Flexible Packaging Association
Connecting. Advancing. Leading.

185 Admiral Cochrane Drive
Suite 105
Annapolis, MD 21401

Tel (410) 694-0800
Fax (410) 694-0900

www.flexpack.org

April 11, 2024

www.regulations.gov
Docket EPA–HQ–OAR–2023-0401
Office of Air Quality
Planning and Standards (C504–05),
Environmental Protection Agency,
Research Triangle Park, NC 27711
Spangler.Matt@epa.gov

RE: Clarifying the Scope of "Applicable Requirements" under the State Operating Permit Programs and the Federal Operating Permit Program: 89 Fed. Reg. 1,150 (Jan. 9, 2024).

Dear Mr. Spangler:

Introduction **–** The Flexible Packaging Association (FPA) commends the EPA for proposing to clarify the Clean Air Act ("CAA" or "Act") definition of "applicable requirements" in the Act's Title V (T-V) Operating Permit Program. FPA was established in 1951 and is a national trade association comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials. Examples of flexible packaging include roll stock, bags, pouches, labels, liners, wraps, and tamper-evident packaging for food and medicine. Flexible packaging, a $42.9 billion industry, employs approximately 85,000 people in the United States and is now the second largest segment of the U.S. packaging market estimated to have a value of $180.3 billion.

Background – EPA's purpose in issuing this Notice is to "to better express the EPA's existing positions," 89 Fed. Reg. at 1151, whether the following CAA requirements are Title V ("T-V") operating permit "applicable requirements" that are reviewable during the public review of T-V operating permits and T-V renewal permits pursuant to 40 CFR § 70.2: (1) standards, requirements, and other responsibilities of a T-V source set forth in federal preconstruction permits issued by EPA, State, and/or local permitting authorities ("PAs") under CAA Title I New Source Review ("NSR") Programs; (2) the Clean Air Act's "General Duty Clause" set forth in CAA Section 112(r)(1) of the Act; (3) the applicability of the requirements to obtain a CAA Title I, NSR preconstruction program; construction projects to install emission units that occurred before the issuance, revision and/or renewal or a T-5 permit; and, (4) to a more limited extent, how and when compliance assurance requirements such as periodic and enhanced monitoring and/or recordkeeping required by Sections 504 (b) (4) requirements set forth in other applicable State Implementation Plans (SIPs) and federal standards such as an New Source Performance Standard ("NSPS")

or a National Emission Standard for Hazardous Air Pollutants "NESHAP") are reviewable during T-V permit and renewal permit review. The rule also proposes to update the EPA's regulations in certain respects.

Most of FPA's members' plants operate under State-issued federal T-V permits, which must be renewed pursuant to notice and comment procedures every five-years. Public review of T-V permit renewals for many sources (in other industries) not infrequently raises concerns about whether the CAA's "General Duty Clause," and its requirements to obtain a New Source Review ("NSR") preconstruction permit are "applicable requirements" and have triggered the T-V "objection and petition procedures" set forth at CAA Section 505. These disputes over the meaning of T-V "applicable requirements" elongate, and consume state and local permitting authority resources, and therefore, affect all permit holders. They exist in large part because, as this Notice acknowledges, the agency has resolved associated issues differently over the 25-year history of T-V program. See e.g., *89 Fed. Reg.* at 1152*, 1160-1165.*[1] In more recent years, two federal courts of appeals also have issued divergent decisions regarding whether the requirement to obtain a preconstruction permit pursuant to the NSR provisions in Title I of the Act is an "applicable requirement" that is reviewable when a T-V permit is issued or renewed. *Id.* at 1164.[2] It therefore is important for the EPA to modify the definition of "appliable requirement" is 40 CFR § 70.2 and to provide further clarification of the term's meaning in this and other contexts.

