Air Permitting Forum

Shannon S. Broome
Executive Director | sbroome@hunton.com

Robert J. Morehouse
Director | rmorehouse@hunton.com

COMMENTS OF THE AIR PERMITTING FORUM

EPA, *EVALUATION OF EXISTING REGULATIONS; REQUEST FOR COMMENT*

82 FED. REG. 17,793 (APR. 13, 2017)

Docket ID No. EPA-HQ-OA-2017-0190

Submitted May 15, 2017

CHARLES H. KNAUSS
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037
(202) 419-2003
cknauss@hunton.com
COUNSEL TO THE AIR PERMITTING FORUM

SHANNON S. BROOME, EXECUTIVE DIRECTOR
ROBERT M. MOREHOUSE, DIRECTOR
AIR PERMITTING FORUM

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

INTRODUCTION

The Air Permitting Forum (APF or the Forum) submits these comments in response to the U.S. Environmental Protection Agency (EPA or the Agency) Request for Comment entitled *Evaluation of Existing Regulations*, 82 Fed. Reg. 17,793 (Apr. 13, 2017). The Forum is a coalition of companies focused on implementation issues under the Clean Air Act (CAA or the Act), including pre-construction New Source Review (NSR) and Title V permitting, as well as standard-setting under the National Ambient Air Quality Standards (NAAQS), hazardous air pollutant (HAP), and New Source Performance Standards (NSPS) programs. APF members are subject to numerous CAA regulatory requirements and are uniquely situated to address the impacts of these regulations on the regulated community.

APF supports EPA's efforts to identify regulations that may be appropriate for repeal, replacement or modification in accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (EO 13777) issued on February 24, 2017.[1] APF has a long history of working with EPA in the CAA regulatory process, and it has consistently maintained that the goals of the Act are best served by a pragmatic approach based upon sound cost-benefit analysis, as well as an understanding of the practical implications of regulatory requirements on individual facilities and industry as a whole.

The Forum recently submitted comments in response to the U.S. Department of Commerce (DOC or Commerce) Request for Information (RFI) on the impact of federal regulations on domestic manufacturing.[2] In those comments, APF identified permitting and other regulatory challenges experienced by its members and offered detailed explanations of specific opportunities for regulatory reform within the various CAA regulatory programs.[3] APF encloses those comments with this submittal and incorporates them by reference.

The Forum appreciates the opportunity to build upon its Commerce comments, tailoring the previous submittal to identify specific EPA programs under the CAA that may be appropriate for repeal, replacement, or modification in accordance with EO 13777 criteria. We note that due to the tight timeframes for replying to this notice and our desire to highlight issues of greatest concern, these comments are focused on a limited number of issues. We may provide additional topics and input as time goes on, to focus on other issues as this very productive discussion continues.

---

[1] *See* Exec. Order No. 13777, *Enforcing the Regulatory Reform Agenda*, (Feb. 24, 2017), 82 Fed. Reg. 12,285 (Mar. 1, 2017).
[2] *See* DOC, *Impact of Federal Regulations on Domestic Manufacturing*; *Notice; Request for Information*, 82 Fed. Reg. 12,786 (Mar. 7, 2017).
[3] *See* Comments of the APF on Department of Commerce, *Impact of Federal Regulations on Domestic Manufacturing; Notice; Request for Information*, 82 Fed. Reg. 12,786 (Mar. 7, 2017), dated Mar. 31, 2017, Docket ID No. DOC-2017-0001-0170 (Attach. 1) (APF Department of Commerce Comments), *available at* https://www.regulations.gov/document?D=DOC-2017-0001-0170.

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

DETAILED COMMENTS

EO 13777 requires the EPA Regulatory Task Force to evaluate existing regulations and make recommendations regarding those that are appropriate for repeal, replacement, or modification using six criteria specified in the EO. In the comments that follow, APF identifies regulations and related EPA policies, guidance, and programs under the CAA that are candidates for repeal, replacement, or modification based on the criteria. For each CAA program area, the Forum offers comment on:

(1) the specific topic to be evaluated;
(2) the recommended action to be taken (*i.e.* repeal, replacement, or modification);
(3) the applicable EO 13777 criteria, in accordance with the key below; and
(4) APF's reasons for its recommendation.

In identifying applicable EO 13777 criteria for each topic, the Forum uses the following shorthand references:

Short Reference	EO 13777 Criteria[4]
1 – Inhibits jobs	Eliminates jobs, or inhibits job creation.
2 – Outdated, unnecessary	Is outdated, unnecessary, or ineffective.
3 – Costs v. benefits	Imposes costs that exceed benefits.
4 – Inconsistency	Creates a serious inconsistency or otherwise interferes with regulatory reform initiatives and policies.
5 – Transparency	Is inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility.
6 – Directives	Derives from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

As we explained in our March 2017 comments to Commerce, many current CAA permitting and other requirements stifle economic growth and meaningful job creation by creating regulatory uncertainty, protracted permitting processes that delay construction and job creation, and disincentives for efficiency improvements and modernization of existing sources. The Forum offers the following observations on

[4] *See* EO 13777, 82 Fed. Reg. 12,286.

ED_002674_00002696-00003

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

specific aspects of the Agency's CAA programs that are candidates for repeal, replacement, or modification.

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

Table of Contents

Page No.

INTRODUCTION 1

Detailed Comments 2

I. New Source Review 6

(1) Respect State Implementation Agency Role 7
(2) Eliminate the Practice of Re-interpreting Rules Through Enforcement and Litigation 8
(3) Remove Modeling Barriers to Plant Expansions 10
(4) Appropriately Implement the Causation Requirement/So-called "Demand Growth Exclusion" 12
(5) Resolve Longstanding Ambiguity on Project Netting and Netting Emission Calculations 13
(6) Resolve Longstanding Ambiguity on Aggregation of Projects 15
(7) Resolve Longstanding Ambiguity on How to Address Debottlenecked Emission Units 16
(8) Clarify that "Routine" Means Routine in the Industry for the Routine Maintenance, Repair, and Replacement (RMRR) Exclusion 17
(9) Increase the Significant Emission Rate (SER) for Greenhouse Gas Emissions (GHGs) 18
(10) Improve Process for Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) Technology Determinations 19

II. NAAQS Promulgation and Implementation 20

(1) Improve the Scientific Basis for NAAQS Review 23
(2) Conduct Integrated Quantitative Uncertainty Analyses to Improve the Scientific Basis for NAAQS Review 23
(3) Ensure Appropriate Consideration of Background Concentrations 25
(4) Grandfather Sources Undergoing Permit Review 26
(5) Require Clean Air Scientific Advisory Committee (CASAC) Review of Attainment Strategies 27
(6) Improve Accuracy of Air Quality Modeling Demonstrations 28
(7) Improve Accuracy and Use of NAAQS Co-Benefits 29

ED_002674_00002696-00005

III. **Section 112: HAPs and RMP** 30

(1) Repeal Maximum Achievable Control Technology (MACT) Once-In-Always-In Policy 30
(2) Repeal RMP Amendments 31

IV. **Title V** 31

Stop Collateral Attacks on Construction Permits 32

V. **Other** 34

Regional Consistency Rule 34

CONCLUSION 34

ED_002674_00002696-00006

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

I. NEW SOURCE REVIEW

The Forum supports improvements to the NSR program given its high cost, declining net environmental benefits, and impact in delaying modernization and efficiency improvements at existing manufacturing plants. The Forum believes there are several immediate steps the Administration can take to alleviate NSR-related permitting burdens without reducing environmental protections by simplifying the federal major NSR permitting process. (40 C.F.R. §§ 51.165; 51.166, 52.21, 52.24, and Part 51, App'x S and W).

The process of obtaining a pre-construction permit (whether nonattainment NSR (NNSR) or Prevention of Significant Deterioration (PSD)) is time consuming, expensive, and uncertain. Key steps include project design, permit applicability determinations, identification of potential air pollution controls, detailed technical engineering and cost analyses, air quality modeling, and the review of literally hundreds of guidance documents by legal and technical teams. In our experience, 9 months is the typical minimum time required for permit issuance once a complete application has been submitted, but the complete permitting process including the pre-permit submission work, can take as long as 3 years, if not longer. This timeframe does not, however, include the many months and sometimes years a company may spend in developing its applications, nor does it include the time needed for possible permit appeals or other such delays. Even for minor NSR permits—*i.e.*, those that do not reach the emission increase levels for major modifications—the timeline for processing can be 6 to 18 months, also not including time for potential permit appeals or other delays. This delay severely hampers the ability of companies to adopt innovations and compete effectively in world markets.

Determining whether or not a permit is required is itself a significant source of delay and an obstacle for expanding production in the U.S. The initial determination of whether NNSR or PSD has been triggered may entail numerous hours of engineering and legal evaluation and review. EPA and its state counterparts have generated hundreds of guidance documents interpreting these provisions. Understanding and applying this material—particularly with respect to individual applicability determinations—is estimated by some as the most time-consuming aspect of the permitting process.

The Forum believes that the burdens associated with NSR permitting could be alleviated by taking the following actions, explained in more detail below:

(1) Respect State Implementation Agency Role;
(2) Eliminate the Practice of Re-interpreting Rules Through Enforcement and Litigation;
(3) Remove Modeling Barriers to Plant Expansions;
(4) Appropriately Implement the Causation Requirement/So-called "Demand Growth Exclusion;"

ED_002674_00002696-00007

(5) Resolve Longstanding Ambiguity on Project Netting and Netting Emission Calculations;
(6) Resolve Longstanding Ambiguity on Aggregation of Projects;
(7) Resolve Longstanding Ambiguity on How to Address Debottlenecked Emission Units;
(8) Clarify that Routine Means Routine in the Industry for the Routine Maintenance, Repair, and Replacement (RMRR) Exclusion;
(9) Increase the Significant Emission Rate (SER) for Greenhouse Gas Emissions (GHGs);
(10) Improve Process for Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) Technology Determinations.

NSR Topic 1: Respect State Implementation Agency Role.

Recommended Action: Modify (along with simply changing how EPA interacts with its state partners).

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

In states that have obtained approval to run their permit programs, EPA has a history of second-guessing state decisions, introducing delays and risk for companies that work with their states to obtain permits. Under the CAA and other environmental statutes, Congress has wisely directed EPA to utilize the expertise and resources of the states to better protect the environment, and for the states to remain our nation's frontline environmental regulators. EPA, however, has repeatedly second-guessed the purpose, content, and timing of state permit decisions. This approach conflicts with the "cooperative federalism" intended by Congress. States must be partners and not mere instruments of federal will.

The Forum therefore recommends that EPA respect decisions made by its state partners as Congress originally intended and reduce, if not eliminate, federal second-guessing. The CAA requires each state to adopt a State Implementation Plan (SIP) that has as its goal the attainment and maintenance of the NAAQS as well as implementation of the NNSR and PSD programs. The Act requires that for NNSR, states adopt and implement their own SIP-approved program; for PSD, a state can either allow implementation of the federal program (through a delegation or by having EPA issue permits directly), or it can adopt its own regulations and obtain SIP approval. When a state has an approved program (as compared with a mere delegation), its decisions in individual permits are supposed to be respected and EPA is supposed to exercise its oversight role on a programmatic basis. Unfortunately, over the past decade, states with approved NNSR and PSD programs have repeatedly found themselves being micro-managed on a permit-by-permit basis by EPA. The Forum urges EPA to substitute individual permit oversight for programmatic oversight of a

ED_002674_00002696-00008

state's adherence to permitting requirements. States should be evaluated on how their *program* is performing, not micromanaged on each and every permit decision. In other words, there should be a core presumption that states are making the right decisions, and EPA should spend its oversight resources looking at whether the decisions of the *program as a whole* are faithful to the Act.[5] Doing so will allow states to make local decisions regarding air quality and allocation of the airshed consistent with statutory objectives so that they can allow responsible expansion of manufacturing plants in a timely manner without undue federal oversight and delay (criterion 1). It will also remove costly process and transaction costs by allowing the regulators "on the ground" to make decisions and be responsive to all local stakeholders (criterion 3).

NSR Topic 2: Eliminate the Practice of Re-interpreting Rules Through Enforcement and Litigation.

Recommended Action: Modify and/or clarify.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

Over the past two decades, the CAA's NSR program has been a major—and unnecessary—drag on improved utilization and efficiency of domestic manufacturing capacity. The situation was compounded during the 8 years of the previous Administration due to the increased use of enforcement and litigation to block efficiency and utilization improvement projects by re-interpreting rules as part of the enforcement/litigation process. By changing policy through enforcement/litigation, the U.S. Department of Justice (DOJ) and EPA deprived the public of notice of their obligations and of the opportunity to comment on whether the rules were consistent with law. Regulatory confusion and obstacles to efficiency improvements hurt domestic jobs *and* the environment.

By way of further background, EPA regulations appropriately provide that routine maintenance, repair, and replacement (RMRR) of existing equipment does not trigger NNSR or PSD. Unfortunately EPA has often interpreted the regulations to provide that projects that otherwise would qualify as RMRR should lose this status and trigger NNSR/PSD if they also improve efficiency or expand production with lower emissions per unit of product. As a result, EPA has incentivized existing manufacturing plants to operate their plants exactly as they were built and only to replace parts with the exact vintage of parts that existed when the plant was built. This sends the message that they should not adopt technological advances in materials or design if those improvements will have the effect of making a plant more efficient or achieve higher utilization. Therefore, the only economical choice is to replace 20-year old parts with parts that are

[5] An alternative approach that gives more respect to states with approved programs would be for EPA to apply the same deferential standard that the courts apply to EPA rules. This would mean that EPA must defer to state interpretations of the SIP unless they are unreasonable.

ED_002674_00002696-00009

of the same technological sophistication and design as the originals, rather than with the better and more efficient designs developed over two decades (*e.g.*, as if a person were compelled to purchase a computer today with Y2K technology).

The creation of these NSR disincentives and barriers to modernization and efficiency projects has largely been advanced through "regulation by enforcement/litigation" rather than by the EPA office responsible for crafting and interpreting the underlying regulations. The perverse result is that numerous RMRR projects available for U.S. manufacturing and utility plants that would improve efficiency or expand production with lower emissions per unit of production are not even considered, given the specter of NSR permitting burdens and the difficulty of obtaining determinations of applicability from EPA or the state, even for already well-controlled plants.

To fix these problems, the Forum recommends that EPA:

(1) Review its interpretation of its regulations and modify them to make NSR regulations "more regular" and to incentivize and promote the efficient use of the installed manufacturing, production, and electric generating base. A good place to start is by clarifying policies covered in the following pages that are now in a state of confusion due to narrow and/or inconsistent enforcement/litigation-related interpretations. This will help prevent further litigation and/or policy positions that are inconsistent with this Administration's regulatory reform goals, including respect for State decisions and the promotion of domestic jobs and the environment.

(2) Implement structural changes within the Agency for how enforcement is initiated and managed so that enforcement is conducted by those EPA staff members that best understand the substantive requirements of the regulations they enforce, as well as the history and nuanced nature of the specific regulatory programs. The enforcement functions within EPA have been re-organized multiple times since 1971, and the current scheme warrants a fresh look in order to be more efficient and faithful to the established meaning of regulations within the EPA office that created the regulations. This reorganization could take many forms; however, the essence of a successful reorganization will be that those involved in enforcement are more connected to the standards they enforce, and those that set standards are more connected to the enforcement of the standards they established. By doing this, regulation by enforcement/litigation will be minimized.

ED_002674_00002696-00010

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

NSR Topic 3: Remove Modeling Barriers to Plant Expansions.

Recommended Action: Modify or Repeal and Replace

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

Modeling requirements often unnecessarily prolong the permitting process and may result in costly facility changes with little to no benefit to air quality. This issue has been exacerbated by the establishment of stringent $PM_{2.5}$ NAAQS and the short-term (1-hour) NAAQS for sulfur dioxide (SO_2) and nitrogen oxides (NOx). With the issuance of newer short-term NAAQS, modeling requirements can play a major role in prolonging the permitting process for both PSD and state-only projects, as states (at EPA's request, in many cases) may require projects to conduct modeling for the 1-hour nitrogen dioxide (NO_2), SO_2, and $PM_{2.5}$ NAAQS even for projects that are minor.

Because EPA regional offices oversee SIP development and implementation, states typically accept EPA "recommendations" that require modeling as part of the permit application process, despite actual measurements of air quality through ambient monitoring networks that indicate concentrations at the monitor well below NAAQS levels and, when evaluated against the emissions from the project, strongly suggest that any "modeled" violations of the NAAQS are unlikely to occur. The overly-conservative assumptions employed by EPA that models theoretical exceedances of a NAAQS lead to delays that deter efficiency improvements at existing plants.

In conducting an analysis for the PSD program, facilities are required to use EPA-approved models to demonstrate that a project will not cause or contribute to a violation of a NAAQS standard. The EPA-prescribed methods lead to a modeling result that rarely approximates and typically significantly overestimates monitored concentrations near the facility. Reliance on modeling that over-predicts ambient concentrations can result in additional unwarranted costs by causing facilities to install beyond-BACT pollution control equipment, even though the assumptions used in the models and the predicted concentrations are not representative of real-world conditions.

The NAAQS for SO_2, NO_2, and $PM_{2.5}$ (including both the annual and daily $PM_{2.5}$ standards) have created urgency in addressing this modeling conservatism due to the stringency of these new standards. Modeling demonstrations for the NO_2 and SO_2 1-hour and $PM_{2.5}$ standards have proven to be extremely difficult for many sources, especially during transient operations such as startup and shutdown. The Forum recommends that EPA encourage and empower state regulatory agencies and EPA regional offices to liberally implement the recommendations of the revised Appendix W to represent sources that are a part of the cumulative modeling analysis (but are not new or modified units as part of a project) using temporally representative actual

operating conditions and emissions.[6] This approach would also mean identifying true background levels and including reasonable assumptions regarding neighboring emissions. Because of the stringency of these standards, EPA has allowed some proposals to use monitored data along with modeled data. EPA should be encouraged to allow monitored data along with modeled data when it is available and provide greater flexibility in modeling intermittent operations.

The Forum therefore recommends that EPA revise or replace its modeling rules and guidance to help expedite the NSR permitting process and to vest more authority in the state permitting authorities to make adjustments to the models when they deem appropriate for industrial plants operating in their states. Although EPA's recent stringent NAAQS, including the 1-hour NO_2 standards, will still be challenging to meet even for small projects, the recommended changes in the modeling guidance will help sources by allowing them to rely on more realistic modeling assumptions. Making these improvements fits several of the criteria identified in the EO:

- Changing the current modeling guidance would remove barriers to job creation by allowing manufacturing expansion projects to go forward based on realistic modeling of a project's expected impact (criterion 1).

- Assuring states' primacy as decision-makers on individual permits and modeling requirements would reduce uncertainty and the number of modeling scenarios. Since modeling is expensive and labor-intensive in and of itself, minimizing the number of runs that companies need to complete would save resources and time. Moreover, empowering state authorities to exercise their technical judgment given their understanding of the sources in their jurisdiction and make appropriate decisions at the local level (criterion 3) will help reduce the extensive negotiations over detailed modeling parameters, as well as the delays and uncertainties caused by obtaining case-by-case exceptions from EPA headquarters.

- Making these changes would reduce the incentive for state authorities to incorporate overly conservative assumptions in the modeling requirements based on what they think EPA may want. Existing regulations and guidance for permit modeling establish the state regulatory agency as the "appropriate reviewing authority" and this authority should be respected and overruled only in cases where the state regulatory agency seeks advice at the level of the EPA regional office or headquarters" (criterion 3).

- It would also limit costs that do not provide an environmental benefit (criterion 3). Frequently to demonstrate compliance with modeling, facilities spend money to install fences or taller stacks. These can cost millions of dollars, but do not provide a true environmental benefit.

[6] For example, many sources run intermittently, such that the worst case assumptions in the models grossly overstate impacts.

- In addition, changes to the current modeling guidance would help improve transparency for the regulated community and the public. Permittees would be able to work directly with the state decision-makers (who would be the state permitting authorities) and decisions regarding modeling would be part of the permit record for a given permit (criterion 5).

NSR Topic 4: Appropriately Implement the Causation Requirement/So-called "Demand Growth Exclusion."[7]

Recommended Action: Modify/Repeal Inappropriate Prior Guidance.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

The Forum recommends that EPA review its interpretation of its regulations or otherwise modify them to incentivize and promote the efficient use of the installed manufacturing, production, and electric generating base. As a starting point, EPA should re-visit the way it implements the so-called "Demand Growth Exclusion," which provides that a source *shall exclude* that portion of a projected emissions increase that is unrelated to the change and that could have been accommodated during the baseline period consistent with the existing regulations. This exclusion flows from manufacturing and utility plant regulations, which have always provided that only those emissions that "result" from (*i.e.*, are caused by) a project should be counted in determining whether an emissions increase that will trigger PSD or NNSR permitting has occurred.

Unfortunately, EPA interpretations of its regulations have undermined this fundamental principle. EPA needs to revisit those determinations and ensure that it faithfully implements the CAA, so that manufacturing plants will be allowed to define what a unit was "capable of accommodating" during the baseline period and whether emissions after a project were caused by the project itself or resulted from other factors, such as market conditions or other factors unrelated to the project. While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the "predominant cause,"[8] more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change. EPA

[7] For ease of description, references to "demand growth exclusion" in this document mean the requirement in the statute that emissions increases considered for NSR applicability purposes are those that are caused by the change, 42 U.S.C. § 7411(a)(4), and to the regulatory provisions in the 1992 and 2002 NSR regulations that require exclusion from projected actual emissions of those emissions that the unit could have accommodated during the baseline period and that are unrelated to the change. EPA, *Requirements for Preparation Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources; Final Rule*, 57 Fed. Reg. 32,314 (July 21, 1992); EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects; Final rule*, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (2002 NSR Reform Rule).
[8] 57 Fed. Reg.at 32,327.

ED_002674_00002696-00013

should clarify that the Demand Growth Exclusion/causation requirement be implemented in a manner that promotes efficiency improvements and modernization.

