August 21, 2026

Joint Comments of Environmental and Public Health Groups[1]
on the
U.S. Environmental Protection Agency's Clean Air Act Rulemaking Proposal, *Minor New Source Review Program Air Permitting Public Participation Requirements for State Implementation Plans*, 91 Fed. Reg. 41,591 (July 7, 2026)

Submitted via email and regulations.gov on August 21, 2026, by
Southern Environmental Law Center
Docket ID No. EPA–HQ–OAR–2025–1212

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[1] The undersigned organizations are Environmental Defense Fund, Earthjustice, Sierra Club, Center for Biological Diversity, Southern Environmental Law Center, Natural Resources Defense Council, Environmental Law & Policy Center, Greater-Birmingham Alliance to Stop Pollution, Clean Air Council, Kentucky Resources Council, Air Law for All, Environmental Integrity Project, and California Communities Against Toxics ("Commenters").

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INTRODUCTION

The undersigned organizations ("Commenters") strongly oppose EPA's proposal to eliminate minimum public participation requirements for state and local Clean Air Act minor new source review ("NSR") preconstruction permitting programs. For more than fifty years, EPA's regulations have required public notice and an opportunity to comment on preconstruction air pollution permits. That longstanding federal requirement reflects the reality that public review improves permitting decisions by identifying underestimated emissions, inadequate pollution limits, insufficient air-quality-impacts analyses, and other errors before construction begins. In recent years, clean air advocates and EPA's own Office of Inspector General have urged the Agency to strengthen oversight of minor NSR programs and ensure that states comply with the existing federal public participation requirements.[2] Unfortunately, EPA now proposes to move in the opposite direction, authorizing state and local air agencies to issue preconstruction air pollution permits in secret, without any public notice or opportunity for comment.

EPA's use of the term "minor," which does not appear in the Clean Air Act's permitting provisions, obscures the significance of the new sources and plant modifications governed by the permitting programs impacted by EPA's proposed rule. The reality is that the vast majority of new sources and modifications to existing sources are authorized pursuant to minor NSR permits, including all but the very largest new sources and expansion projects.[3] The wide array of new sources typically authorized via minor NSR permits includes, among many others, data centers, industrial wood-pellet manufacturing plants, chemical manufacturing plants, waste incinerators including plastic pyrolysis facilities, landfills, and ethylene oxide sterilizers. And due to the various emissions accounting tricks authorized by EPA over the last few decades, surprisingly large modifications to existing major sources are subject to minor NSR; for example, the Tennessee Valley Authority's new Cumberland methane-gas power plant was authorized pursuant to a minor NSR permit on the basis that the new plant counts as a minor modification to the nearby existing coal plant.[4] Similarly, permits for two new 645-megawatt gas plants at the same Louisville Gas & Electric facility were separately proposed as "minor" construction projects.[5] And while many of the new sources and modifications subject to minor NSR are actually quite large, even lower-emitting projects can have significant impacts on nearby communities, particularly when they propose to locate near homes, schools, and other population centers or in areas already overburdened by existing air pollution sources.[6]

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[2] U.S. Environmental Protection Agency, Office of Inspector General, Report No. 21-P-0175*, EPA Should Conduct More Oversight of Synthetic-Minor-Source Permitting to Assure Permits Adhere to EPA Guidance*, (2021), Docket I.D. EPA-HQ-OAR-2025-1212-0151*, available at* https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0151 ("EPA Inspector General Report").

[3] *See, e.g.,* Agency Information Collection Activities; Submission to OMB for Review and Approval, 73 Fed. Reg. 45,436, 45,437 (Aug. 5, 2008) (estimating that annually, permitting agencies nationwide process 282 PSD permit applications, 519 nonattainment NSR permit applications, and 74,591 minor permit applications).

[4] *See Environmental Defense Fund v. EPA*, No. 18-1149, 2026 WL 2164508, at *4 (D.C. Cir. 2026).

[5] *See* Permit Comments Table, Attach. 70 (Kentucky Resources Council (KRC) and Sierra Club Comments to Louisville Metro Air Pollution Control District on Mill Creek Permit dated June 29, 2026), Docket No. EPA-HQ-OAR-2025-1212-0253, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0253.

[6] *See, e.g.,* 85 Fed. Reg. 74,890, 74,906 (Nov. 24, 2020) ("Minor NSR permit actions require the opportunity for public comment, which provides an opportunity for stakeholders to raise potential environmental justice concerns

It is critical that minor NSR permits fulfill their statutory purpose of preventing violations of the national ambient air quality standards. As explained below, public participation is an essential tool for fulfilling that purpose. Permits issued in secret cannot be relied upon to protect public health and the environment from harmful air pollution. EPA should withdraw its proposal and instead strengthen minor NSR permitting by facilitating meaningful public participation and adopting the substantive regulatory improvements recommended below.

I. BACKGROUND

A. EPA's Proposal

On July 7, 2026, EPA published a proposed rule in the Federal Register titled "Minor New Source Review Program Air Permitting Public Participation Requirements for State Implementation Plans," designated as Docket No. EPA–HQ–OAR–2025–1212. The proposal would remove the minimum public participation requirements applicable to State and local minor New Source Review (NSR) programs approved as part of State Implementation Plans (SIPs). Specifically, the proposal would eliminate the longstanding regulatory requirement in 40 C.F.R. § 51.161 that state and local air agencies provide public notice and a 30-day opportunity for public comment on all decisions to authorize proposed new minor sources and minor modifications.[7] Instead, EPA's proposed rule would give state and local air agencies broad discretion to determine "whether, when, and for how long to provide opportunities for public participation on preconstruction review of proposed new minor sources and modifications."[8]

EPA acknowledges that its proposal reflects a significant change in the Agency's position,[9] since the existing federal public participation requirements for NSR programs at 40 C.F.R. § 51.161, promulgated in 1973, do not distinguish between major NSR and minor NSR in terms of public participation.[10] Hence, EPA does not deny that for more than 50 years, federal regulations have required state and local agencies to provide for public participation in minor NSR permitting.

In support of its proposal to eliminate the minimum minor NSR public participation requirements, EPA argues that the statutory basis for the minor NSR program, CAA section

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based on the characteristics of the project and the location of the project relative to any environmental justice communities within the vicinity of the source."); *see also* 91 Fed. Reg. 41,591, 41,600 (July 7, 2026) (describing feedback from some state air agencies indicating that they prioritize offering a public comment period on minor NSR permits for "minor sources and modifications locating near sensitive receptors.").

[7] Under 40 C.F.R. § 51.161(a), State and local air agencies must provide an "opportunity for public comment on information submitted by owners and operators" regarding new construction or modification of any stationary source. This opportunity must include three elements: (1) public inspection availability of the information submitted by the source owner and the agency's air quality analysis; (2) a 30-day period for submittal of public comment; and (3) notice by prominent advertisement in the affected area of the location of the source information and analysis.

[8] 91 Fed. Reg. 41,591, 41,597 (July 7, 2026).

[9] *Id.* at 41,597.

[10] EPA explains that the requirements at 40 C.F.R. §§ 51.161-51.164 currently apply to both major and minor NSR "but are supplemented by the more detailed regulatory requirements … for major NSR programs." *Id.* at 41,954.

110(a)(2)(C), "does not prescribe" public participation requirements, but requires only that each state implementation plan ("SIP") include "a program to provide for … regulation of the modification and construction of any stationary source . . . as necessary to assure that the national ambient air quality standards [the "NAAQS"] are achieved, including a permit program as required in parts C and D [of CAA title I]."[11] Because CAA section 110(a)(2)(C) contains "no explicit requirement for public participation in preconstruction review of minor sources," EPA asserts that pursuant to the Supreme Court's framework under *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024), "the best reading of this provision of the CAA is that it does not require a Federal minimum standard for public participation in minor NSR programs."[12] Going further, EPA contends: "While the statute does not prevent state or local air agencies from exercising discretion to adopt public participation requirements for minor NSR, it does not appear to *allow* the EPA to require minor NSR public participation as a condition of approving an otherwise valid SIP submission."[13] EPA declares, without explanation, that it "does not believe that minor source public participation is generally 'necessary to assure that [the NAAQS] are achieved' in the context of developing a program for the 'regulation of' minor source construction and modification."[14]

If finalized, the rule would establish that EPA "would not expect, whether informally on a case-by-case basis or formally as a minimum requirement set out in regulation, that states include minor NSR public participation for the SIP to be approved as containing sufficient regulatory provisions 'as necessary to assure that [the NAAQS] are achieved.'"[15] Instead, states would "include such elements at their discretion and tailor them to particular circumstances so long as these elements are consistent with the CAA and applicable Federal regulations."[16] The proposed rule would not require state and local air agencies to revise their existing SIP-approved minor NSR public participation requirements, but each agency would have "the discretion to do so if they determine a revision is reasonable given the existing public participation provisions already approved into the SIP for their minor NSR program."[17]

B. Impact of "Minor" Sources on Communities

"Minor" sources can entirely change the nature of a community, transforming it from a pleasant, healthy place to raise a family to one in which residents endure foul odors and persistent noise, may often need to keep their kids from playing outside, and, worse, suffer from increased rates of respiratory illnesses, cardiovascular harm, cancer, and even premature death. Public comments are vital precisely because it is the people living near such sources who can best convey the harms they endure and why. EPA must not strip away their federally guaranteed

[11] 91 Fed. Reg. at 41,594 (citing 42 U.S.C. § § 7410(a)(2)(C)).

[12] *Id.* at 41,599.

[13] *Id.* at 41,600 (emphasis added).

[14] 91 Fed. Reg. at 41,597.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 41,602.

right to public notice and comment. Therefore, Commenters are sharing the following sample of anonymized quotes from residents near minor sources in two areas of Pennsylvania

Between 2021 and 2025, residents of Emsworth, Pennsylvania who live across the river from the Metalico scrap metal processing facility, a synthetic minor source, shared the following experiences:

- "The 'containment' area where the processed shredded material is being piled has grown to grotesque proportions and the normal winds by the river are blowing the dust everywhere… There has also been the usual heavy odor of burnt plastics/vinyl /electrical wire. The smell was overwhelming the minute I arrived home today and opened my car door. The odors have been extremely bad and persistent so far this spring to the point where I haven't been able to sit and enjoy the weather on my own porch yet. It's literally been too smelly (causing nausea and headaches) to sit on my own property and breath decent air."
- "Today was the only day this week that I'm able to mow my lawn. For the past 2 hrs I've been forced to breathe in the fumes that Metalico is belching out. I've watched, for 2 hrs, the heavy emissions coming from the shredder annd [sic] the wind blowing all that pollution across the river. I am now severely wheezing and having to use my inhaler, have a horrible headache, and have the taste of metal/melted plastic in my mouth and all through my nose."
- "Being outside for more than a few minutes, is causing a headache and leaves a weird metallic taste in your nose and mouth. My Mom was supposed to visit this afternoon but I will now have to cancel because she was sickened (migraine, tightness in chest) by this same odor over the summer and will not visit when it smells bad. So, yet again, Metalico's pollution is causing negative physical symptoms, forcing me and my neighbors to alter/cancel plans and generally destroying any rights we have to a decent quality of life where we're not being forced to breathe in polluted toxins."[18]
- "The smell of hot melting plastic/wires/etc. is always in the air and worsens the hotter the weather becomes. It makes it difficult to be outside. I've stopped, long ago, having friends or family come over to my home because the smell can be so overwhelming at times and I don't want them to get sick or uncomfortable…I also have to keep my windows closed, despite having no AC, because this sticky dust and dirt infiltrates its way inside my living space and necessitates cleaning with soap and water to remove."

The next set of quotes are from residents in Bulger, Pennsylvania. Bulger is in Washington County, which contains numerous minor sources in close proximity, including the Revolution Cryogenic Plant which processes and fractionates natural gas.[19] The Revolution facility is currently planning to expand while continuing to operate as a minor source.[20] Across the street is

[18] ACCAN, *Metalico Blog*, https://accancamera.com/#blog (last visited August 4, 2026) (Attachment A).

[19] *Revolution Cryogenic Plant*, Oil & Gas Watch, https://oilandgaswatch.org/facility/1033 (last visited Aug. 18, 2026) (Attachment B).

[20] *Id.*

the MarkWest's Harmon Creek Gas Processing Plant.[21] Nearby are compressor stations, which are also minor sources, in addition to smaller associated emissions sources like wellpads, which are subject to general state permits. If the already overburdened communities lost the right to public notice and comment, they might not even know if there were plans to build additional minor source facilities near them, adding to their cumulative air pollution load.

- "I live two miles from the Revolution and MarkWest processing plants. In addition to the horrible odors, there is a constant low-grade vibration and hum from the plants that reach my house. It is a constant irritant that never stops. There are also times when the flaring is so forceful that it rattles my windows and I can feel it in my chest, pulsing with the flares. Between the pulsing and the smell, it is disruptive. We've had flaring at night that is so massive that it looks like the sun is rising in the West."
- "Commenting allows the community to have a seat at the table. This is our community and we live in a democracy. It is our health and our way of life on the line."
- "What concerns me is that without EPA requiring public comments, if Harrisburg decides to limit our ability to comment, then we can't even have a say in what we are exposed to and what we are dealing with. We are the impacted community. We should have a right to speak out. If they have no oversight, we may have nothing."
- "I'm sad to hear EPA views this as streamlining. This is a necessary process. As it is, permitting is too fast. These projects need to be reviewed by the community that will be burdened."
- "We [residents near proposed projects and modifications] are the boots on the ground. Without the right to say what we are experiencing, the state agencies are taking the company's word. It's the fox watching the henhouse. Eliminating our ability to comment is eliminating a public right. Companies always says everything is or will be fine. WIthout public comments, the agency won't hear that all isn't well."
- "Comments bring to light issues that the company or the agency didn't think about. Also, people need to know what is coming. EPA should see it as a bigger picture for the country and want to trust them to safeguard our rights."

These specific examples and the multitude of community comments on minor NSR permitting decisions discussed below show that supposed "minor" NSR sources can have significant impacts on the communities in which they are located. These communities have an interest in permitting decisions that impact their "public health and welfare," which the Clean Air Act was implemented to protect.

C. Emissions from Minor Sources Can Be Significant to NAAQS Attainment and Maintenance.

Not only do so-called "minor" sources frequently have significant impacts on the local communities in which they are located, but, especially in areas where many such sources are clustered or where air quality is close to or worse than the NAAQS, emissions from minor new

[21] Harmon Creek Gas Plant, Oil & Gas Watch, https://oilandgaswatch.org/facility/895 (last visited Aug. 18, 2026) (Attachment C).

sources and minor modifications to existing major sources can cause or contribute to violations of the NAAQS.

For example, the Oregon Department of Environmental Quality ("DEQ") concluded that its longstanding practice of using annual Significant Emission Rates ("SERs") to screen sources from NAAQS compliance modeling was inadequate to ensure compliance with the short-term NAAQS.[22] DEQ's in-house modeling demonstrated that a source could exceed a 1-hour NAAQS even where its annual average emissions remained below the SER.[23] Thus, on September 1, 2021, DEQ issued an internal directive requiring that *all* new sources with pending applications as of June 9, 2021 demonstrate compliance with the short-term NAAQS.[24]

Many areas across the United States continue to violate at least one of the NAAQS.[25] For example, with respect to the 2015 ozone NAAQS, EPA's 2025 design-value workbook identifies 28 currently designated nonattainment areas that continue to exceed the 2015 ozone NAAQS.[26] Two "maintenance" areas, Atlanta and Cincinnati, are again violating the 2015 ozone NAAQS.[27] And EPA identifies 28 violating monitoring sites in 27 counties located outside of areas previously designated nonattainment.[28] The American Lung Association's 2026 State of the Air report further documents the United States' ongoing air pollution problems, concluding that 44 percent of people in the United States—152.3 million people—live in places with unhealthy levels of air pollution.[29]

As in Oregon, there is every reason to expect that increased emissions caused by construction of new and modified sources pursuant to state minor NSR programs contribute to persistent air quality problems nationwide.

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[22] Oregon Dep't of Env't Quality, Air Operations, *Short-Term NAAQS Compliance Internal Management Directive* 5 (2021), *available at* https://www.oregon.gov/deq/Filtered%20Library/Short-TermNAAQS-IMD.pdf (Attachment D).

[23] *Id*. at 5.

[24] *Id*. at 6.

[25] *See* U.S. EPA, Air Quality Design Values, https://www.epa.gov/air-trends/air-quality-design-values (accessed Aug. 20, 2026).

[26] EPA, Ozone Design Values 2025, **Table 1a: NAA Status 8-hour 2015**, available at https://www.epa.gov/air-trends/air-quality-design-values#report (Attachment E).

[27] *Id.*

[28] EPA, Ozone Design Values 2025, **Table 2: Other Violations** (Violating Sites in Areas Not Previously Designated Nonattainment for the 2015 8-hour ozone NAAQS), available at https://www.epa.gov/air-trends/air-quality-design-values#report (Attachment F).

[29] American Lung Association, State of the Air Report (2026), at 13, available at https://www.lung.org/research/sota ("ALA 2026 Report") (Attachment G).

D. Importance of Minor New Source Review Permitting

1. Ensuring NAAQS Compliance

Minor NSR is an essential component of the Clean Air Act's framework for achieving and maintaining NAAQS. As EPA's Proposal itself states, Section 110(a)(2)(C) of the Act requires each State Implementation Plan to include "a program to provide for…the regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved."[30] Consistent with that statutory mandate, minor NSR provides a mechanism for reviewing construction and modification of stationary sources that do not trigger major source NSR requirements.[31] While the Act's Prevention of Significant Deterioration ("PSD") and Nonattainment NSR provisions impose heightened requirements on major sources and major modifications—including use of technology that constitutes Best Available Control Technology ("BACT") or achieves the Lowest Achievable Emissions Rate ("LAER"), air quality impacts analyses, and enhanced public participation—minor NSR serves as the broader preconstruction review program that captures emissions increases from the much larger universe of sources and modifications. Unlike major NSR, which is triggered only at specified emissions thresholds, minor NSR applies to sources below those thresholds where construction or modification could nevertheless affect attainment or maintenance of NAAQS. Thus, minor NSR fills the gap left by major NSR by ensuring that emissions increases from other construction projects do not undermine attainment or maintenance of the NAAQS.

2. Establishing Accurate and Effective Potential-to-Emit Limits

A source's "potential to emit" under the Clean Air Act informs whether a source will be permitted as a major or minor source of pollution. The Proposal states that "new stationary sources are considered "minor" if they do not have the potential to emit air pollutants in amounts equal to or exceeding the "major source" statutory thresholds within parts C and D of CAA title I." The minor NSR provisions may also:

> apply to "synthetic minor" sources and modifications, which are new facilities and/or modifications to existing sources that would ordinarily increase emissions of regulated pollutants by amounts equal to or exceeding the applicable "major source" thresholds, but which voluntarily accept one or more enforceable limitation(s) that keep their emissions below the "major source" thresholds. In doing so, new sources and modifications that would otherwise constitute "major" sources and modifications become "synthetic minor" sources and modifications by constraining their emissions to levels that make them minor sources and minor modifications. In contrast, "true minor" sources and modifications do not require enforceable limitations to keep their emissions below major source thresholds as

[30] 42 U.S.C. § 7410(a)(2)(C); 91 Fed. Reg. at 41,594, 41,597 ("[A]ll SIPs must regulate minor sources and minor modifications within the areas covered by the SIP as necessary to assure that the NAAQS are achieved[.]").

[31] 91 Fed. Reg. at 41,594 ("SIPs must [] include programs to regulate construction of new minor sources and minor modifications, along with the major source programs, as necessary to assure the NAAQS are achieved.").

> their emissions are below the "major NSR" thresholds without the application of an enforceable limitation.[32]

In the absence of enforceable limits, a "synthetic minor" source would constitute a major source of emissions.[33] As such, Minor NSR serves a critical role in establishing accurate and effective potential-to-emit ("PTE") limits by providing the regulatory framework through which permitting authorities evaluate, impose, and enforce source-specific operational and emissions restrictions. Because PTE is defined based on a source's maximum capacity to emit considering legally and practically enforceable limitations, minor NSR provides the mechanism for translating theoretical emissions capacity into legally enforceable limits. These requirements are critically important for synthetic minor sources, where enforceable limits are central to ensuring that sources with the physical capacity to emit above major source thresholds remain below those thresholds and do not circumvent major NSR applicability requirements. Pursuant to EPA guidance, authorities may utilize minor NSR permitting to establish enforceable restrictions on factors such as production and emission rates, operating hours, fuel usage, and control requirements, together with appropriate monitoring, recordkeeping, and reporting obligations necessary to ensure compliance with those restrictions.

Accurate, enforceable PTE limits that hold emissions below defined major source thresholds are the mechanism by which synthetic minor sources avoid major NSR preconstruction requirements. Absent a legally and practically enforceable restriction ensuring that a new source or modification to an existing source that otherwise has the capacity to cause emissions that equal or exceed the major NSR applicability threshold will not actually emit above that threshold, the source must comply with major NSR requirements. The opportunity for public comment on minor NSR permits establishing such limits—as well as minor NSR permits for sources that claim that they are "true" minors even without such limits—is critical for ensuring that sources are properly classified as "minor."

Further, as noted in further detail below and throughout these comments, EPA's own Inspector General, community outreach, and data research has revealed significant gaps in synthetic minor permit oversight, which suggests an enhanced need for both EPA review and public participation to ensure enforceability and compliance assurance. Restricting opportunities for public participation would worsen the problems EPA has already identified with respect to PTE limits and overall compliance with CAA permitting requirements.

E. Regulatory Changes Have Enabled Increasing Numbers of New Sources and Modifications to be Classified as "Minor" Rather than "Major."

Over time, regulatory changes have reduced the universe of sources subject to major NSR permitting requirements and increased the number of new sources and modifications subject to the minor NSR program. Given the increased universe of sources subject to minor NSR, ensuring robust minor NSR procedures, including public participation requirements, is critical. The minor

[32] *Id.*

[33] *Id*.

NSR program cannot fulfill its statutory purpose of preventing NAAQS violations without public participation in the permitting process.

Over the past two decades, EPA has made it much easier for existing major sources to make emissions-increasing modifications without undergoing major NSR. For example, the 2002 NSR Reform reduced the number of source modifications subject to major NSR by allowing the "actual-to-projected-actual" method for calculating emissions increases, including the subtraction of any emissions increase purportedly resulting from "demand growth."[34] Because the 2002 NSR Reform allows sources to base their emissions calculation on what they project to emit rather than their maximum capacity (potential to emit), many more projects now are able to stay below major modification thresholds.[35] Additionally, the plantwide applicability limits ("PALs") established in the 2002 regulations created an option for sources to avoid major NSR by accepting a plantwide emissions limit; if total plant emissions stay under that limit, individual modifications do not trigger major NSR.[36]

The Trump Administration went further, making it easier for sources to avoid aggregating activities for purposes of determining whether a change will cause a major-NSR-triggering emissions increase.[37] Pursuant to a 2018 guidance and subsequent Trump EPA regulations, sources may now also manipulate emissions calculations by utilizing "project emissions accounting," allowing emissions increases resulting from a change to be offset with emission decreases without the source having to verify that those decreases are permanent, enforceable, or even related to the project in question.[38] The purpose of these various regulatory changes was to reduce the number of sources subject to major NSR, and it worked. Sources can now easily make changes without triggering major NSR.

In creating the many avenues for avoiding major NSR, EPA asserted that its rule changes would not threaten public health and the environment because minor NSR requirements would remain in place to guard against violations of the National Ambient Air Quality Standards ("NAAQS"). For example, in establishing the option for sources to avoid major NSR by accepting "plantwide applicability limits," EPA asserted, "we believe we can rely on the reviewing authority's existing programs for addressing air quality issues."[39] Specifically, EPA

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[34] *See* 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, 67 Fed. Reg. 72,607 (Dec. 31, 2002).

[35] *Id.*

[36] *Id.* at 80,189 ("A PAL is a voluntary option that will provide [facilities] with the ability to manage facility-wide emissions *without triggering major NSR review.*") (emphasis added).

[37] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 83 Fed. Reg. 57,324 (Nov. 15, 2018).

[38] *See* Memorandum from E. Scott Pruitt, Administrator, EPA, on Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program (Mar. 13, 2018), https://www.epa.gov/sites/default/files/2018-03/documents/nsr_memo_03-13-2018.pdf (Attachment H); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule, 90 Fed. Reg. 34,206 (July 21, 2025).

[39] 67 Fed. Reg. 80,186, 80,222 (Dec. 31, 2002).

contended that certain changes allowed under a PAL "would generally be covered by the reviewing authority's minor NSR construction permit program," and that, apparently as part of minor NSR, "[t]he reviewing authority would ordinarily request air quality modeling for any changes if it believes that the changes under the PAL may affect the NAAQS and PSD increments."[40] And as discussed *infra*, pursuant to Section 110(a)(2) of the Clean Air Act, states must ensure that that their state implementation plans (SIPs) "include … regulation of the modification and construction of any stationary source … to assure that [NAAQS] are achieved."

Likewise, in promulgating the "project emissions accounting" rule, EPA declared that "projects at existing major stationary sources that are determined not to trigger major NSR permitting requirements will, in many or most cases, be subject to minor NSR permitting requirements, regardless of the accounting procedures used in determining major NSR applicability.[41] EPA explained that as part of such minor NSR proceedings, "records of the project activities, the emissions increases and any emissions decreases associated with those activities, the applicability test and the corresponding emissions calculations should be available or made available for review as part of the permit application and permit records for the project, which include the permit terms."[42] Indeed, in relying on minor NSR as an air quality safeguard, EPA emphasized: "Minor NSR permit actions require the opportunity for public comment" and thus, "stakeholders [would have the opportunity] to raise potential environmental justice concerns based on the characteristics of the project and the location of the project relative to any environmental justice communities within the vicinity of the source."[43]

The opportunity to assess a new or modified source's impact on ambient air quality as part of minor NSR permitting is especially important where a source avoids major NSR by using "project emissions accounting" because the emissions decreases relied on to offset the increases may occur years after the increases.[44] Thus, nearby communities may experience unhealthy air quality for a prolonged period. In fact, the D.C. Circuit recently observed that a delayed emission decrease "might not satisfy the substantial contemporaneity test" for when a source is allowed to avoid major NSR based on offsetting emissions decreases, and that concerns about a source's improper use of project emissions accounting are to be raised in "as applied" challenges.[45] And regardless of whether a delayed emissions decrease legally qualifies as "contemporaneous," the permitting agency is statutorily obligated to ensure that the initial increase will not cause or contribute to a violation of the NAAQS.[46] Accordingly, the minor NSR permitting program has an especially critical role to play in ensuring that a source using project emissions accounting is not improperly avoiding major NSR and is not otherwise causing unhealthy air quality.

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[40] *Id.*

[41] 85 Fed. Reg. at 74,906.

[42] *Id.* at 74,902.

[43] *Id.* at 74,906.

[44] *Environmental Defense Fund v. EPA*, No. 18-1149, 2026 WL 2164508, at *7 (D.C. Cir. 2026).

[45] *Id.*

[46] CAA § 110(a)(2)(C), 42 U.S.C. §7410(a)(2)(C) (State plans must "include a program for … regulation of the modification an construction of any stationary soruce within the area covered by the plan as necessary to assure that national ambient air quality standards are achieved.").

In light of the regulatory changes that have enabled sources to evade major NSR and increased reliance on the minor NSR program, EPA must ensure that the minor NSR program works as intended, with full public participation requirements, to achieve and maintain NAAQS. Due to mechanisms like the project emissions accounting rule, a source can have major source-sized impacts on air quality for years before those impacts are offset by promised reductions. It is arbitrary for EPA to claim that such source permits do not merit or require public participation when their initial impacts on air quality are just as great–or even greater–than major sources for which public notice and comment are required.

F. Deficiencies in EPA Oversight of State and Local Permitting Programs

EPA's proposed rule would eliminate public participation requirements despite the Agency's own Inspector General's recent findings regarding persistent state agency failures in the implementation of minor NSR programs.[47] Rather than addressing those documented deficiencies, EPA proposes to entirely abandon federal oversight in how states gather public input in their minor NSR permitting programs. Beyond abandoning this oversight role, the proposal would also remove applicability the requirement to notify "the Administrator through the appropriate Regional Office, and to all other state and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located" in relation to all but major sources and major modifications,[48] thus removing the important oversight of other authorities granted pursuant to the principles of comity recognized in the Clean Air Act.[49]

1. EPA Failure to Require States to Comply with Public Participation Requirements

In July 2021, EPA's Office of Inspector General issued a comprehensive audit report titled "EPA Should Conduct More Oversight of Synthetic-Minor-Source Permitting to Assure Permits Adhere to EPA Guidance."[50] In the Report, the Inspector General found that "EPA conducts only limited oversight"[51] of state and local minor NSR permits, despite the Agency's responsibility under its 1984 Policy on Oversight of Delegated Environmental Programs to oversee state programs through "a combination of support and evaluation activities."[52] The investigation revealed a troubling pattern: many states were not complying with the public participation requirements in 40 C.F.R. § 51.161, and EPA was doing nothing to enforce compliance.

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[47] EPA Inspector General Report, *supra* note 2.

[48] 40 C.F.R. § 51.161(d); Proposed Regulatory Text Amendments Red-Line Strikeout, document EPA-HQ-OAR-2025-1212-0007 in this docket at renumbered § 51.161(c).

[49] *See*, *e.g.*, CAA §§ 110(a)(2)(M) and 121; 42 U.S.C. §§ 7410(a)(2)(M) and 7421.

[50] EPA Inspector General Report, *supra* note 2.

[51] *Id.*, summary page.

[52] *Id.* at 6.

Most troubling, the Report found that Oklahoma, one of the two states whose permits were examined in detail, "does not currently issue its individual synthetic-minor-source permits for public comment before they are finalized, as required by EPA regulations."[53] EPA Region 6 staff acknowledged they were "aware of this issue" but had taken no corrective action.[54] As a result, the Report recommended that EPA "[i]dentify all state, local, and tribal agencies in which Clean Air Act permit program implementation fails to adhere to the public participation requirements for synthetic-minor-source permit issuance and take appropriate steps to assure the identified states adhere to the public participation requirements."[55] EPA agreed with this recommendation and committed to identify non-complying states by July 2022 and take corrective steps by December 2023.[56]

Yet, instead of following through on this commitment, EPA is now proposing to eliminate the very requirements that states were failing to meet. EPA's proposed rule offers no explanation for this reversal. EPA also does not dispute the Report's findings, nor does it claim that states have come into compliance. Rather, EPA simply proposes to remove the public comment baseline, converting widespread non-compliance into permissible state discretion. The Report demonstrates that the problem is not excessive public participation requirements, but rather insufficient EPA oversight to ensure states are meeting even minimal standards.

2. State and Local Agency Failure to Ensure that Minor NSR Permit Limits are Accurate and Enforceable

EPA's Inspector General Report revealed that the technical quality and enforceability of minor NSR permits had significant problems, particularly synthetic minor permits that establish emission limits designed to keep sources below major NSR thresholds.[57] The Inspector General reviewed 30 synthetic minor source permits covering 16 natural gas extraction facilities in Colorado and Oklahoma, examining a total of 523 individual permit limits.[58] The audit found that "23 of the 30 synthetic-minor-source permits [] reviewed in the natural gas extraction industry did not adhere to all elements of the EPA's guidance on practical enforceability."[59] Those findings demonstrate why public participation is essential: state agencies are making critical errors that public review could help identify and correct.

Additionally, several permit limits (102 of 529) did not have sufficient information to determine "whether the limits were technically accurate,"[60] with 96 "not adequately supported by documentation, such as underlying information about pollution control equipment with an

[53] *Id.* at 23.

[54] *Id.*

[55] *Id.* at 24.

[56] *Id.* at 38.

[57] *Id.*, summary page.

[58] *Id.* at 5.

[59] *Id.* at 6.

[60] *Id.*, summary page.

assumed control efficiency, in the permit or permit record."[61] For example, many permits assumed that enclosed combustion devices (pollution control equipment commonly used at natural gas facilities) would achieve 95% control efficiency in reducing volatile organic compound emissions.[62] Yet in 20 cases where permits relied on this 95% efficiency assumption, "neither the permit nor permit record provided documentation to support this assumption,"[63] such as manufacturer guarantees, testing data, or model inputs. This lack of supporting information prevented auditors from "determining whether the limits contained errors and properly prevented the synthetic-minor source from operating at major-source levels,"[64] which would clearly impact NAAQS attainment if left unchecked.

The Report further found that "26 limits did not specify the method for assessing compliance."[65] Other limits were based on production limits that were required to be tracked monthly, "but the permits did not clearly explain how monthly tracking of production limits demonstrates compliance with emission limits."[66] The Inspector General warned that "[v]ague permitting conditions, such as unclear or missing statements on the method for determining compliance, can allow facilities unintended flexibility."[67] For instance, "a facility may discover that its typical method for determining compliance with an emission limit generates emissions estimates in excess of the emission limit during a compliance period,"[68] and if the compliance method is not specified in the permit, "the facility has the option to use a more favorable estimation technique that may not show the facility has exceeded its permit limit."[69]

Perhaps most significantly, the Report found that 55 limits "did not have sufficient monitoring requirements to determine whether the facility's assumed pollution reduction from pollution control devices was being achieved."[70] The Inspector General concluded that this deficiency "could result in a synthetic-minor facility emitting pollutants at or above major-source levels without being detected."[71] The consequences of inadequate monitoring can be severe. The Inspector General explained that "[i]f a facility's actual control efficiency falls below the assumed control efficiency, it could cause the facility to unknowingly exceed its permit limits and become a major source of emissions."[72] If neither "EPA headquarters nor regional offices conduct regular or routine evaluations or review synthetic-minor-source permits and the

[61] *Id.* at 10.

[62] *Id.* at 9.

[63] *Id.* at 10.

[64] *Id*.

[65] *Id.*, summary page.

[66] *Id.* at 12.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id.*, summary page.

[71] *Id*.

[72] *Id.* at 16.

limitations adopted by facilities to avoid major source status,"[73] then there is effectively no backstop to ensure that faulty permit limits, incorrect control assumptions, or inadequate monitoring requirements are ever identified or corrected.

These findings directly contradict EPA's claim in the proposed rule that public participation is not necessary to assure NAAQS achievement. Instead, the Report demonstrates that state permits frequently contain critical technical deficiencies, that EPA conducts essentially no oversight to identify these problems, and that permit violations may go undetected due to inadequate monitoring requirements. Public review represents a mechanism that helps identify permit deficiencies before construction and emissions even start. Thus, EPA should increase oversight instead of proposing to eliminate public participation, a move that would solve none of these existing problems, but would instead worsen them. The Inspector General made this point explicitly, recommending that EPA "develop and implement an oversight plan" that includes "an initial review of a sample of synthetic-minor-source permits in different industries" and "a periodic review of a sample of synthetic-minor-source permits to occur, at a minimum, once every five years."[74]

3. EPA and State Failure to Ensure Compliance with Minor NSR Permit Limits

Beyond the failure to ensure permits contain enforceable limits, EPA and state agencies have also failed to ensure that sources comply with them. This enforcement gap means that even permits with adequate limits on paper may not protect air quality in practice, further suggesting that public participation is essential to supplement air agency oversight. The Inspector General's Report found that, while states generally conducted inspections, those inspections focused primarily on "verifying that the pilot light is operating and checking for visible emissions"[75] rather than using "parametric measures that accurately show what control efficiency the device is actually achieving."[76] The underlying monitoring data that the Inspector General reviewed was often insufficient to verify that pollution control equipment was actually achieving assumed control efficiencies.[77] For synthetic minor sources, compliance depends on whether pollution control devices are *continuously* operating at the efficiency levels assumed in permits. Yet, the Report found that the monitoring requirements in many permits were inadequate to verify continuous compliance. Without continuous parametric monitoring of key operating parameters, like combustion chamber temperature[78] or changes in pressure,[79] neither facility operators nor state inspectors can confirm that assumed 95% control efficiencies were being met on an ongoing basis.

