provisions are more general in nature and do not impose substantive requirements that are incorporated into title V permits. For example, title III of the CAA includes general provisions related to a number of cross-cutting topics. *See* 42 U.S.C. 7601–7628. Although some of these requirements may directly or indirectly impact title V permitting, most provisions within title III are not ''applicable requirements'' for title V purposes.[19]

3. Requirements That Do Not Apply to Emission Units

Not all requirements from CAA programs identified in the EPA's regulatory definition of ''applicable requirement'' are considered applicable requirements for title V purposes. This is because the definition only includes such requirements ''as they apply to emission units in a part 70 source.'' 40 CFR 70.2, 71.2. Applicable requirements generally include the substantive requirements from other provisions of the Act that dictate the ongoing operations of emission units at the source. After all, as the name of this program suggests, title V operating permits are fundamentally designed to specify the conditions under which a source's emission units must *operate.* Further, a key purpose of the title V program is to assure that *the source* complies with the requirements to which it is subject. *See* 42 U.S.C. 7661a(a).

Therefore, requirements of the CAA that do not directly apply to individual emission units at a part 70 source are not ''applicable requirements'' for title V purposes. Many of the CAA provisions that do not apply to emission units at a title V source could be described as programmatic or procedural in nature. For example, CAA requirements that specify actions that the EPA must take in order to establish or oversee different CAA programs (such as promulgating rules, taking action on state rules, and other programmatic oversight activities) are not applicable requirements that need to be reflected in a source's title V permit.[20] Similarly, the CAA requires state air agencies to undertake various activities related to the establishment and implementation of different CAA programs, including attainment planning requirements (*e.g.,* in developing SIPs).[21] State permitting authorities are also subject to various requirements (mostly procedural) related to the issuance of non-title V permits (*e.g.,* NSR permits).[22] In general, the EPA does not believe that Congress intended the title V program to serve as a vehicle to catch or correct programmatic or procedural problems associated with the establishment of applicable requirements in other CAA programs.[23] Instead, again, the title V program was designed to ensure that regulated sources comply with all the substantive air pollution control requirements to which they are subject. Thus, to the extent these requirements only directly regulate EPA or state actions—and do not result in requirements directly applicable to emission units at a title V source—they are not applicable requirements for title V purposes.

Also, the CAA contains many cross-cutting general provisions (*e.g.,* in title III of the CAA) that are not considered applicable requirements because they do not directly apply to emission units at part 70 sources.[24] The same is true for various cross-cutting regulatory provisions. To the extent these provisions are relevant to the implementation or enforcement of the title V program, they are independently enforceable and do not need to be explicitly specified in a title V permit. One example that often arises in the context of title V petitions is that of ''credible evidence.'' EPA, states, and citizens can use any credible evidence to prove compliance and non-compliance with the CAA, including compliance and non-compliance with title V permits. *See* 42 U.S.C. 7413(a), 7604(a)(1), 7604(f)(4); 62 FR 8314 (Feb. 24, 1997). The EPA has repeatedly held that title V permits need not include language affirmatively restating the existence of this principle.[25]

4. ''Part 70 Requirements''

As previously stated, the definition of ''applicable requirement'' in 40 CFR 70.2 and 71.2, and the manner in which this phrase is used throughout the EPA's title V regulations, focus on CAA requirements arising from *other* CAA programs beyond title V. By contrast, the requirements within title V and the EPA's part 70 and 71 regulations are not technically considered ''applicable requirements.'' [26] Instead, the EPA generally refers to these as ''part 70 requirements.'' [27]

[19] One notable exception is the Outer Continental Shelf permitting requirements under CAA section 328, 42 U.S.C. 7627, which are considered applicable requirements for title V purposes. 40 CFR 70.2, 71.2.

[20] *See, e.g., In the Matter of Hu Honua Bioenergy Facility,* Order on Petition No. IX–2011–1 at 6–7 (Feb. 7, 2014) (*Hu Honua I Order*).

[21] *See, e.g., In the Matter of Exxon Chemical Americas, Baton Rouge Polyolefins Plant,* Order on Petition No. 6–00–1 at 10–11 (Apr. 12, 2000).

[22] *See, e.g., In the Matter of Century Aluminum of South Carolina, Inc.,* Order on Petition No. IV–2023–09 at 19–20 (November 2, 2023) (*Century Aluminum Order*). However, note that there are limited circumstances under which procedural issues associated with other CAA programs (namely, the issuance of NSR permits) may be implicated in title V. See section IV.B.5.a. of this preamble for further discussion.

[23] By contrast, issues related to the procedures used to issue a title V permit are of central relevance to the title V program, and the unique title V oversight tools available to the EPA and the public generally may be used to address those deficiencies. See section III.D.4. of this preamble for more information on such part 70 requirements.

[24] These general provisions are not considered applicable requirements for two reasons: (i) they are not specified within the regulatory definition's list of 13 types of CAA requirements (as discussed in the preceding subsection of the preamble), and (ii) they do not apply to emission units at a source (as discussed in this subsection).

[25] *See, e.g., In the Matter of Plains Marketing LP and Four Other Facilities,* Order on Petition Nos. IV–2023–1 & IV–2023–3 at 50 (Sept. 18, 2023). Note that EPA has also indicated that title V permits cannot be drafted in such a way that would preclude the use of all credible evidence in enforcement proceedings. *See, e.g., In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery,* Order on Petition No. VI–2021–8 at 70 (June 30, 2022) (*Valero Houston Order*).

[26] Part 70 requirements do not meet the regulatory definition of ''applicable requirement'' because they are not included within the definition's list of 13 types of CAA requirements. Moreover, some part 70 requirements (*e.g.,* procedural requirements) do not directly apply to emission units.

[27] The phrase ''part 70 requirements'' is based on various portions of the part 70 regulations that refer to the ''requirements of this part'' as a distinct, and additional, source of requirements from ''applicable requirements'' based on other CAA programs. *See* 40 CFR 70.4(b)(3)(v), 70.6(a)(9)(iii), 70.6(a)(10)(iii), 70.7(a)(1)(iv), 70.8(b)(2), 70.8(c)(1), 70.12(a)(2). This concept is also relevant with respect to EPA-issued permits under 40 CFR part 71, where a similar distinction exists between ''applicable

This distinction is meaningful because the regulatory use of the term ''applicable requirement'' is closely tied to the core purpose of title V: to consolidate and assure compliance with the substantive requirements from other CAA programs, but not to create or modify such requirements. Thus, as previously described, the title V permitting process and title V oversight tools are generally not used to reevaluate the content of ''applicable requirements'' from other CAA programs.

By contrast, many ''part 70 requirements'' are directly implemented through title V permitting, as these requirements relate to the content of title V permits and the process used to issue them. For example, the requirements that dictate the content of title V permits are part 70 requirements (not applicable requirements). These include, for example, the requirement that title V permits include and assure compliance with ''applicable requirements'' established elsewhere, and the authority to impose, as necessary, additional monitoring and other compliance assurance provisions. *See, e.g.,* 40 CFR 70.6(a), (c). Further, the requirements related to public participation in title V permits, the availability of information, and related procedural requirements are all part 70 requirements (not applicable requirements). *See* 40 CFR 70.7(h). Title V and the part 70 regulations contain other unique title V authorities—such as the ''permit shield'' under CAA section 504(f) and 40 CFR 70.6(f).[28] The important distinction between these part 70 requirements and applicable requirements from other CAA programs is that part 70 requirements are properly subject to the additional oversight mechanisms unique to title V (including the EPA objection authority, public petition opportunity, and other programmatic oversight authorities).

E. Self-Implementing Applicable Requirements (e.g., NSPS, NESHAP)

Turning to CAA provisions that *are* considered ''applicable requirements,'' not all applicable requirements are treated the same in title V permits. This subsection addresses applicable requirements with the most straightforward title V implementation, often referred to as ''self-implementing'' or ''self-executing'' requirements. The hallmark of a self-implementing requirement is that the underlying statutory or regulatory provision defines the requirements applicable to a given emission unit with enough specificity for these requirements to be independently and immediately enforceable, even before going through the permitting process.[29] In other words, these applicable requirements require no further case-specific decisionmaking (*e.g.,* through a permitting process) in order to define the precise requirements to which a source is subject. Such requirements consist of prescribed emission standards, operational limitations, testing, monitoring, recordkeeping, reporting, and other compliance assurance requirements. These requirements are explicitly identified within an EPA regulation (*e.g.,* NSPS under CAA section 111, NESHAP under CAA section 112, Federal Plan under CAA section 111(d), similar rules under CAA section 129, or a FIP under CAA section 110(c)) or an EPA-approved state regulation (*e.g.,* SIP under CAA section 110(a) or a State Plan under CAA sections 111(d) or 129).

Such self-implementing applicable requirements should generally be included in, or incorporated into, a title V permit without further review.[30] It would not be appropriate, for example, to use the title V permitting process to reevaluate the stringency of a Maximum Achievable Control Technology (MACT) standard promulgated by the EPA through rulemaking under CAA section 112.[31] The same is true with respect to the content of self-implementing standards contained in SIPs, as discussed further in section III.G. of this preamble.

Central to the concept of ''applicable requirements'' is the fact that each applicable requirement is established through its own dedicated process, which includes the ability for the public to participate in the development of and, if necessary, challenge the substantive sufficiency of the requirement. For example, the EPA regulations referenced in preceding paragraphs are generally undertaken under CAA section 307, which establishes various procedural and public participation-related requirements, as well as the opportunity for judicial review of final regulations. *See* 42 U.S.C. 7607(b)–(d). The promulgation and approval of SIPs often involves two such rulemakings—one at the state level and one at the federal level. Thus, the fact that self-implementing applicable requirements are not substantively re-evaluated through title V does not mean the public is without recourse; it simply means that the title V permitting process was not designed to collaterally attack or reopen these previously-finalized applicable requirements.

Given title V's key role in consolidating applicable requirements, questions often arise during the permitting process as to which CAA requirements are applicable to a given source or emission unit. To the extent that applicability is clearly established within the applicable requirement itself (*e.g.,* a source-specific SIP provision) or some other type of final agency action (*e.g.,* a formal EPA applicability determination under CAA sections 111, 112, or 129), applicability would not be subject to further scrutiny through title V.[32] However, there are cases where the applicability of a requirement—including a requirement that could otherwise be described as ''self-implementing''—has not been conclusively established prior to title V permit issuance. In these cases, the title V permitting process can and should be used to determine which requirements apply to the source, so that the title V permit can include and assure compliance with those requirements. For example, determining which NSPS

requirements'' derived from other CAA programs and the requirements of part 71 that are derived from title V of the Act. *See, e.g.,* 40 CFR 71.10(g)(1). However, given that this issue most often arises in the context of state-issued part 70 permits, this preamble uses the term ''part 70 requirements'' to refer to requirements derived from title V.

[28] The permit shield is discussed in more detail in section IV.C.3. of this preamble to the extent it impacts NSR permitting decisions.

[29] This is in contrast with some other programs the EPA administers, such as certain requirements under the CWA. Some new requirements under the CWA only become effective once they are incorporated into a source's National Pollutant Discharge Elimination System (NPDES) permit. *See, e.g., Texas Oil & Gas Ass'n et al* v. *US EPA,* 161 F.3d 923, 928 (5th Cir. 1998) (''Despite their central role in the framework of the CWA, [Effluent Limitation Guidelines, or ELGs] are not self-executing. They cannot be enforced against individual dischargers, and individual dischargers are under no legal obligations to obey limits set by ELGs. Rather, ELGs achieve their bite only after they have been incorporated into NPDES permits.'' (citing *American Paper Inst.* v. *EPA,* 996 F.2d 346, 350 (D.C. Cir. 1993); *American Petroleum Inst.,* 661 F.2d 340, 344 (5th Cir. 1981)).

[30] The manner in which such requirements may be included in or incorporated by reference into, a title V permit is beyond the scope of this rulemaking. For more information about incorporation by reference, *see,* for example, *ExxonMobil Baytown Chemical Order* at 16–19 and *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program,* 36–41 (Mar. 5, 1996).

[31] *See, e.g., In the Matter of Borden Chemical, Inc. Formaldehyde Plant,* Order on Petition No. 6–01–1 at 48–49 (Dec. 22, 2000).

[32] The EPA has established formal and informal processes for EPA to resolve questions regarding the applicability of NSPS, NESHAP, and section 111(d) and section 129 rules, called the ''applicability determination'' process. *See* 40 CFR 60.5, 61.06, 62.02(b)(2); *EPA Process Manual for Responding to Requests Concerning Applicability and Compliance Requirements of Certain Clean Air Act Stationary Source Programs,* Appx B (July 2020), available at *https://www.epa.gov/sites/default/files/2020-07/documents/111-112-129_process_manual.pdf.*

or NESHAP subpart is applicable to a source may require further site-specific factual analysis through the permitting process. Additionally, within a given NSPS or NESHAP rule, there may be multiple different sets of requirements that apply differently to emission units with different characteristics. In these situations, it may be necessary to use the title V permitting process to decide (and identify) which specific requirements within a NSPS or NESHAP rule apply to each emission unit at a source. In these cases, the title V permitting process can and should be used to determine which requirements apply to the source, so that the title V permit can include and assure compliance with those requirements.

Finally, even for self-implementing applicable requirements, the title V permitting process may be used to determine whether additional compliance assurance provisions (*e.g.,* monitoring) are necessary. *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d at 680. Further guidance on determining the sufficiency of monitoring and other compliance assurance provisions is beyond the scope of this rulemaking.

F. Requirements Defined Through Title V Permitting

Although title V generally does not *impose* substantive new requirements, title V permits sometimes serve as the vehicle to further *define* applicable requirements from other CAA programs. This most often occurs when the underlying applicable requirement provides general direction and requires further source-specific analysis to define the precise requirements that apply to a given source or emission unit. Some underlying applicable requirements expressly identify title V permits as the vehicle for this analysis; others may be more open-ended about the vehicle used to define the applicable requirement; and still others may specify a different vehicle for establishing these requirements (*e.g.,* NSR permits, discussed further in section IV. of this preamble).

Unlike applicable requirements that are established in full elsewhere, where the details of an applicable requirement are defined for the first time through the title V permitting process, questions about the content of such an applicable requirement *are* subject to title V's unique oversight tools, including the EPA's objection authority and the public petition opportunity.

For example, CAA section 112(g) requires the development of case-by-case Maximum Achievable Control Technology (MACT) limits prior to certain construction activities at a major source of HAPs where there is no NESHAP under CAA section 112(d).[33] These limits can—and in some cases, must—be established through the title V process. In such cases where a title V permit is used to establish a case-by-case MACT limit, questions about both the applicability and the content of such a limit (*i.e.,* whether the limit properly reflects MACT) *are* subject to the unique oversight tools of title V.[34]

Other requirements of CAA section 112 NESHAP and section 111 NSPS regulations may require further definition through, for example, various types of site-specific operational plans. These plans are generally developed outside of the title V permitting process, but to the extent they are necessary to impose or assure compliance with an applicable requirement of the NSPS or NESHAP, they must be included or incorporated into title V permits.[35] The title V permitting process may also be used for similar case-by-case decisions based on underlying SIP provisions, as discussed further in the following subsection of this preamble.

In these situations, it is not the title V permit that establishes the applicable requirement itself. The applicable requirement is still based on the underlying statutory or regulatory provision, but the title V permit defines the precise details of the applicable requirement. Essentially, the title V permitting process is used to develop the specific ''enforceable emission limitations and standards . . . and such other conditions as are necessary to assure compliance with the [more general underlying] applicable requirements. . . .'' 42 U.S.C. 7661c(a). Absent an underlying CAA-based authority, title V permits should generally not be used to impose new substantive requirements. 40 CFR 70.1(b).

G. Applicable Requirements Related to the NAAQS and SIPs

CAA requirements associated with the NAAQS and SIPs reflect the full spectrum of issues discussed in the preceding subsections of this preamble. Some are not applicable requirements for title V purposes; others are self-implementing applicable requirements that need no further review during title V; still others may be defined through title V permitting; and many are established in the NSR permitting process. Perhaps due to the variability and complexity of issues related to the NAAQS and SIPs, the EPA has received numerous title V petitions raising concerns that the EPA was not able to address through that mechanism. The EPA hopes that the following discussion will help reduce confusion about the issues that are—and are not—redressable through title V oversight tools.[36]

Beginning with the NAAQS, it is well-established that the NAAQS are not themselves applicable requirements because they do not apply directly to sources.[37] That is, the promulgation of a NAAQS does not, in and of itself, automatically result in emission limits or other control measures applicable to a source. Instead, the NAAQS create an obligation on *states* to develop SIPs (and on EPA to promulgate FIPs, as necessary) that contain requirements necessary to achieve and maintain the NAAQS. 42 U.S.C. 7410(a)(1), (c)(1).

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[33] Under CAA section 112(g)(2), if the EPA has not established a MACT standard for a source category, the EPA or the state must establish a case-by-case MACT emission limit prior to certain construction activities at a major source of HAPs. Similarly, under CAA section 112(j)(2), if the EPA has not established a MACT standard for a source category, a new or existing major source's title V operating permit must include a case-by-case MACT limit. *See also* 40 CFR 63.40–44 (implementing regulations for 112(g)), 63.50–56 (implementing regulations for 112(j)).

[34] *See* 61 FR 68384, 68393, 68395 (Dec. 27, 1996) (''Where EPA determines that the MACT determination made by the permitting authority fails to meet any of the requirements of § 63.43 [and] where the MACT determination is made part of a source's part 70 permit, EPA may veto issuance of the permit in accordance with the provisions of 40 CFR 70.8(c).''); *id.* at 68395 (''If, during the EPA's review of the section 112(g) determination, it becomes apparent that the determination is not in compliance with the Act, then EPA must object to the issuance or revision of that permit.''); *In the Matter of American Electric Power Service Corp., Southwest Electric Power Co., John W. Turk Plant,* Order on Petition No. VI–2008–01 at 15–16 (Dec. 15, 2009); *In the Matter of Shintech Inc., PVC Plant,* Order on Petition No. 6–03–1 at 16–21 (July 3, 2003).

[35] Other requirements of CAA section 111 NSPS and section 112 NESHAP regulations may require further definition through various types of site-specific operational plans. These plans are generally developed outside of the title V permitting process, but to the extent they are necessary to impose or assure compliance with an applicable requirement of the NSPS or NESHAP, they must be included or incorporated into title V permits. *See, e.g., Valero Houston Order* at 25–26.

[36] As with essentially all other portions of this preamble, the explanations in this section reflect existing policies, as expressed in prior rule preambles, guidance documents, and numerous title V petition orders.

[37] 40 CFR 70.2 (defining ''applicable requirement'' to include the NAAQS ''but only as it would apply to temporary sources''); 57 FR at 32276 (''Under the Act, NAAQS implementation is a requirement imposed on States in the SIP; it is not imposed directly on a source. In its final rule, EPA clarifies that the NAAQS and the increment and visibility requirements under part C of title I of the Act are applicable requirements for temporary sources only.''); 56 FR at 21732–33 (''The EPA does not interpret compliance with the NAAQS to be an 'applicable requirement' of the Act.'').

The specific measures contained in each state's EPA-approved SIP to achieve the NAAQS are the applicable requirements with which sources must comply. 40 CFR 70.2. For purposes of title V permitting, this means that a state does not have any general obligation to establish emission limitations or other standards within a title V permit in order to protect the NAAQS. Whether such requirements are necessary is largely dependent on the relevant terms of the SIP.

Some applicable requirements in SIPs could be described as ''self-implementing'' in a manner similar to the EPA's NSPS and NESHAP standards discussed in section III.E. of this preamble. For example, a source-specific SIP provision may impose a specific numerical emission limit or operational limit on a specific source. Or, a SIP provision, ''permit by rule,'' or ''general permit'' within the SIP may impose similar requirements on a category of sources or emission units. Such requirements should be included in the source's title V permit without further review (except, of course, to ensure that the permit contains sufficient monitoring and other compliance assurance conditions). Nonetheless, the EPA has received many title V petitions challenging such requirements contained in an EPA-approved SIP. Some petitions have directly challenged the SIP provision itself, asserting that the SIP requirement was incorrectly established or failed to satisfy certain legal requirements governing SIPs. More often, petitions have challenged permit terms that repeat verbatim an approved SIP provision; such claims effectively challenge the SIP itself. As the EPA has explained, if an alleged problem lies with the content of the SIP, the proper remedy would be a ''SIP Call'' under CAA section 110(k), not a title V petition. Until the EPA approves a corrective SIP revision or issues a FIP, the SIP provision remains an ''applicable requirement'' that should be incorporated unchanged into the title V permit. The EPA has consistently denied title V petition claims on this basis.[38]

Other SIP requirements are less specific and must be further defined in subsequent proceedings (generally before the state) that involve a fact-specific analysis of the relevant affected sources and emission units.[39] Depending on the nature of the SIP provisions at issue, this analysis may involve, for example, various methods of qualitatively or quantitatively assessing a source's impact on the NAAQS (including, but not limited to, ambient air dispersion modeling). This analysis may also result in case-by-case emission limits designed to protect the NAAQS. Determining the proper venue for satisfying or defining these general SIP requirements depends on the specific language contained in the SIP, as discussed in the following paragraphs.

In general, most SIP provisions provide that case-by-case decisions necessary to fulfill general SIP requirements will proceed either through subsequent rulemaking actions[40] or through the NSR permitting process (as discussed in section IV. of this preamble). Once established, the more specific requirements of the SIP, as defined through those processes, are generally not subject to further review during the title V permitting process.

However, some SIP requirements may be defined for the first time in a title V permit, in which case the contents of these requirements *are* reviewable using the unique title V oversight tools. Again, whether a SIP-based requirement is reviewable through the title V process depends on the specific SIP provision at issue. For example, the EPA has reviewed (and granted) title V petitions requesting analysis of a source's impacts on the NAAQS or case-specific emission limits designed to protect the NAAQS in situations where the SIP provisions at issue specifically suggested that such requirements would be implemented through title V.[41] In such cases, the EPA has generally provided the permitting authority the opportunity to interpret the relevant SIP provisions and to explain the scope, timing, and applicability of these provisions as they relate to the source in question.

The EPA has also addressed other, more general SIP provisions that do not explicitly require any specific action during the title V process. These provisions often take the form of broad, general prohibitions on air pollution, and these SIP provisions are not always directly tied to the NAAQS or any specific federal requirements. The EPA has explained that states have discretion under these general SIP provisions to determine that it is not necessary to impose source-specific limits through title V permits.[42] However, this does not prevent states from using title V to address such general requirements.[43]

Although uncommon, some SIP provisions expressly identify title V permits as a vehicle for establishing or modifying SIP-based limits. For example, some SIP provisions based on the EPA's Plantwide Applicability Limit (PAL) rules expressly identify title V renewal permits as a potential vehicle for adjusting a PAL.[44] Where the title V process is specifically identified in a SIP as a means of establishing or defining an applicable requirement of the SIP, questions related to these requirements maybe properly raised during the title V permitting process.

[38] *See, e.g., In the Matter of Piedmont Green Power,* Order on Petition Number IV–2015–2 at 28–29 (Dec. 13, 2016) (*Piedmont Green Power Order*); *In the Matter of Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants,* Order on Petition No. VIII–00–1 at 23–24 (Nov. 16, 2000).

[39] *See, e.g.,* 56 FR at 21757 (''Where SIP requirements are clear, the part 70 permit must adopt these limitations and reestablish them as permit conditions that implement the SIP. Where the SIP requirements are ambiguous or absent, the permit could provide a way of resolving questions as to how the SIP applies and is enforced.'').

[40] *See, e.g., In the Matter of TransAlta Centralia Generation, LLC,* Order on Petition at 11–12 (Apr. 28, 2011).

[41] *See In the Matter of In the Matter of Alabama Power Co., Barry Generating Plant,* Order on Petition No. IV–2021–5 at 11–14 (June 14, 2022) (granting a claim related to a SIP provision that required owner/operators of a certain type of source to ''[d]emonstrate, to the satisfaction of the [state], that sulfur oxides emitted, either alone or in contribution to other sources, will not interfere with attainment and maintenance of any primary or secondary [NAAQS]''); *In the Matter of Duke Energy, LLC, Asheville Steam Electric Plant,* Order on Petition No. IV–2016–06 at 11–17 (June 30, 2017) (granting claim related to a SIP requirement that ''the permit shall contain a condition requiring'' controls more stringent than the applicable emission standards when necessary to prevent a violation of the NAAQS—a provision the state had previously relied upon to establish limits in individual permits); *In the Matter of Duke Energy, LLC, Roxboro Steam Electric Plant,* Order on Petition No. IV–2016–07 at 10–15 (June 30, 2017) (same as *Duke Asheville*); *In the Matter of Public Service of New Hampshire, Schiller Station,* Order on Petition No. VI2014–04 at 8–13 (July 28, 2015) (granting claim related to a SIP requirement to ''apply special emission limits to the stationary sources on a case-by-case basis to insure [*sic*] that their air quality impacts'' do not interfere with NAAQS attainment in adjacent states).