Specifically, the Forum recommends that EPA clarify its position on the Demand Growth Exclusion/causation requirement to remain faithful to the principles stated when the provisions were established in 1992 and 2002 as well as to the CAA. Making this improvement fits several of the criteria identified in the EO:

- It would remove barriers to job creation because it would mean that EPA would stop inappropriately attributing emissions increases to projects that are not actually causing those increases. It would also allow for plants to be maintained using up-to-date technology/parts and to improve efficiency, which could help U.S. facilities better compete internationally (criterion 1).

- From a cost/environmental benefit perspective, it would allow companies to maximize the use of existing assets/the installed base and would in many cases result in lower emissions per unit of product produced, even if more units are produced in a given time period (criterion 3).

- It would eliminate the inconsistent manner in which EPA has interpreted the demand growth exclusion to create a level playing field for manufacturing plants (criterion 4).

- It would improve transparency for permittees because they would know that they can make reasonable projections of the impacts of a project and rely on the demand growth provisions when appropriate. In the current situation, EPA is second-guessing state regulators and companies, even when there has been no emissions increase from a project—a situation that is untenable from a transparency perspective because companies have no way of knowing what the rules of the road will be for their particular project and are unable to rely on the determinations of their state regulators (criterion 5).

- It would improve transparency for all stakeholders because it would provide national guidance or regulations that explain how efficiency improvements are to be treated under the NSR program (criterion 5).

NSR Topic 5: Resolve Longstanding Ambiguity on Project Netting and Netting Emission Calculations.

Recommended Action: Modify/Replace.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

NSR applicability involves a two-step inquiry: First is whether the project itself causes a significant emissions increase, and if it does, the second is whether the major

stationary source will also experience a significant net emissions increase. To implement the second step, the NSR regulations have long provided for a "netting analysis" that involves considering emission increases and decreases, from both the current project and other projects that have occurred during a contemporaneous time period. Prior to the 2002 NSR Reform rules, in the first step, companies could determine if a project would increase emissions by looking at the project-related effects on increasing and decreasing emissions (*e.g.*, if a project involved shutdown of a unit).

In revising the regulations in 2002,[9] EPA made what we believe was an inadvertent change that EPA now interprets as eliminating the ability to count emission decreases that are expected to occur from a project in the first step of the analysis, so-called "project netting," which had always been previously allowed. In practical terms, the idea of allowing a complete look at a project in step 1 means that when a project involves shutting down a unit and building a different process unit, which may be larger or slightly different than the prior one, determining the "project's emissions increase" should involve determining the emissions increase from the new unit and subtracting the emissions that previously were attributed to the unit being shut down. This straightforward analysis makes sense because such a project involves both a shutdown and an installation, so both should be considered in step 1 of the analysis. Requiring that decreases only be counted in the netting analysis means that a time-consuming netting analysis must be done to consider the shutdown of the old unit. In a 2006 proposal, EPA proposed to return to the pre-2002 approach.[10] EPA did not take final action on the proposal in 2009, leaving in place a more cumbersome analysis that often results in triggering NSR or at least complicating the applicability decision.[11] We note further that EPA has ignored plain language in parts of the NSR regulations that clearly contemplate project netting in that they require evaluation of the "sum of the difference" of emissions in determining applicability.

EPA should clearly state that emission decreases from a project are allowed in determining project emissions changes without triggering full netting of all contemporaneous projects. Returning to the pre-2002 rules will simplify applicability determinations for companies and reduce permitting burdens on states, as they will only need to address those projects that actually cause a significant increase.

On a separate point and an approach that is not required by the NSR regulations, EPA has also taken the position that when contemporaneous netting is conducted, companies must change their analysis of the emissions from previous projects to assume, even though there is no reason to do so (and actual emissions changes from completed projects are known), that emissions in the future will be at potential emission levels. In other words, EPA applies an actual-to-projected-actual test for increases

[9] 2002 NSR Reform Rule, 67 Fed. Reg. 80,186 (Dec. 31, 2002).
[10] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting; Proposed Rule*, 71 Fed. Reg. 54,235, 54,248-49 (Sept. 14, 2006).
[11] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting; Final Rule*, 74 Fed. Reg. 2376, 2376 (Jan. 15, 2009).

ED_002674_00002696-00015

when a project is constructed but an actual-to-potential test when that project is considered in a contemporaneous netting analysis in the future. This nonsensical "apples and oranges" approach is illogical and counterproductive and in fact is the very approach that was rejected in the 2002 NSR Reform Rule. EPA should take this opportunity to reverse this interpretation.

The Forum recommends that EPA finalize the project netting rule that was proposed in 2008 and either revise the regulations or repeal the prior guidance that would apply an actual-to-potential test for projects that are included in a netting analysis. Making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation because it would mean that EPA would allow companies to take appropriate credit for real emission reductions that they are achieving, thus expansion (criterion 1).

- It would reduce costs of netting analyses while providing the same environmental benefits that are otherwise achieved through the contemporaneous netting approach (criterion 3).

- It would improve transparency because the project netting analyses are far more straightforward than contemporaneous netting analyses, so members of the public could easily follow what is being proposed in a given permit (criterion 5).

NSR Topic 6: Resolve Longstanding Ambiguity on Aggregation of Projects.

Recommended Action: Repeal/Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

In EPA's 2009 final rule,[12] which remains under reconsideration since February 2009,[13] EPA established a rebuttable presumption that projects separated by 3 years or more are not part of a single project and that there is no presumption for projects that occur within the 3 year time frame to be treated as a single project, as these should be judged on their own facts.[14] Because of the reconsideration process, EPA's statements in the public notices associated with that reconsideration, and the stay of the 2009 final rule, there is unnecessary confusion regarding what activities must be considered as a single project for purposes of NSR applicability. Aggregating projects that are independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. It also illegally treats separate changes as a single change in a manner inconsistent with

[12] *Id.*
[13] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Notice of Reconsideration*, 74 Fed. Reg. 7193 (Feb. 13, 2009).
[14] 74 Fed. Reg. at 2377.

congressional intent when the projects are in fact separate. At the same time, the Forum acknowledges that companies should not be able to artificially de-aggregate a project into multiple projects to circumvent permitting requirements, but EPA guidance has expanded the "aggregation" criteria well beyond what is needed (and beyond what was originally intended) to prevent such "sham" permitting.

Had it not been put on hold, the 2009 final rule would have brought needed clarity and simplified administration of the program. EPA should remove the stay of the final rule and either deny reconsideration now (in light of the Obama Administration's 8-year failure to act) or conduct the reconsideration and finalize it so that the matter can be completed and if litigated, resolved by the courts. Making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation because it would establish clear rules that allow companies to determine whether a project triggers NSR permitting requirements (criterion 1).

- It would reduce the time-consuming efforts associated with applicability determinations since EPA's current approach is case-by-case and seeking agency concurrence is costly and time-consuming, while the outcomes of any determination are uncertain (criterion 3).

- It would improve transparency because the rules of the road would be clear (criterion 5).

NSR Topic 7: Resolve Longstanding Ambiguity on How to Address Debottlenecked Emission Units.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

In determining NSR applicability for a modified emissions unit, EPA currently requires emissions increases from upstream and downstream units (that were not modified) to be counted. This discretionary regulatory decision often results in an appearance of a higher emission impact from a project than is appropriate and results in more frequent imposition of onerous NSR permitting requirements.

Typically, the included upstream and downstream units (referred to as debottlenecked units) have previously obtained pre-construction permits and including them in another analysis essentially triggers another round of permitting for those units. In light of the current requirements, the Forum recommends that EPA issue a rule to clearly state that only emission increases related to units actually being modified should be analyzed. EPA has in fact previously proposed to address this issue such that only

ED_002674_00002696-00017

emission increases at debottlenecked units that are actually "caused" by the project are to be included in the NSR applicability analysis.[15] While the Forum supports this second approach, it suffers from ambiguity over whether emission increases are "caused" by the change. Lack of clarity over issues such as this can delay permits and create significant uncertainty for the company seeking a permit.

Resolving the current ambiguity on how to address debottlenecked emission units fits several of the criteria identified in the EO:

- It would remove barriers to job creation (and retention) because it would allow utilization of the installed manufacturing base—such as a boiler or furnace that has extra capacity to support a new manufacturing unit at a plant (criterion 1).

- It would reduce time and uncertainty associated with applicability determinations (criterion 3).

- It would improve transparency because the rules of the road would be clear (criterion 5).

NSR Topic 8: Clarify that "Routine" Means Routine in the Industry for the Routine Maintenance, Repair, and Replacement (RMRR) Exclusion.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 5 (transparency)

Reasons:

EPA has long excluded RMRR activities from NSR applicability because these are not the types of activities Congress contemplated as the "major modifications" that would justify the costly expenditures and lengthy delays associated with a major NSR permit. EPA continues to inappropriately interpret this exclusion narrowly. For example, EPA requires RMRR activities to occur multiple times at a given unit, even though court cases have held that activities routine in the industry should be excluded even if they do not occur frequently at a given unit. Analogizing to car maintenance, the interpretations are akin to treating a timing belt replacement as a major modification: every car needs a new timing belt once during its life, and it is still a replacement that can be expected to occur for car owners generally as a group. It would be absurd to treat that action as creating a "new car" for emissions requirements. For major manufacturing plants, RMRR can involve large, high-cost projects necessitating considerable planning. The fact that an activity is costly does not mean that it is not RMRR.

[15] 71 Fed. Reg. at 54,239.

EPA should clarify that replacements and repairs that are routine in the industry, even if they may occur only once or twice during the life of a plant or emissions unit are considered "routine" within the meaning of the RMRR exclusion. Making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation (and retention) because it would recognize that maintaining plant equipment as recommended by manufacturers and as envisioned by the company when it installed the emissions unit does not transform an existing emissions unit into a new one (*e.g.*, like replacing a major part on a car does not make it a new car, even though that part may only be replaced once or twice during the life of the car (criterion 1).

- It would reduce time and uncertainty associated with applicability determinations since a significant amount of time is spent determining whether a state and EPA will consider a particular replacement or other maintenance event to be routine (criterion 3).

- It would improve transparency because the rules of the road would be clear (criterion 5).

NSR Topic 9: Increase the Significant Emission Rate (SER) for Greenhouse Gas Emissions (GHGs).

Recommended Action: Modify.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit)

Reasons:

In October 2016, EPA proposed a rule to establish a significant emission rate for GHGs of 75,000 tons per year (tpy) of carbon dioxide equivalent (CO_2e), or potentially less based on the proposal.[16] GHGs are emitted in quantities significantly higher than those for traditional criteria pollutants, which drives the need for a higher SER to avoid tens of thousands of potentially impacted sources. The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tpy based on the number of sources covered and the marginal effect the permitting requirements would have.[17] The Forum also highlighted that even if it agreed with EPA's proposed levels (which it does not), the regulatory language proposed did not properly implement the Supreme Court's directive in the *UARG* case[18] in that as

[16] EPA, *Revisions to Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program; Proposed Rule*, 81 Fed. Reg. 68,110 (Oct. 3, 2016).
[17] Comments of the APF in response to EPA proposed *Revisions to the PSD and Title V GHG Permitting Regulations and Establishment of a SER Rate for GHG Emissions Under the PSD Program*, dated Dec. 16, 2016 Docket Id. EPA-HQ-OAR-2015-0355-0091, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0355-0091.
[18] *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014).

proposed, the regulation would allow for a plant that did not trigger PSD permitting for any pollutant to trigger PSD for GHGs on their own. EPA's final rule must not allow this result to be finalized.

The Forum continues to support this change. Permitting requirements should be applied only to sources where they will yield a meaningful benefit. Making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation (and retention) because it would establish a significance level that is more closely correlated to the type of "major" modification that Congress envisioned would trigger NSR (criterion 1).

- It would improve the cost/benefit calculus because it would ensure that NSR is only triggered for GHGs when a meaningful increase occurs and would reduce costs associated with the technology determinations associated with GHG BACT (criterion 3).

- It would improve transparency because it would provide a rational basis for selecting the significance level—which is what the Supreme Court opinion in the *UARG* case required of EPA. The lack of a rational basis was the reason that the significance level was invalidated. EPA's October 2016 proposal simply sought to revalidate what it had already issued, rather than conducting a reasoned analysis of what the level actually should be. This is highlighted by the fact that EPA never even considered a value higher than the existing 75,000 tpy CO_2e that the Court rejected (criterion 5).

NSR Topic 10: Improve Process for Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) Technology Determinations.

Recommended Action: Modify.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

The determination of BACT or LAER is based on what is often an exhaustive case-by-case review of the plant and control technologies. As a result, certainty in the permitting process is reduced. Similar sources may end up with significantly different permit requirements. This general lack of predictability undermines project finance and hampers business decision-making.

For these reasons, the Forum recommends that EPA modify its current case-by-case permit review procedures to provide standardized regulatory decisions that are periodically updated through rulemaking after public notice and comment. For instance, the control requirements mandated under the NSPS program provide clear notice to

companies of what technology will be required if they build a new process or modify an existing one. In contrast, the NSR permitting program lacks this certainty, which is one reason decision-making is so protracted and companies are incentivized to limit operations (and productivity) to avoid the program.

NSR should provide more certainty as to the controls that will be required. Although the Forum recognizes legislation would be required to substitute an NSPS approach for the current case-by-case review under NSR, the Forum recommends that EPA undertake administrative changes to the NSR program to reduce uncertainty, by adopting approaches like "presumptive BACT" and giving states the flexibility to make expeditious permitting decisions without second-guessing by EPA. Such an approach will avoid the time-consuming and costly analyses associated with minor differences in emissions levels (e.g., debating whether a recent permit that imposed a 1.5 ppm CO permit is now "BACT" when all other recent permits were at from 1.6 ppm CO).[19] As noted above, making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation because it would cut the red tape associated with expansion projects at existing plants, improved efficiency of existing plants, and installation of new plants (criterion 1).

- It would remove a costly process that in the end rarely, if ever, results in a greater environmental benefit than would result from following a more streamlined process (criterion 3).

- It would reduce inconsistency among states (criterion 4).

- It would improve transparency for all stakeholders because establishing presumptive BACT or LAER would provide a clearer picture of what the government's expectations are and allow the public to participate in vetting of technologies on a nationwide instead of a piecemeal basis, which can be extremely time-consuming (criterion 5).

II. NAAQS PROMULGATION AND IMPLEMENTATION

NAAQS regulations represent some of the most costly and impactful federal regulations issued by EPA. The establishment of new ambient air quality standards triggers a complex series of federal and state control requirements affecting stationary and mobile sources to help bring areas into attainment. In areas classified as nonattainment, the designation and effective impact of the control requirements hinder business development and job creation.

[19] To the extent that certainty is not available, companies face the worst of both worlds, not only facing a moving target but also having an inflexible approach, looking at each pollutant individually and struggling to have regulators be able to recognize the tradeoffs among pollutants, e.g., lower NOx resulting in higher CO, VOC, ammonia, and $PM_{2.5}$.

ED_002674_00002696-00021

Published reports from the National Bureau of Economic Research confirm the severity of these impacts. Between 1972 and 1987, researchers have concluded, based on a review of more than a million manufacturing plant observations, that nonattainment counties (relative to attainment ones) lost approximately 590,000 jobs, $37 billion in capital stock, and $75 billion (in 1987 dollars) of output in pollution-intensive industries.[20]

Over the last several decades, the NAAQS have become increasingly stringent due in part to the fact that the statute prevents the Administrator from considering costs or offsetting health impacts that result from the significant costs imposed by the new standards. As the NAAQS have grown more stringent, the health and environmental benefits have grown more uncertain while compliance costs have escalated. In order to estimate the cost of compliance with recent ozone standards, EPA has relied on speculative estimates of the cost of unknown controls and new technologies to develop a compliance scenario that attains the new standards. EPA's most recent ozone standards have become so stringent that they approach background concentrations in some locations of the country. As a result, these areas may not be able to demonstrate attainment and could be at risk of sanctions such as loss of federal highway funds.

In addition to imposing high compliance costs on industry, the stringent NAAQS bring additional costs and delays to permitting decisions that affect the ability of manufacturing plants to build and expand. As noted above, the overall stringency of NSR requirements differ depending on whether an area is classified as attainment or non-attainment with a NAAQS. Tighter standards force more areas into nonattainment, resulting in more expensive air pollution control costs under the NSR preconstruction permitting requirements. But this is only half of the story. For PSD permits in attainment areas, the tighter standards significantly increase the technical challenge of demonstrating that the new plant or modification will not cause or contribute to a NAAQS violation—an air quality demonstration that can become very difficult as standards approach background concentrations. Similarly, as discussed above, the adoption of short-term NAAQS for NO_2, SO_2, and $PM_{2.5}$ (*i.e.*, 1-hour, 24-hour) also creates challenges for individual sources to make the required modeling demonstration, especially when using the overly conservative modeling and emissions representation assumptions required by EPA.

All of these factors make it more difficult and uncertain for companies to expand manufacturing operations in the U.S. in both attainment and nonattainment areas. At a minimum, the NAAQS and related permitting requirements will delay construction and, in some cases, may serve to prevent projects from going forward. The permitting complexities are compounded by the fact that it takes years after a NAAQS is revised for EPA to issue all of the implementation rules and guidance required for states and companies on how to achieve the standards, yet the standards are effective

[20] Michael Greenstone, *The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 & 1977 Clean Air Act Amendments and the Census of Manufactures*, at 3, National Bureau of Economic Research, Working Paper No. 8484, (Sept. 2001), *available at* http://www.nber.org/papers/w8484.pdf.

ED_002674_00002696-00022

immediately for permitting purposes in attainment areas under EPA's interpretation of the statute.[21] For example, the $PM_{2.5}$ NAAQS was first issued in 1997, but the implementation rule was not issued until 2008. This created over a decade of uncertainty.

Similarly, EPA did not issue the final implementation rule for the March 12, 2008 ozone standard until March 6, 2015. For companies seeking permits, the lack of guidance on issues, such as significant impact levels (SILs), can pose immediate and practical challenges once a new standard is issued. SILs set emission significance levels to assist permitting authorities and companies in determining whether a PSD source causes or contributes to a violation. Without SILs, companies may be forced to conduct unnecessary modeling to determine whether a PSD source causes or contributes to a violation. This imposes costs and can further delay construction. Unfortunately, EPA still has yet to issue the SILs for the 2015 ozone standard.

In addition to the problems caused by unnecessary delay in issuing implementation rules and guidance, the implementation rules themselves often add unnecessary complexity that invites litigation from all stakeholders, instead of facilitating compliance with the new standards. As a result, companies face uncertainty about what the requirements will be for their plants years after the standards are issued. This includes questions surrounding statutory interpretations on reasonably available control technology, offsets (*e.g.*, substitutions, ratios), and attainment obligations. The uncertainty undermines the ability of manufacturers to plan projects with a certain timeline and cost expectation, creating incentives for projects to be done at other locations in and outside the U.S. where these uncertainties do not exist. As a result, the NAAQS process does anything but make regulation regular for those who must comply.

The overall costs of implementing the NAAQS program and its negative effect on permitting decisions make it a high priority regulation for inclusion on a list of regulations for review to alleviate unnecessary regulatory burdens. Lack of transparency in the review of the science supporting NAAQS decisions coupled with reliance on outdated and overly conservative models also support review and evaluation of the NAAQS program. In light of the EO's request for specific suggestions regarding repeal, replacement, or modification of regulations that inhibit job creation, the Forum makes the following recommendations to improve the NAAQS program:

(1) Improve the Scientific Basis for NAAQS Review;
(2) Conduct Integrated Quantitative Uncertainty Analyses to Improve the Scientific Basis for NAAQS Review;
(3) Ensure Appropriate Consideration of Background Concentrations;
(4) Grandfather Sources Undergoing Permit Review;
(5) Require Clean Air Scientific Advisory Committee (CASAC) Review of Attainment Strategies;

[21] For example, significance levels are included in the implementation rules, and they are critical to planning projects, and companies planning projects that may be a few years out will not know the relevant levels against which to determine permitting requirements.

(6) Improve Accuracy of Air Quality Modeling Demonstrations;
(7) Improve Accuracy and Use of NAAQS Co-Benefits.

NAAQS Topic 1: Improve the Scientific Basis for NAAQS Review.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

The scientific review process is the most important element shaping NAAQS decisions. Unfortunately, the review process is not transparent with regard to the criteria used for including scientific studies in the review or the criteria used by EPA in evaluating and ranking studies once they are included. Moreover, EPA has a history of emphasizing studies that have positive results over studies that fail to show an association simply based on the study results rather than the overall quality of the study. These decisions skew the review process in a manner that is not always transparent or objective. Although the Agency has a clear mandate to protect public health, this mandate should not impact assumptions or study selection criteria that are buried in the scientific assessments. Instead, EPA decision-makers and the public should see the full range of data and uncertainties in making any decision rather than basing a decision on a potentially biased group of pre-selected studies. For these reasons, the Forum recommends that EPA should establish clear standards for conducting NAAQS scientific reviews, including criteria for assessing and ranking health effects studies in the NAAQS review process. In addition, the Agency should establish a transparent system for objectively weighing the evidence, and a balanced and open peer review process that allows for a meaningful comment.

NAAQS Topic 2: Conduct Integrated Quantitative Uncertainty Analyses to Improve the Scientific Basis for NAAQS Review.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

In public forums and in fact sheets, EPA and other third-party interest groups often overstate the certainty of benefits associated with new NAAQS, suggesting that such benefits are certain within narrow ranges, rather than the results of a highly uncertain series of assumptions with regard to both risk and exposure. This shorthand, while understandable, can misinform the public and decision-makers. The Office of Management and Budget (OMB) Circular A-4 specifically requires a formal quantitative

analysis of uncertainty for rules that exceed $1 billion annually.[22] Many of the NAAQS issued meet this cost criterion. For rules with annual benefits and/or costs in the range of 100 million to $1 billion, OMB Circular A-4 instructs agencies to use "rigorous approaches" to addressing uncertainty.[23] The Forum concurs with OMB and believes that EPA has not conducted the required quantitative analyses.

