NACAA
national association of clean air agencies

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U.S. Environmental Protection Agency
Docket ID No. EPA-HQ-OAR-2016-0194

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed rule, *Revisions to the Petition Provisions of the Title V Permitting Program*, which was published in the *Federal Register* on August 24, 2016 (81 Fed. Reg. 57,822). NACAA is a national, non-partisan, non-profit association of air pollution control agencies in 40 states, the District of Columbia, four territories and 116 metropolitan areas. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the United States. These comments are based upon that experience. The views expressed in these comments do not necessarily represent the positions of every state and local air pollution control agency in the country.

EPA is proposing to substantially revise the 40 C.F.R. Part 70 rules regarding the Title V petition process and associated procedural and administrative record-related requirements. The proposal is intended to increase stakeholder access and understanding of the process by which citizens may object to Title V operating permits and to facilitate EPA's review of proposed permits and petitions. It includes three categories of proposed rule language: (1) provisions that would encourage use of EPA's electronic submittal system for Title V petitions; (2) provisions specifying mandatory petition content requirements and standard formatting requirements; and (3) provisions establishing procedures that state and local permitting authorities must follow in responding to public comments on draft Title V permits, developing the administrative record for Title V permits and submitting proposed permits to EPA. NACAA's comments focus on the third component of the proposal, which would add and amend requirements that apply directly to our members, the state and local permitting authorities.

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NACAA understands and agrees that the Title V petitions process should be made more transparent and efficient, and we support sensible changes to the Part 70 rules that would advance this goal. There are, however, elements of the proposed rule that we believe would pose an undue burden on state and local agencies – in particular the proposal to require permitting authorities to provide public notice when they transmit a proposed permit package to EPA. We have also identified a number of areas where we believe the proposed rule language should be amended or clarified. These concerns are discussed in detail below.

Notice of Transmittal of Proposed Permit to EPA

EPA is proposing to require state and local permitting authorities to provide, within 30 days of sending a proposed permit to EPA for its 45-day review period, public notice stating that the proposed permit and response to significant comments are available to the public and explaining how the materials can be accessed. The apparent underlying purpose of the provision is to keep the public apprised of the timeline for EPA's review of a permit, and of where they may obtain information that could assist in decisions of whether or not to object to a permit and/or information that could be included in a petition.

NACAA opposes this proposed "notice of transmittal" requirement because it would impose an inappropriate and undue burden on state and local agencies. The proposal is objectionable for several reasons. First, it goes beyond the requirements of Title V of the Clean Air Act. Section 505(a) of the Clean Air Act Amendments of 1990 (42 U.S.C. § 7661d(a)) requires that "the permitting authority shall notify all States whose air quality may be affected and that are contiguous to the State in which the emission originates, or that are within 50 miles of the source, of each permit application or proposed permit forwarded to the Administrator under this section..." but says nothing regarding notification to the *public* of each proposed permit forwarded to the Administrator.

Requiring state and local agencies to publish what amounts to a second public notice for every proposed Title V permit would be expensive, and many agencies are already struggling with scarce funds and staffing resources. EPA's recent finalization of the permitting e-notice rule will help lower the costs associated with permit notices, but it does not eliminate the problem, especially for agencies that still publish these notices in newspapers. Moreover, publication of the notice by the state or local agency may wrongly suggest to the public that the public comment period on a permit is still open, or is being re-opened.

Finally, there is a fundamental disconnect in requiring state and local agencies to bear the responsibility of informing the public about the start of a decision-making process that does not involve them. The 45-day period for EPA's review of a proposed permit begins upon EPA's *receipt* of a complete permit package. Whether to object to a proposed permit in this period is, of course, a decision that is completely in the hands of EPA. If EPA chooses not to object to a permit, any citizen who wishes to challenge that

decision files a petition with EPA, not with the state or local permitting authority. In sum, the permit review and objection process is an *EPA* process, and NACAA believes that any obligation to inform the public about timelines and procedures related to that process should rest with EPA, not with state and local agencies.

EPA states in the preamble that in addition to proposing to require agencies to provide notice of permit transmittals to EPA, the agency "proposes to post when a proposed permit is received and the corresponding 60-day deadline for submitting a petition on the EPA Regional Office Web sites" (81 Fed. Reg. at 57,839). We note, however, that this provision for EPA website posting does *not* appear in the proposed rule language. EPA expressly solicits comment on "the best method for the public to be made aware of the date that a proposed permit is received by the EPA, as well as the deadline to submit a petition on a particular proposed permit." NACAA believes that posting the information on EPA's Regional Office websites would be a fine way to accomplish this. A reasonable alternative to requiring permitting authorities to provide a notice of permit transmittal to EPA would be for agencies to state in the notice of the draft permit that this information will be available on EPA's website, and to direct them to EPA for further information.

Response to Significant Comments

EPA is proposing to add regulatory language to 40 C.F.R. § 70.7 that would require permitting authorities to respond in writing to significant comments received on a draft permit during the public comment period. State and local agencies recognize that responding to significant comments is required under general principles of environmental and administrative law, and thus already do this as a matter of course (indeed, many agencies go beyond this requirement by responding to all public comments, not just "significant" ones). NACAA does not oppose spelling out the response to significant comments requirement in the Part 70 rules, as it would help the public to understand the process by which concerns expressed with respect to draft permits are considered and addressed.

