



Proposed Rule: Clarifying the Scope of “Applicable Requirements” Under State & Federal Operating Permit Programs

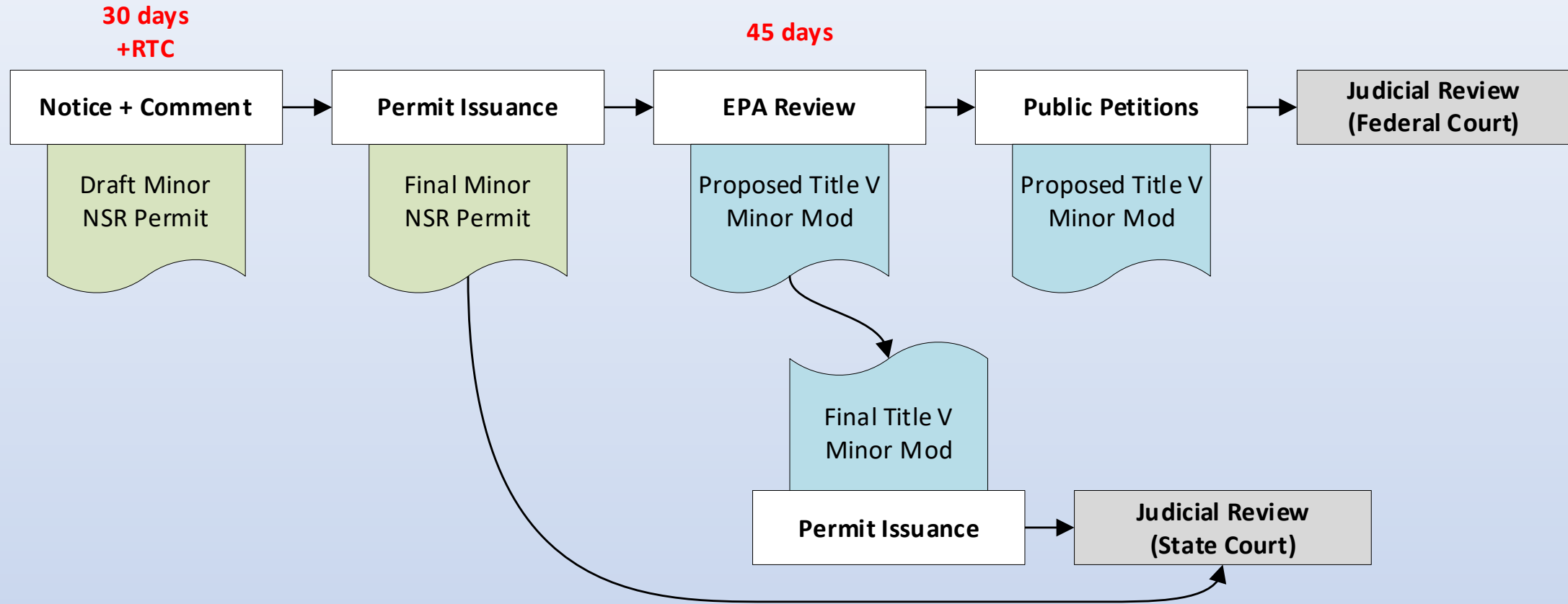
Q&A Regarding Treatment of “Enhanced NSR”