The National Research Council (NRC) has repeatedly recommended that the Agency conduct rigorous uncertainty analysis and move away from presenting point estimates of risk. In 1994 the NRC made the following important observations that are still relevant today:

> The major difficulty with EPA's current approach is that it does not supplant or supplement artificially precise single estimates of risk ("point estimates") with ranges of values or quantitative descriptions of uncertainty, and that it often lacks even qualitative statements of uncertainty. This obscures the uncertainties inherent in risk estimation (Paustenbach, 1989; Finkel, 1990), although the uncertainties themselves do not go away. Risk assessments that do not include sufficient attention to uncertainty are vulnerable to four common and potentially serious pitfalls (adapted from Finkel, 1990):
>
> 1. They do not allow for optimal weighing of the probabilities and consequences of error for policy-makers so that informed risk-management decisions can be made. An adequate risk characterization will clarify the extent of uncertainty in the estimates so that better-informed choices can be made.
> 2. They do not permit a reliable comparison of alternative decisions, so that appropriate priorities can be established by policy-makers comparing several different risks.
> 3. They fail to communicate to decision-makers and the public the range of control options that would be compatible with different assessments of the true state of nature. This makes informed dialogue between assessors and stakeholders less likely, and can cause erosion of credibility as stakeholders react to the overconfidence inherent in risk assessments that produce only point estimates.
> 4. They preclude the opportunity for identifying research initiatives that might reduce uncertainty and thereby reduce the probability or the impact of being caught by surprise.
>
> Perhaps most fundamentally, without uncertainty analysis it can be quite difficult to determine the conservatism of an estimate. In an ideal risk assessment, a complete uncertainty analysis would provide a risk manager with the ability to estimate risk for each person in a given population in both actual and projected scenarios of exposures; it would

[22] OMB, Circular A-4, *Regulatory Analysis*, at 40-41 (Sept. 17, 2003).
[23] *Id.* at 41.

> also estimate the uncertainty in each prediction in quantitative, probabilistic terms. But even a less exhaustive treatment of uncertainty will serve a very important purpose: it can reveal whether the point estimate used to summarize the uncertain risk is "conservative," and if so, to what extent. Although the choice of the "level of conservatism" is a risk-management prerogative, managers might be operating in the dark about how "conservative" these choices are if the uncertainty (and hence the degree to which the risk estimate used may fall above or below the true value) is ignored or assumed, rather than calculated.[24]

EPA can improve transparency and the scientific review process and better fulfill its responsibilities under OMB Circular A-4 by rigorously and transparently assessing the many significant sources of uncertainty. These include the potential for exposure misclassification, assumptions regarding causation and the shape of the dose response curve, the potential confounding role of socio-economic factors and exposure to other air pollutants, and uncertainties regarding the valuation of risk avoidance. Qualitative discussions, while helpful, fail to communicate the potential significance of the uncertainties and their combined effect. The Forum recommends that EPA conduct an integrated *quantitative* uncertainty analysis of all major sources of uncertainty to inform decisions makers and the public. As part of this process, EPA should also increase research on major sources of uncertainty to better assess their impact in the risk assessment process.

NAAQS Topic 3: Ensure Appropriate Consideration of Background Concentrations.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

As noted above, the stringency of recent NAAQS may make it difficult if not impossible for some areas to reach attainment due to their proximity to background concentrations from natural sources and foreign emissions. In 1997, the EPA Administrator directly considered proximity to peak background concentrations as one of three major factors affecting her decision to set the standard at 0.08 ppm.[25] However, in setting the 2015 ozone standard, EPA interpreted the existing case law as preventing the Agency from directly considering background concentrations if they exceeded the range judged necessary to be protective of public health with an adequate

[24] NRC, *Science and Judgment in Risk Assessment*, National Academies Press (US); (1994) *available at* https://www.ncbi.nlm.nih.gov/books/NBK208276/.
[25] EPA, *National Ambient Air Quality Standards for Ozone; Final Rule*, 62 Fed. Reg. 38,856, 38,868 (July 18, 1997).

margin of safety.[26] In fact, the Agency only sought more extensive public input on the issue of background ozone concentrations after the 2015 rule was finalized.[27] Given the increased stringency of existing standards, and the higher likelihood that EPA has and will set standards that cannot realistically be met in some areas of the country without the elimination of most if not all man-made emissions, EPA should conduct a thorough legal and technical analysis of current and projected background concentrations and their implications for attaining existing standards. The analysis should look at peak concentrations as well as mean concentrations, taking into consideration the likely increases projected from foreign sources of emissions.

NAAQS Topic 4: Grandfather Sources Undergoing Permit Reviews.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

The Forum recommends that EPA establish a clear implementation transition policy for grandfathering all new or modified sources for purposes of PSD permitting that have submitted a PSD application prior to the finalization of a new NAAQS, particularly since the time for processing applications once submitted is out of the control of the applicant. This would prevent sources from having to: (1) redo air quality modeling and related technical analysis to address the recently finalized standard; and (2) resubmit an application. It would also prevent companies from having to wait for new modeling or measurement techniques to make updated air quality demonstrations. Without clear transition rules, including grandfathering PSD permit applications, construction at new and existing sources subject to PSD will be unnecessarily delayed across the country, with potential impacts on job creation.

EPA should also adopt appropriate grandfathering rules for sources in newly designated nonattainment areas that are being permitted at the time a NAAQS may transition to a more stringent level. Because of the delays in obtaining NSR permits and the five-year NAAQS review cycle, companies can find themselves facing new and unanticipated requirements when EPA revises a NAAQS standard. This situation is critical because EPA has persistently determined that revised NAAQS become effective for permitting sources immediately upon the effective date, despite the fact that state

[26] EPA, *National Ambient Air Quality Standards for Ozone; Final Rule*, 80 Fed. Reg. 65,292, 65,328 (Oct. 26, 2015) (EPA states: "Further, the courts have clarified that the EPA may consider proximity to background concentrations as a factor in the decision whether and how to revise the NAAQS only in the context of considering standard levels within the range of reasonable values supported by the air quality criteria and judgments of the Administrator. 79 FR 75242–43 (citing *ATA III,* 283 F. 3d at 379)."

[27] On December 30, 2015, EPA issued a white paper on background ozone for public comment, with two public workshops on February 24 and 25, 2016. *See* EPA, *Background Ozone Workshop and Information*, *available at* https://www.epa.gov/ozone-pollution/background-ozone-workshop-and-information.

regulatory agencies have up to two years to determine attainment relative to the new standard and several years longer to devise control strategies.

NAAQS Topic 5: Require Clean Air Scientific Advisory Committee (CASAC) Review of Attainment Strategies.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Section 109(d)(2) of the CAA requires EPA's NAAQS scientific advisory committee to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards."[28] Despite this clear statutory mandate, EPA has failed to request the required analysis from CASAC and to provide the advisory committee with sufficient resources and personnel to conduct the required analysis. In light of this legal deficiency, EPA should take immediate steps to assure that the required analysis is conducted for all future NAAQS standards in a timely manner, starting with the 2015 ozone standard. The review may help inform and guide state decisions and improve our understanding generally of the adverse consequences of costly implementation programs. If Congress and/or EPA has a clear understanding of these potential adverse effects, they can take concrete steps to reduce them.

NAAQS Topic 6: Improve Accuracy of Air Quality Modeling Demonstrations.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

As noted above, the issuance of new NAAQS results in the immediate imposition of new requirements on sources seeking a permit to assure that the source will not interfere with attainment or maintenance of the new standard. The issuance of lower, more stringent standards coupled with overly conservative modeling requirements has made modeling challenging, if not impossible, for some sources. Lack of clear guidance from EPA and the use of outdated guidance compound the problem and create significant adverse uncertainty for sources and their investors. It is difficult to understate the impact of this uncertainty on new investments and construction that could modernize companies and increase the U.S.'s competitive position in world markets. With respect to air quality demonstration modeling, the Forum recommends that EPA:

[28] 42 U.S.C. § 7409(d).

- Empower states to make decisions based on a reasonable and appropriate interpretation of Appendix W recommendations, including emissions inputs to models that utilize temporally representative actual operating levels and operating factors. Eliminate numerous conservative assumptions that tend to over-predict the potential impacts of a source's emission changes relative to the NAAQS. This is confirmed by ambient monitoring data collected near manufacturing sites that show concentrations that are well below the standards even when the required modeling results show "on-paper" exceedances that would prevent a source from being permitted. It is important to note that the NAAQS themselves are already based on conservative assumptions including a "margin of safety" for sensitive individuals. Over-predicting the contribution of emissions to ambient concentrations compounds that conservativism, especially when considering the fact that new standards are being set close to background levels (*e.g.*, $PM_{2.5}$). Given the increasing technical challenges posed by the stringent NAAQS and the conservative modeling assumptions, many permit applicants may simply decide not to submit a permit application for projects that will improve productivity or bring new jobs.

- Allow the option for a source to proceed with permitting based on collection of monitoring data after construction of the project rather than relying on overly conservative modeling assumptions. EPA has implemented this approach in some permits already when it appeared that the model was over-predicting the impacts that would occur in practice. This type of approach includes reopening provisions in the permit to address actual exceedances.

- Support decisions made by the appropriate reviewing authority as designated by Appendix W. EPA headquarters staff should not have to approve all variances from permit dispersion modeling procedures. This review delays the approval of any project, since most permit applications are reviewed at the state level. Federal modeling guidelines at 40 C.F.R. Part 51 – Appendix W explicitly assign review and approval duties to the "appropriate reviewing authority," which is primarily the state/local regulatory permitting agency, occasionally in limited circumstances after consultation with the EPA Regional Office. Given the experience of state permit engineers, states should be empowered to approve changes to the modeling procedures and make reasonable site-specific determinations based on sound science and reasonable judgment of facts relevant to each application. EPA and the public, always have the opportunity to review changes during the permit review period.

ED_002674_00002696-00029

NAAQS Topic 7: Improve Accuracy and Use of NAAQS Co-Benefits.

Recommended Action: Modify

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

In addition to the NAAQS regulatory and permitting issues discussed above, NAAQS-related risk reduction estimates are used by EPA as co-benefits to justify federal regulations designed to regulate other air pollutants. According to OMB's *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, EPA rules accounted for 61 to 80 percent of the monetized benefits of all major federal regulations reviewed by OMB from 2005 to 2015, with the largest estimated benefits attributable to reductions in public exposure to fine particulate ($PM_{2.5}$).[29] As a result, EPA's reliance on $PM_{2.5}$ co-benefits in issuing regulations has had a profound effect in not only justifying EPA regulations but in supporting the overall value of the government's regulatory enterprise.

Given the out-sized role of $PM_{2.5}$ benefits, EPA bears a unique and important responsibility to assure that EPA's reliance on co-benefits is justified and fully supported by an objective review of the science. The importance of this review is highlighted by the fact that most of the claimed co-benefits occur in areas that have attained the current $PM_{2.5}$ standard. As explained by Anne Smith in her 2016 paper "Inconsistencies in Risk Analyses for Ambient Air Pollutant Regulations," over 99 percent of the projected benefits from one of EPA's most expensive rules—to reduce mercury emissions from electric utility units—are based on reductions in $PM_{2.5}$ exposures projected to occur in areas where the $PM_{2.5}$ levels are already below the $PM_{2.5}$ NAAQS.[30]

The Forum recommends that EPA undertake a review of the use of co-benefits, including co-benefits that are derived from reductions in exposures that are well below the levels deemed safe by EPA. The review should consider the effect of assumptions regarding causality, the shape of the dose-response curve (particularly at low exposure levels), and the potential for exposure misclassification.

[29] OMB, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, at 11-12 (2016).
[30] Anne E. Smith, *Inconsistencies in Risk Analyses for Ambient Air Pollutant Regulations*, Risk Analysis, Vol. 36, No. 9, at 1742-43 (2016).

III. SECTION 112: HAPS AND RMP

Section 112 Topic 1: Repeal Maximum Achievable Control Technology (MACT) Once-In-Always-In Policy

Recommended Action: Repeal and Replace

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

EPA established a policy that once a source is subject to a MACT standard (major source), the regulatory obligations associated with the applicable MACT standard remain even if the facility undertakes pollution prevention or installs control devices to reduce emissions below the major source applicability thresholds. This policy is not mandated by the statute and creates a significant disincentive for companies to reduce emissions; it also imposes costly monitoring requirements when none are needed. Moreover, because "major sources" must obtain Title V permits, this policy means sources have no incentive to further reduce emissions to eliminate requirements associated with Title V permitting. EPA had proposed to eliminate the policy,[31] but an appropriations bill blocked finalization of the rule prior to the Obama Administration taking office. The proposal was never withdrawn and EPA remains free to take final action on that proposal. EPA should finalize that proposal as soon as possible. Making these improvements fits several of the criteria identified in the EO:

- It would improve the cost/benefit calculus because it would remove disincentives for companies that want to reduce their emissions. It would provide them with the benefit of being considered a minor source, which would remove the costly major source Section 112 requirements and would allow the facilities to become minor sources for Title V purposes (criterion 3).

- It would improve transparency because it would provide that when a plant's emissions are at the level of a minor source, the plant can be called a "minor source" instead of a major source (criterion 5).

[31] EPA, *National Emission Standards for Hazardous Air Pollutants: General Provisions; Proposed Rule*, 72 Fed. Reg. 69, 70 (Jan. 3, 2007).

Section 112 Topic 2: Repeal RMP Amendments

Recommended Action: Repeal

Applicable EO 13777 Criteria: 3 (cost v. benefit)

Reasons:

The Forum endorses the petition for reconsideration filed by the Chemical Safety Advocacy Group (CSAG) on EPA's midnight rule amendments to the RMP regulations.[32] The Forum believes that these amendments actually inhibit safety and do not address the objectives that the Agency stated it was trying to achieve in issuing the regulation. We refer you to the CSAG petition for details on this issue. Making these improvements fits the following criteria identified in the EO:

- It would improve the cost/benefit calculus because it would eliminate highly costly requirements for which EPA has identified no quantifiable benefits (criterion 3).

IV. Title V

Title V requires all major sources and a limited number of minor sources to obtain and renew operating permits every 5 years to continue to operate. The permit is a legally-enforceable document intended to facilitate compliance by listing applicable air pollution control requirements in a single document. The Title V operating permit, however, was not intended to create new substantive requirements or increase the stringency of existing control requirements. Unfortunately, obtaining, maintaining, and renewing Title V permits has become costly and controversial. With thousands of plants subject to the program, the program costs today are far beyond anything ever anticipated, and few have asked whether the benefits being obtained are worth this investment.

While the Forum is not advocating for repeal of Title V, we believe that given the enormous costs of the program, it is incumbent on the government to take whatever steps it can to streamline permitting and minimize costs. This is even more important given that the current level of costs were never predicted by the Administration when it authored the bill and were never disclosed to Congress. These core issues are exacerbated by the fact that professional environmental non-governmental organizations (ENGOs) have been using the modification and renewal processes as opportunities to attempt to reopen long-settled permit terms on which companies have relied for planning purposes. Indeed, ENGOs that unsuccessfully challenged the outcome of a major or minor NSR permit are now challenging the Title V permits on the same grounds that have already been adjudicated. Moreover, Title V petitions often sit

[32] CSAG, Pet. for Reconsideration and Stay, regarding EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), dated Mar. 13, 2017, Docket Id. No. EPA-HQ-OEM-2015-0725-0766 *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0766.

ED_002674_00002696-00032

in a long queue at EPA, and then can end up back in court—duplicating costs for industry to defend its expansive and long-evaluated permits.

From 2005 to 2006, EPA convened a "Title V Task Force" to make recommendations on ways to improve the Title V program. EPA should implement the recommendations of the Title V Task Force related to streamlined compliance certifications, facilitating faster processing of permit modifications, and reducing fees. EPA should actively review the existing program to identify opportunities to reduce costs, recognizing that the Title V program was not intended to create new applicable emission standards or requirements. EPA should ensure that the Title V fees that are collected are being used exclusively for the Title V operating permit program, minimize transaction costs, and encourage states to innovate with fees to fund expediting permits (which applies to both operating and construction permits). EPA should minimize the potential for stakeholders to use the Title V operating program as an opportunity to seek additional review and litigation over issues that should have been raised and decided in rulemakings over the underlying applicable requirements. For instance, EPA should summarily deny Title V petitions on issues already ruled on in the underlying NSR permit. Although this would require a statutory change, it makes sense to lengthen the permit term from five to ten years to reduce burdens on states since permit modifications are required for significant changes anyway. Until a statutory change is made, EPA should look for opportunities to streamline the renewal process to reduce burdens. More details on the highest-priority Title V item for consideration by EPA are provided below.

Title V Topic 1: Stop Collateral Attacks on Construction Permits.

Recommended Action: Modify.

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

Because of the interplay between the Title V and NSR programs, companies that have obtained construction permits and invested significant funds in constructing a project may face challenges from opponents of the project at the stage where they seek an operating permit. The Act does not contemplate that final construction permit decisions can be challenged at the operating permit stage. EPA should make clear that challenges to construction of a new project or new plant must be resolved at the construction permit stage and a Title V permit does not offer protestants a second bite at the apple once a company has reasonably relied on its permit and built a new project.

APF therefore recommends EPA review the myriad of Title V objection petition responses which have been issued over the past 8 years and revalidate the principle established in the original Title V regulations that construction permit decisions are not to be reopened in Title V permitting. This policy was intended to allow Title V to fulfill its promise (1) that it was not a substantive program but rather one that involves recording

of applicable requirements established under the substantive provisions of the Act into a single document and (2) of providing certainty to all stakeholders of the requirements that apply to a facility. The consequence of EPA waffling on the fundamental principles of finality in construction permits is that ENGO petitioners have filed numerous petitions for objection to Title V permits based on their disagreement with the underlying construction permit, which in most cases was issued years before the operating permit petition to object and where they often raised the exact same objections. EPA should include rule and preamble language in the revisions to the Title V petition rule that clarifies that petitions raising issues that were, or should have been, raised at the construction permit phase will not be entertained.[33] This is important to provide certainty to companies that are looking at future significant investments in their plants that EPA will stand by the permit decisions on which companies legitimately rely. It is simply untenable to allow for the threat that a company may not be able to operate a plant expansion for which construction permits were validly issued based on such collateral attacks. Furthermore, EPA should act on the long backlog of permits currently in the Title V petition queue based on these principles. Making these improvements fits several of the criteria identified in the EO:

- It would remove barriers to job creation (and retention) because it would establish the principle that companies can rely on construction permits once they are issued and will not be subject to serial negotiation for additional concessions to operate a plant after the investment has already been made. If companies believe that their permits are not really final when they are issued, their management may legitimately question whether a project that offers new jobs or secures existing jobs should be undertaken (criterion 1).

- It would improve the cost/benefit calculus because it would prevent expenditures of resources defending against petitions to object to operating permits (criterion 3).

- It would improve transparency because it would provide all stakeholders with notice of the proper forum in which to raise construction permit objections—at the construction permit stage (criteria 5 and 6).

[33] This is consistent with the position that EPA took in the original Title V rules. *See* EPA, *Operating Permit Program; Final Rule*, 57 Fed. Reg. 32,250, 32,289 (Jul. 21, 1992) (explaining that Title V process was not to EPA to second-guess the results of any State NSR determination); *See also* 40 C.F.R. § 70.8(d) ("Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in §70.7(h) of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period."); 57 Fed. Reg. at 32,256 ("The objections in the petition must have been raised during the public participation period on the permit provided by the State issuance process, unless the petitioner shows that it was impracticable to raise the objections at that time.").

ED_002674_00002696-00034

V. OTHER

Miscellaneous Topic 1: Regional Consistency Rule

Recommended Action: Repeal and Replace

Applicable EO 13777 Criteria: 1 (inhibits jobs), 3 (cost v. benefit), 4 (inconsistency), 5 (transparency)

Reasons:

The Forum is currently litigating EPA's recently issued rule allowing for inconsistent policy and practice among EPA regions on key issues like Title V and NSR applicability. As stated in our comments on this final rule, inconsistency on fundamental issues like this violates the CAA.[34] Repealing the recent amendments to the Regional Consistency regulations fits several of the criteria identified in the EO:

- Preventing one EPA region from being more stringent on states in its jurisdiction than other EPA regions would allow states to retain or create jobs that may end up going to other states that have more favorable interpretations of the exact same EPA regulation (criterion 1).

- It would also allow companies to implement national compliance guidance on fundamental aspects of the CAA, rather than having to train employees on differing interpretations of the Act from one state to the next based on the view of that particular EPA regional office (criteria 3 and 4).

- It would force a transparent national discussion on fundamental policy decisions being made by the Agency and prevent a particular region from overtaking the process by issuing an applicability determination that is inconsistent with EPA headquarters' perspective (criterion 5).

CONCLUSION

The current evaluation mandated by EO 13777 provides EPA with a unique opportunity to look at its CAA programs holistically and to assess the strengths and weaknesses of each one in light of the criteria set forth in the Order. APF encourages the Agency to take advantage of the opportunity to improve its CAA programs in keeping with the recommendations above.

* * * * *

[34] APF, Comments on EPA's proposed *Amendments to Regional Consistency Regulations*, 80 Fed. Reg. 50,250 (Aug. 19, 2015), dated Nov. 3, 2015, Docket Id. No. EPA-HQ-OAR-2014-0616-0016 *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0616-0016.

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

The Forum appreciates the opportunity to comment on EPA's Request for Comment. Please contact Chuck Knauss at cknauss@hunton.com, Shannon S. Broome at sbroome@hunton.com, or Bob Morehouse at rmorehouse@hunton.com with any questions regarding these comments.

Attachment 1

Air Permitting Forum

Shannon S. Broome
Executive Director | sbroome@hunton.com

Robert J. Morehouse
Director | rmorehouse@hunton.com

COMMENTS ON DEPARTMENT OF COMMERCE, *IMPACT OF FEDERAL REGULATIONS ON DOMESTIC MANUFACTURING; NOTICE; REQUEST FOR INFORMATION*

82 FED. REG. 12,786 (MAR. 7, 2017)

Docket ID No. 170302221–7221–01

Submitted March 31, 2017

CHARLES H. KNAUSS
TERESA A. GORMAN
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037
(202) 419-2003
cknauss@hunton.com
COUNSEL TO THE AIR PERMITTING FORUM

SHANNON S. BROOME, EXECUTIVE DIRECTOR
ROBERT M. MOREHOUSE, DIRECTOR
AIR PERMITTING FORUM

Air Permitting Forum
Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

The Air Permitting Forum (APF or the Forum) submits these comments in response to the Department of Commerce (the Department) Request for Information (RFI) entitled *Impact of Federal Regulations on Domestic Manufacturing*, 82 Fed. Reg. 12,786 (Mar. 7, 2017).