[42] *See In the Matter of EME Homer City Generation LP and First Energy Generation Corp.,* Order on Petition Nos. III2012–06, III–2012–07, and III–2013–02 at 15–16 (July 30, 2014) (SIP provision stated ''No person may permit air pollution as that term is defined in the act''); *In the Matter of TransAlta Centralia Generation, LLC,* Order on Petition at 7 (April 28, 2011) (SIP provision prohibited ''emissions detrimental to persons or property''); *In the Matter of Hercules, Inc.,* Order on Petition at 8 (Nov. 10, 2004) (SIP provision prohibited emissions that would cause injury or unreasonably interfere with enjoyment of life or use of property).

[43] *See, e.g., In the Matter of Oxbow Calcining LLC,* Order on Petition No. VI–2020–11 at 10–12 (June 14, 2022) (addressing a situation where a state permitting authority took enforcement action against a source that allegedly caused a violation of a NAAQS, on the basis that this alleged violation also violated permit terms reflecting a general SIP provision prohibiting air pollution).

[44] *See, e.g.,* 51.166(w)(10)(v); *ExxonMobil Baytown Chemical Order* 9 at 13–14.

IV. Interface Between NSR and Title V Permitting

Since the title V program was created in the early 1990s, the EPA, state permitting authorities, and other interested stakeholders have grappled with questions related to the intersection of the title I (NSR) [45] preconstruction permitting programs and the title V operating permit program. Among other issues, one has persisted: in what situations, and to what extent, should the unique title V oversight tools (*e.g.,* the EPA's objection authority and the public petition opportunity) be used to address alleged deficiencies related to title I permitting decisions? This issue implicates various questions about the relationship between title V permits and applicable requirements established in other CAA programs. For example, when is an applicable requirement considered established, such that it should be incorporated into a title V permit without further substantive review? Should applicable requirements established under NSR permitting programs be treated the same as applicable requirements established under other CAA programs? The EPA's answer to these questions has changed over time, and two federal circuit courts have reached differing conclusions on the matter, as discussed in section IV.A.3. of this preamble.

This action proposes to codify the reasonable approach that the EPA has implemented on a case-by-case basis since 2017, as further described and justified in sections IV.A.3., IV.B., and IV.E. of this preamble. In short, provided a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, that NSR permit establishes and defines the relevant NSR-related applicable requirements of the SIP (or FIP) for purposes of title V. As with applicable requirements established under other CAA authorities (*e.g.,* NSPS, NESHAP), the EPA would *not* revisit those NSR decisions through the title V process.

This approach creates an incentive for permitting authorities to provide opportunities for meaningful public involvement through the most appropriate venue—the NSR permitting process. However, to the extent that the public is deprived of the opportunity to participate in the NSR permitting process, the title V process will serve as a backstop to ensure that each title V permit contains all applicable requirements. In other words, even under the EPA's current (and proposed) framework, there are certain situations in which the EPA *would* review substantive NSR issues through the title V permitting process, as explained in more detail in section IV.B.5. of this preamble.

The EPA is also soliciting comment on alternative approaches, presented in section IV.F. of this preamble, that would involve using title V to review NSR decisions in more situations.

The proposed regulatory changes related to NSR permitting are distinct and severable from the proposed change related to the general duty clause under CAA section 112(r)(1), discussed in section V. of this preamble.

A. Background: Historical and Current EPA Positions

1. NSR Programs (1977–Present)

The title I (NSR) preconstruction permitting program was established before the title V operating permits program. The NSR program is based on the 1977 Amendments to the CAA. The overall NSR program is comprised of three sub-programs, as discussed later.

The NSR program was designed to protect public health and welfare from the effects of air pollution and to preserve and/or improve air quality throughout the nation. *See* 42 U.S.C. 7470(1), (2), (4). The NSR program requires certain stationary sources of air pollution to obtain air pollution permits prior to beginning construction. Construction of new sources and the modification of certain sources with emissions above statutory and/or regulatory thresholds are subject to ''major source'' NSR requirements. New sources and modifications below the relevant emissions thresholds may be subject to minor NSR requirements or excluded from NSR altogether.

The major NSR program includes two distinct programs that each have unique requirements for new or modified sources. The applicability of these two programs depends on whether the area where the source is located is exceeding the NAAQS for one or more pollutants. The PSD program, based on requirements in part C of title I of the CAA, applies to pollutants for which the area is not exceeding the NAAQS (areas designated as attainment or unclassifiable) and to regulated NSR pollutants for which there are no NAAQS. 42 U.S.C. 7470–7479. The Nonattainment NSR (NNSR) program, based on part D of title I of the CAA, applies to pollutants for which the area is not meeting the NAAQS (areas designated as nonattainment). 42 U.S.C. 7501–7515.

To implement the CAA requirements for these programs, most states have EPA-approved SIPs containing PSD and NNSR preconstruction permitting programs that meet the minimum requirements reflected in the EPA's major NSR program regulations at 40 CFR 51.166 and 51.165. Upon EPA approval of a SIP, the state or local air agency becomes the permitting authority for major NSR permits for sources within its boundaries and issues permits under state law. Currently, state and local air agencies issue the vast majority of major NSR permits each year. When a state or local air agency does not have an approved NSR program, federal regulations (40 CFR 52.21, through incorporation into a FIP) apply and either the EPA issues the major NSR permits or a state or local air agency issues the major NSR permits on behalf of the EPA by way of a delegation agreement. For sources located in Indian Country, 18 U.S.C. 1151, the EPA is the permitting authority for major NSR.

The permitting program for construction of new and modified non-major sources and minor modifications to major sources is known as the minor NSR program. In addition to the specific major NSR requirements in CAA sections 165 and 173, CAA section 110(a)(2)(C) requires states to develop a program to regulate the construction and modification of any stationary source ''as necessary to assure that [NAAQS] are achieved.'' 42 U.S.C. 7410(a)(2)(C). The CAA and the EPA's regulations are less prescriptive regarding minimum requirements for minor NSR, so air agencies generally have more flexibility in designing minor NSR programs in their EPA-approved SIPs. *See* 40 CFR 51.160–51.164. Minor NSR permits are almost exclusively issued by state and local air agencies, although the EPA issues minor NSR permits in many areas of Indian Country. *See* 40 CFR 49.151–49.165.

The applicability of the PSD, NNSR, and/or minor NSR programs to a stationary source must be determined in advance of construction and is a pollutant-specific determination. Thus, a stationary source may be subject to the PSD program for certain pollutants, NNSR for some pollutants, and minor NSR for others.

2. Original Title V Approach to NSR (1990–1997)

[45] For purposes of this preamble, the terms ''title I permit'' and ''NSR permit'' are used interchangeably to describe a preconstruction permit issued to satisfy the NSR-related requirements of title I of the Clean Air Act.

As noted previously, the title V program was established in the 1990 CAA Amendments. The legislative history articulates Congress's intent that, notwithstanding the enactment of title V, NSR permits would continue to be issued as they had for over a decade, and that title V permits would be used to incorporate those requirements, but not to alter or impose additional NSR-related requirements.[46] The text of the CAA implicitly reflects this paradigm. However, the statute does not unambiguously prescribe the details of how EPA should approach the intersection of the NSR and title V permitting programs.

Thus, when the EPA promulgated the original title V implementing regulations in 1991 and 1992, the agency sought to provide clarity through multiple regulatory provisions, both of which were introduced earlier in this preamble. Again, 40 CFR 70.1(b) states: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require that . . . certain procedural measures be adopted especially with respect to compliance.'' Additionally, the EPA created a definition of ''applicable requirement'' in 40 CFR 70.2 (and later, 71.2) that includes, in relevant part: ''all of the following as they apply to emissions units in a part 70 source . . . (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter; (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.''

In the preamble of this initial part 70 rulemaking effort, the agency spoke directly to the intersection of title V and title I permitting. The EPA did not express an intention to use the title V permitting process to review the substance of applicable requirements established in preconstruction permitting programs under title I of the CAA. To the contrary, the EPA stated that ''[a]ny requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits *without further review.*'' 56 FR 21712, 21738–39 (May 10, 1991) (emphasis added). The EPA stated clearly that ''[t]he intent of title V is *not to second-guess* the results of *any* State NSR program.'' *Id.* at 21739 (emphasis added). The EPA stated that ''[d]ecisions made under the NSR and/or PSD programs (*e.g.,* Best Available Control Technology [BACT]) *define applicable SIP requirements* for the title V source and, if they are not otherwise changed, can be incorporated without further review into the operating permit for the source.'' *Id.* at 21721 (emphasis added). The preamble to the final rule further confirms that ''[d]ecisions made under the NSR and/or PSD programs *define certain applicable SIP requirements* for the title V source.'' 57 FR 32250, 32259 (July 21, 1992) (emphasis added).

3. Revised Title V Approach to NSR (1997–2017)

Once state permitting authorities began issuing title V permits in the mid-to-late-1990s, the EPA began receiving public petitions challenging those permits. Some of the earliest title V petitions included challenges to various types of NSR permitting decisions, proving a test to the statements the EPA made when promulgating its part 70 rules. The EPA's approach ultimately differed depending on whether the underlying NSR permit was issued under the EPA's federal PSD rules (40 CFR 52.21, administration of which was delegated to many states at the time) or under EPA-approved SIP rules.

For NSR permits issued under the federal rules, the EPA's petition responses from 1997 onward followed the agency's interpretations and statements of intent from the early 1990s. In other words, the EPA declined to use the title V petition process to review the merits of NSR permits issued by the EPA or a delegated agency under a FIP. The EPA's reasoning at the time was that appeals of such NSR permits are governed by 40 CFR 124.19 and are heard exclusively by the EPA Environmental Appeals Board (EAB). Thus, the EPA concluded that it need not entertain claims that such permits are deficient when raised in a petition to object to a title V permit.[47] The EPA consistently reiterated the same or similar statements in the decades that followed.[48]

However, starting in 1997, the EPA adopted a different approach to title V permitting with respect to NSR permits issued by state permitting authorities under EPA-approved SIP rules.[49] The EPA began to interpret section (1) of the definition of ''applicable requirement'' to allow the EPA, states, and the public to use the title V permitting process to examine the propriety of prior title I permitting decisions. For instance, in the 1997 *Shintech I Order,* the EPA stated:

> Where a state or local government has a SIP-approved PSD program, the merits of PSD issues can be ripe for consideration in a timely petition to object under Title V. Under 40 CFR 70.1(b), ''all sources subject to Title V must have a permit to operate that assures compliance by the source with all applicable requirements.'' Applicable requirements are defined in section 70.2 to include ''(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act . . . .'' The [state] defines ''federal applicable requirement,'' in relevant part, to include ''any standard or other requirement provided for in the Louisiana [SIP] approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T.'' Thus, the applicable requirements of the Shintech Permits include the requirement to obtain a PSD permit *that in turn complies with the applicable PSD requirements under the Act,* EPA regulations, and the Louisiana SIP.[50]

In a 1999 letter responding to requests from permitting authorities, the Director of the EPA Office of Air Quality Planning and Standards articulated the agency's then-current understanding of the interaction of title I and title V.[51] The letter stated that ''applicable requirements include the requirement to

[46] See sections IV.E.2. and IV.E.3. of this preamble for further discussion of legislative intent.

[47] *See In the Matter of Maui Electric Co., Ltd.,* Order on Petition (June 16, 1999) *In the Matter of Hawaii Electric Light Co. Ltd.,* Order on Petition (Apr. 3, 1998); *In the Matter of Kawaihae Cogeneration,* Order on Petition (Mar. 10, 1997) (*Kawaihae Order*).

[48] *See, e.g., In the Matter of East Kentucky Power Cooperative, Inc., Hugh L. Spurlock Generating Station,* Order on Petition, 5 n.2 (Aug. 30, 2007) (*Spurlock I Order*); *In the Matter of Carmeuse Lime and Stone,* Order on Petition No. V–2010–1 at 7 n.1 (Nov. 4, 2011); *see also Hu Honua I Order* at 3 n.4.

[49] For example, within the *1997 Kawaihae Order,* in which the EPA declined to review the merits of a PSD permit issued under delegated federal authority, the EPA also announced the following (without explanation): ''In contrast, where a state or local government has a SIP-approved PSD program and the [EAB] lacks jurisdiction to entertain PSD permit appeals, the merits of PSD issues are ripe for consideration in a timely veto petition under Title V.'' *Kawaihae Order* at 3.

[50] *Shintech I Order* at 3 n.2 (emphasis added) (citation omitted).

[51] Letter from John S. Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO (May 20, 1999), available at *https://www.epa.gov/sites/production/files/2015-08/documents/hodan7.pdf.*

obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and SIP's.'' The letter expressed the view that section 505(b) of the Act provides a form of corrective action in addition to all the other enforcement authorities the EPA has under the Act. It stated that generally the agency will not object to a title V permit for NSR determinations ''made long ago during a prior preconstruction permitting process.'' However, regarding recently issued NSR permits, the EPA indicated it may object to improper NSR determinations. Additionally, the letter said that the EPA could object to a title V permit where ''EPA believes that an emission unit has not gone through the proper preconstruction permitting process.''

The EPA has also used this reading of the agency's oversight authority under title V as part of the justification for approving state PSD programs.[52] In these approvals, the EPA pointed to its authority under title I, sections 113 and 167, and stated that title V ''has added new tools'' for addressing concerns with implementation of PSD requirements by allowing for objection to title V permits under section 505(b) of the Act. However, the authority to revisit an issued preconstruction permit does not appear to have been dispositive to the approval of these PSD programs, as EPA could still conduct oversight using its title I-based authorities.

The EPA implicitly or explicitly followed this approach in responding to title V petitions between 1997 and 2017. In general, the petition claims at issue alleged two types of defects related to NSR: First, some claims alleged flaws with the terms of major NSR permits issued by a state permitting authority—for example, that BACT limits in a PSD permit were not stringent enough. The EPA refers to these claims as addressing ''NSR permit content.'' Second, other claims alleged that a facility should have received a major NSR permit, instead of a minor NSR permit, to authorize the construction of a new source or modification. The EPA refers to these claims as addressing ''NSR applicability.'' For both types of issues, the EPA indicated that the agency could review whether preconstruction permitting decisions complied with the requirements of the SIP.

During this time period, the EPA often limited or qualified its use of title V authorities to address substantive NSR permitting issues. For example, in 1999, the agency stated:

> In determining BACT under a minor NSR program, as in implementing other aspects of SIP preconstruction review programs, a State exercises considerable discretion. Thus, EPA lacks authority to take corrective action merely because the Agency disagrees with a State's lawful exercise of discretion in making BACT-related determinations. State discretion is bounded, however, by the fundamental requirements of administrative law that agency decisions not be arbitrary or capricious, be beyond statutory authority, or fail to comply with applicable procedures.[53]

Applying this framework, the EPA has also drawn an analogy between this approach and the standard used by the EAB in reviewing EPA-issued PSD permits, described as a ''clearly erroneous'' standard.[54] More recently, the agency summarized this framework as follows:

> Where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate to the Administrator that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. As the EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, such requirements include that the permitting authority: (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. As the permitting authority for [the state's] SIP-approved PSD program, [the state agency] has substantial discretion in issuing PSD permits. Given this discretion, in reviewing a PSD permitting decision in the title V petition context, the EPA generally will not substitute its own judgment for that of [the state]. Rather, consistent with the decision in *Alaska Dep't of Envt'l Conservation* v. *EPA,* 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state's PSD permitting decision, the EPA generally will look to see whether the petitioner has shown that the state did not comply with its SIP-approved regulations governing PSD permitting, or whether the state's exercise of discretion under such regulations was unreasonable or arbitrary.[55]

Between 1997 and 2017, the EPA occasionally articulated further restrictions on the use of title V oversight tools to address title I permitting issues. For example, on at least three occasions, the EPA indicated that ''the Agency generally does not object to the issuance of a title V permit due to concerns over BACT or related determinations made long ago during a prior preconstruction permitting process.'' [56]

Additionally, on at least one occasion, the EPA suggested that the title V petition demonstration burden may require a final determination that NSR applies before the EPA can use the title V process to overturn an NSR applicability decision made by the permitting authority. The EPA found ''that [the state] has not reached a final determination in this permitting context that PSD is an applicable requirement for these sources, that the USEPA has not determined otherwise, and that a court has not issued a determination in the litigation context. Accordingly, there is no requirement under the facts of this case for the permits to include either PSD limits or a compliance schedule for the source to come into compliance with such limits at this time.'' The EPA concluded that ''even if [the state] were to recognize that the potential for noncompliance [with title I preconstruction permitting requirements] exists, it is not required to pursue inquiries further in the title V context,'' but instead could pursue the

[52] *See, e.g.,* Approval and Promulgation of Implementation Plans; Oregon, 68 FR 2891, 2899 (Jan. 22, 2003); *see also* Approval and Promulgation of Implementation Plans; Idaho; Designation of Areas for Air Quality Planning Purposes; Idaho, 68 FR 2217, 2221 (Jan. 16, 2003).

[53] *In the Matter of Roosevelt Regional Landfill,* Order on Petition, 9 (May 4, 1999).

[54] *See, e.g., Spurlock I Order* at 4–5 (Aug. 30, 2007) (''The standard of review applied by the EAB in its review of federal PSD permits has been explained in numerous orders of the EAB. In short, in such appeals, the burden is on a petitioner to demonstrate that review is warranted. Ordinarily, a PSD permit will not be reviewed by the EAB unless the decision of the permitting authority was based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. Thus, when a response to a petition to object to a title V permit requires the Administrator to determine whether an approved state's PSD permitting decision was adequately explained and meets the requirements of its SIP, EPA believes it is appropriate to apply a similar standard of review to that employed by the EAB in its review of federal PSD permits. When EPA promulgated the regulations governing the EAB's exercise of its review authority, the Agency noted that the power of review 'should be only sparingly exercised.' Similar deference to the permitting authority is also justified in the case of a PSD permit issued by a state with an approved PSD program, as is the case here.'' (quoting 45 FR 33290, 33412 (May 19, 1980); citing *In re Prairie State Generating Company,* 13 E.A.D. 1 (EAB 2006); *In re Kawaihae Cogeneration,* 7 E.A.D. 107 (EAB 1997)).

[55] *In the Matter of Appleton Coated, LLC,* Order on Petition Nos. V–2013–12 & V–2013–15 at 5 (Oct. 14, 2016) (*Appleton Order*) (citations omitted).

[56] *In the Matter of Georgia Pacific Consumer Products LP Plant,* Order on Petition No. V–2011–1 at 17 (July 23, 2012); *Spurlock I Order* at 19; *see In the Matter of Chevron Products Company, Richmond, California Facility,* Order on Petition No. IX–2004–08 at 9 (Mar. 15, 2005). Note that this statement is based on the EPA policy articulated in the 1999 letter discussed in footnote 51.

matter through title I enforcement mechanisms.[57]

4. Current Title V Approach to NSR (2017–Present)

Beginning in 2017, the EPA adopted a more nuanced view that, in the EPA's present opinion, better reflects not only the statute and Congress's intent, but also the EPA's regulatory definition of ''applicable requirement'' and the manner in which the title V permitting program interacts with other types of CAA requirements. As with many of the EPA's views on this topic, the EPA's updated view was articulated within Administrator-signed orders responding to title V petitions on individual title V permits.

The first such order was the 2017 *PacifiCorp-Hunter I Order*.[58] There, the EPA interpreted the CAA and the EPA's title V regulations to not require permitting authorities (including the EPA) to examine the merits of certain title I permitting decisions in the title V permitting context. Specifically, in response to a petition claiming that a PSD permit (instead of a minor NSR permit) was required for certain changes that occurred at the facility at issue approximately 20 years prior, the EPA explained:

> In circumstances such as those present here where a preconstruction permit has been duly obtained, . . . when a permitting authority has made a source-specific permitting decision with respect to a particular construction project under title I, those decisions ''define certain applicable SIP requirements for the title V source'' for purposes of title V permitting. 57 FR 32250, 32259 (July 21, 1992). The EPA is now interpreting the regulations to mean that the issuance of a[n NSR] permit defines the applicability of preconstruction requirements under section (1) of the definition of ''applicable requirement'' for the approved construction activities for the purposes of permitting under title V of the Act. . . . These source-specific permitting actions take the general preconstruction permitting requirements of the SIP—the requirement to obtain a particular type of permit and the substantive requirements that must be included in each type of permit—and evaluate at the time of the permitting decision whether and how to apply them to a proposed construction or modification.[59]

Further, the EPA stated:

> Consistent with this reading, permitting agencies and the EPA need not reevaluate—in the context of title V permitting, oversight, or petition responses—previously issued final preconstruction permits, especially those that have already been subject to public notice and comment and an opportunity for judicial review. Concerns with these final preconstruction permits should instead be handled under the authorities found in title I of the Act. Where a final preconstruction permit has been issued, whether it is a major or minor NSR permit, the terms and conditions of that permit should be incorporated as ''applicable requirements'' and the permitting authority and the EPA should limit its review to whether the title V permit has accurately incorporated those terms and conditions and whether the title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit.[60]

Shortly after issuing the *PacifiCorp-Hunter I Order,* the EPA issued the *Big River Steel Order,*[61] which applied similar statutory and regulatory interpretations to a different set of facts. In *Big River Steel,* the EPA declined to use the title V petition process to review whether a PSD permit satisfied the relevant SIP requirements governing PSD permit content (including BACT) and modeling related to the NAAQS. The EPA did so notwithstanding the fact that the PSD permit at issue, and the title V permit being petitioned, were issued at the same time and in the same physical permit document. The EPA's rationale was fully expressed within the *PacifiCorp-Hunter I* and *Big River Steel Orders.* To the extent those or similar rationales are relevant to this proposed rulemaking, they are presented in section IV.E. of this preamble.

Since the 2017 *PacifiCorp-Hunter I* and *Big River Steel Orders,* the EPA has issued approximately 20 other title V petition orders addressing similar issues under different fact patterns. Although the EPA has consistently followed the overarching interpretations and policies articulated in the *PacifiCorp-Hunter I* and *Big River Steel Orders,* each decision about *whether* those interpretations were applicable depended on the specific facts at issue.[62] Through these case-by-case decisions, the EPA has clarified various aspects of the EPA's interpretation of the title V provisions. However, because those decisions are spread across many different orders, the EPA understands that not all stakeholders—including permitting authorities, permittees, and members of the public—may fully understand the EPA's views about which types of issues are, or are not, subject to review through title V.[63] This preamble summarizes the most relevant aspects of these prior decisions in order to provide additional clarity about the EPA's current views.

In some of these decisions, the EPA concluded that NSR permitting actions established the relevant ''applicable requirements'' for title V purposes, and the EPA declined to review the substance of those applicable requirements in the title V petition context. The EPA applied this approach to many different types of issues, including the sufficiency of major NSR permit terms,[64] the sufficiency of minor NSR permit terms,[65] issues related to modeling and the NAAQS,[66] procedures used to issue NSR permits,[67] whether major NSR is applicable,[68] and other

[57] *In the Matter of Midwest Generation-Joliet Generating Station and Will County Generating Stations,* Order on Petition No. V–2005–2 at 9–10 (June 14, 2007).

[58] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition No. VIII–2016–4 (Oct. 16, 2017).

[59] *PacifiCorp-Hunter I Order* at 10–11. As the EPA explained: ''This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available.'' *Id.* at 11 n.21.

[60] *PacifiCorp-Hunter I Order* at 19 (citing 42 U.S.C. 7661c(a); 40 CFR 70.6(a)(3), 70.6(c)(1)).

[61] *In the Matter of Big River Steel, LLC,* Order on Petition No. VI–2013–10 (Oct. 31, 2017).

[62] *See, e.g., PacifiCorp-Hunter I Order* at 11 n.21 (''This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach.''); *Sierra Club* v. *EPA,* 926 F.3d 844, 850 (D.C. Cir. 2019) (emphasizing the case-specific nature the EPA's decision to apply the interpretation at issue in *PacifiCorp-Hunter I,* as well as the case-specific nature of any future EPA decisions to apply or not apply the same interpretation to different fact patterns).

[63] In recent permitting decisions and title V petitions, the EPA has observed that both state permitting authorities and public petitioners have often misapplied, misinterpreted, or ignored the interpretations and policies expressed in these orders.

[64] *AK Steel Order* at 9–13; *In the Matter of Riverview Energy Corp.,* Order on Petition No. V–2019–10 at 19–29 (Mar. 26, 2020) (*Riverview Order*); *In the Matter of South Louisiana Methanol, LP, St. James Methanol Plant,* Order on Petition Nos. VI–2016–24 & VI–2017–014 at 8–10 (May 29, 2018) (*South Louisiana Methanol Order*); *Big River Steel Order* at 8–20.

[65] *In the Matter of Delaware City Refining Company, LLC, Delaware City Refinery,* Order on Petition No. III–2022–10 at 26 (July 5, 2023) (*Delaware City Refinery Order*); *In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery,* Order on Petition No. VI–2021–8 at 65–66 (June 30, 2022) (*Valero Houston Order*); *In the Matters of Superior Silica Sands & Wisconsin Proppants, LLC,* Order on Petition Nos. V–2016–18 & V–2017–2 at 14–15 (Feb. 26, 2018) (*SSS/WP Order*); *In the Matter of Tennessee Valley Authority, Gallatin Fossil Plant,* Order on Petition Nos. IV–2016–11 & IV–2017–17 at 19–20 (January 30, 2018) (*TVA Gallatin II Order*).

