BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT DETERIORATION* AND SUBMIT THE ADOPTED 20.11.61 NMAC TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY FOR PROPOSED INCORPORATION INTO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2015-2

Air Quality Program,
Environmental Health Department,
City of Albuquerque, Petitioner

CITY OF ALBUQUERQUE'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

Pursuant to 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*, the City of Albuquerque Environmental Health Department, Air Quality Program, hereby submits its Notice of Intent to present technical testimony (NOI) in this proceeding.

1. **The person for whom the witness will testify.**

Air Quality Program, Environmental Health Department, City of Albuquerque, New Mexico.

2. **The name and qualifications of each technical witness.**

Ed Merta. Air Quality Regulation Development Coordinator, Control Strategies Division, Air Quality Program, Environmental Health Department, City of Albuquerque, New

Mexico. J.D. (Natural Resources Certificate), University of New Mexico; M.A. (and "ABD") History, Harvard University; M.A. History, Ohio University; B.A. International Studies, Ohio State University. Employed by the City of Albuquerque's Environmental Health Department since October 2014. Previously employed by the following organizations: New Mexico Renewable Energy Industries Association (law clerk school, temporary, 2014); WildEarth Guardians (intern, 2014); Western Resource Advocates (intern, 2013); Department of Family and Community Medicine, University of New Mexico School of Medicine (2007 to 2011); Health Sciences Library and Informatics Center , University of New Mexico (1998 to 2007).

Chief responsibility is to facilitate promulgation of air quality regulation through the Albuquerque – Bernalillo County Air Quality Control Board (Air Board) for implementation within the City of Albuquerque and the County of Bernalillo, including research, drafting and editing of technical and legal documents, hearing preparation, testifying, and submittal, through the New Mexico Records Center and Archives and the New Mexico Environment Department, to the U.S. Environmental Protection Agency (EPA) for approval.

Isreal Tavarez, P.E. Environmental Health Manager, Permitting Division, Air Quality Program, Environmental Health Department, City of Albuquerque, New Mexico. M.S. Chemical Engineering, New Mexico State University; B.S. Chemical Engineering, NMSU. Registered Professional Engineer (New Mexico). Employed by the City of Albuquerque's Environmental Health Department, Air Quality Program for 18 years. Previously employed by the State of New Mexico, Air Quality Bureau (1994-1996).

Mr. Tavarez's primary responsibility is to manage the air quality stationary source permitting program which includes reviewing and approving all air quality stationary source permits to ensure the permits are issued in accordance with local, state and federal regulations.

Damon Reyes. Environmental Health Manager, Enforcement and Compliance Division, Air Quality Program, Environmental Health Department, City of Albuquerque, New Mexico. B.S. in Environmental Science, College of Santa Fe, May 2001. Trained in extensive array of manufacturing and industrial technologies, related air pollution control approaches. Employed by City of Albuquerque Environmental Health Department, Air Quality Program, for ten years. Previously employed by Air Quality Bureau, New Mexico Environment Department (2002 to 2005), Pueblo Office of Environmental Protection, All Indian Pueblo Council (2000 to 2002), Philips Semiconductor (1998 to 2000).

Main responsibilities include: overseeing enforcement and compliance actions and bringing them to resolution; reviewing inspection reports that have designated a source as out of compliance, to determine if an enforcement action can be pursued; drafting penalty calculations and notices of violation.

Dan Gates. Quality Assurance Section Supervisor, Air Quality Program, Environmental Health Department, City of Albuquerque, New Mexico. B.A. Architecture, University of New Mexico. Employed by the City of Albuquerque for 20 years. Four years with the Wastewater Utility Division and 16 years with the Environmental Health Department's Air Quality Program. Mr. Gates oversees the Program's quality assurance activities including data quality management, data validation, and the monitoring equipment auditing program. Mr. Gates also evaluates all the air monitoring data prior to submission to the EPA and works closely with EPA Regional staff to ensure that the Air Quality Program's Air Monitoring data meets all applicable federal requirements.

3. Summary and Estimated Duration of Testimony

Mr. Merta's written testimony is attached as AQP Exhibit 4. Presentation of that testimony is expected to take ten minutes or less. Mr. Merta will testify that an amended 20.11.61 NMAC, *Prevention of Significant Deterioration*, as indicated in the Public Review Draft, AQP Exhibit 1, should be adopted and be approved for submittal to EPA as a proposed revision to the New Mexico State Implementation Plan (SIP). It is estimated that the hearing will take one hour or less. The Department is petitioning the Albuquerque - Bernalillo County Air Quality Control Board to adopt the amended 20.11.61 NMAC and approve its submittal to EPA for the following reasons.

A. Federal law requires states and local air authorities to adopt a Prevention of Signification Deterioration (PSD) permit program. This requirement is contained in: the Federal Clean Air Act and the Code of Federal Regulations, as described in the Department's petition for rulemaking, shown as AQP Exhibit 1a. To implement a local PSD program, the Air Board has promulgated 20.11.61 NMAC, *Prevention of Significant Deterioration*.

B. On April 10, 2013, the Air Board approved amendments to 20.11.61 NMAC, Sections 2, 5, 6, 7, 10, 11, 12, 14, 15, 18, 20, 23, 24, 27, 29 and 30, effective May 13, 2013. These amendments were required by several EPA rulemakings related to PSD, which revised the Code of Federal Regulations and thus required revisions to the SIP. More detailed information on the EPA rulemakings and the Air Board's response is included in the Exhibits related to the Board's April 10, 2013 hearing, which are attached as AQP Exhibits 8a to 8f.

C. On July 26, 2013, New Mexico Environment Secretary Ryan Flynn submitted the amendments to 20.11.61 NMAC to EPA as a proposed SIP revision. Secretary Flynn's letter is included with this NOI as AQP Exhibit 8f. EPA review of the proposed revision is underway.

D. In February 2015, EPA informed the Air Quality Program that approval of the proposed 2013 SIP revision would depend on three particular amendments to the current locally effective version of 20.11.61 NMAC. These proposed amendments are indicated in EHD's Public Review Draft of the amended 20.11.61 NMAC. EPA's reasons for requesting the amendments are described in the EPA's communications with EHD, shown in AQP Exhibits 2a and 2b. In sum, EPA states that the currently effective versions of 20.11.61.11(B) and 20.11.61 11(C) NMAC are inconsistent with federal regulations found in 40 CFR § 51.166, regarding applicability of PSD regulations to a permitted source. EPA notes that the previous versions of these provisions, prior to the Air Board's April 2013 amendments, were consistent with federal regulations. The Air Quality Program's proposed draft of a revised 20.11.61 will restore the language of 20.11.61.11(B) and (C) to that of the versions in effect prior to the April 2013 amendments. EPA further notes that the currently effective version of 20.11.61.7(CCC) NMAC includes language inconsistent with a federal court decision made after the 2013 amendments were approved. That decision, *Center for Biological Diversity v. Environmental Protection Agency*, 722 F.3d 401 (D.C. Cir. 2013), is attached to this NOI as AQP Exhibit 9. Per EPA's request, the Air Quality Program's proposed draft of a revised 20.11.61 NMAC excises the language pointed to by EPA to bring the regulation up to date.