The Forum is a coalition of companies focused on implementation issues under the Clean Air Act (CAA or the Act), including pre-construction New Source Review (NSR) and Title V permitting, as well as standard-setting under the National Ambient Air Quality Standards (NAAQS), hazardous air pollutant (HAP), and New Source Performance Standards (NSPS) programs. The group was formed in the early 1990s in the wake of enactment of the CAA Amendments of 1990 and the myriad regulations and new requirements that were mandated in that legislation. Forum members, unlike a trade group focused on one particular industry, represent a broad range of U.S. manufacturing sectors and, through their participation in the Forum, have a longstanding record of working with the U.S. Environmental Protection Agency (EPA) to achieve the goals of the CAA in a streamlined and efficient manner. Given the internationally competitive markets in which members operate, the Forum supports cost-effective policies that responsibly promote economic growth and enhance U.S. competitiveness while also supporting CAA and environmental regulatory compliance. This stance is consistent with CAA Section 101(b)(1)'s statement of the purpose of the Act—to protect and enhance the nation's air resources while simultaneously promoting its productive capacity.[1] As a result, the Forum is uniquely qualified to provide input on the Department of Commerce request for information on permit streamlining and reducing regulatory burdens with respect to the CAA.

As industry leaders, Forum members are important drivers of domestic economic growth and job creation. U.S. or overseas manufacturing locations are often determined by manufacturing and distribution costs. Because of this, members seek to streamline the permitting process and to modernize poorly designed and inefficient regulations for domestic manufacturers. Forum members appreciate the Department's and the President's initiative to identify priority actions needed to improve permitting processes and to reduce regulatory burdens more generally.

In response to the President's Memorandum[2] and the RFI, the Forum offers the following comments. Section 1 provides an overview of the permitting challenges experienced by Forum members and the need for reforms which may require both statutory and regulatory changes. It concludes with a "Top 10 List" of recommended principles for reform. Section 2 responds to the specific questions included in the RFI and provides a more detailed assessment of potential opportunities within existing statutory structures, including the CAA, that can be pursued immediately without legislation and without weakening environmental protections. Also attached for your reference are comments that the Forum submitted to EPA in 2005 when the agency

[1] 42 U.S.C. § 7401(b)(1).
[2] White House, Presidential Mem., *Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing* (Jan. 24, 2017).

undertook a year-long comprehensive review of the Title V operating permit program and sought ways to streamline its requirements and implementation.[3] The review was conducted by a small group of Title V experts, the Title V Task Force, representing environmental non-governmental organizations (ENGOs), states, and industrial stakeholders. Both the Forum's current executive director and director were regulated community representatives in that group. We encourage the Administration to review those comments, since many of the recommendations of the Task Force have not been implemented but are just as relevant today as they were 12 years ago.

Section 1: Today's Permitting Requirements are Slowing Economic Growth in Manufacturing

Overview of Permitting Challenges

The Forum offers the following general observations on the burdens created by the current permitting system.

1. *Current permitting requirements impose significant costs on manufacturing, which slow economic growth and meaningful job creation.* U.S. manufacturers face significant challenges in complying with the complex permitting system in the U.S.
   a. Multiple layers of government (federal, state, and local) and agencies have created a permitting system of unreasonable complexity and cost for new construction and improvements of existing plants.
   b. The World Bank lists the U.S. as a country in which it is substantially more difficult to obtain permits for new construction than in many of the U.S.'s major trading partners (*e.g.*, Germany, France, U.K., South Korea, and Taiwan).[4]
   c. Today's permitting requirements also impose time delays on manufacturing that prevent companies from capitalizing on and responding to changing market conditions.

2. *The complexity, cost, and time-consuming nature of current permitting requirements undermine many of their intended environmental benefits.*
   a. The complexity and cost of obtaining permits create an incentive for older plants to keep operating as they are, even though their efficiency could be improved (*e.g.*, by producing more product per unit of time, producing goods with less raw material).
   b. Instead of incentivizing modernization, current permitting requirements discourage capital investment in existing plants if that investment could trigger new permitting requirements, which may be time-consuming and difficult to

[3] *See* Comments of the Air Permitting Forum to the Title V Task Force (Mar. 31, 2005), Docket Id. EPA-HQ-OAR-2004-0075-0074, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0075-0074.
[4] *See* World Bank, *Doing Business — Measuring Business Regulations — Economy Rankings*, *available at* http://www.doingbusiness.org/rankings (last visited Mar. 30, 2017).

obtain. Rather than modernizing plants, the system incentivizes companies to continue to operate using less efficient and outdated technology.

3. *Existing permit programs penalize efficiency and utilization improvements at domestic manufacturing plants, allowing our international competition to gain market share at our expense.*
   a. In addition to hindering the construction of new plants, permit programs also hinder equipment upgrades intended to increase plant efficiency and utilization and preserve U.S. jobs at existing plants.
   b. This has the unfortunate outcome of encouraging plants to replace worn-out equipment with the same kind of equipment, when they could be improving both quality and efficiency by installing more efficient, state-of-the-art, and durable replacement parts. It can also encourage plants to accept caps on utilization and production at levels below plant capacity (to avoid permitting burden, delay, and cost), which effectively strands the assets.
   c. As a result, many existing plants forego opportunities to increase efficiency and reduce emissions per unit of output because the air permitting rules dictate that such efficiencies trigger costly permitting requirements.
   d. Ultimately, this places U.S. manufacturers at a competitive disadvantage to other countries that encourage and reward efficiency improvements.

4. *The complex, uncertain, and time-consuming nature of current permitting requirements will also undermine any immediate economic stimulus benefits from infrastructure spending.*
   a. Permitting constraints may delay the actual expenditure of appropriated funds for critical infrastructure projects. While legislators of both parties can agree that some level of federal infrastructure spending is necessary, what is often missed is that permitting delays for federal infrastructure projects may mean that appropriated funds simply cannot be spent on these projects before the appropriation expires.
   b. As a result, permitting constraints remain a major consideration in crafting any stimulus infrastructure spending plan.

5. *The costs and burdens of obtaining a permit are poorly understood and rarely accounted for in estimating the cost of federal regulatory programs, such as in the CAA. This lack of transparency masks the problem such that there has not been an incentive to solve it.* Many costly and time-consuming steps are involved in obtaining an air permit, including:
   a. Applicability determinations—simply determining whether the project will need an air permit. Companies may be forced to spend months and invest substantial funds to make and/or obtain applicability determinations for large, complex projects, incurring substantial delays on just this first step.
   b. Identification of covered sources, possible alternative control requirements, including offsetting economic and technical factors.
   c. Detailed technical engineering analyses and air quality modeling demonstrations.

ED_002674_00002696-00041

d. Legal and technical staff review of applicable regulations and guidance documents.
e. Required demonstrations of compliance with ambient air quality standards "on paper"—such as additional fencing, moving stacks, raising stack heights—which may have no true benefit to air quality for plant modifications and improvements.
f. Contingency planning for alternative paths forward, in light of the uncertainty associated with the ability to obtain permits.

6. *Despite all of these significant steps and costs, the government has a record of ignoring or underestimating the cost and impact of its permitting requirements.*
   a. For example, when Title V was enacted, the administration that authored the bill did not provide a cost estimate, but did suggest that the costs would be minimal. When EPA issued the Title V rules in 1992, it estimated the costs at $526 million annually, costs that have been far exceeded by fees alone.[5]
   b. In addition, Regulatory Impact Analyses (RIAs) of new standards rarely include the effect of new regulations and guidance on the permitting process, and even when they do, they do not capture the costs to the economy of delay and the potential for some projects to not go forward.
   c. The problem is further complicated by the fact that companies rarely track or report the time and resources spent on obtaining permits or on projects that were rejected internally due to the potential expense and delay of permitting.

7. *Obtaining a permit for just one CAA program alone (the NSR program) can require the permittee to review nearly 700 posted guidance documents—a significant burden, and the list of guidance keeps growing every year.*[6] The permitting programs have become elaborate mazes that require hiring law firms and technical staff to navigate at a significant cost.

8. *Preconstruction air permit programs which require a case-by-case review of permit conditions impose a unique and challenging permitting burden on sources and federal/state regulating agencies.*
   a. Due to continuous changes in pollution control technology and its application, case-by-case review of individual permits often translates to changing permit requirements for the same manufacturing technology.
   b. As a result, there is less certainty that the permit requirements approved within even the same year for a similar source can serve as a guide for an upcoming permit decision.
   c. Permit applicants and regulatory agencies must constantly "reinvent the wheel" because the regulations require (or are interpreted as requiring) reviewing and updating previous permit decisions to determine the range of possible outcomes.

---

[5] *See* Comments of the Air Permitting Forum to the Title V Task Force, *supra* note 3 at 1-6.
[6] *See* EPA, *New Source Review Policy and Guidance Document Index, available at* https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index (last updated Mar. 13, 2017).

d. This level of uncertainty can be challenging for new plants and for modifications at existing facilities because of the potential for the final permitting conditions to impose higher costs than originally expected and potentially undermine the economics of the proposed project.
e. State regulatory agencies are also burdened with conducting extensive, time-consuming reviews that may result in little, if any, incremental benefit, only to be second guessed by EPA after the state determination has been made.

9. *Judicial deference to EPA decisions exacerbates the uncertainty and challenge of obtaining a permit.*
   a. Court deference has given EPA license to reinterpret the regulations or issue new guidance that interprets the regulations in a more stringent way. This means that companies cannot rely on the existing regulation language, preambles, and voluminous guidance that have already been issued to determine if they will need a permit or what the control costs will be if they need one.
   b. This increases overall uncertainty and the potential for new and unexpected permit requirements and rationales.

10. *In states that have obtained approval to run their permit programs, EPA has a history of second-guessing state decisions, introducing delays and risk for companies that work with their states to obtain permits.*
    a. Under the CAA and other environmental statutes, Congress has wisely directed EPA to utilize the expertise and resources of the states to better protect the environment, and for the states to remain our nation's frontline environmental regulators.[7]
    b. Unfortunately, EPA has repeatedly second-guessed the purpose, content, and timing of state permit decisions. This approach conflicts with the "cooperative federalism" intended by Congress. States must be partners and not mere instruments of federal will.

11. *Because of these factors, it is not surprising that obtaining permits has become more challenging for new projects than obtaining capital commitments.*
    a. Traditionally, projects would first obtain financing and then a permit. Now in many cases, project finance is contingent on holding the permit.
    b. This reversal underscores how uncertain and challenging it is to obtain a federal permit. Given the unpredictability of the process, banks now will not extend loans until they know a company has an approved permit.

[7] *See, e.g.* 42 U.S.C. §§ 7401(b)(3)-(4), (c); 7402(a), (c); 7407(a).

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

Principles for Reform

The Forum recommends that the Administration restructure existing permit programs to achieve the same intended benefits and protections at lower costs and with due speed. The Forum provides the following top ten recommendations:

1. Respect decisions made by EPA's state partners as Congress originally intended whenever possible and reduce, if not eliminate, federal second-guessing. Substitute individual permit oversight with federal programmatic overview of state adherence to permitting requirements. States should be evaluated on how their *program* is performing, not micromanaged on each and every permit decision.

2. Increase the transparency of the federal permitting process by tracking and publishing the time from application to issuance. In addition, reduce potential agency "gaming" of NSR permit timing by delaying "completeness determinations," so as to prevent the CAA one–year deadline clock from starting.[8] Provide estimates of the time for regulated entities to prepare applications to help educate the public.

3. Fully analyze and account for the cost of permitting requirements on new construction, competitiveness, and jobs in RIAs for new regulations and in periodic, ongoing reports of the cost of federal regulatory programs. For example, changes in NAAQS can significantly affect companies' ability to obtain permits, the costs of which are never even evaluated.

4. Eliminate or reduce the number of environmental programs that mandate pre-construction authorizations to situations where necessary to protect the public from imminent public health and safety risks. Companies should be able to start construction at their own risk, knowing that additional facility changes may have to be made to comply with any final permit requirements.

5. Eliminate the ability of EPA and stakeholders to modify or re-litigate final construction permit decisions during Title V operating permit revision processes or at renewals. The issuance of a Title V permit should not allow litigants a second opportunity to challenge preconstruction permit decisions.

6. Replace uncertain case-by-case permit review programs with standardized regulatory decisions that are periodically updated through rulemaking after public notice and comment. For instance, the control requirements mandated under the NSPS program provide clear notice to companies of what technology will be required if they build a new process or modify an existing one. In contrast, the NSR permitting program does not provide this certainty, which is one reason decision-making is so protracted and companies are incentivized to limit operations (and productivity) to avoid the program. NSR should provide more

[8] *See* 42 U.S.C. § 7475(c).

certainty as to the controls that will be required. Although the Forum recognizes legislation would be required to substitute NSPS standards for the current case-by-case review under NSR, the Forum recommends administrative changes to the NSR program (listed below) to reduce uncertainty.

7. Incentivize improvements in efficiency rather than creating barriers. It is not enough for EPA's rules to stop discouraging efficiency projects. EPA should be taking affirmative steps to encourage and reward them, as the more efficiently we use our existing resources, the more efficient our overall production in the country will be. This is consistent with the dual purposes of the CAA—to protect the nation's air resources and to *promote the productive capacity* of its population.[9]

8. Consistent with Recommendation 7 above, incentivize efficiency by offering an alternative test to measuring emission increases on a per unit of production basis. Before making a modification at an existing facility, EPA's current regulations require plant operators to project whether a construction project will cause a significant increase in emissions on an annual basis and thus trigger NSR. EPA's current methodology allows for exclusion of emissions increases that are due to factors unrelated to a project, but EPA has narrowly construed this aspect of the calculation and does not provide credit for situations where a production process has become more efficient in producing electricity or manufacturing a product. EPA should seek ways to credit efficiency improvements, for example by focusing on whether the modification at an existing plant reduces emissions per unit of product production, whether it be automobiles, turbines, petrochemicals, or kilowatts.

9. Require EPA to fully implement CAA Section 110(h)(1), which required EPA to assemble and publish all state implementation plans (SIPs).[10] Congress created this requirement because it was virtually impossible to determine which regulations were currently approved as part of the SIP. This lack of transparency serves to delay projects simply because discerning what regulations apply presents its own challenge. The currently approved SIPs should be assembled on one easily-accessible website. This is also important due to the current backlog in state plan approvals, such that the current regulations on the books in the state may differ from what EPA has approved into the SIP as federal law. EPA should also make it a priority to reduce the state plan backlog and limit the number of discretionary requests for additional state plan revisions until the backlog is addressed.

10. Support legislation to extend the review period for NAAQS and the term of Title V operating permits from five to ten years, and consider the administrative changes recommended below to facilitate permit issuance and renewals.

[9] 42 U.S.C. § 7401(b)(1).
[10] 42 U.S.C. § 7410(h)(1).

ED_002674_00002696-00045

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

Section 2: Detailed Reform Comments and Response to RFI Questions

Manufacturing Permitting Process

1. **How many permits from a federal agency are required to build, expand or operate your manufacturing facilities? Which federal agencies require permits and how long does it take to obtain them?**

While numerous federal, state, and local permits are required to build a new facility or to modify an existing one, the Forum's comments below focus on EPA's implementation of the CAA's federal air permitting requirements—an issue, as noted above, of significant concern and uncertainty. Obtaining a pre-construction federal air permit for major sources under the CAA is a precondition to building a new manufacturing plant, and to making major modifications at existing units that increase efficiency, utilization, and/or production. For air permits, a project typically requires two permits—a construction permit (which may be minor or major) and an operating permit.[11]

The CAA is based on federalism concepts, recognizing that states are in the best position to make determinations about air quality but must do so consistent with national standards. Given the vast array of operations subject to CAA requirements, it makes sense that states are the primary implementers. Thus, under the CAA, states can (and in some cases must) apply for and receive approval for implementing and enforcing clean air programs in their states. States with "delegated" authority implement the federal program, but all must assure compliance with federal standards. With respect to timing, when an NSR permit is required, it can take anywhere from 9 to 36 months from the time an application is submitted for a permit to be issued, not including time needed for possible permit appeals and other delays. This timeframe, however, does not include the many months and potentially years a company may spend in developing the application. As noted above, key steps include determining applicability, the range of alternative control requirements and conducting the necessary technical, air quality modeling and cost demonstrations. In our experience, 9 months is the typical minimum time required for permit issuance once a complete application has been submitted, but the complete permitting process including the pre-permit submission work, can take as long as 3 years, if not longer. Modeling requirements often unnecessarily prolong the permitting process. This issue has been exacerbated by the establishment of stringent short-term (1-hour) NAAQS for sulfur dioxide (SO_2) and nitrogen oxides (NO_x) and the $PM_{2.5}$ NAAQS.

Because of the length of time and uncertainty (including timing and substantive requirements for case-by-case determinations and for permit terms) surrounding the

[11] Sometimes three permits are required because both a minor permit and a major permit may be needed if there are pollutants for which the plant is major and others for which it is minor.

issuance of pre-construction permits, the permit development process often precedes detailed project development. In other words, companies may submit a permit application even before process designs are complete to take into account lead time. This less-defined permit application, where changes to a design may trigger changes to the permit application, further delays permit review and approval. Longer permit approval times also increase the risk that the underlying regulatory requirements reflected in the permit may change or the pending permit may need to be changed to reflect the terms and conditions of other recently approved permitted facilities.

Even for minor NSR permits—*i.e.*, those that do not reach the emission increase levels for major modifications—the timeline for processing can be 6 to 18 months. With the issuance of newer short-term NAAQS, modeling requirements can play a major role in prolonging the permitting process, as states (at EPA's request, in many cases) may require projects to conduct modeling for the 1-hour nitrogen dioxide (NO_2), SO_2 NAAQS, and $PM_{2.5}$ NAAQS. Because EPA regional offices oversee SIP development and implementation, states typically accept EPA "recommendations" that require modeling as part of the permit application process, despite actual measurements of air quality through ambient monitoring networks that indicate attainment with applicable standards. This overly-conservative approach to oversight of project permitting can lead to delays that deter efficiency improvements at existing plants.

2. **Do any of the federal permits overlap with (or duplicate) other federal permits or those required by state or local agencies? If the answer is yes, how many permits? From which federal agencies?**

Under the CAA, state agencies have primary responsibility for implementing the Act and its requirements, given that they are in the best position to make determinations about allocation of air resources and "headroom" for compliance with the NAAQS. Because of this oversight structure established in the Act, permit overlap between state and federal requirements is not a significant issue for APF members. Rather, a principal challenge is heavy-handedness in federal EPA oversight of CAA programs, which often does not allow states leeway to make independent judgments on Best Available Control Technology (BACT), modeling procedures, and other permitting decisions that should be within their purview under the Act.

3. **Briefly describe the most onerous part of your permitting process.**

As noted above, Forum members are generally subject to two types of air permits under the CAA—pre-construction permits and operating permits which must be renewed every five years. Of the two, preconstruction permits impose the greater cost and penalty on manufacturing expansion and job creation (though Title V burdens should not be ignored by the government).

Pre-construction permits under the CAA's NSR program require major sources to obtain an approved permit before construction can begin on a new plant or an existing manufacturing plant can be modified (if the modification will result in an emissions

increase). In areas of the country that do not meet existing NAAQS—known as nonattainment areas—new and existing sources that trigger NSR must install stringent air pollution controls to achieve the lowest achievable emission rate (LAER) prior to operation and offset any emission increase at a ratio of 1 to 1.1 - 1.5, depending on the status of the nonattainment area. This is known as a nonattainment NSR (NNSR) permit.

In attainment areas, new and existing sources that trigger NSR must also install stringent air pollution controls, known as BACT, prior to operation and demonstrate that the emissions from the construction and operation of the sources will not cause or contribute to a violation of the NAAQS or exceed an air quality increment. This is referred to as a Prevention of Significant Deterioration (PSD) permit.

The process of obtaining a pre-construction permit (whether NNSR or PSD) is time consuming, expensive, and uncertain. Facilities that do not trigger major source permitting are still typically subject to minor source construction permits. Determining whether or not a permit is required is itself a significant source of delay and an obstacle for expanding production in the U.S. Key burdens include:

- *Case-by-Case Determinations*. The determination of LAER or BACT is based on a case-by-case review of the plant and control technologies. As a result, certainty in the permitting process is reduced. Similar sources may end up with significantly different permit requirements. This general lack of predictability undermines project finance and hampers business decision-making.

- *Modeling*. As discussed above, there are numerous issues with modeling, including that states are requiring—often at EPA's request—modeling for minor NSR permits.

- *Disincentives for Modernization and Efficiency Improvements.* While the regulations appropriately provide that routine maintenance, repair, and replacement (RMRR) of existing equipment does not trigger NNSR or PSD, they also provide that *any* physical or operational change that improves efficiency or production can do so. As a result, the regulations bias existing manufacturing plants against equipment upgrades if those upgrades will have the effect of improving a plant's overall efficiency and utilization. This means that the only economical choice is to replace 20-year old parts with parts that are of the same technological sophistication and design as the original parts, rather than with the better and more efficient designs that have been developed in two decades (*e.g.*, as if a person were compelled to purchase a computer today with Y2K technology). There are numerous projects at U.S. manufacturing plants that would improve efficiency or expand production with lower emissions per unit of product produced that may not even be considered due to the burdens of NSR permitting or the inability to obtain a determination from EPA or the state that NSR does not apply, even for already well-controlled plants.

- *Skewed Interpretative Policies*. Existing interpretative policies implementing the CAA's requirements have exacerbated the problem by imposing emission estimation

procedures that overstate the likely emissions increase. For example, EPA has recently interpreted its regulations to provide that a facility that projected its emissions from a physical change to be below NSR trigger levels and in fact operated consistent with its projection would still be required to assume for purposes of the permitting process that it will increase emissions, triggering costly permitting requirements. Forcing assumptions that are divorced from reality dramatically increases the number of existing facilities potentially subject to NSR.

- *Project Delays.* As noted above, obtaining a permit is a time-consuming and highly technical process that can take years even before the application permit is submitted. Key steps include project design, permit applicability determinations, identification of potential air pollution controls, detailed technical engineering and cost analyses, air quality modeling, and the review of literally hundreds of guidance documents by legal and technical teams. This delay severely hampers the ability of companies to adopt innovations and compete effectively in world markets.