[66] *Riverview Order* at 19–21; *Big River Steel Order* at 8–20.

[67] *AK Steel Order* at 9–13.

[68] *In the Matter of Waelz Sustainable Products, LLC,* Order on Petition No. V–2021–10 at 9–16 (Mar. 14, 2023) (*Waelz Order*); *In the Matter of Yuhuang Chemical Inc. Methanol Plant,* Order on Petition Nos. VI–2017–5 & VI–2017–13 at 7–8 (Apr. 2, 2018) (*Yuhuang II Order*); *In the Matter of ExxonMobil Corp., Baytown Olefins Plant,* Order on Petition No.

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NSR-related issues.[69] Some of these orders involved situations where NSR permits were issued well before the title V permits being challenged,[70] while others involved more contemporaneous NSR and title V permitting decisions.[71]

In other orders with materially different factual underpinnings, the EPA determined that it *would* be appropriate to review certain NSR-related issues through the title V permitting process. For example, the EPA substantively engaged with title V petition claims concerning the sufficiency of monitoring established in NSR permits,[72] requirements involving an explicit overlap between NSR and title V,[73] and other NSR issues where no underlying NSR permit was issued [74] or where the underlying NSR permit did not involve public notice and the opportunity for comment.[75]

Two of the EPA's petition orders—the *PacifiCorp Hunter I Order* and the *ExxonMobil Baytown Olefins Order*—were challenged in different federal circuit courts. The U.S. Court of Appeals for the Fifth Circuit issued the first ruling, upholding the *ExxonMobil Baytown Olefins Order. Env't Integrity Project* v. *EPA,* 969 F.3d 529 (5th Cir. 2020). There, the court found persuasive the ''EPA's view that Title V permitting is not the appropriate vehicle for reexamining the substantive validity of underlying Title I preconstruction permits.'' *Id.* at 253. The court's conclusion was ''based principally on Title V's text, Title V's structure and purpose, and the structure of the Act as a whole.'' *Id.* at 249.[76]

Shortly thereafter, the U.S. Court of Appeals for the Tenth Circuit issued a ruling vacating and remanding the *PacifiCorp-Hunter I Order. Sierra Club* v. *EPA,* 964 F.3d 882 (10th Cir. 2020). Unlike the Fifth Circuit, the Tenth Circuit did not address the EPA's statutory interpretation but instead rejected the EPA's reasoning as inconsistent with the EPA's regulations. *Id.* at 897. According to the Tenth Circuit, the EPA's regulations require that title V permits ensure compliance with all ''applicable requirements,'' which the court interpreted to include all requirements in the SIP, including those related to major NSR. *Id.* at 885–86, 890–91.

Because these two courts ruled on different grounds (with the Fifth Circuit focusing on the statute, and the Tenth Circuit focusing on the EPA's existing regulations), the legal reasoning underlying their holdings is not in direct conflict. However, for practical purposes, the differing rulings have made it difficult for the EPA to apply a uniform interpretation of its current title V regulations nationwide.

Within the Tenth Circuit's jurisdiction, in the EPA's subsequent responses to petitions on the PacifiCorp-Hunter permit (*PacifiCorp-Hunter II* [77] and *PacifiCorp-Hunter III* [78]), the EPA reviewed whether a source should have obtained a major NSR permit for projects previously authorized by a minor NSR permit. This review was based on the Tenth Circuit's decision on the *PacifiCorp-Hunter I Order.*

In title V petition orders regarding permits issued by states outside of the Tenth Circuit, however, the EPA has followed a different approach. As the EPA has explained:

> EPA continues to believe that the interpretation of the CAA upheld by the Fifth Circuit's decision in *Environmental Integrity Project* v. *EPA,* 969 F.3d 529 (5th Cir. 2020), is correct. EPA thus intends, where supported by the facts of individual permits, to continue to apply the reasoning of *In re Big River Steel, LLC,* Order on Petition No. VI–2013–10 (October 31, 2017), when issuing and reviewing title V permits and reviewing petitions on permits for sources in states outside of the Tenth Circuit. That is, where EPA has approved a state's title I permitting program, duly issued preconstruction permits establish the NSR-related ''applicable requirements'' for the purposes of title V. As with ''applicable requirements'' established through other CAA authorities, the terms and conditions of those permits should be incorporated into a source's title V permit without a further round of substantive review as part of the title V process.[79]

Thus, when reviewing permits issued by permitting authorities in states beyond the Tenth Circuit's jurisdiction, the EPA has continued to apply its approach dating back to 2017 and has, in many instances, declined to use the title V process to review the substance of NSR permitting decisions. In the situations outside the Tenth Circuit where the EPA decided that it *was* appropriate to use the title V process to review certain NSR issues, these decisions were *not* based on the Tenth Circuit's interpretation of the EPA's regulations, but rather on factual distinctions that, in the EPA's view, provided a basis for reviewing such issues under EPA's post-2017 interpretation of the regulations.[80]

As explained in the next section of this preamble, the EPA continues to maintain that the *Big River Steel Order* and subsequent title V orders reflect the best interpretation not only of the relevant statutory provisions, but also of the existing regulations. Nonetheless, in light of the differing circuit court decisions, the EPA considers it prudent to update the EPA's regulations to reflect its interpretation of the statute. The changes proposed in this rulemaking will allow the EPA to apply a single framework across the nation by amending the text in the regulations.

VI–2016–12 at 9–12 (*ExxonMobil Baytown Olefins Order*); *PacifiCorp-Hunter I Order* at 8–20.

[69] *In the Matter of ExxonMobil Corp., Baytown Refinery,* Order on Petition No. VI–2016–14 at 12–13 (*ExxonMobil Baytown Refinery Order*); *ExxonMobil Baytown Olefins Order* at 9–12 .

[70] *Delaware City Refinery Order* at 16; *Valero Houston Order* at 65–66; *ExxonMobil Baytown Refinery Order* at 12–13, *ExxonMobil Baytown Olefins Order* at 9–12; *TVA Gallatin II Order* at 19–20.

[71] *Waelz Order* at 13–15; *Riverview Order* at 24–28; *South Louisiana Methanol Order* at 9; *Yuhuang II Order* at 7–8; *SSS/WP Order* at 14–15; *Big River Steel Order* at 8–20.

[72] *In the Matter of Gulf Coast Growth Ventures, LLC, Olefins, Derivative, & Utilities Plant,* Order on Petition No. VI–2021–3 at 17–19 (May 12, 2022) (*Gulf Coast Growth Ventures Order*); *ExxonMobil Baytown Chemical Order* at 20–21; *South Louisiana Methanol Order* at 10–11; *Yuhuang II Order* at 8; *see also, e.g., Big River Steel Order* at 17, 17 n.30, 19 n.32, 20; *PacifiCorp-Hunter I Order* at 16, 17, 18, 18 n.33, 19.

[73] *Suncor East Order* at 53–54; *ExxonMobil Baytown Chemical Order* at 13–14; *In the Matter of Coyote Station Power Plant,* Order on Petition Nos. VIII–2019–1 & VIII–2020–8 at 12–13 (January 15, 202) (*Coyote Station Order*).

[74] *Suncor East Order* at 45–48, 54–55; *SRP Agua Fria Order* at 11 n.18; *In the Matter of Salt River Project Agricultural Improvement & Power District, Desert Basin Generating Station,* Order on Petition No. IX–2022–3 at 12 n.20 (July 28, 2022) (*SRP Desert Basin Order*); *In the Matter of BP Products North America, Inc., Whiting Business Unit,* Order on Petition No. V–2021–9 at 13 n.24 (Mar. 4, 2022) (*BP Whiting II Order*).

[75] *Suncor East Order* at 48; *Coyote Station Order* at 12.

[76] The court stated its conclusion several ways, as the following examples illustrate: ''Concluding EPA's interpretation of the Title V program is independently persuasive and therefore entitled to the mild form of deference recognized by *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944), we deny the petition.'' 969 F.3d at 242. ''[W]e find [the EPA's] reasoning persuasive as a construction of the relevant provisions of Title V and its implementing regulations.'' *Id.* at 247. ''Applying *Skidmore,* we ask whether EPA's interpretation of Title V and its implementing regulations in the *Hunter* Order is persuasive. Specifically, we inquire into the persuasiveness of EPA's current view that the Title V permitting process does not require substantive reevaluation of the underlying Title I preconstruction permits applicable to a pollution source. As we read it, the *Hunter* Order defends the agency's interpretation based principally on Title V's text, Title V's structure and purpose, and the structure of the Act as a whole. Having examined these reasons and found them persuasive, we conclude that EPA's current approach to Title V merits *Skidmore* deference.'' *Id.* at 249.

[77] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition Nos. VIII–2016–4 & VIII–2020–10 (Jan. 13, 2021).

[78] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition No. VIII–2022–2 (Sept. 27, 2022).

[79] *PacifiCorp-Hunter III Order* at 16 n.29; *see also PacifiCorp-Hunter II Order* at 15 n.26.

[80] *See Suncor East Order* at 46 n.61; *Gulf Coast Growth Ventures Order* at 17 n.28; *ExxonMobil Baytown Chemical Order* at 14 n.27; *BP Whiting II Order* at 13 n.24; *Coyote Station Order* at 12.

This action thus addresses the ruling from the Tenth Circuit by amending the regulatory language that it found to be in conflict with the EPA's current interpretation. It also more clearly aligns the EPA's regulations with the EPA's statutory interpretation endorsed by the Fifth Circuit.

B. Proposed Action

The EPA proposes to update its regulations to more closely reflect the agency's current view regarding the intersection between title I permitting and title V permitting. In sum: provided a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, such NSR permit establishes the NSR-related ''applicable requirements'' of the SIP (or FIP) for purposes of title V. As with ''applicable requirements'' established under other CAA authorities (*e.g.,* NSPS, NESHAP), the EPA would *not* revisit those NSR decisions through the title V process.

The following subsections of this preamble explore the situations in which NSR-related applicable requirements of the SIP (or FIP) would effectively be established through the NSR process, as well as situations in which the title V process could be used to further address or define those requirements. Determining the extent to which title V should be used to address NSR-related requirements inherently requires a fact-specific, case-by-case analysis of multiple variables associated with both title I and title V permitting. However, in general, the EPA's framework applies similarly regardless of: (i) the stage of the title V permitting or oversight process at issue; (ii) the NSR permit's origin (*i.e.,* from a SIP or a FIP), (iii) the type of substantive NSR requirement at issue (*e.g.,* NSR permit terms or major NSR applicability); and (iv) the procedures by which the NSR permit is incorporated into the title V permit (*e.g.,* sequentially or concurrently issued permits).

1. Different Stages of the Title V Permitting and Oversight Process

The EPA's views regarding the NSR-title V interface have primarily been discussed in the context of one specific oversight tool: the EPA's responses to title V petitions. This rulemaking would further codify the scope of issues that would be within, or beyond, the scope of the EPA's review in responding to title V petitions. However, the concepts underlying the EPA's current view—as well as this proposed rule—are not confined to title V petitions, but extend to other aspects of title V permitting. Specifically, the EPA's approach is equally relevant: (i) when prospective permittees prepare title V permit applications; (ii) when permitting authorities (including EPA, where applicable) develop title V permits and respond to public comments on draft title V permits, (iii) when EPA reviews and decides whether to object to proposed title V permits during its 45-day review period; (iv) when EPA considers reopening title V permits for cause; and (v) when EPA considers other programmatic oversight actions under, for example, 40 CFR 70.10.

2. Different Origins of NSR Permits

As described earlier in this preamble, the EPA's approach to reviewing NSR issues through title V diverged in the late-1990s, depending on whether the underlying NSR permit was issued under a state's EPA-approved SIP rules (which the EPA would review) or EPA-promulgated FIP rules (which the EPA would not review). At the time, this distinction was based on the differing routes to review such NSR permitting actions; appeals of SIP-based NSR permits were reviewed through the state court system, while appeals of FIP-based NSR permits proceeded through the EAB and federal court system.

Instead of presenting a basis to treat SIP-based and FIP-based title I permits differently, these NSR permit appeal pathways highlight why they should be treated similarly. Both SIP-based and FIP-based appeal pathways promote public involvement and ensure the substantive validity of the underlying NSR permitting decisions. Both pathways are similar to those used to establish (and, if necessary, challenge) other types of applicable requirements of the CAA. See section IV.E.4.a. of this preamble for additional information. The fact that one pathway leads to the state courts, and the other pathway leads to the federal courts, simply reflects the cooperative federalism system established by Congress for the NSR program.[81]

Overall, the EPA does not view the difference between NSR-based requirements established pursuant to a SIP, or NSR-based requirements established pursuant a FIP, to be meaningful insofar as title V is concerned. Both processes effectively establish and define the NSR-related requirements of title I for title V purposes. Accordingly, the EPA's proposed rule would codify the EPA's current approach, which does not differentiate between NSR permits issued pursuant to a SIP or a FIP.[82]

3. Different Types of NSR Requirements

The EPA's current (and proposed) approach applies regardless of the types of NSR requirements involved. That is, once an NSR permit has been issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, that NSR permit defines the NSR-related requirements of the SIP (or FIP) that are applicable to the construction of the new source or modification that was the subject of the permit. The terms of both major and minor NSR permits are applicable requirements that must be included in title V permits.[83] These permit conditions are not derived or created within or through the title V process. Thus, the title V permitting process should not be used to reevaluate the terms of such major NSR or minor NSR permits, including questions about (i) the content of the NSR permit (*e.g.,* whether the permit limits reflect BACT), (ii) whether additional requirements (*e.g.,* major NSR requirements) should have been applicable to the construction, and (iii) other types of NSR requirements (*e.g.,* whether the permitting authority correctly determined that the construction would not cause or contribute to a violation of the NAAQS).

This principle is perhaps most intuitive with respect to permit content. When a permitting authority authorizes construction by issuing either a major NSR permit or minor NSR permit, it establishes emission limits and other

[81] For additional information about how the EPA's approach to SIP-based NSR permits comports with the structure of the CAA and congressional intent, see sections IV.E.2. and IV.E.3. of this preamble.

[82] This is consistent with the existing regulatory definition of ''applicable requirement,'' which treats SIP-based and FIP-based requirements the same. *See* 40 CFR 70.2, 71.2 (definition of applicable requirement, items (1) and (2)).

[83] The EPA's existing regulations reflect this fact. The current definition of ''applicable requirement'' includes ''*Any* term or condition of *any* preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including Parts C or D, of the Act.'' 40 CFR 70.2 (emphasis added). This definition includes not only the specifically listed major NSR permits (required under parts C or D), but also minor NSR permits issued under a SIP. This language, included in the 1992 final rule, reflects a change from the language in the 1991 proposed rule, which only included major NSR permits. *See* 57 FR at 32276; 56 FR at 21768. Nonetheless, in order to provide maximum clarity to the public, the EPA proposes a small change to make the inclusion of minor NSR permit requirements more explicit. Note that not every single term of every single NSR permit is an ''applicable requirement'' that must be included in a title V permit. Some terms of NSR permits may no longer be applicable because, for example, they are obsolete or extraneous. *See White Paper for Streamlined Development of Part 70 Permit Applications,* 7–16 (July 10, 1995).

standards necessary to satisfy the SIP requirements relevant to either major or minor NSR. For example, PSD permits must include emission limits reflecting BACT; NNSR permits must include emission limits reflecting the Lowest Achievable Emissions Rate (LAER), and minor NSR permits may contain analogous requirements depending on the terms of the SIP. Although SIPs contain general criteria for establishing those limits, individual permit actions are necessary to specifically define the limits for each source subject to NSR. Once these limitations are established through the NSR permitting process, the title V process should not be used to re-evaluate whether the resulting limits reflect the general SIP requirements related to BACT, LAER, or other similar requirements.

Similar concepts apply to questions about NSR applicability. SIPs contain general criteria and thresholds for determining the applicability of different SIP requirements. However, determining which specific requirements apply to individual emission units requires a fact-specific permitting exercise. When a permitting authority authorizes construction by issuing either a minor NSR permit or major NSR permit, it decides which NSR-related SIP requirements are applicable to different aspects of the project on a pollutant-by-pollutant basis. The resulting NSR permit might include PSD requirements (*e.g.,* BACT) for some pollutants, NNSR requirements (*e.g.,* LAER) for other pollutants, and/or minor NSR requirements for yet other pollutants. In this manner, within a single NSR permit action, questions about the applicability of different NSR requirements may be inextricably linked with questions about the content of the NSR permit. Further, questions about NSR permit content and NSR applicability are fundamentally similar because both questions seek to answer whether permit limits are set at a level stringent enough to satisfy the relevant general SIP requirements, and both questions require a highly technical application of general SIP criteria to specific circumstances at the source.[84] Thus, once an NSR permit is issued, the limitations and other terms of that permit establish all relevant NSR-related requirements of the SIP (whether major or minor NSR) that apply to construction or modification of the source, and should be incorporated into the title V permit without further review.[85]

Permitting authorities satisfy other types of NSR requirements in a SIP when issuing NSR permits. One requirement that frequently arises in the context of title V petitions involves determining that the new source or modification will not cause or contribute to a violation of the NAAQS. Again, to satisfy this requirement, the state must undertake a fact-specific analysis through the NSR permitting process. This analysis may (but does not always) involve atmospheric dispersion modeling, and this may (but does not always) result in the imposition of additional permit terms that restrict emissions in order to protect the NAAQS.[86] In all cases, the NSR permitting process is designed to ensure that the NSR permit ultimately contains whatever specific conditions are necessary to satisfy this NSR SIP requirement. Similar principles hold true for a variety of other substantive NSR requirements in SIPs, including a variety of requirements that are unique to NNSR.

Overall, substantive issues concerning NSR permit content, NSR applicability, and other NSR requirements are fundamentally similar. Each of these decisions require a state to derive specific requirements for an individual source from general criteria in the NSR portion of the SIP (*e.g.,* requirements to include limits reflecting certain technology-based criteria, to issue major NSR permits to projects meeting certain applicability criteria, or to ensure that permits meet certain criteria relevant to the NAAQS). Each of these determinations involve relatively complex, fact-specific decisionmaking, which occurs during the NSR permitting process. Once that process concludes, the state issues an NSR permit that contains these source-specific applicable requirements of the SIP for the construction project being authorized. Thus, under the EPA's current (and proposed) approach, all types of different NSR-related issues are generally treated the same for purposes of title V review. The merit and validity of these substantive requirements are subject to review and correction through the available mechanisms for appeal of the NSR permit, and need not be further reviewed by a state permitting authority or the EPA through title V.

Note that compliance with procedural requirements associated with the issuance of NSR permits are also subject to review in appeals of NSR permits and are also not directly reviewable through title V. However, the latter is for reasons not directly related to the interpretation of ''applicable requirements'' at issue in this proposed rule. Under the statute and the EPA's existing regulations, the EPA can object to a title V permit that does not comply with ''applicable requirements'' of the CAA (as that term is defined in EPA regulations) or requirements of part 70, including procedural requirements of part 70. *See* 42 U.S.C. 7661d(b); 40 CFR 70.8(c)(1), 70.12(a)(2), (a)(2)(ii)–(iv). Notably, the EPA's authority to object under CAA section 505(b) only extends to the particular proposed title V permit before the agency for review.[87] Procedural requirements associated with NSR permit issuance are not ''applicable requirements'' for title V purposes because they do not ''apply to emissions units at a part 70 source.'' 40 CFR 70.2. Rather, they dictate the behavior of permitting authorities in issuing NSR permits. Procedural requirements associated with NSR permit issuance are also not part 70 requirements because they are not related to title V or the part 70 regulations governing the issuance of a specific title V permit. Thus, alleged violations of procedural requirements associated with NSR permit issuance generally would not provide an independent basis for the EPA to object to a title V permit that incorporates such an NSR permit.[88] Nonetheless, although procedural flaws with the issuance of an NSR permit would not provide a direct basis for the EPA to object to a title V permit, such procedural issues could impact whether other more substantive NSR issues should be reviewed through the title V process. See section IV.B.5.a. of this preamble for further information.

[84] For example, questions about whether (i) an emission limit that purports to satisfy BACT should instead be made more stringent in order to satisfy BACT are similar to questions about whether (ii) an emission limit that purports to satisfy minor NSR requirements should instead be made more stringent in order to satisfy BACT.

[85] See section IV.E.4.a. of this preamble for additional discussion about how the EPA's treatment of NSR applicability issues aligns with the EPA's treatment of other types of CAA applicability issues.

[86] In this manner, not all NSR-based SIP requirements related to the NAAQS result in the imposition of requirements that apply to emission units at a source. As discussed previously, only those requirements that ''apply to emissions units in a part 70 source'' qualify as ''applicable requirements'' for title V purposes. 40 CFR 70.2; *see* 40 CFR 71.2.

[87] The references within CAA section 505(b) to ''any permit,'' ''the proposed permit,'' ''a permit,'' ''the permit,'' etc. apply to the title V permit that a permitting authority proposes to issue and transmits to EPA under CAA section 505(a)(1). 42 U.S.C. 7661d(a), (b)(1), (b)(2); *see also* 40 CFR 70.8(c)(1), (d) (similar language and cross-references as the statute), 70.12(a)(1) (requirement that petitioners identify the specific title V permit action on which the petition is based), 70.12(a)(2) (petition claims must be based on alleged deficiencies in the ''permit process'' associated with the title V permit being petitioned).

[88] *See Century Aluminum Order* at 19–20.

4. Different Procedures for Incorporating NSR Permits Into Title V Permits

In most cases, the EPA's current (and proposed) approach applies in the same way regardless of the procedures by which a state permitting authority incorporates the terms of an NSR permit into a title V permit. In other words, as long as a permitting authority formally issues an identifiable NSR permit that has the force of law [89]—and regardless of whether the NSR and title V permits are issued sequentially, contemporaneously, or even in the same physical document—the unique title V oversight tools should not be used to review the NSR-related decisionmaking underlying that NSR permit.

The EPA's approach is most straightforward when an NSR permit is issued in final form prior to the initiation of any title V permitting action, or when an NSR permit has already been included in a previous version of a title V permit that is up for renewal. This is the default approach, as the EPA's regulations allow regulated entities subject to major NSR preconstruction permitting requirements to submit a title V permit application within 1 year after beginning operation, in most cases. 40 CFR 70.5(a)(1)(ii); 71.5(a)(1)(ii). Additionally, where new requirements become applicable to a source, including by virtue of a change to the source (*e.g.,* minor NSR requirements), the timeline for reopening a source's title V permit to include such requirements depends on the amount of time left in the title V permit; required revisions would either need to be completed within 18 months or at the next permit renewal. 40 CFR 70.7(f)(1)(i), 71.1(f)(1)(i). Regardless of the specific timing, it should be straightforward in these instances to simply incorporate the applicable requirements from the previously finalized NSR permit into the title V permit.

Not all NSR and title V permits are processed sequentially. Before discussing more streamlined permit issuance mechanisms, it is important to recognize that the NSR and title V permitting programs are based on distinct federal and state statutory and regulatory authorities and feature significant differences in both their substantive and procedural requirements. However, the two programs do feature some overlapping public participation requirements, including requirements for public notice, the opportunity for public comment, and the opportunity for judicial review. Accordingly, some state permitting authorities choose to streamline permit issuance by conducting one process that satisfies both sets of overlapping requirements. Based on the EPA's experience, the mechanisms that state permitting authorities use to streamline the permitting processes vary considerably across the nation. Different streamlining mechanisms have received various labels, including ''combined,'' ''merged,'' or ''unified'' permits.[90] This preamble addresses three of the more common forms of streamlining. For example, some permitting authorities streamline NSR and title V permit issuance by processing the two permits concurrently, subject to overlapping public participation opportunities.[91] There are two basic variations to this theme. First, the permitting authority could concurrently issue the NSR permit as a standalone document containing only NSR permit terms, and also issue a title V permit containing all existing title V permit terms as well as the new NSR permit terms. Or, second, the permitting authority could issue one permit document that contains both the NSR permit and title V permit conditions. Some permitting authorities employ a third mechanism, whereby the NSR permit is first issued with enhanced procedural and substantive requirements (based on title V requirements), and then the NSR permit requirements are subsequently incorporated into a title V permit through an administrative amendment process that does not require public participation.