E. EPA attaches particular urgency to submission of an amended 20.11.61 NMAC as a proposed SIP revision. This urgency is due in part to the need for EPA to clear its backlog of proposed local SIP revisions. Revisions to the local PSD regulation and their incorporation into the New Mexico SIP are an important component in a multi-year work plan, agreed upon by EHD and EPA, to address EPA's large backlog in SIP revisions. In addition to the backlog, another reason for the urgency of this proposed SIP revision is that the amendments EPA has requested must be made in order for EPA to act on three other pending SIP revisions related to 20.11.61 NMAC. One is an Infrastructure SIP for the 2010 National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO_2), approved by the Air Board on June 12, 2013 and submitted to EPA in July 2013. A second pending SIP revision is an Infrastructure SIP for the 2008 NAAQS for lead, adopted by the Board on January 11, 2012 and submitted to EPA in May 2012. The third pending SIP revision that depends on amendment of 20.11.61 NMAC is the proposed Infrastructure SIP for the 2010 sulfur dioxide NAAQS, presented to the Board in AQCB petition 2015-1. EPA's interpretation of the Clean Air Act, Section 110(a)(2), makes EPA approval of an Infrastructure SIP conditional on the presence of a fully EPA approved PSD permitting program. EPA's policy on this matter is described in its guidance to state and local air agencies on preparation of Infrastructure SIP, shown as AQP Exhibit 10.

F. In consultation with EPA, EHD requested that EPA consider the proposed amended 20.11.61 NMAC by a procedure known as "parallel processing," provided for in Appendix V, Section 2.3 of 40 CFR, Part 51. This process entails EPA reviewing a proposed revision to a State Implementation Plan (SIP) simultaneously with state or local rulemaking on the proposed revision, rather than, as is typically the case, after the state or

local rulemaking process is complete. EPA utilizes parallel processing for proposed SIP revisions that are expected to be non-controversial and will not be further amended during the state or local rule-making process. Correspondence related to initiation of EPA parallel processing for the proposed amended 20.11.61 NMAC are shown as AQP Exhibits 3a, 3b, and 3c.

G. The rulemaking for adopting the amended 20.11.61 NMAC, *Prevention of Significant Deterioration*, is being carried out in accordance with federal and state procedural requirements and with 20.11.82 NMAC, *Rulemaking Procedures -- Air Quality Control Board*. Consistent with the provisions of these legal authorities, EHD circulated the Public Review Draft, AQP Exhibit 1, attached to EHD's petition for rulemaking to the Albuquerque Bernalillo County Air Quality Control Board (Air Board), which is shown as AQP Exhibit 1a. To further demonstrate compliance with procedural requirements, EHD is submitting the following exhibits. Notice of the petition is attached as AQP Exhibit 1b. Draft minutes of the Air Board meeting at which the Air Board approved EHD's request for a hearing on the proposed Infrastructure SIP are shown as AQP Exhibit 4. Notices of the rulemaking hearing, scheduled for April 30, 2015, are shown as AQP Exhibits 5a, 5b, and 5c. The draft agenda for the April 30 Air Board meeting and hearing is shown as AQP Exhibit 6.

H. Due to the urgency of this rulemaking, as described above, EHD solicited stakeholder comments as part of the rulemaking procedures under 20.11.82 NMAC, rather than obtaining stakeholder comments in advance of beginning these rulemaking procedures. EHD pursued this approach in consultation with EPA in order to expedite the urgent rulemaking at EPA's request. Stakeholders were afforded ample opportunity to comment on the proposed amended 20.11.61 NMAC by the following: circulation of the

Public Review Draft attached to EHD's petition to rulemaking; legal notice of the rulemaking hearing; the holding of the hearing itself, at which members of the public may comment. In sending notices of the above rulemaking actions, EHD specifically notified stakeholders likely to have an interest in amendments to the local PSD regulation, including PSD permit holders, environmental consultants and consulting organizations, Title V permit holders, and Synthetic Minor sources.

I. The Department anticipates that the proposed amendments will not have a local adverse impact on the regulated community. In part, this is because the proposed amendments are procedural, not substantive. They alter language in the regulation to align with federal regulations, but they do not require a regulated source to alter its behavior. In addition, the PSD regulation, 20.11.61 NMAC, applies only to a very narrow category of sources. These sources are: (1) very large sources of potential air pollutant emissions; (2) sources that are proposed for new construction, or major new construction that will result in a major modification of an existing source, thereby leading to emissions potential sufficiently large to trigger PSD requirements; (3) in an area that is in attainment for a NAAQS. Because sources meeting these conditions have been rare locally, the PSD regulation has rarely been triggered. There have been only two such instances. The first was in 1977, when the PSD program was administered locally by the EPA. At that time, EPA issued a PSD permit for a construction project that modified an existing facility, by building a finish mill at a large cement manufacturing plant in Tijeras, New Mexico (currently known as the GCC Rio Grande Inc. -- Tijeras Plant). The second instance of a PSD permit issued locally was in 1998, for construction of what is currently the Rio Bravo Generating Station near Rio Bravo and Broadway Boulevard SE, in Albuquerque, owned by Public Service Company of New Mexico.

4. Text of Recommended Amendments to 20.11.61 NMAC for Submission to EPA as a Proposed Revision to the New Mexico State Implementation Plan

EHD recommends adoption of the proposed amendments to 20.11.61 NMAC, *Prevention of Significant Deterioration* as proposed in the Public Review Draft attached to the petition for regulatory change, filed February 20, 2015. The petition and Public Review Draft are shown as AQP Exhibits 1 and 1a.

5. List and Description of Exhibits

The Division has attached the following exhibits to this Notice of Intent:

Exhibit Number	Title of Exhibit
AQP Exhibit 1/1a/1b	{1} Public Review Draft, amended 20.11.61 NMAC, *Prevention of Significant Deterioration*; {1a} Petition to amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP), as filed February 20, 2015 {1b} text of email notice of petition, sent February 20, 2015 to "Air Quality Control Board Announce List Serve" and list of stakeholders with special interest in PSD program (stakeholder review was conducted by seeking comments during rulemaking process under 20.11.82 NMAC, *Rulemaking Procedures -- Air Quality Control Board*)

AQP Exhibit 2a	EPA letter to EHD, requesting amendments to 20.11.61 NMAC, received by U.S. mail February 12, 2015 (this rulemaking originated as request from EPA -- thus, EPA review was initiated by EPA rather than by EHD)
AQP Exhibit 2b	EPA email to EHD, requesting additional amendment to 20.11.61 NMAC, received February 17, 2015
AQP Exhibit 3a	EPA email to EHD, describing proposed parallel processing of amendments to 20.11.61 NMAC, received February 13, 2015
AQP Exhibit 3b	Letter from Director, City of Albuquerque Environmental Health Department, to Ryan Flynn, Cabinet Secretary, New Mexico Environment Department, on request to EPA for parallel processing, March 3, 2015
AQP Exhibit 3c	Letter from Ryan Flynn, Cabinet Secretary, New Mexico Environment Department, requesting parallel processing, March 4, 2015
AQP Exhibit 4	Draft minutes of Air Quality Control Board Meeting, March 11, 2015 (during which petition for rulemaking was presented)
AQP Exhibits 5a/b/c	Notices of rulemaking hearing, including: {5a}Legal advertisement of hearing in Albuquerque Journal, 3/15/15;

{5b} Legal advertisement of hearing in New Mexico Register, 3/16/15;

{5c} text of email notice to "Air Quality Control Board Announce" List Serve and to list of stakeholders with special interest in PSD program, 3/16/15

AQP Exhibit 6 Draft agenda of Air Quality Control Board meeting and hearings, scheduled to be held April 30, 2015

AQP Exhibit 7 Direct Testimony of Ed Merta, Air Quality Program, in support of adoption of amended 20.11.61 NMAC, *Prevention of Significant Deterioration*, to be presented at hearing on AQCB Petition No. 2015-2

AQP Exhibit 8a to 8f Records related to April 2013 rulemaking hearing:

{8a} Department's Petition for Regulatory Change, filed January 29, 2013, proposing amendments to 20.11.42 NMAC, *Operating Permits*, 20.11.60 NMAC, *Permitting in Nonattainment Areas*, and 20.11.61 NMAC, *Prevention of Significant Deterioration*, for submission to EPA as proposed revision of New Mexico State Implementation Plan;

{8b} Department's Notice of Intent to Present Technical Testimony at April 10, 2013 Air Board hearing on AQCB Petition 2013-1, as filed March 20, 2013;

{8c} Agenda for Air Quality Control Board meeting and hearings, April 10, 2013;

{8d} Direct Testimony of Neal Butt supporting AQCB Petition 2013-1, adoption of amended 20.11.42 NMAC, *Operating Permits*, 20.11.60 NMAC, *Permitting in Nonattainment Areas*, and 20.11.61 NMAC, *Prevention of Significant Deterioration*, delivered at April 10, 2013 Air Board hearing;

{8e}Minutes of Air Quality Control Board meeting and hearings, April 10, 2013;

{8f} Letter from Ryan Flynn, Cabinet Secretary, New Mexico Environment Department, to Ron Curry, Regional Administrator, U.S. Environmental Protection Agency Region 6, , July 26, 2013, transmitting amended 20.11.42 NMAC, *Operating Permits*, 20.11.60 NMAC, *Permitting in Nonattainment Areas*, and 20.11.61 NMAC, *Prevention of Significant Deterioration*, as proposed revisions to the New Mexico State Implementation Plan

AQP Exhibit 9 Decision by Federal Court of Appeals for the D.C. Circuit, vacating EPA's "biogas deferral" rule, *Center for Biological Diversity v. Environmental Protection Agency*, 722 F.3d 401 (D.C. Cir. 2013).

AQP Exhibit 10 EPA Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2), September 2013

6. **Reservation of Rights**

This Notice of Intent to Present Technical Testimony is based on the Department's Petition for Regulatory Change, filed February 20, 2015.The Department reserves the right to call any person to testify and to present any exhibit in response to another notice of intent or public comment filed in this matter or to any testimony or exhibit offered at the public hearing. The Department also reserves the right to call any person as a rebuttal witness and to present any exhibit in support thereof.

Respectfully submitted,

Ed Merta
Air Quality Regulation Development Coordinator
Air Quality Program
Environmental Health Department
One Civic Plaza, NW, Suite 3023
Albuquerque, New Mexico 87103
(505) 768-2660

CERTIFICATION

I hereby certify that on April 14, 2015, an original and 15 copies of this Notice of Intent to present technical testimony (NOI), with attached exhibits were delivered to the following person for filing.

Andrew Daffern
Air Quality Control Board Liaison
Air Quality Division
Environmental Health Department
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103

And that on April 14, 2015 a copy of this NOI with attached exhibits was sent by email to the Attorney for the Board, Felicia Orth.

Ed Merta
Air Quality Regulation Development Coordinator
Air Quality Department
Environmental Health Department

1	Ex. #1. Public Review Draft - 20.11.61 NMAC; [1a.] Petition to Amend 20.11.61 NMAC; [1b.] Email notice sent to "AQCB Announce" list serve, 2-20-2015
2	Ex. #2a. EPA letter to AQP, requesting amendments to 20.11.61 NMAC, 2-12-2015; [2b.] EPA email to AQP, requesting additional amendment to 20.11.61 NMAC, 2-17-2015
3	Ex. #3a. EPA email to AQP re: parallel processing, 2-13-2015; [3b.] EHD request to NMED for parallel processing, 3-3-2015; [3c.] NMED request to EPA for parallel processing, 3-4-2015
4	Ex. #4. Draft minutes of Air Quality Control Board Meeting, 3-11-2015
5	Ex. #5a/b/c. Notices of Proposed Rulemaking: [5a.] Abq Journal, 3-15-2015; [5b.] NM Register, 3-16-2015; [5c.] Email notice sent to "AQCB Announce" list serve, 3-16-2015
6	Ex. #6. Draft agenda of Air Quality Control Board meeting and hearings, scheduled to be held 4-30-2015
7	Ex. #7. Direct Testimony by Ed Merta, AQP, in support of adoption of amended 20.11.61 NMAC, to be presented at hearing on AQCB Petition No. 2015-2
8	Ex. #8a/b/c/d/e/f. Records re: 2013 Rulemaking; [8a] AQP's Petition for Reg. Change; [8b] NOI on AQCB 2013-1; [8c] AQCB agenda; [8d] Neal Butt Testimony; [8e] AQCB minutes; [8f] NMED to EPA, SIP transmittal
9	Ex. #9. Decision by Federal Court of Appeals for the D.C. Circuit, vacating EPA's "biogas deferral" rule, *Center for Biological Diversity v. Environmental Protection Agency*
10	Ex. #10. EPA Guidance of Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2), 9-2013
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TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 61 PREVENTION OF SIGNIFICANT DETERIORATION

20.11.61.1 ISSUING AGENCY: Albuquerque - Bernalillo County Air Quality Control Board. P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-2601.
[20.11.61.1 NMAC - Rp, 20.11.61.1 NMAC, 1/23/06; A, 8/30/10]

20.11.61.2 SCOPE: Any person constructing any new major stationary source or major modification, as defined in 20.11.61 NMAC, that emits or will emit regulated new source review (NSR) pollutants in an attainment or unclassifiable area shall obtain a permit from the department in accordance with the requirements of 20.11.41 NMAC, *Authority-to-Construct*, and 20.11.61 NMAC prior to the construction or modification.

A. Exempt:

(1) sources within Bernalillo county which are located on Indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction;

(2) each regulated NSR pollutant emitted by a source or modification located in a nonattainment area for that pollutant;

(3) after a public hearing, consistent with the public notice and participation provisions of 20.11.41 NMAC, *Authority-to-Construct*, the board may exempt major stationary sources or major modifications if:

(a) the major stationary source would be a nonprofit health or nonprofit educational institution, or a major modification that would occur at such an institution; or

(b) the source or modification is a portable stationary source which has previously received a permit pursuant to 20.11.61 NMAC if:

(i) the owner or operator proposes to relocate the source, and emissions from the source at the new location would be temporary; and

(ii) the emissions from the source would not exceed its allowable emission rate; and

(iii) the emissions from the source would not impact any federal class I area nor any area where an applicable increment is known to be violated; and

(iv) reasonable notice is given to the department prior to the relocation identifying the proposed new location and the probable duration of operation at the new location; such notice shall be given to the department not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the department;

(4) sources or modifications that would be major only if quantifiable fugitive emissions are considered in calculating the potential to emit, and the source does not belong to:

(a) any category in Table 1 of 20.11.61.26 NMAC; or

(b) any other stationary source category which as of August 7, 1980, is being regulated under Section 111 or 112 of the act.