Within the NSR program, it is difficult to pinpoint one particular aspect that is the "most" onerous, given the many complex and resource-intensive requirements. First, the initial determination of whether NNSR or PSD has been triggered may entail numerous hours of engineering and legal evaluation and review. EPA and its state counterparts have generated hundreds of guidance documents interpreting these provisions. Understanding and applying this material—particularly with respect to individual applicability determinations—is estimated by some as the most time-consuming aspect of the permitting process. While one might conclude that a simple solution to this issue is to seek government guidance on the applicability analysis, response time from both the federal EPA and state agencies on such issues is very slow and often leads to overly conservative interpretations (and maximum EPA enforcement discretion). States in particular are hesitant to make definitive determinations, because they want to avoid second-guessing by EPA.[12]

That said, once it has been determined that a permit is required for a project, the application and review processes can be onerous as well, especially for construction projects. These processes are particularly challenging where the relevant state authority is implementing a federal CAA program under EPA delegation (as opposed to where the state is implementing its own approved program) because of the numerous oversight checkpoints involved, an issue most notable in the context of PSD permitting.

Because of the complexity of the NSR permitting program, there are several recommendations discussed in the next section which collectively would improve the permitting process.

[12] *See, e.g., U.S. v. DTE Energy Co.,* 711 F.3d 643, 648 (6th Cir. 2013) (discussing EPA enforcement case concerning power plant's post-project emissions calculations that reflected no significant emissions increase, which were unquestioned by state reviewing authority when submitted).

4. If you could make one change to the federal permitting process applicable to your manufacturing business or facilities, what would it be? How could the permitting process be modified to better suit your needs?

New Source Review

The Forum supports statutory changes to the NSR program given its high cost, questionable net environmental benefits, and its impact in delaying modernization and efficiency improvements at existing manufacturing plants that adhere to the principles outlined above. Short of statutory changes, however, the Forum believes there are several immediate steps the Administration can take to reduce NSR-related permitting burdens without reducing environmental protections by simplifying the federal major NSR permitting process. (40 C.F.R. §§ 51.165; 51.166, 52.21, 52.24, and Part 51, App'x S and W.) Specifically, the Forum proposes the following improvements:

- Respect for EPA's State Partners. Most important, as discussed above, is deference to state decisions on applicability and the ability of companies to obtain these decisions, with EPA exercising its oversight role on a programmatic level. In other words, there should be a core presumption that states are making the right decisions, and EPA should spend its resources for oversight looking at whether the decisions of the program as a whole are faithful to the Act.

- Providing Certainty Once the Construction Permit Is Obtained. Because of the interplay between the Title V program and the NSR programs, companies that have obtained construction permits and invested significant funds in constructing a project may face challenges from opponents of the project at the stage where they seek an operating permit. The statute does not contemplate that final construction permit decisions can be challenged at the operating permit stage. It would be helpful for EPA to make clear that challenges to construction of a new project or new plant must be resolved at the construction permit stage and that it will not provide a second bite at the apple once a company has reasonably relied on its permit and built a new project to prevent it from operating or extract additional concessions in order to operate.

- Appropriate Implementation of Demand Growth Exclusion and Causation Requirement. The regulations for both manufacturing and utility plants have always provided that only those emissions that "result" from a project should be counted in determining whether an emissions increase that will trigger PSD or NNSR permitting has occurred. Unfortunately, EPA interpretations of the regulations have undermined this fundamental principle. EPA needs to revisit those determinations and ensure that it faithfully implements the statute.

- Applicability of NSR to Downstream/Upstream Units. When a unit is modified, EPA currently requires, in determining NSR applicability, any emission increases from upstream and downstream units (that were not modified) be considered in the applicability analysis. This discretionary regulatory decision often results in a higher

emission calculation than that associated with the unit being modified, thereby assuring that onerous NSR permitting requirements are triggered more frequently. Typically, the included upstream and downstream units (referred to as debottlenecked units) have previously obtained some type of pre-construction permit. Including them in another analysis essentially triggers another round of permitting for those units.

In light of the current requirements, the Forum recommends that EPA issue a rule which clearly states only emission increases related to the unit being modified should be part of the analysis, not unmodified upstream or downstream units. EPA previously proposed that only emission increases at debottlenecked units "caused" by the physical change or change in the method of operation are to be included in the modification analysis to determine NSR applicability.[13] While the Forum supports this second approach, it suffers from ambiguity over whether emission increases are "caused" by the change. Lack of clarity over issues such as this can delay permits and create significant uncertainty for the company seeking a permit.

- Project Netting and Netting Emission Calculations. The NSR regulations have long allowed facilities to consider emission increases and decreases, from both the current project and other projects which have occurred during a contemporaneous time period, when determining NSR applicability. Prior to the 2002 NSR Reform rules, companies could determine if a project would increase emissions by looking at its effects of increasing and decreasing emissions (*e.g.*, if a project involved shutdown of a unit). Now, EPA provides that any counting of decreases that are projected to occur must take into account all projects in the prior 5 years, a time-consuming and cumbersome process. In a 2006 proposal, EPA proposed to return to the pre-2002 approach, a change that would enable emissions decreases from a project to be included in the calculation of whether a significant emissions increase will result from the project (project netting) in the first place.[14] EPA did not take final action on the proposal in 2009, leaving in place a more cumbersome analysis.[15] EPA should clearly state that emission decreases from a project should be allowed in determining project emissions changes without triggering full 5-year netting of all contemporaneous projects. Returning to the pre-2002 *status quo* will simplify applicability determinations for companies and reduce permitting burdens on states so they will only need to address those projects that actually cause a significant increase.

  On a separate point, EPA has also taken the position that when 5-year netting is conducted, companies must change their analysis of the emissions from previous projects to assume, even though there is no reason to do so (and actual emissions changes from completed projects are known) that emissions in the future will be at

[13] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting; Proposed rule*, 71 Fed. Reg. 54,235, 54,239 (Sept. 14, 2006).
[14] 71 Fed. Reg. at 54,248-49.
[15] 74 Fed. Reg. at 2376.

potential emission levels. This is the very approach that was rejected in the 2002 NSR Reform Rules and EPA's interpretation should be reversed.

- Aggregation of Projects. In EPA's 2009 final rule,[16] which remains under reconsideration since February 2009,[17] EPA established a rebuttable presumption that projects separated by 3 years or more are not part of a single project and that there is no presumption for projects that occur within the 3 year time frame to be treated as a single project, as these should be judged on their own facts.[18] Because of the reconsideration process and stay of the 2009 final rule, there is unnecessary confusion regarding what activities must be considered as a single project for purposes of NSR applicability. Aggregating projects that are independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. It also illegally treats separate changes as a single change in a manner inconsistent with congressional intent when the projects are in fact separate. The Forum agrees that companies should not be able to artificially de-aggregate a project into multiple projects to circumvent permitting requirements. The 2009 final rule brought needed clarity and simplified administration of the program had it not been put on hold. EPA should remove the stay of the final rule and move to end the reconsideration process.

- Routine Maintenance, Repair, and Replacement Exclusion. EPA has long excluded RMRR activities from NSR applicability because these are not the types of activities Congress contemplated as the "major modifications" that would justify the costly expenditures and lengthy delays associated with a major NSR permit. EPA's actions continue to inappropriately interpret this exclusion narrowly. For example, EPA requires RMRR activities to occur multiple times at a given unit, even though court cases have held that activities routine in the industry should be excluded even if they do not occur frequently at a given unit. Analogizing to car maintenance, the interpretations are akin to treating a transmission replacement as a major modification: a transmission replacement may only occur once over the life of your car, but it is still a replacement that can be expected to occur for car owners generally as a group and one would not consider the replacement of a transmission to create a "new car" for emissions requirements. For major manufacturing plants, RMRR can involve large, high-cost projects necessitating considerable planning. The fact that an activity is costly does not mean that it is not RMRR. EPA should issue a new rule to clarify that all routine repairs are excluded even if they are expected to occur only once or twice over the lifetime of a plant.

- Plant-wide Applicability Limits (PAL). EPA's PAL regulations are intended to allow companies to establish a site-wide cap that gives them flexibility to make changes

[16] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting; Final Rule,* 74 Fed. Reg. 2376 (Jan. 15, 2009).
[17] EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Notice of Reconsideration*, 74 Fed. Reg. 7193 (Feb. 13, 2009).
[18] 74 Fed. Reg. at 2377.

during the term of the PAL without complex new permitting requirements. EPA should also eliminate the ratchet provisions included in the rules and instead provide incentives for companies to accept a ratchet, *e.g.,* allowing them to sell their offset credits to other companies that want to create jobs within the air-shed.

- Assessing Required Control Technology. EPA could substantially improve the determination process for assessing required control technology, specifically the top-down BACT process. While EPA has said that states have flexibility to adopt other approaches, it has expressed its clear preference for states to enforce the top-down process. The top-down BACT process requires permit applicants to identify the most stringent control technology available and to either accept this technology or demonstrate that it is not acceptable based on technical, economic, energy, or environmental factors. The permit's final performance-based limits are based on the selected technology. The top-down BACT process is onerous, requiring significant research on recently issued permits, most of which are not readily available. Because technologies change, searches must be updated. The problems with the top-down BACT process have been exacerbated by EPA's greenhouse gas (GHG) BACT guidance document, which interpreted the applicable regulations to require the inclusion of technologies that could not reasonably be applied to a process and to require extensive and costly analysis before such technologies could be rejected. Given that the CAA requires only BACT emission limits, and not the top-down BACT analysis, the Forum recommends that the Administration seek to establish optional presumptive BACT limits through a notice and comment process, that could be rebutted by the permittee by proceeding with a case-by-case BACT analysis. Companies seeking permits could then presume with greater confidence the likely outcome of the permitting process. Moreover, state regulators would benefit from reduced second-guessing from federal officials. At a minimum, EPA should issue guidance clarifying that states with SIP-approved programs have the authority to prepare and determine BACT-based emission limits in accordance with their program.

- Modeling. In conducting an analysis for the PSD program, facilities must use EPA-approved models to demonstrate that a project will not cause a violation of a NAAQS standard. The models' overly conservative algorithms and assumptions, however, can create a modeling result that rarely represents and often significantly overestimates monitored concentrations around the facility. Reliance on modeling that over-predicts ambient concentrations can result in additional unwarranted costs by causing facilities to install beyond-BACT pollution control equipment, even though the assumptions used in the models and the predicted concentrations are not representative of real-world conditions.

  The NAAQS for SO_2, NO_2, and annual $PM_{2.5}$ have created urgency in addressing this modeling conservatism due to the stringency of these new standards. Modeling demonstrations for the NO_2 and SO_2 1-hour and $PM_{2.5}$ standards have proven to be extremely difficult for many sources, especially during transient operations such as startup and shutdown. The Forum recommends that EPA review and reconsider key

modeling assumptions that do not represent real-world conditions. This includes more realistic modeling scenarios based on actual, variable emissions.[19] It also means identifying true background levels and including reasonable assumptions regarding neighboring emissions. Because of the stringency of these standards, EPA has allowed some proposals to use monitored data along with modeled data. EPA should be encouraged to allow monitored data along with modeled data when it is available and provide greater flexibility in modeling intermittent operations.

- Significant Emission Rate (SER) for GHGs. In October 2016, EPA proposed a rule to establish a significant emission rate for GHGs of 75,000 tons of carbon dioxide equivalent (CO_2e), or potentially less based on the proposal.[20] GHGs are emitted in quantities significantly higher than those for traditional criteria pollutants, which drives the need for a higher SER to avoid tens of thousands of potentially impacted sources. The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tons per year based on the number of sources covered and the marginal effect the permitting requirements would have.[21] The Forum continues to support this change. Permitting requirements should be applied only to sources where they will yield a meaningful benefit.

Title V Operating Permits

Title V of the CAA requires all major sources and a limited number of minor sources to obtain and renew operating permits to continue to operate. The permit is a legally-enforceable document intended to facilitate compliance by listing applicable air pollution control requirements. The Title V operating permit, however, was not intended to create new substantive requirements or increase the stringency of existing control requirements.

Unfortunately, obtaining, maintaining, and renewing Title V permits has become costly and controversial. With thousands of plants subject to the program, the cost of the program today is far more than was ever anticipated and no one has asked the question whether the benefits being obtained are worth this investment. While the Forum is not advocating for repeal of Title V, we believe that given the enormous costs of the program, it is incumbent on the government to take whatever steps it can to streamline permitting and minimize costs. This is even more important given that the level of costs were never predicted by the Administration when it authored the bill and were never disclosed to Congress. These core issues are exacerbated by the fact that

[19] For example, many sources run intermittently, such that the worst case assumptions in the models grossly overstate impacts.
[20] EPA, *Revisions to Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program; Proposed Rule*, 81 Fed. Reg. 68,110 (Oct. 3, 2016).
[21] Comments of the APF in response to EPA proposed Revisions to the PSD and Title V GHG Permitting Regulations and Establishment of a SER Rate for GHG Emissions Under the PSD Program, (Dec. 16, 2016) Docket Id. EPA-HQ-OAR-2015-0355-0091, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0355-0091.

members of the public can view modification to incorporate new construction permit requirements or renewal of a Title V permit as an opportunity to reopen permit terms that have already been decided and on which companies have relied for planning purposes. Indeed, ENGO groups that unsuccessfully challenged the outcome of a major or minor NSR permit are now challenging the Title V permits on the same grounds that have already been adjudicated. Moreover, Title V petitions often sit in a long queue at EPA, and then can end up back in court—duplicating costs for industry to defend its expansive and long-evaluated permits.

While changes to the NSR permitting program remain a higher priority for Forum members, APF also recommends improved implementation of the Title V operating permit program to help reduce costs and facilitate the permitting process. Specifically, the Forum recommends that EPA:

- Implement recommendations of the Title V Task Force related to streamlined compliance certifications, facilitating faster processing of permit modifications, and reducing fees.
- Actively review the existing program to identify opportunities to reduce costs, recognizing that the Title V program was not intended to create new applicable emission standards or requirements.
- Ensure that the Title V fees that are collected are being used exclusively for the Title V operating permit program, minimize transaction costs, and encourage states to innovate with fees to fund expediting permits (which applies to both operating and construction permits).
- Minimize the potential for stakeholders to use the Title V operating program as an opportunity to seek additional review and litigation over issues that should have been raised and decided in rulemakings over the underlying applicable requirements. For instance, EPA should forcefully deny Title V petitions on issues already ruled on in the underlying NSR permit.
- Although this would require a statutory change, it makes sense to lengthen the permit term from five to ten years to reduce burdens on states since modifications are required for significant changes anyway. Until a statutory change is made, EPA should look for opportunities to streamline the renewal process to reduce burdens.

ED_002674_00002696-00055

Shannon S. Broome
Executive Director | sbroome@hunton.com
Robert J. Morehouse
Director | rmorehouse@hunton.com

5. Are there federal, state, or local agencies that you have worked with on permitting whose practices should be widely implemented? What is it you like about those practices?

A number of states (*e.g.*, South Carolina, Georgia, Louisiana, Texas) have implemented "expedited" permitting processes for issuance of permits in a timely manner. This has resulted in improved processes and reduced uncertainty with obtaining permits. These states allow companies that have a need for an expedited permit to pay additional fees to fund overtime or allocate resources (*e.g.*, expedited publication of public notices) to move a permit through the required processes faster. In addition, the fees help offset state costs of implementing permitting and incentivize states to be responsive stewards of economic growth. In Indiana, there is a fast-track permitting process that allows for construction to begin in 21 days with an initial public notice and then a subsequent notice while the company begins construction at its own risk. EPA approved Indiana's program and it has operated well. EPA should encourage these types of programs in other states and move quickly to approve them in other states. Ohio EPA piloted a program in which it took normally sequential steps in permit processing and executed them in parallel, significantly reducing overall permit processing time. EPA should also seek and embrace these and other innovative approaches to permitting, recognizing the true costs of the preconstruction and operating permitting programs.[22] Examples of other approaches that could be employed include: the Texas Commission on Environmental Quality's tiered BACT approach, expedited permitting programs in Texas and Louisiana (which are similar to South Carolina, Georgia, and Indiana), imposition of statutory timelines to process permits (which are seen in Indiana and Pennsylvania), permits by rule and general permits that companies can opt into for standard pieces of equipment, and the like.

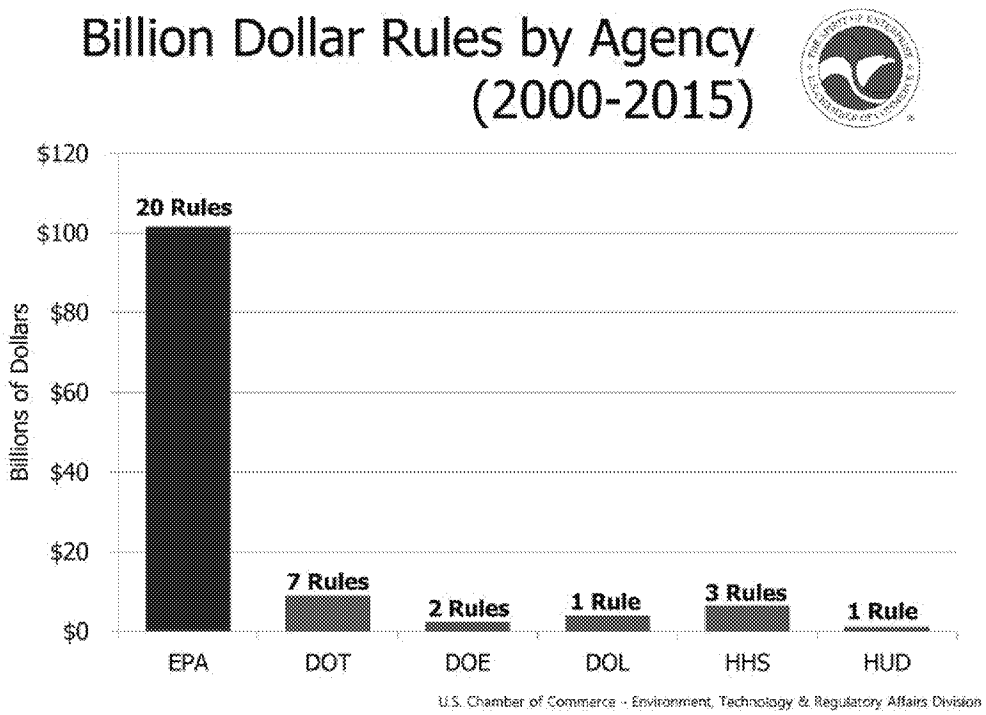
[22] The concepts embodied in EPA's 2009 "Flexible Air Permitting Rule" provides a valuable starting point for this effort. The Forum specifically recommends that EPA promote and directly facilitate issuance of innovative state/regional air quality permits that include and allow for "advance-approve" changes at manufacturing facilities. *See* EPA, *Operating Permit Programs; Flexible Air Permitting Rule; Final Rule*, 74 Fed. Reg. 51,418 (Oct. 6, 2009). EPA could use this opportunity to broaden the scope of facility changes that qualify for advance-approval. The resulting "advance-approved" permits could be used to streamline multiple redundant or conflicting applicable requirements into a single set of permit requirements, and ensure that innovative air permits require no more time to issue than "traditional" air permits.

Regulatory Burden/Compliance

The following comments respond to the RFI's questions concerning regulatory burden and compliance.

1. **Please list the top four regulations that you believe are most burdensome for your manufacturing business. Please identify the agency that issues each one. Specific citation of codes from the Code of Federal Regulations would be appreciated.**

Although there are many federal regulatory programs impacting manufacturing, EPA regulations dominate in cost and impact. As shown in the chart below, the number of billion-dollar rules issued by EPA far exceeds any other federal agency. The Forum hopes that the Department of Commerce will appropriately weigh EPA's disproportionate role and impact in prioritizing actions for reform.



Source[23]

[23] U.S. Chamber of Commerce, *The Most Costly Federal Rules: Billion Dollar Regulations*, *available at* https://www.uschamber.com/the-most-costly-federal-rules-billion-dollar-regulations (last visited Mar. 30, 2017).

Within the environmental area, Forum member facilities are subject to numerous regulatory requirements, many of which pose permitting and compliance burdens.[24] We offer the following four priorities for the Administration to consider: NAAQS standards/implementation; Section 112 policies and regulations for HAPs and its Risk Management Plan (RMP) regulations; standard-setting for malfunctions; and ozone-depleting substance regulatory revisions.

a. National Ambient Air Quality Standards

NAAQS regulations continue to represent some of the most costly federal regulations issued by EPA. The establishment of new ambient air quality standards unfurls a series of stationary and mobile source controls across the country to help bring areas into attainment. In areas classified as a nonattainment, the designation and effective impact of controls can hinder business development and job creation because they create complex regulatory environments with overlapping requirements. Published reports from the National Bureau of Economic Research confirm the severity of these impacts. Between 1972 and 1987, researchers have concluded, based on a review of more than a million manufacturing plant observations, that nonattainment counties (relative to attainment ones) lost approximately 590,000 jobs, $37 billion in capital stock, and $75 billion (in 1987 dollars) of output in pollution-intensive industries.[25]

The underlying statutory requirements do not allow the consideration of cost in setting a new standard. As a result, as the NAAQS have grown increasingly more stringent, health and environmental benefits have reached a point of diminishing returns while compliance costs have escalated. In order to estimate the cost of compliance with recent ozone standards, EPA relied on speculative estimates of the cost of unknown controls and new technologies that have yet to be developed to envision a compliance scenario. EPA's most recent ozone standards have become so stringent that background concentrations approach the level of the standard in some locations of the country, such as in the western states, meaning that they may not be able to demonstrate attainment and putting them at risk of sanctions such as loss of federal highway funds.