SUMMARY OF FPA'S COMMENTS

From a general perspective, FPA believes that the agency's wisest course is to revise the regulatory definition of "applicable requirement" at 40 CFR § 70.2 to make explicit which CAA requirements are Title V "applicable requirements" and which are subject to Title V public comment (and are reviewable under the objection and petition procedures. For this reason, FPA particularly likes the agency's approach to 'codifying" in paragraph 4 of the definition of applicable requirement," that the Act's Section 112(r)(1) General Duty Clause is *not* a Title V "applicable requirement."

FPA also agrees, for the most part, with the proposed clarifications that standards and other requirements in a Title I preconstruction permit that was issued under an approved State Implementation Plan (SIP) or a Federal Implementation Plan (FIP) or under Parts C and D of Title 1 *are* applicable requirements, but that they are self-executing and thus BACT/NNSR terms such as BACT and/or LAER or an Federal Land Manager's Review under PSD are *not* reviewable Title V applicable requirements under Title V permit review

---

[1] *These "*inconsistent determinations*"* are included in the agency's title V petition database, an archive of the EPA's determinations under the CAA Section 505 objection and permit procedures. While the database is an important resource, it too has the potential to cause confusion and draw out Title V permitting and draining resources. FPA draws attention to this issue later in its comments.

[2] 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, holding the *ExxonMobil Baytown Olefins Order. Env't Integrity Project* v. *EPA,* 969 F.3d 529 (5th Cir. 2020).

or subject to Title V objection and petition procedures. However, as explained further below, we are not clear what EPA is proposing with regard to NSR permits that were issued when a State's NSR program *was* of is *not* fully approved--or if a feature of the NSR program is subject to a SIP-call or operating under Appendix S following a change to a National Ambient Air Quality Standard (NAAQS). Similarly, FPA agrees with the proposed clarification that the requirement to seek a Title I preconstruction review under an approved SIP or FIP is not a T-V "applicable requirement," and hence subject to T-V review or the opportunity for the public to object and file a petition for the Administrator's review of such decisions, which can be challenged in the respective federal court appeals for the jurisdiction in which the NSR permit was "not issued." We begin with the proposed regulatory amendment to paragraph 4 of the definition of "applicable requirement" to the General Duty Clause and work through our lack of clarity on EPA's proposed resolution of NSR applicability issues under Title V for unapproved, or partially approved SIPs, and lastly, request further clarification of any limits on a permitting authority's review of compliance monitoring carried into a T-V permit.

II. FPA'S COMMENTS ON THE PROPOSED RULEMAKING & RELATED REGULATORY CLARIFICATIONS.

Existing Regulations - Pursuant to 40 CFR §70.3, the requirement to obtain a T-V permit "applies to the following sources: (1) Any major source; (2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act; (3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act; (4) Any affected source; and (5) Any source in a source category designated by the Administrator pursuant to this section." Each T-V permit must include all "applicable requirements," a general T-V permit term defined at 40 CFR § 70.2.

Pursuant to 40 CFR §70.2, a T-V "*Applicable requirement*" means 13 sets of CAA requirements "as they apply to emissions units" at a source that is subject to the Title V permitting requirements, (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates). The instant Notice of Proposed Rulemaking ("NPRM" or "Notice"), however, only affects includes the applicable requirements listed in paragraphs 1-4 of the definition, set forth below:

> (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;*

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(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.

A. FPA supports EPA's Proposed Amendment to Paragraph 4 of the Definition of Applicable Requirement" Which Would Explicitly Exclude the General Duty Clause Set Forth in 112(r)(1) of the Clean Air Action.

Background **–** The General Duty Clause at CAA Section 112(r)(1) is a unique CAA requirement that imposes a "general" responsibility on owners and operators of all stationary emitting sources to prevent the accidental release of listed hazardous and extremely hazardous substances into the ambient air, and to minimize the consequences of any such releases of such substances on neighboring communities, that is consistent with Section 1564 of the Occupational Safety Act 's requirement "to identify hazards which may result from such releases using *appropriate hazard assessment techniques,* to design and maintain a safe facility *taking such steps as are necessary* to prevent releases, and to minimize the consequences of accidental releases which do occur*." (Emphasis supplied).*

It might be inferred from current definition of an "applicable requirement" in Section 70.2 that because the General Duty "concerns accident prevention under Section 112," it is a T-V "applicable requirement." See *id.* at 1186-87. In the Jan. 9, 2024 NPRM, EPA proposed to explicitly amend paragraph 4 of the definition of "applicable requirement" at 70.2, to say that an applicable requirement does "not include any requirement under section 112(r)(1) if the Act." See *id.,* at 1189/1. FPA concurs and urges the agency to finalize the proposed amendment of paragraph 4.