B. Variances: The director may grant a variance to any person constructing a major stationary source or major modification from the federal class I maximum allowable increases consistent with the requirements listed in 40 CFR 52.21(p)(5).
[20.11.61.2 NMAC - Rp, 20.11.61.2 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.3 STATUTORY AUTHORITY: 20.11.61 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4 and 74-2-5; the Joint Air Quality Control Board Ordinance; Bernalillo county Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 Sections 9-5-1-3 and 9-5-1-4.
[20.11.61.3 NMAC - Rp, 20.11.61.3 NMAC, 1/23/06]

20.11.61.4 DURATION: Permanent.
[20.11.61.4 NMAC - Rp, 20.11.61.4 NMAC, 1/23/06]

20.11.61.5 EFFECTIVE DATE: January 23, 2006, unless a later date is cited at the end of a section.
[20.11.61.5 NMAC - Rp, 20.11.61.5 NMAC, 1/23/06; A, 5/13/13]

20.11.61.6 OBJECTIVE: To minimize air pollutant emissions from new major stationary sources or major modifications in areas classified as in attainment of the national ambient air quality standards (NAAQS) or determined to be unclassifiable pursuant to Section 107(d) of the act.
[20.11.61.6 NMAC - Rp, 20.11.61.6 NMAC, 1/23/06; A, 1/10/11; A, 5/13/13]

20.11.61.7 DEFINITIONS: In addition to the definitions in 20.11.61 NMAC, the definitions in 20.11.1 NMAC, *General Provisions*, shall apply unless there is a conflict between definitions, in which case the definition in 20.11.61 NMAC shall govern.

A. "Act" means the federal Clean Air Act, as amended, 42 U. S. C. Sections 7401 et seq.

B. "Actual emissions" means the actual rate of emissions of a regulated NSR pollutant from an emissions unit, as determined in accordance with Paragraphs (2) through (4) of Subsection B of 20.11.61.7 NMAC.

(1) This definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a PAL under 20.11.61.20 NMAC. Instead, Subsections I and VV of 20.11.61.7 NMAC shall apply for those purposes.

(2) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation. The department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(3) The department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(4) For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

C. "Administrator" means the administrator of the U.S. environmental protection agency (EPA) or an authorized representative.

D. "Adverse impact on visibility" means visibility impairment which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the federal class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency, and time of the visibility impairments and how these factors correlate with the following:

(1) times of visitor use of the federal class I area; and

(2) the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas as defined in 40 CFR 51.301 *Definitions*.

E. "Air quality related values (AQRV)" means visibility and other scenic, cultural, physical, biological, ecological, or recreational resources which may be affected by a change in air quality resulting from the emissions of a proposed major stationary source or major modification that interferes with the management, protection, preservation, or enjoyment of the AQRV of a federal class I area.

F. "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(1) the applicable standards as set forth in 40 CFR Parts 60 and 61;

(2) the applicable state implementation plan emissions limitation, including those with a future compliance date; or

(3) the emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

G. "Associated emission sources" means secondary emissions and all reasonably foreseeable emissions of regulated pollutants from the growth of general residential, commercial, industrial, governmental emission sources and other mobile and non-mobile emission sources which are associated with or support the proposed new major stationary source or major modification. Other mobile and non-mobile emission sources shall include, but not be limited to, new highways and roads or improvements to existing highways and roads to increase capacity, new parking facilities or improvements to existing parking facilities to increase capacity, service enhancements to ground and air public transportation to include the building of new public transportation facilities or improvements to existing public transportation facilities to increase capacity; and the building of new public or private educational facilities or improving existing public or private educational facilities to increase enrollment.

H. "Attainment area" means, for any air pollutant, an area which is shown by monitored data or which is calculated by air quality modeling not to exceed any NAAQS for such pollutant, and is so designated under Section 107(d)(1)(D) or (E) of the act.

I. "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Paragraphs (1)-(4) of Subsection I of 20.11.61.7 NMAC.

(1) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five year period immediately preceding when the owner or operator begins actual construction of the project. The department shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(a) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(b) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(c) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

(d) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparagraph (b) of Paragraph (1) of Subsection I of 20.11.61.7 NMAC.

(2) For an existing emissions unit (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 10 year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received by the department for a permit required either under 20.11.61 NMAC or under a plan approved by the administrator, whichever is earlier, except that the 10 year period shall not include any period earlier than November 15, 1990.

(a) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(b) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(c) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period. However, if an emission limitation is part of a maximum achievable control technology standard that the administrator proposed or promulgated under 40 CFR Part 63, the baseline actual emissions need only be adjusted if the state has taken credit for such emissions reductions in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G).

(d) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

(e) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparagraphs (b) and (c) of Paragraph (2) of Subsection I of 20.11.61.7 NMAC.

(3) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(4) For a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in Paragraph (1) of Subsection I of 20.11.61.7 NMAC, for other existing emissions units in accordance with the procedures contained in Paragraph (2) of Subsection I of 20.11.61.7 NMAC, and for a new emissions unit in accordance with the procedures contained in Paragraph (3) of Subsection I of 20.11.61.7 NMAC.

J. "Baseline area"

(1) Means any intrastate area (and every part thereof) designated as attainment or unclassifiable under Section 107(d)(1)(A)(ii) or (iii) of the act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact for the pollutant for which the baseline date is established, as follows: equal to or greater than one microgram per cubic meter (1 $\mu g/m^3$) (annual average) for SO_2, NO_2 or PM_{10}; or equal to or greater than 0.3 $\mu g/m^3$ (annual average) for $PM_{2.5}$.

(2) Area redesignations under Section 107(d)(1)(A)(ii) or (iii) of the act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(a) establishes a minor source baseline date; or

(b) is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166, and would be constructed in the same state as the state proposing the redesignation.

(3) Any baseline area established originally for total suspended particulates (TSP) increments shall remain in effect and shall apply for purposes of determining the amount of available PM_{10} increments, except that such baseline area shall not remain in effect if the department rescinds the corresponding minor source baseline date in accordance with Paragraph (3) of Subsection MM of 20.11.61.7 NMAC.

K. "Baseline concentration" means that ambient concentration level that exists in the baseline area at the time of the applicable minor source baseline date.

(1) A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

(a) the actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in Paragraph (2) of Subsection K of 20.11.61.7 NMAC;

(b) the allowable emissions of major stationary sources that commenced construction before the major source baseline date, but were not in operation by the applicable minor source baseline date.

(2) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(a) actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(b) actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

L. "Begin actual construction" means, in general, the initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities, other than preparatory activities which mark the initiation of the change.

M. "Best available control technology (BACT)" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification, which the director on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice, or operation, and shall provide for compliance by means which achieve equivalent results.

N. "Building, structure, facility or installation" means 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. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which have the same first two-digit code) as described in the standard industrial classification (SIC) manual, 1972, as amended by the 1977 supplement (U. S. government printing office stock numbers 4101-0066 and 003-005-00176-0, respectively) or any superseding SIC manual.

O. "Class I area" means any federal land that is classified or reclassified as "class I" as listed in 20.11.61.25 NMAC.

P. **"Commence"** as applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(1) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(2) entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

Q. **"Complete"** means, in reference to an application for a permit, that the department has determined the application contains all of the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the department from requesting or accepting any additional information.

R. **"Construction"** means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

S. **"Continuous emissions monitoring system (CEMS)"** means all of the equipment that may be required to meet the data acquisition and availability requirements of 20.11.61 NMAC, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.

T. **"Continuous emissions rate monitoring system (CERMS)"** means the total equipment required for the determination and recording of the pollutant mass emissions rate (in terms of mass per unit of time).

U. **"Continuous parameter monitoring system (CPMS)"** means all of the equipment necessary to meet the data acquisition and availability requirements of 20.11.61 NMAC, to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and to record average operational parameter value(s) on a continuous basis.

V. **"Department"** means the city of Albuquerque, environmental health department or its successor agency.

W. **"Director"** means the director of the city of Albuquerque, environmental health department or the director of its successor agency.

X. **"Electric utility steam generating unit"** means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

Y. **"Emissions unit"** means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric utility steam generating unit as defined in 20.11.61.7 NMAC. For purposes of 20.11.61 NMAC, there are two types of emissions units as follows:

(1) a new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than two years from the date such emissions unit first operated;

(2) an existing emissions unit is any emissions unit that does not meet the requirements in Paragraph (1) of Subsection Y of 20.11.61.7 NMAC. A replacement unit is an existing unit.