The first approach—featuring separate NSR and title V permit documents issued at or around the same time—is undoubtedly the clearest of the various streamlining approaches. There can be no mistaking the fact that there are two legally distinct permit actions, and it is simple to identify which requirements are based on the NSR regulations (and thus not subject to additional review through title V).[92]

The second approach is also viable, provided the underlying authority for the NSR aspects of the permit document are readily ascertainable from the permit(s) and permit record(s). *See* 40 CFR 70.6(a)(1)(i). As explained in detail in several petition orders,[93] even where NSR and title V permit authorizations are contained within one permit document, such a permit action actually reflects two legally distinct permit actions by the state: (i) a preconstruction permit issued under the EPA-approved title I SIP regulations governing NSR, and (ii) an operating permit under EPA-approved part 70 regulations governing title V. Again, NSR permits and title V permits are based on differing statutory and regulatory schemes, and although the two programs feature similarities, they also feature important substantive and procedural differences. A permitting authority's decision to increase administrative efficiency by issuing a single permit document to satisfy the legal requirements of two distinct permitting programs does not alter the applicability of requirements associated with each respective program. For example, substantive requirements unique to NSR would not be applied to establish or evaluate non-NSR-based title V permit terms. Likewise, procedural requirements unique to title V (including the EPA's objection authority and public petition opportunity, among other things) would not be extended to review substantive elements of the permit action unique to the NSR permitting process. The EPA's objection authority, and the public's ability to petition EPA to object, are confined by the CAA to title V permits. *See* 42 U.S.C. 7661d(b). Combining the procedures by which a permitting authority issues NSR and title V permits does not alter this basic principle.

The EPA appreciates that the combined-permit approach has the potential to introduce more confusion about which types of issues can be raised through different public participation avenues. In general, provided the permitting authority complies with existing regulatory requirements, the EPA believes this

[89] Because it is the NSR permit that establishes the ''applicable requirements'' for title V purposes, the EPA has long explained that title V permits do not supersede title I permits—which must remain in effect to authorize construction and/or operations—even after the terms of a title I permit are incorporated into a title V permit. *See, e.g.,* 69 FR 10167, 10170 (Mar. 4, 2004); 66 FR 64039, 64040 (Dec. 11, 2001); Letter from John S. Seitz, EPA, to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, Encl. A at 4 (May 20, 1999).

[90] The EPA considers it more appropriate to refer to the results of such streamlining as a combined ''permit,'' as opposed to a combined ''program.'' This is because, although a single *permit* document may be used to satisfy both NSR and title V permitting requirements, the requirements of the NSR and title V *programs* are legally distinct. *See Riverview Order* at 25–26.

[91] This process is similar to another mechanism for permit streamlining (not directly implicated by this rulemaking), under which a permitting authority may consolidate two procedures associated with title V permit issuance: the public's review of a draft permit and the EPA's review of a proposed permit. *See* 40 CFR 70.8(a)(1)(ii).

[92] *See South Louisiana Methanol Order* at 9; *SSS/WP Order* at 14–15.

[93] *See Waelz Order* at 13–15; *Riverview Order* at 24–28; *Yuhuang II Order* at 7–8; *Big River Steel Order* at 11–12.

confusion can be minimized. First, the public could comment on all portions of a combined permit document during the comment period associated with the combined permit document. Similarly, all portions of a combined permit document could be challenged in a state court appeal of the final permit action.[94] Beyond that, the available mechanisms to challenge different permitting decisions would diverge. The EPA's 45-day review of the proposed permit, and the subsequent public petition opportunity, would apply only to title V-related aspects of the permit action. Likewise, unique oversight tools associated with title I permits (*e.g.,* the EPA's authority under CAA section 167 to order a stop in work) would only apply to title I-related aspects of the permit action.

Differentiating between NSR-based and title V-based permit terms in a combined permit should be straightforward, as all title V permits ''shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.'' 40 CFR 70.6(a)(1)(i).[95] Thus, any NSR-related terms should be readily distinguishable from any non-NSR-related terms (or any title V-related terms related to monitoring and compliance assurance). The substance of appropriately designated NSR-based permit terms should not be subject to additional scrutiny through the unique title V oversight tools.

Although the EPA's approach generally applies the same regardless of whether NSR and title V permits are sequentially or concurrently issued, there are important qualifications to this principle. Most notably, NSR permits must be finalized by the time the title V permit is finalized in order to establish the ''applicable requirements'' for title V purposes.[96] Moreover, it is critically important that concurrently issued permits (including combined permit documents) are clear as to the nature of, and the legal authority underlying, the permit actions reflected therein. This principle applies to the public notice announcing such permit action, other portions of the permit record available for public review, and the terms of the permit(s). *See, e.g.,* 40 CFR 70.7(h)(2), 70.7(a)(5), 70.6(a)(1)(i). Where NSR and title V permit documents have been merged to such an extent that it is impossible to legally distinguish the NSR permit action from the title V permit action, it may be necessary to use the title V process to review whether the NSR-related requirements of the SIP are included in the title V permit. The next subsection elaborates on these and other situations in which NSR issues would be subject to review through title V oversight tools.

A third process used by some permitting authorities is often described as ''enhanced NSR.'' The EPA's existing regulations allow requirements from an NSR permit issued with certain enhancements to be incorporated into a title V permit via administrative amendment procedures (instead of a significant modification or minor modification procedures, which would otherwise be required). To qualify for this type of streamlined processing, the NSR permit would need to be issued following ''procedural requirements substantially equivalent to the requirements of [40 CFR] 70.7 and 70.8 . . . that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in [40 CFR] 70.6.'' 40 CFR 70.7(d)(1)(v); *see* 71.7(d)(1)(v).

This third pathway has the potential to create confusion—and to conflict with the EPA's current (and proposed) approach—because the language quoted earlier may be read to mean that the EPA's objection authority and the public petition opportunity in 70.8(d) apply to the *issuance of the NSR permit.*[97] This result is problematic for multiple reasons. For one, the CAA only provides the EPA with authority to object to the issuance of title V permits, not NSR permits. Similarly, the statutory obligation for the EPA Administrator to respond to petitions under CAA section 505(b)(2) only applies to petitions on title V permits. 42 U.S.C. 7661d(b)(2). Moreover, even if the EPA were to object to the issuance of an NSR permit, the EPA generally lacks authority to enforce such objection, as the EPA cannot issue the NSR permit if the state does not resolve the EPA's objection. Again, the authority to do so only relates to title V permits. 42 U.S.C. 7661d(c). Further, the existence of this process creates more confusion about the scope of issues properly subject to review during the NSR permitting action than the other two streamlined pathways. This is because it may be more difficult to distinguish title I and title V components within a single ''enhanced NSR'' permit.[98] Based on the preamble of the EPA's 1992 title V rules, it appears that the EPA's original intention when promulgating this mechanism was to generally confine EPA's review to the title V-based components of the enhanced NSR permit (*i.e.,* the compliance requirements in 40 CFR 70.6).[99] However, contradictory positions taken by EPA in subsequent years has created confusion.[100]

Although this third pathway reflected the EPA's attempt to allow for the streamlining of NSR and title V permit procedures, it raises more issues than it solves, and ultimately it is not necessary. The other two streamlining mechanisms—concurrent issuance of NSR and title V permits either in separate documents or in a single combined permit document—cause fewer problems and provide more advantages. Specifically, concurrent issuance mechanisms are compatible with the EPA's current (and proposed) approach to the title I/title V interface, while the ''enhanced NSR'' mechanism appears to erroneously suggest that the EPA has authority to directly object to title I permits. Additionally, concurrent

[94] Provisions governing the right to appeal final title V permits in state court is provided by 42 U.S.C. 7661a(b)(6) and 40 CFR 70.4(b)(3)(x)–(xii). For a discussion of equivalent opportunities to challenge title I permits in state court, see section IV.C.2. of this preamble.

[95] This requirement is important in all situations where NSR permit terms (and permit terms derived from other CAA programs) are incorporated into a title V permit. However, it is especially important when NSR permit authorizations are issued within the same document as a title V permit in the first instance.

[96] Although the regulatory definition of ''applicable requirement'' includes ''requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates,'' 40 CFR 70.2, 71.2, this only covers future-effective requirements that have already been finalized at the time of title V permit issuance.

[97] The EPA observes that some permitting authorities have EPA-approved SIP and/or title V program rules that differ from the EPA's regulations in this respect. Specifically, some EPA-approved state rules reserve the EPA's objection authority and public petition opportunity until the title V permit is administratively amended. This arrangement features less potential for confusion and less conflict with the EPA's current (and proposed) approach. *See AK Steel Order* at 10–12.

[98] For similar reasons, this process could cause difficulties with respect to allocating title V permit fees consistent with 40 CFR 70.9.

[99] *See* 57 FR at 32289 (''The primary intent of these 'enhancements' of the NSR process is to allow the permitting authority to consolidate NSR and title V permit revision procedures. As stated in the May 10, 1991 proposal, it is not to second-guess the results of any State NSR determination. For example, if a State does provide for EPA's 45-day review in its NSR program, EPA would only be reviewing whether the State had conducted a BACT analysis, if applicable, and whether that analysis is faithfully incorporated in the title V permit. The EPA will not use its review period to object to or attempt to revise the State's BACT determination. Correspondingly, EPA's failure to object to the substance of the BACT determination will not limit any remedies EPA might-otherwise have under the Act to address a faulty BACT determination.'').

[100] *See, e.g., In the Matter of Alon USA, Bakersfield Refinery,* Order on Petition No. IX–2014–15 at 2–7 (Dec. 21, 2016).

issuance mechanisms allow permitting authorities to more clearly delineate the title I and title V permit actions, providing more clarity to the public about which issues may be challenged through different review pathways. Finally, concurrent issuance mechanisms are more efficient than the enhanced NSR mechanism, as permitting authorities need not take an additional, separate title V administrative amendment action after issuing an NSR permit.

For the foregoing reasons, the EPA proposes to remove from its regulations the provisions relating to enhanced NSR permitting and related title V administrative amendments. The EPA solicits comment on whether state permitting authorities should remove equivalent regulations from their EPA-approved program rules, although the EPA does not anticipate such actions will be necessary. Instead, it should be sufficient for permitting authorities to simply stop using this mechanism in a manner that purports to provide an EPA objection authority and public petition opportunity directly on an NSR permit. In any case, the EPA generally will not use its objection authority to address the substance of NSR permitting decisions made through this process.

The EPA specifically requests comments regarding additional mechanisms that permitting authorities use to streamline the issuance of NSR and title V permits. The EPA requests comments about how these differing approaches might impact, or be impacted by, the EPA's current (and proposed) approach.

5. Situations in Which the Title V Process Will Be Used To Review NSR Issues

There are certain situations in which the title V permitting process *is* the appropriate venue for addressing NSR permitting issues. This conclusion is supported by the same statutory and regulatory interpretations underlying situations in which the title V permitting process is *not* appropriate for addressing NSR permitting issues. In sum, as explained further in the following subsections, where applicable requirements are conclusively established under another CAA program, they are *not* substantively addressed through title V. Where applicable requirements are not conclusively established under another CAA program, they *are* substantively addressed through title V. Where the requirements of another CAA program and the requirements of title V feature substantive overlap, such areas of overlap *are* addressed through title V.

a. No Permit Issued Through a Title I Permitting Process With Public Notice and the Opportunity for Comment and Judicial Review

Under the EPA's current (and proposed) framework, title I permits issued with public notice and the opportunity for comment and judicial review conclusively establish NSR-related ''applicable requirements'' of the SIP (or FIP) for title V purposes. But if NSR permitting decisions are not developed through a formal process that involves public notice and the opportunity for comment and judicial review, the public and the EPA have no opportunity to provide input on, or appeal, whether the relevant NSR requirements were properly established. In this circumstance, it would be inappropriate to simply incorporate any such NSR requirements into a title V permit without further review. In other words, where NSR-related requirements are not established through a public title I permitting process with an opportunity for judicial review, the applicable requirements of the SIP (or FIP) relevant to the construction project at issue are not yet conclusively defined for title V purposes.[101] In such a situation, the title V process can and should be used to assure compliance with the relevant underlying NSR-related applicable requirements of the SIP (or FIP). This approach is similar to how the title V process is used to define the specific requirements necessary to assure compliance with general requirements of other CAA programs that are not definitively established through a separate rulemaking or permitting process, as discussed in section III.F. of this preamble.

The title V process can be used to review NSR issues in various situations, some of which the EPA has confronted in recent years. For example, the EPA has reviewed, and will continue to review, substantive NSR issues where no title I permit is issued to authorize the projects at issue.[102] The title V process can be used to ensure that any new or modified sources that do not obtain an NSR permit (sometimes called ''unpermitted projects'') comply with all relevant NSR-related requirements of the SIP (or FIP).

If a preconstruction permit is issued, but not issued under title I—that is, not issued under NSR permitting rules that have been approved by EPA and incorporated into the SIP or FIP—then such a permit would not establish the NSR requirements of the SIP (or FIP) that apply to an individual source. Issuance of a non-title I permit does not reflect a determination as to which of the NSR requirements in a SIP (or FIP) apply to construction and thus does not fulfill any NSR requirements in the SIP (or FIP). In this situation, it would thus be appropriate to use the title V permitting process to assess whether there are NSR requirements in the SIP (or FIP) that apply to a construction project covered by a non-title I permit. Moreover, it would be appropriate to use the title V permitting process to explore whether a preconstruction permit was issued under a title I-based authority, as opposed to a non-title I authority.[103]

The EPA has also reviewed, and will continue to review, substantive NSR issues where the underlying NSR permit was not issued following public notice and the opportunity for comment and judicial review.[104] As previously explained, this is because an NSR permit that is not issued following such procedures does not provide the title V

[101] As explained further in section IV.C.1. of this preamble, this view relates only to how an NSR permit is treated during the title V permitting process. It does not in any way affect the independent enforceability of the NSR permit itself.

[102] *See Suncor East Order* at 45–48, 54–55 (reviewing NSR issues where the state ''has not issued any title I NSR permits that would establish the NSR-related 'applicable requirements' of the SIP''); *SRP Agua Fria Order* at 11 n.18 (reviewing NSR applicability issues where no NSR permit had been issued); *SRP Desert Basin Order* at 12 n.20 (same); *BP Whiting II Order* at 13 n.24 (reviewing an NSR-related emission limit that was established in a title V, as opposed to an NSR, permit action). Additionally, within a portion of the EPA's 2017 *PacifiCorp-Hunter I Order* that was not challenged and not subject to the Tenth Circuit's partial vacatur, the EPA addressed the merits of a petition claim involving allegedly unpermitted modifications. *See PacifiCorp-Hunter I Order* at 26–31.

[103] For example, within a portion of the EPA's 2017 *PacifiCorp-Hunter I Order* that was not challenged and not subject to the Tenth Circuit's partial vacatur, the EPA addressed the merits of a petition claim involving a NSR permit that was allegedly not issued under EPA-approved SIP rules. *See PacifiCorp-Hunter I Order* at 24. Determining the authority underlying a preconstruction permit could also be relevant in other title V contexts. For example, states may issue preconstruction permits under state-only-enforceable laws (as opposed to federally-approved and federally-enforceable state laws, or federal laws). Such state-only permit requirements may be included in title V permits, but they must be labeled as ''state-only'' or ''not federally enforceable'' within a title V permit. 40 CFR 70.6(b)(2). Questions about the authority underlying such permits would therefore be relevant to determining whether 40 CFR 70.6(b)(2) was satisfied. *See, e.g., In the Matter of Phillips 66 Co., Borger Refinery,* Order on Petition No. VI–2017–16 at 8–10 (Sept. 22, 2021).

[104] *See Suncor East Order* at 48 (reviewing NSR-related issues where ''the current title V renewal proceeding is the first permit action in which these NSR issues have been subject either to public notice and comment or the opportunity for judicial review,'' among other reasons); *Coyote Station Order* at 12 (reviewing NSR-related issues ''where no public notice was provided of the underlying NSR permit action,'' among other reasons).

permit writer or public with sufficient assurance that the preconstruction permitting process has conclusively established the applicable NSR requirements of the SIP (or FIP) for that source for title V purposes. Thus, questions about the procedures used to issue NSR permits may be indirectly relevant to the EPA's review of title V permits or public petitions on title V petitions.[105] Specifically, such questions may inform whether it is appropriate to use the title V process to review the substance of that NSR permit in order to ensure that the title V permit reflects, and assures compliance with, all relevant NSR applicable requirements of the SIP (or FIP). It is important to recognize that procedural problems associated with the issuance of an NSR permit would simply present a basis for EPA to review the underlying NSR issues; such procedural problems would not present an independent basis for the EPA's objection to the title V permit.[106]

It is also important to recognize that, in proposing to add text to parts 70 and 71 referencing ''public notice and the opportunity for public comment and judicial review'' of NSR permits, this proposed rule would simply establish a precondition relevant to whether underlying NSR permits are insulated from, or subject to, additional review through title V. These proposed regulatory revisions will not impose any binding procedural requirements governing a permitting authority's issuance of NSR permits. Rather, such procedural requirements are found in the relevant statutory and regulatory authorities governing NSR, and the SIP regulations that implement them. *See, e.g.,* 42 U.S.C. 7475(a)(2); 40 CFR 51.161, 51.165(i), 51.166(q). Although the proposed additions to parts 70 and 71 use language similar to existing requirements in the NSR rules, this proposed rule does not seek to define those concepts in the context of NSR. Rather, outside of this title V proposed rule, the EPA is reviewing opportunities for public participation in minor NSR permitting.

For title V purposes, provided an NSR permit is issued following public notice, the opportunity to comment, and the opportunity for judicial review, the EPA will consider that NSR permit as establishing the relevant applicable requirements of the SIP with respect to the activities being permitted. Accordingly, the title V permitting process will not be used to second-guess the substance of those requirements. By codifying such criteria through the current proposed rule, the EPA's intent is not to create new requirements on NSR permitting, but rather to create an incentive for permitting authorities to offer robust opportunities for public involvement on NSR permit actions. In this manner, this proposed rule will 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.

b. Issues Involving Overlapping Title V and NSR Requirements

The EPA has reviewed (and will continue to review) issues involving an overlap of title V and NSR requirements. The most notable example involves using title V to evaluate the sufficiency of monitoring and related compliance assurance requirements associated with more substantive NSR permit requirements. As the EPA explained in one title V petition order:

> Unlike the BACT determination claims discussed above, claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a PSD permit), are properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains ''enforceable emission limitations and standards'' supported by ''monitoring . . . requirements to assure compliance with the permit terms and conditions,'' 42 U.S.C. 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit. Therefore, the EPA will address the merits of those portions of the Petition that challenge the enforceability of emission limits and the sufficiency of monitoring conditions in the Permit.[107]

The EPA has also considered (and will continue to consider) other issues involving an explicit overlap between NSR and title V. Examples addressed to date include situations where a state's SIP rules and part 70 program rules explicitly require consideration of NAAQS impacts in a title V permit proceeding;[108] where both SIP and part 70 rules require an evaluation of the scope of the ''stationary source'' or ''major source'' subject to permitting requirements;[109] and where SIP rules explicitly require consideration of adjustments to a PAL (a type of NSR permitting mechanism) in a title V renewal permit action.[110]

Notably, the EPA's consideration of NSR-related issues within these past actions did not involve reevaluating or second-guessing the content of applicable requirements established in NSR permitting actions. Instead, the EPA's consideration of those issues was based either on unique requirements of title V (*e.g.,* to add supplemental monitoring to the requirements in underlying applicable requirements) or on directives within the SIP itself, which effectively provided a mandate to further define applicable requirements of the SIP through the title V process (instead of the NSR process). Thus, the limited situations in which the EPA does use (and proposes to continue using) the title V process to address NSR-related issues is wholly consistent with the EPA's position that, in general, the title V process should not be used to second-guess or alter substantive applicable requirements that are established through a title I permitting process with public notice and the opportunity for comment and judicial review.

6. Summary of Proposed Regulatory Changes

In order to more clearly express the EPA's current approach to the interface between NSR permits and title V permits, the EPA proposes the following amendments to the EPA's regulations.

The EPA proposes to update paragraphs (1) and (2) of the definition of ''applicable requirement'' in 40 CFR 70.2 and 71.2. Paragraph (1) addresses SIP (and FIP) requirements more generally. This rule would add text to paragraph (1) to clarify that, for purposes of title V, where an NSR permit is issued under an EPA-approved or EPA-promulgated title I program (*i.e.,* SIP or FIP), with public notice and the opportunity for comment and judicial review, then the terms and conditions of that preconstruction permit define the NSR-related applicable requirements of the SIP or FIP that apply to the activities

[105] To the extent the public raises procedural issues related to NSR permit issuance in a title V petition, petitioners have the burden to demonstrate that the correct process was not followed, similar to all other title V petition issues. 42 U.S.C. 7661d(b)(2); *see* 40 CFR 70.12(a)(2).

[106] As explained in section IV.B.3. of this preamble, procedural requirements associated with NSR permit issuance are neither ''applicable requirements'' for title V purposes (because they do not apply to emission units at a part 70 source), nor are they part 70 requirements (because they are not related to the issuance of a specific title V permit).

[107] *South Louisiana Methanol Order* at 10–11; *see Gulf Coast Growth Ventures Order* at 17–19; *ExxonMobil Baytown Chemical Order* at 20–21; *Yuhuang II Order* at 8; *see also, e.g., Big River Steel Order* at 17, 17 n.30, 19 n.32, 20; *PacifiCorp-Hunter I Order* at 16, 17, 18, 18 n.33, 19.

[108] *Suncor East Order* at 53–54.

[109] *Coyote Station Order* at 12–13.

[110] *ExxonMobil Baytown Chemical Order* at 13–14.

authorized by such a preconstruction permit.

This rule would also add text to paragraph (2) to clarify that, for purposes of title V, the relevant terms and conditions of all types of NSR permits issued under a SIP or FIP—including minor NSR permits—are applicable requirements that must be included in a title V permit, regardless of whether the procedures referenced in paragraph (1) are followed.

The EPA also proposes to remove the provisions in 40 CFR 70.7(d)(1)(v), 70.7(d)(4), 71.7(d)(1)(v), and 71.7(d)(4) that relate to the ''enhanced NSR'' and title V administrative amendment procedures, as discussed in section IV.B.4. of this preamble.

The EPA does not believe any additional changes to the regulations are necessary. However, the EPA requests comments on other changes to the regulatory text that would be necessary to fully effectuate the EPA's proposed approach.

C. Interaction With NSR Permitting, Oversight, and Enforcement

Although this rulemaking addresses the intersection of the NSR and title V permitting programs, the EPA's proposed approach only directly affects implementation of the title V permitting program. More specifically, this rulemaking only affects the extent to which the title V permitting process will be used to assess whether issuance of an NSR permit complies with the NSR-related requirements of a SIP (or FIP). Thus, as explained in the following paragraphs, the EPA's proposed approach for limiting review of NSR permitting decisions through the title V process does not affect the independent validity or enforceability of NSR permit terms or the SIP (or FIP) requirements upon which they are based.

1. No Impact on the Independent Validity or Enforceability of NSR Permits

As discussed throughout this preamble, where an NSR permit is issued following public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish the NSR-related applicable requirements of the SIP (or FIP) for title V purposes. Although these permit terms should generally be incorporated into the title V permit without further substantive review, an EPA decision not to conduct that review in the title V process does not mean that the EPA agrees that the state action complies with NSR requirements. It merely indicates that a title V permit is not the appropriate venue to correct any deficiencies in the NSR permit. Thus, even if EPA might find an error upon reviewing a preconstruction permitting decision made by the permitting authority, for purposes of the title V operating permit, the terms of the NSR permit should be incorporated into the title V operating permit until such time that there is a final action to revise, reopen, suspend, revoke, reissue, terminate, or invalidate the preconstruction permit, such as a court order in a state court appeal or through an enforcement action.[111]

By the same token, if an NSR permit is *not* issued through a process that included public notice and the opportunity for comment and judicial review, this proposed rule would not address whether such a permit is valid or enforceable in its own right. Rather, this proposed rule would only affect how such a permit is treated through title V. The terms of such a permit would still need to be included in the title V permit under item (2) of the EPA's regulatory definition of ''applicable requirement.'' However, any such permit terms (and underlying permit decisions) would not be sufficient to conclusively define the NSR-related ''applicable requirements'' of the SIP under item (1) of the EPA's regulatory definition. Therefore, questions about the whether the NSR permit satisfied the requirements of the SIP *would* be subject to review through the title V process. But that is the only consequence insofar as this proposed rule is concerned. Any relevant requirements of the SIP would remain fully enforceable, and the independent enforceability of any NSR permit issued without an opportunity for comment and judicial review would be determined on the basis of those requirements.

2. Title I Oversight and Enforcement Authorities

Under the EPA's proposed approach for considering NSR permitting decisions through the title V permitting process, there are meaningful opportunities for the EPA and the public to review NSR preconstruction permitting decisions under title I of the CAA.[112] Congress provided various mechanisms for EPA and public oversight of NSR permitting decisions.

Specifically, Congress gave the EPA programmatic oversight authority under title I to disapprove state NSR permitting programs and call for revisions to those programs if the state's program does not satisfy federal statutory and regulatory authorities governing NSR. 42 U.S.C. 7410(a)(2)(C), 7410(k)(5). Further, if a state fails to properly implement its NSR program, the EPA can take additional actions. 42 U.S.C 7413(a)(2), (a)(5).

