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Title V/Clean Air Act: U.S. Environmental Protection Agency Proposed Rule Addressing "Applicable Requirements"

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The United States Environmental Protection Agency ("EPA") published in the January 9th Federal Register a proposed rule addressing the Clean Air Act Title V Operating Permit program regulations. See 89 Fed. Reg. 1150.

EPA describes the proposed rule objective as to:

... more clearly reflect the EPA's existing interpretations and policies concerning when and whether "applicable requirements" established in other Clean Air Act ... programs should be reviewed, modified, and/or implemented through the title V operating permits program.

Congress in 1990 added Title V to the Clean Air Act to assure stationary sources were subject to a comprehensive air permit. The Title V Operating Permit generally does not impose new substantive air quality control requirements.

Title V of the Clean Air Act requires certain stationary sources of air pollutants to obtain operating permits. The Clean Air Act provides that states administer Title V through adopted implementation plans. The intent of a Title V permit is to organize in a single document all the requirements that apply to the permit holder.

States are provided the opportunity to develop their own Title V programs. They are required to submit them to EPA for approval. For example, Arkansas's Title V operating program was approved by EPA many years ago. It is found in Arkansas Pollution Control & Ecology Commission Rule 26. If the proposed EPA rule is adopted, Arkansas and the other delegated states would be required to similarly revise their rules.

EPA believes that the proposed rule will clarify what it describes as the "limited situations" in which requirements under the New Source Review ("NSR") preconstruction permitting program would be reviewed using the Title V oversight authorities. The federal agency also states that it has put forth similar interpretations when addressing citizen petitions to object to the issuance of Title V permits.

The federal Clean Air Act Title V program includes a provision that allows the EPA Administrator to object to a Title V permit issued by a delegated state. The EPA Administrator can object to a Title V permit at two points.

An objection may be made during the 45-day review period and in response to a public Petition within 60 days after the end of the 45-day review period. Further, even if EPA fails to object to a proposed Title V

permit, the right to petition the Agency to reconsider its failure to object to the Permit is potentially available. The right to petition EPA arises at the close of the Agency's 45-day review period.

EPA states that:

. . . 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.

An example of an Order in which EPA addressed this involved Nucor-Yamato Steel Company's [objection](#) to the Title V permit for the Big River Steel, LLC plant in Arkansas.

The three primary positions that EPA takes include:

- The Title V operating permit program is a vehicle for compiling air quality control requirements from other Clean Air Act programs and for providing conditions necessary to assure compliance with such requirements. (It is not a vehicle for creating or changing applicable requirements from those other programs.)
- Provided a source obtains an NSR 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 State Implementation Plan (i.e., SIP) for purposes of incorporation into a title V permit. (EPA would not revisit those NSR permitting decisions through the Title V process.)
- Codification of what EPA describes as its "well established position" that the General Duty Clause is not an "applicable requirement" and therefore not implemented through Title V.

Key components of the preamble to the proposed rule include:

- Background on Title V Operating Permits and CAA "Applicable Requirements"
- Title V Permitting Process, Public Participation, and the EPA's Oversight Role
- Purpose and Function of Title V Permits
- Regulatory Definition of "Applicable Requirements"
- Requirements That Are Not "Applicable Requirements" for Purposes of Title V Permitting
- Self-Implementing Applicable Requirements (e.g., NSPS, NESHAP)
- Requirements Defined Through Title V Permitting
- Applicable Requirements Related to the National Ambient Air Quality Standards and SIPs
- Interface Between NSR and Title V Permitting
- Background: Historical and Current EPA Positions
- Proposed Action
- Interaction With NSR Permitting, Oversight, and Enforcement
- Impacts of Proposed Action
- Alternative Approaches
- The General Duty Clause Concerning the Prevention of Accidental Releases of Hazardous Substances
- Background and Summary of Proposed Action
- Rationale for Proposed Action

A copy of the Federal Register Notice can be downloaded [here](#).