1. FPA Agrees that the General Duty Clause is Not an "Applicable T-V Requirement" Because it is Self-Implementing.

FPA agrees that the General Duty to design and maintain a safe plant to prevent and minimize accidental releases of hazardous emissions into the ambient air is self-effectuating, meaning it doesn't require a particular course of response to an accident, explosion, or unplanned release to be implemented or enforced through *any* CAA or an OSHA permit, which would be reviewed by the public, in contrast to the requirements of Section 112 (r)(7) Toxic Release Inventory or Risk Management Plan requirements, which are also self-executing "applicable T-V requirement." *See id.* at 1185. Arguably, making the General Duty a "T-V requirement" could diminish its power to require any regulated or unregulated source of emissions to take the appropriate cautions to anticipate and prevent the impact of events at the plant that could affect surrounding communities, regardless of the specific OSHA and EPA authorities to which the plant is subject.

2. FPA also agrees that incorporating the General Duty Clause in a Title V permit is inconsistent with the CAA because the Act does not allow citizens to enforce it.

One of the general purposes of the Title V permit program was to put all the CAA applicable requirements into one place where they could be enforced by EPA or the public. But, as the NPRM captures, Congress explicitly declined to make the General Duty enforceable by the public through Section 304 citizen suits. Thus, because it is only enforceable by EPA, FPA agrees that it would be plainly inconsistent with the law to make it applicable through a T-V permit. Even listing the General Duty Clause in a T-V permit, with bunches of "asterisks" around the provision that would say "the public and the permitting authority cannot enforce this provision, nor can they petition the Administrator for failing to object to its absence in a source's T-V permit," creates unreasonable public expectations that are inconsistent with other provisions of section 112(r) set forth in the CAA and its legislative history.

3. In FPA's view, it also would be challenging from a practical standpoint to set forth the General Duty Clause in a Title V permit.

The General Duty Clause applies to owners of *all* stationary emitting sources, of which a subset is "major stationary sources" and another is "minor/area" stationary sources. Only certain minor or area sources must obtain a T-V permit because they are subject to a CAA Section 111 and/or Section 112 standard. Thus, FPA believes that EPA lacks the ability to limit the applicability of the General Duty to only major T-V sources, and incongruously, by treating the it as a "applicable T-V requirement," it could be interpreted to require all minor or area sources to obtain a Title V permit simply because it is currently listed under par. 4 as a 112(r) requirement. In the Notice, the EPA ruminates over how difficult and resource intensive it would be for T-V permitting authorities if EPA were to change its current longstanding position and require state and federal Pas to reopen all T- V permits pursuant to notice and comment review requirements to include the General Duty as a new "applicable requirements. See *id. at 1186.* In FPA's view, the situation actually would be far worse, because all stationary sources, not just T-V sources that already have permits, would become subject to a standard under 112(r), under 40 CFR §70.2 therefore, have to obtain a *de novo* T-V permit, even it was a "hollow permit." That would be even more resource intensive that amending the existing T-V permits even if the permitting authority charged T-V fees to issue it. In a nutshell, requiring a permit for such sources, also would conflict with Congress's intent to limit the applicability of the Title V operating permit program to stationary sources that that have the potential to emit 100 tons per year of criteria pollutants or ten/25 tons per year of hazardous pollutant, and minor or area sources that are subject to Title 1 State Implementation ("SIP")Requirements, including New Source Review ("NSR") Requirements, including NSR) and/or area sources of hazardous air pollutants subject to NSPS and/or NESHAPs requirements under Title III of the 1990 Clean Air Act Amendments.