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[73] *Id.* at 8.

[74] *Id.* at 17.

[75] *Id.* at 14.

[76] *Id*.

[77] *Id.* at 13.

[78] *Id.*

[79] *Id*.

The consequences of this monitoring gap are significant. EPA's own studies have documented that enclosed combustion devices can achieve widely varying control efficiencies and "may fall far below their assumed 95 percent efficiency for unknown periods of time."[80] If actual control efficiency falls below permitted levels, facilities will exceed their emission limits and may emit at major source levels without detection.[81]

The enforcement challenges described in the Report are particularly significant for synthetic minor sources that emit near major source thresholds (SM-80 sources, which emit at 80 percent of major source thresholds or higher).[82] For facilities emitting just below major source thresholds, even brief periods of excess emissions can push them into major source classification.[83] Without adequate monitoring requirements to detect such malfunctions, and without public participation to ensure permits include such monitoring, these violations will go undetected. EPA presents no evidence supporting its contention that public participation opportunities are unrelated to a minor NSR program's effectiveness at protecting air quality. To the contrary, the Inspector General's report demonstrates that EPA's distinction between major and minor sources for public comment purposes is arbitrary because so-called "minor" sources can emit at major source levels if their permits are deficient. Thus, the need for public oversight is just as great for minor sources as for major sources.

II. EPA SHOULD WITHDRAW THE PROPOSED RULE AND INSTEAD REQUIRE STATES TO ADOPT AND IMPLEMENT THE PUBLIC PARTICIPATION REQUIREMENTS IN THE EXISTING FEDERAL RULES

A. Public Participation in Minor NSR Permitting Is Critical To Ensuring That Permit Limits Are Sufficient to Achieve and Maintain Compliance with National Ambient Air Quality Standards as Required by Clean Air Act 110(a)(2)(C).

As illustrated by the long list of examples provided by Commenters in the "Permit Comments Table" submitted to the docket for this rulemaking,[84] public participation in minor NSR permitting provides critical oversight needed to ensure that minor NSR permits–and especially those permits purporting to limit a facility's "potential to emit" ("PTE") to below major source levels–are accurate and effective. These real-world examples directly refute EPA's unsupported assertion that "public participation is generally [not] 'necessary to assure that [the

[80] *Id.* at 15.

[81] *Id.* at 16.

[82] *Id*. at 3.

[83] For instance, the Report calculated that for one facility "if only one of the four permitted ECDs malfunctioned and achieved a maximum 60 percent control efficiency for approximately six days, the facility would violate its permit limits and become a major source of emissions." *Id.* at 16.

[84] Permit Comments Table, Submitted to the regulatory docket by Keri Powell, SELC, Docket I.D. No. EPA-HQ-OAR-2025-1212-0249, available at https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0249 ("Permit Comments Table").

NAAQS] are achieved' in the context of developing a program for the 'regulation of' minor source construction and modification."[85]

1. Real-World Examples of Public Involvement in Minor NSR Permitting Demonstrate That Public Participation Can and Does Strengthen Permits and Contribute to NAAQS Achievement.

Commenters' Permit Comments Table identifies nearly 50 examples of minor NSR permitting actions that demonstrate the continued need for and usefulness of public participation in CAA permitting.[86] These examples show that providing for public notice and comment in minor NSR permitting is not merely procedural—it repeatedly results in air permits that better comply with federal and state CAA requirements. Public comments have identified substantive flaws in draft permits and underlying permit applications that permitting authorities corrected only after receiving detailed public comments. Across a wide range of source categories and jurisdictions, public comments have resulted in final permits with enforceable emissions limits and better monitoring and recordkeeping requirements, the reclassification of sources as subject to major NSR permitting, and even the withdrawal of permit applications. The varied types of sources included in these examples—such as power plants, integrated steel mills, chemical manufacturers, data centers, and industrial wood pellet plants—also emphasize that "minor" source permitting can involve facilities with substantial emissions and significant consequences for surrounding communities. Taken together, these examples show that public notice and comment can improve not only the accuracy, enforceability, and legal sufficient of individual permits, but also the quality and transparency of the agency decision-making underlying them.

Table 1 provides examples of permitting actions in which public notice and comments resulted in changes to the final air permits issued by state and local air agencies. These examples demonstrate concrete ways in which meaningful public participation can improve permitting outcomes. For example, public participation has resulted in final air permits that:

- Include additional operating limits to avoid triggering major NSR permitting requirements, such as a waste incinerator accepting a condition to burn only clean wood to avoid increased NOx emissions from combusting resinated wood (Lawndale Recycling);
- Improve monitoring and reporting requirements to ensure that synthetic minor limits are practically enforceable, such as requiring parametric monitoring of VOC and PM emissions from a gas-fired electric generating station on a monthly basis to demonstrate compliance with 12-month rolling limits on these pollutants (Sundance Power Plant Permit V20690.R02)
- Include additional reporting requirements to assure compliance with emission limits, such as requiring a data center to record the hours of generator use at different loads to demonstrate compliance with load-dependent NOx and CO limits (Lavender Fields Holdings LLC, Initial Permit, No. 091-49561-00195); and

[85] *See* 91 Fed. Reg. at 41,597.

[86] Permit Comments Table, *supra* note 84.

- Assure compliance with federal emission standards, such as the removal of provisions in an air curtain incinerator permit that would have allowed the burning of plastic bags in violation of NSPS Subpart EEEE (City of Demopolis Public Works, Permit No. 105-0022-X001)

While the Table 1 examples plainly demonstrate that public input strengthens permits in ways that protect air quality and help assure an area's compliance with the NAAQS and SIPs, the value of public participation in minor NSR permitting cannot be measured simply by whether comments ultimately produce changes in permit terms. Public participation also serves an important accountability function when agencies ultimately decline to make the changes commenters request.

Table 2 provides examples of pending public comments on recent proposed minor NSR permits that generated significant public interest. These comments raise consequential issues such as potential PSD applicability, the enforceability of synthetic minor limits, and inadequate monitoring and recordkeeping requirements. The fact that these proceedings remain pending does not diminish their significance: they show that public commenters continue to identify substantial legal and technical issues that permitting agencies must confront before issuing final permits. Table 3 provides examples of permit proceedings that generated extensive public participation without ultimately resulting in significant changes to the permit terms. These proceedings demonstrate a different but equally important function of public participation.

Regardless of whether a permitting agency determines that public comments warrant permit changes, the comment process requires the agency to confront significant technical and legal concerns, explain the basis for its determinations, and create a record demonstrating how it reached those determinations. That process provides both the public and reviewing bodies with information necessary to assess the agency's decision and can inform later oversight, enforcement, and review. A permitting process in which an agency considers a substantial, relevant objection and provides a reasoned explanation for rejecting it is not a process in which public participation has failed. Rather, requiring that explanation is itself an important function of public review. The permitting of the Metal Management Indiana facility (DBA Sims Metal), for example, illustrates this function: although the comments did not result in substantial permit revisions, they required the permitting agency to address technical concerns and explain its reasoning, creating a more complete administrative record and giving the affected community important information with which to evaluate the facility's future operation and regulation.

The real-world examples provided on the Permit Comments Table demonstrate that public notice and comment serves multiple important functions that help ensure minor NSR permits fulfill the CAA's purpose of protecting public health and air quality: it identifies errors before permits are issued, improves enforceability and legal sufficiency of permit terms, requires agencies to address significant legal and technical concerns, and creates a record of the basis for the agency's decisions. Ensuring that permits are legally sufficient includes ensuring that they comply with the state's approved SIP control strategy that in turn is designed to provide for achievement of the NAAQS.[87] Eliminating or reducing opportunities for public involvement

[87] *See* 42 U.S.C. 7410(a)(1), (2); 40 CFR 51.160.

would remove an important safeguard against permitting errors and increase the risk that unlawful or inadequately protective permits will go undetected or uncorrected. The documented record of permit improvements, regulatory accountability, and increased transparency resulting from public participation confirms that meaningful public notice and comment is a necessary component of an effective minor NSR permitting program.

2. Detailed Case Studies Demonstrating How Public Participation in Minor NSR Permitting Leads to More Protective Permits.

a. Environmental Integrity Project's Industrial Wood Pellet Mill Campaign

One of the strongest examples of public involvement in minor NSR permitting leading to more robust and enforceable air quality protections is the industrial wood pellet campaign led by the Environmental Integrity Project ("EIP") from 2017 to 2023. The industrial wood pellet sector began dramatically expanding across the South in the late 2000s. In 2017, EIP set out to determine whether the industry was being held accountable for compliance with all applicable Clean Air Act requirements. After reviewing air permitting files for 21 plants from Virginia to Texas, EIP released a report, *Dirty Deception: How the Wood Biomass Industry Skirts the Clean Air Act*.[88] The report documented that more than half of the wood pellet plants EIP evaluated (11 out of 21) either failed to keep emissions below legal limits or failed to install required pollution controls.[89] EIP presented evidence showing that seven of the facilities had violated their permits in the prior year by releasing illegal amounts of air pollution, while another four had faulty permits issued by states that failed to require pollution control equipment required by the federal Clean Air Act. All but one of the facilities EIP evaluated had been constructed pursuant to minor NSR permits.

After releasing the report, EIP, working together with partner groups across the South, worked to bring the industry into compliance by commenting on and challenging air permits and bringing litigation where necessary. By 2023, EIP and its partners had, primarily through engagement in air permitting, succeeded in requiring installation of 15 new Regenerative Thermal Oxidizer ("RTO") controls for volatile organic compounds ("VOCs") at facilities located in six states. In addition, the advocacy coalition obtained an array of permit improvements that strengthened emission limits, made permit conditions more enforceable, and required improved monitoring, recordkeeping, and reporting necessary to identify future compliance problems. In addition, compliance concerns raised by EIP and its partners in permit proceedings led to several high-profile state administrative enforcement actions.

Advocacy specifically impacting minor NSR permits and associated synthetic minor limits was as follows:

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[88] Patrick Anderson and Keri Powell, Environmental Integrity Project, *Dirty Deception: How the Wood Biomass Industry Skirts the Clean Air Act* (Apr. 26, 2018) ("*Dirty Deception*"), https://environmentalintegrity.org/wp-content/uploads/2017/02/Biomass-Report.pdf (Attachment I).

[89] *Dirty Deception* at 1.

Enviva Hamlet Plant (North Carolina): *Public Participation in Permitting Resulted in the Facility Installing a Regenerative Thermal Oxidizer to Control Emissions from Its Dry Hammermills*

In 2018, the North Carolina Department of Natural Resources (DENR) announced a public comment period on the draft "synthetic minor" permit for Enviva Hamlet, a wood pellet plant in North Carolina (Air Permit No. 10365R03). A coalition of public interest organizations commented that the permit omitted production or operating limits on a key unit.[90] The company's application had estimated that the particular unit would process no more than 85% of the entire facility's throughput, but was in fact capable of processing up to 100%.[91] The commenters argued that the facility's PTE limit was ineffective because the permit failed to restrict the unit's production to 85% of facility throughput as assumed, and calculating PTE at the maximum processing rate for the unit resulted in facility-wide PTE that exceeded the major source PSD threshold.[92] In addition, the commenters argued that the facility-wide wood pellet production limit was too high to ensure that emissions remained below the major source threshold and that Enviva either needed to accept a lower production limit or install additional pollution controls. After DENR rejected their concerns, the commenters petitioned for a contested case hearing before North Carolina's Office of Administrative Hearings. Prior to the hearing, the organizations reached a settlement agreement with Enviva and DENR requiring that the permit be revised to include the 85% throughput limit, require the facility install additional controls, and require the facility to perform appropriate monitoring to verify its compliance with these new requirements.[93]

Enviva Greenwood Plant (formerly Colombo Energy) (South Carolina): *Public Participation in Permitting Led to the Addition of an Enforceable Production Limit to Restrict Potential Emissions to Below the Major Source Threshold*

In 2018, a coalition of public interest organizations learned that the South Carolina Department of Health and Environmental Control (DHEC) issued a synthetic minor construction permit for the Enviva Greenwood wood pellet manufacturing plant in Greenwood County, South Carolina (Air Construction Permit No. 1240-0133-CB). The permit authorized the plant to install controls needed to comply with PSD PTE limits established in its initial 2013 synthetic minor construction permit (the original owner had greatly underestimated the facility's VOC emissions, entirely omitting some significant emitting units from its emissions calculation). Like the plant's initial 2013 permit, the 2018 permit revision purported to establish enforceable PTE limits for PSD avoidance. Unfortunately, the public interest organizations discovered that neither the initial PTE limits nor the revised limits were effective because they lacked enforceable operating

[90] Permit Comments Table, Attach. 28, at 2 (Comments on the Draft Air Quality Permit for Enviva Pellets Hamlet (Nov. 15, 2018)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[91] *Id.*

[92] *Id.*

[93] Permit Comments Table, Attach. 29, at 2 (Enviva Hamlet Plant Settlement Agreement (June 2, 2019)), submitted to Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

restrictions like production limits and effective monitoring to make the emission limits enforceable.

Though DHEC did not provide public notice or an opportunity for public comment on the 2018 permit revisions, the public interest organizations independently found out about the permit and filed a request for "final permit review" with DHEC.[94] In their request, the organizations pointed to EPA's guidance explaining that "[w]hen a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year)."[95]

DHEC rejected the organizations' final review request.[96] Directly contrary to EPA's longstanding guidance[97] and Title V orders,[98] DHEC declared that it does not have to specify required monitoring or how the source is to demonstrate compliance with its PTE limit. Rather, DHEC contended that it is enough for the permit to state that the facility will perform some sort of unspecified monitoring and compliance demonstration, to be developed by the source after final permit issuance.

After DHEC dismissed the organizations' final permit review request, the organizations began preparing a request for a trial-like "contested case hearing" before the South Carolina Administrative Law Court. Prior to filing their hearing request, however, they reached out to the permittee to determine whether the parties could reach an agreement as to how the permit could be revised to address the PTE enforceability concerns. Ultimately, the permittee agreed to request that DHEC revise the permit to include an enforceable pellet production limit as well as specific monitoring and reporting requirements to track compliance with that limit.[99] DHEC agreed to the request and revised the permit,[100] and the organizations did not file for a contested case hearing.

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[94] Permit Comments Table, Attach. 23 (Request for Final Review of Air Permit Number 1240-0133-CB, Issued to Colombo Energy, Inc. (Jan. 26, 2018)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[95] *Id.* at 6.

[96] Permit Comments Table, Attach. 25 (Colombo Energy DHEC Staff Response, Docket No. 18-RFR-4), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[97] *See* 84 Fed. Reg. 36,304, 36,317, n.22.

[98] *See, e.g., In the Matter of Piedmont Green Power*, 2016 EPA CAA Title V LEXIS 6, Pet. No. IV-2015-2, at 21 ("[F]or an emission limit to be enforceable as a practical matter, the permit must clearly specify how emissions will be measured or determined for purposes of demonstrating compliance with that limit.").

[99] Permit Comments Table, Attach. 27 (Signed Enviva Greenwood Agreement, dated Mar. 8, 2018), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[100] Permit Comments Table, Attach. 26 (Revised Enviva Pellets Greenwood Permit issued Jan. 12, 2018, revised Mar. 20, 2018), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

Enviva Northampton Plant (North Carolina): *Public Participation in Permitting Led to Facility Installing Regenerative Thermal Oxidizers to Control Emissions from Dryers, Dry Hammermills, and Pellet Coolers*

The Enviva Northampton facility in North Carolina was permitted as a synthetic minor source subject to a PTE limits for VOC, including both operating restrictions and an emission limit of 249 tpy.[101] In 2015, however, just two years after commencing operations, the facility requested and the state granted a permit modification allowing the source to become a major source of VOCs without complying with PSD requirements.[102] Specifically, the 2015 permit revision greatly increased the VOC PTE limit for PSD purposes using a dubious application of the "one-time doubling" policy, which enabled the facility to continue to avoid PSD so long as it kept its VOC emissions below 456.4 tpy, greatly exceeding the applicable 250 tpy major source threshold for this source category.[103]

The first-ever opportunity for public comment on the Enviva Northampton plant occurred nearly five years after issuance of the facility's construction permit, when North Carolina DENR proposed to issue the facility a Title V operating permit in 2017 (Title V Operating Permit No. 10203T06). EIP and its partners submitted extensive comments to DENR on the facility's Title V permit.[104] The commenters pointed out that North Carolina's 2015 decision to allow the facility to nearly double its emissions without undergoing PSD contravened the "Source Obligation Rule" in the federal PSD regulations at 40 C.F.R. 52.21(r)(4), which is incorporated into North Carolina's Clean Air Act state implementation plan. That provision provides that "[w]hen a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification to emit a pollutant … then the provisions of [North Carolina's PSD regulations] shall apply to the source or modification as though construction had not yet begun on the source or modification." NC SIP Rule 15A NCAC 2D.[105] Enviva decided following receipt of public comments to apply to install new controls that would enable it to reduce its VOC emissions below

[101] Permit Comments Table, Attach. 30 (Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC, at 2 (Oct. 20, 2017)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[102] *Id.*

[103] *Id.* at 3 ("The proposed [PSD] avoidance limit is baseline (207.4) plus 249 or 456.4 tons per consecutive 12-month period.").

[104] Comments on Draft Title V Permit for Enviva Pellets Northampton, LLC*, supra* note 101.

[105] The most recent version of North Carolina's PSD regulations includes the same language but in a different place: 15A NCAC 2D. 0530(k).

the PSD major source threshold.[106] In October 2019, a new permit required installation of a full suite of VOC air pollution controls.[107]

MRE Crossville Plant (Alabama): *Public Participation in Permitting Demonstrated that Source's PTE Limit to Avoid Title V Was Inaccurate; Subsequent Settlement With Company Required Title V Compliance, and State Agency Subsequently Took Enforcement Action*

Under prior ownership, the wood pellet plant now known as MRE Crossville in Alabama had acknowledged it was subject to Title V as a major source, but had not yet applied for a Title V permit.[108] When MRE Crossville purchased the plant in 2018, however, the company decided it would prefer to accept PTE limits to avoid Title V applicability.[109] The state therefore released a draft synthetic minor state operating permit for public notice and comment, and the draft permit contained several operating and production restrictions that allegedly restricted VOCs to less than the 100 tpy Title V threshold.[110] EIP and its partners submitted comments arguing that, based on numerous stack tests from other facilities, the production limit was too high to restrict PTE to below the Title V threshold.[111] After the state rejected those comments and issued the permit, the groups filed an administrative appeal and eventually settled the case with MRE Crossville.[112] The settlement required the facility to apply for a Title V permit, commit to a firm stack testing deadline, and reduce production by 33% until it received the Title V permit.[113] The required stack tests confirmed that the source's PTE under the production and operating limits of the state operating permit far exceeded the Title V threshold of 100 tpy, with a PTE of at least 180 tpy.[114] Based on the stack test results, in October 2019, the

[106] Permit Comments Table, Attach. 31 (Comments on the 2019 Revised Draft Air Quality Permit for Enviva Pellets Northampton (Aug. 23, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251. This permit authorizing Enviva's installation of controls has not yet been issued, however, and the facility continues emitting far higher rates of VOCs and HAP than had the facility been required to comply with major source requirements in 2015 as it should have been (in 2015, BACT for VOCs in this industry had been firmly established as regenerative thermal oxidizers capable of at least 95% reduction in VOCs and similar reductions in organic HAPs.)

[107] *See* Permit Comment Table, Attach. 32, at 2 (North Carolina DAQ, Application Review for Enviva Pellets Northampton, LLC), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251 (revised permit incorporates emission reduction efforts to comply with 15A NCAC 02Q .0317 Avoidance Conditions for 15A NCAC 02D .0530: Prevention of Significant Deterioration and 15A NCAC 02Q .0317 Avoidance Condition for 15A NCAC 02D. 1111: Maximum Available Control Technology (MACT) Standards for HAPs.").

[108] Permit Comments Table, Attach. 47, at 2 (Comments on Draft Synthetic Minor Operating Permits for MRE Crossville (May 2, 2018)), Docket No. EPA-HQ-OAR-2025-1212-0252, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0252.

[109] *Id.*

[110] These limits included a 120,000 tpy production limit and a maximum softwood production rate of 50%. *See id.*

[111] *Id.*

[112] Settlement Agreement between GASP and MRE Crossville (Oct. 12, 2018).

[113] *Id.* at Conditions (A)(1), (A)(3), and (B)(1).

[114] Subsequent to the issuance of the permit at issue, the state granted a second state permit to increase allowable softwood processing from 50% to 80%, therefore the stack tests at issue occurred while processing 80% softwood.

Alabama Department of Environmental Management issued a $40,000 fine to MRE Crossville for exceeding its VOC emission limits.[115]

Drax Amite BioEnergy Plant (Gloster, Mississippi): *Public Participation in Permitting Led to Facility Installing a Combined Post-Dryer Regenerative Thermal Oxidizer*
Comments filed by EIP and its partners in 2017 showed the facility was emitting hundreds of tons of illegal VOCs from several key units.[116] Drax had initially warranted that these units did not emit any VOCs, but EIP provided stack tests from numerous other pellet plants in other states indicating very high levels of VOC emissions, meaning the facility was likely emitting around 1,000 tons of VOCs per year despite being subject to a 250 tpy synthetic minor limit. Drax finally conceded this likely was true after testing at its Louisiana sister facility showed that plant emitting more than 1,000 tons of VOCs from these same kinds of units.[117] Subsequent stack testing revealed annual VOC emissions of nearly 800 tons.[118] Drax Amite applied for a permit to install a new RTO on its post-dryer units in January 2020. In 2021, Drax agreed to pay a $2.5 million penalty for the violations EIP and its partners exposed.[119]

Drax Morehouse BioEnergy Plant (Bastrop, Louisiana): *Public Participation in Permitting Led to Facility Installing a Combined Post-Dryer Regenerative Thermal Oxidizer*
Around the same time that EIP submitted comments on the Drax Amite (Mississippi) facility, EIP and its partners also submitted comments on a draft permit for Drax's Louisiana plant, Morehouse BioEnergy.[120] These comments likewise demonstrated that the facility was exceeding its synthetic minor limits and the major source threshold, and needed to install an RTO to control all post-dryer units. In response, Louisiana agreed and required Drax to submit a major source permit application,[121] which included the new RTO. Emissions testing ultimately confirmed the facility emitting more than 1,100 tons of VOCs per year, despite being limited to no more than 250 tons per year. The new

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The initial test produced a PTE of 262 tpy, which we reduce by 30% to roughly estimate PTE with a 50% softwood limit.

[115] Permit Comments Table, Attach. 49 (Alabama DEM, Consent Order for MRE Crossville (Oct. 23, 2019), Docket No. EPA-HQ-OAR-2025-1212-0252, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0252.

[116] Comments on Draft Title V Permit No. Permit No. 0080-00031 for Amite BioEnergy (Aug. 14, 2017) Docket I.D. EPA-HA-OAR-2025-1212-0031, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0031, (Page 24 of PDF).

[117] Drax Amite BioEnergy Correspondence and Stack Test Reports, Docket I.D. EPA-HQ-OAR-2025-1212-0031, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0031 (page 44 of PDF).

[118] *Id.* (page 46 of PDF).

[119] Permit Comments Table, Attach. 15 (MDEQ, Agreed Order No. 7082 20 (Nov. 4, 2020)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[120] Comments on Permit No. 1920-00018-V3 for Morehouse BioEnergy LLC (July 20, 2018), Docket I.D. EPA-HQ-OAR-2025-1212-0031, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0031, (Page 49 of PDF).

[121] LDEQ Response to Comments, Morehouse BioEnergy, LLC - Wood Pellet Manufacturing Facility, Permit No. 1920-00018-V3, at 3-6, Docket I.D. EPA-HQ-OAR-2025-1212-0032, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0032.

controls reduced emissions to less than 150 tons per year. In 2022, Louisiana issued a $1.6 million penalty against Drax Morehouse for the violations EIP and its partners revealed.[122]

AED Copiah Wood Pellet Plant (Hazlehurst, Mississippi): *Public Participation in Permitting Led to Facility Installing Regenerative Thermal Oxidizer to Reduce VOC Emissions from Pellet Presses*

In August 2019, EIP and its partners submitted unsolicited comments on a permit application for the construction of AED Copiah, a 500,000 tpy pellet plant proposed in Mississippi.[123] The comments argued that the company's permit application had underestimated the planned facility's air pollution levels, and that when properly calculated the facility would qualify as a "major" air pollution source rather than a "minor" source, as claimed by the company. In response to EIP's letter, the company revised their design to add much more effective pollution controls for both volatile organic compounds and hazardous air pollutants, greatly reducing the facility's anticipated air pollution levels. These changes were reflected in the draft permit subsequently released for public comment.[124]

Jasper Pellets (South Carolina): *Public Participation in Permitting Led to Facility a Stricter Production Limit and Additional Testing, Operating, and Monitoring Requirements.*

In November 2019, EIP and its partners commented on the minor source construction permit for Jasper Pellets in South Carolina.[125] The plant originally had the physical capacity to produce 105,000 tons of wood pellets each year, and the proposed minor permit modification would enable the plant to double its capacity to 210,000 tons per year. EIP and its partners submitted copious testing data to show that if the facility wished to remain a minor source, it would need to reduce production to no more than 80,000 tons per year in order to reduce its VOC and hazardous air pollutant emissions. The state listened and after undertaking additional research, ultimately restricted the facility's production to 60,200 tons per year.[126] The state also granted the groups' request to include additional testing, operating, and monitoring requirements in the final permit.

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[122] Permit Comments Table, Attach. 16 (LDEQ, Settlement No. SA-AE-22-0039 for Morehouse BioEnergy LLC (Nov. 21, 2022)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250

[123] Permit Comments Table, Attach. 2 (Letter from Patrick Anderson, EIP, to Kayra Johnson, MDEQ (Aug. 9, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[124] Permit Comments Table, Attach. 3 (Public comments on Draft Air Pollution Control Permit No. 0600-00075 for Alternative Energy Development Copiah (Nov. 12, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[125] Permit Comments Table, Attach. 39 (Public comments on Draft Synthetic Minor Construction Permit No. 1360-0050-CC for Jasper Pellets, LLC (Nov. 9, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[126] Permit Comments Table, Attach. 40 (SCDHEC, Statement of Basis for Permit No. No. 1360-0050-CC for Jasper Pellets, Appendix C, Response to Comments, at 1-2 (Apr. 9, 2020)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

Pinnacle Renewable Energy Newton Facility (Mississippi): *Public Participation in Permitting Led to Withdrawal of Construction Permit Application.*
In April 20202 comments on Pinnacle Renewable Energy's minor NSR permit application to construct a new pellet mill in Newton, Mississippi, EIP and its partners demonstrated that the company had underestimated emissions and needed either to add additional VOC controls or substantially reduce production.[127] The main problem was that Pinnacle did not intend to operate VOC controls on key post-dryer units, and had further substantially underestimated emissions from these units. Based on testing from other pellet plants, EIP showed that the facility would need to install additional pollution control technology if it wished to be permitted as a minor source. The company withdrew its application shortly thereafter, in May 2020.

Varn Wood Products (Georgia): *Public Participation in Permitting Led to More Stringent Synthetic Minor Limits*
After EIP and its partners submitted comments on the facility's draft renewal operating permit in 2017, Georgia regulators substantially tightened the requirements set forth in the Varn Wood Products permit, adding a wood pellet production limit and numerous new testing and monitoring requirements.[128] As with the above examples, EIP used a compilation of stack testing from similar mills to show that without these requirements, the facility would be a major source of VOCs but only held a minor NSR permit.

Appling Wood Pellets (Georgia): *Public Participation in Permitting Led to More Stringent Synthetic Minor Limits and Increased Emissions Testing and Monitoring*
In response to comments by EIP and its partners on the Appling Wood Pellets permit, Georgia made so many changes to the permit that it had to release a new permit for public comment.[129] The draft permit failed to include adequate synthetic minor limits, and in response to comments, EPD revised the permit to include new emission limits to ensure that the facility's emissions remain below "major source" levels for purposes of the New Source Review program, along with significantly improved testing and monitoring requirements.

Georgia Biomass (Georgia): *Public Participation in Permitting Led to More Accurate and Enforceable Synthetic Minor Limits*
In response to comments by EIP and its partners on Georgia Biomass' draft renewal operating permit, Georgia regulators added emission factors to be used when calculating

[127] Permit Comments Table, Attach. 51 (Public comments on Draft Air Pollution Control Permit No. 1980-00045 for Pinnacle Renewable Energy, Newton MS Facility (Apr. 24, 2020)), Docket No. EPA-HQ-OAR-2025-1212-0252, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0252.
[128] Permit Comments Table, Attach. 64 (EPD, Title V Renewal Application Review for Varn Wood Products, LLC, Addendum and Response to Comments at 3-12 (Feb. 8, 2018)), Docket No. EPA-HQ-OAR-2025-1212-0253, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0253.
[129] Permit Comments Table, Attach. 7 (EPD, Title V Application Review for Appling County Pellets LLC, at Addendum 1 (Oct. 2, 2018)), submitted to Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

the facility's emissions and specified an equation to be used for such calculations that encompasses all of the facility's emission sources.[130]

Enviva Cottondale (Florida) *Public Participation in Permitting Led to Installation of Controls.*
Enviva Cottondale was for many years the largest wood pellet plant in the country; originally permitted as a true minor source, stack testing in 2013 showed it was capable of emitting well over 1,000 tons of VOCs.[131] In response, Florida proposed to issue an "after-the-fact" *minor* source permit that would implement BACT-like controls, but would not require the facility to undergo actual PSD permitting.[132] Even after installing what the agency considered to be voluntary BACT controls, the facility would still have the potential to emit more than 500 tons of VOCs.[133] EIP and partners commented on this minor-source "after-the-fact" permit to argue that this scheme was illegal, and that the facility either needed to be permitted as a major source and undergo PSD permitting, or be required to restrict emissions to minor source levels.[134] Florida regulators agreed, issued a consent order to Enviva, and required the facility to apply for and obtain a PSD permit and install additional VOC controls.[135] Florida released a revised permit for public comment, explaining that "[t]he resolution of the [public] comments . . . result[ed] in substantial changes to the draft permit issued on June 23, 2017."[136]

Telfair Forest Products (Georgia): *Public Participation Led to Facility to Abandon Flawed Modification Application.*
Telfair Forest Products is a relatively small pellet mill, but because it does not operate significant VOC controls, it is capable of emitting well over 250 tons of VOCs. To avoid major NSR, it had accepted synthetic minor limits to keep emissions below 250 tons. But the facility then sought to undertake a minor permit modification that would increase allowable emissions to almost 500 tons of VOCs per year. Commenters pointed out that the facility had already accepted enforceable synthetic minor limits to avoid PSD permitting, and under the "Source Obligation" rule in federal NSR regulations, Telfair

[130] Permit Comments Table, Attach. 33 (EPD, Title V Application Review for Georgia Biomass LLC, at Addendum 1 (July 5, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[131] Permit Comments Table, Attach. 19, at 7 (Florida DEP, Technical Evaluation & Preliminary Determination, Enviva Pellets Cottondale, LLC, Application for Minor Source Air Construction Permit, After-the-Fact Facility-Wide Permit (June 22, 2017)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[132] Permit Comments Table, Attach. 20, at 2-4 (Public Comments on Enviva Cottondale Permits (Sept. 16, 2017)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[133] *Id.* at 4.

[134] *Id.* at 1-13.

[135] Permit Comments Table, Attach. 21, at 1 (Florida DEP Revised Draft Permit Determination for Enviva Cottondale Permit No. 0630058-020-AV), Docket No. EPA-HQ-OAR-2025-1212-0251, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[136] *Id.* at 4.

could not relax or eliminate its synthetic minor limits without undergoing PSD.[137] After groups appealed the permit in a state administrative process, the company withdrew its application.[138]

Highland Pellets South (Arkansas): *Public Participation Led to Withdrawal of Flawed Construction Application.*
Highland Pellets South sought to construct one of the largest pellet mills in the country, with a production capacity of more than 800,000 tons per year. EIP and partners commented on the initial construction permit that the company had underestimated both VOC and NOx emissions from numerous sources, citing recent industry stack testing. EIP's comments indicated the facility would either need more effective controls or much tighter production limits to avoid major source status.[139] The company withdrew the application shortly after EIP filed its comments.

Enviva Epes and Pinnacle Demopolis (Alabama): *Public Participation Led to Additional Testing Requirements.*
These facilities were designed at the start to include substantially more robust air pollution controls than were installed on plants constructed before EIP's Wood Biomass Campaign began. In comments on the draft permits, however, EIP argued that even with those controls uncontrolled emissions from the proposed facilities' wood pellet storage and handling operations would cause plantwide emissions to exceed the "major" source threshold, triggering applicability of more stringent air pollution control measures. In response, Alabama regulators included conditions to the final construction permits (issued in November 2019 and January 2020) requiring the facilities to perform periodic testing of emissions from their storage silos.[140] This was the first such testing to be required in the wood pellet manufacturing industry, which is now more common.

Taken as a whole, EIP's industrial wood pellet facility campaign demonstrates the important role that public participation plays in ensuring that minor NSR permitting fulfills its fundamental purpose of protecting air quality and preventing construction or modification of sources in ways that could cause or contribute to violations of the NAAQS. Again and again, EIP and its partners identified underestimated emissions, ineffective synthetic-minor limits, missing

[137] Permit Comments Table, Attach. 5 (Public Comments on Air Permit Application No. 780227 for Telfair Forest Products, LLC (Sep. 29, 2023)), Docket No. EPA-HQ-OAR-2025-1212-0250, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0250.

[138] Permit Comments Table, Attach. 57 (EPD, Letter re: Telfair Permit Revocation Request (Oct. 23, 2024)), Docket No. EPA-HQ-OAR-2025-1212-0252, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0252.

[139] Permit Comments Table, Attach. 37 (Public Comments on Air Permit No. 2389-AOP-R0 for Highland Pellets South (Jan. 30, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0251https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251.