Z. **"Federal land manager"** means, with respect to any lands in the United States, a federal level cabinet secretary of a federal level department (e.g. interior department) with authority over such lands.

AA. **"Federally enforceable"** means all limitations and conditions which are enforceable by the administrator, including:

(1) those requirements developed pursuant to 40 CFR Parts 60 and 61;

(2) requirements within any applicable state implementation plan (SIP);

(3) any permit requirements established pursuant to 40 CFR 52.21; or

(4) under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that expressly requires adherence to any permit issued under such program.

BB. **"Fugitive emissions"** means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

CC. **"Greenhouse gases" or "GHGs"** means the air pollutant defined in § 86.1818–12(a) of Chapter I of Title 40 of the CFR, as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

DD. **"High terrain"** means any area having an elevation 900 feet or more above the base of a source's stack.

EE. "Indian governing body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

FF. "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or achieving at least comparable reductions at lower cost in terms of energy, economics, or non-air quality environmental impacts.

GG. "Low terrain" means any area other than high terrain.

HH. "Lowest achievable emission rate (LAER)" means, for any source, the more stringent rate of emissions based on the following:

(1) the most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(2) the most stringent emissions limitation which is achieved in practice by such class or category of stationary source; this limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source; in no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

II. "Major modification"

(1) Means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase of a regulated NSR pollutant; and a significant net emissions increase of that pollutant from the major stationary source.

(2) Any significant emissions increase from any emissions units or net emissions increase at a major stationary source that is significant for volatile organic compounds or oxides of nitrogen shall be considered significant for ozone.

(3) A physical change or change in the method of operation shall not include:

(a) routine maintenance, repair, and replacement;

(b) use of an alternative fuel or raw material by reason of an order under Section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) use of an alternative fuel by reason of an order or rule under Section 125 of the act;

(d) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) use of an alternative fuel or raw material by a stationary source which:

(i) the source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166; or

(ii) the source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) an increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166;

(g) any change in ownership at a stationary source;

(h) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(i) the state implementation plan for the state in which the project is located; and

(ii) other requirements necessary to attain and maintain the NAAQS during the project and after it is terminated;

(i) the installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated NSR pollutant emitted by the unit; this exemption shall apply on a pollutant-by-pollutant basis; or

(j) the reactivation of a very clean coal-fired electric utility steam generating unit.

(4) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under 20.11.61.20 NMAC for a PAL for that pollutant. Instead, the definition at Paragraph (8) of Subsection B of 20.11.61.20 NMAC shall apply.

JJ. "Major source baseline date" means:

(1) in the case of PM_{10} and sulfur dioxide, January 6, 1975;
(2) in the case of nitrogen dioxide, February 8, 1988; and
(3) in the case of $PM_{2.5}$, October 20, 2010.

KK. "Major stationary source"

(1) means:

(a) any stationary source listed in Table 1 of 20.11.61.26 NMAC which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant;

(b) notwithstanding the stationary source categories specified in Subparagraph (a) of Paragraph (1) of Subsection KK of 20.11.61.7 NMAC, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any regulated NSR pollutant; or

(c) any physical change that would occur at a stationary source not otherwise qualifying under Subsection KK of 20.11.61.7 NMAC, as a major stationary source if the change would constitute a major stationary source by itself.

(2) A major source that is major for volatile organic compounds or oxides of nitrogen shall be considered major for ozone.

(3) The fugitive emissions of a stationary source shall not be included in determining whether it is a major stationary source, unless the source belongs to one of the stationary source categories found in Table 1 of 20.11.61.26 NMAC or any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the act.

LL. "Mandatory federal class I area" means any area identified in 40 CFR Part 81, Subpart D.

MM. "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or major modification subject to 40 CFR 52.21, or to regulations approved pursuant to 40 CFR 51.166, submits a complete application under the relevant regulations.

(1) The trigger dates are:

(a) August 7, 1977, for PM_{10} and sulfur dioxide; and

(b) February 8, 1988 for nitrogen dioxide; and

(c) October 20, 2011, for $PM_{2.5}$.

(2) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(a) the area in which the proposed major stationary source or major modification would construct is designated as attainment or unclassifiable under Section 107(d)(1)(A)(ii) or (iii) of the federal act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166; and

(b) in the case of a major stationary source, the pollutant would be emitted in significant amounts, or in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(3) Any minor source baseline date established originally for the TSP increments shall remain in effect and shall apply for purposes of determining the amount of available PM_{10} increments, except that the department may rescind any such minor source baseline date where it can be shown, to the director's satisfaction that, either the emissions increase from the major stationary source, or the net emissions increase from the major modification, responsible for triggering that date did not result in a significant amount of PM_{10} emissions.

NN. "Natural conditions" includes naturally occurring phenomena that reduce visibility as measured in terms of visual range, contrast or coloration.

OO. "Necessary preconstruction approvals or permits" mean those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the New Mexico state implementation plan.

PP. "Net emissions increase"

(1) Means, that with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(a) the increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to Subsection D of 20.11.61.11 NMAC; and

(b) any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable; baseline actual emissions for calculating increases and decreases shall be determined as provided in Subsection I of 20.11.61.7 NMAC, except that Subparagraph (c) of Paragraph (1) and Subparagraph (d) of Paragraph (2) of Subsection I of 20.11.61.7 NMAC shall not apply.

(2) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(a) the date five years prior to the commencement of construction on the particular change; and

(b) the date that the increase from the particular change occurs.

(3) An increase or decrease in actual emissions is creditable only if:

(a) it occurs between:

(i) the date five years prior to the commencement of construction on the particular change; and

(ii) the date that the increase from the particular change occurs; and

(b) the department has not relied on it in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.166, which permit is in effect when the increase in actual emissions from the particular change occurs; and

(c) the increase or decrease in emissions did not occur at a ***clean unit***, as defined in 40 CFR 51.166 (b)(3)(iii)(c) and Federal Register Vol. 76 No. 61, 3/30/11, p. 17554.

(d) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in Paragraph (3) of Subsection KK of 20.11.61.7 NMAC or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in Paragraph (3) of Subsection KK of 20.11.61.7 NMAC and that are not, by themselves, part of a listed source category.

(4) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or oxides of nitrogen that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(5) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(6) A decrease in actual emissions is creditable only to the extent that:

(a) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) it is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and

(c) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(7) an increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant; any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(8) Paragraph (2) of Subsection B of 20.11.61.7 NMAC shall not apply for determining creditable increases and decreases.

QQ. "Nonattainment area" means an area which has been designated under Section 107 of the act as nonattainment for one or more of the NAAQS by EPA.

RR. "Portable stationary source" means a source which can be relocated to another operating site with limited dismantling and reassembly.

SS. "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollutant control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitations or the effect the limitation would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

TT. "Predictive emissions monitoring system (PEMS)" means all of the equipment necessary to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and calculate and record the mass emissions rate (for example, lb/hr) on a continuous basis.

UU. "Project" means a physical change in, or change in method of operation of, an existing major stationary source.

VV. "Projected actual emissions"

(1) Means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the five years (12-month period) following the date the unit resumes

regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant, and full utilization of the unit would result in a significant emissions increase, or a significant net emissions increase at the major stationary source.

