Title V/Clean Air Act: National Association of Clean Air Agencies Comments on U.S. Environmental Protection Agency Proposed Rule Addressing "Applicable Requirements"

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The National Association of Clean Air Agencies ("NACAA") submitted April 10th comments to the United States Environmental Protection Agency ("EPA") addressing a rule proposed on January 9th titled:

Clarifying the Scope of Applicable Requirements Under State Operating Programs and the Federal Operating Permit Program, 89 Fed. Reg. 1150 ("Proposed Rule")

NACAA describes itself as the:

. . . national, nonpartisan, non-profit association of 157 air pollution control agencies in 40 states, including 117 local air agencies, the District of Columbia, and five territories.

In describing the proposed rule's objective, EPA stated it is 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 has stated its belief 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 states that it has put forth similar interpretations when addressing citizen petitions to object to the issuance of Title V permits.

The 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 pursuant to the timeline provided in the Clean Air Act.

NACAA's April 10th comments states a recognition that the effect of proposed rule would be to:

. . . codify a policy position that EPA has taken since 2017: that EPA will not "revisit" NSR decisions made by state and local permitting authorities through the Title V process so long as the decision was made "with public notice and the opportunity for comment and judicial review" (emphasis added).

The comments state that because of a conflicting United States Court of Appeals for the Tenth Circuit decision, the proposed rule is designed to eliminate the conflict and allow application of a uniform policy interpretation across the United States.

NACAA cites as its "chief concern" the new definitional reference to "public notice and the opportunity for comment and judicial review." A specific concern is how this would intersect with state and local minor NSR programs. Cited are the variation among state and local programs with respect to public comment and judicial review opportunities associated with minor NSR permitting. Referenced are permitting authorities that have SIP-approved public notice requirements for minor NSR programs that differ from the 30-day public notice and comment periods required for major NSR permit decisions.

EPA is noted to be developing a non-binding minor NSR policy addressing public participation, etc. NACAA states that the finalization of the policy may provide clarify as to what constitutes sufficient "public notice and the opportunity for public comment and judicial review" in minor NSR permitting. However, concern is expressed that there is currently no consensus as to what that term means with respect to minor NSR.

Therefore, NACAA believes it is:

. . . critically important that EPA's two efforts related to minor NSR be closely coordinated.

The organization requests that in the meantime the proposed Title V applicable requirements proposed rule not be finalized.

A copy of the NACAA comments can be downloaded here.