[140] Permit Comments Table, Attach. 22 (ADEM, Response to Comments on Draft Air Permits Nos. 712-0017-X001-X009 for Enviva Pellets Epes (Nov. 25, 2019)), Docket No. EPA-HQ-OAR-2025-1212-0251https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0251; Permit Comments Table, Attach. 50 (Response to Comments on Draft Air Permits Nos. 105-0020-X001-X006 for Pinnacle Renewable Energy (Feb. 25, 2020)), Docket No. EPA-HQ-OAR-2025-1212-0252, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0252.

controls, and inadequate monitoring that permitting agencies had failed to identify on their own. If these problems had been left uncorrected, the facilities would have emitted far more air pollution than the agencies assumed when determining that they could construct and expand under minor NSR. In many instances, state agencies initially rejected these concerns and corrected the permits only after sustained public advocacy or administrative challenges. And notably, throughout this years-long effort to uncover and correct systemic permitting deficiencies across numerous states, EPA played no role in identifying or remedying the problems. These examples thus provide concrete evidence that eliminating public participation would remove a critical safeguard against permitting errors that can undermine the very air-quality protections the minor NSR program is intended to provide.

b. Public Review Finds that a Series of Separately Permitted Modifications of Sunoco's Natural Gas Liquids Plant in Marcus Hook, Pennsylvania Were a Single Project Circumventing Major NSR and PSD Applicability

Permit applicants sometimes attempt to circumvent major NSR applicability by improperly segregating a single project into multiple separate project applications to circumvent major NSR applicability.[141] Yet the Clean Air Act requires substantially related projects to be aggregated when calculating whether the project as a whole would result in a substantial emissions increase, which is the first step in determining whether major NSR requirements apply.[142] "Project aggregation" "ensures that nominally-separate projects occurring at a source are treated as a single project for NSR applicability purposes where it is unreasonable not to consider them a single project."[143] Federal regulations define a project as "a physical change in, or change in the method of operation of, an existing major stationary source."[144] As demonstrated in the examples below, illegal circumvention is sometimes caught only through public review of proposed minor NSR or even state-only permits.

From February 2013 through April 2016, the Pennsylvania Department of Environmental Protection ("PADEP") approved seven separate applications for modifications of Sunoco's Marcus Hook natural gas liquids plant. Considered separately, none of the nominally separated projects were considered major. Commenter Clean Air Council (the "Council"), a nonprofit environmental health organization, reviewed the projects and corresponding permits, and appealed the permit for the seventh project, "Project E."[145] The Council argued that the Clean Air Act and Pennsylvania's Air Pollution Control Act required the projects to be aggregated, and, when they were, the full project would trigger major NSR and PSD applicability.[146]

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[141] 83 Fed. Reg. 57,324, 57,326 (Nov. 15, 2018).

[142] *Id.* at 57,325-6.

[143] *Id*. at 57,326.

[144] 40 CFR § 51.165(a)(1)(xxxix).

[145] *Clean Air Council v. Commonwealth of Pennsylvania, et al*., Commonwealth of Pennsylvania Environmental Hearing Board, EHB Docket No. 2016-073-L (Jan. 9, 2019) at 47 (Attachment J) ("Marcus Hook Adjudication").

[146] *Id.*

Commenters note that in its analysis, the Pennsylvania Environmental Hearing Board ("PA-EHB"), explained that project aggregation is separate from single-source determination, in which the permitting agency must determine whether a developer is submitting separate applications for multiple sources that must be considered a single source, or facility, for the purpose of major NSR applicability determinations.[147] A permitting agency evaluates whether the NSR requirements apply to a "stationary source," which federal regulations define as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."[148] The regulations further define a "building, structure, facility, or installation" as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel."[149] Improper single-source determinations are also a type of error that might be corrected through public review and comments.

For the project aggregation analysis required of the PA-EHB, however, the Judge explained that multiple modifications are clearly proposed for a single facility. To determine whether the projects must be aggregated, the Department had to consider "'the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations.'"[150]

After completing its analysis, the PA-EHB concluded that the PADEP should have aggregated Project E with the other six projects.[151] Moreover, the Judge noted that

> There is some evidence of record to show that Sunoco had a plan to develop its facility in such a way as to deliberately avoid triggering PSD/NSR requirements. For instance, one of the fractionation towers that Sunoco built as part of Project A and renamed as part of Project D was up for consideration for use as part of Project E, but Sunoco was concerned that if it reused that tower the Department would aggregate Projects 1, A, and C with Project E, so Sunoco decided to use a different tower for Project E.[152]

Ultimately, the PA-EHB remanded the permit for Project E to PADEP so that the agency could properly analyze the NSR and PSD applicability to the aggregated project.[153] If not for the Council's review of the proposed permits, some of which PADEP judged to be exempt from

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[147] *Id.* at 49.

[148] 40 C.F.R. 51.166(b)(5).

[149] 40 C.F.R. 51.166(b)(6).

[150] Marcus Hook Adjudication at 76 (quoting *United Refining Co. v. DEP*, 2016 EHB 442, 445, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017).

[151] *Id.* at 76.

[152] *Id.* at 61.

[153] *Id.* at 77.

even minor NSR review, Sunoco would have evaded the legally required major NSR and PSD applicability. This example demonstrates the importance of public participation in reviewing minor NSR, and perhaps even ostensibly more minor projects, to ensure that projects are properly aggregated and do not circumvent major NSR and PSD requirements.

c. Public Review of Minor NSR Permit for West Virginia's Institute Facility Uncovers Improper Disaggregation of Emitting Units to Avoid Major Source Requirements.

Public scrutiny can be critical when changes in ownership or operation are used to divide what was once treated as a single major source into multiple separately permitted minor sources. That determination can dictate whether emissions are considered together in determining major-source status and, ultimately, whether the facility remains subject to the more protective requirements applicable to major sources. The years-long disaggregation process at West Virginia's Institute Facility illustrates the importance of public oversight. Through a series of corporate transactions, a large, major-source, ethylene-oxide-emitting facility has been divided into nine units owned by four different companies.

Until 2018, Union Carbide Corporation (UCC) owned and operated the entire Institute Facility, including all eight units. While the West Virginia Department of Environmental Protection issued separate Title V permits for each of the eight units, the agency treated the Institute Facility as a single source when determining Title V and NESHAP applicability. For example, in a 2017 permit decision on the Logistics unit, the West Virginia Department of Environmental Protection found that the entire Institute "facility has the potential to emit over 100 TPY of CO, NOx, and VOC's, as well as over 10 TPY of a single HAP and 25 TPY of total HAP's" and stated that UCC was required to have a Title V operating permit "[d]ue to the facility-wide potential to emit over 100 tons per year of criteria pollutants, over 10 tons per year of a single HAP, and over 25 tons per year of aggregate HAPs."[154]

In 2018 and 2019, however, UCC began transferring ownership of "business units" within the Institute Facility, as well as the land under the Institute Facility itself, to other parties.[155] As a result of these transactions, UCC "now only has two business units at its Institute Facility"—(1) the transfer station and related storage tanks, referred to together as the "logistics unit," and (2) the catalyst plant.[156] The Institute Facility's boilers, barge operations, emergency services, wastewater treatment and maintenance operations, as well as the land itself, are owned by Altivia Services, LLC—and are each separately permitted. The current ownership of each piece of the Institute Facility's operations is provided in Table 1 below.

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[154] DAQ, Fact Sheet for final renewal permitting action under 45 CSR 30 and Title V of the Clean Air Act, Logistics (Group 3 of 8), R30-03900005-2017 at 2, *available at* https://dep.wv.gov/daq/permitting/titlevpermits/Documents/August%202017/UCC%20Institute%203of8%208-1%20FFS.pdf (Attachment K).

[155] *See* Press Release, Altivia, Altivia Completes Dow's Acetone Derivatives Business Acquisition, PR Newswire (Nov. 4, 2019), https://www.prnewswire.com/news-releases/altivia-completes-dows-acetone-derivatives-business-acquisition-300950706.html (Attachment L).

[156] *See* UCC, Fact Sheet, R30-03900005-2023 (2 of 2) at 3 (2023), *available at* https://dep.wv.gov/daq/permitting/titlevpermits/Pages/default.aspx (Attachment M).

Table 1: Summary of Current Ownership of Institute Facility Units

Previous Group ID	Current Owner	Unit Name	Current Permit No.	Transfer Date (from UCC)
1 of 8	UCC	Catalyst Plant	R30-03900005-2022	N/A
2 of 8	Altivia	Institute Acetone Derivatives Plant	R30-03900692-2022	November 1, 2019
3 of 8	UCC	Logistics	R30-03900005-2022	N/A
3A of 8 (part of 3 of 8)	Altivia	Logistics Barge Operations	R30-03900692-2023	November 1, 2019
4 of 8	MC (US) 3 LLC	Glutaraldehyde Plant	R30-03900734-2022	November 26, 2018
5 of 8	Specialty Products/Roquette	Water Soluble Polymers	R30-03900682-2025	November 26, 2018
6 of 8	Altivia	Emergency Services	R30-03900692-2021	November 1, 2019
7 of 8	Altivia	Wastewater Treatment and Maintenance Operations	R30-03900692-2021	November 1, 2019
8 of 8	Altivia	Institute Facility (boilers)	R30-03900692-2021	November 1, 2019

In 2025, UCC filed notice that it was reclassifying its two remaining units from major sources to area sources for purposes of the federal air toxics program and applied for modifications to its current NSR and Title V permits, with an aim of replacing them with a minor source NSR permit. UCC also sought to remove references to the currently applicable federal air toxics standards, and to eliminate certain monitoring, testing, and reporting requirements.[157]

While the state agency has so far taken public comment on the draft NSR permit for one of these units, the reclassification itself is apparently self-executing with no opportunity for public participation. In other words, public comment on Union Carbide's new minor source NSR permit may be the public's only opportunity to assess and weigh in on the reclassification of the Union Carbide units and the permit limits on which its minor-source status depends. The

[157] *See* UCC Reclassification Letter (Aug. 19, 2025), *available via* WV Application Enhancer, https://documents.dep.wv.gov/AppEnhancer/ (querying by primary ID 039-0005) (Attachment N); Draft Proposed Permit for Union Carbide Corporation, Institute Facility, Logistics (Group 2 of 2), R13-3727 (Attachment O), accompanying Engineering Evaluation / Fact Sheet, R13-3727 (Attachment P), and underlying Application Package (Attachment Q), *available via* WV Application Enhancer, https://documents.dep.wv.gov/AppEnhancer/ (querying by secondary ID 13-3727).

Institute Facility example therefore also illustratess the shortcomings of EPA's argument that Title V permitting will somehow act as a procedural backstop if states eliminate public participation in minor NSR permitting.[158] Even putting aside that this asserted backstop provides no protection unless the facility ultimately surpasses the major source threshold and obtains a Title V operating permit, EPA's rationale fails entirely when this process operates in reverse– when a facility moves from major-source to minor-source status.

That is, where a major source facility reclassifies as an area source for HAPs or otherwise becomes a synthetic or natural minor source for criteria pollutants, there may be no Title V permitting process with public participation to serve as a backstop. Instead, the facility may seek an amendment, modification, or termination of its Title V permit. Although UCC sought to remove all substantive requirements from its Title V permit—with an apparent aim to ultimately terminate the permit—it applied for a "minor modification," for which West Virginia requires no public notice or opportunity for public comment.[159]

While this is an example of just one facility, it provides a broader view of the potential consequences of EPA's rollback of minor NSR public participation requirements. Eliminating public participation from minor NSR permitting risks allowing sources to escape major-source requirements on the basis of determinations that have never been subjected to meaningful public scrutiny. Errors in such determinations can lead to substantial emission increases that can cause or contribute to violations of the NAAQS.

d. Public Participation in Permitting Has Identified and Corrected Synthetic Minor Limits and Compliance Demonstration Methods that Fail to Account for All Facility Emissions.

Another important area in which public input has led to critical and substantive improvements in minor NSR permitting is the use of synthetic minor limits that either expressly exclude some portion of a facility's emissions or rely on compliance demonstration methods that fail to account for all relevant emissions, such as emissions during startup, shutdown, or malfunction or fugitive emissions. To ensure that a source is properly classified as minor, permit restrictions relied upon to limit its potential to emit must apply at all times to all actual emissions and all such emissions must be included in determining compliance.[160]

Emissions of many different types of air pollutants can rise dramatically during startup, shutdown, and malfunctions at industrial facilities. Pollutants such as NOX, CO, and highly reactive VOCs (HRVOC) can exceed their annual permitted limits during just one of these events.[161] In fact, "According to Texas Administrative Code (TAC) Title 30, Chapter 115,

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[158] *See* 91 Fed. Reg. 41,591, 41,601 ("One potential consequence involves additional oversight through the title V operating permit program.").

[159] *See* 45 W.Va. CSR §§ 30.6.1.a; 6.8.

[160] *See, e.g., In re Yuhuang Chemical Inc. Methanol Plant*, Order on Petition No. VI-2015-03, at 14, 18-27 (Aug. 31, 2016), https://www.epa.gov/sites/default/files/2016-09/documents/yuhuang_response2015_0.pdf (Attachment R).

[161] Ziyuan Wang et al., *Impacts of flare Emissions from an Ethylene Plant Shutdown to Regional Air Quality*, 138 Atmospheric Env't 22 (Aug. 2016), https://www.sciencedirect.com/science/article/abs/pii/S1352231016303247 (Attachment S).

subchapter H, industrial flaring has been identified as the largest source for producing HRVOCs."[162] Industrial flaring events happen routinely in hundreds of communities across the country daily at both minor and major sources of air pollution. In the South Coast Air Quality District over 100 flares operate at landfills, refineries, wastewater treatment plants, and oil and gas facilities all of which experience startup, shutdown, and malfunction events. Many of these facilities across the nation are at minor sources.[163]

Several Title V petition proceedings illustrate the critical role that public participation plays in identifying and correcting deficiencies involving the unlawful exclusion of certain types of facility emissions from the determination of compliance with synthetic minor limits. In these cases, public-interest organizations first raised the deficiencies with state permitting authorities during the permitting process. After the permitting authorities nevertheless issued the permits without correcting the problems, the organizations petitioned EPA to object, and EPA agreed that the permits were deficient.

For example, in *Cash Creek Generation*, commenters challenged a compliance equation used to demonstrate compliance with a 36-ton-per-year VOC PTE limit because it failed to account for all flare emissions.[164] After the permitting authority issued the permit without correcting the problem, petitioners sought EPA review. EPA granted the claim, finding that the equation failed to account for flare emissions during shutdown and explaining that those emissions "cannot be disregarded" in determining compliance.[165] EPA directed the permitting authority to revise the compliance equation so that all actual flare emissions, including emissions during shutdown and, were applicable, malfunctions, were counted.

Similarly, in *Hu Honua Bioenergy*, public commenters challenged synthetic minor CO and NOx limits because the short-term emission limits relied on to keep the source below the major NSR threshold did not apply during boiler startup and shutdown.[166] When the state issued the permit without resolving the problem, the commenters petitioned EPA, which agreed that the limits could not adequately restrict PTE if they did not apply during those periods. EPA directed the permitting agency to ensure that the source-wide limits applied "at all times" and that all actual facility emissions were considered in determining compliance.

The same type of synthetic minor deficiency was at issue in *Yuhuang Chemical*.[167] Public-interest commenters identified deficiencies in several limits intended to restrict a facility's PTE, including compliance methodologies that did not ensure that all relevant emissions would

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[162] *Id.,* Introduction.

[163] Paul Stroik, Draft Socioeconomic Impact Assessment for Proposed Rule 1118.1 – Control of Emissions from Non-Refinery Flares, at i, South Coast Air Quality Management District (Dec. 2018), https://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/1118.1/pr-1118-1-draft-socio.pdf?sfvrsn=1 (Attachment T).

[164] *In re Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4, at 18-19 (June 22, 2012).

[165] *Id.*

[166] *In re Hu Honua Bioenergy Facility*, Order on Petition No. IX-2011-1, at 11-12 (Feb. 7, 2014).

[167] *In re Yuhuang Chemical Inc. Methanol Plant*, *supra* note 160.

be counted.[168] After the Louisiana Department of Environmental Quality ("DEQ") issued the permit without adequately addressing those concerns, petitioners sought review.[169] EPA agreed with the petitioners, finding, among other things, that a fugitive CO limit did not clearly account for all potential fugitive emissions and that the permit lacked adequate methods for accounting for emissions from certain loading and storage-tank operations.[170] In objecting to the permit, EPA directed DEQ to ensure that demonstrations of compliance with PTE limits included all actual emissions from all emission units, specifically identifying emissions from "startups, shutdowns, maintenance, upsets, and malfunctions," fugitive emissions, leaks, spills, and tank roof landings and cleanings.[171]

Accurately accounting for all facility emissions in determining whether the facility qualifies as "major" for NSR is essential to ensuring that the NSR program performs its core function of preventing new and modified sources from causing or contributing to violations of the NAAQS. Importantly, in each of the examples above, the state permitting agency failed to identify and correct the permit deficiency until members of the public raised the issue, and EPA addressed the deficiency only after it was brought to EPA by the public-interest groups through the Title V process. These examples therefore directly refute EPA's claim that public participation in minor NSR permitting is unnecessary for such permits to fulfill their function of protecting the NAAQS.

B. The Proposal Is Unlawful Because It Does Not Reflect the Best Reading of the Statute

The proposed rule does not reflect the best reading of the Clean Air Act and must be withdrawn. Under CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C), every State Implementation Plan ("SIP") must provide for regulation of the construction and modification of stationary sources "as necessary to assure" attainment and maintenance of the national ambient air quality standards ("NAAQS"). Sources that do not meet the statutory thresholds for "major" sources under Parts C and D of Title I of the Act are regulated as "minor" sources under this same provision.[172] Since 1973, EPA's implementing regulations have required that, before authorizing construction of any new or modified stationary source, the permitting authority make the source's application materials and the agency's air-quality analysis available for public inspection, provide at least a thirty-day period for public comment, and give prominent public notice.[173]

The proposed rule would eliminate this requirement for minor NSR programs, leaving states and local air agencies free to reduce or eliminate public notice, comment, and hearing

[168] *Id.* at 8.

[169] *Id.* at 29.

[170] *Id.* at 22.

[171] *Id.* at 19.

[172] *See* 91 Fed. Reg. at 41,594–95.

[173] *See* 40 C.F.R. § 51.161(a)–(b); 91 Fed. Reg. at 41,596.

opportunities for minor NSR authorizations as they see fit.[174] Indeed, many states have laws or regulations that align its requirements with EPA's minimum requirements. Thus, although EPA is not proposing the require states to eliminate public participation requirements, that very well may be the effect in many states. EPA grounds this change in a single statutory argument: because § 110(a)(2)(C) does not itself mention public participation, EPA reasons that the "best reading" of the provision leaves the question of minor NSR public participation entirely to state and local discretion.[175] As explained below, that reasoning does not withstand scrutiny.

The "best reading" of the Clean Air Act is that Congress endorsed and incorporated EPA's then-existing public participation requirements into the minor NSR and NNSR programs as part of the 1977 Clean Air Act amendments.[176] The Clean Air Act's text against the backdrop of the existing EPA regulations requiring public participation also necessarily preserved EPA's authority to require such procedural elements in state minor NSR programs. Further, §110(a)(2)(C)'s plain language preserves EPA's authority and duty to require public participation where, as shown here, a public participation requirement for such programs is "necessary to assure the national ambient air quality standards are achieved." EPA's argument that the phrase "regulation of the modification and construction of any stationary source" does not bestow EPA authority to issue procedural requirements for state minor NSR programs[177] is incorrect and has no basis in the text. Section 301 also provides EPA independent authority to issue procedural requirements as part of state minor NSR programs.

In contrast, EPA's proposed interpretation of the Clean Air Act—that its textual silence on public participation elements of minor NSR programs is best read as a *limit* on EPA's ability to require such elements— is not the "best reading."

1. The Clean Air Act Requires Public Participation in all New Source Review Permits.

The best reading of the Clean Air Act is that when Congress adopted the 1977 Clean Air Act amendments formally incorporating into the statute the New Source Review program, it preserved and adopted EPA's existing public participation requirements into the statutory requirements. The regulatory and legislative history of the New Source Review program shows Congress intended to maintain and expand public participation requirements that were always a part of the program. Congress's plainly expressed desire to incorporate public participation into air permitting decisions further reinforces this interpretation.

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[174] *See* 91 Fed. Reg. at 41,597–98.

[175] *See id.* at 41,598 ("[T]he best reading of this provision of the CAA is that it does not require a Federal minimum standard for public participation in minor NSR programs.").

[176] *Loper Bright*, 603 U.S. at, 400.

[177] *See* 91 Fed. Reg. at 41,599–600.

a. EPA's 1973 Regulations Required Public Participation for New Source Review Permits with No Distinction Between Major and Minor Sources.

EPA's own account of the regulatory history in the proposed rule confirms that the public participation requirements it now proposes to eliminate for minor sources are not mere gloss layered onto the 1977 major-source program. They are older than that program, and they applied to every new or modified stationary source subject to NSR without any distinction between major and minor sources.

EPA promulgated the public participation requirements now codified at 40 C.F.R. § 51.161 on June 18, 1973, in response to a court order requiring EPA to review previously-approved SIPs to ensure they would assure attainment and maintenance of the NAAQS.[178] The D.C. Circuit ordered EPA to "review the maintenance provisions of all state implementation plans presently approved," to disapprove "[t]hose plans which do not provide for measures necessary to insure the maintenance of the primary standard after May 31, 1975, and those plans which do not analyze the problem of maintenance of standards in a manner consistent with applicable regulations," and to direct those states to prepare new implementation plans.[179]

In response, EPA issued an Advance Notice of Proposed Rulemaking ("ANPR") on March 8, 1973.[180] In the ANPR, EPA stated:

> it is the Administrator's determination that the most practical manner in which to adequately and effectively provide for the maintenance of the standards at this time is to require State plans to contain procedures by which each State will review a wide range of new sources and causes of air pollution and will have the authority to prevent the development of such sources or causes where necessary to insure that the standards are maintained.[181]

EPA then announced "[t]he Administrator will propose amendments to 40 CFR Part 51 which will set forth such requirements" for "States, where necessary, to revise their review procedures for construction or modification of sources."[182]

EPA proposed regulations on April 18.[183] It stated that "the primary purpose of the review procedures is to insure that proposed projects are designed and located in a manner consistent with air quality requirements." It proposed the following public participation requirements:

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[178] *See* 91 Fed. Reg. at 41,596, 41,598.

[179] *Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency*, 475 F.2d 968, 971-72 (D.C. Cir. 1973).

[180] *See* 38 Fed. Reg. 6,279 (Mar. 8, 1973).

[181] *Id.*

[182] *Id.*

[183] 38 Fed. Reg. 9,599 (Apr. 18, 1973).

> (g) (1) Such procedures shall provide that prior to approving or disapproving the construction or modification of a facility, building, structure, or installation pursuant to procedures required by paragraph (a) of this section, the state or local agency will provide opportunity for public comment on the information submitted by the owner or operator and on the agency's analysis of the effect of such construction or modification on ambient air quality, including the agency's proposed approval or disapproval.
> (2) For purposes of subparagraph (1) of this paragraph, opportunity for public comment shall include, as a minimum, notice by prominent advertisement in the region affected. Such notice shall specify the availability for public inspection in at least one location in the region affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality, and shall provide for at least a 30-day period for submittal of public comment.[184]

Two months later, EPA finalized the regulations.[185] In doing so, it summarized the comments it had received in response to its proposed public participation requirements and provided a rationale for adopting them.

> A number of air pollution control agencies suggested that the public comment requirements would impose an unnecessary burden, since it will involve the public in what they characterized as largely a technical judgment. Other groups requested that public participation be expanded to include opportunity for a public hearing, not just the opportunity to submit written comments. In the Administrator's judgment, the proposed requirement for public comment represented a reasonable balance between these conflicting positions and was consistent with the emphasis in the act on public participation in developing and carrying out the implementation plans. Accordingly, it is not being modified.[186]

It thus adopted the following requirements:

> (h) (1) Such procedures shall provide that prior to approving or disapproving the construction or modification of a facility, building, structure, or installation pursuant to this section, the State or local agency will provide opportunity for public comment on the information submitted by the owner or operator and on the agency's analysis of the effect of such construction or modification on ambient air quality, including the agency's proposed approval or disapproval.
> (2) For purposes of paragraph (h)(1) of this section, opportunity for public comment shall include, as a minimum:
> (i) Availability for public inspection in at least one location in the region affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality.
> (ii) A 30-day period for submittal of public comment, and

[184] *Id*. at 9,600.

[185] 38 Fed. Reg. 15,834 (Jun. 18, 1973).

[186] *Id.* at 15,835.

> (iii) A notice by prominent advertisement in the region affected of the location of the source Information and analysis specified in paragraph (h)(2)(i) of this section.
>
> (3) Where the 30-day comment period required in paragraph (h) of this section, would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements.
>
> (4) A copy of the notice required by paragraph (h) (2) of this section shall also be sent to the administrator through the appropriate regional office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also shall be sent to any other agency in the region having responsibility for implementing the procedures required under this section.[187]

As EPA acknowledges in the proposed rule itself, "[t]he EPA-promulgated NSR program did not distinguish between 'major' and 'minor' NSR until after the 1977 CAA amendments," and "[t]he language in the NSR regulations at 40 CFR 51.160–51.161 remains substantively unchanged since its original promulgation in 1973."[188]

b. Legislative History Shows Congress Wanted to Preserve and Expand Public Participation Requirements in the 1977 Amendments.

Congress enacted the 1977 Amendments against that regulatory backdrop.[189] Those amendments added additional detailed substantive and procedural requirements onto major sources. A review of the House and Senate committee reports accompanying the 1977 Amendments reveals no suggestion that Congress viewed EPA's existing, undifferentiated public participation requirement as improper, unnecessary, or in need of correction for minor sources.[190] Instead, the legislative history reveals that even as Congress focused on reviewing EPA's regulations and, in some cases, expanding state and local decision-making power in the program—Congress also intended to protect the role of the public and public engagement in decisions about air quality.

If Congress had wanted to remove public participation requirements for minor NSR permits, they had every opportunity at that moment to correct and rescind the public participation requirements EPA had instituted. The purpose of the NSR provisions of the 1977 Amendments was to review EPA's scheme and amend certain provisions with ones Congress designed and approved. It is thus telling that they did *not* strike down the minor New Source Review public participation requirements.

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[187] *Id.* at 15,836.

[188] 91 Fed. Reg. at 41,598–99.

[189] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127(a), 91 Stat. 685, 731–40 (Aug. 7, 1977) (adding Part C, Prevention of Significant Deterioration ("PSD")); id. § 129, 91 Stat. at 745–53 (adding Part D, nonattainment NSR).

[190] *See* H.R. Rep. No. 95-294 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, and S. Rep. No. 95-127 (1977).

A May 1977 House report sheds light on Congress' intentions with the amendments. Congress clearly identified portions of the existing EPA regulations it felt reached too far into state and local authority–and public participation requirements are *not* mentioned.

> The intended purposes of this provision are: . . [to restrict] the Federal Government in the following ways: (a) By removing the Federal land manager's authority to control classification of Federal lands, which is contained in the EPA regulations. (b) By eliminating the authority which the Administrator has under current EPA regulations to override a State's classification of any area on the ground that the State improperly weighed energy, environment, and other factors. (c) By prohibiting the Administrator from compelling any State to impose any uniform or automatic no growth buffer zone around any area. (d) By assuring a local role in decisionmaking, while the current EPA regulations provide for no such local role; and (e) By fixing allowable increments and thus removing the Administrator's authority to prescribe more or less strict requirements.[191]

This passage shows that where Congress took issue with EPA's existing approach it clearly delineated new procedural and substantive requirements to replace EPA's existing regulations. The silence on EPA's existing approach to minor sources and NNSR sources is thus telling. The best reading of Congress' action to *maintain* EPA's minor NSR public participation requirements is that this was an intentional decision to enshrine them into the program.

This conclusion is only further strengthened when looking at the House Committee's enumeration of the purposes of their amendments to the PSD provisions and their emphasis on the need to incorporate public participation.

> Purpose. The section has several stated purposes: (1) To protect health from harmful exposures occurring at levels below the ambient standards; (2) To protect national parks and other areas of special natural, recreational, scenic, or historic value; (3) To assure economic growth in a manner consistent with preservation of existing clean air resources; (4) To prevent interstate air pollution which significantly degrades air quality; (5) To assure careful evaluation of all consequences and opportunity for full public participation prior to a State's decision allowing deterioration in existing clean air areas.

Congress affirmed EPA's existing approach "to assure . . . opportunity for full public participation prior to a State's decision." And whether a state is issuing a minor permit or a major permit in attainment areas, they are allowing additional pollution in an area designated as having "clean" air. Congress intended for "full public participation" in this decision. In Part C, Congress clearly enumerated as one of the purposes of the Act's PSD provisions:

> to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a

[191] H.R. Rep. No. 95-294, at 7-8 (May 12, 1977).

> decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.[192]

In this declaration of purpose Congress clearly states its intent to "assure that *any* decision to permit increased air pollution in *any* area" is made only after "adequate procedural opportunities for informed public participation."[193] Congress did *not* limit this requirement to only "major" sources but instead used language that applies to *any decision to permit increased air pollution*—by its own terms including minor sources.

Congress is presumed to legislate with knowledge of the administrative backdrop already in place, and when it builds a new statutory scheme on top of an existing one without disturbing an agency's existing regulation, courts do not lightly assume that Congress meant to work an implicit repeal.[194] Here, Congress built a new major-source permitting regime directly on top of a pre-existing framework that already required public participation for every source, major and minor alike, and it left that framework in place. If Congress had believed EPA's existing regulations improperly imposed participation requirements the statute did not support, the 1977 Amendments were the place in which to say so, particularly given how substantially Congress restructured NSR in that same enactment. It did not. The proposed rule never identifies anything in the 1977 Amendments, their legislative history, or any later enactment suggesting that Congress found the pre-existing minor-source public participation requirement inconsistent with the Act. The best reading of that silence is that Congress endorsed it.

The House Committee Report discusses different options that the Committee could have considered in addressing the problem before it of how to prevent deterioration of air quality. The Committee notes why they disregarded the option of simply endorsing the existing EPA regulations with no further action. One of the reasons was that the existing regulation didn't go *far enough* in providing public participation opportunities.

> The third option, suggested by the testimony of Administrator Train, was that the Committee simply could endorse the Administration's present regulations. (1975 House Hearings, pp. 1181-2.) While the Committee appreciates the years of study and the careful analysis on which the current regulations (in effect since January 1975) are based, those regulations contain the following shortcomings . . .
> (2) the regulations do not provide for adequate participation by State and local governments and by the public in all decisionmaking.[195]

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[192] 42 U.S.C. § 7470(5).

[193] *Id.* (emphasis added).

[194] *See, e.g., Hikvision USA, Inc. v. Fed. Commc'ns Comm'n*, 97 F.4th 938, 946–47 (D.C. Cir. 2024) ("when Congress referred to the Covered List in the [statute] without questioning or discussing the makeup of that list, Congress affirmatively ratified the Covered List as it existed at the time of the SEA's passage") (citing *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 239–40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

[195] H.R. Rep. No. 95-294, at 140-141 (May 12, 1977).

Congress consistently prioritized public involvement in decision-making about air pollution. The fact that they added provisions to PSD permitting to strengthen that program does not in any way diminish the importance of the public participation requirements EPA already applied to other types of permits. The Committee states they felt the existing regulations did not "provide for adequate participation . . . by the public in all decisionmaking." Congress thus did not see EPA's public participation requirements in state NSR programs as an exertion of EPA's authority into state and local matters. Instead they saw as distinct stakeholders the public, state/local government, and the Federal government, and they consistently prioritized public involvement in all decision-making about allowing more pollution.

This logic is apparent in a House Committee discussion on its decision to give states more control over designations of Federal lands:

> The committee believes that the public interest and full public participation is better advanced by a State redesignation process rather than conferring authority for redesignations on EPA or any other Federal agency. The committee rejects the approach taken in present regulations which attempts to assure public involvement and protection of the public interest by providing EPA veto power over all State classifications which it deems "arbitrary and capricious" and by assigning to the Federal land managers the authority to classify all Federal lands without regard to State concerns. The committee's approach, rather than providing EPA veto power over State decisions and Federal agency classification of Federal lands, utilizes a State/local reclassification process for State and Federal lands. In redesignating a Federal area from class I to class II, or redesignating any area class III, the States will be considered to have assured adequate public involvement and consideration of the public interest by meeting the following procedural requirements.
>
> First, the State must provide a satisfactory analysis of the health, environmental, economic, social and energy effects of the proposed redesignation. Second, public hearings are to be held in the areas proposed for redesignation. Third, the proposed redesignation must be approved by local governments representing a majority of the people of the areas affected by the redesignation and the State legislature must be consulted.
>
> The committee has chosen this approach so as to remove from the States the threat of EPA "second-guessing" the wisdom of every State decision and to provide the States control over air quality, over most Federal lands. Therefore, unlike the administration's regulations, the bill does not authorize EPA to disapprove any State redesignation decision on the ground that it is "arbitrary and capricious" or that environmental, health or other factors should have -been given more weight in the State's decision. The committee considers these judgments to be totally in the discretion of the State and local governments, properly reached through adequately informed, fair and open political processes.[196]

[196] *Id*. at 149-150.

This passage showcases how Congress was thinking about public participation as it provided States/local governments a greater role in air quality classification decisions. Congress sought to make sure states exercised that authority with "adequate public involvement and consideration of the public interest" and procedures allowing for "adequately informed, fair and open political processes."

c. Congress' Subsequent, Express Statutory Commands for Public Participation Confirm Its Consistent View That Participation Is Integral to Effective Clean Air Act Permitting.

Every time Congress has separately addressed public participation in Clean Air Act permitting, it has only added to the participation baseline already in place. This pattern confirms that Congress has never regarded public participation in permitting, including in the pre-existing minor NSR framework, as an unwarranted regulatory imposition.

The Act's baseline SIP-development requirement—itself predating both the 1973 NSR regulations and the 1977 Amendments—required that every SIP "be adopted by the State after reasonable notice and a public hearing."[197] In 1977, when Congress created the PSD program for major sources, it went further and wrote a public hearing requirement directly into the statute: no PSD permit may issue unless "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations."[198] In 1990, when Congress created the Title V operating permit program, it did the same thing again: State permit programs must include "adequate, streamlined, and reasonable procedures for . . . public notice, including offering an opportunity for public comment and a hearing."[199] EPA has explained that one purpose of Title V is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements."[200]

Each of these enactments reinforced the public participation baseline EPA had already established for NSR permitting in 1973. Nothing about Congress' decision to write an explicit hearing requirement into the 1977 PSD provisions, or an explicit notice-and-comment-and-hearing requirement into the 1990 Title V provisions, suggests that Congress thought EPA's pre-existing, undifferentiated minor NSR participation requirement was legally unsound, unnecessary, or beyond EPA's authority. To the contrary, each subsequent statute moved in the same direction—toward more public participation in permitting decisions, not less. The fact that Congress felt it important to expressly affirm extensive public participation requirements for PSD and Title V permits only confirms that Congress considered public participation to be a

[197] 42 U.S.C. 7410(a)(1).

[198] 42 U.S.C. 7475(a)(2).

[199] 42 U.S.C. 7661a(b)(6).

[200] 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

crucial part of all Clean Air Act proceedings. Reading fifty years of this consistent legislative pattern to now mean that EPA must strip public participation entirely out of minor NSR inverts the record rather than reflecting it.

2. Congress Preserved EPA's Authority to Require Public Participation in all NSR Permitting.

For all the reasons explained in part A, the best reading of the statute is to require public participation in all NSR permitting, including for minor sources. Congress also preserved EPA's *authority* to require public participation in all NSR permitting. As explained above, Congress adopted the 1977 Amendments with full knowledge and after close scrutiny of EPA's NSR regulations—which had required public participation for all NSR permitting with no distinction between major and minor sources. The decision to not limit or change that portion of EPA's regulation demonstrates, at the very least, a preservation of EPA's authority to issue such requirements—without requiring any additional finding by EPA.