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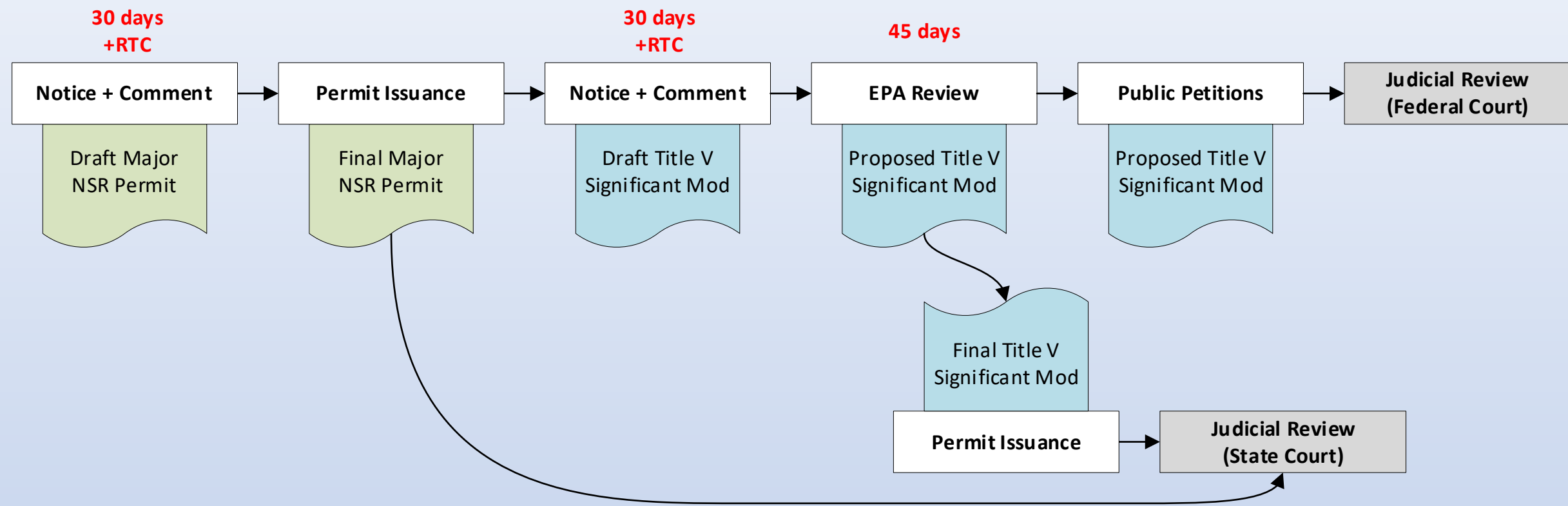
Minor NSR → Title V Minor Modification: Sequential Approach (89 FR at 1167)



Note: This depiction is for illustrative purposes only; it is a simplified generalization of a permit issuance process described in the proposed rule preamble.



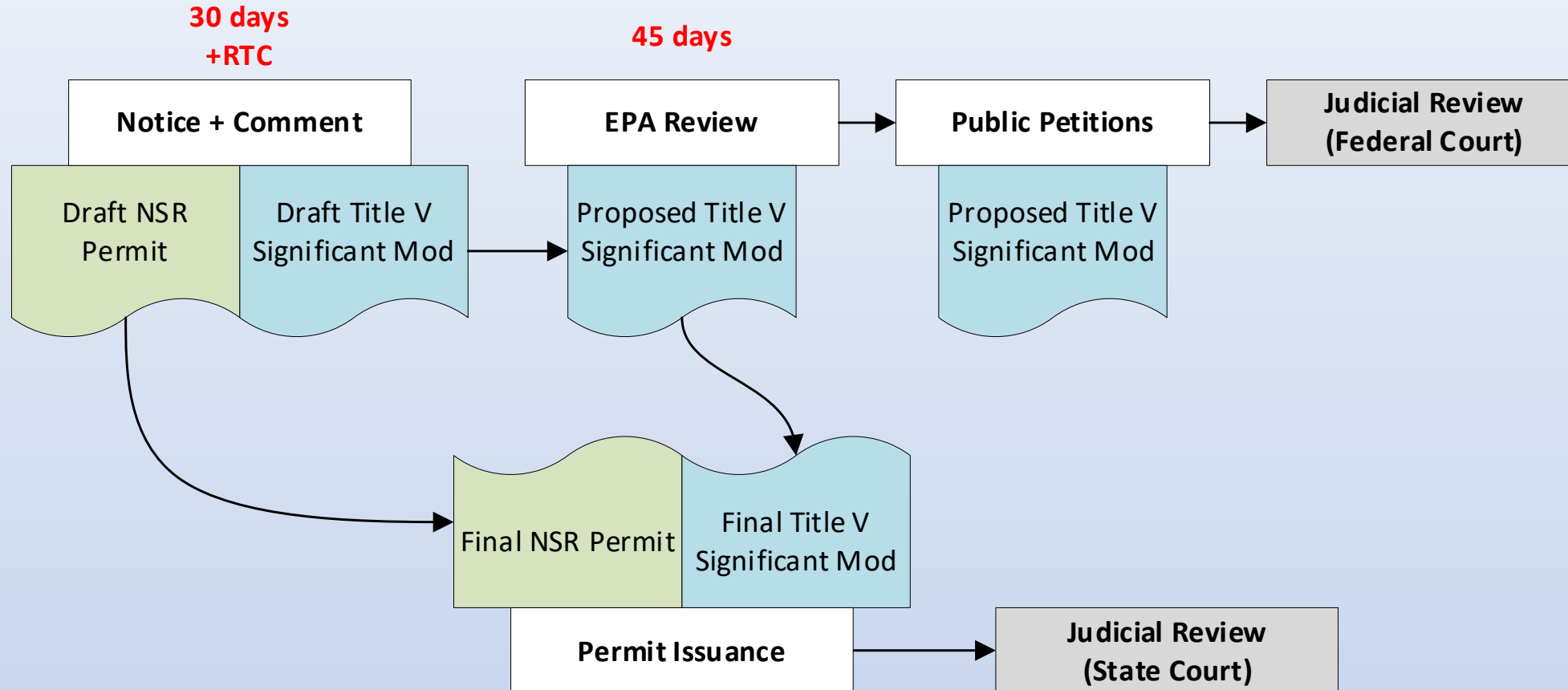
Major NSR → Title V Significant Modification: Sequential Approach (89 FR at 1167)