In addition to imposing high compliance costs on the country, the stringent NAAQS bring additional costs and delays to permitting decisions. As noted above, the overall stringency of NSR requirements differ depending on whether an area is classified as in attainment or non-attainment of a NAAQS. Tighter standards force more areas into nonattainment, resulting in more expensive air pollution control costs under the NSR preconstruction permitting requirements. But this is only half the story. For PSD permits, the tighter standards significantly increase the technical challenge of

[24] Because the Forum's comments are limited to CAA-related regulatory programs, the Forum reserves comment on whether there are individual regulations outside the purview of EPA that may be more burdensome on individual manufacturing facilities than the EPA regulations listed below.
[25] Greenstone, Michael, "The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 & 1977 Clean Air Act Amendments and the Census of Manufactures," National Bureau of Economic Research, Working Paper No. 8484, (Sept. 2001).

demonstrating that the new plant or modification will not contribute to a potential NAAQS violation—an air quality demonstration that can become very difficult as standards approach background concentrations. Similarly, the adoption of short-term NAAQS for NO_2, SO_2, and $PM_{2.5}$ (*i.e.* 1-hour, 24-hour) has also made it challenging for sources to make the required modeling demonstration.

All of these factors make it more difficult and uncertain to expand manufacturing operations in the U.S. At a minimum, they will delay construction and in some cases may serve to prevent projects from going forward. These permitting complexities are compounded by the fact that it takes years after a NAAQS is revised for EPA to issue what are called "implementation rules"—the rules of the road for states and companies that must comply with the standards[26]—and when they are issued, they do not do enough to ease the transition. As a result, companies face uncertainty about what the requirements will be for their plants years after the standards are issued. This includes questions surrounding statutory interpretations on reasonably available control technology, offsets (*e.g.,* substitutions, ratios), and attainment obligations. The uncertainty undermines the ability of manufacturers to plan projects with a certain timeline and cost expectation, creating incentives for projects to be done at other locations in and outside the U.S. where these uncertainties do not exist. Conversely, the requirements in attainment areas apply immediately after the revised NAAQS is final even though there is a lack of tools to implement it. The NAAQS process does anything but make regulation regular for those who must comply.

In light of these many factors, the Forum supports the following statutory and regulatory changes to the NAAQS program.

- Although this would require a statutory change, the required five-year statutory review of each NAAQS should be lengthened to ten years to more appropriately reflect the scientific and technical challenge of assessing and revising the standard and to allow time for science to advance between reviews. This will also increase the likelihood that areas can make meaningful progress toward meeting a standard before it is revised.

- The Administrator should consider a standard's attainability in establishing a NAAQS. Failure to consider attainability increases the likelihood that EPA will establish standards that regions of the country cannot realistically meet.

- EPA should establish a clear implementation transition policy of grandfathering all new sources for purposes of PSD permitting that have submitted a PSD application prior to the finalization of a new NAAQS, particularly since the time for processing applications once submitted is out of the control of the applicant. This would prevent sources from having to redo air quality modeling and related technical analysis to

[26] For example, significance levels are critical to planning projects, and companies planning projects that may be a few years out will not know the relevant levels against which to determine permitting requirements.

ED_002674_00002696-00059

address the recently finalized standard. It would also prevent companies from having to wait for new modeling or measurement techniques to make updated air quality demonstrations. Without clear transition rules, including the grandfathering in of PSD permit applications, construction at new and existing sources subject to PSD will be unnecessarily delayed across the country.

- EPA should also adopt appropriate grandfathering rules for sources in newly designated nonattainment areas that are being permitted at the time a NAAQS may transition to a more stringent level. Because of the delays in obtaining NSR permits and the five-year NAAQS review cycle, companies can find themselves facing new and unanticipated requirements when EPA revises the standard. This situation is critical because EPA has persistently determined that revised NAAQS become effective for permitting sources immediately upon the effective date, despite the fact that state regulatory agencies have up to two years to determine attainment relative to the new standard and several years longer to devise control strategies.

- EPA should also establish clear standards for conducting NAAQS scientific reviews, including clear criteria for assessing and ranking health effects studies, a transparent system for objectively weighing the evidence, and a balanced and open peer review process that allows for a meaningful comment process.

- Despite clear statutory language under CAA Section 109(d) requiring EPA's NAAQS scientific advisory committee to assess the public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of the NAAQS,[27] EPA has failed to request the analysis and to provide the advisory committee with sufficient resources to conduct the required analysis. EPA should take immediate steps to assure that the required analysis is conducted for all future NAAQS standards in a timely manner. This is important because there has been no clear review and understanding of the potential for adverse consequences from the attainment process, and if there had been, Congress and EPA could have taken concrete steps to ensure welfare, social, economic, and energy benefits.

- With respect to air quality demonstration modeling, EPA should:

  — Eliminate numerous conservative assumptions that tend to over-predict the potential impacts of a source's emission changes relative to the NAAQS. This is confirmed by ambient monitoring data collected near manufacturing sites that show concentrations that are well below the standards even when the required modeling results show "on-paper" exceedances that would prevent a source from being permitted. It is important to note that the NAAQS themselves are already based on conservative assumptions including a "margin of safety" for sensitive individuals. Over-predicting the contribution of emissions to ambient concentrations compounds that conservativism,

[27] 42 U.S.C. § 7409(d).

especially when considering the fact that new standards are being set close to background levels (*e.g.* ozone). Given the increasing technical challenges posed by the stringent NAAQS and the conservative modeling assumptions, many permit applicants may simply decide not to submit a permit application for projects that will improve productivity or bring new jobs.

— Allow the option for the company to proceed with permitting based on collection of monitoring data after construction of the project rather than relying on overly conservative modeling assumptions. EPA has implemented this approach in some permits already when it appeared that the model was over-predicting the impacts that would occur in practice. This type of approach includes reopeners in the permit to address actual exceedances.

— Empower states to make modeling decisions. EPA headquarters staff should not have to approve all variances from permit dispersion modeling procedures. This review delays the approval of any project, since most permit applications are reviewed at the state level. Federal modeling guidelines at 40 C.F.R. Part 51 – Appendix W explicitly assign review and approval duties to the "appropriate reviewing authority," which is primarily the state/local regulatory permitting agencies, occasionally in limited circumstances after consultation with the EPA Regional Office. Given the experience of state permit engineers, states should be empowered to approve changes to the modeling procedures and make reasonable site-specific determinations based on sound science and reasonable judgment of facts relevant to each application. EPA, and the public, always have the opportunity to review changes during the public and EPA permit review period.

b. Section 112: Hazardous Air Pollutants and Risk Management Plan Regulation Revisions

The CAA Section 112 program covers the regulation of hazardous air pollutants (a defined list) for various source categories.[28] Initially, these National Emission Standards for Hazardous Air Pollutants (NESHAPs) were established based on a review of currently employed air pollution control technology applied to existing and new sources (referred to as Maximum Achievable Control Technology, or MACT). Then, after eight years, the statute requires EPA to conduct residual risk and technology reviews.[29] EPA assesses the risk remaining after application of MACT controls and determines if it is acceptable. If not acceptable, further controls must be applied.[30] EPA is also required to evaluate if advances in control technologies have occurred since the MACT and to determine if their application to the source category is appropriate.[31] Opportunities to improve Section 112 implementation include:

[28] 42 U.S.C. § 7412.
[29] 42 U.S.C. §§ 7412(d)(2), (f)(2).
[30] 42 U.S.C. § 7412(f)(2).
[31] 42 U.S.C. § 7412(d)(2).

ED_002674_00002696-00061

- Repeal Once-in-Always-in-Policy. EPA established a policy that once a source is subject to a MACT standard (major source), the regulatory obligations associated with the applicable MACT standard remain even if the facility undertakes pollution prevention or installs control devices to reduce emissions below the major source applicability thresholds. This policy is not mandated by the statute and creates a significant disincentive for companies to reduce emissions; it also imposes costly monitoring requirements when none are needed. Moreover, because "major sources" must obtain Title V permits, this policy means that sources are prevented from reducing emissions to avoid Title V permitting. EPA had proposed to eliminate the policy,[32] but an appropriations bill blocked finalization of the rule prior to the Obama Administration taking office. The proposal was never withdrawn and EPA remains free to take final action on that proposal.

- Residual Risk Review Should Inform Technology Review. EPA should interpret the statute to conclude that if a risk review shows the existing standard is protective of public health with an ample margin of safety, no further technology reviews are required. Requiring added controls under a technology review when risk is demonstrated to be acceptable generates unnecessary costs.

- Pollutant-by-Pollutant Standard Setting Process. EPA has established Section 112 limits pollutant-by-pollutant in some MACT standards, which can create an unachievable standard that no one source can meet. EPA should modify its policy to ensure standards are achievable and establish achievability by considering all pollutants in setting standards for source categories.

- RMP Rule Revisions. The Forum refers the Agency to the Petition for Reconsideration and Stay submitted by the Chemical Safety Advocacy Group on March 13, 2017.[33] The January 13, 2017 RMP rule revisions are inappropriate and should be substantially revised.

c. Standard-Setting for Malfunctions.

In the past few years, EPA has taken the position that emission standards applicable to normal operations must also apply during malfunction periods. It is widely recognized that even the best designed piece of equipment can break down, even if it is well-maintained. As far back as the 1970s, the courts have told EPA that it needed to

[32] EPA, *National Emission Standards for Hazardous Air Pollutants: General Provisions; Proposed Rule*, 72 Fed. Reg. 69, 70 (Jan. 3, 2007).
[33] Chemical Safety Advocacy Group, Pet. for Reconsideration and Stay of EPA's *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017) dated Mar. 13, 2017.

take these situations into account and not force companies into "noncompliance" when unpreventable malfunctions occur.[34]

While recent court decisions indicate that an outright exemption under CAA Section 112 is not permitted for startup, shutdown, and malfunction situations,[35] EPA's response has not always been appropriate. Rather than systematically develop a "work practice" standards for these situations, EPA has often concluded that it would simply apply the standards developed based on data for normal operating modes during these unpredictable operating modes. When defaulting to this position, EPA has not diligently sought alternatives. Such an approach penalizes companies that do the right thing—they install the controls; they maintain their equipment; they operate it well. Companies should not be at risk of enforcement and citizen suits in these situations.

Unfortunately, EPA has incorrectly applied this same approach to the NSPS program and SIPs for NAAQS. EPA is now requiring states to remove affirmative defenses for malfunctions from emissions standards included in these plans or make them state-only applicable. Instead of inappropriately applying the MACT decision to SIPs, EPA should address the problem by reinstating its previous guidance on affirmative defense.

The Administration can take steps to immediately address these problems by establishing work practice standards for Section 112 standards that can apply during malfunction periods and by reinstating previous guidance on affirmative defense for SIPs. Such an approach will ensure responsible operation of plants that minimizes emissions, while not creating unreasonable and unattainable requirements for companies.

d. Ozone-Depleting Substances

EPA recently expanded the detailed refrigerant management requirements currently applicable to Class I and II refrigerants to include substitutes.[36] The rule is currently being challenged in the U.S. Court of Appeals for the D.C. Circuit.[37] CAA Section 608 requirements were established to regulate ozone depleting substances, but the expansion to substitutes means that EPA is applying Section 608 to chemicals that may not be ozone depleting. EPA is transforming this provision beyond ozone-layer-protection to achieve other policy goals not intended by Congress to be addressed under this provision.

---

[34] *See, e.g.*, *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) (a "standard . . . must be achievable" under section 111); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980) (EPA bears the burden of explaining "how the standard proposed is achievable under the range of relevant conditions which may affect the emissions to be regulated").
[35] *See Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).
[36] *See* EPA, *Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act; Final Rule,* 81 Fed. Reg. 82,272 (Nov. 18, 2016) (Final Rule).
[37] *Nat' Envtl. Dev. Ass'n Clean Air Project v. EPA*, No. 17-1016 (D.C. Cir. filed Jan. 17, 2017).

ED_002674_00002696-00063

2. How could regulatory compliance be simplified within your industry or sector?

The Forum offers the following additional suggestions to simplify CAA permitting and compliance for manufacturing facilities.

- Regulatory interpretations. Often, after a rule has been finalized, or even years later, questions arise with regards to rule applicability or a compliance requirement. The EPA individuals most familiar with the rule background and issues discussed during regulatory development are those in the Office of Air Quality and Planning Standards (OAQPS) (or outside of the air program in the substantive divisions). These substantive experts are primarily responsible for standard-setting. Once a rule is finalized, however, interpretations of those regulations become the responsibility of the enforcement office (OECA). In most cases, the OECA personnel addressing the interpretation question are less familiar with the rule and in our experience have at times imposed interpretations inconsistent with the intent of the rule. The responsibility for responding to regulatory interpretations should be assigned to the division or group responsible for the original rule development.

- Reporting Requirements. Harmonizing federal and state reporting requirements would help to simplify facilities' reporting obligations. Currently, EPA requires electronic reporting of facility information, whereas states require hard copy submittals. Aligning these requirements would allow facilities to fulfill their reporting obligations in a uniform and consistent manner.

* * * * *

The Forum appreciates the opportunity to comment on the Notice. Please contact Chuck Knauss at cknauss@hunton.com, Shannon Broome at sbroome@hunton.com, or Bob Morehouse at rmorehouse@hunton.com with any questions regarding these comments.

Attachment: Air Permitting Forum Comments to Title V Task Force (Mar. 31, 2005)

COMMENTS
of the

AIR PERMITTING FORUM
to the
TITLE V TASK FORCE

March 31, 2005

Charles H. Knauss
Swidler Berlin LLP
3000 K Street, NW
Washington, DC 20007

chknauss@swidlaw.com

Shannon S. Broome
5001 Proctor Avenue
Oakland, CA 94618

sbroome@pacbell.net

Comments of the
Air Permitting Forum to the Title V Task Force

March 31, 2005

The Air Permitting Forum appreciates the opportunity to submit these comments for the record regarding implementation of the Title V program. Forum members operate well over 100 plants subject to Title V in numerous states and a primary focus of our activities is to achieve smooth implementation of the Title V program consistent with statutory and regulatory requirements.

We commend EPA for convening this Title V Task Force ("Task Force"). In addition to being represented directly on the Task Force, we believe it is important to provide written comments to the Task Force as a whole on the issues that Forum members face as we obtain, comply with, modify, and renew our operating permits.

I. Title V: Legislative and Regulatory History

Some 15 years after the 1990 Amendments to the Clean Air Act were enacted and 13 years after the initial issuance of the Title V regulations mark appropriate milestones for an evaluation of the implementation of Title V. Examining Title V's implementation is helpful also because it is a tool for implementing the substantive programs found in other titles of the Act. Therefore, this evaluation may also reveal opportunities for improvement to air program implementation more generally.

In July of 1989, President George H.W. Bush proposed to Congress amendments to the Clean Air Act, which included provisions establishing a comprehensive permit program to be administered by states under detailed federal procedures.[1] The provisions were broadly applicable to stationary sources subject to the various standards and requirements of the Act.[2] This program largely federalized the many state permit programs that were already being administered at the time.[3]

The President's bill (also referred to as the "Administration's Bill") was introduced in the House by Chairman Dingell of the Committee on Energy and Commerce as H.R. 3030, and was introduced in the Senate by Senator Chafee, ranking minority member of the Committee on Environment and Public Works, as S. 1490.[4] The Senate Environmental Protection Subcommittee of the Committee on Environmental Public

---

[1] CRS Report 89-449 ENR, *Clean Air Act Amendments: A Summary of the Administration's Bill*, Updated Sept. 22, 1989 ("CRS Report 89-449"), at Summary, CRS-8; CRS Report for Congress, *Clean Air Amendments: Permits and Market-Oriented Provisions in the Administration Bill*, Aug. 18, 1989 ("1989 CRS Report"), at CRS-2.

[2] 1989 CRS Report at Summary.

[3] *Id.*

[4] CRS Report 89-449 at CRS-1.

ED_002674_00002696-00066

Works drafted S. 1630, introduced by Senator Baucus, which did not include the permitting provisions.[5] After markup of the bill by committee, S. 1630 included the permitting provisions from S. 1490. *Id.* In February of 1990, Senate Majority Leader Mitchell withdrew S. 1630 from floor consideration to negotiate with the Administration, and substituted a "compromise" bill on March 5, 1990. *Id.* Although the permitting provisions were to continue to be discussed, subsequent amendments to include Administration-supported provisions were defeated. Senate Debate on S. 1630, Mar. 26, 1990, A Legislative History of the Clean Air Act Amendments of 1990, Vol. IV, at 6338. The House and Senate bills were subsequently sent to conference, where some modifications were made to the permitting provisions.[6]

A. Title V Was Intended to Compile Substantive Requirements Created Under Other Substantive Titles of the Act, Not to Create or Authorize EPA and States to create New Substantive Limits on Plant Operations.

Much of the debate on the 1990 Amendments focused on substantive provisions of the Act, like the Acid Rain program in Title IV and the new hazardous air pollutant program in Title III of the Amendments. With respect to the Title V program, however, there are several indications in the legislative history of the 1990 Amendments of what Title V was intended to accomplish:

- First and foremost, to gather and recite in one place the obligations imposed by the Act on a source, contrasted with the pre-1990 system under which some requirements were in the SIP, others in construction permits, others in state operating permits, and others in regulations like NESHAPs and NSPS.[7]

- To promote uniformity of enforcement across the country by standardizing the information base and applying similar requirements to similar sources.[8]

---

[5] *Legislative History of the Clean Air Act Amendments of 1990*, 22 E.L.R. 10,321, 10,322 (May 1992).

[6] 22 E.L.R. at 10, 321. One of the significant changes between the Senate bill and the conference agreement was the removal of EPA authority to use Title V permits to modify SIP requirements.

[7] *See, e.g.,* Senate Debates on S. 1630, Jan. 24, 1990, A Legislative History of the Clean Air Act Amendments of 1990, Vol. IV (Statement of Senator Chafee):

> The permits will serve the very useful function of gathering and reciting in one place—the permit document itself—all of the duties imposed by the Clean Air Act upon the source that holds the permit. This would clearly be an improvement over the present system, where both the source and EPA must search through numerous provisions of State implementation plans and regulations to assemble a complete list of requirements that apply to any particular plant." (p. 4858)

[8] *See, e.g.,* Senate Debate on S. 1630, Mar. 20, 1990, A Legislative History of the Clean Air Act Amendments of 1990, Vol. IV [136 Cong. Rec. S2715 (Mar. 20, 1990)] (Statement of Senator Baucus).(p. 5811).

ED_002674_00002696-00067

- To consolidate duplicative and redundant requirements, thereby streamlining permitting.[9]

During the House debate on H.R. 3030's pre-conference version the program, the operating permit program was considered "potentially H.R. 3030's most important *procedural* reform."[10] The most extensive comments on the purpose of the Title V program were provided by Representative Bilirakis. He clarifies the importance of streamlining requirements while at the same time ensuring that Title V creates no new substantive requirements on sources:

> The creation of the new permit program in title V provides an opportunity and an obligation for EPA to harmonize the substantive provisions of the other titles in this complex legislation. . . . ***EPA must make every effort to harmonize and prevent unproductive duplication among those titles. The permit provisions of title V provide a focus for this harmonization, although title V does not change, and gives EPA no authority to modify, the substantive provisions of these other titles.***
>
> ***Title V creates no new substantive emission control requirements. Nothing in the permitting title should be read to increase the stringency of any control requirement*** nor to delay or accelerate the effectiveness of such requirements, except as expressly provided in titles I, III, and IV.

---

[9] *See* Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Commerce, U.S. House of Representatives, 104th Congress, 1st Sess., on Title V Permits, May 18, 1995

> In 1990, the Congress envisioned title V as a modest tool for bringing some clarity to the world of stationary source regulations under the Federal and State clean air programs. *While the goal of consolidated source requirements and eliminating duplicate and overlapping provisions is a good one*, it may not be worth the billions of dollars that EPA seems to want the program to cost.
>
> Statement by Chairman Dingell at 31

Although Chairman Dingell's statements were made after passage of the 1990 Amendments in reference to the implementation of the program, his views as to what was intended at the time of enactment are relevant given his central role in the Conference Committee.

See also, Statement of Representative Bilirakis, 136 Cong. Rec. E3675 (Extension of Remarks) (Nov. 2, 1990) ("EPA must avoid duplication between the SIP and permit processes.")

[10] Clean Air Facts, May 3, 1990, reprinted in A Legislative History of the Clean Air Act Amendments of 1990, Vol. II (House Debate on H.R. 3030 May 17, 1990).

ED_002674_00002696-00068

> The administration proposed this comprehensive permit title—there was no such title in the original House and Senate bills, H.R. 3030 and the predecessors to S. 1630—to create a permit program that will serve the following three purposes: First, to provide a more comprehensive inventory of the emission sources of pollutants controlled under this Act; second, to facilitate enforcement by providing a single reference for all of a major source's operating limits and requirements under the Clean Air Act; and third, to institute a system of permit fees that would support the States in carrying out the issuance and renewal of permits. ***To the degree these purposes can be realized without unnecessary delay and paperwork, EPA and the States are encouraged to make full use of the mechanisms provided in this and other titles of this act—such as those related to modifications and the use of general permits***. These provisions should be used to the maximum degree possible, consistent with emission control requirements, particularly to ease the burden on small businesses.
>
> 136 Cong. Rec. E3673 (Extension of Remarks) (Nov. 2, 1990) (emphasis added).

As one of the Conferees for the House, Representative Bilirakis provided important insights for EPA as to how the program should be administered to facilitate compliance. He also clarified that Title V does not authorize EPA or states to create or change through the operating permit the substantive requirements of the Act, including anything that would increase the stringency of the substantive limits in other provisions of the Act.[11]

When EPA adopted its regulations to implement Title V, it also recognized several of these goals of the program, through adoption of implementation principles. EPA stated that it viewed the Title V program as a tool to aid effective implementation of the Act and to enhance the Agency's ability to enforce the Act and sought, among other things, to facilitate use of market-based incentives, allow flexibility in state programs and source permits, minimize redundancy in SIPs and permit programs, and promote simple and streamlined regulation. 56 *Fed. Reg.* 21712, 21715 (1991). In the final Part 70

---

[11] Some parties have provided statements to the Task Force indicating that Congress intended the Title V program to be implemented just like the NPDES program under the Clean Water Act. While there are several references in the legislative history to the NPDES program, nothing indicates that Title V was intended to create substantive requirements like the NPDES program. Indeed, the differences between water and air pollution sources were specifically noted. See S. Rep. No. 101-228: Clean Air Act Amendments of 1989, Report of the Committee on Environment and Public Works United States Senate at 353 (S. 1630), Dec 20, 1989. Moreover, EPA specifically considered the relationship between Title V and the NPDES program in its Part 70 rulemaking. The Agency concluded that there are "significant dissimilarities" between the two programs and concluded that "NPDES precedent should not be presumed binding for purposes of decisions made in the implementation process for the Title V program." 57 *Fed. Reg.* 32250, 32260 (1992).