3. The Act's Plain Language Preserves EPA's Authority to Require Public Participation in Minor NSR Permitting.

Contrary to EPA's assertions, Clean Air Act section 110(a)(2)(C)'s plain language preserves EPA's authority to require public participation where, as shown here, a public participation requirement is "necessary to assure that national ambient air quality standards are achieved."[201] EPA's argument that the phrase "regulation of the modification and construction of any stationary source" does not bestow EPA authority to issue procedural requirements for state minor NSR programs is incorrect and has no basis in the text.[202]

a. EPA May Issue State Plan Requirements that Are "Necessary" to Assure Achievement of the NAAQS.

The main statutory provision that EPA reads as a "limit" on EPA's authority in fact does the opposite. Section 110(a)(2)(C) requires that State implementation plans

> include a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D…

EPA is tasked with approving only state plans that meet these requirements.[203] Thus, if public participation requirements in state minor NSR programs are "necessary to assure that national

[201] 42 U.S. § 7410(a)(2)(C).

[202] *Id*.

[203] *See id*. § 7410(k)(3).

ambient air quality standards are achieved," EPA *must* disapprove a plan that lacks such requirements. [204]

Moreover, the best reading of "necessary" in section 110(a)(2)(C), in context, is EPA's original reading as reflected in its 1973 regulations that state permitting programs for construction or modification of *any* source must require public notice and the opportunity to comment. The plain and ordinary meaning of "necessary" is that which "is required to achieve a desired goal," but this varies by statute and must be read in context.[205] The goal specified by section 110(a)(2)(C) is "to assure that national ambient air quality standards are achieved." Reading public participation out of "necessary" for minor NSR conflicts with the express object of that term in section 110(a)(2)(C). Allowing issuance of minor source permits without public participation is inconsistent with the express aim of the NSR program, i.e., to assure that the NAAQS are met. EPA's interpretation leaves the question whether a source will be subject to controls sufficient for NAAQS compliance entirely up to the source and the regulator, with no oversight by EPA or the public. This would create a potential loophole around Congress's direction that SIPs include a program "to provide for…[the] regulation of the modification and construction of *any* stationary source…as *necessary* to assure" attainment of the NAAQS, regardless of the source's categorization as major or minor.[206] Therefore, EPA's proposed interpretation that public participation is not necessary for minor NSR is not the best reading of the statute.

b. EPA Previously Determined Public Participation in Minor NSR Was "Necessary."

When EPA initially adopted its regulations, it constrained itself to imposing requirements it believed were "necessary" to achieve and maintain the NAAQS. When issuing the ANPR, EPA stated that it was "set[ting] forth such requirements" "to require State plans to contain procedures" "to adequately and effectively provide for the maintenance of the standards."[207] When proposing the regulations—including public participation requirements that EPA is now proposing to remove—EPA stated that "the primary purpose of the review procedures is to insure that proposed projects are designed and located in a manner consistent with air quality requirements."[208] When EPA adopted the final regulations, it noted it was rejecting arguments by air pollution control agencies that "the public comment requirements would impose an unnecessary burden" and instead stated: "In the Administrator's judgment, the proposed requirement for public comment represented a reasonable balance . . . and was consistent with the emphasis in the act on public participation in developing and carrying out the implementation plans."[209]

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[204] *Id*.

[205] *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d, 502, 510 (D.C. Cir. 2003).

[206] *Id*. (emphasis added).

[207] *See* 38 Fed. Reg. at 6,279.

[208] 38 Fed. Reg. at 9,599.

[209] 38 Fed. Reg. at 15,834, 15,835.

For reasons set forth above, Congress's decision to not disturb those requirements or explicitly limit EPA's authority is best read as both an endorsement of EPA's decision that such requirements were in fact necessary to achieve the NAAQS and of EPA's independent authority to issue such requirements through its regulations when it deems such requirements "necessary."

c. The Statute Places No Restriction on EPA's Requirement of Procedural Protections in State Plans When EPA Determines Such Requirements Are "Necessary."

EPA suggests that it lacks the ability to include public participation and other process elements as minimum requirements for state minor NSR plans because they are not a form of "regulation of the modification and construction of any stationary source. . . as necessary to assure that [the NAAQS] are achieved."[210] EPA claims that

> the term is most naturally read as referring to substantive restrictions, such as permitting requirements and limitations. Such restrictions may include procedural aspects as a practical matter, but the key element is the restriction itself rather than the ancillary processes involved in carrying out the restriction. For this reason, reading procedural elements like minor NSR public participation into the term "regulation" would be in tension with the breadth of the term "necessary" and the significant discretion afforded to States in crafting minor NSR programs. . . .While the statute does not prevent State or local air agencies from exercising discretion to adopt public participation requirements for minor NSR, it does not appear to allow the EPA to require minor NSR public participation by regulation or to insist on minor NSR public participation as a condition of approving an otherwise valid SIP submission.[211]

EPA's interpretation has no basis in the statutory text, which requires state plans to "include a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D."[212]

First, Congress required states to include "a program" "to provide for the" "regulation" of covered sources.[213] Importantly, Congress used the term "program," rather than specifying states issue specific types of emissions restrictions, as it did in section 110(a)(2)(A), which requires states to "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or

[210] 91 Fed. Reg. at 41,599.

[211] *Id.*

[212] 42 U.S.C. §7410(a)(2)(C).

[213] *Id*.

appropriate to meet the applicable requirements of this chapter."[214] If Congress had intended to limit the measures referenced by this provision, it would *not* have used such a broad term as "program." The term "program" can encompass a variety of measures, both substantive and procedural, with Merriam-Webster defining it as "a plan or system under which action may be taken toward a goal."[215] There is nothing in the statute to suggest that Congress intended program elements to be only substantive and not procedural.

Second, it is clear that the term "program" includes both procedural and substantive elements because the same paragraph clarifies that such "program" includes the "permit program as required in parts C and D."[216] As EPA itself notes, the permit program of C explicitly includes procedural elements including a public hearing and opportunity for written comments.[217] Based on this context and overall statutory scheme, the provision of 110(a)(2)(C) clearly includes procedural components of a state "program" that the Administrator determines to be necessary to assure the NAAQS.

Third, procedural and substantive measures are not so easily separated as to provide a clear boundary. EPA itself provides a caveat that, in its interpretation, "[s]uch restrictions may include procedural aspects as a practical matter, but the key element is the restriction itself rather than the ancillary processes involved in carrying out the restriction."[218] Procedural components of a program are tied directly to the sufficiency and efficacy of substantive restrictions. If EPA's role is primarily one of oversight and enforcement, with states playing a primary role in determining the substantive regulations of sources needed to achieve the NAAQS, the procedural requirements become even more important because they allow EPA to assess the sufficiency of the measures the state has adopted. That is, EPA's authority to provide procedural safeguards for state permit programs *allows* for greater state discretion over substantive measures.

Furthermore, EPA is applying its own standard inconsistently. EPA's proposal leaves in place other (non-public participation related) procedural requirements for minor NSR permits at 40 C.F.R. § 51.160. These requirements include procedural requirements to ensure the state has information before it to properly assess *whether* there will be a violation of the NAAQS and measures needed to prevent such a violation. Public participation requirements fulfill the exact same purpose and flow directly from the authority EPA has in the Act to oversee state programs to ensure they will maintain and achieve the NAAQS. EPA does not, and cannot, explain why some "procedural" requirements are acceptable while others are not.

d. EPA Fails to Explain its Reversed Position.

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[214] *Id*. §7410(a)(2)(A).

[215] Mirriam-Webster, *Program*, https://www.merriam-webster.com/dictionary/program (last visited Aug. 19, 2026) (Attachment U).

[216] 42 U.S.C. §7410(a)(2)(C).

[217] *See* 42 U.S.C. §7475(a)(2)

[218] 91 Fed. Reg. at 41,600.

The proposed rule is arbitrary and capricious because EPA fails to explain *why* it has changed its mind about public participation requirements being "necessary" to ensure compliance with the NAAQS. Courts have held that "when. . . [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy" it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[219]

EPA acknowledges in a conclusory fashion that "EPA does not believe that minor source public participation is generally 'necessary to assure that [the NAAQS] are achieved' in the context of developing a program for the 'regulation of' minor source construction and modification."[220] EPA also cites to feedback from some state and local agencies received during 2022-2023 stakeholder outreach meetings. Putting aside whether that feedback actually supports EPA's new position, as discussed below, EPA fails to acknowledge that it previously reviewed and rejected the same arguments it appears to be putting credence in now, and EPA offers no explanation for doing so.

EPA cites a series of stakeholder outreach meetings from 2022 to 2023 wherein certain state and local agencies expressed concern about the capacity of "air permit programs' limited budgets, time, and personnel" to carry out the public participation requirements for minor NSR permits.[221] EPA claims to have received feedback that state and local agencies thought that "providing public participation on all minor source preconstruction activities would be an ineffective use of their limited resources" compared to focusing solely on major sources. EPA also provides the feedback included "that many of the proposed minor source preconstruction activities they reviewed were so small . . . they received very few comments, most of which were either insubstantial or non-actionable," and that agencies feared "subjecting all such activities to public participation requirements risked overwhelming the public with inconsequential information about minimal-impact minor sources an[222]d modifications, which could discourage public participation in the overall NSR decision-making process instead of promoting it."[223]

As discussed above, EPA received similar feedback when it first adopted the public participation requirements, citing feedback from state agencies that such requirements would be unnecessary and burdensome. At the time, EPA believed the approach it took represented a workable balance between competing considerations. But EPA does not acknowledge or explain why it is now changing its position.

Moreover, EPA arbitrarily failed to consider alternatives to removing public participation requirements entirely. EPA does not appear to have considered options such as supporting states

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[219] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

[220] 91 Fed. Reg. at 41,597.

[221] *Id*. at 41,600.

[222] *Id.*

[223] *Id.*

with resources to streamline and carry out public participation requirements more efficiently or to identify a subset of actions where public participation requirements are less necessary that would still maintain procedures for the large and highly-polluting yet "minor" actions these comments illustrate. There is a spectrum of options EPA could have pursued to address any legitimate concerns about state and local resources short of fully removing requirements.

EPA also cites two articles by Pew Charitable Trusts concerning states grappling with budget gaps as evidence of "further restrict[ions on] the resources available to state and local air agencies" but provides no additional details about the studies.[224] Looking more closely at those articles, neither includes any specific discussion of air permitting or environmental regulation generally.[225] This lack of specification is important because the Clean Air Act requires states to demonstrate adequate funding and personnel to address air quality implementation throughout the state, including sufficient permitting fees.[226] Accordingly, to the extent states do not have sufficient resources for public notice and comment in issuing air permits, they can raise their permitting fees—a CAA-specific solution not addressed in these Pew studies. EPA has not quantified the costs for states and local entities to carry out public participation requirements or provided any particularized evidence to draw a link between state resources constraints and minor NSR public participation.

Furthermore, EPA simply recites this input as neutral background information and does not explain to what degree EPA found this feedback persuasive or relied on it when making the decision to propose to remove public participation requirements.[227] EPA instead primarily relies on a statutory argument that it no longer has discretionary authority to require public participation in state plans. But, as explained throughout this section, EPA's statutory argument is incorrect and EPA does *not* lack the authority. And "[a]n agency decision cannot be sustained [] where it is based not on the agency's own judgment but on an erroneous view of the law."[228] To support its reversal, EPA must demonstrate that minor NSR programs will achieve and maintain the NAAQS even in the absence of public participation requirements. These comments explain why EPA *cannot* make that showing.

For all the reasons discussed in Sections I and V of these comments, EPA's existing NSR regime for state plans fails in many ways to identify and address air pollution increases that will lead to violations of the NAAQS. Removing public participation opportunities will only weaken

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[224] 91 Fed. Reg. at 41,600.

[225] *See id.* at n. 50, citing J. Goodman, *Lawmakers Face Budget Crunches, Tough Decisions to Close Expected Shortfalls*, Pew Charitable Trusts (2025), https://www.pew.org/en/research-and-analysis/articles/2025/01/13/lawmakers-face-budget-crunches-tough-decisions-to-close-expected-shortfalls (Attachment V); L. Farmer, *States Tread Carefully With Budgets as Gaps and Revenue Uncertainty Loom*, Pew Charitable Trusts (2025), https://www.pew.org/en/research-and-analysis/articles/2025/07/10/states-tread-carefully-with-budgets-as-gaps-and-revenue-uncertainty-loom (Attachment W).

[226] CAA § 7410(a)(2)(E)(i) and (L).

[227] As discussed elsewhere, EPA's failure to disclose the full record from that stakeholder engagement is arbitrary and capricious as it prevents the public from fully understanding and weighing the evidence EPA has before it and testing it.

[228] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

oversight and information that regulators have before them to assess and prevent violations of the NAAQS. EPA does not explain how—in the absence of this authority—it will continue to ensure the NAAQS are achieved. EPA is not, for example, determining that it no longer has authority to require public participation requirements but deciding to fill the gap that creates through other measures. EPA is removing a protection in a factual context that shows the program is not currently meeting Congressional goals without any acknowledgement of the practical impacts this will have or any plan to address those impacts.

e. EPA's Proposal is Arbitrary and Capricious Because it Contradicts Prior Factual Findings and Policies Which Helped Create The Problem At Issue

EPA's proposal is also arbitrary and capricious because the rationale for the proposal is to respond to a problem of the same Administration's creation. While EPA cites state budget crises as a rationale for the proposal, EPA neglects to mention that the Agency itself has contributed to this problem by implementing massive budget cuts for state and local programs. For example, in EPA's Fiscal Year 2026 budget, EPA completely eliminated its Categorical Grant for State and Local Air Quality Management[229], cut Federal Support for Air Quality Management, and made other cuts across state and tribal assistance grants by $2,631,362 to just 20% of 2025 levels.[230] EPA said that it was "returning the responsibility for funding local environmental air quality management programs to state and local entities"[231] and that the budget reflected "that EPA has invested hundreds of billions of dollars over several decades building state and local capacity and many programs are mature or have accomplished their purpose."[232] EPA has proposed further cuts to state and local support programs in its proposed Fiscal Year 2027 budget.[233]

EPA's proposal is at odds with the assertions and claims it has made in these budget documents and decisions. Specifically, EPA cannot on the one hand say that state and local programs have been adequately funded and "matured" sufficiently to carry out their function with reduced EPA support but then claim state and local programs are too under-resourced to carry out long-standing requirements of the Clean Air Act. EPA fails to explain how this policy can be reconciled with policies to withdraw support and funding for state and local air quality programs. EPA's budget documents do not discuss the lack of resources available for state and

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[229] EPA, United States Environmental Protection Agency Fiscal Year 2026 Justification of Appropriation Estimated for the Committee on Appropriations at 480 (June 2025), https://www.epa.gov/system/files/documents/2025-06/fy-2026-epa-congressional-justification.pdf (Attachment X).

[230] EPA, FY 2026 EPA Budget in Brief at 32 (May 2025), https://www.epa.gov/system/files/documents/2025-05/fy-2026-epa-bib.pdf (Attachment Y).

[231] EPA, United States Environmental Protection Agency Fiscal Year 2026 Justification of Appropriation Estimated for the Committee on Appropriations, *supra* note 229, at 480.

[232] *Id.* at viii.

[233] EPA FY 2027, Justification of Appropriation Estimates for the Committee on Appropriations at 153 (Apr. 2026), https://www.epa.gov/system/files/documents/2026-04/epa-fy27-congressional-justification.pdf (cutting Federal Support for Air Quality Management) (Attachment Z); *Id.* at VII ("The Budget continues the realignment of resources to address the reality that EPA has invested hundreds of billions of dollars over several decades building state and local capacity and many programs are mature or have accomplished their purpose.").

local governments and this Proposal does not discuss that EPA simultaneously believes state and local governments to be under resourced and needing relief from compliance with minor NSR public participation requirements but has also itself been cutting support because it believes these programs can adequately carry out Clean Air Act requirements with reduced Federal support.

f. EPA's Argument that Public Participation in Minor NSR is Unnecessary Because the Public Does Not Engage is Pretextual.

EPA' argument that public participation in minor NSR is overly burdensome because its costs are too high given minimal engagement is arbitrary and capricious because it is internally inconsistent and appears to be pretextual.

First, EPA's argument does not hold up because public processes that involve minimal or no public engagement are likely to be substantially less resource intensive than those that attract significant, widespread public engagement. If a permit proceeding does attract widespread public engagement, it is likely because the permit has significant air quality implications and is exactly the type of action where public notice and engagement plays an important role in ensuring adequate air quality protections.

Second, there is evidence that this rationale is pretextual because it directly contradicts EPA Administrator Lee Zeldin's reasoning for the policy change provided in a 2025 Fox News op-ed. In that op-ed, Administrator Zeldin previewed the forthcoming proposal stating: "Through the CAA permitting process, EPA will seek to address the minimum requirements for public participation when it comes to minor emitters so the protest of a few does not unnecessarily thwart progress for all Americans."[234] This statement suggests that the problem EPA is trying to solve is not that public participation is unnecessary because no one is participating but that the problem is that the public *is* engaging in participation opportunities on permitting decisions and that engagement *is* having the intended impact of affecting permitting decisions and EPA is trying to squash that impact. This is not a valid purpose to support a Clean Air Act rulemaking.

That EPA's statutory interpretation and policy arguments are pretextual is further supported by other statements that EPA has made suggesting this rule is primarily intended to shield permitting decisions about unpopular data center infrastructure from public scrutiny. An EPA News Release about the proposed rule claims: "This approach is intended to reduce administrative burden and responsibly speed up permitting, supporting American economic development and energy dominance."[235] This Administration has elsewhere indicated its intent to modify permitting procedures in order to allow accelerated data center development. President Trump issued Executive Order 14318, Accelerating Federal Permitting Of Data Center Infrastructure, which specifically directed EPA Administrator Zeldin to "assist in expediting permitting on Federal and non-Federal lands by developing or modifying regulations

[234] Lee Zeldin, *LEE ZELDIN: Trump's EPA clearing the regulatory path for America to dominate the global AI revolution*, Fox News (July 17, 2025), https://www.foxnews.com/opinion/lee-zeldin-trumps-epa-clearing-regulatory-path-america-dominate-global-ai-revolution (Attachment AA).

[235] EPA, *EPA Proposes to Streamline State and Local Permitting Process for Minor Sources* (July 1, 2026), https://www.epa.gov/newsreleases/epa-proposes-streamline-state-and-local-permitting-process-minor-sources (Attachment BB).

promulgated under the Clean Air Act (42 U.S.C. 7401 *et seq.*)."[236] EPA's 2027 Fiscal Year budget justification also proclaims as one of EPA's primary goals to "Make America the AI Capital of the World" and to "work to facilitate investment in and development of AI supporting infrastructure within the U.S. by completing reviews and providing updates under the New Source Review (NSR) clean air permitting program."[237]

EPA is thus on the one hand claiming that state/local agencies "received very few comments" during public comment periods that were held on minor NSR decisions, Proposal at 41600, and on the other hand claiming public engagement is sapping state resources and putting up barriers to progress. Both things cannot be true. Here, "the evidence tells a story that does not match the explanation the [Administrator] gave for his decision," and the proposal is invalid because EPA has failed to provide its "genuine justification[]" for the rule. *DOC v. New York*, 588 U.S. 752, 783-85 (2019).

It is furthermore egregious that EPA nowhere in the preamble and rationale for this rule explains that it has been motivated to make these changes to speed up permitting for data centers and AI infrastructure. This rationale is essential for the public to understand the implications of this action. Despite this clearly being an intended purpose, EPA does not discuss the air emission implications of speeding up reviews or discuss health impacts from removing public participation requirements from these decisions. The Clean Air Act provides that a "promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation"[238] To the extent that EPA is basing the rule upon information that public participation requirements are posing a barrier to AI development–EPA must place such data and information supporting this finding in the docket for commenters to assess and provide input on.

g. Public Participation Requirements *Are* Necessary to Achieve and Maintain the NAAQS.

Public participation in minor NSR permitting is critical to ensuring that permit limits are sufficient to achieve and maintain compliance with national ambient air quality standards as required by Clean Air Act §110(a)(2)(C). EPA argues that it does not believe that minor source public participation is "necessary to assure that [the NAAQS] are achieved" in the context of developing a program for the "regulation of minor source construction and modification," but it cites *no* record evidence supporting this statement.[239] As demonstrated by the specific permitting examples documented by Commenters, [240] public participation is directly related to the development of stronger and more accurate minor NSR permits that serve to prevent violations of the NAAQS. Here we discuss documented benefits of public participation from relevant

[236]Exec, Order No. 14,318, 3. C.F.R. 90 Fed. Reg. 35,385 (Jul. 28, 2025), https://www.whitehouse.gov/presidential-actions/2025/07/accelerating-federal-permitting-of-data-center-infrastructure/ (Attachment CC).

[237] FY 2027, Justification of Appropriation Estimates for the Committee on Appropriations, *supra* note 233, at 132.

[238] 42 U.S.C. Section 7607(d)(6)(C).

[239] 91 Fed. Reg. at 41,597.

[240] Public Comments Table, s*upra* note 84.

academic literature. EPA has failed to address the loss of these benefits or to analyze the impact on state's ability to maintain and achieve the NAAQS.

Public participation is not a procedural formality layered on top of rulemaking; it goes to the substance of what conditions permits impose and whether NAAQS are actually achieved. The literature of various academic fields has concluded that public participation is key to good environmental governance for three reasons: (1) public participation allows a plethora of diverse voices to be heard; (2) it improves the quality of decision-making by ensuring decision-makers consider various potentially overlooked aspects of the problem; and (3) it builds public trust and legitimacy in the government.[241]

First, public participation is a key instrument in improving environmental decision-making and outcomes because it incorporates diverse environmental values into decision-making. Public participation can improve the democratic process and its outputs when it is inclusive and the "right people" provide feedback, such as those stakeholders affected by a decision or those with unique information.[242] By engaging in public participation, marginalized communities and other relevant stakeholders are included in decisions that affect them, improving outcomes.[243]

Second, public participation improves the quality of decision-making by catching issues that might otherwise be overlooked. The wide-sweeping nature of environmental governance, which implicates various interests, concerns, and scientific expertise, introduces a real risk that government decision-makers will discount important issues or the views of an affected community.[244] Scholars have determined that providing opportunities for public participation guards against this risk, giving the government the chance to avoid problematic exercises of power when making decisions about environmental quality, while helping to define and reconcile the sometimes opposing views that different stakeholders bring to an issue.[245] Without that participation, decision-making reverts to a top-down model in which policies may be implemented that completely disregard local priorities.[246]

Third, public participation can increase the legitimacy of governmental decisions. Studies have consistently demonstrated that public acceptance of a decision depends less on the outcome itself but more on whether the decision-making process is perceived as fair.[247] This dynamic is

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[241] Sanne Akerboom and Robin K. Craig, *How law structures public participation in environmental decision making: A comparative law approach*, 32 Env't Policy and Governance 232, 233 (2022) (Attachment DD).

[242] Laura H. Berry, *et al.*, *Making space: how public participation shapes environmental decision-making* 2, Stockholm Env't Inst. (Jan. 2019) (Attachment EE).

[243] Mark S. Reed, *Stakeholder participation for environmental management: A literature review*, 141 Biological Conservation 2418, 2420 (2008) (Attachment FF).

[244] Akerboom, *et al.*, *supra* note 241, at 233.

[245] Harriet Bulkeley and Arthur P.J. Mol, *Participation and Environmental Governance: Consensus, Ambivalence and Debate*, 12 Env't Values 143, 151 (2003) (Attachment GG).

[246] Berry, *et al.*, *supra* note 242.

[247] *Id*.

especially pronounced in environmental decision-making, where science is an important aspect of the policy-making process and experts are frequently utilized to address issues of science and technology, such as ozone depletion and climate change. [248] Because these issues can feel abstract or inaccessible to the public, they often breed distrust, which in turn can spill over into political debate about the science itself.[249] However, bringing the public into decision-making can help to counter this dynamic while reinvigorating debate, moving policy forward, and restoring confidence in both the process and its outcomes. As Bulkeley and Mol (2003) explain, participatory processes can counter the loss of faith and trust in local government that members of the public frequently articulate by ensuring that the public has access to decision-making processes at large, rather than leaving those processes to the "articulate and traditionally influential groups."[250]

The effectiveness of this approach can be seen in empirical studies. For instance, a 2023 analysis of participation in environmental governance concluded that improved environmental outcomes were associated with increased public participation, including increased communication and dialogue between stakeholders and the government and increased participation by public health interest groups and stakeholders.[251] Furthermore, public participation in environmental decision-making has increasingly become considered a democratic right, entrenching the idea that it is necessary for effective decision-making.[252] It is widely agreed that public participation is highly desirable for environmental policy-making processes.[253]

4. CAA Section 301(a) Authorizes EPA to Require Public Participation in Minor NSR Permitting, and Section 110(a)(2)(C) Does Not Foreclose that Authority.

The Act's general grant of rulemaking authority to the Administrator, CAA § 301(a)(1), 42 U.S.C. § 7601(a)(1), is sufficient to sustain a requirement that minor NSR programs include public participation, and nothing about the "as necessary" standard of CAA § 110(a)(2)(C) forecloses that authority.

CAA § 301(a)(1) authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under" the Act.[254] The D.C. Circuit has recognized that this

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[248] *Id.*

[249] Berry, *et al., supra* note 242, at 2.

[250] Bulkeley & Mol, *supra* note 245, at 148-49.

[251] Jens Newig et al., *Does stakeholder participation improve environmental governance? Evidence from a meta-analysis of 305 case studies*, 82 Global Env't Change 102705 (2023) (Attachment HH).

[252] Reed, *supra* note 243, at 2418 (Public participation is enshrined as a democratic right by the United Nations Economic commission for Europe's 1998 Arhus Convention.).

[253] Ciaran O'Faircheallaigh, *Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making*, 30 Envtl. Impact Assessment Rev. 19 (2010) (Noting that the design and implementation of programs containing public participation mechanisms "remains contentious.") (Attachment II).

[254] 42 U.S.C. § 7601(a)(1).

authority "is sufficiently broad to allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act."[255] A regulation requiring public notice, comment, and an opportunity for hearing before a state or local agency authorizes construction of a new pollution source exemplifies such a reasonable procedural requirement.

EPA does not dispute that § 301(a) is available to it; the proposed rule itself invokes this same authority, noting that "[t]he EPA has long exercised the Agency's authority under the CAA to establish regulations governing the development and submission of SIPs pursuant to CAA section 110, and has the authority to reconsider and revise these regulations."[256] Here, however, the proposed rule treats § 110(a)(2)(C)'s broad direction that SIPs regulate "modification and construction of any stationary source" as an explicit bar on public participation that constrains EPA's section 301(a) authority.[257] But congress's delegation of broad authority is not the equivalent of silence or a prohibition on agency's discretion. It is a delegation to fill in the details.[258]

Nothing in the proposed rule identifies any statutory text that forecloses requiring minor NSR public participation. EPA has simply chosen, as a policy matter, to abandon its own longstanding construction of 110(a)(2)(C). Section 301(a) supplies EPA with ample authority to make the opposite choice.

5. EPA's Proposed Reading of the Statute Fails.

a. *Loper-Bright* did not eliminate EPA's authority to require states to include public participation in their minor NSR programs.

The Supreme Court's decision in *Loper Bright* does not require or justify EPA revisiting its decades-long regulations requiring public participation for minor source air permits. As an initial matter, in *Loper Bright* the Supreme Court clarified how courts prospectively should interpret statutes administered by federal agencies.[259] It expressly declined to disturb prior cases that relied on a *Chevron* interpretive framework and did not suggest agencies must now scour their regulations looking for decades-old interpretations to revise.[260] Moreover, the Court noted that to the extent agency interpretations are relevant to a court's inquiry into the correct meaning of a statute, those interpretations "issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's

[255] *NRDC v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994).

[256] 91 Fed. Reg. at 41,598.

[257] *Cf.* 86 Fed. Reg. 26,406, 26,414 (EPA's general-rulemaking authority under § 301(a) is broad, but the authority to issue ancillary regulations "is not open-ended, particularly when there is statutory language on point").

[258] *Loper Bright*, 603 U.S. at 394-95 ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.").

[259] *Id.* at 412.

[260] *See id.*

meaning."[261] That consideration strongly supports upholding EPA's existing rule that was adopted in 1973 and retained through the 1977 and 1990 revisions to the Act.

In any event, *Loper Bright* would only support EPA's revised interpretation of § 110(a)(2)(C) if that new interpretation is the "best reading" of the statute, which it is not for the reasons already explained. EPA says the best reading of the statute is that it delegates to EPA discretion to determine whether it is necessary for minor source NSR permitting programs to provide for public participation to assure that the NAAQS are achieved.[262] EPA further argues that the lack of specificity in Part A, and use of the phrase "as necessary," is a *limit* on EPA's authority to impose minimum regulatory requirements on states beyond what is needed to make a SIP approvable under § 110(k).[263] From this faulty logic, EPA then states that it is consistent with the statute for EPA to leave state air agencies' discretion to determine the degree of public participation required for minor NSR permitting. *Id.*

EPA's interpretation of the Clean Air Act is not the "best" interpretation for several reasons. First, while *Loper Bright* recognizes that there are instances where statutes "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme . . . or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,'" that flexibility is bounded by the terms of the statute.[264] Critically, EPA states that the Act's use of the phrase "as necessary" indicates a delegation of discretionary authority.[265] However, EPA's interpretation of § 110(a)(2)(C) as a *limit* on its authority to preclude public participation criteria for SIPs fails to give meaning to the remainder of that directive: i.e., "to assure that national ambient air quality standards are achieved." Rather, the best reading of § 110(a)(2)(C) is that the phrase "as necessary" empowers EPA to determine what elements of a plan are "necessary" to assure the NAAQS are achieved, subject to judicial review of whether "the agency's decision constitute[s] a sensible exercise of judgment."[266]

Here, EPA is not exercising any discretion; it is abdicating responsibility to assure that required SIP elements meet the ends mandated by Congress. The statute plainly requires that SIPs contain provisions for preconstruction review of any stationary source that includes whatever requirements are "necessary to assure" that the NAAQS are attained and maintained. Nowhere in the preamble does EPA explain how its proposal to *eliminate* public participation requirements for minor sources and synthetic minor source permitting would meet the statutory requirement to assure that SIPs contain the elements "necessary" to attain and maintain the NAAQS. EPA says it "believes" that public participation is not "necessary" for minor source permitting without providing any basis for that statement whatsoever:

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[261] *Id.* at 394.

[262] 91 Fed. Reg. at 41,599.

[263] *Id.*

[264] *Loper Bright*, 603 U.S. at 394-95 (internal quotations and citations omitted).

[265] *See* 91 Fed. Reg. at 41,599.

[266] *Loper Bright*, 603 U.S. at 388.

> Although the EPA believes that procedures for minor NSR public participation typically will not ''necessary,'' as compared to substantive regulatory requirements, State and local air agencies may determine that public participation requirements are among these features or otherwise desirable.[267]

EPA's statement does not reflect the best interpretation of the statute; it is not an interpretation at all. Rather, EPA is making a conclusory judgment that it *believes* public participation is not "necessary" for minor source permitting without any explanation. An "agency cannot reach whatever conclusion it likes and then defend it with vague allusions to its own expertise."[268] As explained elsewhere in this comment, bare assertions are not adequate justifications for EPA action under the arbitrary and capricious standard.[269]

To the extent that EPA suggests its proposed interpretation of § 110(a)(2)(C) gives states discretion to include public participation requirements as they see fit, that too is contrary to the best interpretation of the statute. The Clean Air Act requires EPA to ensure that a state's implementation plan "meets all of the applicable requirements,"[270] one of which is that it "include a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved."[271] EPA cannot remove public participation requirements from minor NSR programs, as doing so would impermissibly allow minor NSR programs that are unable to assure achievement of the national ambient air quality standards.

While states have discretion to determine what specific measures to include in their SIPs, subject to the CAA's minimum requirements, "Congress tasked EPA with ensuring that SIPs comply with the Act's requirements."[272] EPA is responsible for establishing the NAAQS and assuring that SIPs contain measures necessary to attain and maintain the NAAQS.[273] EPA's proposal to leave it to state air agencies to determine whether to include public participation in minor source permitting would abdicate its responsibility to assure the sufficiency of those SIPs to attain and maintain the NAAQS.

What is worse, EPA's proposal hints that the "discretion" it is providing to states to include public participation is in fact a presumption against public participation requirements for minor sources, unless a state shows that public participation requirements are necessary or otherwise appropriate under the CAA.[274] Neither the text, context, or other statutory indicators, nor EPA's preamble statements would support such a restrictive reading of § 110(a)(2)(C).

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[267] 91 Fed. Reg. at 41,597.

[268] *Sierra Club v. Env't Prot. Agency*, 972 F.3d 290, 298 (3d Cir. 2020).

[269] *See supra* at 46-49.

[270] 42 U.S.C. § 7410(k)(3).

[271] 42 U.S.C. § 7410(a)(2)(C).

[272] *Env't Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. Env't Prot. Agency*, 94 F.4th 77, 85 (D.C. Cir. 2024).

[273] See *id*. (citing 42 U.S.C. 7410(k)).

[274] *See* 91 Fed. Reg. at 41,597.

Under no circumstances should EPA use its discretion to constrain states' ability to include public participation in their minor source permitting programs.[275]

b. The 1977 Amendments Preserved Public Participation Requirements for minor New Source Review

EPA misreads the statute and its legislative history in concluding that the 1977 Clean Air Act Amendments addition of Part C and Part D requirements somehow implicitly revoked EPA's authority to require public participation in minor New Source Review programs.[276] As explained above, legislative history shows Congress refusal to expressly remove such requirements served as an endorsement of EPA's existing approach. Nowhere in the statute is there textual support for EPA's position that the adoption of more detailed requirements in Part C and Part D created a "historical inconsistency"[277] with EPA's longstanding minor NSR requirements.

Indeed, when Congress adopted the 1977 amendments, it explicitly included a savings clause declaring:

> all rules [and] regulations . . . issued, made, or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act . . . not suspended by the Administrator or the courts, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act.[278]

Congress preserved EPA's existing NSR rules - including the public notice and comment requirement for minor NSR permits and intended them to remain in place unless EPA took action to modify the rules in accordance with the amended Act.. If Congress had wanted EPA to repeal public participation requirements for minor NSR programs or to remove EPA's authority entirely to maintain them it would have explicitly said so. Moreover, for almost 50 years EPA itself has refused to interpret the statute in the way EPA now proposed –even as it promulgated other NSR regulations to implement Part C and Part D–providing further significant evidence that Congress did not intend to eliminate the public participation requirement for minor source permits. In fact, in recodifying the public participation provision in 1986, EPA rejected language that would have limited a part of 40 CFR 51.161 to only major sources. Specifically, EPA had initially proposed to limit the notice requirement of 51.161(d) to major sources, but in the final rule rejected that change:

> The EPA noted that the last two sentences of the proposed § 51.161(d) stated "For pollutants where no designations are established, such as for lead, a copy of the notice is required for all major sources. The definition of a major source for lead is

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[275] *See Union Electric Co. v. Env't Prot. Agency*, 427 U.S. 246, 265-69 (1976) (finding that EPA cannot disapprove SIPs that are more stringent than CAA requirements).

[276] 91 Fed. Reg. at 41,598-99.

[277] 91 Fed. Reg. at 41,599.