Finally, FPA submits that owners of emitting sources would be unable to articulate all the conditions of a potential accident or cover all the potential responses one might require to protect surrounding communities (including other emitting sources) that would

be required to limit injury under the General Duty into a T-V permit. This duty to prevent releases of hazardous emissions into the ambient air and to minimize such releases when they occur to prevent harm to surrounding communities is immediately contrastable to the specific regulatory obligations that T-V sources have under the CAA's Section 112(r)(7) Toxic Release Inventory ("TRI") regulations and the recently promulgated CAA Risk Management Plan Rule, which sets out the exactly the types of hazardous and extremely hazardous emissions to be addressed by certain industries.

B. FPA Recommends that the EPA Should Amend the Definition of "Applicable Requirement" in § 70.2, to Explicitly Delete Other CAA and Environmental Requirements that are *Not* Applicable T-V Requirements Listed in the Notice of Proposed Rulemaking, Such as the 1964 Civil Rights Act.

FPA believes that the amendment of paragraph 4 of the definition of "applicable requirement" to explicitly exclude the General Duty Clause it the best approach that EPA can take with respect to this and other applicability issues that arise during Title V permit review and the permit objection/petition process. In the NPRM, EPA lists a number of other requirements associated in the permit petition process that the agency has determined are *not* T-V "applicable requirements," including the Civil Rights Act of 1964, Executive Orders Issued by the President or other White House Offices, Greenhouse Gas Reporting Program Requirements, and Consolidated Air Emissions Reporting Requirements, etc. See *id* at 1156. FPA strongly recommends that the Agency codify these "non-applicability determinations," in a "new" paragraph 14 in the definition of "applicable requirement." Not only would including those issues obviate continued and new litigation in various federal appellate courts on the definition of the term, yielding potentially different results, but more importantly, that information would be readily at hand in the Code of Regulations.

C. FPA Generally Agrees with EPA's Proposal that the Terms of a Title I Preconstruction Permit for a New Major Source or Major Modification of a Major Source are Self-Implementing T-V Applicable Requirements, That Are Not Reviewable During T-V Permit Issuance or Renewals, and Thus are Not Subject to Title V's Objection or Petition Procedures.

1. <u>FPA agrees that the terms of NSR permits issued under an EPA-approved state preconstruction permit programs that EPA approves under Section 110 are "applicable T-V requirements," which cannot be challenged during review of a Title V Permit or Permit Renewal.</u>

The notice states 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.'' *Id. at* 1162/3. FPA agrees that none of these terms should *ever* be fodder for public comment during review of a T-V permit, which is merely "the envelope" for listing NSR permit requirement with other applicable Title V applicable requirements in one place. The public has already been provided notice and the opportunity to contest NSR terms such as pollution control requirements and other issues

related to PSD increments, LAER, air dispersion modeling, or other elements of state and local review and contest those decisions in state court when the permit is issued. The public also has had the opportunity to review and contest the adequacy of local, as well as the adequacy of local PSD and/or Nonattainment NSR programs, when they are adopted under local and state administrative laws, and then again when they are approved/disapproved/ or partially approved & disapproved by EPA into a state implementation plan, actions which are contestable in federal court. Further state and local permit programs can also be attacked under other procedures set forth in CAA Sections 110(c) and 110(k), pursuant to which EPA can subsequently disapprove a State's SIP and implement a federal preconstruction program unless those state provisions are addressed, which also can be contested in a federal district or appellate court.

Allowing the public a second bite at the apple to retroactively second-guess the implementation of the elements of state and local NSR permit review programs during Title V permit reviews also would be – and in some instances, currently is -- fractious, resource intensive, and counter-productive for state and local permitting programs. For emission sources, allowing collateral challenges on either the adequacy of any preconstruction permit or the sufficiency of a state/local permit program when the PSD/NSR long after the permit was issued, not only would be inconsistent with the Clean Air Act, but it also raises fundamental questions about whether the Title V source ever had a valid construction permit or has been operating without a permit—in some cases for many years. For this reason, FPA supports the agency's statement in the NPRM that--

> *[T]he 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 . . . 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).*

Id. at 1152. Thus, FPA agrees with these statements and the agency's proposed codification of revisions to paragraph 1 of the "applicable requirement definition" set forth in the Notice as follows--

> *(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;*

> *(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;*

Id. at 1189 *(emphasis added*).