In terms of reviewing individual title I permits, each SIP must provide for public notice and an opportunity for comment on proposed NSR permits in its preconstruction permit program. 42 U.S.C. 7475(a)(2); 40 CFR 51.161, 51.165(i), 51.166(q). The EPA may provide feedback on state-issued NSR permits through this process.[113] Inherent in this title I permitting scheme—and reflected in the congressional record for the 1977 CAA Amendments—is the understanding that the adequacy of state NSR permitting decisions would be subject to review in state administrative and judicial forums.[114]

Congress also provided EPA and the public with various enforcement mechanisms to address non-compliance with title I permitting requirements on a facility-by-facility basis. The EPA possesses the authority to issue

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[111] As explained previously, this approach is analogous to how the EPA treats potential defects in other types of applicable requirements, including (non-NSR) requirements of the SIP. For instance, even when the EPA has made a determination that a provision of the SIP is not in compliance with the Act, the EPA will not object to a permit that includes that provision until there is final action to remove it from the SIP. *See, e.g., Piedmont Green Power Order* at 28–29. EPA's lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it complies with the Act or applicable regulations; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the SIP.

[112] If anything, this action has the potential to increase the availability of certain enforcement opportunities, as discussed in Section IV.C.4. of this preamble.

[113] Title I of the CAA specifically contemplates that the ''interested persons'' who may comment on state-issued PSD permits include ''representatives of the Administrator.'' 42 U.S.C. 7475(a)(2).

[114] ''In order to challenge the legality of a permit which a State has actually issued . . . a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court.'' Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-Section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 3892 (1977). Note that the U.S. Supreme Court has also acknowledged the primacy of state courts to adjudicate disputes over NSR permit terms. *See Alaska Dep't of Env't Conservation* v. *EPA,* 540 U.S. 461, 490 n.14 (2004); *see also id.* at 491–94 (addressing the relationship between state court review of NSR permits and federal oversight tools related to NSR permits). The EPA has expressed similar views when approving individual NSR SIPs. *See, e,g.,* 77 FR 65305, 65306 (Oct. 26, 2012) (The EPA ''interpret[s] the CAA to require an opportunity for judicial review of a decision to grant or deny a PSD permit, whether issued by EPA or by a State under a SIP-approved or delegated PSD program.'').

injunctive orders to halt construction. 42 U.S.C. 7413(a)(5)(A), 7477. The EPA may also pursue various types of civil or criminal enforcement actions pursuant to sections 113 and 167 of the Act. 42 U.S.C. 7413, 7477. Under title III of the CAA, Congress also provided authority for citizens to bring enforcement actions seeking civil penalties and injunctive relief against a source that has violated certain NSR requirements. *Id.* 7604(a)(1), (a)(3). These enforcement-based tools can be used to address situations where a source failed to obtain a required major NSR permit (even if it obtained a minor source permit). *See e.g., U.S.* v. *S. Ind. Gas & Elec. Co.,* No. IP99–1692–CM/F, 2002 WL 1760699, at *3–5 (S.D. Ind. July 26, 2002); *United States* v. *Ford Motor Co.,* 736 F. Supp. 1539, 1550 (W.D. Mo. 1990). They can also be used to ensure that decisions made in establishing the terms of a major NSR permit, such as BACT limits, were made on reasonable grounds properly supported by the record. *See, e.g., Alaska Dep't of Env't Conservation* v. *EPA,* 540 U.S. 461 (2004) (affirming application of section 167 of the CAA in this context).

3. Title V Permit Shields

The incorporation of the terms and conditions of an NSR permit into a title V permit does not, by itself, diminish the ability of the EPA or citizens to enforce preconstruction permitting requirements. However, enforcement could be affected by a title V ''permit shield'' imposed under CAA section 504(f) and 40 CFR 70.6(f) and 71.6(f). A permit shield, if part of an approved title V program and expressly included in a title V permit,[115] may provide a sufficient defense from enforcement actions under certain circumstances. This proposed rule does not change the agency's interpretation or enlarge the scope of a permit shield.

There are two types of permit shields under title V. The first, default permit shield states that compliance with the title V permit ''shall be deemed compliance with'' title V. 42 U.S.C. 7661c(f). Where a facility is entitled only to this default permit shield, requirements of the CAA outside of title V (including NSR requirements) are still independently enforceable against the facility.

A permitting authority may go further to provide a facility with a second, more expansive type of permit shield. This more expansive permit shield has two prongs. Under the first prong of an expanded permit shield, a permitting authority can provide that compliance with the title V permit ''shall be deemed compliance with other [non-title V] applicable provisions,'' but only if ''the permit includes the applicable requirements of such provisions.'' 42 U.S.C. 7661c(f)(1); *see* 40 CFR 70.6(f)(1)(i). Where a title V permit includes this type of permit shield and also incorporates the terms of an NSR permit, the permit shield would provide that compliance with the title V permit would be deemed compliance with the specific applicable requirements reflected in the NSR permit. However, compliance with such a title V permit would *not* be deemed compliance with any other requirements that are not contained in the NSR permit. For example, if a source obtained a minor NSR permit for a project and the title V permit included this type of permit shield, compliance with the title V permit would not preclude an enforcement action alleging a violation of title I of the Act for failure to obtain a major NSR permit.

Under the second prong of an expanded permit shield, a permitting authority can only provide a shield from requirements it has expressly determined to be non-applicable. The statute and regulations say this shield is available if the state, ''in acting on the [title V] permit application[,] makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.'' 42 U.S.C. 7661c(f)(2); *see* 40 CFR 70.6(f)(1)(ii). In other words, this type of permit shield requires that the permitting authority make a written non-applicability determination during the title V permitting process and memorialize this determination within the title V permit record.

Further, if a permitting authority chooses to include a title V permit shield that expressly covers NSR requirements that either are, or are not, applicable to a particular construction project, that decision would be based on title V authority and part of the title V permit action. As such, the NSR requirements covered by the title V permit shield would be subject to review and oversight through title V, including being subject to the EPA's objection authority and the public petition opportunity. The availability of these title V oversight tools is important because an express title V permit shield effectively precludes enforcement through the federal court system under CAA sections 113 or 304. By including an express permit shield through title V, that enforcement-based oversight tool is replaced by oversight through the title V permitting process, which provides an alternative pathway to the federal courts.[116]

4. Other Enforcement Considerations

As one federal Court of Appeals explained: ''Title V itself reserves the EPA's ability to bring an enforcement action for violations of the CAA unless an express 'shield' on the face of the permit bars that action. This provision would hardly be necessary if the EPA was supposed to resolve all alleged violations of the CAA in the permitting process.'' *Citizens Against Ruining the Environment* v. *EPA,* 535 F. 3d 670, 678 (7th Cir. 2008) (quoting 42 U.S.C. 7661c(f)). However, other circuit courts have barred enforcement actions that they viewed as impermissible collateral attacks on permits.[117] In these cases, the courts' decisions were premised upon the notion that the EPA would assess the substantive validity or applicability of certain CAA requirements (including NSR requirements [118]) through the title V petition process, and that the EPA Administrator's decision in response to a title V petition could be challenged in federal court. Based on that premise, these courts decided that the jurisdictional bar in CAA section 307(b)(2) against ''[a]ctions of the Administrator with respect to which review could have been obtained'' applies to bar enforcement of these the substantive requirements underlying those enforcement actions. 42 U.S.C. 7607(b)(2). These decisions, however, did not identify statutory or regulatory text to support this premise; they may have been implicitly based on EPA practice from 1997 to 2017.

In light of the EPA's position since 2017 with respect to certain NSR permits, the premise underlying those cases no longer applies. Based on the interpretation of the title V provisions discussed in this proposal, the EPA's view is that the title V process does not operate to bar enforcement of the NSR permitting requirements on the basis of

[115] ''A part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.'' 40 CFR 70.6(f)(2).

[116] Specifically, if the EPA does not object to a title V permit on its own volition, and subsequently denies a petition requesting that the EPA object to the permit, such denial may be appealed to the relevant U.S. Court of Appeals. 42 U.S.C. 7661d(b)(2), 7607(b)(1).

[117] *See Nucor Steel-Arkansas* v. *Big River Steel, LLC,* 825 F.3d 444 (8th Cir. 2016); *EPA* v. *EME Homer City Generation, LP,* 727 F.3d 274 (3rd Cir. 2013); *Sierra Club* v. *Otter Tail Power Co.,* 615 F.3d 1008 (8th Cir. 2010); *Romoland School Dist.* v. *Inland Empire Energy Center, LLC,* 548 F.3d 738 (9th Cir. 2008).

[118] *See Nucor,* 825 F.3d at 452–53; *Romoland,* 548 F.3d at 754–56.

section 307(b)(2). This proposed rule will codify the EPA's current view that certain NSR issues are *not* subject to review through title V processes, including the petition process. Because the EPA Administrator will not consider or take any action concerning the substantive validity of these NSR permitting decisions through title V, there is no opportunity for federal judicial review of these issues through title V, and therefore the statutory bar in CAA section 307(b)(2) simply does not apply. Therefore, enforcement of certain NSR-related requirements in the district court should no longer be viewed as a collateral attack on an Administrator's action (or lack thereof) through title V for which review could have been obtained in an appellate court. At least one court that considered this issue since the EPA revised its interpretation in 2017 has declined to impose such a jurisdictional bar.[119]

D. Impacts of Proposed Action

This proposed rule is primarily procedural in nature and does not impose any specific or direct requirements on any potentially affected stakeholders. Additionally, given that this proposed rule seeks to codify the EPA's existing policies and interpretations that have been in place since 2017, most of these effects will not arise from this regulatory action itself. The following paragraphs summarize the anticipated indirect impacts of EPA's current and proposed approach.

1. Impacts on the EPA

This action most directly affects the EPA itself, and specifically the EPA's actions in overseeing both the title V and NSR permitting programs. This action will codify the EPA's current framework regarding the scope of issues that EPA will—and will not—review through unique title V permitting mechanisms, including the EPA's 45-day review of title V permits and the EPA's responses to citizen petitions challenging title V permits. Reflecting this existing approach more directly in regulations will provide consistency across the country and ensure that the EPA's permitting oversight resources are most effectively focused on the issues where such oversight can achieve the greatest results. For example, by not reviewing complex NSR issues through its title V oversight tools, the EPA can prioritize using those tools to ensure that title V permits assure compliance with substantive requirements established in other CAA programs, such as by requiring additional monitoring, recordkeeping, and reporting when necessary. This action further emphasizes the EPA's commitment to using its existing title I oversight tools to address title I permitting issues. As discussed in section IV.E.4.b. of this preamble, those title I oversight tools are more effective means of addressing title I issues than the EPA's title V oversight tools.

2. Impacts on State, Local, and Tribal Permitting Authorities

This rule may also impact state, local, and Tribal permitting authorities that issue title V and/or NSR permits. From the EPA's experience, it appears that many, if not most, permitting authorities already implement their title V and NSR programs in a manner consistent with the EPA's current (and proposed) approach. That is, these permitting authorities do not use the title V permitting process to revisit NSR permitting decisions that they themselves previously made. For permitting authorities that have not been implementing the EPA's current approach, this action is expected to decrease administrative burdens. Permitting authorities should generally only have to address NSR-related permitting issues once: during the NSR permitting process.

The EPA does not expect it will be necessary for most permitting authorities to revise their regulations or to submit revised part 70 regulations or SIP regulations for EPA approval as a result of this proposed rule. The EPA views its existing part 70 and part 71 regulations—and, by extension, the equivalent regulations in EPA-approved state rules—to be consistent with the EPA's existing (and proposed) approach. This proposed rule is intended to make EPA's regulations clearer. Nonetheless, permitting authorities that desire the greater certainty associated with the rule revisions proposed in this action are welcome to make changes to their regulations similar to those the EPA is proposing.[120] The EPA specifically solicits comments from permitting authorities about their ability (or inability) to implement the EPA's proposed approach without changes to their EPA-approved part 70 program rules.

The current proposed rule does not itself mandate any requirements governing the issuance of NSR permits. However, permitting authorities may choose to change some of their NSR permitting practices in order to realize benefits in their permitting programs. For example, in order to ensure that the EPA will not use its title V oversight tools to revisit a permitting authority's NSR permitting decisions, permitting authorities may increase the amount of public participation opportunities offered on minor NSR permit actions. The EPA strongly encourages permitting authorities to provide for robust and meaningful public participation opportunities on NSR permitting actions, consistent with existing statutory and regulatory requirements and EPA guidance.

Permitting authorities that currently process NSR and title permit actions through streamlined processes should consider the best way to achieve their administrative efficiency goals while maintaining the maximum amount of clarity regarding the distinctions between title I and title V permit actions. In particular, the EPA strongly encourages permitting authorities that currently employ an ''enhanced NSR'' framework to stop using such procedures and instead consider other mechanisms for streamlining. See section IV.B.4. of this preamble for additional information about how different streamlined permit issuance procedures impact the EPA's review of NSR issues through its title V authorities.

3. Impacts on Regulated Entities

As far as regulated entities are concerned, the approach described in this action increases certainty in final preconstruction permitting decisions. The additional regulatory text that EPA proposes to codify in this rulemaking should further increase such certainty. In order to take advantage of this increased certainty, the EPA expects that sources subject to both title V and NSR permitting programs will have an

[119] *See Sierra Club* v. *Entergy Arkansas LLC,* 503 F.Supp.3d 821, 847–48 (2020) (''In addition, plaintiffs maintain that the EPA's interpretation of statutory language such that it will no longer oversee state Title I permit decisions through Title V petitions provides an additional basis upon which the Court should decline to find and impose an exhaustion requirement. The Court has examined the allegations in the amended complaint and the briefing with respect to the specific provisions of the CAA under which plaintiffs bring claims and the alleged requirements for bringing those claims in federal court. The Court is satisfied at this stage of the litigation that the Court has subject matter jurisdiction over plaintiffs' claims in their amended complaint.'').

[120] For example, states within the Tenth Circuit's jurisdiction may currently have language that matches the language in the EPA's regulation that the court considered in *Sierra Club* v. *EPA,* 964 F.3d 882 (10th Cir. 2020). Once the EPA revises its own regulations, this should provide those states the certainty that the EPA will not use the title V process to address NSR issues, even within this jurisdiction. However, such states may wish to consider the extent to which the Tenth Circuit's reading of the same language affects their state law obligations with respect to the title V and NSR permitting interface.

incentive to work with their permitting authorities to ensure that all relevant NSR permit actions are subject to robust and meaningful public participation opportunities.

4. Impacts on the Public

The EPA expects that the public at large, including communities impacted by pollution from facilities regulated under the title V and NSR programs, will benefit from the increased clarity provided in this rulemaking, as well as from more effective engagement in NSR permitting decisions. A central focus of this effort is to more clearly define the most appropriate and effective routes for the public to participate in—and, if necessary, challenge—different types of CAA permitting decisions. In this manner, this rule does not limit meaningful public participation, but rather encourages *more* meaningful public participation by directing the public to the pathways that can be used to most effectively provide oversight over different types of permits.

This rule will allow the public, permitting authorities, and the EPA to focus their title V-based efforts on issues that can be more fully and effectively addressed through title V, such as supplementing monitoring when necessary to assure compliance with underlying applicable requirements.

As explained in section IV.E.4.b. of this preamble, the title V permitting process has proven a generally ineffective mechanism to address deficiencies in NSR permitting actions. The available title I permitting and title III enforcement mechanisms are better tools for the public to utilize in addressing issues with NSR permitting decisions. The EPA's pre-2017 policies that ostensibly allowed the public to challenge NSR permit decisions through the title V process created a misleading incentive for the public to forego those more appropriate and effective title I appeal mechanisms. This process often resulted in the public investing considerable resources in pursuing title V-based challenges, which had limited effect on the permit terms at issue. As this proposed rule makes clear, the public's attention and resources would be more effectively deployed in challenges to NSR permits through the appropriate title I permitting and title III enforcement channels.

Additionally, the public should benefit from the incentives that this rule will create for states and regulated entities to ensure that relevant NSR permit actions involve public notice and the opportunity for comment and judicial review. These incentives will complement the related (but separate) actions that the EPA is considering with respect to minor NSR programs. Collectively, these actions should encourage increased public participation in the NSR permitting process.

To the extent that the public is deprived of meaningful opportunities to address NSR permit deficiencies, the title V permitting process should serve as a backstop so that the public (and the EPA) have the ability to ensure that title V permits contain the necessary NSR-related requirements.

The EPA solicits comment on examples of past situations (not hypothetical) where the EPA's objection to a title V permit helped address NSR-related issues that the public either did, or did not, have a chance to address through the NSR permitting process.

E. Rationale for Proposed Action

As explained in the following subsections, title V of the CAA does not compel the EPA or state permitting authorities to use the title V operating permit process to review the substance of decisions made during the title I (NSR) preconstruction permitting process. The statute requires that title V permits assure compliance with ''applicable requirements'' of the CAA, but the statute does not define this term or expressly require that permitting authorities revisit NSR permitting decisions. The EPA interprets the statute to mean that the terms and conditions of a NSR permit issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, define the relevant NSR-related applicable requirements of the SIP (or FIP) for purposes of title V permitting.

The EPA's interpretation is supported by the structure and purpose of title V. Congress designed title V to consolidate, assure compliance with, and improve the enforceability of applicable requirements established under other CAA programs. The title V program was not intended to create new substantive requirements or modify substantive requirements added in those other programs (other than to include supplemental compliance assurance measures, when necessary). This understanding of the purpose of title V—both in general and as it relates to the intersection of title V and NSR permitting—is reflected in the statute and regulations, the legislative history, EPA statements contemporaneous with the promulgation of the initial title V regulations, and various federal court decisions and EPA statements since that time.

The EPA's interpretation is also consistent with the structure of the CAA as a whole. The EPA's current (and proposed) approach gives weight to the title I mechanisms that Congress provided to establish the specific NSR-related requirements of SIPs, as well as the title I and title III procedures for evaluating, challenging, and enforcing title I permitting requirements. It also respects the system of cooperative federalism reflected in the NSR and title V permitting programs.

The EPA's current (and proposed) approach also reflects better policy than alternative interpretations because it: ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting; better accounts for procedural, resource-related, and practical limitations associated with title V oversight tools; incentivizes the use of robust title I avenues of review; and respects the finality of NSR permitting decisions.

1. Statutory Text and Interpretation

The text of title V alone does not conclusively define the scope of issues subject to review (or re-review) during the title V permitting process. In relevant part, the CAA requires that title V permits ''include enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of [the CAA], including the requirements of the applicable implementation plan,'' *i.e.,* the SIP or FIP. 42 U.S.C. 7661c(a). Similarly, if the EPA determines that a title V permit is ''not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan,'' the EPA must object, and if the EPA does not, any person may petition the EPA to do so. 42 U.S.C. 7661d(b)(1)–(2).[121]

[121] Similar requirements appear in other parts of title V. For example: ''The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.'' 42 U.S.C. 7661(3). ''Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.'' 42 U.S.C. 7661a(a). Permitting authorities ''have adequate authority to . . . issue permits and assure compliance . . . with each applicable standard, regulation, or requirement under this chapter.'' 42 U.S.C. 7661a(b)(5). The regulations to implement the program shall include a ''requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter.'' 42 U.S.C. 7661b(b). However, like section 504, these sections do not specify the scope of the term ''applicable requirements'' or how the permitting

However, the term ''applicable requirements'' is not defined in the Act, and the statute does not otherwise specify how to determine the applicable requirements of the CAA or the SIP (or FIP) for a particular source.

With respect to title I preconstruction permits, the statutory term ''applicable requirements'' is particularly ambiguous. As explained further in section IV.E.3.a. of this preamble, during the preconstruction permitting process, permitting authorities determine which NSR requirements in the SIP (or FIP) are applicable (*e.g.,* major NSR or minor NSR requirements) to new or modified sources, and derive the specific permit conditions (*e.g.,* emission limitations and other standards) applicable to a given source or modification based on the general direction in the SIP. The public has the opportunity to provide comment on draft permits and also to seek review in state court. At the end of this NSR permitting process, the NSR permit terms reflect the NSR-related requirements of the SIP (or FIP) applicable to the new or modified source.

The question, then, is whether the title V permitting process should be used to double-check—and re-check during every subsequent title V renewal permit—the substantive adequacy of applicable requirements established through NSR permitting decisions. In other words, the question is whether title V should be used to assess whether the requirements embodied in an NSR permit were properly derived from the general, overarching SIP (or FIP) provisions governing NSR.

Title V of the CAA contains no language expressly mandating such a re-evaluation through title V. Notably, the Fifth Circuit found the CAA's silence on this topic a persuasive reason for upholding the EPA interpretation that is the basis for this proposed rule. *Env't Integrity Project,* 960 F.3d at 248–49.[122] The statute's silence on this topic stands in contrast to the presence of more specific statutory mandates, such as the requirement that title V permits be used to add compliance assurance measures like monitoring, recordkeeping, and reporting requirements. 42 U.S.C. 7661c(c); *see* 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d at 680.

Moreover, the CAA's references to ''applicable requirements'' do not compel such a re-evaluation. Notably, the Fifth Circuit rejected the notion that this general term should be construed as ''broad and sweeping,'' or that this term should be read to mandate using title V to review of whether requirements in an NSR permit accurately reflect the requirements of a SIP. *See Env't Integrity Project,* 960 F.3d at 249–250 (''[Petitioners] would effectively rewrite the clause to read: 'a de novo reconsideration of the source's preconstruction permitting.' Surely, Congress would not have hidden that regulatory elephant in this residual mousehole.'').

In light of the statute's ambiguity, the EPA has adopted an interpretation of the statutory terms ''applicable requirements'' and ''requirements of the applicable implementation plan.'' [123] The EPA's interpretation is that the terms and conditions of an NSR permit issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, define the relevant set of ''applicable requirements'' for purposes of title V permitting. That is, the ''requirements of an applicable implementation plan'' relevant to a particular construction project are the requirements that the permitting authority determined to be applicable during the NSR permitting process, as reflected in the terms of such an NSR permit. Not only is this interpretation consistent with the statutory text, but the EPA also considers this to be the best interpretation in light of the structure and purpose of title V, the structure of the CAA as a whole, and other policy reasons, as explained in the following subsections of this preamble.

2. Structure and Purpose of Title V

The EPA's interpretation of ''applicable requirements'' in the context of title V and NSR permitting is supported by the structure and purpose of the title V program—namely, to consolidate, assure compliance with, and improve the enforceability of applicable requirements established under other CAA programs. The title V program was not intended to establish new substantive requirements or modify substantive requirements created in other programs (other than to include supplemental compliance assurance measures, when necessary). This purpose is reflected in the statute and regulations, the legislative history associated with Congress's enactment of title V, EPA statements contemporaneous with the promulgation of the initial title V regulations, and various federal court decisions and EPA statements since that time.

As introduced in section III.B. of this preamble, a core purpose and function of title V is to identify, consolidate, and assure compliance with the requirements applicable to individual sources from other, more substantive CAA programs. This function is embodied primarily within CAA section 504 and 40 CFR 70.6(a) and (c), which generally require that title V permits include conditions that assure an individual source's compliance with all CAA applicable requirements.

When Congress enacted title V in 1990, it explained this purpose as follows:

> The first benefit of the title V permit program is that . . . it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations . . . are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations. . . . The air permit program will ensure that all of a source's obligations . . . will be contained in one permit document.

S. Rep. No. 101–228 at 347 (Dec. 20, 1989), *reprinted in* 5 Legislative History of the Clean Air Act Amendments of 1990 (CAA Legislative History) at 8687 (1998).[124]

In addition to identifying and consolidating existing requirements

authority or the EPA is to determine what the applicable requirements are for an individual source as part of its title V permit.

[122] Specifically, the court stated the following: ''We find persuasive EPA's position that Title V lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits. Our own review of Title V confirms that it contains no such explicit requirement, nor any language guiding the agency on how to perform a review of that nature. The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. A number of cases have identified the *casus omissus pro omisso habendus est* canon, under which a statute should not be read to include matter it does not include. Here, Title V does not tell EPA to reconsider [NSR] in the course of Title V permitting. We reject Petitioners' position because there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'' *Env't Integrity Project,* 960 F.3d at 248–49 (cleaned up) (citing *Lamie* v. *U.S. Tr.,* 540 U.S. 526, 538 (2004); *Iselin* v. *United States,* 270 U.S. 245, 251 (1926); *Yates* v. *Collier,* 868 F.3d 354, 369 (5th Cir. 2017); *In re Miller,* 570 F.3d 633, 638–39 (5th Cir. 2009)).

[123] This interpretation is reflected, in part, in the EPA's existing regulations. 40 CFR 70.2, 71.2. These existing regulations can be read to support the statutory interpretation explained in this preamble. However, in light of the Tenth Circuit's ruling (which held that the EPA's regulatory definition of ''applicable requirement'' precluded the EPA's approach), the EPA is proposing to amend the EPA's regulations to more clearly reflect the EPA's statutory interpretation. For further discussion of the EPA's interpretation of its existing regulations, see *Big River Steel Order* at 9–11.