[278] Pub.L. 95-95, Title IV, § 406, Aug. 7, 1977, 91 Stat. 795, as amended Pub.L. 95-190, § 14(b)(6), Nov. 16, 1977, 91 Stat. 1405.

given in § 51.100(k)(2)." **In these two sentences, the term "major" was incorrectly proposed and is replaced with the term "point" in this action.**
51 FR 40656, 40659 (1986) (emphasis added). This language reaffirmed EPA's longstanding intent for section 51.161 to apply beyond just major sources. In the extensive 1990 amendments to the Act, Congress evidenced no intent to overturn that interpretation. As noted elsewhere in these comments, Congress' failure to overturn EPA's longstanding requirement for public notice and comment on minor source permits through two major Clean Air Act amendments evidences Congressional approval of that requirement.

c. EPA's Reading of the Statute is Inconsistent with Enforcement Provisions of the Act.

EPA's interpretation of the statute also conflicts with Congress's command in § 110(a)(2)(C) that SIPs contain appropriate enforcement of emissions limitations, which is supplemented by the Act's citizen enforcement provisions.[279] While Parts C and D of the Title I provide specific details that SIPs must contain in the PSD and NNSR permitting programs for major sources, § 110(a)(2)(C) requires SIPs assure attainment and maintenance of the of the NAAQS is not impaired by construction or modification of "any stationary source."[280] Because the degree of preconstruction analysis of emissions that must be undertaken and the level of emissions control required turn on whether a source is major or minor, that determination is one that should be made with full public participation. Preventing public access to relevant information regarding sources' compliance with permitting requirements, including whether minor or major NSR applies, inhibits enforcement.[281]

d. EPA's Reading of the Statute Creates an Inconsistency with Public Participation Requirements in NNSR.

EPA's reading of the statute's silence on public participation requirements to mean EPA has neither the obligation nor discretion to require public participation in state minor NSR programs cannot be the "best reading" of the statute because it would mean abolishing public participation requirements in NNSR permits as well.

EPA notes that "[a]lthough the statutory requirements at CAA title I, part C expressly include a public participation provision and the statutory requirements at CAA title I, part D do

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[279] 42 U.S.C. §§ 7410(a)(2)(C), 7604.

[280] *Cf. New York v. Env't Prot. Agency*, 443 F.3d 880, 884-85 (D.C. Cir. 2006) (holding that "any" means any emissions increase and invalidating expansion of routine maintenance exception to NSR to include equipment replacement that does not exceed 20% of the value of the original equipment as contrary to Congress's requirement that "any physical change" constitutes a modification subject to NSR).

[281] *Cf. Sierra Club v. Env't Prot. Agency*, 972 F.3d at 307-308 (invalidating EPA's approval of a SIP that left recordkeeping requirements to the state's internal procedures that excluded public access to information related to compliance with emissions limitations, because it would "tether enforcement of the Clean Air Act safeguards to the vicissitudes of [the] political winds of state permitting agencies" and make regulation dependent on "the candor or veracity of the very entities being regulated"); *New York v. Env't Prot. Agency*, 413 F.3d 3, 35 (D.C. Cir. 2005) (holding that when a state proposal's lack of sufficient reporting requirements prevents the EPA from conducting enforcement, a given regime thereby fails to comply with the Clean Air Act).

not." Proposal at 41599 n. 43. Rather than admit the problem this creates for applying EPA's statutory interpretation, EPA dodges the question by declaring

> the EPA has provided by regulation for a uniform approach based on the parallel structure and purpose of the two major source NSR programs (i.e., PSD and NNSR). The EPA is not reopening or revisiting this issue in this rulemaking, which construes the statutory text in CAA section 110(a)(2)(C) and not the statutory text in parts C and D of CAA title I.

Id. Statutory language must be construed as part of the statutory context.[282] EPA recognizes that Congress's assertion of the importance and centrality of public participation in PSD permitting is unambiguous.[283] Part C starts out by declaring a Congressional purpose "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process."[284] It goes on to detail specifically the requirement that there be a public hearing, information provided to the public about the air quality implications of the permit, and opportunity for the public to submit oral and written presentations.[285]

Meanwhile, Part D, pertaining to major sources in nonattainment areas, contains no mention of public participation requirements. Across the board otherwise, the requirements of nonattainment NSR are more stringent than for PSD—reflecting that greater action is needed in nonattainment areas to achieve the NAAQS in the first place. NNSR has more stringent requirements for installation of control technology (lowest achievable emission rate vs. best available control technology for PSD) and requires the procurement of offsets. As explained in the legislative and regulatory history above, EPA has always required public participation in issuance of these permits and Congress did not touch that requirement when it adopted the 1977 Amendments against EPA's existing regulatory backdrop.

EPA is now simultaneously (implicitly) claiming it does have authority to continue to require public participation in issuance of NNSR permits—despite the absence of such requirement in the NNSR provisions—as it disclaims authority to require public participation for minor NSR permits—solely based on the same absence of statutory language to that effect. This logic does not hold; EPA cannot read statutory language in one area of the statute as a limit on its authority, while reading the same language in another area of the statute as discretionary freedom.

It would not make sense for Congress to not have envisioned public participation requirements continuing for NNSR when in other aspects it created more stringent requirements for sources in these areas. Just as Congress endorsed EPA's existing practice of requiring public

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[282] *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 675 (2023).

[283] 91 Fed. Reg. at 41,599.

[284] 42 U.S.C. § 7470(5).

[285] *Id.* § 7475(a)(2).

participation for NNSR permits by declining to repeal those elements of EPA's 1973 regulations, Congress equally endorsed EPA's existing practice of requiring public participation in minor NSR permits.[286]

e. The Role Prescribed for State and Local Agencies by Congress Is Not Diminished by Public Participation Requirements.

EPA bases its interpretation that the statute "limits" EPA's ability to require public participation in minor NSR programs on the premise that "the statute [] offer[s] State and local air agencies a broad degree of discretion in developing programs to regulate the construction of new minor stationary sources and minor modifications to existing stationary sources."[287] EPA portrays public participation requirements for state minor NSR programs as an exertion of its own power and authority *over* state and local NSR programs. But the legislative history reveals Congress looked at the problem very differently.

In a House Committee report, the Committee states they felt the existing regulations did not "provide for adequate participation . . . by the public in all decisionmaking."[288] And the Committee speaks of this shortcoming in the same breath as discussing the existing regulations yield too much power to the Federal government at the expense of state and local governments *and the public*.[289]

As explained above, in the 1977 Amendments Congress *was* keenly focused on giving authority to states and local governments and limiting EPA's role in some of the *substantive* decisions about air quality. But nothing in the statute's text or legislative history suggests that Congress saw public participation requirements in state NSR programs as an exertion of EPA's authority into state and local matters. Instead, they saw the public, state/local government, and the Federal government as distinct stakeholders, and they consistently prioritized public involvement in all decision-making about allowing more pollution. The "limit" that EPA suggests for itself in fact harms the *public* and limits the *public's* role in NSR. But EPA does not have power to take away the role of the public in NSR that the legislative history shows Congress meant the public to have.

This is not a situation like in *Train v. NRDC*. In *Train*, the Supreme Court found that the EPA correctly interpreted Clean Air Act § 110 (a)(3), "which provides that the Agency shall approve any revision of an implementation plan which meets the § 110(a)(2) requirements

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[286] As further evidence that Congress endorsed EPA's existing public participation requirements for NNSR permits, see 42 U.S.C. § 7515, a savings clause enacted as part of the 1990 Amendments that explicitly states Congress' intent that "each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990, shall remain in effect according to its terms."

[287] 91 Fed. Reg. at 41,598; *see also, id.* at 41,600 ("While the statute does not prevent State or local air agencies from exercising discretion to adopt public participation requirements for minor NSR, it does not appear to allow the EPA to require minor NSR public participation by regulation or to insist on minor NSR public participation as a condition of approving an otherwise valid SIP submission.").

[288] H.R. Rep. No. 95-294, 95th Cong. 1st Sess. at 140-141 (May 12, 1977).

[289] *Id.*

applicable to an original plan," to "permit[] a State to grant individual variances from generally applicable emission standards, both before and after the attainment date, so long as the variance does not cause the plan to fail to comply with the requirements of § 110(a)(2)."[290] The Court reasoned that the Clean Air Act gave states "considerable latitude in determining specifically how the [NAAQS] would be met," and so EPA correctly read §110(a)(3)'s authority in broadly allowing States to grant variances *as long as* the 110(a)(2) standards were met.[291] Importantly, the Court held that these variances were permissible only if each individual variance was submitted to EPA as a SIP revision (after notice and comment at the state level) and EPA determined that the revision would meet all the applicable SIP requirements, including (but not limited to) assurance of attainment and maintenance of the NAAQS. The situation in *Train* is different than the situation here, because in *Train* the Agency was confronted with a situation in which it could objectively and independently determine whether the state's grant of a variance would lead to violations of the NAAQS. EPA could rely on air quality modeling of covered sources to determine whether the state's action would comply with §110(a)(2) and continue to provide for timely attainment and maintenance of the NAAQS.[292]

Here, EPA has failed to show that state programs without public participation requirements can and will consistently "assure" compliance with the NAAQS. The agency has not demonstrated why such requirements are no longer "necessary." EPA has not articulated any specific methodology to determine what factors or elements state plans need to demonstrate in order to meet §110(a)(2)(C)'s criteria without the inclusion of public participation requirements. Above we have explained some of the benefits that are lost with removal of public participation requirements. EPA has not acknowledged the loss of those benefits or explained how those protections may be retained (if at all) through the addition of other state plan elements.

In addition, while it is consistent with the statutory scheme for states and local governments to make some of the decisions about the substance of permits and air quality controls, EPA has an important role in establishing the *process* used to reach those decisions and ensuring the Agency has an accurate record on which to judge the state's consideration and addressing of the relevant factors. If EPA fails to require public participation in state minor NSR programs, EPA will have a less robust record on which to judge state NSR decisions. A thinner record to support state decisions could perversely *increase* EPA's role in judging the substance of state's decisions by thinning the process and record of state decisions and granting EPA more leeway to insert its own judgement rather than assessing only how the state considered the evidence and information the public put before it.

The interpretation of a statutory provision that broadly delegates authority without specifying specific authority on a single issue as a *limit* of EPA's authority to regulate on that issues has no basis in the text. If Congress had wanted to prohibit EPA from requiring public participation in minor NSR programs, Congress would have explicitly prohibited that existing practice when they adopted the 1977 Amendments. Even if one construes Congressional silence on the issue as meaning the statute itself does not require public participation in minor NSR

[290] *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 70 (1975).

[291] *Id.* at 86-87.

[292] *Id.* at 79-80.

programs, there is no link to get from there to the conclusion that the amendments *removed* EPA's authority to require public participation in minor NSR. And if Congress had wanted EPA to make a new affirmative decision that public participation requirements were "necessary" before it included such requirements, it also would have made that clear.

C. The Proposal Would Violate the Act's Anti-Backsliding Provisions for Nonattainment Areas

The Act contains two separate provisions barring EPA from weakening Clean Air Act requirements in nonattainment areas. Section 172(e) of the Act, 42 U.S.C. §7502(e) provides that after NAAQS revisions, EPA rules must provide for controls which are "not less stringent than the controls applicable" to nonattainment areas before the NAAQS revision. Section 193, 42 USC § 7515, provides that: "No control requirement in effect… before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant." Each of these provisions bars EPA's proposed elimination of its longstanding public participation requirements for minor source permitting in nonattainment areas.

Section 172(e)

Section 172(e) of the Act provides as follows:

> If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

Although applicable by its terms to situations where EPA relaxes a NAAQS, EPA has construed this provision as also applying after the strengthening of a NAAQS, an approach upheld by the courts.[293] The D.C. Circuit has broadly construed the "controls" protected by §172(e) to include process requirements. For example, the court has held that §172(e) bars relaxation of requirements to conduct permitting processes, to conduct reviews of transportation programs and projects, and to prepare emission fee programs and contingency plans that might never be triggered.[294] It has expressly rejected the notion that "controls" for purposes of §172(e) are limited to measures that produce quantifiable emission reductions.[295] EPA has also identified the

[293] *E.g., South Coast Air Quality Mgmt. Dist. v. Env't Prot. Agency*, 472 F.3d 882, 899-900 (D.C. Cir. 2007) ("*South Coast I*"); *Nat. Res. Def. Council v. EPA*, 571 F.3d 1245, 1270-1271 (D.C. Cir. 2009).

[294] *South Coast*, 472 F.3d 900-904; *South Coast Air Quality Mgmt. Dist. v. Env't Prot. Agency*, 882 F.3d 1138, 1148-1149 (D.C. Cir. 2018) ("*South Coast II*").

[295] *South Coast I*, 472 F.3d at 901.

requirement for enhanced ambient monitoring in CAA §182(c)(1), 42 U.S.C.§7511a(c)(1), as a control subject to the Act's antibacksliding provisions.[296]

The public participation requirements at issue here are controls protected by §172(e). They were first promulgated in 1973, prior to the post-1990 revision of NAAQS for ozone, PM2.5, PM10, SO2, NO2, and lead. They are an integral part of the process to assure that national ambient air quality standards are achieved, as required by 42 U.S.C. §7410(a)(2)(C). *See* 40 CFR §§ 51.160 (a)-(c) (requiring applicants to submit information sufficient to determine whether the source will interfere with attainment or maintenance of standards) and 51.161 (requiring opportunity for the public to review and comment on that information). The public participation requirements facilitate a more searching review of proposed new emitting facilities than would otherwise be required, defer new polluting activity until after the public comment period and consideration of comments, and act as an important check on allowing increased pollution. As shown elsewhere in this submission, public comment has in fact often led to more protective minor source permits than initially proposed. EPA itself has stated that "[p]ublic participation is viewed as integral to effective air quality management."[297] For all the foregoing reasons, elimination of the public participation requirement would amount to less stringent control of minor sources in nonattainment areas in contravention of 42 U.S.C. §7502(e).

Section 193

As noted above, section 193 provides that "[n]o control requirement in effect… before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant." EPA first adopted the public participation rule at issue here in 1973, so it was plainly in effect prior to 1990. 91 FR at 41596. The mandatory public participation provisions of 40 CFR §51.161 qualify as "control requirements" for the same reasons they constitute "controls" for purposes of §172(e). At least one court has held that the term "control requirement" in section 193 is at least as broad as "emission standard or limitation" in section 304(f), 42 U.S.C. §7604(f).[298] "Emission standards and limitations" under §304 encompass procedural requirements connected with obtaining clean air permits.[299]

Further, EPA's proposal here fails to insure equivalent or greater emission reductions than the existing rule. As noted above, the public participation process facilitates a more rigorous review that can and does lead to stronger emission limitations for proposed emitting facilities. Repeal of public participation requirements cannot insure equivalent or greater reductions and therefore violates CAA section 193 as applied to nonattainment areas.

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[296] 40 C.F.R. §§51.900(f)(1), 51.l100(o)(8); 80 Fed. Reg. 12,264, 12,298-12,299 (March 6, 2015).

[297] EPA, *Managing Air Quality - Public Participation*, https://www.epa.gov/air-quality-management-process/managing-air-quality-public-participation (last updated Mar. 30, 2026) (Attachment JJ).

[298] *Citizens Against Columbus Center v. City of New York*, 967 F.2d 764, 773-774 (2d Cir 1992).

[299] *See, e.g.*, *Communities for a Better Environment v. Cenco Refining Co.*, 180 F.Supp.2d 1062, 1072, 1081-1082 (C.D. Cal. 2001)(requirement for a 30-day public comment period on proposed permits was an emission standard or limitation).

D. EPA's Statutory Analysis Ignores Critical Context

EPA focuses its attention on the language of section 110(a)(2)(C). However, the Act imposes other requirements for minor NSR programs. These requirements give EPA more than adequate authority to require public participation for state minor NSR programs.

1. Adequate Public Participation Is Necessary for Enforceability of Minor NSR Permit Terms and Conditions

Minor NSR permit terms and conditions must be both federally and practically enforceable. EPA entirely ignores this core requirement and the role of public participation in implementing it. But EPA itself, in the context of state operating permit programs, has stated that notice and opportunity to comment would be required for such programs, because it "would make enforcement by EPA and private citizens much more effective and practical."[300]As a result, EPA's proposal is arbitrary and capricious, and EPA's statutory analysis is fatally flawed.

a. Minor NSR Permit Terms and Conditions Are Federally Enforceable

While EPA has long held this position,[301] it follows from the plain language of the Act. First, sections 113(a)(1)(C) and 113(b)(1) of the Act give EPA a cause of action in federal district court for "any requirement or prohibition of an applicable implementation plan or permit."[302] The juxtaposition of "applicable implementation plan"[303] and "permit" show that permits issued under an approved SIP, such as minor NSR, fall within this provision.[304] Thus, minor NSR permit terms and conditions are federally enforceable.

This is confirmed by the plain language of the citizens' suit provisions in section 304. Section 304(a)(1) gives citizens a cause of action in federal district court "against any person" who is in violation of "an emission standard or limitation under this chapter."[305] In turn, "emission standard or limitation under this chapter" is defined to include "any other standard, limitation, or schedule established … under any applicable State implementation plan approved by the Administrator" as well as "any permit term or condition … which is in effect … under an applicable implementation plan."[306]

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[300] 54 Fed. Reg. 27,274, 27,283 (June 28, 1989).

[301] *See, e.g.* Letter from John S. Seitz, Director, to Doug Allard, President at 2 (Mar. 31, 1999), *available at* https://www.epa.gov/sites/default/files/2015-08/documents/capcoafe.pdf (Attachment KK); *see also* 40 C.F.R. § 52.23 (under section 113, EPA can enforce violations of "any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary [] sources").

[302] 42 U.S.C. §§ 7413(a)(1)(C), (b)(1).

[303] "Applicable implementation plan" is defined by the Act in relevant part as "the portion … of the implementation plan … which has been approved under section 7410 … or promulgated under section 7410(c)." 42 U.S.C. § 7602(q).

[304] Even if not, the catch-all provisions in section 113(a)(3) and (b)(2) would apply, as they apply to violations of a "requirement or prohibition of any … permit issued" under the Act. *See* 42 U.S.C. §§ 7413(a)(3), (b)(2).

[305] 42 U.S.C. § 7604(a)(1)

[306] *Id.* § 7604(f)(4).

b. Minor NSR Permit Terms and Conditions Must Be Practically Enforceable.

As the Act makes minor NSR permit terms and conditions federally enforceable, it necessarily follows that those terms and conditions must be practically enforceable. EPA itself has stated:

> [Practical enforceability] is an implied requirement of [federal enforceability]. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.[307]

EPA further explains practical enforceability in its General Preamble for the 1990 Amendments:

> Measures are enforceable when they are duly adopted, and specify clear, unambiguous, and measurable requirements. A legal means for ensuring that sources are in compliance with the control measure must also exist in order for a measure to be enforceable. This principle is well grounded in the Act. New section 110(a)(2) of the Act requires that SIP's include "enforceable emission limitations and other control measures" and "a program to provide for the enforcement of the measures" in the plan. Court decisions made clear that regulations must be enforceable in practice. A regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit.[308]

EPA has explained at length the requirements for practical enforceability. For example:

> [P]ractical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.[309]

EPA entirely fails to discuss the impacts of lack of notice and comment for practical enforceability and ignores this requirement in its analysis of the statutory language. This is both arbitrary and capricious as well as faulty statutory analysis.

c. Public Notice and Opportunity to Comment Are Necessary for Practical Enforceability

EPA "proposes to revise the Agency's regulations at 40 CFR 51.161 to remove the requirement for public notice and comment as a minimum feature of state and local minor source

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[307] Memorandum, "Guidance on Limiting Potential to Emit in New Source Permitting," Office of Air Quality Planning and Standards at 2 (June 13, 1989), *available at* https://www.epa.gov/sites/default/files/2015-07/documents/lmitpotl.pdf (Attachment LL).

[308] 57 Fed. Reg. 13,498 (Apr. 16, 1992).

[309] Memorandum, "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits," Kathie A. Stein, Director at 6 (Jan. 25, 1995), *available at* https://www.epa.gov/sites/default/files/2015-07/documents/potoem.pdf (Attachment MM).

NSR programs."[310] While EPA's faulty statutory analysis frames the question as whether "public participation" is required by the language of section 110(a)(2)(C), it's necessary to consider public notice by itself, as it is a critical part of minor NSR programs.

Simply put, without public notice of minor NSR permits, they cannot be enforced by any parties other than the issuing agency. This is contrary to the structure of the Act. Minor NSR permits are not practically enforceable, to say the least, by citizens if the permit is not publicly available.

That there may be other state law, such as a state open records law, that gives potential access to minor NSR permits is wholly inadequate. First, open records requests take variable and extended lengths of time, not to mention requiring a well-formed query.[311] Minor NSR permits need to be enforceable when they become effective, not at some later time. Second, such state laws are not typically made part of the SIP. The Act requires the SIP to ensure enforceability.[312]

Furthermore, opportunity for comment is also necessary for practical enforceability. This is demonstrated by the examples on Commenters' Permit Comments Table,[313] which documents specific circumstances where public comment led to permit revisions needed to make permit limits enforceable as a practical matter, such as the inclusion of stricter limits more reflective of actual source emissions, the addition of clear permit terms requiring compliance with limits and assumptions used to calculate the facility's PTE, and the inclusion of monitoring, recordkeeping and reporting requirements to document facility compliance with applicable limits.

2. EPA Ignores the Role of States, Local Governments, and EPA Itself.

Enforceability is an overarching requirement that EPA failed to consider in its proposal. EPA also ignores other structural elements of the Act regarding the roles of affected downwind states, local governments, and EPA itself in its supervisory role. As a result, EPA's proposed action is arbitrary and capricious, and EPA's statutory analysis is fatally flawed.

a. Affected Downwind States Must Have Notice and Opportunity to Comment on Minor NSR Permits.

Section 126(b) gives affected downwind states the right to "petition the Administrator for a finding that any major source or *group of stationary sources* emits or *would emit* any air pollutant in violation of the prohibition of" section 110(a)(2)(D)(i) of the Act.[314] In turn, "the prohibition" in section 110(a)(2)(D)(i) prohibits:

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[310] 91 Fed. Reg. at 41,600.

[311] Indeed, without public notice it may not be practical to even be aware of the new or modified source to be able to form the open records query in the first place.

[312] *E.g.,* 42 U.S.C. § 7410(a)(1) (the SIP must provide for enforcement).

[313] Permit Comments Table, *supra* note 84.

[314] 42 U.S.C. § 7426(b). While this provision references section 110(a)(2)(D)(ii), it is a well-known "scrivener's error" that must be read as referring to section 110(a)(2)(D)(i). *Appalachian Power Co. v. Env't Prot. Agency*, 249 F.3d 1032, 1040–44 (D.C. Cir. 2001) (per curiam).

> *any source* or other type of emissions activity within the State from *emitting any air pollutant* in amounts which *will—*
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS], or
> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this [title I] to prevent significant deterioration of air quality or to protect visibility[315]

Section 126(b) applies not only to major sources but "any … group of stationary sources," including minor sources. EPA has not, and cannot explain, how affected downwind states can exercise this right in the absence of public notice of the construction of new or modified minor sources.[316] This is reinforced by the prospective language in both section 126(b)—"would emit"—and in section 110(a)(2)(D)(i)—"will." An affected downwind state must have the opportunity to petition EPA under section 126(b) in advance of construction of a new or modified source.

Specific to section 110(a)(2)(D)(i)(I), EPA has used thresholds to determine "significant contribution" and "interference with maintenance."[317] Without notice of the proposed construction, affected downwind states cannot ascertain whether these thresholds are being exceeded by construction of new or modified minor sources. While the existing rules for minor NSR purport to require the permitting authority to consider whether construction of the new or modified minor stationary source "will result in … interference with attainment or maintenance of a national standard … in a neighboring State,"[318] that does not protect downwind, non-neighboring States, and in any case section 126(b) exists to remedy issues caused by other state's failures to protect affected downwind states, which may include faulty air quality analyses in minor NSR permits.

Furthermore, the existing rules for minor NSR programs do not protect affected downwind states with respect to section 110(a)(2)(D)(i)(II), which prohibits interference with affected downwind state's prevention of significant deterioration and visibility programs.[319] For example, a new minor source may affect the "maximum allowable increases in concentrations over baseline concentrations"[320] for PSD permitting in an affected downwind state. Or a new minor source could be sufficiently close to a Class I area in the downwind state that it would impact visibility in that area. Affected downwind states must have notice of new pollution

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[315] 42 U.S.C. § 7410(a)(2)(D)(i).

[316] As explained above, a state open records law is insufficient. *See supra*, section II(D)(1)(c).

[317] *See, e.g.*, 76 Fed. Reg. 48,208, 48,211 (Aug. 8, 2011).

[318] 40 C.F.R. § 51.160(a)(2).

[319] 42 U.S.C. § 7410(a)(2)(D)(i)(II). As EPA's proposal rests in large part on EPA's failure to update the minor NSR regulations after major NSR (and visibility protection) were added to the Act, EPA has reopened the issue of revising the regulations to address these additions. EPA must revise 40 C.F.R. section 51.160 accordingly.

[320] *Id.* U.S.C. § 7473(b).

sources (both major and minor) to fully exercise their rights with respect to prevention of significant deterioration and visibility.

Given that public notice is required to protect the rights of downwind states, it is not rational to bar those states from commenting on minor NSR permits. It is much more efficient to resolve these potential issues through comments on an individual permit than through the multi-state petition process provided for in section 126(b). EPA's proposal doesn't eliminate the pollution prohibition on the upwind state contained in section 126(b); instead, it denies downwind states and EPA the information necessary to determine the upwind state's compliance with it.

b. Local Governments Must Be Consulted and Have Opportunity to Participate.

Section 126(b) gives the same petition right to "any … political subdivision" of any state.[321] For the same reasons as above, local governments must have public notice of minor NSR permits to be able to exercise this petition right.

Additional requirements, outside of section 126, apply for local governments in the subject state itself. First, any SIP revision "must meet the applicable requirements of section [121] (relating to consultation)."[322] In turn, section 121 applies to, among other things, SIP revisions regarding "preconstruction review of direct sources of air pollution," which includes EPA's proposed revisions should a state choose to revise its SIP accordingly.[323] For SIP revisions subject to section 121, "the State shall provide a satisfactory process of consultation with general purpose local governments."[324] EPA has not explained how states that revise their SIPs in accordance with the proposed revisions can carry out a "satisfactory process of consultation." It is certainly not enough to provide notice and opportunity for comment on such revisions, as that is already required by section 110(a)(2) itself.[325] If that were enough, it would write section 121 out of the Act.

Separately, "[s]uch process shall be in accordance with regulations promulgated by [EPA] to assure adequate consultation."[326] Current requirements in 40 C.F.R. 51.166(d) that require notification to notify "the Administrator through the appropriate Regional Office, and to all other state and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located" would be eliminated by the proposal in relation to all but major sources and major modifications.[327] Other EPA regulations for intergovernmental consultation, such as they are, can be found in 40 C.F.R. Part 51, Subpart M.

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[321] *Id.* § 7426(b).

[322] *Id.* § 7410(a)(2)(J).

[323] *Id.* § 7421.

[324] *Id.*

[325] 42 U.S.C. § 7410(a)(2).

[326] 42 U.S.C. § 7421.

[327] 40 C.F.R. § 51.166(d); Proposed Regulatory Text Amendments Red-Line Strikeout, document EPA-HQ-OAR-2025-1212-0007 in this docket at renumbered § 51.166(c).

In relevant part, they merely require the state to "identify organizations, by official title, that will participate in developing, implementing, and enforcing the plan and the responsibilities of such organizations."[328] Identifying the relevant local governments is part of consultation, but by itself identification does not "assure adequate consultation." Therefore, the plain language of Section 126 governs.

Furthermore, section 110(a)(2)(M) requires the SIP to "provide for consultation and participation by local political subdivisions affected by the plan."[329] To avoid writing this provision out of the Act, EPA must give it meaning above and beyond what section 110(a)(2) (general notice and comment on SIP revisions) and section 121 (consultation on specific SIP revisions) provide. Denying local governments the opportunity to participate in minor NSR permitting through notice and comment cannot possibly be consistent with the text of section 110(a)(2)(M), as it is the polar opposite of what that provision requires. There is no limiting language in section 110(a)(2)(M) that suggests local governments should not be able to participate in one part of the plan that can affect them, i.e., the minor NSR permitting program.

c. EPA Cannot Adequately Perform Its Supervisory Role Without Notice and Opportunity to Comment.

For the same reasons given above, without public notice EPA cannot enforce the terms and conditions of minor NSR permits. To eviscerate EPA's enforcement oversight is contrary to the Act. As stated by the Ninth Circuit Court of Appeals regarding a related issue (reliance on provisions that were not adopted into the SIP and therefore not enforceable by EPA):

> This plain language reading is further supported by the most basic of principles. If the state standards that are necessary for meeting federal requirements are not a part of the SIP, then, while the state agency, CARB, perhaps could enforce them, the responsible federal agency, EPA, would not be able to bring an action directly challenging violation of those state standards. It is the primary responsibility of EPA to ensure that Congress's aims to ensure healthy air quality have been carried out, and it is fundamentally error if any of the standards necessary for federal compliance are not within the SIP so as to be enforceable directly by the responsible federal agency. The federal agency, EPA, not the state agency, CARB, has the fundamental duty to carry the ball across the goal line to achieve compliant air quality levels or satisfactory progress toward that end.[330]

The same applies to minor NSR permits–EPA must be provided notice of minor permits in order preserve their enforcement oversight.

Given that public notice is necessary for EPA to carry out this oversight role, it is irrational to disallow EPA comment on minor NSR permits. Potential issues with a minor NSR permit are much more easily resolved through an EPA comment during the permitting phase than

[328] 40 C.F.R. § 51.240.

[329] 42 U.S.C. § 7410(a)(2)(M).

[330] *Committee for a Better Arvin v. Env't Prot. Agency,* 786 F.3d 1169, 1176-77 (9th Cir. 2015).

an EPA enforcement action at some later time. Removing public comment does not eliminate a state's burden; instead, it increases the burden and shifts it to EPA (and potentially federal courts).

EPA itself explained, in the context of state operating permit programs used to create limits on potential to emit (PTE):

> It is important that EPA maintain an effective oversight of permit decisions made pursuant to these programs. The EPA is not now implementing a formal review program with procedural tools such as a veto provision to address inappropriate permitting actions (see, e.g., 40 CFR 123.44 with respect to certain permits issued under the Clean Water Act). However, EPA will comment on proposed permits as may be reasonable. The EPA stresses that, in order to implement this review, *States will be required to provide draft permits to EPA for comment*. In addition, the State must provide EPA with copies of all final permits upon their issuance. If permits are issued inconsistent with the SIP as discussed above, EPA will consider those permits to be invalid and will pursue such enforcement action as may be appropriate. It should be noted that EPA's intent is to review these permitting actions in parallel with, and within the same schedule as, routine state procedural steps. The EPA intends to work with State programs to minimize any delay or intrusiveness from this activity.[331]

EPA has not, and cannot, explain how its proposal is consistent with EPA's supervisory role.

d. EPA Failed to Provide Notice or an Explanation for Its Separate Proposal to Eliminate Notice of Minor NSR Permits to EPA and State and Local Government Entities.

Critically, the regulatory changes proposed are not limited to removing public participation requirements for minor NSR programs. EPA has also proposed changes to 40 C.F.R. Section 51.161(d) dealing with notice requirements to EPA and state and local government entities. This provision currently provides:

> (d) A copy of the notice required by paragraph (b) of this section must also be sent to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be sent to any other agency in the region having responsibility for implementing the procedures required under this subpart.

EPA's "Proposed Regulatory Text Amendments Red-Line Strikeout"[332] shows the Agency is proposing to narrow this requirement to apply only to major sources and major modifications. Yet, EPA does not provide *any* notice, discussion, policy rationale, basis, or description of this

[331] 54 Fed. Reg. 27,274, 27,283 (June 28, 1989).

[332] Document ID EPA-HQ-OAR-2025-1212-0007.

regulatory change in the Federal Register. EPA's arguments in support of its decision to remove public notice and comment do not support a decision to remove notice to EPA and state and local authorities. These comments explain EPA's oversight role as well as the need for coordination and collaboration between various state/local entities having jurisdiction in an area or being affected by pollution from a specific are–all of which will be harmed by removal of this notice requirement. It would be absurd for EPA to claim that it is not "necessary" for other state/local air pollution control agencies with jurisdiction in the region or that are responsible for implementing NSR procedures to receive notice of a new permit proceeding. And EPA has not even attempted such an explanation here.

Without proposed notice and explanation for these changes, it is impossible for commenters to provide informed comment. It is especially relevant because EPA's removal of this requirement implicates specific other Clean Air Act requirements. Section 110(a)(2)(M) requires participation for all "local political subdivisions affected by the plan."[333] And section 121 requires consultation with "general purpose local governments."[334] EPA must provide notice and explanation of how it will continue to comply with these Clean Air Act requirements even as it removes these provisions.

Second, commenters cannot adequately assess and comment on EPA's proposal without having notice of and considering the proposed regulatory changes as a whole. If EPA, as commenters believe, must retain requirements for notice to EPA and state and local air pollution control agencies, then it is also fundamentally irrational for agencies to not transmit the same notice to the public. The extra burden of extending notice and opportunity to comment to the public would be tiny and could not possibly outweigh the benefits. Furthermore, by providing citizens with a cause of action under section 304, the Act contemplates that EPA's oversight must be supplemented by "private attorneys general." To eviscerate citizens' role with respect to minor NSR permits is contrary to this fundamental structure.

E. EPA's Statutory Argument Completely Ignores Issues Regarding Synthetic Minor Permits

As relevant here, a so-called "synthetic minor" permit purports to allow stationary sources that otherwise emit at major levels to evade PSD or nonattainment NSR review through permit limits that purport to keep any resulting emission increases below the relevant permitting thresholds for major sources or major modifications.[335] EPA has recognized various means of creating such permit limits;[336] foremost among these is the minor NSR program.[337] EPA entirely fails to discuss this critical aspect of the issue.

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[333] 42 U.S.C. § 7410(a)(2)(M).

[334] *Id.* § 7421.

[335] *See, e.g.* "Guidance on Limiting Potential to Emit in New Source Permitting," *supra* note 307, at 1.

[336] "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits", *supra* note 309.

[337] *See, e.g.*, Memorandum, "Limitation of Potential to Emit with Respect to Title V Applicability Thresholds," from John Calcagni, Director (Sept. 18, 1992), available at https://www.epa.gov/sites/default/files/2015-

1. EPA's Statutory Analysis Does Not Apply to Synthetic Minor Permits

Synthetic minor permits are not issued solely to meet section 110(a)(2)(C)'s requirement for "regulation of the modification and construction" of stationary sources "to assure that [NAAQS] are achieved."[338] Instead, they are primarily issued to affect applicability of major NSR permitting requirements.

Regardless of the limits in a synthetic minor permit that purport to bring emissions below major NSR applicability, the resulting new or modified stationary source is still a minor source that is subject *separately* to the requirements of minor NSR. In other words, there must be an air quality analysis to assure that the allowed emissions do not interfere with attainment or maintenance of the NAAQS.[339] Furthermore, the terms and conditions of these permits must not violate the SIP's overall pollution control strategy.[340] For example, if a RACT limit in the SIP applied, the limit in the permit must reflect that.