We believe, however, that EPA's proposed regulatory language for § 70.7(h)(6) and (7) should be improved to more accurately describe what is minimally required of state and local agencies in this regard. In particular, we are concerned that the proposed § 70.7(h)(6) as currently written could be misinterpreted as requiring permitting authorities to send a written response directly to each and every individual who submits a significant comment on a draft permit. We recommend that the language be amended to clarify that the permitting authority has the option to prepare one document containing written responses to all significant comments received, and this consolidated "written response" becomes part of the permit record that is transmitted to EPA and made available to the public upon request. Posting the response to comments on the agency's website should be an option that would suffice for meeting the latter requirement. Of course, state and local agencies would be able to go above and beyond what is minimally required – and many already do – but it is important that they retain the flexibility to

decide whether and when it is appropriate to send written responses directly to individual commenters, depending on the circumstances surrounding a particular permit.

NACAA agrees that the regulations should require permitting authorities to respond only to "significant" public comments received on draft permits, as this is consistent with what is required under administrative law. Again, many agencies respond to all public comments, and we understand that the proposed regulatory language would not prevent them from doing so, nor is it intended to discourage this practice. We think it is important for EPA to clarify that the primary responsibility for determining whether a comment is "significant" rests with the state and local permitting authorities and EPA should defer to their reasonable determinations in this regard when reviewing proposed permits and petitions for objection.

Permit Information Transmitted to EPA

Under EPA's proposal, any proposed Title V permit transmitted by a permitting authority to EPA for its 45-day review period must be accompanied by the written "statement of basis" document and the response to significant comments. If no significant comments are received, the permitting authority would be required to send a statement to that effect to EPA. EPA's 45-day review period would not commence until all of these materials are received. NACAA agrees that sending this information to EPA as part of the proposed permit package is a sensible way to improve the efficiency of EPA's review process. However, we have identified three areas of concern with the rule language as proposed.

First, as EPA recognizes, some permitting authorities engage in "concurrent" review of draft Title V permits, meaning that the 30-day public comment period and EPA's 45-day review period run concurrently, so long as no significant public comments are received. If a member of the public submits a significant comment on the draft permit to the state or local permitting authority, the review process switches to "sequential" review, in which EPA's 45-day review period starts after the close of the 30-day public comment period. NACAA believes it is extremely important that the regulations continue to accommodate concurrent review practices. The proposed rule language does not effectively do so.

In particular, we are concerned that under § 70.8(a)(1) as currently drafted, when no significant public comments are received, the permitting authority is required to send a "statement to that effect" to EPA. The last sentences of § 70.8(a)(1)(i) and (ii) both indicate that the Administrator's 45-day review period will not begin until "all necessary supporting material" required under paragraph (a)(1)(i) has been received by EPA. That "supporting material" would appear to include the statement that no significant comments were received, where that is the case. But a state or local agency engaging in concurrent review submits a proposed permit package to EPA *before* the 30-day public comment period has ended (or even begun) – so the agency would be unable to state at that point whether or not any significant comments were received.

NACAA recommends that EPA amend the proposed regulatory language to clarify that in instances where the permitting authority and EPA are engaged in concurrent review, EPA's 45-day review period begins when all supporting materials listed in § 70.8(a)(1)(i) are received *except* for materials related to public comments or lack thereof. One way to accomplish this, and to improve the rule's overall clarity, would be to delete the last sentences from paragraphs (a)(1)(i) and (ii) and add a new paragraph (a)(1)(iii) to explain when the 45-day review period begins for each scenario (on one hand, for permits submitted after the public participation process is completed, and on the other, for permits submitted before the public participation process is completed).

Second, "statement of basis" is not a defined term in the Part 70 rules. The term is commonly used to refer to the requirement in § 70.7(a)(5) for permitting authorities to provide "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." But as EPA recognizes in the preamble to the proposal (81 Fed. Reg. at 57,832 n.12), this statement is not required to be a standalone document. For example, in some cases, permitting authorities include the statement of basis within the draft permit itself. By referring to the "statement of basis" as one of several items which must be included as part of a permit notice (§ 70.7(h)(2)) or the permit package transmitted to EPA (§ 70.8(a)(1)), the proposed language (1) invites confusion, because it employs an undefined term that appears nowhere else in the Part 70 rules, and (2) wrongly implies that the statement of basis must be a separate document. NACAA recommends the references to "statement of basis" in §§ 70.7(h)(2), 70(a)(1)(i), and 70.13 be changed to "the statement required by § 70.7(a)(5)."

Third, EPA should not require a separate statement of basis for each proposed permit and for each final permit. EPA proposes to amend § 70.7(h)(2) to require the permitting authority to provide a "statement of basis for the draft permit." It also proposes to amend § 70.0(a)(1)(i) to require the permitting authority to provide a "statement of basis for each proposed permit and for each final permit." This implies that a separate statement of basis document must be prepared at each stage of Title V permit review. NACAA requests that EPA clarify that the common practice of preparing the statement required by § 70.7(a)(5) for the draft permit, and then referencing that document throughout the proposed and final stages of the permit process, fulfills the requirement to prepare a statement of basis for each proposed permit and each final permit. To require a permitting authority to provide a second statement of basis for the proposed permit and a third statement of basis for the final permit would impose an undue burden on the permitting authority.

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Once again, we thank you for this opportunity to provide NACAA's views on the Title V petitions process proposal. If you have any questions, please feel free to contact either of us or NACAA Senior Staff Associate Karen Mongoven (kmongoven@4cleanair.org).

Sincerely,

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