

EPA Limits Title V Re-Litigation of NSR Permits

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Overview

On September 25, 2026, the U.S. Environmental Protection Agency (“EPA”) published a final rule that significantly limits the ability of third parties to use the Clean Air Act (“CAA”) Title V permitting process to revisit New Source Review (“NSR”) permitting decisions years after those decisions were made. The rule establishes that NSR permitting determinations generally must be challenged during the original permitting proceeding, thereby providing regulated sources with greater permitting certainty and finality for major capital projects. Published in the Federal Register titled *Clarifying the Scope of “Applicable Requirements” Under State Operating Permit Programs and the Federal Operating Permit Program* (Docket ID No. EPA-HQ-OAR-2023-0401), the rule amends 40 C.F.R. Parts 70 and 71 to codify EPA’s interpretation regarding when requirements established under other CAA programs may be reviewed, modified, or implemented through the Title V operating permit program. The rule becomes effective 30 days after publication.

The rule addresses two principal issues: (1) the relationship between NSR preconstruction permitting and Title V operating permits, and (2) the treatment of the General Duty Clause under CAA section 112(r)(1). Most significantly, the rule provides greater certainty for sources navigating the NSR permitting process. EPA’s amendments are intended to ensure that NSR permitting decisions made through an approved public process are generally not revisited later through Title V permit proceedings.

The rule responds to a circuit split between the U.S. Courts of Appeals for the Fifth and Tenth Circuits. In *Environmental Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020), the Fifth Circuit upheld EPA’s interpretation, concluding that it was consistent with the text, structure, and purpose of Title V. In contrast, the Tenth Circuit reached the opposite conclusion in *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020), finding that the then-existing regulatory definition of “applicable requirement” did not support EPA’s position.

By amending the regulatory language on which the Tenth Circuit relied and codifying the

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interpretation approved by the Fifth Circuit, EPA has established a nationwide framework governing the interaction between NSR and Title V.

NSR and Title V: EPA Establishes a Uniform Nationwide Framework

At the core of the rule is EPA's effort to define the respective roles of NSR and Title V. The rule codifies the approach EPA has applied since 2017: once a source obtains an NSR permit under an EPA-approved permitting program, and that permit was issued following public notice with an opportunity for comment and judicial review, the permit establishes the NSR-related "applicable requirements" of the State Implementation Plan ("SIP") or Federal Implementation Plan ("FIP") for Title V purposes.

Under this framework, Title V is not a vehicle for re-examining underlying NSR permitting decisions. EPA does not intend to use the Title V process to revisit applicability determinations, emissions calculations, control technology determinations, permit conditions, or other issues resolved through the NSR permitting process. This principle applies regardless of the stage of the Title V proceeding; whether the NSR permit was issued pursuant to a SIP or FIP; the type of NSR issue involved; or whether the NSR permit is incorporated into Title V sequentially or concurrently.

Limited Exceptions

EPA recognizes several circumstances in which NSR issues may still be reviewed through the Title V program:

- No NSR permit was issued at all;
- The permit was issued without public notice and an opportunity for comment and judicial review; or
- The issue involves substantive overlap between Title V and NSR requirements, such as the adequacy of monitoring provisions.

As a result, the rule does not insulate unpermitted projects or foreclose review of matters that independently arise under Title V.

Key Regulatory Amendments

The rule revises the definition of "applicable requirement" in 40 C.F.R. §§ 70.2 and 71.2.

- Paragraph (1): Where an NSR permit is issued with public notice and an opportunity for comment and judicial review, the permit establishes and defines the applicable SIP or FIP requirements for Title V purposes.
- Paragraph (2): All NSR permit terms, including terms contained in minor NSR permits, constitute applicable requirements that must be incorporated into Title V permits.
- Paragraph (4): CAA section 112(r)(1) (the General Duty Clause) is expressly excluded from the definition of "applicable requirement," while section 112(r)(7) Risk Management Program requirements remain included.

EPA also amended 40 C.F.R. §§ 70.8 and 70.12 to clarify that alleged defects in requirements established outside the Title V process generally do not provide a basis for

EPA objection to a Title V permit or for a Title V citizen petition.

General Duty Clause Exclusion

The rule also codifies EPA's longstanding position that the General Duty Clause in CAA section 112(r)(1) is not an "applicable requirement" for Title V purposes. EPA points to several considerations supporting that conclusion, including the distinction between the General Duty Clause and Title V permit terms, the provision's origins in the Occupational Safety and Health Act's general duty clause, and the different enforcement structures applicable to the General Duty Clause and Title V permit requirements.

Importantly, excluding section 112(r)(1) from the definition of "applicable requirement" does not eliminate EPA's authority to enforce the General Duty Clause independently of the Title V program. The final rule instead clarifies that the General Duty Clause need not—and should not—be incorporated into Title V permits as an applicable requirement.

Practical Implications for Regulated Sources

Greater Finality for NSR Permits

For projects requiring PSD, nonattainment NSR, or minor NSR permits, the permitting process becomes the primary forum for resolving disputes regarding applicability determinations, emissions calculations, control technology requirements, offsets, and permit conditions. Once an NSR permit is issued through a qualifying public process, regulated sources should face substantially reduced risk that those same issues will be challenged years later through Title V permit proceedings.

Reduced Risk of Collateral Permit Challenges

Stakeholders have sometimes sought to use Title V permit issuance, renewal, revision, or citizen-petition proceedings to challenge underlying NSR determinations. The final rule makes clear that Title V is not the appropriate vehicle for challenging whether an applicable requirement was correctly established in the first instance. This should reduce the risk of permit delays and uncertainty associated with collateral challenges to previously issued NSR permits.

The rule does not, however, eliminate all Title V challenges relating to an NSR permit. Challenges concerning the Title V permit itself—including whether it appropriately incorporates applicable requirements or contains adequate compliance provisions—remain possible.

Increased Importance of the Initial NSR Proceeding

Because Title V generally will not provide a second opportunity to challenge the substantive validity of an NSR determination, the administrative record developed during the NSR process becomes increasingly important. Permit applicants should ensure that applicability analyses, emissions calculations, control technology evaluations, modeling demonstrations, and supporting technical documentation are thoroughly developed

during the original permitting proceeding.

For significant projects, applicants may therefore have an additional incentive to identify and resolve potential permitting issues before the NSR permit is issued rather than assuming that unresolved issues can be addressed during a subsequent Title V proceeding.

Potential Incentive for Broader Public Participation

EPA also notes that permitting authorities may choose to provide public notice and an opportunity for comment for a broader range of NSR permits because permits issued through a qualifying public process receive the benefit of the finality framework established by the rule. Some permitting authorities may conclude that greater public participation at the NSR stage is preferable to uncertainty during subsequent Title V proceedings.

Conclusion

The final rule is principally a permitting-certainty measure. For sources that obtain NSR permits through a public process, EPA has substantially limited the ability of third parties to revisit underlying NSR determinations through the Title V program. As a result, regulated entities should benefit from greater finality regarding key permitting decisions, reduced risk of collateral permit challenges, and increased certainty when planning and implementing capital projects.