Additionally, if parts C and D did not exist, neither would synthetic minor permits. But minor NSR would still exist, as required by section 110(a)(2)(C). Thus, synthetic minor permits are entirely a creature of parts C and D, not section 110(a)(2)(C). This point is reinforced by EPA's position that there are other vehicles, outside of minor NSR permits, for establishing synthetic minor emission limits.[341]

Furthermore, synthetic minor permits are entirely an EPA invention. Nothing in the bare phrase "potential to emit" in the applicability requirements for major NSR explicitly authorizes, or even implicitly suggests, a secondary permitting scheme for the purposes of reducing PTE below applicability levels.[342]

As the CAA does not specifically discuss or authorize synthetic minor permits as a requirement in section 110(a)(2)(C), EPA's statutory analysis of that provision is irrelevant. Furthermore, the fact that synthetic minor permits are an EPA invention outside the plain language of the Act strongly suggests that if these permits are a valid exercise of EPA's authority, then EPA also has discretion to require public notice and opportunity to comment on them.

08/documents/threshld.pdf (preconstruction review program approved into the SIP used to limit PTE) (Attachment NN); 54 Fed. Reg. 27,274 (June 28, 1989); 91 Fed. Reg. at 41,595.

[338] 42 U.S.C. § 7410(a)(2)(C).

[339] 40 C.F.R. §§ 51.160(a)(2), (b)(2), (f).

[340] *Id.* §§ (a)(1), (b)(1).

[341] "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits," *supra* note 309, at 6.

[342] *See* 42 U.S.C §§ 7479(1) (definition of "major emitting facility" for PSD); 7502(c)(5), 7503(a), 7602(j) (definition of "major stationary source" and "major emitting facility" for nonattainment NSR).

If anything, the fact that synthetic minor permits are entirely a creature of parts C and D also shows that public participation should be required. After all, such stationary sources would be major emitting facilities but for the synthetic minor permit limits. And those permit limits may not be valid; for example, the limits may not be practically enforceable due to vague terms or inadequate monitoring, recordkeeping, or reporting. Thus, public participation for them, if anything, should track the public participation requirements for major NSR permits.

In particular, Part C requires notice and opportunity for comment for PSD permits.[343] Furthermore, section 126 requires *60 day* advance notice of proposed construction or modification of major stationary sources to nearby states in two cases: 1) for all sources subject to PSD; and 2) for all sources "which *may* significantly contribute" to violations of the NAAQS in nearby states.[344] As notice requirements for synthetic minor permits should track those for major NSR, the public participation regulations in 40 C.F.R. section 51.161 should be updated to reflect this requirement.

Additional structural considerations, similar to those for minor NSR permits, confirm that notice and opportunity for comment is required for synthetic minor permits, as shown next.

2. Synthetic Minor Permit Limits Must Be Federally Enforceable

Assuming "synthetic minor" permits are allowed under the Act,[345] the relevant emission limits must be federally enforceable. This again flows from the plain language of the Act. As explained above, emission limits in a minor NSR permit are federally enforceable.[346] Independently, synthetic permit terms and conditions, no matter whether they are embedded in a minor NSR permit or other vehicle, must be federally enforceable.

Assuming section 113(b)(1) does not apply (which it would in the case of a minor NSR permit), section 113(b)(2) authorizes EPA to bring an action in federal district court for any violation of "any other requirement or prohibition" of "this subchapter," i.e. Title I of the Act.[347] The word "any" in section 113(b)(2) is expansive and therefore unambiguously includes requirements and prohibitions under Parts C and D of Title I. Furthermore, section 113(b)(2) includes "a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved" under the Act.[348]

Under EPA's theory of "synthetic minor" permits, a stationary source that otherwise has a potential to emit above a major NSR applicability level must either get a major NSR permit or a synthetic minor permit that prohibits emissions above the major NSR applicability level. This shows that a synthetic minor permit is a "requirement" for such a facility under the meaning of

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[343] 42 U.S.C. § 7475(a)(2). Notice to Federal Land Managers (FLMs) may also be required. *Id.* § 7475(d)(2).

[344] *Id.* U.S.C. § 7426(a)(1) (emphasis added).

[345] *See infra*, section III.

[346] *See supra* at 64.

[347] 42 U.S.C. § 7413(b)(2).

[348] *Id.*

section 113(b)(2), and its terms and conditions are a "requirement or prohibition" under the meaning of section 113(b)(2). Thus, synthetic minor permit emission limits (and associated monitoring, recordkeeping, and reporting) are federally enforceable.

Separately, section 304(a)(3) gives citizens a cause of action "against any person" who is "in violation of any condition" of "a permit required under part C … or part D of [title] I."[349] As explained above, a synthetic minor permit to evade major NSR is a requirement under part C or part D and therefore falls within this provision. Alternatively, a synthetic minor permit falls with the definition of "emission standard or limitation under this Chapter," due to the catch-all language in section 304(f)(3):

> any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, *any permit term or condition*, and any requirement to obtain a permit as a condition of operations. *which is in effect under this chapter* (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.[350]

While this paragraph is not the simplest to parse, to give effect to the phrase "any permit term or condition," it must be applied to the concluding phrase starting with "which."

In any case, under *Loper-Bright* (or indeed even *Chevron*), EPA has no authority to "interpret" this provision. Section 304 creates a private right of action in the federal courts, and the meaning of section 304(f) affects the scope of that private right. EPA cannot alter that private right.[351]

3. The D.C. Circuit Decision in *National Mining Association* Is Not to the Contrary

In *National Mining Ass'n v. Env't Prot. Agency*,[352] the D.C. Circuit Court of Appeals remanded an EPA rule that required federal enforceability for provisions that limited "potential to emit considering controls" for the purpose of avoiding major source status under section 112 of the Act. Subsequently, in *Chemical Manufacturers Association v. Env't Prot. Agency*,[353], the court applied that same reasoning to the major NSR regulations and summarily vacated the federal-enforceability requirement.[354] While the issue in *National Mining* is closely related to the federal enforceability of synthetic minor NSR permits, the D.C. Circuit's decision does not

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[349] 42 U.S.C. § 7604(a)(3).

[350] *Id.* U.S.C. § 7604(f)(4) (emphasis added).

[351] *Nat. Res. Def. Council v. Env't Prot. Agency*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (holding that section 304(a) creates a private right of action and therefore "the Judiciary, not any executive agency, determines the scope … of judicial power vested" by section 304(a) (internal citations and quotations omitted)).

[352] 59 F.3d 1351 (D.C. Cir. 1995).

[353] 70 F.3d 637, 638 (D.C. Cir. 1995).

[354] *Id.*

contradict the textual analysis in the previous section and does not control here. To see this, considerable background is necessary.

In 1983, EPA proposed to remove the requirement for federal enforceability from the definitions of "potential to emit" and "net emissions increase" in the major NSR regulations.[355] EPA did so in response to industry arguments that federal enforceability for those provisions was redundant, as it was already a violation of the SIP—which would be subject to federal enforcement[356]—to construct a new major stationary source or major modification without the appropriate major NSR permit.[357]

In 1989, EPA chose not to finalize this proposed revision.[358] EPA argued that federal enforceability was "essential to the integrity of the PSD and nonattainment programs" to ensure "effective enforcement" so that "limitations and reductions [would be] actually incorporated into a source's design and followed in practice."[359] While EPA noted concerns about the effectiveness of enforcement under sections 113 and 304 in the absence of federal enforceability for provisions to limit potential to emit,[360] EPA did not make any arguments that the specific language of sections 113 and 304 compelled federal enforceability for such provisions.[361]

Also notably, EPA addressed the possibility of using state operating permit programs to create synthetic minor limits.[362] Among other things, EPA stated that notice and opportunity to comment would be required for such programs, because it "would make enforcement by EPA and private citizens much more effective and practical."[363]

As discussed in the previous sections, the current language of section 113 and 304 grants EPA and citizen authority to enforce minor NSR permits as well as synthetic minor permits. The current language was established by the 1990 Amendments, which expanded EPA's enforcement authority.[364] The 1990 Amendments also introduced the major source/area source distinction into section 112, analogous to the major/minor source distinction in preconstruction review.[365]

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[355] 48 Fed. Reg. 38,742, 38,748 (Aug. 25, 1983).

[356] Under the Act as amended in 1977, section 113 provided EPA with a cause of action in federal district court for violations of a SIP after a 30-day notice period. 1 Legislative History of the Clean Air Act Amendments of 1977 Together with a Section-by-Section Index 41 (1978) (Clean Air Act as amended in 1977).

[357] 48 Fed. Reg. at 38747.

[358] 54 Fed. Reg. 27,274 (June 28, 1989).

[359] *Id.* at 27,277.

[360] *Id.* at 27,277-78.

[361] *See generally id.* at 27277-280. Such an argument might have been more difficult to make under the less expansive versions of section 113 and 304 in effect at the time.

[362] *Id.* at 27,282-83.

[363] *Id.* at 27,283.

[364] 1 Legislative History of the Clean Air Act Amendments of 1990 Together with a Section-by-Section Index 96-105 (Envt'l Policy Div., Cong. Research Serv. 1992) (section 113 as revised by the 1990 Amendments).

[365] *Id.* at 51.

In response to the section 112 amendments, EPA promulgated new general provisions for part 63.[366]

In response to comments on EPA's proposal to require federal enforceability in the definition of "potential to emit considering controls" for section 112 purposes, EPA stated: "The Agency believes that these comments are similar in all relevant respects to arguments the Agency already has considered and responded to" in the 1989 decision to retain federal enforceability for provisions to limit potential to emit in the major NSR programs.[367] EPA reiterated those considerations, but did not analyze the language of sections 113 and 304 as revised by the 1990 Amendments.[368]

Thus, there was no EPA analysis of sections 113 and 304 as revised by the 1990 Amendments in the record for the litigation over the general provisions for part 63. EPA, in its response brief, did not even cite, much less analyze, either section, but instead relied on a *Chevron* step 2 argument that the phrase "considering controls" was ambiguous and it was reasonable for EPA to interpret it as requiring federal enforceability.[369]

Naturally, under the *Chevron* framework the Court found the language of section 112(a)(1) ambiguous with respect to the issue of federal enforceability, as it is silent about enforceability. However, as shown by similar arguments to those above for minor NSR, the language of 112(a)(1) is irrelevant. The issue is controlled by the plain language of sections 113 and 304.[370]

The Court correspondingly did not examine the legislative history of sections 113 and 304, either. In summary, the Court never considered whether the plain language, structure, and legislative history of the Act compelled federal enforceability at *Chevron* step 1. And, of course, *Chevron* has been overruled. Thus, *National Mining* does not control here.

Furthermore, the Court did not decide that the Act compelled "effectiveness" as the sole standard for provisions to limit "potential to emit." Instead, as discussed above it was EPA that created the "effectiveness" standard in its major NSR rulemaking; the Court merely found that EPA had not made the case under EPA's standard that federal enforceability was required for "effectiveness." As the court carefully stated: EPA's interpretation "*at least as presented in*

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[366] 59 Fed. Reg. 12,408 (Mar. 16, 1994).

[367] *Id.* at 12,414.

[368] *Id.*; *see also* U.S. EPA, General Provisions for 40 CFR Part 63: National Emission Standards for Hazardous Air Pollutants for Source Categories—Background Information for Promulgated Regulation, EPA-450/3-91-019b, at 2-31 (Feb. 1994) (response to comments) (Attachment OO).

[369] See Respondent's Brief, 1995 WL 17204788, at *46-58 (D.C. Cir. Mar. 23, 1995).

[370] The Court did note that a source with actual emissions above the threshold, despite limits on "potential to emit considering controls," would be subject to enforcement for violation of the MACT standard under section 113. *National Mining Association*, 59 F.3d at 1364 n.20. However, that does not answer the question of whether the language of section 113, which the Court did not examine, itself requires limits on "potential to emit considering controls" to also be enforceable under section 113.

argument to us, ha[s] not been justified, either in terms of § 112 or *other provisions of the Act*."[371]

Viewed more broadly, the *National Mining* approach proves too much. For example, section 110(a)(2)(A) requires SIPs to include "enforceable emission limitations and other control measures, means, or techniques."[372] But section 110(a)(2)(A) is silent on whether enforceability must be federal. Thus, if one focuses just on 110(a)(2)(A), it might seem that state-only emission limitations and control measures could be permissible. Under the *National Mining Association* approach, EPA when acting on a submitted SIP revision would have to decide which submitted provisions were reasonable to make federally enforceable and which were not. But the Act unambiguously requires federal enforceability for approved SIP provisions.[373] Correspondingly, EPA incorporates the approved state provisions by reference into the Code of Federal Regulations.[374]

As noted above, the Ninth Circuit Court of Appeals held that provisions "that are necessary for meeting federal [SIP] requirements" must be approved into the SIP so that EPA can enforce them to carry out its "primary responsibility."[375] The same structural consideration mandates federal enforceability for provisions to limit "potential to emit." EPA is not specifically authorized by the Act to bring actions in state court to enforce state-only provisions to limit "potential to emit," and therefore cannot under the *National Mining* approach carry out its fundamental duty.[376]

4. Notice and Comment Is Necessary for Practical Enforceability of Terms and Conditions of Synthetic Minor Permits

As terms and conditions of synthetic minor permits must be federally enforceable, it follows that they must be practically enforceable.[377] As explained above, public notice and an opportunity for public comment is an important tool for achieving practically enforceable

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[371] *National Mining Association,* 59 F.3d at 1364 (emphasis added).

[372] 42 U.S.C. § 7410(a)(2)(A).

[373] 42 U.S.C. §§ 7413(b)(1); 7604(f).

[374] *See, e.g.*, 91 Fed. Reg. 40,409, 40,413-426 (July 2, 2026) (revising the C.F.R.) ("In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of revisions to the Oklahoma regulations for air permitting as described in section IV of this preamble.").

[375] *Committee for a Better Arvin,* 786 F.3d at 1176-77.

[376] *Cf. Alaska Dept. of Envt'l Conservation v. Env't Prot. Agency*, 540 U.S. 461, 492 (2004) ("It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court. We decline to read such an uncommon regime into the Act's silence.").

[377] "Guidance on Limiting Potential to Emit in New Source Permitting," *supra* note 307, at 2 ("[Practical enforceability] is an implied requirement of [federal enforceability]. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.").

permits.[378] This is demonstrated by the examples on Commenters' Permit Comments Table,[379] which documents specific circumstances where public comment led to permit revisions needed to make synthetic minor permit limits enforceable as a practical matter. The examples from Environmental Integrity Project's industrial wood pellet campaign are especially illustrative of how public input has been essential to the development of accurate and enforceable synthetic minor limits needed to ensure that a source classified as "minor" is not actually emitting air pollution at major source levels. [380]

5. Notice and Comment on Synthetic Minor Permits Is Necessary for States, Local Governments, and EPA

As explained above, notice and comment is necessary for minor NSR permits so that affected downwind states and affected local governments can exercise their rights under section 126.[381] The same reasoning applies equally to synthetic minor NSR permits. Without notice of such permits, affected states and local governments will not have opportunity to petition EPA in advance of construction of a new or modified source that violates the prohibitions in section 110(a)(2)(D)(i). Without opportunity to comment, the burden shifts to the affected states and EPA to independently identify and resolve any potential issue. This is not rational.

Furthermore, if a SIP-approved program—minor NSR or otherwise—is used to issue synthetic minor permits, sections 121 and 110(a)(2)(M) require consultation on any revision of the program as well as notice and opportunity for comment on the synthetic minor permits.[382] The proposal would also remove applicability the requirement to notify "the Administrator through the appropriate Regional Office, and to all other state and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located" in relation to all but major sources and major modifications.[383]

As explained above[384], notice and opportunity for comment is necessary for EPA to carry out its supervisory role. [385] And an additional structural consideration applies to EPA's role with respect to synthetic minor NSR permits. Under section 167:

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[378] *Supra* at 65-66.

[379] Permit Comments Table, *supra* note 84.

[380] Discussed *supra* at 18-28.

[381] *Supra*, section II(D)(2)(a).

[382] *Supra*, section II(E)(5).

[383] 40 C.F.R. § 51.166(d); Proposed Regulatory Text Amendments Red-Line Strikeout, document EPA-HQ-OAR-2025-1212-0007 in this docket at renumbered § 51.166(c).

[384] *Supra* at section II(D)(2)(d).

[385] 54 Fed. Reg. 27,274, 27,283 (June 28, 1989) ("It is important that EPA maintain an effective oversight of permit decisions made pursuant to these programs. . . . EPA will comment on proposed permits as may be reasonable. The EPA stresses that, in order to implement this review, *States will be required to provide draft permits to EPA for comment*.").

> [EPA] *shall* … take such measures, including issuance of an order, or seeking injunctive relief, as necessary *to prevent* the construction or modification of a major emitting facility which does not conform to the requirements of [Part C][386]

EPA has not, and cannot, explain how it can carry out this mandatory requirement without notice of synthetic minor permits. Furthermore, as EPA must take measures "to prevent" construction or modification, this suggests EPA must have *advance* notice. To harmonize this provision with section 126, it appears 60-day advance notice would be reasonable and give EPA sufficient time to act.[387]

Here again, as advance notice is required, it is simply not rational to deny EPA the opportunity to comment on synthetic minor permits. This will resolve any issues much more efficiently than requiring EPA to issue a section 167 stop-construction order. Denying opportunity to comment does not eliminate the state's burden; instead, it shifts it to EPA.

F. EPA's Selective and Misleading Reliance on the 2022-2023 Stakeholder Outreach to Support its Proposed Elimination of Federal Minimum Public-Participation Requirements Is Arbitrary and Capricious.

EPA invokes its 2022-2023 stakeholder outreach as support for its proposal to eliminate public participation as a minimum federal requirement for minor NSR programs.[388] But the available outreach record undermines, rather than supports, EPA's proposal. EPA withheld the underlying stakeholder submissions, failed to acknowledge public-interest comments directly contradicting the proposal's central premise, and selectively described feedback from state and local air agencies. These defects deprived the public of a meaningful opportunity to evaluate EPA's characterization of the outreach and demonstrate that EPA's reliance on that outreach as support for its proposal is arbitrary and capricious.

Notably, despite EPA's stated reliance on input obtained in connection with its 2022-2023 stakeholder outreach in developing its proposal to eliminate federal minimum minor NSR public participation requirements, EPA did not include records related to that outreach in the rulemaking docket, with the exception of its own summary of input provided by state and local air agencies. EPA also did not create a docket in connection with the 2022-2023 outreach sessions and refused requests to expedite its response to Freedom of Information Act requests for related documents so that commenters would have access to this information during the comment period on this proposal.[389] Accordingly, the comments provided below are largely based on documents pertaining to the 2022-2023 stakeholder outreach that commenters have been able to obtain independently.

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[386] 42 U.S.C. § 7477.

[387] As mentioned above, EPA has reopened this issue for comment.

[388] Proposal at 41,600.

[389] *See, e.g.*, EPA denial of SELC's request for expedited processing of their FOIA request (Attachment PP).

1. EPA's Selective Characterization and Withholding of the 2022-2023 Outreach Record Violates the Administrative Procedure Act's Requirements for Reasoned Decision-Making and Meaningful Notice and Comment.

EPA states that it "conducted a series of outreach sessions from 2022 to 2023 on minor NSR public participation and considered the resulting information to determine how to address the regulatory framework for this proposed action."[390] Public-interest organizations participated in this outreach and provided EPA with extensive input concerning the importance of public participation in minor NSR permitting, deficiencies in existing public-participation practices, and measures EPA should take to strengthen public participation and improve the effectiveness of minor NSR programs in protecting the NAAQS.[391]

EPA's proposal, however, does not acknowledge that input. Instead, in the section of the rulemaking proposal expressly describing the "Minor New Source Review Public Participation Early Outreach Workgroup Outcome," EPA discusses only input received from state and local air agencies.[392] EPA relies on that input to assert, among other things, that many air agencies do not provide a 30-day comment opportunity for all minor NSR actions, that some agencies were "surprised" to learn about 50+-year old federal regulations requiring such public comment opportunity, and that some agencies questioned whether they had sufficient resources to comply with that longstanding public participation requirement.[393] Each of these assertions cites the same docket document, entitled "EPA Summary Observations from 2022-2023 Minor NSR Stakeholder Input from State and Local Air Agencies."[394] EPA neither describes the contrary or additional input received from public-interest stakeholders nor includes their written submissions in the rulemaking docket. Nor, for that matter, does the rulemaking docket include any of the actual written comments submitted by air agencies or transcripts of the EPA outreach sessions, access to which would enable the public to identify any mischaracterizations of that input.

EPA's selective treatment of the outreach record raises serious concerns under the Administrative Procedure Act. An agency must "examine the relevant data and articulate a satisfactory explanation for its action," and agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or offered an

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[390] Proposal at 41,600.

[391] *See* Letter from Environmental Defense Fund to David J. Svendsgaard, U.S. EPA, dated Dec. 19, 2022, Docket I.D. EPA-HQ-OAR-2025-1212-0030, *available at* https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0030 ("EDF Comments"); Letter from Earthjustice on Behalf of RISE St. James, Louisiana Bucket Brigade, Sierra Club, and Healthy Gulf to David J. Svendsgaard, U.S. EPA, dated Dec. 9, 2022, Docket I.D. EPA-HQ-OAR-2025-1212-0035, *available at* https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0035 ("Earthjustice Comments").

[392] Proposal at 41,600 (only describing input from some "State and local air agencies" and making no mention of public interest group input).

[393] *Id.*

[394] *See* "EPA Summary Observations from 2022-2023 Minor NSR Stakeholder Input from State and Local Air Agencies," Docket ID No. EPA-HQ-OAR-2025-1212-006, https://www.regulations.gov/document/EPA-HQ-OAR-2025-1212-0006 ("EPA Summary").

explanation that "runs counter to the evidence before the agency."[395] EPA therefore may not rely on the 2022-2023 outreach as evidence supporting elimination of the federal public-participation requirement while disregarding material information obtained through the same outreach that cuts against its proposed rule.

2. Input Provided to EPA By Public-Interest Organizations During EPA's 2022-2023 Outreach Sessions Established That Public Participation in Minor NSR Permitting is Critical to Achieving Minor NSR's Statutory Air-Quality Purpose.

EPA's failure to consider public-interest stakeholder input in its 2022-2023 outreach when developing the proposed rule is particularly consequential because such input bears directly on EPA's premise for this proposed rule: that "EPA does not believe that minor source public participation is generally 'necessary to assure that [the NAAQS] are achieved' in the context of developing a program for the 'regulation of' minor source construction and modification."[396]

Although Commenters have not been given access to EPA's complete record of its 2022-2023 outreach, they have independently obtained two comment letters submitted to EPA by public interest organizations during this outreach process.[397] Those comments, submitted by Environmental Defense Fund ("EDF") and Earthjustice, emphasized that public notice and comment in minor NSR proceedings is an important safeguard for ensuring that permitting authorities accurately characterize a source's emissions, determine whether major NSR applies, establish adequate and enforceable limits, evaluate the source's effects on ambient air quality, and prevent construction of new sources and modifications to existing sources that would interfere with attainment or maintenance of the NAAQS.

In their comments, EDF explained that minor NSR has become increasingly important as changes to major NSR applicability rules have allowed more emissions-increasing projects to proceed without major NSR review.[398] EPA previously defended some of those changes on the basis that minor NSR programs would continue to protect against NAAQS violations.[399] EDF therefore urged EPA to strengthen enforcement of existing minor NSR requirements.[400] EDF further explained that sources classified as "minor" are not necessarily insignificant: synthetic minor sources have the physical capacity to emit at major-source levels and avoid major NSR only because of enforceable permit restrictions, while true minor sources may emit as much as 249 tons per year of a single NAAQS pollutant.[401]

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[395] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[396] Proposal at 41,597.

[397] *See* EDF Comments, *supra* note 391; Earthjustice Comments, *supra* note 391.

[398] EDF Comments, *supra* note 391, at 1.

[399] *Id.* at 1-2.

[400] *Id.* at 2.

[401] *Id.* at 4.

EDF argued that public review provides an essential check on permit applicants' emissions estimates and proposed permit restrictions.[402] Whether a source qualifies as a true minor or synthetic minor source frequently turns on whether source-specific emissions calculations, operating assumptions, and proposed limitations on production, hours of operation, fuel use, or other activities.[403] If those calculations are inaccurate or the proposed restrictions are inadequate or unenforceable, a source may improperly avoid major NSR and may emit far more pollution than its permit purports to allow.[404]

EDF provided concrete examples demonstrating that the risk of insufficient synthetic minor limits is not hypothetical.[405] First, EDF described a challenge by public interest organizations to the adequacy of a 249-ton-per-year volatile organic compound (VOC) limit major NSR avoidance limit included in the air permit for the **Drax Amite BioEnergy facility in Mississippi.**[406] Stack testing undertaken by the company after receipt of the public comments revealed that the plant—which had already been operating for years—actually emitted approximately 795 tons per year of VOCs, several times above the major NSR applicability threshold.[407] Second, EDF described how public comment on the major-NSR-avoidance limit for **Drax's Morehouse BioEnergy facility in Louisiana** revealed that the company had substantially underestimated the facility's VOC emissions.[408] In response to public comments, the Louisiana Department of Environmental Quality agreed that Morehouse BioEnergy was a major NSR source.[409] Subsequent testing indicated that the facility's potential VOC emissions were approximately 1,150 tons per year—more than four times the major NSR applicability threshold.[410] EDF noted that when the Morehouse BioEnergy facility was constructed, it had been permitted as a true minor source with projected VOC emissions of only 33 tons per year.[411] This example illustrated not just the importance of public notice and comment on synthetic minor permits, but also the risks of shielding permit applications for "true minor" sources from public scrutiny.

EDF's comments also documented widespread weaknesses in the ambient-impacts analysis undertaken for minor NSR sources and the enforceability of limits included in minor NSR permits to ensure that source emissions remain below the major NSR threshold.[412] EDF cited an EPA Region 8 investigation finding that Colorado had issued minor NSR permits even through air-quality modeling predicted NAAQS violations, without addressing those predicted

[402] *Id.* at 6-8.

[403] *Id.* at 4, 7-8, 14.

[404] *Id.* at 5, 7-8, 14.

[405] *Id.* at 7-8.

[406] *Id.* at 7.

[407] *Id.*

[408] *Id*.

[409] *Id*.

[410] *Id.* at 7-8.

[411] *Id.* at 8.

[412] *Id.* at 4-6.

violations through refined modeling, supplemental data, or additional permit conditions.[413] EPA Region 8 concluded that the State's practices "failed to ensure compliance with the NAAQS" and could harm air quality and public health. EDF also cited the EPA Inspector General Report described *supra* at 11-15.[414] Of 529 permit limits reviewed by the EPA Inspector General, 102 lacked sufficient information to determine whether they were technically accurate, 26 did not specify a compliance method, and 55 lacked sufficient monitoring to determine whether the required pollution reductions were being achieved.[415]

Comments submitted by Earthjustice on behalf of RISE St. James, Louisiana Bucket Brigade, Sierra Club, and Healthy Gulf demonstrated the consequences of allowing minor NSR permits to be issued without public notice.[416] The comments explained that Louisiana generally did not require notice for true minor permits or for many minor modifications at major sources and had provided public notice for only three apparent true minor permits during the preceding five-year period.[417] As a result, residents of communities already burdened by industrial pollution had been routinely excluded from permitting decisions authorizing new or increased emissions.[418]

The Earthjustice comments focused in particular on the historic, majority-Black Burton Lane community in St. James Parish, which is situated between the NuStar Logistics St. James Terminal and Marathon's Capline Station.[419] According to the comments, both facilities expanded through minor permitting actions without public notice except in connection with permit renewals.[420] NuStar reportedly emitted more than 300 tons per year of VOCs, and Capline more than 200 tons per year, yet neither facility had been required to conduct air-dispersion modeling.[421] Residents therefore had no opportunity to participate in the permitting decisions and lacked information regarding the facilities' individual and cumulative impacts on the surrounding community.[422]

The Earthjustice comments also identified other Louisiana facilities authorized via minor NSR permits without public comment, including a grain terminal permitted to emit more than 81 tons per year of PM_{10} and 37 tons per year of $PM_{2.5}$ in the majority-Black community of Wallace, and a coal terminal permitted in the predominantly Black community of Ironton only 39 days

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[413] *Id.* at 4-5 (citing U.S. EPA, EPA Region 8 Review of EPA's Office of Inspector General Hotline Complaint No. 2021-0188 (July 22), available at https://www.epa.gov/system/files/documents/2022-07/EPA_Region8_CDPHE_NSR_Complaint_Report.pdf) (Attachment QQ).

[414] *Id.* at 5.

[415] *Id*.

[416] Earthjustice Comments, *supra* note 391.

[417] *Id.* at 2-4.

[418] *Id.* at 4-11.

[419] *Id.* at 5-8.

[420] *Id.* at 7.

[421] *Id.* at 7-8.

[422] *Id.* at 8.

after the application was submitted.[423] The comments explained that cumulative modeling prepared for a proposed major source had identified existing modeled violations of the $PM_{2.5}$ and nitrogen dioxide NAAQS in St. James Parish, including modeled violations near the NuStar facility.[424] These examples directly refute any assumption that true minor permits and minor modifications necessarily have inconsequential air-quality effects or that permitting agencies can reliably identify, without public input, which actions warrant public concern.

Taken together, the public-interest-group comments provided to EPA during its 2022-2023 outreach sessions supplied EPA with concrete evidence that public participation in minor NSR permitting is directly related to fulfilling minor NSR's statutory purpose of preventing NAAQS violations. The comments demonstrated that public review can and does reveal underestimated emissions, improper classification of major sources as minor, inadequate or unenforceable permit restrictions, failures to conduct necessary air-quality modeling, and local or cumulative conditions overlooked by the permitting authority. The comments also emphasized the importance of providing affected communities with notice before new pollution is authorized and enabling them to contribute information concerning the air they breathe and the conditions in the areas where they live. EPA's failure to consider this input before proposing to allow States to eliminate public participation for all minor NSR actions—including synthetic minor permits, modifications to existing major sources, high-emitting true minor sources, and projects affecting communities already burdened by cumulative pollution—is arbitrary and capricious.

3. EPA Did Not Solicit Air-Agency Input on Eliminating All Federal Minimum Public-Participation Requirements, and the Feedback It Received Does Not Support That Result.

EPA's 2022-2023 outreach did not ask state and local air agencies whether EPA should eliminate public participation altogether as a minimum federal requirement for minor NSR programs. Instead, EPA presented a narrower set of discussion questions involving whether and how the existing public-participation requirements should be tailored for different categories of minor NSR actions. Because air agencies were not asked to evaluate across-the-board elimination of public participation requirements, their responses to EPA's narrower questions cannot reasonably be treated as support for EPA's dramatically broader rulemaking proposal.

According to the EPA slide presentation provided to participants in the Fall 2022 Stakeholder Engagement Sessions, the purpose of the sessions was to ensure that EPA's minor NSR rules clearly provide for "Accountability – to protect the National Ambient Air Quality Standards (NAAQS)" and "Transparency – to offer the public an opportunity to participate meaningfully in the permit process."[425] EPA further described the outreach's focus as being on "[p]ublic notice and comment requirements for different types of Minor NSR permit actions—i.e., synthetic minor sources, modifications at major stationary sources, and true minor sources,"

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[423] *Id*.

[424] *Id.* at 9-10.

[425] U.S. EPA, "Clarifying/Revising the Minor New Source Review Program for Air Agencies, Fall 2022 Stakeholder Engagement Sessions," Slide 8 ("EPA Presentation"), Docket ID EPA-HQ-OAR-2025-1212-0034, https://www.regulations.gov/comment/EPA-HQ-OAR-2025-1212-0034.

along with procedural requirements for general permits and permits-by-rule and other issues concerning public review and participation.[426] That framing presented meaningful public participation as an objective of the project and sought input on how the applicable procedures should differ among categories of permits; it did not present elimination of all minimum requirements as an option under consideration.

EPA's discussion points for the three principal categories of minor NSR permits confirm the limited nature of its outreach. For synthetic minor sources, EPA stated that establishing permit limitations to ensure that a source's emissions remain below the major NSR threshold "warrants transparency and accountability, although flexibility for smaller emitting synthetic minor sources may be warranted."[427] For modifications at major stationary sources, EPA similarly states that an applicant's analysis establishing that its project is not subject to major NSR "warrant[s] transparency and accountability, although flexibility for smaller emitting modifications may be warranted."[428] And for true minor sources, EPA suggested that greater flexibility might be appropriate because of the variability in their potential air-quality effects, but expressly stated that such flexibility should still ensure "a commensurate level of transparency and accountability."[429]

Thus, for synthetic minor permits and modifications at major sources, EPA identified transparency and accountability as the baseline and asked whether flexibility might be warranted for the smaller-emitting subset of those actions. For true minor sources, EPA asked how participation requirements might be calibrated to differences in air-quality significance. EPA did not ask whether states should be free to eliminate public participation even for high-emitting synthetic minor sources, substantial modifications at major facilities, or true minor sources with potentially serious local or cumulative air-quality effects.

EPA's own summary of the outreach agendas independently confirms that the sessions concerned category-specific flexibility rather than wholesale elimination of minimum minor NSR public-participation requirements. EPA states that the October 2022 sessions addressed existing public-participation requirements "as they apply to various types of minor NSR actions (*e.g.*, synthetic minor sources, minor modifications at major sources, true minor sources) and whether to consider adding flexibility to those requirements for each type."[430] EPA likewise explains that its January 2023 "Minor NSR Roundtable 1" with state and local air agencies addressed "[w]hether specific categories of case-by-case minor NSR permits should or should not require public notice and an opportunity for public comment" and "[w]hich specific factors should be considered when determining the appropriate level of public notice and comment for specific types/sizes of minor NSR activities."[431] Similarly, EPA's "Minor NSR Roundtable 2" focused on obtaining information regarding transparency and accountability in state processes

[426] *Id.,* Slide 9.

[427] *Id.,* Slide 10.

[428] *Id.,* Slide 11.

[429] *Id.,* Slide 12.

[430] EPA Summary, *supra* note 394, at 7.

[431] *Id.* at 12.

for establishing general permits and permits-by-rule and identifying covered sources, not on eliminating existing public participation requirements.[432] Thus, at all of the outreach sessions, EPA invited agencies to identify factors relevant to the appropriate degree of public participation and transparency. EPA did not ask whether it should rescind every minimum federal public-participation requirement.

The feedback described in EPA's summary was responsive to the narrower questions described above. EPA reports that "[m]any air agencies indicated that their minor NSR programs did not require a 30-day opportunity for public comment on *all* types of minor NSR preconstruction activities regulated under their minor NSR programs" and that some programs provided comment periods shorter than 30 days.[433] EPA further states that many agencies "were not aware that the existing federal regulations at 40 C.F.R. 51.161 are interpreted to require minor NSR programs to provide a 30-day public comment opportunity … on *all* proposed new minor sources and minor modifications regulated under such programs."[434] The recurring concern, therefore, was the application of the same 30-day public comment period to *all* minor NSR actions—not that public participation was unnecessary for any category of minor NSR permits.

EPA describes the resource concerns raised by air agencies during its outreach sessions in similarly limited terms. According to EPA's summary, some air agencies stated that "a requirement to provide public participation for *all* received minor NSR permits could increase the resource demands of their minor NSR programs."[435] Some agencies also questioned whether they would be able to provide "a 30-day opportunity for public comment on *all* regulated minor NSR preconstruction activities" give the costs and "high volume of minor NSR applications received annually."[436] And EPA indicates that some agencies questioned "the benefit of a 30-day public comment opportunity on *all* minor NSR applications and draft decisions."[437] Again, each of these observations addresses air agency concerns about applying a uniform 30-day public comment period to every minor NSR action. None express the view that states should be allowed to dispense with all public-participation requirements for all minor permits.