Note: This depiction is for illustrative purposes only; it is a simplified generalization of a permit issuance process described in the proposed rule preamble.



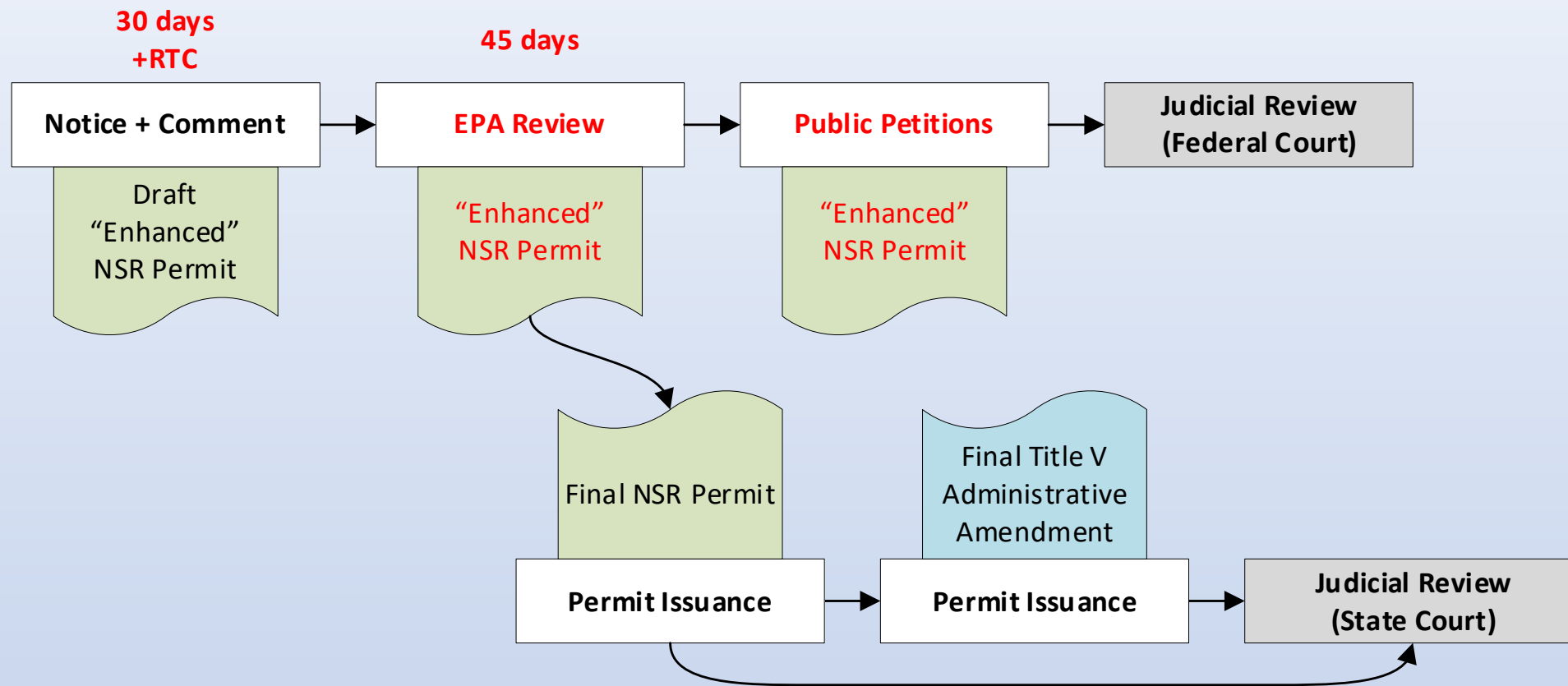
Major NSR & Title V Significant Modification: Concurrent Approach (89 FR at 1167-68)



Note: This depiction is for illustrative purposes only; it is a simplified generalization of a permit issuance process described in the proposed rule preamble.