So far so good. But, on page 1152 of the Notice, EPA also states--

> *"<u>However</u>, there are situations in which the title V permitting process is the appropriate venue for addressing NSR permitting issues, <u>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</u>. 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.*

Id. (*emphasis added*).

2. <u>FPA does not agree that NSR permit terms and permit applicability determinations that made by state and local permitting authorities under unapproved Title I NSR programs or during a period when a state's Title I program has been "called" are subject to review during Title V permit issuance and renewal public notice and comment periods and T-V permit objection/petition processes.</u>

The agency's statement on page 1152 of the Notice that refers to instances "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, id.,* appears to FPA to perpetuate the NSR regulatory purgatory that has existed with collateral attacks on elements of State NSR permit programs during the past two decades. At the very least, FPA requests the agency to clarify in the final rule when such circumstances could present themselves as well as EPA's legal basis for allowing collateral attacks through Title V reviews and the objection/petition review process.

FPA submits that it seems entirely unreasonable for EPA to take the position this position when the agency has more than sufficient authority to under CAA Sections 110 and 113 (and citizens have authority under CAA Section 304), to contest an NSR permit at any time after such a permit is issued, or if a permit for a construction project was not issued, whether or not a state or local permitting authority made a formal determination that a preconstruction permit was not necessary. In fact, on page 1172, col. 3, EPA acknowledges that the agency possesses such authority, so we are left to wonder why EPA, or a citizen for that matter, should be able to question a preconstruction permit term or the adequacy of a state or local NSR program at the time of a Title V permit renewal, if the agency or a citizen had not already raised it during the review of a Title I preconstruction

permit (provided of course, that such an opportunity existed before the draft NSR permit was issued). Further, if a state or local NSR permitting authority has complied and corrected a deficiency identified by the Administrator under CAA Section 110(c) and/or (k), and thereafter added sufficiently similar notice and public comment procedures to its NSR program should "inoculate" any NSR terms from Title V review.

.

Perhaps FPA's overarching concern about the instant rulemaking in regard to Title 1 permit terms may be better "unpacked" in the context of the agency's statements on page 1152 that appear in clarifications proposed on pages 1171-1172 of the Notice. For instance, the agency states --

> *[I]f an NSR permit is <u>not</u> 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." <u>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.</u>* ***<u>Therefore, questions about the whether the NSR permit satisfied the requirements of the SIP would be subject to review through the title V process.</u>*** *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.*

Id. at 1171 (*emphasis added*).

This statement begs the answer to two logistical questions: First, how will the public know at the time that a draft T-V permit is issued for review, whether such permit terms were issued under an insufficient NSR program, and therefore, are subject to review under the T-V process (including the permit objection/petition procedures)? While we are aware that most state and local permitting authorities earmark most, if not all, T-V permit terms with an origin (i.e., permit # 19XX-A23), that information is not sufficient to identify whether the state's NSR Program has been incorporated into a SIP and the SIP has been revised, revoked or "called" for any reason, whether associated with the NSR program or some other program (*e.g.*, the attorney general did not have sufficient authority to enforce the program at some moment in time). A spin through the Agency's recently posted SIP Status site, https://www.epa.gov/air-quality-implementation-plans/tools-state-implementation-plan-sip-status, does not seem to reveal that information with any particular granularity that would elucidate that issue.