Indeed, EPA's summary expressly reports that air agencies distinguished between permits with significant potential consequences and permits that might properly receive streamlined treatment:

> Some types/sizes of proposed minor NSR activities have significant potential impacts such that public participation is appropriate. However, other types/sizes of proposed minor NSR activities are so small in terms of their air quality impacts

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[432] *Id.* at 13-14.

[433] *Id.* at 2 (emphasis added).

[434] *Id.* at 2-3 (emphasis added).

[435] *Id.* at 3 (emphasis added).

[436] *Id.* (emphasis added).

[437] *Id.* at 4 (emphasis added).

> and public interest that requiring public notice and comment on such activities would be an inefficient use of people's time and air agency resources.[438]

EPA then states, "Some air agencies discussed the idea of a 'de minimis' threshold for applying public participation requirements to minor source actions."[439] That feedback supports a tiered approach under which genuinely de minimis actions might receive differential treatment while public participation remains required for permits with significant potential impacts. It does not support EPA's proposal to eliminate public participation requirements for all types of minor NSR permits.

EPA's description of the concern about public-notice fatigue raised by some air agencies reinforces the same distinction between *de minimis* permitting actions and those with potentially significant air quality impacts. EPA reports that some air agencies contend that public notice of large numbers of "inconsequential" and "minimal-impact" actions could overwhelm the public and "discourage overall engagement in NSR air permitting public participation opportunities, even when provided with proposed permitting actions with more significant air quality implications."[440] Even if true—which Commenters' dispute—that concern assumes the continued existence and importance of public participation for actions with more significant air-quality implications; it does not support EPA's proposal to eliminate public-notice-and-comment requirements for all minor NSR permits across-the-board.

EPA's summary of input received from air agencies during its outreach sessions also reveals that at least some agencies acknowledge the importance of public participation in minor NSR permitting. Because EPA has not placed any records of actual air-agency feedback in the administrative record for its proposed action, it is not possible to know how many agencies mentioned public participation benefits or the context in which agencies offered those views. However, EPA's summary acknowledges that air agencies described public participation as a means to "[s]atisfy the public's 'right to know' about proposed actions that could introduce pollution to an area," to "[a]llow the public to provide comment and correct any issues or errors they have identified with the permit," and to enable the air agency to respond to public inquiries and feedback.[441] The agencies' recognition of public participation benefits further undermines EPA's suggestion that agency feedback endorsed abandonment of all federal minimum safeguards.

Even those agencies arguing for flexibility did not suggest that EPA should entirely eliminate public participation requirements for all minor NSR actions. Rather, EPA states that such agencies believed flexibility allowed them "to focus their limited resources on the preconstruction activities that piqued genuine public interest and posed the most consequential air quality impacts."[442] Their objective therefore appears to be for EPA to allow them to direct

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[438] *Id.* at 3.

[439] *Id.*

[440] *Id.* at 3-4.

[441] *Id.* at 2.

[442] *Id.* at 4.

their resources toward permits for which public participation would matter most—not to eliminate public participation requirements for all minor NSR permits.

In sum, the feedback EPA received from state and local air agencies during its 2022-2023 outreach sessions—even as described by EPA—does not support EPA's proposal. EPA asked the agencies whether the same 30-day process should apply to every minor NSR action, which categories might warrant targeted flexibility, and what factors should determine the appropriate level of participation. The agencies' feedback concerning smaller, lower-impact, or de minimis activities provides no basis for EPA's far broader proposal, which would allow the elimination of public participation in minor NSR actions with significant potential air quality effects, including synthetic minor permits, substantial modifications at existing major sources, and new sources locating near population centers already burdened by large numbers of polluting sources.

G. Post-Construction Title V Public Participation Is a Critical and Statutorily Required Backstop, Not a Substitute for Public Participation in Preconstruction Permitting.

EPA states that the proposed rule "would not affect Federal public participation requirements for air agencies' operating permit programs that implement the statutory requirements of CAA title V."[443] EPA further observes that states choosing to reduce or eliminate public participation in minor NSR permitting may be subject to "additional oversight through the title V operating permit program."[444] Specifically, EPA states:

> NSR preconstruction authorization decisions that have been subject to public notice and the opportunity for comment and judicial review conclusively establish the applicable requirements of the SIP for construction and modification of individual stationary sources, thereby foreclosing further substantive review of those source-specific NSR permit requirements during the title V permitting process. By contrast, in situations in which an NSR permit or other NSR authorization was not issued following public notice and the opportunity for comment and judicial review, the title V permitting process may be used to evaluate the substance of such underlying NSR authorization decisions to ensure that the title V permit assures compliance with the applicable requirements of the SIP for construction and modification of stationary sources of air pollution.

EPA further explains that, for those sources subject to Title V, if a state chooses to issue minor NSR permits without public notice and an opportunity for comment, "EPA may not have grounds to decline to review the substance of the associated minor NSR authorization decisions during the title V permitting process."[445] While commenters do not agree with the EPA's policy (and proposed rule) regarding the consideration of NSR permitting decisions in the Title V

[443] Proposal. at 41,598.

[444] *Id.* at 41,601.

[445] *Id.*

permitting process, that policy is strongly based on the availability of public participation during the NSR process. Accordingly, there is no "may" about it – if EPA finalizes and states adopt the proposed removal of public comment for minor NSR permits, EPA cannot also refuse to address underlying NSR permitting issues, including applicability, in the the Title V process.

Moreover, Commenters strongly disagree with EPA's assertion that Title V review may be foreclosed with respect to the adequacy of synthetic minor limits in minor NSR permits or other permitting errors that improperly allowed a new or modified source to avoid major NSR. Many of our organizations also submitted comments opposing EPA's separate pending proposal to codify that interpretation.[446] Although EPA does not solicit comment here on the circumstances in which Title V review may be available, EPA invokes that review as a potential consequence of eliminating public participation in minor NSR permitting. That rationale necessarily raises a distinct issue presented by this proposal: whether Title V review is an adequate substitute for preconstruction minor NSR review. It is not. Title V review is an important and statutorily required backstop to ensure that existing sources comply with all applicable Clean Air Act requirements. But Title V public-participation opportunities typically arise long after construction is complete and operation has begun and therefore cannot substitute for notice and comment before a source is authorized to construct.

Even if a source will later be subject to Title V review and the underlying minor NSR determination remains open to scrutiny, that later review cannot perform minor NSR's essential preventive function. Preconstruction public participation allows concerned members of the public to examine a permit applicant's emissions calculations, proposed synthetic minor limits, major NSR applicability analysis, and air quality modeling before the proposed facility is built and begins causing air pollution. If warranted in light of public comments, the permitting agency can require the applicant to undertake additional analyses, install additional controls, or accept more stringent controls. And if necessary, the permitting agency can deny the permit application. Once construction is complete and operation has begun, the surrounding community may already have been exposed to unlawful or inadequately controlled pollution for years. Correcting a permitting mistake may require costly retrofits, unforeseen production restrictions, or other measures that would have been more feasible to impose before construction. Critically, while Title V review can address an ongoing violation, it cannot undo pollution already emitted or restore the lost opportunity to prevent unlawful construction in the first place. Moreover, because many sources subject to minor NSR are not subject to Title V, Title V provides no public participation opportunity at all for those sources.

At the same time, preconstruction review cannot be expected to reveal every permitting error, which is why meaningful Title V review remains indispensable even if public participation opportunities are provided at the time of minor NSR permit issuance. Some permit deficiencies become apparent only after a source begins operating and information from stack testing, monitoring results, production data, or experience at comparable facilities demonstrates that the assumptions underlying the construction permit were wrong. The Drax Amite and Morehouse

[446] *See* Comments by Southern Environmental Law Center, et al., dated Apr. 10, 2024, Docket ID EPA-HQ-OAR-2023-0401-0038, https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0401-0038.

facilities described above[447] illustrate this point: public participation during post-construction Title V proceedings revealed that the facilities' actual or potential VOC emissions were several times greater than the preconstruction emission estimates initially relied upon to classify them as minor sources.[448] Public comments made on the draft Title V permits for these facilities ultimately led to additional emissions testing, revised permitting determinations, new pollution controls, and even state agency enforcement.

Indeed, the D.C. Circuit recently underscored Title V's continuing role in addressing major NSR applicability errors.[449] The court observed that a source that uses "Project Emissions Accounting" to avoid major NSR in a manner inconsistent with the Clean Air Act's definition of "modification" or EPA's regulatory definition of "project" "is subject to 'compliance and enforcement' proceedings, including proceedings under Title V."[450] The court further noted that "EPA has used the Title V petition process to correct one State regulator's misunderstanding of what constitutes a 'project'" for NSR purposes.[451]

In sum, preconstruction minor NSR review and post-construction Title V oversight serve different but complementary purposes. The availability of Title V review cannot justify eliminating preconstruction minor NSR review, nor can the availability of preconstruction minor NSR review justify restricting Title V review. Public participation in both programs is critical to preventing and correcting permitting errors that may allow new or modified sources to avoid applicable pollution-control requirements or cause or contribute to violations of the NAAQS.

H. EPA's Suggestion that Providing an Opportunity for Public Notice and Comment is Too Burdensome on States Lacks Merit.

EPA does not even give an estimate of the amount of burden allegedly imposed by public notice and comment of minor air permits, however the record that does exist indicates it is not a significant portion of the NSR permitting process. Furthermore, as discussed below in response to EPA's Question # 1, the burden being created by the permitting fragmentation that would result from finalization of this proposal likely far outweighs the burden of public notice and comment, and shifts some of that burden onto the affected public.

While there is no authoritative national count of minor NSR actions, the scale is large and knowable from primary sources: EPA's NSR Information Collection Request ("ICR")[452] counts

[447] *Supra* at 23-4, 82, 89-90.

[448] Add citation (refer to earlier section citations to attachments)

[449] *Env't Def. Fund v. Env't Prot. Agency*, No. 18-1149, 2026 WL 2164508, at *8 (D.C. Cir. July 28, 2026).

[450] *Id*.

[451] *Id.* at *8 n. 16 (citing 89 Fed. Reg. 36,870, 36,878 n. 65 (May 3, 2024)).

[452] OMB control number 2060-0003. Cited in the preamble at Section VI.C., explaining the view that the "proposed action, if finalized, would not impose any new information collection burden under the [Paperwork Reduction Act] PRA."

123 state/local/tribal reviewing authorities;[453] and historically assumes on the order of 74,591 minor-source actions per year at ~30 permitting-agency hours each.[454] ***However,*** the portion of that dedicated to publicly noticing such actions isn't separately broken out, but is presumably a small fraction in comparison to the complex task of legal and engineering review of applications and drafting of permit documents. It does not appear that as part of this proposed action, or prior to it, EPA has taken any steps to quantify the impact of elimination of the requirements for public participation.

Furthermore, EPA's existing regulations already enable states to further mitigate this fractional and modest burden. First, states already have the ability to tailor their minor NSR programs to address only those sources that are "necessary" to regulate to achieve the NAAQS. If a new source or modification is sufficiently significant to interfere with NAAQS compliance, it is significant enough to warrant public notice and comment.

Second, EPA already allows states to exclude smaller sources with insignificant impacts on NAAQS compliance to be excluded from minor NSR permitting, including public participation procedures. CAA § 110(a)(2)(C), requires each SIP to include a program regulating "the modification and construction of any stationary source . . . *as necessary to assure* that [NAAQS] are achieved."[455] EPA's regulations specify that state plans must "identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review."[456]

Finally, EPA's 2016 e-notice final rule removed mandatory newspaper-publication requirements and allowed electronic notice as an option for agencies running EPA-approved programs, instead requiring e-access (posting the draft permit) whenever e-notice is used.[457] EPA "anticipate[d] that e-notice, which is already being practiced by many permitting authorities … will provide cost savings over newspaper publication,"[458] and its fact sheet likewise states e-

[453] Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Prevention of Significant Deterioration and Nonattainment New Source Review (Renewal), 88 Fed. Reg. 3404, 3405 (Jan. 19, 2023).

[454] Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Prevention of Significant Deterioration and Non-Attainment Area New Source Review (Renewal), 73 Fed. Reg. 45,436 (Aug. 5, 2008). The 30 hours represents **agencies' entire permitting process**, not public notice. The number of such actions and estimate of time were affirmed in the most recent renewal of the ICR, 88 Fed. Reg. at 3,405.

[455] 42 U.S.C. § 7410(a)(2)(C).

[456] 40 C.F.R. § 51.160(e). EPA has also taken several actions to allow states to limit or not to require public notice of certain "minor" NSR actions. For instance, the Louisville Metro Air Pollution Control District Regulations require no public notice except for permits at Title V facilities. APCD Regulation 2.07, 40 C.F.R. 52.920 (c), Table 2; see also Regulation 2.03, 40 C.F.R. 52.920 (c), Table 2.

[457] Revisions to Public Notice Provisions in Clean Air Act Permitting Programs, 81 Fed. Reg. 71,613 (Oct. 18, 2016) (to be codified at 40 C.F.R. pts. 51, 52, 55, 70, 71 & 124).

[458] *Id.*

notice "results in cost savings over newspaper publication."[459] The time required to simply post applications and proposed permits online and send out an e-notice appear trivial. Further, reviewing comments may actually save the agency time in the long run by flagging mistakes and issues of concern and addressing them so as to avoid appeals and problems that could end up taking up much more time.

Ancillary to this requirement, it is also important to note that the proposal would also remove applicability of the requirement to notify "the Administrator through the appropriate Regional Office, and to all other state and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located" in relation to all but major sources and major modifications.[460] The public notices issued by permitting authorities currently also fulfill this requirement, which ultimately stems from the requirement of Clean Air Act §§ 110(a)(2)(M) and 121, for "consultation and participation by local political subdivisions affected by the plan,"[461] and "a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal land manager having authority over Federal land to which the State plan applies, … as part of such plan."[462] Removal of this requirement also would potentially lead to greater burdens for many of the same reasons as removal of the public participation requirements, and is largely not acknowledged by the EPA in the proposal's preamble, nor is it justified on the same bases.

III. EPA'S PROPOSAL CONSTRUCTIVELY REOPENS WHETHER MINOR NSR PERMITS MAY BE USED TO ESTABLISH SYNTHETIC MINOR LIMITS, AND MOST PAPER LIMITS CANNOT LAWFULLY EXEMPT OTHERWISE MAJOR SOURCES FROM MAJOR NSR.

One of the most consequential uses of state minor NSR permitting programs is to establish source-specific limitations intended to allow sources that otherwise have the potential to emit at major-source levels to avoid major NSR.[463] These so-called "synthetic minor" permits determine whether a new or modified source must comply with major NSR's pollution control, air quality analysis, offset, and public participation requirements. EPA's proposal expressly encompasses minor NSR permits that establish synthetic minor limits.[464]

A mistake in establishing synthetic-minor status can result in a source capable of emitting well above major-source levels constructing and operating without complying with the air quality safeguards Congress prescribed for such sources. In light of the significant health and

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[459] U.S. Env't Prot. Agency, *Fact Sheet: Final Rule: Revisions to the Public Notice Provisions in Clean Air Act Permitting Programs* (Oct. 5, 2016), https://www.epa.gov/sites/default/files/2016-10/documents/fact_sheet_final_e-notice_rule.pdf (Attachment RR).

[460] 40 C.F.R. § 51.166(d); Proposed Regulatory Text Amendments Red-Line Strikeout, document EPA-HQ-OAR-2025-1212-0007 in this docket at renumbered § 51.166(c).

[461] 42 U.S.C. § 7410(a)(2)(M).

[462] 42 U.S.C. § 7421.

[463] *See* Proposal at 41,595 ("Minor NSR programs also apply to "synthetic minor" sources and modifications, which are new facilities and/or modifications to existing sources that would ordinarily increase emissions of regulated pollutants by amounts equal to or exceeding the applicable 'major source' thresholds.")

[464] *Id.*

environmental repercussions of defective synthetic minor limits, EPA stated during its 2022-2023 outreach sessions that "[t]he act of setting limitations/conditions on a source to ensure, on an ongoing basis, that is emissions . . . are not subject to the more prescriptive requirements under Major NSR warrants transparency and accountability."[465] Nonetheless, EPA's proposal would remove public notice and comment as a minimum federal requirement for all state minor NSR programs, leaving state and local permitting agencies free to decide whether to provide any public notice or opportunity for comment in connection with issuance of synthetic minor permits.

Public notice and comment has long been understood as a fundamental safeguard in the establishment of a legitimate synthetic minor limit, allowing the public to examine whether the proposed limit is accurate, enforceable, and sufficient to prevent the source from emitting at major source levels. Since 1973, EPA's regulations governing state implementation plans have required state and local air agencies to provide an opportunity for public comment of 30 days for any NSR permit, which thus applies when permitting any synthetic minor source.[466] Thus, in 1981, when EPA promulgated the Part 51 definitions governing whether physical or operational limitations may restrict a facility's potential to emit, every NSR permit subject to Part 51 was already required to undergo a public notice and public-comment period of at least 30 days.[467] If finalized, EPA's proposal to eliminate these longstanding minimum public participation requirements would fundamentally alter the regulatory regime. Accordingly, EPA's proposal reopens for comment the fundamental question of whether, and under what substantive and procedural conditions, a minor NSR permit may lawfully restrict a source's potential to emit and allow an otherwise major source to avoid major NSR.

A. By Removing a Safeguard Historically Applicable to Synthetic-Minor Permitting, EPA Has Reopened the Legal Basis and Minimum Requirements for Establishing Synthetic-Minor Status Through Minor NSR Permits

The D.C. Circuit has recognized that any agency constructively reopens an earlier regulatory determination when it materially changes the surrounding regulatory framework in a manner that significantly alters the operation or consequences of the earlier determination. In *Sierra Club v. Env't Prot. Agency*, the court held that EPA reopened an existing regulatory exemption when it removed procedural and substantive safeguards that had previously constrained the exemption, even though EPA did not amend the regulatory language creating the exemption itself.[468] The court explained that the safeguards were part of the regulatory construct

[465] EPA Presentation, Slide 10, *supra* note 425.

[466] *Id. See also* 40 C.F.R. § 51.161(a), (b)(2); Preparation, Adoption, and Submittal of Implementation Plans, Proposed Rule, 38 Fed. Reg. 9,599, 9,600-01 (Apr. 18, 1973); Maintenance of National Ambient Air Quality Standards, 38 Fed. Reg. 15,834, 15,836 (June 18, 1973) (promulgating former 40 C.F.R. § 51.18(h)); Air Quality Implementation Plans; Restructuring SIP Preparation Regulations, 51 Fed. Reg. 40,656, 40,669 (Nov. 7, 1986) (recodifying the requirements at 40 C.F.R. § 51.161).

[467] *See* 40 C.F.R. §§ 51.165(a)(1)(iii), 51.166(b)(4); Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 44 Fed. Reg. 51,924, 51,948, 51,956-58 (proposed Sept. 5, 1979), finalized at 45 Fed. Reg. 52,676, 52,688-690, 52,730-31, 52,743-44 (Aug. 7, 1980).

[468] 551 F.3d 1019, 1024-26 (D.C. Cir. 2008).

under which the exemption operated and that eliminating them "significantly alter[ed] the stakes."[469]

The D.C. Circuit's reasoning in *Sierra Club* also applies here. EPA has long allowed minor NSR permits to establish limits intended to alter a source's potential to emit, but those permits have been subject to the minimum public-participation requirements in 40 C.F.R. § 51.161. The existing rule requires state permitting agencies to provide the public with: (1) notice of the proposed new source or modification, (2) access to the permitting agency's analysis of the effect of construction or modification on ambient air quality, and at least 30 days to submit comments.[470] EPA acknowledges these longstanding public participation requirements in its 2022 stakeholder materials, explaining that they apply to the permitting of "any synthetic minor source."[471]

EPA's guidance likewise treats public participation as a significant feature of the process through which synthetic minor limits are established.[472] The guidance states that minor NSR permits can restrict potential to emit when issued under an approved permitting program and made legally and practically enforceable, but cautions that enforceability of a synthetic minor limit may be called into question if the permit in which it is established did not undergo the public process required by EPA's regulations.[473]

EPA's only comprehensive federal rule expressly establishing a synthetic-minor permitting mechanism similarly incorporates public participation. Specifically, EPA's 2011 Federal Indian Country minor NSR rule "require[s] public participation on all draft permits for minor sources and minor modifications locating in Indian country."[474] This includes public notice and a 30-day public comment period, followed by an opportunity for administrative and judicial review.[475] In promulgating these requirements, EPA explained that "the size and amount of emissions from [synthetic minor] sources warrants a case-by-case review of the source and their proposed emission limitations," and therefore rejected a comment requesting that synthetic minor sources be eligible for general permits.[476]

A permitting system that allows an otherwise major source to avoid major NSR through a state-only enforceable limit issued without public notice and an opportunity for comment is fundamentally different from the framework EPA originally established more than 40 years ago.

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[469] *Id.* at 1025-26.

[470] 40 C.F.R. § 51.161.

[471] EPA Presentation, Slide 10, *supra* note 5.

[472] Letter, John Seitz, EPA, Federal Enforceability of a State's Existing Minor New Source Review Programs (1994), https://www.epa.gov/sites/default/files/2015-07/documents/nescaum.pdf (Attachment SS).

[473] *Id.* at 2.

[474] 91 Fed. Reg. at 41,598 (citing 40 C.F.R. § 49.157).

[475] 40 C.F.R. §§ 49.157, 49.159.

[476] 76 Fed. Reg. 38,748, 38,770 (July 1, 2011).

Without public notice and an opportunity for public comment on proposed synthetic minor limits, members of the public cannot be assured that sources that avoid major NSR's procedural and substantive air quality safeguards will actually emit less than the major NSR applicability threshold. EPA has therefore constructively reopened whether, and under what minimum substantive and procedural conditions, a minor NSR permit may lawfully be used to alter a source's potential to emit and exempt it from major NSR. Before removing the minimum public-participation requirements from the federal minor NSR regulations, EPA must evaluate and take public comment on the legality and adequacy of the resulting regime for developing, implementing, and enforcing synthetic minor limits.

B. EPA's Proposal Undermines the Basis for Treating Paper Restrictions as Limits on Potential to Emit and Reopens Whether Such Restrictions Lawfully Serve to Exclude Sources from Major NSR.

A regulatory regime under which synthetic minor limits are neither federally enforceable nor subject to public participation, and that lacks codified criteria governing legal and practical enforceability, does not ensure that emissions from synthetic minor sources will actually remain below major source thresholds. Synthetic minor status often turns not on any inherent limitation in a source's design, but on permit conditions restricting emissions, operating hours, production, throughput, fuel use, or materials processed. Whether those paper limits are effective depends on accurate emissions calculations, sufficiently specific permit terms, adequate monitoring and recordkeeping, continuing compliance, and effective enforcement. From the outset, public participation has provided an important check on each of these elements. As shown by Commenters' list of examples of minor NSR permits that have been improved or withdrawn as a result of public input,[477] public scrutiny can uncover substantially underestimated emissions, inadequate compliance methods, and insufficient monitoring requirements, among other permitting flaws. By removing public participation from EPA's already incomplete regulatory framework, EPA's proposal calls into question whether its synthetic minor permitting regime can reliably distinguish genuinely minor sources from sources that retain the capacity to emit at major-source levels.

If EPA finalizes this proposal, an otherwise major source would avoid major NSR through a paper restriction that is neither enforceable by EPA and the public nor subject to federally required public notice and comment before issuance. Without such scrutiny, the validity of the source's synthetic minor limit would depend entirely on the permitting agency's unreviewed conclusion that the limit is technically accurate and legally and practically enforceable. That altered regulatory regime substantially undermines EPA's premise that paper restrictions can change a source's potential to emit. Public notice and comment, EPA oversight, and federal and citizen enforcement have operated together to help ensure that potential to emit limits are effective. Removing those safeguards causes the oversight system to break down.

More fundamentally, EPA's proposal reopens a threshold statutory question that has never been adequately addressed by EPA or reviewed by a court: whether a legal restriction on a source's operations actually reduces its potential to emit for purposes of determining major NSR

[477] Permit Comments Table, *supra* note 84.

applicability. The Clean Air Act defines major source status based on what a source "emit[s] [] or [have] the potential to emit."[478] EPA's regulations similarly begin by defining potential to emit as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design."[479] And in *Alabama Power Co. v. Costle*, the D.C. Circuit described potential emissions as those produced when a source operates at "full design capacity," accounting for the anticipated operation of pollution control equipment designed into the facility.[480] While installed pollution controls can be viewed as reducing a source's maximum capacity to emit, a permit restriction limiting a source's hours of operation or the amount of material the source uses or products it produces does not. Rather, such a restriction leaves the source physically and operationally capable of emitting above the statutory threshold.

Indeed, EPA's regulatory text acknowledges the artificial nature of synthetic minor limits that restricts a source's hours of operation or other operational restrictions. It states that those restrictions "shall be treated as part of its design" if they are enforceable.[481] Restrictions need not be "treated" as design features if they actually change a source's design. Under the best reading of the Clean Air Act, a source with the physical or operational capacity to emit above the major source threshold remains a major source notwithstanding a voluntary promise not to use that capacity. At most, potential to emit should account for installed pollution controls, inherent equipment limitations, permanent physical constraints, or comparable design features that actually prevent the source from emitting at major source levels.

EPA cannot eliminate public participation while simply assuming that all existing forms of synthetic minor limits remain valid. By removing a safeguard central to determining whether paper limits are accurate, effective, and enforceable, EPA has reopened whether those restrictions may lawfully alter potential to emit at all. Before removing the minimum public participation requirements from the federal minor NSR regulations, EPA must evaluate and take comment on both the legal basis for treating paper restrictions as part of a source's design and the substantive and procedural conditions necessary for any such restriction to allow an otherwise major source to avoid major NSR. [482]

IV. IF EPA FINALIZES ITS PROPOSAL, IT SHOULD NOT REQUIRE STATES TO REVISE THEIR PLANS TO ELIMINATE PUBLIC PARTICIPATION REQUIREMENTS.

As EPA proposes, if EPA finalizes its proposed elimination of public participation requirements from its minor NSR regulations EPA should not and cannot require states to revise their plans accordingly.

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[478] *See* 42 US.C. §§ 7479(1), 7602(j).

[479] 40 C.F.R. §§ 51.165(a)(1)(iii), 51.166(b)(4), 52.21(b)(4).

[480] 636 F.2d 323, 353 (D.C. Cir. 1979)

[481] 40 C.F.R. §§ 51.165(a)(1)(iii), 51.166(b)(4), 52.21(b)(4).

[482] Reopening the synthetic minor permitting regime is especially warranted because EPA has never completed its response to the D.C. Circuit's remand of the NSR regulations to EPA for it to make a non-arbitrary determination as to whether limits on a source's potential to emit need to be federally enforceable to enable the source to avoid major NSR. *See infra* at section V(D).

EPA cannot and should not require states to adopt provisions into their plans that, as we note throughout these comments, are unlawful and arbitrary. Under 40 C.F.R. § 51.161(a), state and local air agencies must provide an "opportunity for public comment on information submitted by owners and operators" regarding new construction or modification of any stationary source. This opportunity must include three elements: (1) public inspection availability of the information submitted by the source owner and the agency's air quality analysis; (2) a 30-day period for submittal of public comment; and (3) notice by prominent advertisement in the affected area of the location of the source information and analysis. EPA's change in position, as we discuss in Section X, is unsupported and contrary to the Clean Air Act, and cannot be incorporated into preexisting SIPs.

Second, the Clean Air Act prohibits EPA from approving state plans that would interfere with attainment of air quality and other applicable requirements.[483] For the myriad reasons outlined above, the proposed rule would negatively impact air quality and interfere with applicable requirements of the Act. As such, the proposed revisions, which EPA lacks authority to finalize, cannot be revisions that states are required to incorporate into their SIPs, as they would negatively impact air quality and interfere with applicable legal requirements.

Third, the Clean Air Act allows for mandatory revisions of SIPs in only specific circumstances. The Act's two primary vehicles through which EPA may initiate SIP modifications are: 1) the SIP call procedure under Section 110(k)(5) and 2) the error-correction mechanism under Section 110(k)(6). Under Section 110(k)(5), whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant NAAQS or to otherwise comply with any requirement of the Clean Air Act, the Administrator shall require the state to revise the plan as necessary to correct such inadequacies. The focus here is on attainment and maintenance of air quality—it does not suffice for the Agency to merely prefer a different approach or have amended its own regulations. Similarly, under Section 110(k)(6), the Administrator may determine that a prior approval or disapproval action was in error, and the Administrator may revise such action without requiring any further submission from the state, but only after making an explicit error determination and providing that determination and its basis to the state and the public.

Neither of these sections apply in the context of the instant Proposal. As such, EPA is precluded from requiring revisions to approved SIPs to incorporate these changes. Similarly, as noted here and elsewhere in these comments, we believe the Proposal itself will interfere with the attainment or maintenance of air quality, and as such, not only may EPA not require revisions to state plans as a result of this Proposal should it be finalized, its very deregulatory revisions counsel the exact opposite, making a SIP inherently deficient on the provisions' inclusion.

Requiring the state to eliminate its public participation requirements simply because EPA has amended its own regulations to deregulatory and deleterious effect would be inappropriate where the state's existing program already meets or exceeds the new federal minimums.[484] EPA

[483] 42 U.S.C. § 7410(l).

[484] *See also Union Elec. Co. v. Env't Prot. Agency*, 427 U.S. 246, 265-66 (1976) (finding the CAA allows states to adopt SIPs that are more stringent than EPA's minimum requirements). At least thirty-six states have also adopted some version of a statute constraining state environmental agencies from imposing requirements more stringent than

cannot require states to incorporate its unlawful elimination of public participation requirements that are mandated by the Act.

V. TO PREVENT "MINOR" NEW SOURCES AND MODIFICATIONS FROM PREVENTING ACHIEVEMENT OF AMBIENT AIR QUALITY STANDARDS, EPA SHOULD STRENGTHEN ITS MINOR NSR REGULATIONS AND INCREASE OVERSIGHT OF STATE AND LOCAL MINOR NSR PROGRAMS

As EPA acknowledges in its proposal, the existing federal regulations governing minor NSR permitting were promulgated more than 50 years ago, while the Clean Air Act was in its infancy. The concept of "synthetic minor" limits had not yet been developed. In fact, EPA's early regulations would have required much larger numbers of sources to comply with major NSR requirements. Neither the Clean Air Act nor EPA's regulations specifically refer to "minor NSR" or "synthetic minor" sources. Yet now, most new sources and modifications to existing sources are authorized via minor NSR permits, making minor NSR a key tool for attaining and maintaining compliance with the NAAQS.

As described above, errors in minor NSR permitting can result in sources avoiding important substantive and procedural air quality safeguards despite emitting air pollution well above the major source threshold. And even lower-emitting sources can cause major air quality problems when located close to schools and homes or clustered together in overburdened communities. Rather than eliminating public participation in minor NSR permitting, EPA should be looking for ways to strengthen the minor NSR program so that it better fulfills its statutory purpose of preventing NAAQS violations. Our ideas for how EPA could improve the effectiveness of the minor NSR program are provided below.

A. EPA Should Amend the Minor NSR Regulations to Explicitly State that a Limit Taken to Avoid Major NSR Must Encompass All Source Emissions.

It appears that some states currently allow synthetic minor NSR sources to disregard startup, shutdown, and malfunction ("SSM") emissions in determining whether they are operating in compliance with their synthetic minor emission limits. Though this is already illegal, we urge EPA to include explicit language in the minor NSR rules explaining that any limit taken to avoid major NSR must encompass all source emissions.

Likewise, to avoid any ambiguity, EPA should include explicit language in the minor NSR rules stating that the preconstruction assessment of whether a proposed minor source or

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the applicable federal minimum, with thirteen states applying a broad prohibition and twenty-three applying a more limited version that permits more stringent state requirements upon specified findings. Matthew J. Micheli, Holland & Hart LLP, *Memorandum: Summary of State Law Requiring Agencies to be "No More Stringent Than" Federal Law*, prepared for the Wyoming Legislature's Regulatory Task Force (Jul. 25, 2023), *available at* https://wyoleg.gov/InterimCommittee/2023/S40-20230801NoMoreStringentThan.pdf (citing Envtl. L. Inst., *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* (May 2013)) (Attachment TT). Commenters do not read these statutes as foreclosing states from retaining public notice requirements for all sources. However, if EPA finalizes the proposal it should also clarify that public participation requirements fall reasonably within the range of stringency contemplated by SIP-approved "minor" NSR programs.

minor modification will cause or contribute to a NAAQS violation must include consideration of all reasonably foreseeable plant emissions, including emissions during startup and shutdown.[485] Emissions during these operating scenarios typically involve substantially higher emissions over a shorter period of time than what is released during steady-state operations. Such high-level emission bursts can easily cause or contribute to a violation of the short-term NAAQS in the area around a proposed minor NSR source or minor modification.

Finally, to help ensure that minor NSR permits are fully protective of the communities in which minor sources and minor modifications are constructed, EPA should include explicit language in the federal minor NSR rules prohibiting states from including SSM exemptions of any kind in minor NSR permits.

B. EPA Should Revise the Minor NSR Rules to Require Minor NSR Permitting for Sources That Utilize the Actual-to-Projected-Actual Emissions Calculation Methodology to Avoid Major NSR, and to Require That Emissions Calculations Be Available for Public Review During the Minor NSR Public Comment Period.

Another problem with NSR permitting that necessitates a rule change is the lack of transparency when a source concludes that a planned modification will not cause emissions to increase above the major NSR applicability threshold.

In its 2022-2023 public outreach sessions, EPA explained that a modification to a large major stationary source that was subject to major NSR when initially built can subsequently undertake modifications that are subject to either major or minor NSR depending upon the amount by which they will increase the source's emissions.[486] In determining whether a modification will result in a significant emissions increase that triggers major NSR, a source can consider its projection of future emissions (discounting any amount that the source attributes to demand growth), as well as "aggregation, netting, and debottlenecking."[487] EPA noted that "[s]ome air agencies currently exempt from permitting a modification if its emission increase is below the agency's minor NSR permitting threshold." As a discussion point, EPA stated that a permit applicant's analysis demonstrating that a modification is not subject to major NSR "warrant[s] transparency and accountability," but that "flexibility for smaller-emitting modifications may be warranted." EPA's statements raise several concerns.

First, while as a practical matter there are modifications that are "smaller emitting," the emissions accounting procedures set forth in the federal NSR regulations cannot be relied upon to demonstrate which modifications actually fall into that category. This is because even a modification that has the potential to increase emissions by an enormous amount can avoid major NSR if the facility owner projects that the actual post-change emissions increase will not be significant, or if the facility owner elects to deduct a large amount of that emission increase on

[485] Malfunction conditions should only encompass events that are unavoidable and unforeseeable, and thus a permit applicant would be unable to estimate emissions resulting from these activities prior to construction. However, such emissions must be counted for purposes of complying with any PTE limit.

[486] EPA Presentation at Slide 11, *supra* note 425.

[487] *Id.*

the basis that it can be attributable to demand growth. Likewise, under the Project Emissions Accounting Rule, a source can offset large emissions increases from a planned project with emissions decreases from other activities that are grouped together as part of the same "project," even if the source does not demonstrate that such decreases are permanent, quantifiable, and enforceable, and even if facility-wide emissions will increase during the contemporaneous period. Thus, while a source owner might determine that a particular modification's emissions increase is small, that determination is based on an array of emissions accounting techniques that, if done incorrectly, may mask a very large emissions increase. In other words, the purported amount by which a source claims that a modification will increase emissions may have no bearing whatsoever on the likelihood that the modification will result in a significant emissions increase.