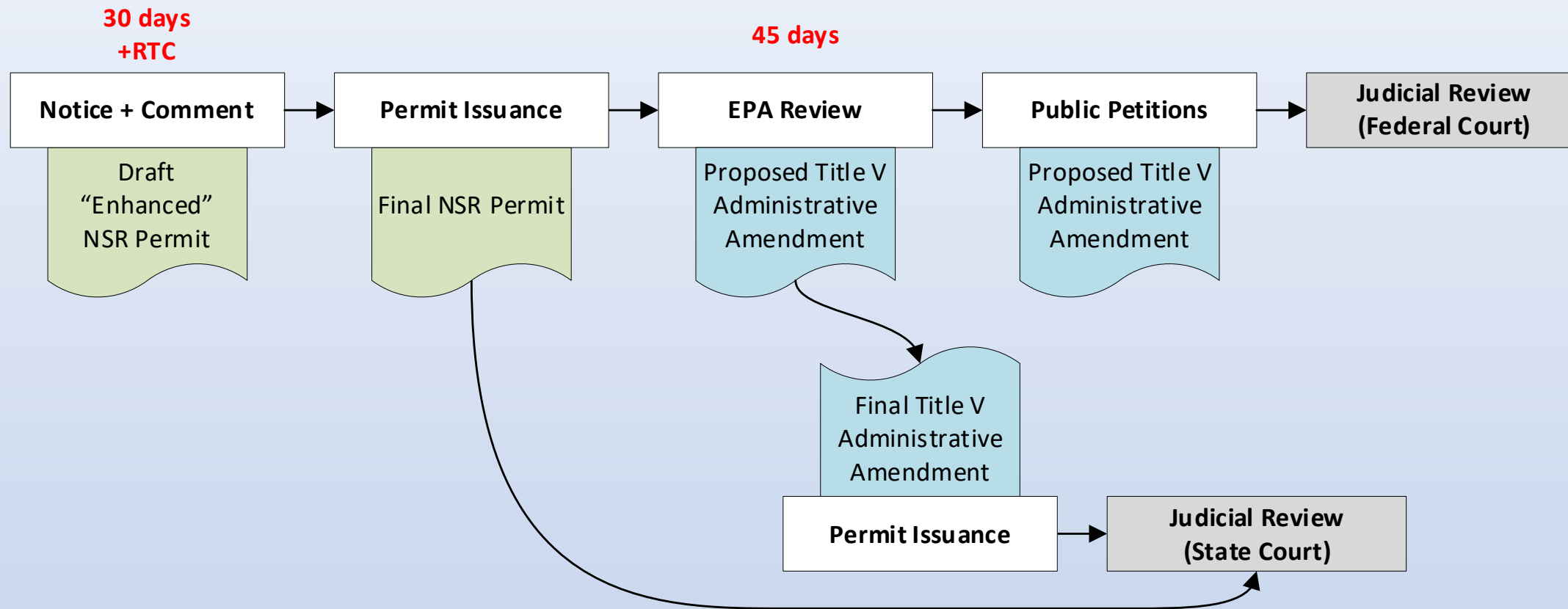
Enhanced NSR → Title V Admin. Amendment: Approach in EPA Rules (89 FR at 1168-69)



Note: This depiction is for illustrative purposes only; it is a simplified generalization of a permit issuance process described in the proposed rule preamble.



Enhanced NSR → Title V Admin. Amendment: Alternative Approach (89 FR at 1168 n.97)



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Preamble Discussion (89 FR at 1168)

- A third process used by some permitting authorities is often described as “enhanced NSR.” The EPA's existing regulations allow requirements from an NSR permit issued with certain enhancements to be incorporated into a title V permit via administrative amendment procedures (instead of a significant modification or minor modification procedures, which would otherwise be required). To qualify for this type of streamlined processing, the NSR permit would need to be issued following “procedural requirements substantially equivalent to the requirements of [40 CFR] 70.7 and 70.8 . . . that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in [40 CFR] 70.6.” 40 CFR 70.7(d)(1)(v); *see* 71.7(d)(1)(v).