Second, even if we could find by digging through 40 CFR Part 51, when a part of a State Implementation Plan had been approved, disapproved, and/or revised, there probably will not be sufficient information to tell us gaps when the state or local authority had the authority to issue construction permits even though it and the EPA region may

have continued to do so. And even if we could find that information, it may have no bearing at all on a decision might by the state or locale to *determine that a permit was not required for* a particular source. Again, this seems to leave all historic NSR decisions up for grabs during Title V review, or at least distending that T-V review, when in fact, Congress gave the EPA and citizens the ability to enforce the adequacy of NSR Permits and NSR Permit programs separately using Sections 110, 113, and 304 of the Act (particularly when Congress does not appear to have given the public or EPA the authority to use Title V permit review opportunities to question whether a permit should have been issued or the BACT/LAER limit should have been tighter than it was when the preconstruction permit was issued).

3. <u>FPA disagrees that the benefits of the proposed clarification regarding Title I PSD and NSR permit terms outweighs the downsides of ambiguity about the status of a State or Local NSR Permit Program any time that an NSR permit is issued.</u>

EPA's proposed definition of applicable requirement, as revised, suggests that only preconstruction permits and terms of preconstruction permits that are issued by EPA itself or under an EPA-approved NSR program are insulated from duplicative review during the issuance or renewal of a Title V permit. On its face, that would be unfair if only because it doubles the workload of permitting authorities and permittees, with the latter facing double jeopardy with respect to holding preconstruction permits that can be voided and/or remanded during the Title V review process. EPA's response to this concern appears to be that agency is not creating new permit requirements, but rather this is an incentive for state and local permit authorities to adopt notice and comment procedures that meet EPA's NSR and Title V public notice and public comment requirements. *Id. at* p. 1160. Not only is that response distressing because it seems to suggest that once a state program has been fully approved – provided we could tell if there was a list of those that have been disapproved, it also implies that EPA does not believe that all states preconstruction permit program regulations have equivalent public notice and review requirement, again triggering the fear that without some sort of presumption that they do, NSR permit requirements remain cannon fodder during T-V permit reviews.[3]

FPA suggests that one way to address our perceived problems with the clarity of the definition of "applicable requirement" as it involves NSR permit terms or applicability determinations is for the final rule to include a new presumption that the NSR term incorporated in a permit has been issued by a state or local permitting authority under equivalent notice and comment procedures, unless a commenter directly raised this issue and the local authority issues authority and EPA agreed that the local agency lacked such authority in the final permit's Statement of Basis.

---

[3] Further, since the EPA has voiced its concern that State and Local Minor Source preconstruction permit programs lack equivalent review procedures, which would add to the problem of inoculating any minor NSR permit term that is collected in a T-V operating permit from public notice and review requirements, EPA should explicitly include issues related to NSR Minor Permits from this rulemaking.

4. SIP Calls or Partial SIP Deficiencies Notices Should Not Affect Whether a Title V Applicable Requirement is Subject to Public Notice and Review Requirements.

EPA issues frequent SIP Calls and Determines that SIPs are Partially Deficient with respect to CAA provisions that affect NSR programs such as the 36 recent SIP Calls that regarding startup, shutdown and malfunction provisions that appear in both T-V and NSR permits.[4] Further, EPA itself intercedes in state and local permitting programs regularly by issuing new regulations and interpretations regarding applicability of the program such as the recent reconsideration proposed rule related to Project Emissions Accounting. FPA does not think that either SIP-calls related to NSR permit elements nor federal program updates like the PEAR rule should affect the presumption that NSR terms are not reviewable in Title V permits because those federal EPA actions do not retroactively affect past NSR decisions. Similarly, when EPA revises a NAAQS, and the attainment status of the program shifts – for instance, kicking into motion Nonattainment NSR Review under Part 51, Appendix S, should not affect NSR permits because they are grandfathered from T-V review when the T-V permit application for revision or renewal deemed complete by the State or by law

D. FPA Agrees with the Proposed Agency Resolution of the Fifth and Tenth Circuits' Decisions Regarding Title V Review of the CAA Requirement to Obtain a Preconstruction Permit for New Major Sources and Major Modifications of Existing Sources.