[124] Other portions of the history of this legislation describe the purpose of title V in similar terms. *See, e.g.,* Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (Oct. 26, 1990), 6 CAA Legislative History at 10768 (1998).

applicable to a source, CAA section 504 provides the authority to use title V permits to establish additional requirements relating to compliance assurance. For example, it is well-established that title V permits may be used to create or supplement monitoring requirements when necessary to assure an individual source's compliance with underlying applicable requirements that do not themselves contain sufficient monitoring provisions.[125] This exception proves the rule; where Congress intended title V to serve as a vehicle for the reevaluation of existing requirements or for imposing new requirements, it expressly said so.

Beyond title V's consolidation and compliance assurance functions, it is axiomatic that title V generally does not impose new pollution control requirements on sources or provide a vehicle to modify such requirements established under other CAA programs. As stated in the congressional record:

> The permit provisions of title V provide a focus for this harmonization [of other titles of the CAA], although title V does not change, and gives EPA no authority to modify, the substantive provisions of these other titles. . . . [T]itle V does not change, and gives EPA no authority to modify, the substantive provisions of these other titles. . . . Title V creates no new substantive emission control requirements. Nothing in the permitting title should be read to increase the stringency of any control requirement nor to delay or accelerate the effectiveness of such requirements, except as expressly provided in titles I, III, and IV.
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> Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (Oct. 26, 1990), 6 CAA Legislative History at 10768 (1998).

Recognizing the core functions of the title V program, the EPA's regulations have provided since 1992: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While *title V does not impose substantive new requirements,* it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.'' 40 CFR 70.1(b) (emphasis added). These principles are further explained in EPA statements contemporaneous with the initial 1992 title V regulations,[126] subsequent rulemakings,[127] and in numerous orders responding to petitions challenging individual title V permits.[128] Likewise, federal courts across the nation have acknowledged and reiterated these general principles.[129]

Not only were these general principles well-established at the inception of the title V program, but both Congress and the EPA specifically spoke to the manner in which these general principles would guide the interaction between title V and title I permitting programs. For example, a Senate Report accompanying title V explained:

> New and modified major sources are already required to obtain construction permits under the [NSR] and [PSD] provisions of the current Act. *EPA should avoid imposing additional construction permit requirements under title V.* Thus, construction permits may continue to be issued under the existing provisions of the Act, but title V will apply with respect to existing source requirements not otherwise required in the construction permit, *e.g.,* fees.
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> S. Rep. No. 101–228 at 349, 5 CAA Legislative History at 8689 (emphasis added).[130] Thus, the legislative history articulates Congress's intent that, notwithstanding the enactment of title V, NSR permits would continue to be issued as they had for over a decade. Title V permits would be used to incorporate the requirements of NSR permits, but not to alter or impose additional NSR-related requirements.

As previously noted, in the 1991 and 1992 preambles to the EPA's initial title V rules, the agency announced a similar understanding of the intersection of title V and title I permitting. The EPA did not express an intention to use the title V permitting process to review the applicable requirements established in preconstruction permitting programs under title I of the CAA. To the contrary, the EPA stated: ''Any requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would

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[125] *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d 673, 674–45, 680 (D.C. Cir. 2008) (''Title V did more than require the compilation in a single document of existing applicable emission limits and monitoring requirements. It also mandated that '[e]ach permit issued under [Title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.' . . . [T]he Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.' '' (citations omitted)); *see also, e.g., In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant,* Order on Petition No. VI–2007–01 at 6–8 (May 28, 2009). This additional purpose is similarly reflected in the legislative history. *See, e.g.,* S. Rep. No. 101–228 at 347, 5 CAA Legislative History at 8687. Various compliance assurance requirements are included within title V and the EPA's implementing regulations; not all are restricted to monitoring. *See* 42 U.S.C. 7661c(a), (b), (c); 40 CFR 70.6(a)(1), (a)(3), (c), 71.6(a)(1), (a)(3), (c); *see also, e.g., In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East),* Order on Petition Nos. VIII–2022–13 & VIII–2022–14 at 13–17 (July 31, 2023).

[126] *See* 57 FR at 32251 (''While title V generally does not impose substantive new requirements, it does require that . . . certain procedural measures be followed, especially with respect to determining compliance with underlying applicable requirements. The program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act. . . . The title V permit program will enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements. Increased source accountability and better enforcement should result.''); *id.* at 32284 (''As discussed above, title V is primarily procedural, and is not generally intended to create any new substantive requirements. . . . The title V permit is intended to record in a single document the substantive requirements derived from elsewhere in the Act. Therefore, in most cases the only emissions limits contained in the permit will be emissions limits that are imposed to comply with the substantive requirements of the Act (including SIP requirements).'').

[127] *See* 81 FR 57822, 57826–27 (Aug. 24, 2016) (''For the most part, title V of the CAA does not impose new pollution control requirements on sources. The definition of 'applicable requirements' in the part 70 regulations includes many standards and requirements that are established through other CAA programs, such as standards and requirements under sections 111 and 112 of the Act, and terms and conditions of preconstruction permits issued under the New Source Review programs. 40 CFR 70.2. Once those air quality control requirements are established in those other programs, they are incorporated into a source's title V permits as appropriate. . . . [I]n providing an opportunity for harmonization through title V of the CAA, Congress did not replace or remove the procedures and requirements for establishing substantive requirements that exist in other provisions of the CAA.'').

[128] Hundreds of EPA petition orders include background discussion reiterating this core function of title V. Electronic copies of these orders are available on the EPA's public database, *https://www.epa.gov/title-v-operating-permits/title-v-petition-database.* To the extent individual petition orders contain particularly relevant discussion, they are discussed elsewhere in this preamble.

[129] *See, e.g., Utility Air Reg. Group* v. *EPA,* 573 U.S. 302, 309 (2014) (''Unlike the PSD program, Title V generally does not impose any substantive pollution-control requirements.''); *Env't Integrity Project,* 960 F. 3d at 250 (''By all accounts, Title V's purpose was to simplify and streamline sources' compliance with the Act's substantive requirements. Rather than subject sources to new substantive requirements—or new methods of reviewing old requirements—the intent of Title V was to consolidate into a single document (the operating permit) all of the clean air requirements applicable to a particular source of air pollution.'' (cleaned up)); *id.* at 244; *see also, e.g., U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 597 (D.C. Cir. 2016); *US* v. *EME Homer City Generation, LP,* 727 F. 3d 274, 280 (3rd Cir. 2013); *Sierra Club* v. *Johnson,* 541 F.3d 1257, 1260 (11th Cir. 2008); *Sierra Club* v. *Leavitt,* 368 F.3d 1300, 1302 (11th Cir. 2004); *Appalachian Power Co.* v. *EPA,* 208 F. 3d 1015, 1026–27 (D.C. Cir. 2000).

[130] Similarly, one lawmaker involved in the statute's enactment explained: ''In the past, some provisions of the Clean Air Act—for example, the nonattainment and PSD new source requirements—were, *and will continue to be,* implemented through preconstruction permits.'' Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (Oct. 26, 1990), 6 CAA Legislative History at 10768 (1998) (emphasis added).

incorporate these limits *without further review.*'' 56 FR 21712, 21738–39 (May 10, 1991) (emphasis added). Similarly, the EPA explained: ''The intent of title V is *not to second-guess* the results of *any* State NSR program.'' *Id.* at 21739 (emphasis added). Further, ''Decisions made under the NSR and/or PSD programs (*e.g.,* [BACT]) *define applicable SIP requirements* for the title V source and, if they are not otherwise changed, can be incorporated *without further review* into the operating permit for the source. The title V program is not intended to interfere in any way with the expeditious processing of new source permits.'' *Id.* at 21721 (emphasis added). The preamble to the final rule further confirms that ''[d]ecisions made under the NSR and/or PSD programs *define certain applicable SIP requirements* for the title V source.'' 57 FR at 32259 (emphasis added).

The EPA's contemporaneous interpretation of the statute (and the regulations implementing this statute), should be afforded great weight, as the Fifth Circuit acknowledged in *Env't Integrity Project,* 960 F.3d at 251 (''We also agree with EPA that the language in part 70's preamble is probative of Title V's purpose as a whole.'').[131] Although the EPA departed from this interpretation during the 2000s, the EPA's return to this interpretation reflects a better construction of the statute and congressional intent.[132] As the Fifth Circuit stated: ''We find persuasive EPA's view that, because Title V was not intended to add new substantive requirements to the Act, it should not be interpreted as Petitioners urge. . . . This goal, as EPA argues, is at cross-purposes with using the Title V process to reevaluate preconstruction permits.'' *Id.* at 250–51.

Other statutory provisions within title V further support the EPA's interpretation. In enacting title V, Congress directed the EPA to ''develop streamlined procedures in cases where the permit simply incorporates without changing[ ] existing requirements found in the SIP or in other provisions of the Act.'' S. Rep. No. 101–228 at 353, 5 CAA Legislative History at 8693. Reflecting this directive, title V requires state programs to have ''[a]dequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . . .'' 42 U.S.C. 7661a(b)(6). Requiring a permitting authority, or the EPA, to go back and review final permitting decisions that have already been subject to the safeguards of public notice and judicial review would frustrate the goal of ''expeditious review of permit actions.''

Similarly, Congress provided abbreviated timeframes for the EPA to review a proposed title V permit: 45 days for the EPA's independent review, and 60 days if confronted with a petition to object. 42 U.S.C. 7661d(b); *see* 40 CFR 70.8(c), (d). Based on ''the abbreviated timeline Congress gave EPA,'' the Fifth Circuit in *Env't Integrity Project* concluded ''that these timelines are inconsistent with an in-depth and searching review of every permitting decision regarding a given source.'' *Env't Integrity Project,* 960 F.3d at 251.[133] This point is compounded by the fact that title V permits must be renewed every 5 years. 42 U.S.C. 7661a(b)(5)(B), (b)(6); *see, e.g.,* 40 CFR 70.6(a)(2). As the Fifth Circuit stated, ''the fact that Title V permits must be renewed every 5 years tends to support the agency's view that Title V was not intended to serve as a vehicle for re-examining the underlying substance of preconstruction permits. Subjecting a source's preconstruction permit to periodic new scrutiny, without any changes to the source's pollution output, would be inconsistent with Title V's goal of giving sources more security in their ability to comply with the Act.'' *Env't Integrity Project,* 960 F.3d at 251–52.

In summary, neither the structure of title V nor the congressional record indicate that Congress intended the EPA to reevaluate and rewrite substantive title I preconstruction requirements through the title V process. Title V was enacted largely to identify and consolidate the variety of requirements applicable to each facility and assure compliance with these requirements through provisions like monitoring, recordkeeping, and reporting. Reexamining title I permits through title V would not help address either of these objectives. Moreover, congressional intent for efficiency would be undermined if permitting authorities were required to second-guess complex decisions reflected in state-issued title I permits during title V review, and then re-check these decisions during each subsequent title V renewal. Such a review would also be generally incompatible with the limited timeframes that Congress provided for EPA's review of title V permits. These considerations related to the structure and purpose of title V align with the EPA's interpretations of the statute from the early 1990s, as well as the opinions of federal courts.

All indications of congressional intent suggest that the EPA's role in oversight over the issuance of title V permits should be limited. In the case of preconstruction permitting requirements derived from title I of the Act, the purpose of title V is to ensure that the terms and conditions of the preconstruction permit are properly included as ''applicable requirements,'' and that the permit contains monitoring, recordkeeping, and reporting sufficient to assure compliance with those permit terms and conditions. *See* 42 U.S.C. 7661c(a), (c); 40 CFR 70.6(a)(1), (a)(3), 70.6(c)(1).

3. Structure of the CAA as a Whole

The EPA's interpretation of ''applicable requirements'' as that term relates to the interface of title I and title V permits is supported by the structure of the CAA as a whole. *See Utility Air Reg. Group* v. *EPA,* 573 U.S. 302, 320 (2014) (acknowledging the ''fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'' (internal citations and quotation marks omitted)). Specifically, the EPA's interpretation is consistent with the title I permitting mechanisms that Congress provided to establish and define the NSR-related requirements of SIPs; the title I and title III procedures for evaluating, challenging, and enforcing title I permitting requirements; and the overarching system of cooperative federalism reflected in the NSR and title V permitting programs.

[131] An agency's contemporaneous interpretation is often given great weight in understanding the meaning of a statute. *See e.g., Good Samaritan Hosp.* v. *Shalala,* 508 U.S. 402, 414 (1993) (''Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.' '' (quoting *FHA* v. *The Darlington, Inc.,* 358 U.S. 84, 90 (1958))).

[132] *See Env't Integrity Project,* 960 F.3d at 251 (''We recognize that EPA has reverted to its original interpretation of § 70.2, reflecting its changing views of Title V. We take the agency's change of position into account in determining whether to defer to its position. But even when 'the agency has embraced a variety of approaches' we may still defer to its present position, 'especially' when the current view 'closely fits the design of the statute as a whole.' '' (quoting *Shahala,* 508 U.S. at 417–18; additional citation omitted)).

[133] *See also Env't Integrity Project,* 960 F.3d at 253 (''Title I [includes] more detailed procedures for in-depth oversight of case-specific permitting decisions. Such permitting decisions follow state appeals or enforcement actions authorized by other provisions of the Act, including citizen suits under Title III. Those mechanisms are better structured to provide agency and citizen oversight of preconstruction permitting. . . . Title V contains none of the procedures that would guide those challenges, as Titles I and III do. . . . And those avenues provide more time for development and consideration of the potential issues.'' (internal citations and quotations omitted)).

a. Implementation of SIP Requirements Through Title I NSR Permits

States must submit SIPs containing NSR permitting programs to EPA for approval. 42 U.S.C. 7410(a)(2)(C).[134] States then determine and define the specific NSR-related requirements of SIPs that apply to individual construction projects by issuing NSR permits to individual facilities. This two-step process under title I is central to the EPA's interpretation of the statutory term ''applicable requirements'' as it relates to the interface between title I and title V permits. It also differentiates NSR-based applicable requirements from other types of applicable requirements.

Section III. of this preamble discusses how different types of ''applicable requirements'' are implemented to greater or lesser extents through title V permitting. In summary, some applicable requirements are self-implementing, in that the specific emission limitations or standards applicable to an individual source (or entire source category) are expressly identified within in the underlying regulation (*e.g.,* a SIP, FIP, NSPS, or NESHAP regulation). These types of self-implementing requirements are incorporated into title V permits without further review, other than to ensure that the title V permit contains sufficient conditions to assure compliance with those requirements. By contrast, other CAA-based requirements may be written in more general terms, requiring additional steps to define the specific requirements that are applicable to a given facility. In some situations—such as where the underlying regulation contains no direction about the mechanism that must be used to further define such requirements—those requirements may be defined through the title V permitting process. NSR requirements are unique, as they fall between these two examples.

The portions of a SIP addressing NSR are general in nature. SIPs require new and modified sources to obtain certain permits before beginning construction; SIPs specify thresholds and other methods to determine what type of permit a source must obtain; SIPs identify other preconditions to obtaining a permit (including requirements related to the NAAQS); and SIPs establish guidelines for establishing specific limitations and other conditions that must be included in a permit. Because the NSR-related provisions within a SIP are necessarily general, they are not self-implementing, and further fact-specific analysis is required to develop the specific requirements applicable to a particular new or modified source.

The question then becomes: is title V the appropriate mechanism to establish (or revisit) the specific NSR-related SIP requirements that are applicable to construction activities at a particular source? As noted earlier, title V of the CAA does not mandate this outcome. And the structure of title I makes clear that this was not Congress's intent. Congress required in title I that SIPs regulate construction and require preconstruction permits. *See, e.g.,* 42 U.S.C. 7475(a)(1), 7502(c)(5); *see* 42 U.S.C. 7410(a)(2)(C).[135] It thus follows that the preconstruction permitting requirements for individual sources are established under these programs in the SIP, not through title V. The SIPs identify the title I permitting process as the mechanism by which the more general SIP requirements applicable to construction of stationary sources will be defined for each new or modified source. During that title I permitting process, a permitting authority determines which NSR-related requirements of the SIP are applicable and designs specific permit terms and conditions to satisfy these more general SIP requirements. This process also includes the opportunity for the public to evaluate and challenge the state's decisions. Overall, the process is designed to result in an NSR permit that contains all terms and conditions necessary to satisfy the NSR-related requirements of the SIP. Thus, it is the title I permitting process—not the general requirements within the SIP itself—that defines the ''applicable requirements'' of the CAA related to NSR, at least insofar as title V is concerned.

In summary, the NSR requirements of a SIP are not self-implementing, but they also do not depend on the title V process to be defined. Instead, the applicable NSR-related requirements of SIPs are established through a dedicated title I-based mechanism with its own public participation opportunities and EPA oversight authority: the NSR permitting process.

The CAA requires that title V permits assure compliance with ''requirements of an applicable [SIP].'' But the CAA does not specify that title V be used to re-create or re-evaluate the requirements of the SIP *that were already defined through the specific mechanism Congress designed to define them: the NSR permitting process.* Again, the purpose of title V is not to create or alter the substantive requirements from other parts of the CAA, but instead to identify, consolidate, and assure compliance with those requirements established in these other programs that apply to each individual source.

b. Oversight of Title I Programs and Permitting Decisions

The many programmatic and case-specific oversight tools contained within title I demonstrate that it is not necessary—and Congress did not intend—to use additional title V permit oversight tools to second-guess the results of title I permitting decisions.[136] As introduced in section IV.C.2. of this preamble, title I provides opportunities for programmatic oversight, oversight over individual permitting decisions, and oversight through enforcement.

Through the review of SIP submissions, the EPA ensures that states have programs in place that provide the authority to issue substantively sound preconstruction permits, while respecting Congress's intended role for the states. Congress gave the EPA authority under title I to disapprove any proposed SIPs that are inconsistent with federal statutory and regulatory authorities governing NSR. 42 U.S.C. 7410(k). For example, if a state submits a proposed SIP containing rules to calculate major source emissions thresholds, and those rules are inconsistent with the CAA or its implementing regulations, the EPA cannot approve the SIP. *Id.* If the state's program subsequently fails to meet statutory or regulatory requirements related to NSR, the EPA can call for a revision of the SIP. 42 U.S.C. 7410(k)(5). Further, if a state fails to properly implement its NSR program, the EPA can take additional actions, including orders, administrative penalties, and civil actions. 42 U.S.C. 7413(a)(2), (5).

[134] This section primarily discusses the issuance of NSR permits under an EPA-approved SIP. Similar principles apply to the issuance of NSR permits under an EPA-promulgated FIP.

[135] Although Congress did not specifically require that the minor NSR program be implemented through permitting, nearly all SIPs across the nation implement minor NSR through permitting. This distinction is not relevant to the approach proposed in this rule, because if a source does not obtain a title I permit to authorize construction, then there would be no permit to establish the ''applicable requirements'' for title V purposes, and the EPA *would* review whether the title V permit assures compliance with the relevant requirements of the SIP. See section IV.B.5. of this preamble for further discussion.

[136] As stated in section IV.C. of this preamble, the EPA's view that reevaluation of NSR permits is not appropriate in the title V permitting context does not mean that the EPA agrees that the state reached the proper decision when setting terms and conditions of such an NSR permit, nor does it diminish the opportunities to review NSR preconstruction permitting decisions under title I of the CAA. *See Env't Integrity Project,* 960 F.3d at 253.

The availability of these title I-based authorities obviates the need to use title V-based oversight tools to address programmatic issues associated with state NSR programs.

In terms of reviewing individual title I permits, each SIP must provide for public notice and an opportunity for comment on proposed NSR permits in its preconstruction permit program. 42 U.S.C. 7475(a)(2); 40 CFR 51.161; 51.165(i), 51.166(q). The EPA may provide feedback on state-issued NSR permits through this process.[137] Thus, both the public and the EPA can seek to correct potential errors in proposed preconstruction permits, including threshold determinations about whether a source or modification is minor or major, and can also challenge the content of permit terms. Should a state permitting authority fail to address legitimate comments, either the public or the EPA can seek review of preconstruction permits in state administrative and judicial forums.[138]

Congress also provided the EPA and the public with various enforcement mechanisms to address title I permitting issues on a facility-by-facility basis. The EPA possesses the authority to issue injunctive orders to halt construction. 42 U.S.C. 7413(a)(5)(A), 7477. The EPA may also pursue various types of civil or criminal enforcement actions pursuant to sections 113 and 167 of the Act. 42 U.S.C. 7413, 7477. In title III of the CAA, Congress also provided authority for citizens to bring enforcement actions seeking civil penalties and injunctive relief against a source that has violated certain NSR requirements. 42 U.S.C. 7604(a)(1), (a)(3). The enforcement-based tools available to the EPA and members of the public can be used to ensure that decisions made in establishing the terms of a major NSR permit, such as BACT limits, were made on reasonable grounds properly supported by the record. *See, e.g., Alaska Dep't of Env't Conservation* v. *EPA,* 540 U.S. 461 (2004). Additionally, they can be used to address situations where a source failed to obtain a required major NSR permit (even where it obtained a minor source permit). *See, e.g., U.S.* v. *S. Ind. Gas & Elec. Co.,* No. IP99–1692–CM/F, 2002 WL 1760699, at *3–5 (S.D. Ind. July 26, 2002); *United States* v. *Ford Motor Co.,* 736 F. Supp. 1539, 1550 (W.D. Mo. 1990). These powerful enforcement tools enable the EPA and the public to directly correct the behavior of facilities that pursue illegal construction.

[137] *See supra* note 113 and accompanying text.

[138] *See supra* note 114 and accompanying text.

Overall, the availability of title I oversight tools weighs against using title V oversight tools to address alleged defects with NSR permitting decisions. As the Fifth Circuit explained:

> EPA contrasts Title V's silence on this front with more stringent oversight authority provided in Title I, arguing that this supports reading the title V provision to supply a more limited oversight role for the EPA with regard to state implementation of preconstruction permitting programs. The agency explains that Title I is better geared for in-depth oversight of case-specific state permitting decisions such as through the state appeal process or an order or action under section[ ] 113 or section 167. And, the agency urges, the absence of such schemes in Title V shows Congress did not intend to recapitulate the Title I process in Title V. We find this reasoning persuasive.

Env't Integrity Project, 960 F.3d at 249 (internal quotations and citations omitted)). Further, these title I-based oversight tools are more effective than the more limited title V oversight tools. See section IV.E.4.b. of this preamble for further discussion of the practical considerations and other policy reasons why title V oversight tools are not well-suited to resolving complex NSR permitting issues.

c. Cooperative Federalism and Congressional Intent

Congress, the EPA, and the courts have often described the CAA (like many other environmental statutes) as a program of cooperative federalism. *See, e.g.,* 42 U.S.C. 7401(a)(3)–(4); *Env't Integrity Project,* 960 F.3d at 252. The EPA and the states work together to realize the goals of the CAA, but they have different roles. States have the ''primary responsibility'' for developing SIPs, 42 U.S.C. 7407, as well as issuing title I permits under SIP programs.

There is no indication that, in enacting title V, Congress intended to change the balance of state responsibility and federal oversight of title I permitting programs.[139] To the contrary, the fact that Congress specifically provided a title I-based mechanism to establish the applicable NSR-related requirements, as well as title I- and title III-based tools for the EPA and citizens to oversee this program, weighs against using title V to re-evaluate, re-establish, or otherwise oversee those title I requirements. Congress ''does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). A reading of title V that would transform it into an opportunity to reevaluate previous preconstruction approvals, instead of simply incorporating existing air pollution requirements into one document, would inappropriately ''alter the fundamental details'' of the oversight authorities the EPA has under title I of the Act.

[139] In fact, as noted in section IV.E.2. of this preamble, the legislative history surrounding the 1990 CAA Amendments suggests that Congress did not intend for the title V program to change the implementation of title I permits.

The text of the Act does not indicate that Congress intended to create this type of additional administrative oversight mechanism for preconstruction permitting actions in an operating permit program designed to consolidate and make existing requirements enforceable. While there is language in title V requiring that a permit ''assure compliance with applicable requirements of this chapter,'' *e.g.,* 42 U.S.C. 7661c(a), and similarly broad language in other parts of title V, this type of general language does not clearly or specifically say that a title V permitting authority must reevaluate preconstruction permitting decisions that have already been made under title I each time that it issues or renews a title V permit. Instead, this general language in the statute should be read to mean that the title V permit must include conditions to assure compliance with the terms and conditions of the source-specific preconstruction permits.

In summary, as the Fifth Circuit concluded in its close examination of Title V:

> Beyond the structure of Title V, EPA also persuasively grounds its interpretation in the structure of the Act as a whole. According to EPA, when Congress added preconstruction permitting requirements to Title I in 1977, it understood that the adequacy of state preconstruction permitting decisions would be subject to review in state administrative and judicial forums. It gave EPA oversight authority over preconstruction permitting only in specific ways, to do specific things. For example, Congress delineated the processes EPA must go through to approve SIPs. When it enacted Title V thirteen years later, Congress granted EPA no such authority. Congress gave no clear indication that it intended to alter the balance of oversight EPA has over state permitting processes. Section 7661c(a)'s requirement that a Title V permit assure compliance with applicable requirements is general and broad and does not clearly or specifically require the revisiting of preconstruction permitting decisions. Once again, the elephants in mouseholes canon supports this reading.