(2) In determining the projected actual emissions (before beginning actual construction), the owner or operator of the major stationary source:

(a) shall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under an approved SIP; and

(b) shall include fugitive emissions to the extent quantifiable and emissions associated with startups, shutdowns, and malfunctions; and

(c) shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under Subsection I of 20.11.61.7 NMAC and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

(3) in lieu of using the method set out in Subparagraphs (a)-(c) of Paragraph (2) of Subsection VV of 20.11.61.7 NMAC, may elect to use the emissions unit's potential to emit in tons per year.

WW. "Regulated new source review pollutant" or "regulated NSR pollutant" means the following:

(1) any pollutant for which a NAAQS has been promulgated; this includes, but is not limited to the following:

(a) $PM_{2.5}$ emissions and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures; on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits; compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan; applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of 40 CFR 51.166 unless the applicable implementation plan required condensable particulate matter to be included;

(b) any pollutant identified under Subparagraph (b) of Paragraph (1) of Subsection WW of 20.11.61.7 NMAC as a constituent or precursor to a pollutant for which a NAAQS has been promulgated; precursors identified by the administrator for purposes of NSR are the following:

(i) volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas;

(ii) sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas;

(iii) nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the state demonstrates to the administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations;

(iv) volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable area, unless the state demonstrates to the administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations;

(2) any pollutant that is subject to any standard promulgated under Section 111 of the act;

(3) any class I or II substance subject to a standard promulgated under or established by Title VI of the act;

(4) any pollutant that otherwise is "subject to regulation" under the act as defined in Subsection CCC of 20.11.61.7 NMAC;

(5) notwithstanding Paragraphs (1) through (4) of Subsection WW of 20.11.61.7 NMAC, the term "regulated NSR pollutant" shall not include any or all hazardous air pollutants either listed in Section 112 of the act, or added to the list pursuant to Section 112(b)(2) of the act, and which have not been delisted pursuant to Section 112(b)(3) of the act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the act;

(6) particulate matter (PM) emissions, $PM_{2.5}$ emissions, and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures; on or after

January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods), such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, $PM_{2.5}$ and PM_{10} in PSD permits; compliance with emissions limitations for PM, $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan; applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of 20.11.61 NMAC unless the applicable implementation plan required condensable particulate matter to be included.

XX. "Replacement unit" means an emission unit for which all of the following criteria are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(1) The emissions unit is a reconstructed unit within the meaning of 40 CFR 60.15(b)(1), or the emissions unit completely takes the place of an existing emissions unit.

(2) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(3) The replacement unit does not change the basic design parameter(s) of the process unit.

(4) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

YY. "Secondary emissions" means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of 40 CFR 51.166, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

ZZ. "Significant" means:

(1) in reference to a net emissions increase or the potential of a source to emit any of the pollutants listed in Table 2 of 20.11.61.27 NMAC, a rate of emissions that would equal or exceed any of the corresponding emission rates listed in Table 2 of 20.11.61.27 NMAC;

(2) in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that Paragraph (1) of Subsection ZZ of 20.11.61.7 NMAC, does not list, any emissions rate; and

(3) notwithstanding Paragraph (1) of Subsection ZZ of 20.11.61.7 NMAC, any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

AAA. "Significant emissions increase" means, for a regulated NSR pollutant, an increase in emissions that is significant for that pollutant.

BBB. "Stationary source" means any building, structure, facility, or installation which emits, or may emit, any regulated NSR pollutant.

CCC. "Subject to regulation" means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the administrator in Subchapter C of Chapter I of Title 40 of the CFR, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) Greenhouse gases (GHGs) shall not be subject to regulation except as provided in Paragraphs (4) and (5) of Subsection CCC of 20.11.61.7 NMAC and shall not be subject to regulation if the stationary source maintains its total source-wide emissions below the GHG PAL level, meets the requirements in 20.11.61.20 NMAC, and complies with the PAL permit containing the GHG PAL.

(2) For purposes of Paragraphs (3) through (5) of Subsection CCC of 20.11.61.7 NMAC, the term "tpy CO_2 equivalent emissions (CO_2e)" shall represent an amount of GHGs emitted, and shall be computed as follows:

(a) multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of Part 98 of Chapter I of Title 40 of the CFR — *Global Warming Potentials*~~; for purposes of Paragraph (2) of Subsection CCC of 20.11.61.7 NMAC, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste~~

~~from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material)~~.

(b) sum the resultant value from Subparagraph (a) of Paragraph (2) of Subsection CCC of 20.11.61.7 NMAC for each gas to compute a tpy CO_2e.

(3) The term "emissions increase" as used in Paragraphs (4) and (5) of Subsection CCC of 20.11.61.7 NMAC, shall mean that both a significant emissions increase (as calculated using the procedures in Subsection D of 20.11.61.11 NMAC) and a significant net emissions increase (as defined in Subsection PP of 20.11.61.7 NMAC and Subsection ZZ of 20.11.61.7 NMAC) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and ''significant'' is defined as 75,000 tpy CO_2e instead of applying the value in Table 2 of 20.11.61.27 NMAC.

(4) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(a) the stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(b) the stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(5) beginning July 1, 2011, in addition to the provisions in Paragraph (4) of Subsection CCC of 20.11.61.7 NMAC, the pollutant GHGs shall also be subject to regulation:

(a) at a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(b) at an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

DDD. "Temporary source" means a stationary source which changes its location or ceases to exist within two years from the date of initial start of operations.

EEE. "Visibility impairment" means any humanly perceptible change in visibility (visual range, contrast, coloration) from that which would have existed under natural conditions.

FFF. "Volatile organic compound (VOC)" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions; this includes any such organic compound other than those which the administrator designates as having negligible photochemical reactivity under 40 CFR 51.100(s).

[20.11.61.7 NMAC - Rp, 20.11.61.7 NMAC, 1/23/06; A, 5/15/06; A, 8/30/10; A, 1/10/11; A, 5/13/13]

20.11.61.8 SAVINGS CLAUSE: Any amendment to 20.11.61 NMAC, *Prevention of Significant Deterioration* that is filed with the state records center and archives shall not affect actions pending for violation of a city or county ordinance or board regulation. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part or section in effect at the time the violation was committed.

[20.11.61.8 NMAC - Rp, 20.11.61.9 NMAC, 1/23/06]

20.11.61.9 SEVERABILITY: If any section, paragraph, sentence, clause, or word of 20.11.61 NMAC or any federal standards incorporated herein is for any reason held to be unconstitutional or otherwise invalid by any court, the decision shall not affect the validity of remaining provisions of 20.11.61 NMAC.

[20.11.61.9 NMAC - Rp, 20.11.61.10 NMAC, 1/23/06]

20.11.61.10 DOCUMENTS: Documents incorporated and cited in 20.11.61 NMAC may be viewed at the Albuquerque environmental health department, One Civic Plaza NW, 3rd Floor, Suite 3023, Albuquerque, NM 87102.

[20.11.61.10 NMAC - Rp, 20.11.61.11 NMAC, 1/23/06; A, 5/13/13]

20.11.61.11 APPLICABILITY:

A. The requirements of 20.11.61 NMAC apply to the construction of any new major stationary source or any project at an existing major stationary source in an area designated as attainment or unclassifiable.

B. ~~The requirements of Sections 20.11.61.12 NMAC and 20.11.61.13 NMAC, Subsections A through C of 20.11.61.14 NMAC, Paragraph (1) of Subsection B of 20.11.61.15 NMAC, Subsections A and B of 20.11.61.16 NMAC, 20.11.61.17 NMAC, Subsections A through C of 20.11.61.18 NMAC, Subsections B and C of~~

~~20.11.61.21 NMAC and 20.11.61.24 NMAC apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as 20.11.61 NMAC otherwise provides.~~ The requirements of 20.11.61.12 NMAC through 20.11.61.18 NMAC, 20.11.61.21 NMAC and 20.11.61.24 NMAC apply to the construction of any new major stationary source or the major modification of any existing major stationary source except as 20.11.61 NMAC otherwise provides.