ED_002674_00002696-00069

rules, EPA further explained that enhancing the productive capacity of the nation is an important concept that is part of the goal of aiding effective implementation of the Act.[12]

In the preamble to the proposed Part 70 rules, EPA explained that it was "proposing that *only those provisions of a permit identified as being required under the Act or necessary for its implementation will be federally enforceable* [and that to] promote this result further, EPA ...[proposed] to require an explicit statement of the regulatory basis for all Title V permit conditions." 56 *Fed. Reg.* 21729. EPA went on to indicate its belief that Congress did not intend "Title V to be a forum for the State to establish any additional requirements that would become federally enforceable [as] ... [t]he primary purpose of the Title V permitting program is to assure that subject sources comply with all requirements of the Act." *Id.* Reflecting this philosophy, both the proposed and final Part 70 rule included the statement that "Title V does not impose substantive new requirements."[13]

Thus, the Title V program is an *administrative tool* to compile and recite the substantive requirements that apply to an industrial facility in a single document. This concept represents an improvement over the prior system under which requirements were found in a variety of locations. Calling the program "administrative" does not mean that it is unimportant. It simply means that it is not substantive. It does not create new emission limits and any requirements imposed through it, as explained by Rep. Bilirakis, cannot act to create such limits.

B. The Burdens Imposed by Title V Were Not Considered Significant Compared to the Substantive Requirements of the Act.

The Administration did not include a detailed analysis of the costs of Title V in its initial estimates of the costs of the legislation transmitted to Congress on July 24, 1989. Estimates of the annual price for the separate House and Senate bills were about $25.4 billion each for 2005 ($11.8B-11.9B for 1995).[14] The costs of concern, however, were for the substantive aspects of the amendments, including the provisions on nonattainment, acid rain, air toxics, and reformulated gasoline. These costs accounted for over 99% of the estimates.

The relevant cost estimates at the time did not provide an estimate of the permitting and enforcement process, which were thought to be "difficult to quantify." Boskin Letter, at 4. Such costs were thought to be "particularly high" for smaller firms

---

[12] 57 *Fed. Reg.* 32260.

[13] 40 CFR § 70.1(b) and proposed 40 CFR § 70.1(c). *See also* Response to Comments on the 40 CFR Part 70 Rulemaking, EPA Docket No. A-90-33, V-C-1 (June 1992) at 6-25 ("Title V is designed not to rewrite the Act's requirements but to enforce them.")

[14] Pechan Report, at Table ES-1, A Legislative History of the Clean Air Act Amendments of 1990, Vol. I, at 979 [136 Cong. Rec. at S16964]. It was estimated that 90% of the cost difference between the Administration proposal and the Senate and House bills was motor vehicle hardware or fuel costs. *Id.* at S16965.

ED_002674_00002696-00070

that have had little contact with this process to date, as they will "likely need to devote considerable managerial attention to this process and to hire outside consultants." *Id.* "Indirect costs include the carrying costs, uncertainties, reduced innovation, and lost opportunities imposed by regulatory delays." *Id.* A later analysis by the Council of Economic Advisors on the House and Senate bills similarly recognized the importance of but could not quantify Title V costs, stating that estimates did "not cover private sector administrative and legal costs, which could be quite substantial but are extremely difficult to estimate quantitatively." Estimated Direct Costs of Clean Air Proposals, Council of Economic Advisors, Sept. 25, 1990, reprinted in A Legislative History of the Clean Air Act Amendments of 1990, Vol. I, at 1351, 1352. Nonetheless, when proposed, the costs associated with the Title V permit were considered not to be significant compared to the costs of the other programs.

The Congressional Research Service analysis in August of 1989[15] stated that the cost dimensions for owners and operators of permitted sources were unknown. It recognized that costs will rise as a source develops the information needed to apply for a permit and maintains the monitoring and recordkeeping required by an operating permit and stated that "the procedural and compliance costs of the permit program are likely to be significantly less than costs incurred by a source which must make capital investments to meet other pollution reduction requirements under the bill."[16]

In its final rule, EPA estimated the cost of the permit program at $526 million per year, for some 34,000 sources. This equates to a mere $15,000 per source, perhaps indicating that, at least in 1992, EPA also viewed the costs of the program as not significant.

After promulgation of the Part 70 rules, states began to develop and obtain approval of their programs. This began the process of collecting fees from Title V sources as well as the filing of applications. An early misstep by EPA created the impression that permit fees would be far higher than ever anticipated by Congress. EPA issued a memorandum on December 18, 1992, stating that a state's Title V fees must be sufficient to cover not only Title V program costs, but also SIP development costs and all costs of the state's Clean Air Act enforcement program.[17] EPA recognized that such a broad scope for Title V fees was not only inconsistent with statutory requirements but would make the costs of the Title V program far higher than was ever

---

[15] In the CRS Report for Congress, *Clean Air Amendments: Permits and Market-Oriented Provisions in the Administration Bill*, Aug. 18, 1989 ("1989 CRS Report").

[16] 1989 CRS Report at CRS-7 to CRS-8.

[17] Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Division Directors, Regions I-X regarding Agency Review of State Fee Schedules for Operating Permits Programs Under Title V (September 18, 1992).

ED_002674_00002696-00071

anticipated by Congress. On August 4, 1993, EPA reissued its fee guidance to clarify that Title V fees may only cover the reasonable costs *of the Title V program*.[18]

While the fee issue was addressed in 1993, the startup costs of the program for sources required to submit permit applications quickly got out of control. EPA soon recognized that even at the application stage, this program was costing far more than either Congress or EPA had envisioned. EPA took action to alleviate the most immediate aspect of the problem, application costs by issuing White Paper No. 1.[19] This White Paper clarified that extensive and costly emission inventories were not required by Title V.

In 1995, Chairman Dingell also expressed concern regarding the rising costs of this program:

> In 1990, the Congress envisioned title V as a modest tool for bringing some clarity to the world of stationary source regulations under the Federal and State clean air programs. *While the goal of consolidated source requirements and eliminating duplicate and overlapping provisions is a good one*, it may not be worth the billions of dollars that EPA seems to want the program to cost.[20]

Since that hearing, the costs of this program have only increased. Permit issuance costs are in the hundreds of thousands of dollars for medium-sized industrial plants. Fees are upwards of $50,000 a year. Reporting, monitoring, and certification requirements are imposing significant costs.

The Forum recognizes that some of these costs are necessary requirements to sustain even the most streamlined program. Nonetheless, any evaluation of how the Title V program is working involves two components:

- First, is it achieving its intended purposes?
- Second, what price are we as a country paying to achieve these goals and is it worth it?

In these comments, we answer from our perspective whether and how Title V is achieving its goals. With respect to the second question, we and other commenters

---

[18] Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Division Directors, Regions I-X regarding Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V (August 14, 1993).

[19] *White Paper for Streamlining Development of part 70 Permit Applications* (July 10, 1995).

[20] Statement by Chairman Dingell, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Commerce, U.S. House of Representatives, 104th Congress, 1st Sess., on Title V Permits, May 18, 1995 at 31.

ED_002674_00002696-00072

have provided information as to the costs of this program for industrial sources and state agencies have also indicated the costs they are experiencing.

We encourage EPA to consider whether these costs are consistent with what was expected when the 1990 Amendments were enacted and when EPA issued the Title V rules. We also encourage EPA to consider whether the primary benefits of the Title V program could have been more cost-effectively achieved through a simple requirement for sources to submit an annual compliance certification through which they would list applicable requirements and certify their compliance. In other words, was there a better way? Was a comprehensive bureaucratic program truly necessary? Although it is impractical to eliminate the program in favor of a simple certification requirement, EPA can ask what can be done to bring these costs in line with original expectations and make implementation changes that reduce costs going forward.

II. Recitation of Applicable Requirements

A. Incorporation of MACT and Other Standards Should Be Accomplished by Citation to Applicable Standards.

Several people have presented information to the Task Force indicating that an inordinate amount of time and effort is being spent translating MACT requirements into the Title V permit. As explained above, Congress intended that the permit document be a repository of the applicable requirements for a given facility. Title V was intended to solve the problem that Clean Air Act requirements for a given facility might be found in various locations, with only the facility having complete knowledge as to which requirements apply. Title V creates a document – the permit – where all of these requirements can be located and made publicly available. By co-locating these requirements and requiring compliance certifications, Title V was also viewed as enhancing enforcement and compliance.

The question is how such a recitation can best be accomplished to promote the goals of Title V. It is clear that the highest priority should be to ensure an accurate and complete permit. In our experience with Title V, we have encountered a variety of approaches. Some states simply cite to a MACT standard by subpart, while others will provide more specificity in their citations. Still others have taken to repeating the MACT *verbatim* in the permit. The most troubling are those states (*e.g.,* Indiana) that have a policy of reorganizing the MACT standard or worse, rephrasing it to tailor its application to the particular source in question.[21]

Several commenters have detailed the problems associated with the rephrasing and reorganizing of MACT standards, the most significant of which is the potential for

[21] In both the rule repetition and the paraphrasing approach, if there are changes/corrections in the actual rule, the rule revised language could be in conflict with the permit, potentially creating a situation where complying with both the permit and the underlying rule simultaneously is impossible.

ED_002674_00002696-00073

inaccuracy in the translation process.[22] We concur with those commenters and are concerned with the potential for enforcement jeopardy when the permit does not match up with the promulgated rule. We believe that the only reasonable way to reflect the MACT in a permit is through a citation-based approach. We also disagree with the approach of attaching the rule or the *Federal Register* notice for a MACT to the permit itself or repeating the entire MACT in the permit. This adds nothing in the way of enforceability and may lock in place standards that are later revised (thus requiring additional permit revisions and costs for both the state and the permittee). We note that EPA recognized in the final rule that applicable referencing requirements "in rules or laws can more easily be referenced in the permit rather than be repeated verbatim" and that standards "may be too cumbersome to place entirely in the permit."[23]

Thus, we recommend that EPA promote a citation-based approach to incorporation of MACT standards.[24] We understand the desire of some states to aid their inspectors in the understanding of MACT requirements as they apply to a particular source and its emission units. Similarly, members of the public may be interested in what a MACT requires. At the same time, it is important to recognize that MACT standards are complex, that they apply to complex facilities and that they are often revised over time.[25] These rules are written by technical experts at EPA who have spent several years understanding the intricacies of an industry, its processes and equipment. It would be naïve to assume that the most technical standards EPA has issued under the Clean Air Act (or any other regulatory program) could somehow be "translated" in enforceable text in a way that both preserves the exact meaning of the regulation and explains it to the inspector, let alone the intelligent lay person.

We believe that the statement of basis or another document is an appropriate place to provide any additional commentary regarding how a MACT applies. This would ensure that a high level description is available to the public regarding source obligations relative to the MACT and would allow for inspection guidance or other documents to reflect a checklist of sorts that the inspector could use to guide review of facility operations.

---

[22] As discussed in more detail in the next section of these comments, the translation process has also frequently resulted in the inappropriate elimination of compliance options that EPA has promulgated under a MACT standard.

[23] RTC at 6-7. At the time of issuance of the Part 70 rules, EPA's perspective was limited to relatively straightforward NSPS and limited NESHAPS. Even EPA could not have envisioned the complexity that would come with MACT standards or the variety of permit formats and software that might be employed by the states in their development of Title V permits.

[24] We recognize that some permittees have asked for clarifications of standards in their permits or a brief narrative to the requirement. It is the option of a permittee to request clarifying language of a particular aspect of a standard where needed but it should not be the baseline approach to translate, reorganize, and rephrase a complicated MACT standard. The starting point must be citations.

[25] After a rule is issued, EPA frequently issues technical or even substantive rule amendments.

ED_002674_00002696-00074

B. The Flexibility Provided by MACT Standards or Other Applicable Requirements Must Be Preserved in Title V Permits.

Many MACT and other standards under the Clean Air Act provide compliance options to sources. The citation-based approach for incorporating MACTs in a Title V permit is the best approach for preserving the compliance flexibility allowed under MACT standards. Some of these are fundamental choices regarding what control device will be used while others are more minor, perhaps relating to the manner in which emissions are calculated. Here are a few examples:

- ***Large Appliance Surface Coating MACT:*** Under this standard, existing affected sources are subject to a limit on organic HAP emissions to the atmosphere of no more than 1.1 pound per gallon of coating solids used during each compliance period. 40 CFR § 63.4090. This standard provides three compliance options: (1) a compliant material option; (2) emission rate without add-on controls; and (3) emission rate with add-on controls. 40 CFR § 63.4091. The rule specifically provides that the source "may use different compliance options for different coating operations or at different times on the same coating operation" but prohibits the source from using "different compliance options at the same time on the same coating operation." The rule addresses switches between compliance options, requiring the source to "document this switch as required by §63.4130(c), and you must report it in the next semiannual compliance report required in §63.4120." *Id.* These compliance options and the ability to change among them were included in the rule in response to comments submitted on the proposed rule. EPA promulgated this rule on July 23, 2002, and it was not challenged in court.

  Sources in this category need the flexibility to change among compliance options and there is no reason that they should be forced to obtain a Title V permit revision to make a switch. Indeed, EPA envisioned that switches among compliance options could occur more than once at a coating operation within the same semi-annual reporting period. For example, a source may be equipped with an incinerator but only need the control to meet the standard during use of certain high HAP content coatings. During other periods, the source may be able to comply using low-HAP coatings. The flexibility not to use the incinerator during these periods is important and prevents both the waste of fuel and the corresponding emissions in such cases.

- ***Miscellaneous Metal Parts and Products Coating MACT:*** Under this standard, there are various limits, expressed in pounds of HAP per gallon of coating solids, categorized by coating type. See 40 CFR § 63.3890. The standard provides three compliance options, similar to the options for the Large Appliance Surface Coating category: (1) a compliant material option; (2) emission rate without add-on controls; and (3) emission rate with add-on controls. 40 CFR § 63.3891. Also like Large Appliance Surface Coating, this standard provides five options for demonstrating capture efficiency when a control device is used: (1) assuming 100 percent capture efficiency if specified design and operation criteria are met; (2) measuring capture

ED_002674_00002696-00075

efficiency ; (3) liquid-to-uncaptured-gas protocol using a temporary total enclosure or building enclosure; (4) gas-to-gas protocol using a temporary total enclosure or a building enclosure; and (5) alternative capture efficiency protocol. 40 CFR § 63.3965. There is no reason to restrict the selection of which promulgated method of capture efficiency demonstration may be used by the source.

- ***Catalytic Cracking Units, Catalytic Reforming Units, Sulfur Recovery Units, and Bypass Lines MACT***: This standard is organized into sections which govern the types of emission units (*e.g.,* cracking units, reforming units, sulfur recovery units, and bypass lines). Within each of these sections, the Agency built in multiple compliance options and flexibility to ensure that compliance with emission limits could be achieved in a cost-effective manner that was consistent with the operational needs of the permitted facilities. For example, for sources using a wet scrubber to control inorganic HAP from a vent on a reforming unit, the source can either use a continuous parameter monitoring system or use pH strips to measure and record the pH of the exiting water or scrubbing liquid hourly during coke burn-off and catalyst rejuvenation. 40 CFR § 63.1573(b). A source may reasonably want the flexibility to use this monitoring alternative either under all circumstances or in the event the continuous parameter monitoring system is non-functional. If the Title V permit forces the selection of the continuous parameter monitoring system at the outset and requires a permit revision to use the alternative, a source could be in noncompliance if its monitor fails. There is no reasonable basis for forcing a source to surrender flexibility provided in applicable requirements like this one. Again, the monitoring method would be reflected in the records at the facility and any deviations would be included in semi-annual reports.

- ***Pulp and Paper Production (Cluster Rule) MACT:*** This MACT standard, at 40 CFR § 63.443(d), contains four compliance options for the control device that is used to reduce HAP emissions from the pulping system. These include: (1) reduce total HAP emissions by 98 percent or more by weight; (2) reduce the total HAP concentration to 20 parts per million; (3) reduce HAPs using a control device designed and operated at a minimum temperature of 1600°F and 0.75 residence time; or (4) reduce total HAP emissions using a boiler, lime kiln, or recovery furnace by introducing the HAP emission stream with the primary fuel or into the flame zone. Each of these options was promulgated by EPA after notice and comment rulemaking. Title V should not impose further procedures.

- ***Automobile and Light Duty Truck Surface Coating MACT:*** This MACT standard contains numerous compliance and monitoring options due to the varied nature of operations in the industry, the number of operations covered by the standard and the need for plants to be able to respond quickly in making coating changes, while still maintaining compliance. For existing units, the rule allows for two compliance limits. If the electrocoat operation can meet a certain high standard specified in the rule, the emission limit is 1.1 pounds of HAP per gallon of solids applied versus a 0.6 pound per gallon of solids applied if it cannot meet this

ED_002674_00002696-00076

standard. 40 CFR § 63.3091. This regulation, like the other MACT standards that provide such options, requires appropriate recordkeeping and reporting for sources that utilize the options provided and for those that change among options. For example, the initial notification of compliance status, which must be submitted to EPA and the state permitting authority, includes the options the source is using at that time to comply with the MACT. 40 CFR § 63.3110(c)(4). The source must also provide notice in advance of performance tests and submit the results to the state and EPA. Moreover, the semi-annual report must include an identification of the compliance option specified in §63.3090(b) or §63.3091(b) used for electro-deposition primer, primer-surfacer, topcoat, final repair, glass bonding primer, and glass bonding adhesive operations plus all coatings and thinners, except for deadener materials and for adhesive and sealer materials that are not components of glass bonding systems, used in coating operations added to the affected source pursuant to §63.3082(c) in the affected source during the initial compliance period. 40 CFR § 63.3120(a)(3)(iv).

These examples illustrate the need to preserve the flexibility built into MACT and other standards. Compliance options and the procedures required to switch among them have all been through the rulemaking process, including public comment and in many cases, public hearings. Moreover, many MACT rules have been the subject of litigation, which has, in some cases, led to further rulemaking and comment.

Clean Air Act Section 307 provides deadlines for challenging Clean Air Act rulemakings with the intent of ensuring finality and certainty regarding the statute's requirements. Removing the certainty provided to sources that relied on the compliance options and the ability to switch among those through the Title V process is inconsistent with that goal. Moreover, Title V was intended to record applicable requirements as they were promulgated. Nothing in the statute or the rules indicates that states should have authority to remove compliance options from sources or to erect hurdles to their implementation through the Title V program.

The Task Force should make a determination that state permitting authorities have been inappropriately restricting compliance flexibility authorized by MACT standards and that such action is contrary to the purposes of Title V and the MACT program. As mentioned above, Title V has a dual purpose of protecting health and welfare as well as promoting the productive capacity of the nation. The compliance options EPA has promulgated in MACT standards serve both of these goals – they are protective of human health and the environment and they provide flexibility to manufacturers to operate efficiently.

The Task Force should recommend that EPA promote use of citation-based formats for incorporating MACT standards into permits at a degree of specificity that *fully preserves the compliance options available* in those standards. As noted in more detail below, the permit revision system is already overburdened. EPA and states should be taking steps to minimize the need for permit revisions rather than increase it.

III. Creation of New Substantive Requirements

A. Converting Monitoring Requirements into Operational Limits.

As documented in Section I of these comments, Congress did not authorize EPA or the states to impose limits that would alter underlying emission control requirements or to create new substantive limits on operations in the Title V permit. Title V was intended and is limited to the recordation of applicable requirements that find their origin in the substantive titles of the Clean Air Act, most notably Title I.

A problematic practice in a few states is the transformation of monitoring parameters into "never-to-be-exceeded limits" in the Title V permit. For example, a source may be required to monitor the pH on a scrubber or the temperature on a thermal oxidizer in an underlying applicable requirement like an NSPS or a minor NSR permit. In Ohio and North Carolina at least, these monitoring requirements are being changed into limits on the source's operation. The typical approach is to take whatever values are monitored during a performance test and make those permit limits. Thus, if a plant is outside the pH range that occurred during a scrubber performance test, the source is in violation of its permit even if it did not violate the emissions limit that is applicable to the unit. Ohio EPA's premise is that the conditions during a performance test are replicated in normal operation and that compliance with those conditions will necessarily mean compliance during other periods of operation. This approach ignores other factors that may influence compliance such as throughput, weather, and the compliance margin during the performance test. It also ignores EPA's own determinations during the debates over the enhanced monitoring rule that it is not possible to correlate parameters during performance tests directly to emissions, but that such parameters should be used as *indicators* of the performance of the control device that trigger investigation and corrective action provisions, as needed.

The Ohio EPA refers to these limits as "operational restrictions" and imposes them on every emission unit with a control device. Several permitted facilities have appealed their Title V permits to the state's Environmental Review Appeals Commission (ERAC) on the ground that such operational restrictions are not authorized. Of the dozens of appeals pending two of those cases have been decided in favor of the permittee, most notably a challenge by General Electric Company to limits on the voltage and current of an electrostatic precipitator. This decision was issued on March 1, 2005. *General Electric Lighting v. Jones*, ERAC Case No. 185017 (March 1, 2005).[26]

The ERAC found that Ohio EPA was not authorized to impose operational restrictions on a plant unless they are "*actually ... designed to assure compliance with the underlying applicable requirement* (in this case mass emissions limitations)" and that "the inclusion of any operational restriction which can[not] be *demonstrated to directly relate to the enforceability of an existing applicable requirement* and [not to]

[26] *See also D.P. & L. v. Jones*, ERAC Case No. 574950, (August 21, 2003).

alter that underlying requirement" is not lawful. *General Electric Lighting* at 17 (emphasis in original). The Commission also concluded that "the basis for an operational restriction must be more than the fact that a permittee operated a piece of equipment at certain levels during testing, especially when the data demonstrate that no direct correlation exists between the required parameters, in this instance kilovolts, milliamps and emissions, and assuring compliance." *Id.* The Commission made a factual finding that the operational restrictions imposed on the GE plant actually forced the facility to increase its emissions to stay in compliance. Facility personnel testified that when one portion of the ESP went out of the required operational ranges, it shut that portion down for a period of time. The facility could comply with the emissions limit and operational ranges using just two sections of the ESP. This meant that the terms included by Ohio EPA forced emissions to be increased deliberately (although still compliant with the emission limit) to avoid a violation of the limits on the voltage and current. This conclusively showed that it makes no sense to presume that parameters occurring during a stack test are necessarily indicative of compliant conditions with emission limits and may in fact be environmentally counterproductive.