1. The requirements "to obtain" a preconstruction permit is not a Title V applicable requirement and therefore a source's Title V permit cannot be challenged on that ground.

One of the critical purposes for this proposed rulemaking is for EPA to "square" the Title V definition of an "applicable requirement" with two facially inconsistent federal appellate court decisions involving T-V permit appeals in the U.S. Court of Appeals for the Fifth and Tenth Circuits. *Id. at* 1164-1165. See ExxonMobil Baytown Olefins Order in *Env't Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020); *Sierra Club* v. *EPA,* 964 F.3d 882 (10th Cir. 2020). Each of these cases involved specifically whether or not a preconstruction permit was a Title V applicable requirement in the context of challenges to the issuance of Title V permits. In the Fifth Circuit case, the court found that challenges to a source's Title V permit on the grounds that it had failed to properly obtain a Title V permit for a minor source and a modification to a major source were not reviewable because the requirement to obtain a Title I permit was not a Title V applicable requirement and inconsistent with the Clean Air Act and it's Title V's legislative history.[5] The Tenth Circuit decided on nearly the

[4] Recently these SIP calls were reversed by the federal D.C. Court of Appeals for the D.C. Circuit in Environ Comm FL Elec Power v. EPA, et al, D.C. Cir. No 15-1239 (Mar. 9, 2024).

[5] *Id. at 1164.* The Fifth Circuit adopted EPA's view that Title V permitting is not the appropriate vehicle for reexamining the substantive validity of v underlying Title I preconstruction permits." *Id.* at 253. The court's

same question whether a Title 1 requirement (i.e., to obtain a preconstruction permit) *was* an applicable Title V requirement, the absence of which required the Administrator's objection and authorized the Court to remand the citizen's petition based on the EPA's failure to object causing the Court to remand the permit back to the agency.[6] One of EPA's clear purposes for this rulemaking is to clarify that the Fifth Circuit's reading of the law, is the interpretation that the Agency supports. FPA agrees.

2. Not only is it important to clarify that a source's historic or future obligation to obtain a Title I preconstruction permit is not a Title V applicable requirement, it is very important for EPA to be consistent throughout the country with regard to this clarification.

FPA submits that is it extremely important to remedy the inconsistency in interpretations that are the outcome of two judicial circuit's decision, if merely because the states in a judicial circuit and those in an EPA region do not overlap, and under EPA's current regional consistency regulation at 40 CFR § 56.3, permitting authorities must follow the applicable law of the judicial circuit. It becomes confusing for a region and a source owner/operator to implement two different sets of T-V rules in the same EPA region, so it also must be confusing for the public. Second, even though the Huntsman case was not based, per se, on an EPA interpretation of applicable requirement, that decision nonetheless conflicts with EPA's interpretation of the agency's and it is more expedient to revise the Part 70 permit rules than further litigate the issue in other jurisdictions. That would be unfair to entities that must obtain federal NSR and T-V permits to construct and operate and would potentially erect barriers to economic expansion in some states.

3. For these reasons, FPA urges the agency to explicitly modify the definition of "Applicable Requirement" to State that the CAA Requirement for the Owner/Operator of a New Major Source or a Major Modification of a Major Source is *Not* a Title V Applicable Requirement.

FPA believes that the final rule should explicitly amend the definition of "applicable requirement," in paragraph 1 of the definition to state that the duty to have obtained a Title I construction permit is not a Title V applicable requirement. As the agency knows, it is one of the most contentious issues that is raised by the public over and over during Title V review. FPA agrees with the clarifications in the proposed rule that the duty to undergo New Source Review and obtain a preconstruction permit is not a T-V applicable requirement, but we remain confused by the Agency's suggestion on page 1152 of the NPRM that there might be situations when the failure to have obtained a Title I preconstruction permit would become reviewable during a Title V renewal permit, and

---

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

[6] Ibid. 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.

thus we believe that amending the definition of the applicable requirement in paragraph 1 would prevent future confusions We recommend the following amendment--

> (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, except that the requirement to obtain a Title I preconstruction permit is not an applicable requirement.*

E. FPA Does Not Agree with EPA's Proposed Clarification Regarding the Appropriateness of Title V Permit Review of the Sufficiency of Monitoring and Related Compliance Recordkeeping and Reporting of Overlapping Title 1 and Title V Requirements.