C. ~~No new major stationary source or major modification to which the requirements of Subsections A, B, C and D of 20.11.61.12 NMAC, Section 20.11.61.13 NMAC, Subsections A through C of 20.11.61.14 NMAC, Paragraph (1) of Subsection B of 20.11.61.15 NMAC, Subsections A and B of 20.11.61.16 NMAC, 20.11.61.17 NMAC, Subsections A through C of 20.11.61.18 NMAC, Subsections B and C of 20.11.61.21 NMAC and 20.11.61.24 NMAC apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.~~ No new major stationary source or major modification to which the requirements of Subsections A, B, C and D of 20.11.61.12 NMAC, Sections 20.11.61.13 NMAC through 20.11.61.18 NMAC, 20.11.61.21 NMAC and 20.11.61.24 NMAC apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

D. Applicability procedures.

(1) Except as otherwise provided in Subsection E of 20.11.61.11 NMAC, and consistent with the definition of major modification, a project is a major modification for a regulated NSR pollutant if it causes a significant emissions increase and a significant net emissions increase. The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(2) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to Paragraphs (3) through (5) of Subsection D of 20.11.61.11 NMAC. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in Subsection PP of 20.11.61.7 NMAC. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(3) **Actual-to-projected-actual applicability test for projects that only involve existing emissions units.** A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions and the baseline actual emissions for each existing emissions unit equals or exceeds the significant amount for that pollutant.

(4) **Actual-to-potential test for projects that only involve construction of a new emissions unit(s).** A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit from each new emissions unit following completion of the project and the baseline actual emissions of these units before the project equals or exceeds the significant amount for that pollutant.

(5) **Hybrid test for projects that involve multiple types of emissions units.** A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in Paragraphs (3) and (4) of Subsection D of 20.11.61.11 NMAC as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant.

E. For any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under 20.11.61.20 NMAC.

[20.11.61.11 NMAC - N, 1/23/06; A, 8/30/10; A, 1/10/11; A, 5/13/13]

20.11.61.12 OBLIGATIONS OF OWNERS OR OPERATORS OF SOURCES:

A. Any owner or operator who begins actual construction or operates a source or modification without, or not in accordance with, a permit issued under the requirements of 20.11.61 NMAC shall be subject to enforcement action.

B. Approval to construct shall not relieve any person from the responsibility to comply fully with the provisions of the Air Quality Control Act, Sections 74-2-1 to 74-2-17, NMSA 1978; any applicable regulations of the board; and any other requirements under local, state, or federal law.

C. Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time; the administrator may extend the 18-month period upon a satisfactory showing that an extension is justified; this provision does not apply to the time period between construction of the

approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

D. At such time that 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 otherwise to emit a pollutant, such as a restriction on hours of operation, then 20.11.61 NMAC shall apply to the source or modification as though construction had not yet commenced on the source or modification.

E. Except as otherwise provided in Paragraph (6) of Subsection E of 20.11.61.12 NMAC the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility within the meaning of Paragraph (6) of Subsection E of 20.11.61.12 NMAC that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant and the owner or operator elects to use the method specified in Paragraphs (1) through (3) of Subsection VV of 20.11.61.7 NMAC for calculating projected actual emissions.

(1) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(a) a description of the project;

(b) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

(c) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under Paragraph (3) of Subsection VV of 20.11.61.7 NMAC and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(2) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in Paragraph (1) of Subsection E of 20.11.61.12 NMAC to the department. Nothing in Paragraph (2) of Subsection E of 20.11.61.12 NMAC shall be construed to require the owner or operator of such a unit to obtain any determination from the department before beginning actual construction; however, necessary preconstruction approvals and/or permits must be obtained before beginning actual construction.

(3) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in Subparagraph (b) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of five years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of Paragraph (3) of Subsection E of 20.11.61.12 NMAC, fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in Table 1 of 20.11.61.26 NMAC or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(4) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the department within 60 days after the end of each year during which records must be generated under Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC setting out the unit's annual emissions during the calendar year that preceded submission of the report.

(5) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the department if the annual emissions, in tons per year, from the project identified in Paragraph (1) of Subsection E of 20.11.61.12 NMAC, exceed the baseline actual emissions (as documented and maintained pursuant to Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC) by a significant amount for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC. Such report shall be submitted to the department within 60 days after the end of such year. The report shall contain the following:

(a) the name, address and telephone number of the major stationary source;

(b) the annual emissions as calculated pursuant to Paragraph (3) of Subsection E of 20.11.61.12 NMAC; and

(c) any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(6) A ''reasonable possibility'' under Subsection E of 20.11.61.12 NMAC occurs when the owner or operator calculates the project to result in either:

(a) a projected actual emissions increase of at least 50 percent of the amount that is a ''significant emissions increase,'' as defined under Subsection AAA of 20.11.61.7 NMAC (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(b) a projected actual emissions increase that, added to the amount of emissions excluded under Paragraph (3) of Subsection VV of 20.11.61.7 NMAC, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under Subsection AAA of 20.11.61.7 NMAC (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; for a project for which a reasonable possibility occurs only within the meaning of Subparagraph (b) of Paragraph (6) of Subsection E of 20.11.61.12 NMAC, and not also within the meaning of Subparagraph (a) of Paragraph (6) of Subsection E of 20.11.61.12 NMAC, then provisions of Paragraphs (2) through (5) of Subsection E of 20.11.61.12 NMAC do not apply to the project.

F. The owner or operator of the source shall make the information required to be documented and maintained pursuant to Subsection E of 20.11.61.12 NMAC available for review upon request for inspection by the department or the general public pursuant to the requirements contained in 40 CFR 70.4(b)(3)(viii).

[20.11.61.12 NMAC - Rp, 20.11.61.12 NMAC, 1/23/06; A, 8/30/10; A, 1/10/11; A, 5/13/13]

20.11.61.13 SOURCE INFORMATION: The owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required by 20.11.61 NMAC.

A. Information shall include, but is not limited to:

(1) a description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing the design and plant layout; and

(2) a detailed schedule of construction of the source or modification; and

(3) a detailed description of the planned system of continuous emission reduction for the source or modification, emission estimates, and other information necessary to determine that best available control technology will be applied.

B. Upon request by the department, the owner or operator shall also provide information on:

(1) the air quality impact of the source or modification, including meteorological and topographic data necessary to estimate such impact; and

(2) the air quality impacts, and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977 in the area the source or modification would affect.

[20.11.61.13 NMAC - Rp, 20.11.61.13 NMAC, 1/23/06]

20.11.61.14 CONTROL TECHNOLOGY REVIEW AND INNOVATIVE CONTROL TECHNOLOGY:

A. A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in amounts equal to or greater than the significance levels as listed in Table 2 of 20.11.61.27 NMAC. This requirement applies to each proposed emissions unit or operation that will emit such pollutant.

B. A major modification shall apply best available control technology for each regulated NSR pollutant at the source when a significant net emissions increase occurs. This requirement applies to each proposed emissions unit or operation where a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

C. For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time but no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

D. Innovative control technology. The department may approve a system of innovative control technology for the major stationary source or major modification if:

(1) the proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function; and

(2) the owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under Subsection A of 20.11.61.14 NMAC by a date specified by the

department. Such date shall not be later than four years from the time of startup or seven years from permit issuance; and

(3) the source or modification would meet the requirements equivalent to 20.11.61.14 NMAC and 20.11.61.15 NMAC based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the department; and

(4) during the interim period of achieving the permitted emission level, the source or modification would not:

(a) cause or contribute to a violation of an applicable NAAQS; nor

(b) impact any federal class I area; nor

(c) impact any area where an applicable increment is known to be violated; and

(5) all other applicable requirements including those for public participation have been met.