Env't Integrity Project, 960 F.3d at 252 (cleaned up).

4. Policy Reasons

In addition to the textual and legal interpretations supporting this action, several policy considerations also support this proposed rule. The EPA's current (and proposed) approach: ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting; better accounts for procedural, resource-based, and practical limitations associated with title V oversight tools; incentivizes the use of proper title I avenues of review; and respects the finality of NSR permitting decisions.

a. Consistent Treatment of Applicable Requirements From Other CAA Programs

The EPA's current (and proposed) approach aligns the EPA's treatment of preconstruction permits with how the EPA has consistently treated other ''applicable requirements'' under title V. As detailed in section III.E. of this preamble, for many other applicable requirements, permitting authorities do not reconsider the content of those requirements in title V permits, nor does the EPA in its oversight role of title V permitting. For instance, the EPA would not allow a permitting authority to revise the self-implementing substantive requirements of an NSPS established under CAA section 111 or a NESHAP established under CAA section 112. Similarly, it would not be appropriate for the EPA to review or revise any self-implementing requirements of a SIP approved under CAA section 110. In fact, as explained in Section III.G of this preamble, even if the EPA disagrees with the content of a SIP, until the EPA approves a corrective SIP revision or issues a FIP, the SIP requirement remains an ''applicable requirement'' that should be incorporated unchanged into the title V permit.

For purposes of establishing ''applicable requirements'' for title V permitting, it is logical and appropriate to treat decisions that go through similar processes similarly. Each of the applicable requirements addressed in the previous paragraph were established pursuant to a process that included public notice and the opportunity for comment and judicial review. Once they are established following these procedures, it would be inappropriate to reevaluate the substance of these requirements in title V permitting. Likewise, most source-specific NSR permitting decisions must go through a similar process at the state level. Once established through the appropriate procedures, and unless and until the terms and conditions of an NSR permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism (such as a state court appeal or enforcement action), the ''applicable requirements'' remain the terms and conditions of the issued NSR permit. These requirements should be incorporated into the title V permit without further review, just like all other similarly established applicable requirements.

Any differences between NSR-based applicable requirements and other types of applicable requirements do not provide a convincing reason to treat NSR requirements differently. For example, the fact that NSR permits are reviewed through the state courts, as opposed to federal courts, is not material. As discussed in section IV.B.2. of this preamble, regardless of the jurisdiction involved, both processes are functionally similar and offer similar levels of public involvement and measured decisionmaking.[140]

Additionally, as discussed in section IV.E.3.a. of this preamble, the NSR-related requirements of the SIP are often general and would not be described as ''self-implementing'' in the same manner as NSPS, NESHAP, or certain source-specific SIP requirements. However, after a source goes through the preconstruction permitting process and emerges with a final NSR permit, the terms of that NSR permit are legally effective in the same manner as any NSPS, NESHAP, or source-specific SIP provision. That is, those NSR permit terms are immediately applicable and enforceable and require no further substantive refinement through, for example, title V permitting.

The EPA's current (and proposed) approach also standardizes the EPA's treatment of questions related to the applicability of different types of CAA requirements. Identifying which requirements apply to a source (*i.e.,* which requirements must be included in the title V permit) is a key function of the title V permitting process. However, it is only necessary and appropriate to use title V to substantively address questions regarding applicability when such questions have not already been resolved by the underlying applicable requirement itself and when such questions require further site-specific factual analysis. For example, it would be appropriate to use the title V permitting process to determine whether—or which specific requirements within—a generally applicable NSPS, NESHAP, or SIP requirement applies to a particular source or piece of equipment, provided such a decision was not reflected in some other final action. Likewise, title V could be used to address whether a source should have obtained either a minor or major NSR permit where such a decision had not already been made following the appropriate title I permitting process.

By contrast, if the applicability of a SIP requirement is established on the face of the SIP itself (*e.g.,* in a source-specific SIP provision), the EPA would not re-evaluate this question through title V. Or, if the EPA has already issued a formal determination regarding the applicability of an NSPS or NESHAP standard, the EPA would not re-evaluate the same issues through title V.[141] Provided a minor NSR permit has been issued following sufficient procedures, major NSR applicability questions are similar to the latter two examples. That is, where an NSR applicability determination has already been made through the title I process—where a state decides that major NSR does not apply to new or modified source and therefore issues a minor NSR permit—that applicability determination establishes the relevant requirements of the SIP that are applicable to the source or project. Any further action by EPA through title V would involve reconsidering that final title I action relevant to applicability. Moreover, if EPA were to conclude that major NSR requirements were applicable (as opposed to minor NSR requirements), such a determination would effectively require revising the substantive applicable requirements established in the final minor NSR permit (since major NSR requirements are generally more stringent than minor NSR requirements). Neither of these outcomes are consistent with how the EPA treats applicable requirements and applicability determinations under other CAA programs. Accordingly, the EPA considers it better policy to afford NSR applicability decisions the same finality as applicability decisions under other CAA programs.

b. Procedural, Resource-Based, and Other Practical Limitations of Title V Oversight Tools

In the EPA's experience, NSR permitting issues are among the most

[140] To the extent federal court review of NSR decisions offers independent value beyond that which may be achieved through state courts, the CAA specifically provides for various means by which the EPA or the public can raise NSR issues to federal courts. See sections IV.C.2. and IV.E.3.b. of this preamble for additional information.

[141] *See supra* note 32 and accompanying text.

factually and legally complicated issues raised during the title V permitting (and petition) process. For multiple reasons, the oversight tools associated with title V permitting process are a poor fit for resolving NSR permitting issues. Compared to the available title I avenues for review, the title V process features limited timelines and procedural opportunities to fully evaluate complex title I issues. Reviewing complex NSR issues through title V involves a considerable resource burden and often is impracticable for decisions made years ago. Even where title V can be used to review NSR issues, the EPA's authority to resolve such issues is indirect, at best.

Procedural constraints associated with title V oversight tools weigh against using these tools to resolve complex NSR issues. Congress provided the EPA with only 45 days to review proposed title V permits, followed by a 60-day period for the public to petition the EPA to object, followed by a 60-day period for the EPA to rule on a petition to object. 42 U.S.C. 7661d(b)(1)–(2). These brief title V review periods are inconsistent with an in-depth and searching review of potentially every source-specific preconstruction permitting decision that has been made by the permitting authority. By contrast, available title I review mechanisms—state court appeals and enforcement actions—are not subject to the same time constraints and allow more time for development and consideration of NSR permitting decisions.

In addition to time constraints, the title V permitting and petition processes involve fewer opportunities to develop the factual record necessary for a complete review of complex NSR permitting issues. For example, by the time the EPA receives a title V petition, the EPA's review is generally limited to the record developed by the permitting authority up to that point. *See* 40 CFR 70.13. By contrast, some state permit appeal and enforcement processes provide more in-depth oversight than title V could afford. Some states have administrative appeal processes that enable additional factual development before a final decision is reached on the permit. In addition, ''unlike the permitting process, the enforcement process allows for discovery, hearings, cross-examination of witnesses, and expert testimony,'' all of which aid the fact-finder in deciding whether major or minor source preconstruction requirements apply to a facility, or whether such requirements were correctly established. *Citizens Against Ruining the Envt.* v. *EPA,* 535 F.3d 670, 678 (7th Cir. 2008).

Moreover, once a title V petition is filed, there are no formal opportunities for other affected parties, such as the permitted source or the state permitting authority, to directly participate in the review process; their opportunity to develop their position occurs earlier in the permitting process. *See* 85 FR 6431, 6442 (February 5, 2020). These other affected stakeholders have more procedural safeguards in state appeal processes and enforcement actions than in the title V petition process. For example, they may be parties to the action and appear before neutral arbiters, and have the opportunity to contest points raised by public challengers through briefs or other filings. Overall, title V oversight processes contain fewer mechanisms than title I oversight processes to fully consider and resolve complex NSR issues.[142]

Title V's limited effectiveness in addressing NSR issues is compounded by the fact that title V permits must be renewed every 5 years. This fact, along with the EPA's longstanding position that all aspects of a title V permit are subject to review during renewal permit proceedings,[143] gives rise to the possibility that, in the absence of the EPA's current (and proposed) approach, the public will seek to use title V oversight tools to review long-past NSR permit decisions. For example, in the 2016 *PacifiCorp-Hunter I* petition that precipitated the EPA's current interpretation, public interest groups challenged an NSR applicability decision made nearly 20 years prior. Given state and federal record retention schedules, staff turnover at state permitting authorities, and similar practical constraints associated with the passage of time, it may simply be impossible in a title V permitting action for a state to recreate a complete, defensible administrative record to support complex, substantive NSR permitting decisions, particularly those made long ago. Instead of pursuing challenges to NSR permitting decisions when a state incorporates a preconstruction permit into a title V permit, or during subsequent title V renewals, interested parties can obtain more direct and timely relief through state permit appeals and enforcement actions at the tile a title I permit is issued.

Some of the constraints on the EPA's and state's ability to address NSR issues through title V may be mitigated by the fact that Congress placed the burden on *petitioners* to demonstrate to the EPA's satisfaction that a title V permit does not satisfy the CAA. In other words, in the situations where NSR issues are properly within the scope of the EPA's title V review, the EPA is not required to undertake an exhaustive independent review of a state's NSR decisions. Instead, petitioners are required to provide sufficient evidence to EPA to demonstrate that the state's NSR permitting decisions did not comply with its SIP-approved regulations or that the state's exercise of discretion under such regulations was unreasonable or arbitrary.[144] Although this demonstration requirement reduces some of the EPA's resource burdens, it places these burdens on the public, who are subject to similarly tight timelines and the other procedural limitations discussed in the preceding paragraphs. As a result of these constraints, combined with the complexity of NSR permitting decisions, it has historically been relatively uncommon for petitioners to successfully demonstrate that an NSR-related deficiency warrants the EPA's objection to a title V permit. As discussed throughout this preamble, the EPA believes the public would be better served to develop any challenges to NSR permitting decisions using title I avenues.

Title V mechanisms are poorly suited not only for *considering* NSR-related issues, but also for *resolving* NSR-related issues. The relief that the EPA can provide through title V to correct an NSR deficiency is limited and indirect. When the EPA objects to a title V permit on the grounds that NSR requirements were not properly established by a state, such objection does not directly invalidate an NSR permit or stop the initial construction or operation of a particular source authorized by an NSR permit. This is true not only when the NSR permit was issued long ago and construction has already been completed,[145] but also when the NSR

[142] *See Env't Integrity Project,* 960 F.3d at 253 (''We are persuaded by the agency's contrasting Title V against Title I's more detailed procedures for in-depth oversight of case-specific permitting decisions. Such permitting decisions follow state appeals or enforcement actions authorized by other provisions of the Act, including citizen suits under Title III. Those mechanisms are better structured to provide agency and citizen oversight of preconstruction permitting. . . . Title V contains none of the procedures that would guide those challenges, as Titles I and III do. . . . And those avenues provide more time for development and consideration of the potential issues.'' (internal citations and quotations omitted)).

[143] *See, e.g., In the Matter of Wisconsin Public Service Corporation, Weston Generating Station,* Order on Petition No. V–2006–4 at 5–7 (December 19, 2007).

[144] *See, e.g., Appleton Order* at 5.

[145] As explained previously, the EPA's regulations allow sources subject to major NSR

Continued

permit was issued more recently and construction has not yet begun. An EPA objection similarly cannot directly require the state to amend an NSR permit. Instead, the EPA's authority to object to a title V permit reaches only the terms of the title V permit itself. For example, the EPA could direct a state to include a compliance schedule in the title V permit directing the source to apply for a new NSR permit. Resolving such an objection would generally require some type of additional, and legally distinct, NSR permitting action by the state permitting authority. If the state ultimately failed to update the title V permit in a manner sufficient to resolve the EPA's objection, then the EPA could then assume responsibility to issue the title V permit. 42 U.S.C. 7661d(c).[146] But even so, the EPA would remain unable to directly change the terms of the underlying NSR permit, or to issue a new NSR permit to the source, without first pursuing title I-based oversight authorities.[147] Thus, no matter what the EPA might do with respect to a title V permit, the EPA lacks title V-based authority to directly intercede and fix issues in NSR permits. Thus, even in cases where the EPA entertained NSR-related claims in title V petitions, the resulting orders rarely resulted in a change to the NSR permit or additional NSR requirements.

Given that the title V oversight tools provide an ill-suited forum for considering and resolving the complex problems associated with NSR permitting, it makes sense that title V permitting authorities and the EPA should only consider whether the terms and conditions of an NSR permit have been properly included in a title V operating permit, and whether there is sufficient monitoring, recordkeeping, and reporting to assure compliance with those terms and conditions. It is more efficient for state permitting authorities, the public, and the EPA to focus on these core title V issues—which are more clearly redressable through title V oversight tools—when preparing title V permits, challenging title V permits, and reviewing title V permits.

c. Incentivizing Title I Avenues of Review

The EPA's current (and proposed) approach not only recognizes the limitations on using title V to review NSR issues, but also emphasizes the importance of public involvement in the title I permitting process to address these issues. This approach encourages the public to engage contemporaneously at the state level to appeal preconstruction permitting decisions that they believe to be incorrect.

As explained in the preceding subsection, the title I permitting process (and other oversight opportunities under titles I and III of the CAA) is better suited to addressing public concerns than the title V permitting process. From a policy standpoint, the EPA's view that the title V permitting process should not be used to reconsider final NSR permitting decisions relies heavily on the opportunity for the public to participate in the title I permitting process. The proposed revisions to the EPA's regulations include criteria relevant to public participation in the title I permitting process. Provided these criteria are satisfied in the issuance of a title I permit, NSR-related decisions associated with that permit would not be subject to further review through title V. The EPA expects that codifying this existing framework will create a strong incentive for state permitting authorities to ensure meaningful public access to NSR permitting actions, particularly for minor NSR permitting actions that may have limited public participation opportunities.[148] This rulemaking is expected to complement related ongoing efforts by the EPA to promote increased implementation of existing requirements related to public participation in minor NSR permit actions.

This approach not only creates an incentive for states to offer more opportunities for public access in NSR permitting, but also for the public to use such processes. During the time period in which the EPA nominally considered the merits of NSR issues through the title V permitting and petition process, the EPA observed that many petitioners would *only* raise their NSR-related concerns through the title V process and would not seek relief through title I mechanisms. By doing this, citizens bypassed an available public participation opportunity and denied the state an opportunity to hear and remedy public concerns contemporaneous with the state action. Moreover, given the inherent difficulty in demonstrating NSR permit flaws and the lack of effective relief available through the title V permitting process, use of title V (rather than NSR appeal processes) may have ultimately been less effective at fostering sound NSR permitting decisions. The EPA believes it is better policy to encourage the public to use title I venues to address NSR-related concerns at the time these permits are issued, and to reserve the title V permitting process for issues that may be more effectively addressed through title V authorities (*e.g.,* monitoring).[149]

d. Respecting Finality and Fostering Certainty in Title I Permitting Decisions

Declining to review title I permitting decisions in title V review avoids duplication and inefficiency, respects the finality of NSR permitting decisions that are subject to public notice and the opportunity for comment and judicial review, and acknowledges regulated entities' need for certainty when investing in the construction and modification of sources.

The availability of public notice, the opportunity for comment, and the opportunity for judicial review of underlying NSR permit actions weigh heavily against the need to repeat all these procedures through title V permitting. This allows an unnecessary and inefficient ''second bite at the apple,'' along with a potentially unlimited number of additional ''bites'' each time a title V permit is reviewed.

preconstruction permitting requirements to apply for a title V permit within 1 year after beginning operation (well after beginning and completing construction), in most cases. 40 CFR 70.5(a)(1)(ii); 71.5(a)(1)(ii). The CAA similarly allows sources to apply for a title V permit up to 12 months *after* becoming subject to title V. 42 U.S.C. 7661b(c). This shows that Congress did not intend for the title V permitting process to be used to prevent the construction of a source authorized under title I.

[146] The EPA could also assume responsibility to issue title V permits within a jurisdiction after determining, for example, that the state failed to properly administer and enforce its title V program. *See* 42 U.S.C. 7661a(i)(4); 40 CFR 70.10(b)(4), (c), 71.4(c).

[147] To directly mandate changes to an NSR permit issued by a state under an EPA-approved SIP, the EPA would need to pursue title I remedies. For example, a court order following a state court appeal, or an enforcement action, could directly mandate that the state permitting authority revise specific NSR permit terms or issue a different type of NSR permit. Alternatively, if the EPA wanted to directly issue an NSR permit to a source that was previously subject to a state permitting authority's jurisdiction, the EPA would first have to issue a ''SIP Call'' under CAA section 110(k) and ultimately impose a FIP, after which the EPA would retake the legal authority to issue NSR permits.

[148] Similarly, the EPA expects that permittees will have an incentive to request that state permitting authorities provide such opportunities for the public to participate in the title I permitting process, so as to avoid the potential that title I permitting decisions will be subsequently overturned using the EPA's title V review authorities.

[149] Of course, as explained in section IV.B.5.a. of this preamble, where the public is denied meaningful opportunities to participate in title I permitting decisions, title V will serve as a backstop to ensure that the public has an opportunity to ensure that a source's title V permit assures compliance with the relevant NSR-related requirements.

The EPA's current (and proposed) approach respects the finality of a permitting authority's title I permitting decisions, provided such decisions were made with the requisite level of formality, consideration, and public process (*i.e.,* issued under title I authorities following public notice and the opportunity for comment and judicial review). By contrast, allowing NSR permitting decisions to be collaterally attacked using the title V permitting process would significantly undermine the finality of state title I permitting decisions. This would decrease the relative importance of states in the cooperative federalist system established by Congress.

The EPA believes that the best policy (and best reading of the Act as a whole, as described in section IV.E.3. of this preamble) is that the public should directly participate in state preconstruction permitting decisions and, if necessary, seek review in state court immediately thereafter. This is a more direct and timely way to identify and correct errors in preconstruction permits. It provides for such review before sources reasonably begin relying on those permits to invest substantial resources in a facility. Thus, the EPA's current (and proposed) approach fosters certainty and avoids upsetting settled expectations and reliance interests of sources that have obtained a legally enforceable preconstruction permit under title I. By contrast, under the EPA's former approach, stakeholders would always face the possibility that the EPA could identify errors with the state preconstruction permitting decisions during title V permit issuance or renewal. In such a circumstance, discovery of errors could come years after the fact, long after a source is constructed and operating, either when a title V permit first incorporates the relevant NSR requirements, or decades after the fact, when the title V permits is subsequently renewed.[150] This would increase uncertainty for the regulated community. It would also increase the burden on EPA, state agencies, and the courts to consider such long-distant issues. As summarized by the Fifth Circuit in examining EPA's current approach:

> EPA's position also respects the finality of the preconstruction permitting decision. The agency reasoned that it would be inefficient to allow review via the Title V permitting process even after the preconstruction permits had been subject to public notice and comment and an opportunity for judicial review. And those avenues provide more time for development and consideration of the potential issues. We are persuaded that EPA's construction of Title V respects the finality of state preconstruction permitting decisions, which is consistent with the Act's cooperative federalism. Petitioners' contrary view of Title V would allow a federal agency to upset states' permitting decisions with no clear mandate from Congress to do so.

Env't Integrity Project, 960 F.3d at 253 (internal citations and quotations omitted).

F. Alternative Approaches

The EPA believes that the agency's existing interpretations and policies reflect the best approach from both a legal and policy standpoint, for the reasons discussed previously. Thus, the EPA is proposing to codify its existing approach. However, the EPA also solicits comment on the following alternative approaches that would involve using title V permits to address substantive NSR issues in additional, targeted situations. Each of the alternatives presented features some level of intuitive appeal but also suffers from legal and/or policy drawbacks. Thus, the EPA specifically requests comments that would provide further legal and/or policy support for applying these alternatives as opposed to the EPA's preferred approach. The EPA also specifically requests comments on how such alternatives could be reflected in the regulatory text.

As discussed in the following subsections, the alternatives that the EPA is considering include: (i) using title V to review contemporaneous or recent NSR permitting decisions; (ii) using title V to review issues related to major NSR applicability, and (iii) using title V to review contemporaneous or recent NSR permitting decisions related to major NSR applicability.

1. Using Title V To Review Contemporaneous or Recent NSR Permitting Decisions

Under the first alternative approach, the title V permitting process could be used to review contemporaneous or recent NSR permitting decisions, but not older NSR permitting decisions.[151] Within this alternative, there are multiple potential variations based on the time frame chosen to differentiate between NSR decisions that would, and would not, be reviewed. For example, the narrowest version of this alternative would involve using title V to review NSR-related decisions that are made contemporaneously with the issuance of a title V permit. Broader versions of this alternative would involve reviewing NSR permitting decisions finalized within a certain period of time before a title V permit is issued.

This alternative approach has some appeal because it avoids some of the practical challenges that motivated, and which support, the EPA's current approach. For example, this alternative would avoid problems associated with the EPA and states being expected to confront long-past NSR decisions without a fully accessible record. This alternative is also less likely to upset settled expectations, particularly if review is restricted to contemporaneously issued NSR and title V permits. However, this alternative would not address other important policy considerations to the same extent as the EPA's proposed approach. For example, this alternative would not address the limited scope and timing available for reviewing complex NSR issues through title V.

Additionally, this alternative would give rise to its own set of problems. For example, reviewing NSR decisions based on a defined timing element would involve a difficult line-drawing exercise. Would it be appropriate to review only NSR decisions finalized at the exact same time as a title V permit issuance, or NSR decisions finalized shortly before a title V permit is finalized, or within the same year, or within five or six years, or some other period of time? The EPA solicits comments on how to define this timing element under this alternative.

Moreover, to the extent this alternative would be applied narrowly to allow title V review of only contemporaneous NSR permitting decisions, this approach could disincentivize states from taking advantage of streamlined permit issuance procedures (which many states currently employ), such as the concurrent permit issuance process described in section IV.B.4. of this preamble. Disincentivizing streamlined permitting could increase administrative burdens and costs for states and could lead to unnecessary delays in title V permit issuance, counter to the CAA's directive to develop ''[a]dequate, streamlined, and reasonable procedures for expeditiously'' issuing permits. 42 U.S.C 7661a(b)(6).

In addition to these policy considerations, it is not clear what legal basis would support an alternative approach based exclusively on the timing of NSR and title V permit issuance. As discussed extensively

[150] See section IV.B.4. of this preamble for additional information about the timing of NSR and title V permit actions.

[151] This approach is similar to prior EPA statements that the EPA would not review NSR decisions made long ago. *See supra* notes 51 and 56 and accompanying text.

earlier in this preamble, the relationship between NSR and title V permits is closely tied to the concept of ''applicable requirements'' that are established under other CAA programs. This concept has generally been time-neutral, such that requirements that are properly established under another EPA program—regardless of when they are established—define the applicable requirements that must be included in a title V permit. To the extent the EPA has addressed timing considerations, is has been to ensure that the definition of ''applicable requirement'' is overinclusive with respect to requirements that have already been promulgated but are not yet effective. *See* 40 CFR 70.2 (definition of ''applicable requirement''). This alternative approach would require the opposite position, *excluding* recent NSR permitting decisions from establishing applicable requirements just because they were undertaken more recently. That position would conflict with the EPA's treatment of applicable requirements under all other types of CAA programs. It is not clear to the EPA that such an approach is compatible with the structure and purpose of the title V program.

Further information explaining why the EPA does not prefer this alternative is included in section IV.B.4. of this preamble (which explains why the EPA's approach applies the same regardless of when an NSR permit was issued).

2. Using Title V To Review Issues Related to Major NSR Applicability

The second alternative approach under consideration would involve using the title V permitting process to review issues related to major NSR applicability (*i.e.,* whether a source should have received a major NSR permit instead of a minor NSR permit). However, the EPA would not review challenges to other types of substantive NSR issues (*e.g.,* BACT determinations or the results of modeling). This alternative would apply the same regardless of the timing of NSR permit issuance and title V permit issuance.

This alternative approach would provide some of the same policy benefits as the EPA's proposed approach, in that it would avoid using title V to reevaluate the content of NSR permits (*e.g.,* whether permit limits correctly reflect BACT). However, given that major NSR applicability questions are among the most complicated NSR-related issues to address, this approach would do little to resolve the resource-related and practical problems that partly motivated the EPA's current (and proposed) approach. For the reasons discussed in section IV.E.4.b. of this preamble, the EPA does not consider the title V permitting process well-suited to resolving these complex questions involving major NSR applicability.

One might argue that this alternative approach is consistent with the view that the title V process can be used to determine which requirements are applicable to a source, even if it should not be used to second-guess the content of such requirements.[152] However, where an NSR applicability determination has already been made through the NSR process and a minor NSR permit is issued, any further action through title V related to major NSR applicability would likely require changes to emissions limits and other applicable requirements established through that NSR process. In other words, using title V to revisit NSR applicability questions would inherently upset not only the NSR applicability decisions, but also NSR permit content decisions. The EPA does not view this result as consistent with the key function of title V.