The only way to have confidence that a source's determination that its modification qualifies as "minor" is to review the source's emissions increase calculation. Unfortunately, despite EPA's claim that federal regulations require modifications excluded from major NSR to be subject to minor NSR, including a public comment opportunity, EPA does not appear to have ever directed states to give the public an opportunity to comment on emissions increase calculations for modifications that are not subject to major NSR.

Even for those modifications that are subject to minor NSR permitting, there is no mention in the federal major NSR regulations of a requirement that the state make the source's emissions-increase calculation available for public review and comment. In fact, for most modifications, the federal major NSR regulations do not require a source to submit its emissions-increase calculation to the state if the source concludes that major NSR is not triggered. Specifically, only electric utility steam generating units (EUSGUs) must submit their initial emissions calculations to the state, and only if they project a "reasonable possibility" that emissions will increase above the NSR significance threshold, i.e., projected emissions will increase by at least 50 percent of the major NSR threshold.[488] Sources other than EUSGUs that project a reasonable possibility of a significant emissions increase only have to submit their calculations to the state upon request.[489] Any source that projects emissions below 50 percent of the significance threshold is not required to maintain records or submit documentation to the state.[490] While the federal major NSR rules require states to provide the emissions information sources maintain pursuant to this "reasonable possibility" rule to the general public upon request,[491] it is difficult to obtain this information if the state has not requested it from the source. Furthermore, since the source is not required to provide initial notification to the state of its calculations, the public has no way of knowing that a modification occurred or that there is a reasonable possibility that the modification will result in a significant emissions increase. Thus, it is unlikely that a member of the public would realize that they should be asking for access to a source's emissions-increase calculation.

[488] 40 C.F.R. § 51.166(r)(6).

[489] *Id.*

[490] *Id.*

[491] 40 C.F.R. § 51.166(r)(7).

To address the concerns identified above, EPA should revise its minor NSR regulations to specify that permitting agencies must require minor NSR permitting of all sources that utilize the actual-to-projected actual methodology for calculating the emissions increase resulting from a planned modification. In addition, EPA should direct states to make the sources' emissions calculations available for public review during the required 30-day public comment period on the minor NSR permit.

C. EPA Should Revise Its Minor NSR Regulations to Clarify That a Deficient Minor NSR Permitting Determination Can Be Corrected Through the Title V Permitting Process.

EPA almost never reviews minor NSR permits to ensure that new sources and modifications are properly classified as "minor" based on an accurate emissions calculation and enforceable potential-to-emit limits.[492] Rather, it is largely up to concerned members of the public to identify problems with minor NSR permitting decisions and either challenge defective determinations at the state level or, if available, seek EPA's intervention by filing a petition for the Administrator to object to a Clean Air Act Title V operating permit.[493] Unfortunately, pursuant to a legal interpretation developed by EPA under the first Trump Administration, throughout most of the country EPA currently prohibits members of the public from challenging deficient minor NSR permitting decisions in the context of a facility's Title V operating permit proceeding. In fact, EPA even prohibits itself from objecting to a facility's Title V permit based on deficiencies in a state's minor determinations, even in the face of blatant errors that result in a new or modified source emitting pollution at major levels without being subject to the major PSD and nonattainment NSR requirements. Commenters urge EPA to amend its regulations to clarify that (1) a state must correct any deficiencies in minor NSR permitting decisions identified during a facility's Title V permit proceeding, and (2) EPA can and must object to a facility's proposed Title V permit if such deficiencies are not corrected.

EPA's decision to eliminate the ability of the public (and EPA and other State and local governments) to address erroneous minor NSR determinations in Title V proceedings was first announced in EPA's response to a petition filed by Sierra Club seeking EPA's objection to the Title V permit for the Hunter Power Plant in Utah ("the Hunter Order").[494] The petition alleged that the state had improperly permitted several plant modifications as "minor" that should have been required to undergo major NSR. In denying the petition, EPA announced a new Title V interpretation under which neither EPA nor the public can utilize the Title V process to require a state to correct deficiencies in prior minor NSR permitting determinations.[495] Sierra Club challenged the petition denial in the U.S. Court of Appeals for the Tenth Circuit and won.[496] In

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[492] *See, e.g.,* EPA Inspector General Report, *supra* note 2, at 8 ([n]either EPA headquarters nor regional offices conduct regular routine evaluations or review synthetic-minor-source permits.").

[493] Clean Air Act § 505(b)(2).

[494] *In the Matter of PacifiCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 (Oct. 16, 2017) (vacated by the 10th Circuit), available at https://www.epa.gov/sites/default/files/2021-03/documents/hunter_order_10-16-2017.pdf.

[495] *Id.*

[496] *Sierra Club v. Env't Prot. Agency*, 964 F.3d 882 (10th Cir. 2020).

vacating EPA's petition denial, the Tenth Circuit held that EPA's definition of what constitutes an "applicable requirement" at 40 C.F.R. § 70.2 "is not ambiguous" and "unmistakably requires that each Title V permit include all requirements" in a state's Clean Air Act implementation plan, including the NSR requirements.[497]

While the Tenth Circuit rejected EPA's restrictive interpretation of Title V, the Fifth Circuit separately upheld the interpretation in a challenge to EPA's denial of a petition for a Texas facility.[498] Then, in another Title V petition denial issued subsequent to both the Tenth and the Fifth Circuit decisions, the Trump Administration declared that it believed the Fifth Circuit's decision was correct and that EPA therefore would "continue to apply" the original Hunter Order interpretation "when issuing title V permits and reviewing petitions on permits for sources in states outside of the Tenth Circuit."[499]

As EPA notes in this proposal, in 2023 EPA proposed to amend the Title V regulations to codify its view that minor NSR permitting decisions that have been subject to public notice and the opportunity for comment and judicial review conclusively establish the applicable NSR requirements and foreclose substantive review of NSR issues during the Title V process. However, EPA has not finalized that proposed regulatory change.[500]

Preventing the public and EPA from utilizing the Title V process to correct mistakes in how NSR requirements have been applied to a source contravenes the plain language of Title V requiring that a Title V permit apply and ensure compliance with all Title I requirements, which includes major and minor NSR.[501] In addition, EPA's refusal to address NSR concerns raised during Title V proceedings is bad public policy that eliminates an important statutory mechanism for EPA to help communities to protect and improve their air quality.

EPA's refusal to allow the public to challenge deficient minor NSR determinations during a source's Title V permitting process appears to be motivated by efficiency: EPA wants for the states to resolve challenges to minor NSR determinations via state processes at the time that a minor NSR determination is made. This rational is flawed.

First, insofar as the problem with the state's minor NSR determination is due to emission calculations, emission calculation errors often are detected after the source obtains final construction approval—and sometimes years later. If a source erroneously calculates its anticipated emissions, it is likely that operating limits intended to keep the source's emissions below the major NSR threshold are inaccurate. This is exactly what happened with respect to industrial-sized wood pellet manufacturing plants constructed across the U.S. South, discussed *supra* at 18-28. At the time that states granted construction approval, the permit applicants

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[497] *Id.* at 891.

[498] *Env't Integrity Project v. Env't Prot. Agency*, 969 F.3d 529 (5th Cir. 2020).

[499] *In the Matter of PacifiCorp Energy*, Order on Petition Nos. VIII-2016-4 and VIII-2020-10 (EPA, Jan. 13, 2021), at 15, note 26, available at https://www.epa.gov/sites/default/files/2021-01/documents/hunteriiorder2021.pdf.

[500] 91 Fed. Reg. at 41,601.

[501] *See, e.g.,* 42 U.S.C. §§ 7661a, 7661c(a).

believed that their VOC emission rate was far lower than it turned out to be. Thus, the wood pellet production limits taken to avoid major NSR were inaccurate and resulted in VOC emissions that were more than 4 times higher than the 250 ton/year major source threshold. To ensure that the public has a reasonable opportunity to correct problems like this, the public must be allowed to bring these issues to the attention of the state and EPA through the periodic Title V renewal proceedings. Indeed, the D.C. Circuit's recent decision upholding EPA's "Project Emissions Accounting Rule" specifically points to Title V proceedings as a backstop to guard against faulty NSR applicability determinations, observing that "any entity that uses project emissions accounting in a manner that contravenes [the rule's] definitions is subject to 'compliance and enforcement' proceedings, including proceedings under Title V of the Clean Air Act,"[502] and pointing to EPA's use of "the Title V petition process to correct one State regulator's misunderstanding of what constitutes a 'project.'"[503]

Second, while a state certainly can take corrective action on its own, states are far less likely to take corrective action if they know that EPA will not object to the facility's Title V permit based on minor NSR permitting deficiencies. In other words, the stronger EPA's policy is in reviewing and objecting to minor NSR permitting deficiencies through the Title V permitting process, the more likely states will address problems without the public having to seek EPA intervention.

Third, requiring members of the public to pursue a state administrative appeal or a state court lawsuit to challenge a deficient minor NSR permit is a substantial burden that typically can only be borne by well-financed organizations or individuals who can devote tens of thousands of dollars to the effort. In effect, a state appeal, whether administrative or judicial, is a mini trial. Bringing such an appeal requires both a legal team and technical experts who are willing to testify. In sharp contrast, filing a Title V petition does not have to be resource intensive. There is no filing fee, no need for expert witnesses, and no need for the petitioner to have litigation expertise. Thus, EPA's insistence that deficient minor NSR permits can only be challenged via state administrative and judicial processes disproportionately impacts communities that lack the resources needed to mount a full-scale legal challenge to a minor NSR permit.

Finally, Title V is the only mechanism by which EPA can exercise direct oversight over a state's implementation of minor NSR permitting requirements. While EPA theoretically has the opportunity to review and comment on state minor NSR permits during the state public comment period (assuming there is one), EPA seldom does so.[504] And even if EPA does comment, its only recourse if the state ignores EPA's concerns is to ask the U.S. Department of Justice to represent EPA in pursuing a judicial remedy. Congress meant to simplify EPA's oversight of state Clean Air Act implementation by providing EPA with the opportunity to review and object to any proposed Title V permit (including a renewal permit) that fails to assure compliance with all applicable Clean Air Act requirements. Specifically, at least once every five years, Title V provides EPA with the opportunity to check-up on each facility and (1) remedy any deficiencies

[502] *Env't Def. Fund v. Env't Prot. Agency*, 2026 WL 2164508, at *8 (internal citations and quotations omitted).

[503] *Id.* at *8, note 16.

[504] 40 C.F.R. § 51.161(d); EPA Inspector General Report, *supra* note 2, at 8 ([n]either EPA headquarters nor regional offices conduct regular routine evaluations or review synthetic-minor-source permits.").

in the application of Clean Air Act requirements, (2) require additional or different recordkeeping, reporting, and monitoring as needed to assure the facility's compliance, and (3) require a remedial compliance plan if needed to correct ongoing violations. Given the importance of NSR in ensuring that stationary sources do not cause or contribute to NAAQS violations, it is essential that the five-year Title V check-up include an opportunity for EPA to correct deficient state minor NSR determinations, regardless of whether EPA could have raised its concerns when the state initially issued its minor NSR approval.

For the above reasons, Commenters urge EPA to revise its regulations to confirm that deficiencies in a state's minor NSR determinations can be raised in a subsequent Title V proceeding. Furthermore, the regulations should state that any such minor NSR deficiency constitutes an objectionable deficiency in the source's Title V permit.

D. EPA Should Revise Its Regulations to Specifically Address Requirements for Synthetic Minor Limits, Including that They Be Subject to Public Notice and Comment, Be Federally Enforceable, and Satisfy Specific Enforceability Criteria.

Though the establishment of synthetic minor limits is one of the most significant functions of minor NSR permits, EPA's regulations entirely fail to establish minimum criteria that such limits must meet to be enforceable, i.e., to effectively restrict a facility's potential to emit to below the applicable major source threshold. To improve the effectiveness of air permitting in helping states to attain and maintain NAAQS compliance, we urge EPA to promulgate regulations governing synthetic minor permitting.

Such regulations should confirm that synthetic minor limits must be federally enforceable, be established in source-specific permits subject to public notice and at least a 30-day opportunity for public comment, and be subject to state administrative and judicial review. And finally, such regulations should establish clear minimum criteria that a synthetic minor limit must meet to be considered "enforceable." For a more detailed explanation of the need for these requirements, Commenters refer EPA to the comments filed with EPA by public interest groups in response to EPA's 2019 proposal to develop effectiveness criteria for hazardous air pollutant PTE limits under CAA section 112.[505] While those comments focus primarily on enforceability of hazardous air pollutant limits, they include NSR PTE-limit examples, and all CAA PTE limits have historically been subject to the same enforceability criteria.[506]

A rulemaking governing synthetic minor permitting is especially warranted because EPA has never completed its response to a D.C. Circuit remand addressing whether synthetic minor limits used to avoid major NSR must be federally enforceable, meaning enforceable by EPA and members of the public in addition to state regulators. As discussed *supra* at Section II(E)(3), in 1995 the D.C. Circuit vacated and remanded the federal-enforceability requirement for synthetic minor limits in EPA's NSR regulations, including the Prevention of Significant Deterioration

[505] Comments by Earthjustice, *et al.* on *Proposed Rule: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*, 84 Fed. Reg. 36,304 (July 26, 2019), dated Sept. 24, 2019 (Docket I.D. No. EPA-HQ-OAR-2019-0282-0343), https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0343.

[506] *See, e.g.,* 84 Fed. Reg. 36,304, 36,317, n.22 (citing to PTE guidance applying to CAA 112, Title V, and NSR avoidance).

regulations at 40 C.F.R. §§ 51.166(b)(4) and 52.21(b)(4) and the nonattainment New Source Review regulations at 40 C.F.R. § 51.165(a)(1)(iii).[507] Initially, EPA acknowledged that the court's decision required a new rulemaking. In a memorandum issued in January 1996 entitled "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," EPA stated that it would hold stakeholder discussions, propose regulatory amendments by Spring 1996, and issue final rules by Spring 1997.[508] In the interim, EPA declared it would consider a synthetic minor limit to be effective if it was either federally or state-enforceable and if it was enforceable as a practical matter.[509] EPA emphasized that its policy was temporary and "would remain in place until January 1997, but may be extended if necessary to coincide with the promulgation of revised regulations."[510] The interim guidance would be "superseded upon completion of the new rulemaking."[511] Yet EPA never completed the promised rulemaking. Instead, EPA continued to administer synthetic minor limits through a collection of temporary policies and extensions.

EPA's more recent actions confirm that the issue of whether synthetic minor limits need to be federally enforceable—and more generally, what criteria should apply to ensure that synthetic minor limits are enforceable by anyone—remains unresolved. In its 2020 rule allowing major sources of hazardous air pollutants to reclassify as area sources, EPA removed the requirement from 40 C.F.R. § 63.2 that "potential to emit" limits on hazardous air pollutants be federally enforceable but characterized that change as an "interim ministerial revision," emphasized that it was "not the EPA's final decision," and stated that the interim regulatory change should not be read to signal the direction of any future final action.[512] EPA explained that it was continuing to consider significant comments concerning the "effectiveness" criteria it had proposed for synthetic minor limits and their interactions with NSR, state implementation plans, and Title V permitting programs and promised to take final action separately. Three years later, in 2023, EPA again acknowledged that the revision to § 63.2 remained interim and announced that it planned to address the definition of potential to emit in the Section 112 hazardous air pollutant program, NSR, Title V, and related programs through future rulemaking or guidance, while continuing to apply its longstanding "interim" policies.[513] Yet as of 2026, no rulemaking or guidance has been forthcoming. Instead, EPA and states continue to administer synthetic minor permitting under a patchwork of purportedly non-final guidance documents and statements in Title V petition orders. In this context, it is not at all surprising that both public

[507] *Chem. Mfrs Ass'n.* 70 F.3d at 638.

[508] Memorandum from John S. Seitz and Robert I. Van Heuvelen, EPA, *Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit,* at 2 (Jan. 22, 1996), https://www.epa.gov/sites/default/files/2015-08/documents/pottoemi.pdf ("1996 Interim Policy memo") (Attachment UU).

[509] *Id.*

[510] Cover letter to 1996 Interim Policy Memo.

[511] 1996 Interim Policy Memo, at 1.

[512] *Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*, 85 Fed. Reg. 73,854, 73,876 (Nov. 19, 2020).

[513] *Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*, 88 Fed. Reg. 66,336, 66,347-48 (Sept. 27, 2023).

interest groups and EPA's own Inspector General have identified major deficiencies in EPA's oversight of state synthetic minor permitting.

VI. QUESTIONS ON WHICH EPA SPECIFICALLY SOLICITS COMMENT

A. Question #1: *How would a final version of the rule affect how State and local air agencies analyze, publish, and act upon applications requesting permission to construct new minor sources and minor modifications under State and local minor NSR programs approved by the EPA as part of their SIPs, including potential reductions in administrative burdens (costs or hours) associated with this type of permitting?*

EPA frames this proposal as burden reduction for permitting agencies, but the record shows the burden being *reduced* is small, largely already-digital, and unquantified, as discussed above in Section II.H., — while the burden being *created or shifted* (through Title V petitions, degraded interagency coordination, and elimination of public knowledge) is real and acknowledged by EPA itself. Eliminating the federal floor for minor NSR public participation would not eliminate administrative burden so much as shift and fragment it in several ways.

First, EPA concedes in the preamble that removing notice could *increase* Title V petition and objection workload — moving burden from state permit writers to EPA and to the public rather than erasing it.[514] EPA's position is that a noticed NSR authorization conclusively establishes applicable requirements and forecloses substantive Title V review, while an un-noticed authorization remains open to substantive review — and public petition — at the Title V stage.[515] Removing minor NSR notice predictably channels disputes into Title V petitions and EPA objections. That is a cost borne by EPA, the public, permitted facilities, *and* state and local authorities, not a societal saving. Furthermore, many state and local permitting authorities maintain similar SIP-approved petition/review processes for issued air permits that would not be affected by this rulemaking, potentially causing an increase in the number of such administrative actions at the state level.[516]

Second, as discussed above, 40 C.F.R. § 51.161(d) currently serves the important function of **interagency coordination** and policy purpose of comity between different agencies. Elimination of the requirement to notify the Administrator and "all other State and local air

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[514] Proposal at Section III.A.

[515] *Id.* at 41,601 ("By contrast, in situations in which an NSR permit or other NSR authorization was not issued following public notice and the opportunity for comment and judicial review, the title V permitting process may be used to evaluate the substance of such underlying NSR authorization decisions to ensure that the title V permit assures compliance with applicable requirements of the SIP for construction and modification of stationary sources of air pollution.")

[516] *See, e.g.,* O.C.G.A. § 12-2-2(c)(2); 415 ILCS 5/40 and 5/40.2; Ind. Code 4-21.5; Ind. Code 4-21.5-7; 315 IAC 1-3-2; KRS 77.310(2); KRS 224.10-420(2); LAC Title 33; Ohio Rev. Code § 3745.04; MCL 24.201 et seq.; MCL 324.5505; Tex. Health & Safety Code § 382.056(n) (incorporating Tex. Water Code §§ 5.556, 5.557); 30 Tex. Admin. Code §§ 55.201–.211, Tex. Comm'n on Envtl. Quality v. San Antonio Bay Estuarine Waterkeeper, No. 15-24-00036-CV, 2025 WL 1419736 (Tex. App.—Austin [15th Dist.] May 20, 2025, no pet. h.) (affirming applicability to minor NSR permits); Va. Code § 10.1-1318 and § 2.2-4026; W. Va. Code §§ 22B-1-1 et seq. and § 22-5-14.

pollution control agencies having jurisdiction in the region in which such new or modified installation will be located," risks setting up a situation where impacts from a permitted facility or cluster of facilities will have unacceptable impacts downwind, within the jurisdiction of another air pollution control agency in the region, exacerbating pollution impacts over which that agency now has no control. Furthermore, it serves the important purpose of fulfilling the requirement of Clean Air Act §§ 110(a)(2)(M) and 121, for "consultation and participation by local political subdivisions affected by the plan,"[517] and "a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal land manager having authority over Federal land to which the State plan applies, … as part of such plan."[518]

Third, a lack of formal public notice would also result in increased burden to state, local, and tribal authorities in the form of **frequent open records requests** from concerned citizens and public interest groups, requiring searches, reviews (including for redactions under various exemptions), approvals, and responses. This process would involve more tailored, and time-consuming review than a program that routinely public notices minor NSR permits.

B. Question #3: *Are there any relevant reliance interests that might be impacted by this proposed action? If so, how should such reliance interests be addressed?*

EPA arbitrarily and capriciously claims that it "does not believe that this change impacts legitimate reliance interests on the part of states, regulated parties, or the general public."[519] But this ignores the reality that for over 50 years the public has relied on these public participation requirements to have a voice in permitting decisions that impact local air quality. First, numerous community groups have advocacy programs that rely entirely on them receiving public notice that a minor NSR permit is going to be issued and having a chance to engage.

For example, GASP in Alabama is interested in advancing air quality throughout the state and reviews all permit notices, whether for major or minor permits, to determine if the permits would allow new air pollution in areas or at sources of interest to their members. As noted,[520] GASP has submitted public comments on multiple minor permits that resulted in improved air permits. GASP's mission "to enhance the health and wellbeing of Alabamians by reducing air pollution" and strengthening air permits would be seriously threatened without public notice of these air permits and the opportunity to comment on them.

Moreover, EPA has itself relied on the public participation requirements in minor NSR to support prior actions. As just one example, in 2020, EPA finalized its Project Emissions

[517] 42 U.S.C. § 7410(a)(2)(M).

[518] 42 U.S.C. § 7421.

[519] Proposal at 41,597.

[520] Permit Comments Table, *supra* note 84.

Accounting regulations.[521] As part of that rulemaking, commenters raised objections that the rule would lead to pollution increases, especially in environmental justice areas, by decreasing the number of projects that would be subject to major NSR. EPA responded in part by noting:

> The EPA also notes that projects at existing major stationary sources that are determined not to trigger major NSR permitting requirements, will, in many or most cases, be subject to minor NSR permitting requirements, regardless of the accounting procedures used in determining major NSR applicability. Minor NSR permit actions require the opportunity for public comment, which provides an opportunity for stakeholders to raise potential environmental justice concerns based on the characteristics of the project and the location of the project relative to any environmental justice communities within the vicinity of the source.[522]

EPA relied on public participation in minor NSR as a rationale for proceeding with the rule. If public participation had not been required for minor NSR permits at the time, EPA would either have had to (1) withdraw the proposal or (2) provide an alternative rationale to address the legitimate concerns commenters raised. If EPA removes these requirements, it must revisit and reconsider the Project Emissions Accounting rule and all other NSR rules and policies that rely on public participation requirements.

EPA fails to grapple with the fact that its entire NSR regime and regulations adopted over the decades, including those that have had the effect of limiting the scope of projects subject to major NSR, have relied on the protections that these public participation requirements bestowed on permits that still applied regardless of whether they were major. In order for EPA to adequately consider these reliance interests, EPA must completely reassess its entire NSR regime that it has created through regulation and assess how these changes impact the regime as a whole.

Another way in which EPA's reliance interests analysis falls short is in its refusal to consider the obvious impacts of its action and instead shifting the focus to the state and local agencies that will be allowed to remove public participation requirements in the wake of EPA's rollback. 91 Fed. Reg. at 41597. This fails to comply with EPA's legal duties in changing position and cannot support the rollback.

"[A]n agency must 'assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'"[523] In the

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[521] *Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NNSR): Project Emissions Accounting*, 85 Fed. Reg. 74,890 (Nov. 24, 2020).

[522] 85 Fed. Reg. 74,890, 74,906 (footnote omitted).

[523] *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 940-41 (D.C. Cir. 2021) (quoting *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020)); *Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate. . . . . when its prior policy has engendered serious reliance interests that must be taken into account"). In weighing such reliance interests, the agency must explain why reliance "concerns were unjustified, entitled to no weight, or outweighed by other considerations." *Cap. Power Corp. v. Fed. Energy Regul. Comm'n*, 156 F.4th 644, 650 (D.C. Cir. 2025).

Proposed Rule, EPA concedes that it has a legal duty to consider reliance interests, noting that an agency must "acknowledge[] the change in position, offer[] a reasonable explanation for the change, and consider[] legitimate reliance interests, where relevant.[524] But when it comes to the actual consideration of these reliance interests, EPA makes the claim that its rollback will not actually affect *any* reliance interests:

> [T]he EPA understands that this action would, if finalized, change minimum requirements applicable by regulation to minor NSR programs and differ from prior representations that minor NSR public participation is required to satisfy the standard in CAA section 110(a)(2)(C). Because this action would not, if finalized, require States to amend their existing SIPs with respect to minor NSR public participation or otherwise, the *EPA does not believe that this change impacts legitimate reliance interests* on the part of States, regulated parties, or the general public.[525]

This is an outrageous position for EPA to take, disclaiming that its rollback of longstanding public participation requirements will have *any* impact on reliance interests and assigning these impacts instead to later actions by delegated state and local agencies when they make *now-permissible* amendments to their SIPs in the aftermath of EPA's rollback. Based on EPA's discussion of the rollbacks in the Federal Register preamble and elsewhere, the Agency is clearly aware that its proposed changes will have at least *some* effects. For example, in the press release accompanying the Proposed Rule, EPA states that "[t]his approach *is intended* to reduce administrative burden and responsibly speed up permitting," and that "EPA is proposing to streamline the [permitting] process."[526] EPA further describes that "[t]he permitting process is already cumbersome, and *unnecessary public notices and comment procedures* for projects with limited environmental impact only slow down the process."[527] Clearly, the intended effect of EPA's proposal is to remove or reduce public participation in the permitting process. For EPA to claim that the rollback will not impact legitimate reliance interests is an intentionally blinkered analysis.

Furthermore, applied more broadly, this type of reliance interests analysis has dangerous effects for future changes-in-position. For example, under the theory EPA advances here, the agency could claim that any rollback of minimum standards implemented by state and local agencies—whether procedural or more substantive, such as air quality standards—would not impact legitimate reliance interests. Another effect is that EPA is piecemealing the analysis of its overarching action—at the time when analysis is most important—to smaller analyses of 50-plus

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[524] Proposal at 41,597 (citing *FDA* v. *Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 568-70 (2025); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983)).

[525] *Id.* (emphasis added).

[526] *See* Press Release, *EPA Proposes to Streamline State and Local Permitting Process for Minor Sources*, July 1, 2026 (emphasis added), *available at* https://www.epa.gov/newsreleases/epa-proposes-streamline-state-and-local-permitting-process-minor-sources (last visited Aug. 5, 2026) (Attachment VV).

[527] *Id.* (emphasis added).

actions by state and local agencies much later in the process and well after EPA's rollback is already final.

C. Question #4: *In light of the reading of CAA section 110(a)(2)(C) that is presented in this proposed rule, should the EPA pursue a separate rulemaking that would propose to make regulatory changes to the Federal public participation requirements for authorizing new minor sources or minor modifications locating within Indian country? If so, how should the EPA propose to amend the minor NSR public participation requirements in Indian Country?*

EPA should not reduce the Federal public participation requirements for authorizing new minor sources or minor modifications locating within Indian country. As set forth above, public participation is critical for ensuring that minor NSR permits are accurate, enforceable, and sufficient to protect against violations of the NAAQS. Moreover, as EPA explained when promulgating the minor NSR regulations for Indian country, "the public has the right to know about any permitting actions occurring in their area."[528] Accordingly, EPA appropriately rejected a comment submitted during the rulemaking suggesting that public participation requirements should be adjusted based on the Agency's determination as to the "environmental significance" of a project.[529] When promulgating the existing public participation requirements, EPA declared that it did so upon "careful consideration" of comments suggesting that less robust requirements would be sufficient.[530] EPA fails to identify any reasoned basis for undertaking a new rulemaking to reduce or eliminate those same public participation rights.

D. Question #5: *What factors, if any, should the EPA describe in situations in which an air agency does not find that a revision to its minor NSR program's public participation requirements is administrative or procedural in nature, for purposes of evaluating whether the SIP submission is consistent with CAA section 110(l)?*

1. Clean Air Act Section 110(l) Contains No Blanket Exemption for "Administrative or Procedural" SIP Provision.

Clean Air Act Section 110(l) bars EPA from approving any SIP revision that "would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter."[531] As EPA acknowledges, state minor NSR programs are required by CAA Section 110(a)(2)(C). Thus, the components of each minor NSR program—including longstanding public participation requirements—fall within Section 110(l)'s scope.[532]

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[528] 76 Fed. Reg. at 38,765.

[529] *Id.*

[530] *Id.* at 38,764.

[531] 42 U.S.C. § 7410(l).

[532] *See Hall v. U.S. EPA*, 273 F.3d 1146, 1156-57 (9th Cir. 2001) (explaining that "applicable requirement" under CAA Section 110(l) includes preconstruction review under CAA Section 110(a)(2)(C)).

In its July 7th Proposed Rule, EPA takes the novel position that "SIP provisions such as public participation requirements may be viewed as administrative or procedural, such that SIP submissions proposing changes to these requirements are not expected to affect emissions and are, therefore, not expected to be inconsistent with the requirements of CAA section 110(l)."[533] Thus, EPA suggests that a state could demonstrate compliance with 110(l) using a "written analysis" that deems the relevant public participation procedures "administrative or procedural in nature" and explains why the changes "will not affect emissions [or] interfere with requirements of the CAA related to such administrative or procedural provisions."[534] If, on the other hand, the state "take[s] the position that their program's public participation requirements are not administrative or procedural, the air agency would need to determine the appropriate CAA section 110(l) analysis for its SIP submission."[535]

EPA's suggestion here—that an "appropriate CAA section 110(l) analysis" is only required if the state decides its public participation requirements are "not administrative or procedural"—is inconsistent with the CAA. As discussed above, public participation is a cornerstone of the NSR permitting process, providing citizens with opportunities to alert the state (and EPA as well) when a proposed new source or modification of an existing source may lead to previously unacknowledged air quality impacts.

Indeed, in the attainment area context, Congress expressly declared a purpose "to assure that any decision to permit increased air pollution … is made only after … informed public participation in the decisionmaking process."[536] EPA's attempt to downplay the value of public input in the minor NSR context is thus contrary to Congressional intent. There is simply no basis for a blanket conclusion that reducing public participation in the permitting process will not impact emissions, given Congress's explicit statement of purpose to the contrary.[537]

It is also telling that EPA makes no effort to ground its "administrative or procedural" hypothesis in actual experience implementing the CAA. The statute is replete with "procedural" safeguards, including multiple layers of public input in the SIP development process (e.g., public comment at the state level and then during the federal rulemaking process). These "procedural" requirements generate real-world emissions impacts, by giving the public an opportunity to inform the permitting agency of facts or legal requirements that may have otherwise been missed. And there are numerous examples of public comments positively impacting the permitting process, as discussed above.[538]

Moreover, as EPA points out in the Proposed Rule, many air agencies have "limited budgets, time, and personnel," combined with "budget shortfalls, which in turn further restrict the resources available to State and local air agencies." 91 Fed. Reg. at 41600. This further

[533] Proposal at 41,603.

[534] *Id.*

[535] *Id.*

[536] 42 U.S.C. § 7470(5).

[537] *Id.*

[538] *See supra* section II.A.

undermines—rather than bolsters—EPA's decision to reduce public input in the permitting process. If the air agencies are under-staffed and under-resourced, then their staff may have diminished ability to thoroughly vet each permit application, making citizen review and input even more valuable.

For all of these reasons, EPA's apparent new policy that revisions to public participation requirements are "administrative or procedural," and therefore do not require compliance with CAA Section 110(l), is inconsistent with the CAA. In addition, it ignores the practical realities of minor NSR implementation, making it arbitrary and capricious. Thus, EPA should reverse course here and retain the default position that amendments to CAA minor NSR permitting programs, including public input requirements, must comply with CAA Section 110(l).

2. Clean Air Act Section 110(l) Requires States to Analyze Minor NSR Program Revisions and Demonstrate that the Revisions will not Interfere with the NAAQS.

As EPA noted thirty years ago in reference to CAA Section 110(l), "each type of SIP revision [presents] unique issues that should be addressed on a case-by-case basis."[539] Thus, "[f]or SIP revisions that will or could potentially lead to a change in emissions or ambient concentrations of a pollutant or its precursors, the section 110(l) demonstration should address all pollutants whose emissions and/or ambient concentrations may change as a result of the SIP revision."[540] In other words, the burden is on the state seeking to amend its SIP to submit an "analysis" that "supports a determination of noninterference."

The same holds true today: a state seeking to amend its SIP—including to remove or limit minor NSR public participation requirements—must analyze whether the change will also change emissions of any criteria pollutants. If the answer is yes, the state must demonstrate how that change will not interfere with the attainment or maintenance of the NAAQS. That analysis must accompany the SIP submittal. If a demonstration is absent from the submittal, EPA must disapprove of the submittal under CAA Section 110(k)(3).[541]

Any state reducing or removing public input in minor NSR permitting through a SIP revision must show that its minor NSR program will still ensure that new or modified sources will not interfere with NAAQS attainment—either by quantifying those emissions reductions and conducting an air quality analysis evaluating the overall impact within the state, or by amending

[539] 61 Fed. Reg. 16,050, 16,052 (April 11, 1996).

[540] "Demonstrating Noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan," June 8, 2005, *available at* https://www.4cleanair.org/wp-content/uploads/Oldmembers/members/committee/criteria/110STAPPA.pdf (last visited July 27, 2026) ("2005 Draft Guidance") (Attachment WW).

[541] 42 U.S.C. § 7410(k)(3).

other SIP provisions to achieve compensatory reductions.[542] In some rare cases, a qualitative analysis may be sufficient.[543]

Although 110(l) ultimately requires a case-by-case analysis tailored to the specifics of each state's preconstruction review program, a state's demonstration must ensure that EPA has the relevant information it needs to determine how a reduction in public participation may or may not interfere with NAAQS attainment in the state. Relatedly, this demonstration will ensure that EPA's approval actions can be adequately supported.

CONCLUSION

For the reasons set forth above, EPA should withdraw the proposed rule and retain the longstanding requirement that state and local minor NSR programs provide meaningful public notice and an opportunity for comment. The record demonstrates that public participation in minor NSR permitting strengthens permits and helps ensure that new sources and modifications authorized through minor NSR are, in fact, properly classified as "minor." Public participation therefore plays a critical role in ensuring that minor NSR programs fulfill their statutory purpose of preventing new and modified sources from causing or contributing to violations of the NAAQS. Rather than eliminating longstanding public participation protections, EPA should focus its efforts on bringing state minor NSR programs into compliance with existing federal public participation requirements; encouraging more robust and effective public involvement in permitting decisions; establishing clear, enforceable criteria for effective synthetic minor limits; and ensuring that permitting agencies undertake the air quality impact assessments needed to ensure that new and modified sources will not cause unhealthy air quality.

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[542] But note that a simplistic "no relaxation" approach to this analysis is not sufficient to adequately demonstrate noninterference. *See Hall,* 273 F.3d at 1,160-61.

[543] If a State's minor NSR program does not meet the minimum requirements of 40 C.F.R. § 51.150-161, or if it has historically been implemented in a way that does not ensure public participation in minor NSR permitting decisions, then this analysis of past public input would be inadequate, since a compliant program would presumably have achieved more emissions reductions than historically occurred in the State. States should not reap benefits from implementing non-compliant SIP programs.

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