More generally, it is important to understand that even if a parameter *could* be correlated to compliance (which it cannot in many cases), it is impossible to determine the full range of parametric values indicating compliance unless the source violates its emission limit. To perform this type of analysis during a compliance test, a source would need to operate for some period of time above and below the compliance level in the applicable rule to evaluate and set the operating conditions representing compliance. Under EPA's February 2003 Interim Stack Testing Guidance, a source could be subject to enforcement for operating in this manner. If the permit has already been issued, the source would also need to report a Title V deviation. This puts the facility in the position of either violating emission limits or subjecting itself to a narrow operating parameter range that is more stringent than the applicable limit.

The practice of creating new applicable requirements, as Ohio EPA and some other states have done, requires a strong statement from the Task Force that such actions are inappropriate and poor policy for several reasons:

- They are inconsistent with congressional intent that Title V not create new substantive requirements.
- They restrict the operation of sources to arbitrarily set conditions that do not relate directly with compliance.
- They create new violations when no emission limits have been exceeded, leading to enforcement risk for facilities that are compliant with emission limits.
- As shown in the General Electric case, they can actually lead to increased emissions.

B. Converting Applicability Exemptions and Applicability Thresholds into Permit Limits.

Part 70 requires Title V permits to include "applicable requirements." 40 CFR § 70.6. There has been some confusion among state permitting authorities regarding the scope of this definition. The term "applicable requirement" includes only affirmative, substantive requirements that apply to a source and does not include applicability exemptions and thresholds established in SIPs or other rules. To put this in context, some states contain regulations that are exempt from construction permit requirement units that use less than 200 gallons of coating a month. Other regulations create applicability thresholds and criteria, stating that a rule applies to a certain type of emission unit. An example of a standard with both exemptions and applicability thresholds is the NSPS for VOC emissions from SOCMI (synthetic organic chemical manufacturing industry) distillation operations. In 40 CFR § 60.660(a)-(b), EPA defines applicability criteria as follows:

> (a) The provisions of this subpart apply to each affected facility designated in paragraph (b) of this section that is part of a process unit that produces any of the chemicals listed in §60.667 as a product, co-product, by-product, or intermediate, except as provided in paragraph (c).
>
> (b) The affected facility is any of the following for which construction, modification, or reconstruction commenced after December 30, 1983:
>
> > (1) Each distillation unit not discharging its vent stream into a recovery system.
> >
> > (2) Each combination of a distillation unit and the recovery system into which its vent stream is discharged.
> >
> > (3) Each combination of two or more distillation units and the common recovery system into which their vent streams are discharged.

In Section 60.660(c), EPA established exemptions from subsection (a):

> (1) Any distillation unit operating as part of a process unit which produces coal tar or beverage alcohols, or which uses, contains, and produces no VOC is not an affected facility.
>
> (2) Any distillation unit that is subject to the provisions of Subpart DDD is not an affected facility.
>
> (3) Any distillation unit that is designed and operated as a batch operation is not an affected facility.

ED_002674_00002696-00080

(4) Each affected facility that has a total resource effectiveness (TRE) index value greater than 8.0 is exempt from all provisions of this subpart except for §§60.662; 60.664 (d), (e), and (f); and 60.665 (h) and (l).

(5) Each affected facility in a process unit with a total design capacity for all chemicals produced within that unit of less than one gigagram per year is exempt from all provisions of this subpart except for the recordkeeping and reporting requirements in paragraphs (j), (l)(6), and (n) of §60.665.

(6) Each affected facility operated with a vent stream flow rate less than 0.008 scm/min is exempt from all provisions of this subpart except for the test method and procedure and the recordkeeping and reporting requirements in §60.664(g) and paragraphs (i), (l)(5), and (o) of §60.665.

Many SIP rules are structured in similar ways, creating criteria for applying a particular rule or construction permitting requirement as well as creating exemptions for certain units that meet the applicability criteria, but are not intended to be covered by the applicable requirement.[27]

Part 70 recognizes that rules are written to create affirmative requirements for a particular set of sources. Nothing in the rules suggests an interpretation of "applicable requirement" that would require a source to be limited by the terms of an exemption or

---

[27] Another typical applicability exemption involves coating or cleaning operations where the usage of coating or solvent in gallons per day on an actual basis is less than a specified level. Above these levels, a VOC content requirement for the coating would apply. Typically, the provision is phrased as an exemption from a VOC coating requirement for facilities that utilize less than 10 gallons/day of coating. It would be inappropriate to include the 10 gallons/day as a limit on the facility if it uses the exemption because the only consequence of exceeding 10 gallons/day is that the facility would have to comply with the VOC requirement. The 10-gallons/day threshold is simply not a requirement. An additional approach to exemptions for coating standards involves excluding certain categories of coating operations (*e.g.,* exterior of airplanes, automobile refinishing, maintenance coatings of production equipment, the application of adhesives or preparation of adhesives, lubricants used to prevent sticking of internally moving parts, chromium-plated plastics, and the application of coatings to burial caskets). Facilities should not be required to list the identification of these types of activities if they occur on-site as subject to the exemption for a coating standard. If a facility elected to use maintenance coatings for production equipment, for example, it would be pointless to require that the exemption from the VOC coating standard be listed in the permit. If the facility had not included this exemption in its original Title V permit and then needed to add this "applicable requirement," both the state and the source would be required to undergo a permit revision exercise for an activity that is clearly exempt and has no real applicable requirements.

A further type of exemption applies where a piece of equipment would be exempt from one emissions standard because it is subject to another standard for the same pollutant. This is typical in the context of general VOC, particulate, and opacity limits where a standard would state that it applies to all sources of a particular type of pollutant but then goes on to exempt those emissions units subject to listed provisions of the regulations. These exemptions clearly do not constitute requirements since the applicable requirements are the provisions that actually apply to the unit in question.

ED_002674_00002696-00081

applicability threshold. Indeed, with respect to SIPs, section 70.2 defines the term "applicable requirement" to include: (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; (2) any *term* or *condition* of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C and D, of the Act.

Exemptions and applicability criteria are neither "standards" nor "requirements." They are also not construction permit terms and conditions. Thus, it is not reasonable to interpret the regulations to require that exemption or applicability criteria be included in Title V permits as applicable requirements.

This makes sense because the purpose of an exemption is to exclude sources from requirements not to subject them to requirements. Moreover, it is equally clear that exemptions do not "implement[ ] the relevant requirements of the Act" as is required by paragraph (1) since the activities are being exempted, not regulated.

Considering exemptions not to be applicable requirements is the only way to reconcile EPA's provisions and statements regarding insignificant emissions units with the definition of applicable requirement. Specifically, EPA has stated that an emissions unit cannot be considered insignificant if it is subject to an "applicable requirement." If exemptions are considered applicable requirements, however, nothing would qualify as an insignificant emissions unit. Emissions units that are insignificant are not subject to SIP requirements because they are exempt. EPA recognized this in the preamble to the final Part 70 regulations when it stated: "An example [of an insignificant emission unit exemption] might be a boiler which is exempt because it is below a specified size." 57 *Fed. Reg.* 32273, col. 2. EPA also noted that the states' discretion in establishing insignificant activity and unit lists would be limited in that "such exemptions [would be precluded] if they would interfere with the determination or imposition of any applicable requirement…." *Id.* This statement clearly indicates that EPA did not contemplate disqualifying an activity from "insignificant status" simply because it is exempted from SIP regulation.

Additionally, EPA recognized that existing state minor NSR construction exemptions would likely serve as the basis for the insignificant activities and emissions unit exemptions in individual state Title V programs. In discussing the need to allow state-specific insignificant lists, EPA stated, "To require one test nationally would ignore several State programs which have already defined workable criteria for insignificant emissions activities. State discretion to apply these exemptions also allows title V to build upon rather than disrupt existing State programs." *Id.* It is important to note in this statement that EPA explicitly referred to "criteria" for exemptions. Thus, it was not contemplated that such "criteria" would themselves need to be considered applicable requirements.

ED_002674_00002696-00082

Moreover, the specific reference in paragraph (2) of the definition to permit terms and conditions of minor and major NSR permits indicates that these are what were intended to be included as applicable requirements and thus Title V permit terms. Many of the exemptions and registration provisions in state minor NSR programs are devised with the sole purpose of limiting the activities that require a construction permit. In other words, they are exempt from the construction permitting program. Explicitly calling out construction permit terms as applicable requirements indicates that EPA did not view exemptions and registrations as rising to the level of applicable requirements. If so, this language would have been much broader.[28]

EPA clearly stated in the final Title V preamble that sources were not to be constrained from making changes that could be made consistent with applicable requirements. In discussing the scope of section 502(b)(10) changes, EPA stated that "[n]othing in this section is meant to imply any limit on the inherent flexibility that sources have under their permits. A permittee can always make changes, including physical and production changes, that are not constrained under the permit." 57 *Fed. Reg.* 32267, col. 2. EPA had previously made this point in the proposed Title V rule (which was adopted generally in the final rule), stating that:

> The first, and perhaps the most important source of flexibility is the general principle … that emissions or other practices not specifically prohibited by a permit are allowed if otherwise legal under the SIP and applicable federal or state law …. Air permits summarize existing restrictions; a permit change is *not* affirmatively required to authorize every change in practices which are otherwise legal under the SIP or federal law merely because an existing permit does not authorize the practice. … For example, an industry would be free to alter its production processes in ways that alter its emissions unless some term of the permit (or other provision of the law) prohibits the change. Permits should be drafted with this principle in mind, so that they do not include unnecessary detail or restrictions which might unduly hamper industrial flexibility to change operations at a later date.

56 *Fed. Reg.* 21746. These statements would be almost meaningless if exemptions needed to be included as permit terms.

Finally, to interpret the Title V regulations to include exemptions and applicability criteria as applicable requirements would create a nonsensical anomaly in that to qualify for an explicit exemption from permitting, a source would have to include a permit term that codifies the exemption. If a particular type of degreaser is exempt from permitting and a source did not previously know that it would need to bring an exempt degreaser on site for its business operations, it would be absurd to require that the source revise

---

[28] At a minimum, EPA cannot be said to have provided notice of its approach to this issue if exemptions and registrations were to be included as applicable requirements.

ED_002674_00002696-00083

its permit to include a permit term exempting this type of degreaser in order to make that change. Even a streamlined process would be a waste of resources and could delay a change that is (1) determined to be environmentally insignificant and (2) needed to introduce a product or innovation to the market and compete. This simply makes no sense and one could not create a better example of a waste of resources, both for the company and the reviewing agency.

We are troubled in this regard by a recent memorandum from William T. Harnett to Regional Air Directors regarding Conditions in Title V Permits to Verify Compliance with NSPS, Subpart J. This memorandum states:

> If a source claims that the H2S standard and the requirement to install and operate continuous monitors do not apply to a particular flare because the flare combusts only fuel gas from a process upset or as a result of relief valve leakage or other emergency malfunctions, then the Title V permit should contain federally enforceable conditions which will ensure that fuel gas does not get routed to such a flare except under those circumstances. This could be accomplished in a variety of ways, such as conditions which track the flow of the fuel gases to affected fuel gas combustion devices or which track the times exempted fuel gas combustion occurs, and the purposes for it.

We believe this memorandum is incorrect. Applicability criteria are not applicable requirements under EPA's rule. Moreover, taking the approach in this memorandum to the extreme, all exemptions in all rules would need to be included in Title V permits. Indeed, a chemical plant might need to accept an enforceable restriction that it not construct a steel mill to ensure that it not be subject to coke oven standards.

The Part 70 applicable requirement definition appropriately encompasses the terms and conditions of preconstruction permits issued under minor and major NSR programs intended to implement the requirements of the Act. Similarly, it would include the substantive provisions of a SIP regulation, such as a limit on sulfur content in fuel for a particular size of boiler. It does not include, however, the thousands of exemption and registration provisions, even if they contain criteria to qualify for them such as size or actual hours of operation. The distinction can easily be made on the basis that the consequence of exceeding or contravening an exemption provision is generally a requirement to obtain a permit or to comply with a regulation whereas the consequence of contravening a permit term or regulatory substantive provision (like the sulfur content in fuel) is a violation of the Act and a potential enforcement action. The Task Force should recommend that EPA abide by its definition of applicable requirement as promulgated and rescind the March 15, 2005 memorandum.

The statutory language also supports EPA's original decision not to include exemptions and applicability criteria as applicable requirements. Section 502(b)(5)(A)

ED_002674_00002696-00084

requires states to "issue permits and assure compliance ... with each applicable standard, regulation or requirement under this chapter." Nothing in this language indicates that Congress considered exemptions and registrations to be requirements. Moreover, Congress used the word "applicable" to indicate that a provision must actually apply to a source. An exemption does not apply to anyone. One meets the terms of an exemption and therefore is not subject to a requirement. This is an important distinction that is clearly reflected in the statutory construct. Section 502(b)(5)(C) also requires states to "assure that upon issuance or renewal, permits incorporate emission limitations and other requirements in an applicable implementation plan." Again Congress refers to affirmative requirements and does not reference in any way exemptions or applicability cutoffs. Surely, Congress was aware that these exemptions exist since states have been adopting them for more than 20 years.[29]

In addition, section 503(b) states that a compliance plan is required for applicable requirements, focusing on remedial measures to achieve compliance with a requirement that the source is currently violating. It is axiomatic that a source cannot "violate" or, for that matter, "comply with" an exemption. Thus, the term "applicable requirement" cannot encompass this type of SIP provision. Section 504(a) requires that permits include applicable requirements, including requirements of the SIP. Exemptions are not requirements of the SIP. As noted above, they define that which is *not* a requirement of the SIP. Section 505 also consistently refers to "requirements" of the SIP.

Finally, we note that Congress devoted a substantial portion of Title V to ensuring that small businesses would be able to maintain their operations and still comply with the Title V program. The SIP exemption requirements are largely designed for the types of activities and emissions units that occur at small businesses. If EPA were to consider these applicable requirements, the impact on small business would be severe and clearly inconsistent with congressional intent.

IV. Format of Compliance Certifications

The Forum urges the Task Force to recommend adoption by all states of a compliance certification format that is concise and simple to complete. In recent years, some EPA staff have promoted the use of the form EPA has developed for compliance certifications under Part 71. This form is several pages long and requires a listing of each and every permit term, in some cases down to the sub-subsection level. The facility is then required to go through and list the method of compliance for each term, even though a simple review of the permit would show what the methods of determining compliance are for each requirement. This form, aptly referred to as the

[29] Sections 502(b)(6) and (b)(9) indicate the type of procedures and timing for a revision if one is needed but in no way indicate that exemptions or registrations are subject to permit content and revision requirements. Again, section 502(b)(9) refers to *applicable federal standards and regulations* not exemptions that EPA creates from regulatory requirements (*e.g.,* HON exemption for research activities).

ED_002674_00002696-00085

"long form" should be abandoned in favor of the formerly prevalent "short form" for several reasons:

- The long form creates additional paperwork.
- The long form does not "add" any assurance of compliance. Facilities develop their own systems for making their certifications, and those do not rely on EPA's "long form." The long form simply adds another layer of burden.
- The long form does not make the certification any more enforceable. The responsible official for a plant must certify compliance and the consequences for a false certification are the same, regardless of what form is used.
- The long form can actually obscure compliance information. If a deviation is reported on a form that is 100 or more pages, it may be difficult to find. If a deviation is reported on a form that states the facility was in compliance except for the following deviations, it will stand out. It will get the responsible official's attention, as well as the permitting authority's attention. It will prompt a dialogue, a response.
- As implemented, the long form's information on method of compliance simply uses a cite to the permit or a catch phrase like "records review" or "recordkeeping" or "monitoring" or "N/A." It adds nothing to enforcement staff or the public's review of the certification. Again, the focus should be on whether there are reported deviations.

Congress established requirements for annual compliance certifications and semi-annual reports of required monitoring to ensure that permitted facilities would regularly apprise EPA and the states of deviations from permit requirements. This not only aids enforcement but also improves the dialogue between the source and the agency. Burying deviations in a form that exceeds 100 pages can only be counterproductive. The short form, on the other hand, focuses the regulator's attention on the issues of concern or "exceptions" from plant compliance. It also helps to focus the responsible official, when he or she signs the form, on the issues that are being brought to the regulators' attention and what is being done to cure any problems the plant is experiencing. Presenting a responsible official with a 100-page form to sign adds nothing to the process, nor does it "enhance" compliance.

In sum, the Forum believes the compliance certification form should consist of a simple statement that the source was in compliance with its permit terms and conditions using the methods specified in the permit except for noted deviations, which would be listed and explained, as appropriate. There should be no requirement to

ED_002674_00002696-00086

detail the method for determining compliance status unless it differs from a method specified by the permit.[30]

V. Permit Clean-Up

One area in which this Task Force could make a significant contribution to streamlining Title V is the process of "permit clean-up." Other groups have provided extensive information regarding the need to address out-of-date terms and conditions in minor and major NSR permits. This is due to numerous factors including the fact that many states did not update construction permits when operations changed, but instead used a local operating permit to reflect current requirements. In other cases, the original permit was flawed. The permittee may have applied for a revision, but states have been slow to address minor revisions to construction permits given other priorities. As a result of EPA's interpretation that all terms of minor and major NSR permits must be included in the Title V permit, many Title V permits contain terms that are not applicable or sources have had to threaten appeal of their Title V permits to force action on pending applications to revise a construction permit.

EPA recognized early on that it would need to confront the problem of out-of-date minor and major NSR permits. EPA's White Paper No. 2 set forth a procedure for revising old NSR permits using the Title V process plus adding one step: physically changing the old permit. In practice, however, this procedure is not working. We believe that the reason for this is as follows:

- **Lack of understanding. EPA's White Paper establishes procedural steps that must occur to legally update an old permit using the Title V process. It requires a notice** in the Title V permit record regarding the action on the underlying construction permit and that the old permit be physically revised. State permit engineers do not comprehend that they cannot just make the change in the Title V permit, nor have they been instructed by their management to include notices regarding the changed terms from construction permits to the Title V permit.

- **Unwillingness to do the extra paperwork.** As an intuitive matter, it is hard for permit engineers to understand why they should be required to go back and change the prior construction permit when the Title V accurately reflects applicable requirements. With high workloads and pressure to issue Title V permits, the revision of the old permit becomes a non-priority and just doesn't happen. Moreover, when a permit engineer knows that he or she will have to do this extra paperwork, there is an immediate reluctance to make the change in

[30] The Forum also notes that there should be no requirement to specify how a facility assessed compliance with permit terms that are recordkeeping, monitoring and reporting. Otherwise, companies will be in a position of specifying monitoring for their monitoring.

ED_002674_00002696-00087

either location, leading to an inaccurate Title V permit with which the plant may not be able to comply.

In our experience, there is rarely a substantive disagreement about the appropriate permit terms to be carried forward from a construction permit or even whether a particular term needs revision. The problem is in persuading someone at the state level to take the steps that EPA has established. This sounds like a problem with the state, but it is so pervasive that it is clearly a problem with the system. EPA should establish a more streamlined path for updating old construction permits and should look to the programs that allow prior permits to be superseded as a potential model for addressing this issue.[31]

VI. On the Horizon – Permit Revisions

In our experience the permit revision system is already overwhelming state permit writers. Indeed, we listened with interest to state agencies testifying to this Task Force regarding their view that the permit revision requirements are overly complex. The Forum believes that the current regulations contain important flexibility provisions that must be preserved to keep the system moving. The off-permit and minor modification procedures allowing a source to implement changes upon submittal of a certified notification or a certified permit application are critical and must be maintained.

Our membership reports that minor permit modifications and administrative amendments are taking very long periods of time to process (several months to more than a year). Administrative amendments are supposed to be completed within 60 days, minor modifications within 90 days. Member facilities report that in many states it is only the ability to utilize off-permit procedures or to implement minor modifications with an application that is allowing the permit program to function at all. We note that there is also confusion in some states regarding the scope of the off-permit provisions of the rule. Their desire to avoid being second-guessed by EPA has made them reluctant to even utilize the process

States must be encouraged and supported in expediting issuance of permit revisions. EPA must recognize that the impact of incorporating new MACT standards into Title V permits is yet to be felt by the permit revision system since most MACTs were just recently issued. The number of permit revisions required to address these MACTs could well overwhelm the system. Therefore, it is essential that the provisions for off-permit changes (which allow a plant to implement new requirements like MACT standards before the state gets around to revising the permit) and minor permit

[31] For example, Indiana permits contain a provision stating that all prior permits are superseded by the terms of the Title V. While the state still issues new construction permits for new projects, it looks to the Title V permit for current requirements and Title I remains the authority for the original construction permit terms.

ED_002674_00002696-00088

modifications (which allow immediate implementation of changes to implement new requirements or to respond to market needs) be preserved.

The complex permit revision schemes proposed and released as drafts in the 1990's were far more complex than the current system. The Task Force should recommend in the strongest terms that EPA not revise the modification system.

VII. Renewals

Preparation of the initial Title V applications was an extremely resource intensive process. Facilities reported costs in the hundreds of thousands of dollars. It is important for EPA to ensure that the permitting authorities do not repeat the mistakes of the initial round of permits at the time of renewal. Some states have adopted a streamlined approach to renewals (e.g., Indiana). Under this approach, a source can simply update the new requirements to take into account any modifications or newly issued rules or permits since the Title V permit was originally issued. Other states (e.g., Georgia) are requiring a complete resubmittal, with all of the work that entailed. The Task Force should recommend that EPA promote the streamlined approach to Title V renewals, allowing the source to use the permit itself as the basis for the application and provide additional information regarding changes to that document and any new requirements that were processed as off-permit changes during the permit term.

CONCLUSION

The members of the Forum appreciate the opportunity to convey their experiences with the Title V program to date.

ED_002674_00002696-00089