Preamble Discussion (89 FR at 1168)

- This third pathway has the potential to create confusion—and to conflict with the EPA's current (and proposed) approach—because the language quoted earlier may be read to mean that the EPA's objection authority and the public petition opportunity in 70.8(d) apply to the *issuance of the NSR permit*.^[97] This result is problematic for multiple reasons.
 - For one, the CAA only provides the EPA with authority to object to the issuance of title V permits, not NSR permits.
 - Similarly, the statutory obligation for the EPA Administrator to respond to petitions under CAA section 505(b)(2) only applies to petitions on title V permits. 42 U.S.C. 7661d(b)(2).
 - Moreover, even if the EPA were to object to the issuance of an NSR permit, the EPA generally lacks authority to enforce such objection, as the EPA cannot issue the NSR permit if the state does not resolve the EPA's objection. Again, the authority to do so only relates to title V permits. 42 U.S.C. 7661d(c).



Preamble Discussion (89 FR at 1168)

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- Footnote 97: The EPA observes that some permitting authorities have EPA-approved SIP and/or title V program rules that differ from the EPA's regulations in this respect. Specifically, some EPA-approved state rules reserve the EPA's objection authority and public petition opportunity until the title V permit is administratively amended. This arrangement features less potential for confusion and less conflict with the EPA's current (and proposed) approach. *See AK Steel Order* at 10–12.



Preamble Discussion (89 FR at 1168)

- Further, the existence of this process creates more confusion about the scope of issues properly subject to review during the NSR permitting action than the other two streamlined pathways.
 - This is because it may be more difficult to distinguish title I and title V components within a single “enhanced NSR” permit.^[98]
 - Based on the preamble of the EPA's 1992 title V rules, it appears that the EPA's original intention when promulgating this mechanism was to generally confine EPA's review to the title V-based components of the enhanced NSR permit (*i.e.*, the compliance requirements in 40 CFR 70.6).^[99] However, contradictory positions taken by EPA in subsequent years has created confusion.^[100]



Preamble Discussion (89 FR at 1168-69)

- Although this third pathway reflected the EPA's attempt to allow for the streamlining of NSR and title V permit procedures, it raises more issues than it solves, and ultimately it is not necessary.
- The other two streamlining mechanisms—concurrent issuance of NSR and title V permits either in separate documents or in a single combined permit document—cause fewer problems and provide more advantages.
 - Specifically, concurrent issuance mechanisms are compatible with the EPA's current (and proposed) approach to the title I/title V interface, while the “enhanced NSR” mechanism appears to erroneously suggest that the EPA has authority to directly object to title I permits.
 - Additionally, concurrent issuance mechanisms allow permitting authorities to more clearly delineate the title I and title V permit actions, providing more clarity to the public about which issues may be challenged through different review pathways.
 - Finally, concurrent issuance mechanisms are more efficient than the enhanced NSR mechanism, as permitting authorities need not take an additional, separate title V administrative amendment action after issuing an NSR permit.



Preamble Discussion (89 FR at 1169)

- For the foregoing reasons, the EPA proposes to remove from its regulations the provisions relating to enhanced NSR permitting and related title V administrative amendments.
- The EPA solicits comment on whether state permitting authorities should remove equivalent regulations from their EPA-approved program rules, although the EPA does not anticipate such actions will be necessary.
- Instead, it should be sufficient for permitting authorities to simply stop using this mechanism in a manner that purports to provide an EPA objection authority and public petition opportunity directly on an NSR permit.
- In any case, the EPA generally will not use its objection authority to address the substance of NSR permitting decisions made through this process.



Preamble Discussion (89 FR at 1173)

- Permitting authorities that currently process NSR and title permit actions through streamlined processes should consider the best way to achieve their administrative efficiency goals while maintaining the maximum amount of clarity regarding the distinctions between title I and title V permit actions.
- In particular, the EPA strongly encourages permitting authorities that currently employ an “enhanced NSR” framework to stop using such procedures and instead consider other mechanisms for streamlining.



Questions?

- Reminder: please submit comments through <http://www.regulations.gov>, Docket EPA-HQ-OAR-2023-0401, by March 11, 2024.