Further information explaining why the EPA does not prefer this alternative is included in section IV.B.3. of this preamble (which contains the EPA's justification for applying its approach uniformly regardless of the type of substantive NSR requirements at issue) and section IV.E.4.a. of this preamble (which explains why the EPA's proposed approach is more consistent wih how applicability questions are treated with respect to other CAA programs).

3. Using Title V To Review Contemporaneous or Recent NSR Permitting Decisions Related to Major NSR Applicability

The third and final alternative approach under consideration would involve using title V to review contemporaneous or recent NSR permitting decisions related to major NSR applicability, but not any older NSR decisions or any NSR decisions related to NSR permit content. This approach is a combination of the preceding two alternatives, and is consequently narrower than either two alternatives—that is, it would involve the use of title V to review NSR issues in fewer situations. *See* the preceding subsections for considerations relevant to this alternative.

[152] This line of reasoning, based on certain statements made when the EPA promulgated the part 70 rules, featured in the Tenth Circuit's interpretation of the current regulatory definition of ''applicable requirement.'' *See Sierra Club* v. *EPA,* 964 F.3d at 893–895.

V. The General Duty Clause Concerning the Prevention of Accidental Releases of Hazardous Substances

A. Background and Summary of Proposed Action

On two occasions in recent years, the EPA received title V petitions requesting that individual title V permits include requirements designed to assure compliance with the ''General Duty Clause'' of CAA 112(r)(1), which concerns the prevention of accidental releases of hazardous substances. These petitions were premised upon the suggestion that the General Duty Clause is an ''applicable requirement'' for title V purposes. However, as the EPA explained in the *Hazlehurst* and *Owens-Brockway Orders* denying both of these petitions, the General Duty Clause is not an applicable requirement for title V.[153] The basis for this position is fully explained in the EPA's *Hazlehurst* and *Owens-Brockway Orders.* However, for the sake of transparency, section V.B. of this preamble restates salient points from those orders.

Moreover, although the current definition of ''applicable requirement'' in the EPA's part 70 and part 71 regulations may reasonably be read to exclude requirements of the General Duty Clause, the EPA intends to provide further clarity to the public by making this exclusion explicit in the EPA's regulations.

This proposed change to the rules is not expected to have any impacts on state permitting authorities, regulated entities, the public, or other stakeholders, as it simply clarifies an element of the title V program that has been understood and implemented in the same way since the inception of the title V program in the early 1990s.

This proposed change is distinct and severable from the proposed changes related to the interface between title V permits and NSR permits, discussed in section IV. of this preamble.

B. Rationale for Proposed Action

1. Statutory Provisions

The General Duty Clause provides:

The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking

[153] *In the Matter of Owens-Brockway Glass Container Inc.,* Order on Petition No. X–2020–2 at 21–28 (May 10, 2021) (*Owens-Brockway Order*); *In the Matter of Hazlehurst Wood Pellets, LLC,* Order on Petition No. IV–2020–5 at 7–14 (Dec. 31, 2020) (*Hazlehurst Order*).

such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. *For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph.*

42 U.S.C. 7412(r)(1) (emphasis added). The last sentence contains a key limitation of the General Duty Clause: it means that citizen suits under CAA section 304 shall not be available to enforce the requirements of the General Duty Clause; instead, this clause may only be enforced by the EPA under CAA section 113.

This enforcement prohibition also effectively restricts the implementation of the General Duty Clause requirements through title V permitting. The CAA provides that all standards and limitations in title V permits are enforceable by citizens under section 304.[154] Thus, if the requirements of the General Duty Clause were included in title V permits, they would ostensibly be enforceable through enforcement of the title V permit itself. However, this would be in direct conflict with the unambiguous statutory prohibition on citizen enforcement of the General Duty Clause under section 304.[155] To avoid this conflict, the General Duty Clause must not be considered an ''applicable requirement'' that is implemented through title V permitting.

Other text within the General Duty Clause further evinces congressional intent that the General Duty Clause would not be implemented through permitting. The statute indicates that the CAA section 112(r)(1) general duty shall be ''in the same manner and to the same extent as section 654 of title 29''—that is, the general duty clause within the Occupational Safety and Health Act (OSH Act). The OSH Act provision, enacted in 1970, is not implemented through site-specific permits, nor are citizen suits authorized to enforce it. *See generally* 29 U.S.C. 651–678. If Congress had intended the CAA General Duty clause to be implemented in a fundamentally different manner than the OSH Act provision on which it was explicitly modeled—*e.g.,* through a permitting program that could be enforced by citizens—it could have specifically said so. However, instead, Congress precluded citizen enforcement under the CAA General Duty Clause, and nowhere did Congress imply that it would be implemented through permitting.

Additionally, the CAA requires that states have the authority to enforce title V permits in order to receive EPA approval of their permitting programs. 42 U.S.C. 7661a(b)(5); *see also* 40 CFR 70.4(b)(3). However, the CAA General Duty Clause is enforceable only by the federal government. The EPA has not delegated authority to implement or enforce the General Duty Clause to state or local air agencies.[156] Were the requirements of the General Duty Clause considered ''applicable requirements'' to be included within individual title V permits, states would be unable to enforce these new permit provisions, which would contradict CAA section 502(b)(5). This would mean that all state and local title V programs would be fundamentally flawed—an absurd result Congress could not have intended.

Notably, each of the relevant statutory provisions discussed earlier—the General Duty Clause of section 112(r)(1), the relevant portion of section 304 authorizing citizen suits to enforce title V permit terms, and the entirety of title V—were promulgated in the same legislative package: the 1990 CAA Amendments. Accordingly, the statutory conflict between these provisions is best understood as reflecting an intentional choice by Congress to fundamentally distinguish the General Duty Clause in section 112(r)(1) from other CAA requirements that would be implemented through the title V permitting program.[157]

2. Regulatory Provisions

Following the statutory text, the EPA's regulations provide: ''All terms and conditions in a part 70 permit . . . are enforceable by the Administrator and citizens under the Act.'' 40 CFR 70.6(b)(1).[158] Additionally, in order to be approvable by the EPA, state programs under part 70 must demonstrate authority to enforce permits. 40 CFR 70.4(b)(3)(vii). Neither of these regulatory requirements are compatible with the view that the General Duty Clause—which is enforceable only by the EPA—should be included in title V permits.

The EPA must read its regulations in a manner consistent with the statute. As explained in the *Hazlehurst* and *Owens-Brockway* petition orders, the existing definition of ''applicable requirement'' can reasonably be read to exclude the General Duty Clause of CAA section 112(r)(1).[159] Nonetheless, in order to provide maximum clarity to the public, the EPA is proposing to revise the definition of ''applicable requirement'' in 40 CFR 70.1 and 71.2 to make this more explicit.

3. EPA Guidance and Implementation

Excluding the General Duty Clause from the regulatory definition of ''applicable requirement'' is consistent with how the EPA has described and implemented both the title V and 112(r) programs since their inception in the early 1990s.[160] In various rulemaking actions, the EPA has consistently indicated that the only applicable requirements related to 112(r) that need to be satisfied through title V are those related to section 112(r)(7) risk management plans under 40 CFR part 68. *See, e.g.,* 57 FR at 32275–76; 60 FR 13526, 13526, 13535–36 (Mar. 13, 1995); 61 FR 31668, 31688–89 (June 20,

[154] This is because any person may, under CAA section 304(a)(1), bring a suit ''against any person . . . who is alleged to have violated . . . or be in violation of (A) an emission standard or limitation under this chapter . . . .'' In turn, ''emission standard or limitation'' is defined to include, *inter alia,* ''any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter . . . .'' 42 U.S.C. 7604(f)(4); *see also* 40 CFR 70.6(b)(1); *see United States* v. *Gonzales,* 520 U.S. 1, 5 (1997). As discussed later, the EPA's regulations contain a limited exception to this principle, which is not applicable to the General Duty Clause.

[155] The specific prohibition on enforcement of the General Duty Clause by citizen suit must govern over the general enforceability of title V permits. *See Nitro-Lift Technologies L.L.C.* v. *Howard,* 568 U.S. 17, 21 (2012).

[156] Because CAA section 304 is the only federal authority through which citizens *and* state or local air agencies could enforce this type of CAA requirement, neither citizens nor state and local air agencies may enforce the General Duty Clause under the CAA. Additionally, some states are prohibited by state law from having general duty authorities. 58 FR 62262, 62278 (Nov. 26, 1993).

[157] *See Maracich* v. *Spears,* 570 U.S. 48, 65 (2013) (''It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.''); *see also Erlenbaugh* v. *United States,* 409 U.S. 239, 243–45 (1972) (''[*In pari materia*] is but a logical extension of the principle that individual sections of a single statute should be construed together . . . . [T]he rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.''); *United States* v. *Ron Pair Enterprises,* 489 U.S. 235, 242 (1989) (''The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'' (internal quotation omitted)).

[158] This principle is subject to one exception: certain terms in a title V permit that are not based on the CAA may be labeled as ''state-only'' requirements that are not federally enforceable or enforceable by citizens through section 304. 40 CFR 70.6(b)(2). The General Duty Clause, which is contained within the CAA, is not eligible for this treatment. Beyond this limited exception, neither the statute nor regulations contemplate other means by which the enforceability of title V permit terms could be restricted in a manner consistent with the limitations in the General Duty Clause discussed earlier.

[159] *See Hazlehurst Order* at 9–10; *Owens-Brockway Order* at 23–24.

[160] The EPA understands that most, and perhaps all, permitting authorities implementing part 70 programs have historically followed the same view.

1996).[161] The EPA has made similar determinations in early title V petition orders. For example, in the 1997 *Shintech I Order,* the EPA concluded that ''compliance with the provisions of 40 CFR 68.215 . . . is sufficient to satisfy the legal obligations of section 112(r) for purposes of part 70.'' [162] The EPA therefore specifically rejected the petitioners' request for additional permit terms related to section 112(r)(l), while noting the independent enforceability of the General Duty Clause.[163] These principles hold true regardless of whether a source is subject to risk management plan requirements under part 68. For example, in the 2001 *Pencor-Masada I Order,* the EPA applied similar principles to a source that was not subject to part 68. There, the EPA reiterated that a source's obligations under the General Duty Clause are unaffected by compliance with part 68 or the terms of a source's title V permit.[164] The EPA has made similar statements concerning title V and CAA section 112(r) in other guidance documents.[165]

Similar to the EPA's title V guidance, the EPA's longstanding guidance concerning the implementation of the General Duty Clause similarly suggests that the General Duty Clause is not to be implemented through title V. Notably, in the EPA's comprehensive Guidance for Implementation of the General Duty Clause (''GDC Guidance''),[166] the EPA details the mechanisms through which the General Duty Clause would be implemented and enforced, and never once mentions permitting as an available mechanism.

4. Additional Policy Considerations

If the EPA were to consider the General Duty Clause an applicable requirement with which title V permit must assure compliance, this would have significant programmatic impacts, upsetting the administration of both the title V and General Duty Clause programs nationwide. For example, The EPA expects that the majority of major sources subject to the title V program may, at some time or another, also have obligations under the General Duty Clause. If the General Duty Clause was considered an applicable requirement, thousands of title V permits nationwide would need to be reopened to include conditions necessary to identify and assure compliance with the clause. Such an enormous resource burden on the permitting authorities that implement the title V program would hardly make sense given that these same permitting authorities cannot enforce the General Duty Clause.[167] This is clearly not an outcome that either Congress or the EPA envisioned when establishing these two programs.[168]

Other practical concerns—closely related to the legal issues discussed previously—weigh against implementing the General Duty Clause through title V. For example, how could a title V permit containing General Duty Clause requirements be structured in order to avoid the statutory constraints on enforcement discussed earlier? Neither the Act nor the EPA's regulations provide that certain portions of the title V permit can be labeled ''enforceable only by the EPA.'' To the contrary, all federally-enforceable permit terms must necessarily be enforceable by the state agencies issuing the permits as well as the public at large. *See* 42 U.S.C. 7604(a)(1), (f)(4), 7661a(b)(5)(E), 7661c(c); 40 CFR 70.4(b)(3)(vii), 70.6(b)(1). Additionally, if the General Duty Clause were considered an ''applicable requirement'' that states have no authority to enforce, the EPA could face pressure to issue notices of deficiency to all 117 state, local, and Tribal permitting authorities nationwide for their failure to enforce all aspects of the title V program. *See* 40 CFR 70.10(b), (c)(1), Appx A. Moreover, the EPA could face pressure to take over the issuance of all title V permits, or to issue partial permits to nearly every title V source to cover these sources' General Duty Clause obligations. *See* 40 CFR 70.10(b)(2)(iii); *see also* 40 CFR part 71. These are clearly not reasonable propositions,[169] but nonetheless ones that could inevitably follow if the EPA were to consider the General Duty Clause an ''applicable requirement'' for title V purposes.

In addition to these untenable impacts to title V permitting, determining that the General Duty Clause must be included in title V permits would fundamentally alter the EPA's implementation and enforcement of the General Duty Clause itself. The EPA has historically described the General Duty Clause as a ''self-executing requirement.'' 61 FR 31668, 31680 (June 20, 1996).[170] This means, quite simply,

[161] This proposed rule does not affect the risk management plan program under section 112(r)(7) or part 68 in any way. However, the limited intersection between section 112(r)(7) risk management plans and title V permits provides context for the EPA's position on the section 112(r)(1) General Duty Clause. The EPA has, through rulemaking, limited the extent to which even the 112(r)(7)-related ''applicable requirements'' would be implemented through title V. Specifically, when the EPA promulgated the final part 68 risk management plan rules in 1996, the agency determined that ''generic terms in [title V] permits and certain minimal oversight activities'' would assure compliance with risk management plan requirements. 61 FR at 31689; *see also* 57 FR at 32275 (''The EPA recognizes, however, that an RMP is not in any sense a 'permit' to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V.'' (citing 42 U.S.C. 7412(r)(7)(F)). For sources subject to both part 68 and title V, these permit content and state oversight requirements are codified at 40 CFR 68.215. For additional information concerning the limited intersection between risk management plans and title V permits, *see In the Matter of Newark Bay,* Order on Petition No. II–2019–4 at 9–16 (Aug. 16, 2019). Requiring title V permits to include permit terms related to the General Duty Clause that are even more specific than those the EPA has established for risk management plans would go well beyond the EPA's long-held view of the scope of section 112(r)-related ''applicable requirements'' that would be implemented through title V.

[162] *In the Matter of Shintech Inc., PVC Plant,* Order on Petition, 12 (Sept. 10, 1997).

[163] Specifically, the EPA emphasized that ''compliance with the requirements of part 68 does not relieve Shintech of its legal obligation to meet the general duty requirements of section 112(r)(1) of the Act . . . . Section 112(r)(1) remains a self-implementing requirement of the Act, and EPA expects and requires all covered sources to comply with the general duty provisions of 112(r)(1).'' *Shintech I Order* at 12 n.9. The EPA also explained that it would be improper to shield a source from liability under the General Duty Clause using a title V permit shield. *Id.*

[164] *See Pencor-Masada I Order* at 31–32 n.38.

[165] *See, e.g.,* Memorandum, *Title V Program Approval Criteria for Section 112 Activities* (April 13, 1993), available at *https://www.epa.gov/sites/production/files/2015-08/documents/t5-112.pdf;* Memorandum, *Relationship between the Part 70 Operating Permit Program and Section 112(r)* (June 24, 1994), available at *https://www.epa.gov/sites/production/files/2015-08/documents/opp112r.pdf.*

[166] *Guidance for Implementation of the General Duty Clause, Clean Air Act Section 112(r)(1),* EPA 550–B00–002 (May 2000), available at *https://www.epa.gov/sites/production/files/documents/gendutyclause-rpt.pdf.*

[167] No statutory or regulatory mechanism currently exists for the EPA to establish General Duty Clause requirements for all title V sources nationwide. Even if it did, implementation of any such mechanism this would present an even greater resource issue for the EPA, and would run against Congress's intent that the title V program is to be primarily implemented by the states, not the EPA. *See* 42 U.S.C. 7661a; *see, e.g., Env't Integrity Project,* 969 F.3d at 536, 545.

[168] The EPA, like Congress, does not ''hide elephants in mouseholes.'' *See Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001).

[169] Such outcomes would be contrary to congressional intent for the title V program to be primarily administered by states.

[170] The EPA has also described the General Duty Clause as a ''self-enabling'' or ''self-implementing'' requirement. *See* Letter from Mathy Stanislaus, Assistant Administrator, EPA Office of Solid Waste and Emergency Response, to Hon. Mike Pompeo, U.S. House of Representatives (Aug. 1, 2013)) (Stanislaus-Pompeo Letter); *Owens-Brockway Order* at 27; *Hazlehurst Order* at 12; *Pencor-Masada I Order* at 32 n.38; *Shintech I Order* at 12 n.9. As discussed in section III.E. of this preamble, the EPA has also used the term ''self-implementing'' to refer to certain types of requirements in other CAA programs, including NSPS and NESHAP standards. The intent of this phrase is slightly different in the context of the General Duty Clause than in the context of NSPS and NESHAP standards. The requirements of the General Duty Clause flow directly from the statute and are implemented in the absence of implementing regulations. By

that the General Duty Clause is meant to be implemented and enforced independently as a direct requirement of the CAA, beyond the strictures of any set of regulations or the title V permitting program.

Although the title V permitting program offers clear benefits for identifying and assuring compliance with other types of more typical emission standard-based requirements under regulations promulgated under the CAA, the title V program is a particularly poor fit for implementing the General Duty Clause. The General Duty Clause is, as its name suggests, a *general* duty. Identifying *specific* obligations within each source's title V permit would conflict with the notion of a general duty. Moreover, determining whether an individual source has satisfied this general duty is highly circumstance-specific. The EPA interprets the General Duty Clause to generally require owners and operators to adhere to recognized industry practices and standards in addition to any applicable government regulations. GDC Guidance at 2, 11–12. However, there may be situations where circumstances make a particular industry standard or municipal code inapplicable, unsuitable, or insufficient for a given source, and there may be other ways to abate hazards than those listed in a particular industry standard or municipal code. Each source's obligations are dependent on the detailed knowledge of each individual source. Even in the absence of an industry standard, a source's knowledge of a potential hazard and a feasible means to abate it is relevant to its general duty under CAA section 112(r)(1). *See* GDC Guidance at 12. Should a source learn of a hazard and a feasible means to abate it after its permit is written, the General Duty Clause would ordinarily hold the source responsible for its knowledge. Given that the factual circumstances and knowledge at the source, as well as any relevant industry guidelines, can change frequently, the source's obligation under the General Duty Clause are necessarily fluid. If General Duty Clause obligations were to be included in title V permits as applicable requirements, the relevant permit terms would need to be constantly updated to accurately reflect a source's obligations. Overall, identifying specific General Duty Clause requirements would not only curtail the flexibilities rightly available to a source, but it would also undermine the General Duty Clause by limiting the scope of a source's potential obligations to those specific requirements contained in the permit.[171] For these reasons, the EPA has rejected requests to define and restrict General Duty Clause obligations through rulemaking.[172] It would be similarly inappropriate to define and restrict these obligations through title V permit terms.

In summary, the CAA specifically prohibits the General Duty Clause from being enforced through the citizen suit provision in section 304 that is available for all standards and limitations included in title V permits. Therefore, the EPA must draft and interpret its regulations such that the General Duty Clause is not an applicable requirement for purposes of title V permitting. Although the current part 70 and 71 regulations can be interpreted as consistent with this position, the EPA proposes to amend the regulations to make this more explicit. This change is consistent with the EPA's implementation of both the title V and General Duty Clause programs since their inception in the early 1990s. Moreover, this proposed amendment is consistent with sound policy and avoids nationwide programmatic impacts that would follow if the EPA attempted to implement the General Duty Clause through title V.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review, and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for the part 70 state operating permit programs) and 2060–0336 (for the part 71 federal operating permit program). The clarifications to the regulations proposed in this action do not directly change any of the information collection activities previously approved by OMB. To the extent that the proposed action impacts permitting authorities or permittees, any impacts would fall under, and potentially reduce the burden of completing, the activities already accounted for in the supporting statement for these information collection requests.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not directly impose any requirements on small entities. This proposed rule primarily concerns the EPA's exercise of the agency's oversight obligations when reviewing title V permits issued by state, local, and Tribal permitting authorities, when reviewing title V petitions submitted by any person, and when issuing title V permits under 40 CFR part 71. This action would not directly impose any requirements on the entities involved in these processes (including permitting authorities, permittees, and members of the public). Although those entities could eventually be affected by case-by-case decisions made when the EPA exercises its oversight and/or permitting authorities, the economic impact of any such future decisions on any small entities is expected to be minimal and not adverse. For example, the proposed rule would reduce uncertainty, and potentially cost, for small entities that obtain both NSR and title V permits by clarifying the limited circumstances under which NSR permitting decisions would be subject to additional EPA scrutiny through the title V permitting process.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or

contrast, emission standards like NSPS or NESHAP standards are generally ''self-implementing'' once regulations are promulgated. The similarity is that in both situations, the self-implementing requirements are enforceable regardless of whether they are reflected in a title V permit.

[171] Were the General Duty Clause treated as a permit term, a source could argue it was shielded from its duty by the terms of the permit for hazards identified after the permit was issued. The potential for sources to request a title V permit shield to cover General Duty Clause obligations would exacerbate these concerns, notwithstanding that such a permit shield would not be appropriate, as the EPA has previously explained. *See Shintech I Order* at 12 n.9.

[172] *E.g.,* Stanislaus-Pompeo Letter.

Tribal governments, or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Additional information about how this action could indirectly impact states is included in section IV.D.2. of this preamble.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. One Tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one Tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. This rulemaking does not require those entities to take any specific actions, as described in section IV.D.2. of this preamble. The EPA informally engaged with Tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. Specifically, prior to issuing this proposed rule, the EPA conducted outreach with Tribal representatives through a call with the National Tribal Air Association. Further, the Agency offered to further discuss this action with the Southern Ute Indian Tribe and Navajo Nation. The EPA also solicits comment from affected Tribal governments on the implications of this rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, the EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA finds that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. The issues addressed in this rulemaking neither directly impact the levels of pollution that regulated entities subject to title V and/or NSR permitting may emit, nor the distribution of such regulated entities relative to communities with environmental justice interests. Rather, the issues in this rule are primarily procedural and apply uniformly across the nation.

This proposed rule seeks to codify the EPA's existing positions, so impacts are expected to be generally minimal across the board. To the extent this action may impact communities with environmental justice concerns, such impacts are expected to mirror those affecting the public at large. These expected impacts on the public are explained in section IV.D.4. of this preamble. In summary, this rule will provide more clarity to the public about the most appropriate, and most effective, avenues in which they can raise concerns with different types of permitting decisions. It will also incentivize states to offer more meaningful public engagement on NSR permitting decisions.

The EPA provided pre-proposal outreach to community and environmental justice groups during a regularly scheduled National Environmental Justice Community Engagement teleconference and plans to offer more detailed outreach after this proposal is published.

VII. Statutory Authority

The statutory authority for this action is provided by 42 U.S.C. 7401 *et seq.* More specifically, CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator the authority to establish a federal operating permit program. Additionally, the Administrator determines that this proposed action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine.'' 42 U.S.C. 7607(d)(1)(V).

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR parts 70 and 71 as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 2. Amend § 70.2 by revising paragraphs (1), (2), and (4) for the definition ''Applicable requirement'' to read as follows:

§ 70.2 Definitions.

* * * * *

Applicable requirement * * *

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter, provided that where a preconstruction permit described in paragraph (2) of this definition is issued

with public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish and define, for purposes of this paragraph, the applicable requirements of the implementation plan that apply to the activities authorized by such a preconstruction permit;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D or section 110(a)(2)(C), of the Act;

* * * * *

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act, but not including any requirement under section 112(r)(1) of the Act;

* * * * *

■ 3. Amend § 70.7 by:

■ a. Revising paragraph (d)(1)(iv);

■ b. Removing and reserving paragraph (d)(1)(v); and

■ c. Removing paragraph (d)(4).

The revision reads as follows:

§ 70.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(d) * * *

(1) * * *

(iv) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority; or

(v) [Reserved]

* * * * *

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 4. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 5. Amend § 71.2 by revising paragraphs (1), (2), and (4) for the definition ''Applicable requirement'' to read as follows:

§ 71.2 Definitions.

* * * * *

Applicable requirement * * *

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter, provided that where a preconstruction permit described in paragraph (2) of this definition is issued with public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish and define, for purposes of this paragraph, the applicable requirements of the implementation plan that apply to the activities authorized by such a preconstruction permit;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D or section 110(a)(2)(C), of the Act;

* * * * *

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act, but not including any requirement under section 112(r)(1) of the Act;

* * * * *

■ 6. Amend § 71.7 by:

■ a. Revising paragraph (d)(1)(iv);

■ b. Removing and reserving paragraph (d)(1)(v); and

■ c. Removing paragraph (d)(4).

The revision reads as follows:

§ 71.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(d) * * *

(1) * * *

(iv) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority; or

(v) [Reserved]

* * * * *

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