1. To the extent that a monitoring requirement for construction of a source pursuant to Subpart C or Subpart D of the Clean Air Act is tied to a control requirement (i.e., BACT and/or LAER for regulated air pollutants), the monitoring decision was part of the control determination, and thus FPA believes it should not be subject to challenges under Title I and Title V's "overlapping" requirements.

EPA states in the NPRM, that unlike the review of BACT determinations for a source under Title 1 NSR preconstruction programs, periodic monitoring imported from a Title 1 permit is properly reviewed during title V permitting. See *id*. at 1170. The Agency reasons that the "overlapping" Title V 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. *Id.* Thus, the agency proposes to clarify that the monitoring and other compliance conditions created for a source by a Title 1 permit are fully reviewable by the public during Title V permit review.

FPA contends, however, that if any emissions unit permitted under an approved NSR program has a monitoring requirement attached to it, the sufficiency of the monitoring should not be subject to T-V permit review. Like other substantive NSR permit requirements, the monitoring was likely part of the BACT or LAER determination for the source, subject to notice and comment under the approved NSR program, and the selection of monitoring technology installed during actual construction of that project was based on the technical feasibility and cost effectiveness of monitoring available when the project was constructed. In other words, it is a historical vestige of the source's permit "control" decisions, and hence, should not be subject to review and reversed under the Title V review process years later – principally because of the cost of existing monitoring which may not have been recovered or because of technical feasibility engineering issues associated with its installation. Enhanced monitoring of the emitting unit has to be anchored to whether or not it is technically available for the unit that was constructed and whether it is still cost-effective for that emitting unit's purpose). In contrast, FPA agrees that if there were *no*

periodic or enhanced monitoring or compliance requirements attached to a substantive control requirement in the NSR permit, monitoring sufficiency issues should be open for Title V review, even if the draft preconstruction permit that a state or EPA issued for that emission unit said no monitoring was being required.

2. FPA has several related questions with respect to the scope of Title V review with respect to the sufficiency of monitoring or other compliance measures, which the Notice did not appear to address:

   (a) If a monitoring issue was resolved in a prior T-V permit renewal, or if an issue that existed in prior T-V permit renewal cycle was not raised at all, can it be raised in a subsequent T-V permit review cycle five years later, when the T-V permit comes up for review again? FPA's view is that once the issue with an applicable requirement or a feature of the applicable requirement such as monitoring was reviewed –or could have been reviewed during a T-V permit renewal, it cannot be reviewed in subsequent T-V renewal procedures.

   (b) Is our assumption correct that the sufficiency of monitoring in a Section 111 NSPS standard or Section 112 NESHAPs cannot be challenged in a T-V permit renewal because it was an element of a prior EPA regulatory rulemaking?

   (c) Although FPA members do not operate equipment that is subject currently to a 111(d) "existing source" NSPS, can monitoring implemented under an approved state plan for existing emission units be challenged in subsequent Title V renewal proceeding for affected sources? It appears to FPA that this situation is analogous to EPA approved NSR programs pursuant to section 110 of the Act, and thus the periodic monitoring of individual emission units controlled under an approved plan are not reviewable during Title V renewal or related procedures.

   (d) Even if a new source permit was issued under an approved state permit program, can the public challenge the absence of any monitoring and/or recordkeeping for the construction of emissions units if there is no periodic monitoring or compliance reporting requirements in the NSR permit?

CONCLUSION –

FPA's members are pleased that EPA undertaken this rulemaking, even if we remain somewhat confused about particular amendments or clarifications. We urge the agency to prioritize finalizing the rulemaking. If you have questions, or wish to discuss these comments, please feel free to reach out to Leslie Ritts, FPA's outside counsel at LRitts@rittslawgroup.com.