E. The department shall withdraw any approval to employ a system of innovative control technology if:

(1) the proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(2) the proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(3) the department decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

F. If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with Subsection E of 20.11.61.14 NMAC, the department may allow the source or modification up to an additional three years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

G. If the owner or operator of a major stationary source or major modification previously issued a permit under 20.11.61 NMAC applies for an extension, and the new proposed date of construction is greater than 18 months from the date the permit would become invalid, the determination of best available control technology shall be reviewed and modified as appropriate before such an extension is granted. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

[20.11.61.14 NMAC - Rp, 20.11.61.14 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.15 AMBIENT IMPACT REQUIREMENTS:

A. The requirements of 20.11.61.15 NMAC shall apply to each pollutant emitted by a new major stationary source or major modification in amounts equal to or greater than that in Table 2 of 20.11.61.27 NMAC. For particulate matter, the source will only be required to perform ambient impact analysis for PM_{10} when the source has the potential to emit significant amounts of PM_{10} as determined from Table 2 of 20.11.61.27 NMAC.

B. Source impact analysis.

(1) **Required demonstration.** The owner or operator of the proposed source or modification shall demonstrate that the allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions, (including secondary emissions), would not cause or contribute to air pollution in violation of:

(a) any NAAQS in any air quality control region; or

(b) any applicable maximum allowable increase (as shown in Table 4 of 20.11.61.29 NMAC) over the baseline concentrations in any area.

(2) **Reserved**

C. The owner or operator of the proposed major stationary source or major modification shall demonstrate that neither a violation of Subparagraph (a) or (b) of Paragraph (1) of Subsection B of 20.11.61.15 NMAC will occur.

[20.11.61.15 NMAC - Rp, 20.11.61.15 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.16 ADDITIONAL IMPACT ANALYSES:

A. The owner or operator of the proposed major stationary source or major modification shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value. The analysis can use data or information available from the department.

B. The owner or operator shall also provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial, and other growth associated with the source or modification.

C. The department may require monitoring of visibility in any federal class I area where the department determines that an adverse impact on visibility may occur due primarily to the operations of the proposed new source or modification. Such monitoring shall be conducted following procedures approved by the department and subject to the following:

(1) visibility monitoring methods specified by the department shall be reasonably available and not require any research and development; and

(2) the cost of visibility monitoring required by the department shall not exceed 50 percent of the cost of ambient monitoring required by 20.11.61 NMAC; if ambient monitoring is not required, the cost shall be estimated as if it were required for each pollutant to which 20.11.61 NMAC applies;

(3) both preconstruction and post construction visibility monitoring may be required; in each case, the duration of such monitoring shall not exceed one year.

[20.11.61.16 NMAC - Rp, 20.11.61.16 NMAC, 1/23/06; A, 8/30/10]

20.11.61.17 AMBIENT AIR QUALITY MODELING: All estimates of ambient concentrations required by 20.11.61 NMAC shall be based on applicable air quality models, data bases, and other requirements as specified in Appendix W to 40 CFR Part 51, its revisions, or any superseding EPA document, and approved by the department. Where an air quality model specified in the Appendix W to 40 CFR Part 51, *Guideline on Air Quality Models*, is inappropriate, the model may be modified or another model substituted. Any substitution or modification of a model must be approved by the department. Notification shall be given by the department of such a substitution or modification and the opportunity for public comment provided for in fulfilling the public notice requirements in Subsection B of 20.11.61.21 NMAC. The department will seek EPA approval of such substitutions or modifications.

[20.11.61.17 NMAC - Rp, 20.11.61.17 NMAC, 1/23/06; A, 8/30/10]

20.11.61.18 AIR QUALITY ANALYSIS AND MONITORING REQUIREMENTS:

A. Preapplication analysis.

(1) Any application for a permit under regulations approved pursuant to 40 CFR 51.166 (e.g. 20.11.61 NMAC) shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(a) for a major stationary source, each pollutant that it would have the potential to emit in a significant amount; or

(b) for a major modification, each pollutant for which it would result in a significant net emission increase.

(2) If no NAAQS for a pollutant exists, and there is an acceptable method for monitoring that pollutant, the analysis shall contain such air quality monitoring data as the department determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(3) For pollutants (other than nonmethane hydrocarbons) for which a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(4) The continuous air quality monitoring data that is required shall have been gathered over a period of one year and shall represent the one year period preceding receipt of the permit application. The department has the discretion to:

(a) determine that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year but not less than four months; or

(b) determine that existing air quality monitoring data is representative of air quality in the affected area and accept such data in lieu of additional monitoring by the applicant.

(5) Ozone monitoring shall be performed if monitoring data is required for volatile organic compounds or oxides of nitrogen. The owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of 40 CFR Part 51 Appendix S, Section IV may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under Subsection A of 20.11.61.18 NMAC.

B. Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as

the department determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area, including monitoring to validate attainment of ambient air quality standards and to assure that increments are not exceeded.

C. Operation of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the requirements of 40 CFR 58, Appendix B during the operation of monitoring stations for purposes of satisfying the requirements of Subsections A through C of 20.11.61.18 NMAC.

D. Exceptions. The department has the discretion to exempt a proposed major stationary source or major modification from the requirements of Subsections A through C of 20.11.61.18 NMAC with respect to monitoring for a particular pollutant if:

(1) the emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the levels listed in Table 3 of 20.11.61.28 NMAC;

(2) the existing ambient concentrations of the pollutant in the area affected by the source or modification are less than the concentrations listed in Table 3 of 20.11.61.28 NMAC; or

(3) the pollutant is **not** listed in Table 3 of 20.11.61.28 NMAC.

[20.11.61.18 NMAC - Rp, 20.11.61.18 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.19 TEMPORARY SOURCE EXEMPTIONS: The requirements of Subsection B of 20.11.61.15 NMAC, 20.11.61.16 NMAC and 20.11.61.18 NMAC shall not apply to a major source or modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification: would not impact any federal class I area or any areas where an applicable increment is known to be violated; and would be temporary.

[20.11.61.19 NMAC - Rp, 20.11.61.19 NMAC, 1/23/06; A, 8/30/10]

20.11.61.20 ACTUALS PLANTWIDE APPLICABILITY LIMITS (PALs):

A. Applicability.

(1) The department may approve the use of an actuals PAL, including for GHGs on either a mass basis or a CO_2e basis, for any existing major stationary source or any existing GHG-only source if the PAL meets the requirements of 20.11.61.20 NMAC. The term "PAL" shall mean "actuals PAL" throughout 20.11.61.20 NMAC.

(2) Any physical change in or change in the method of operation of a major stationary source or a GHG-only source that maintains its total source-wide emissions below the PAL level, meets the requirements of 20.11.61.20 NMAC, and complies with the PAL permit:

(a) is not a major modification for the PAL pollutant;

(b) does not have to be approved through the plan's major NSR program;

(c) is not subject to the provisions in Subsection D of 20.11.61.12 NMAC (restrictions on relaxing enforceable emission limitations that the major stationary source used to avoid applicability of the major NSR program); and

(d) does not make GHGs "subject to regulation" as defined by Subsection CCC of 20.11.61.7 NMAC.

(3) Except as provided under Subparagraph (c) of Paragraph (2) of Subsection A of 20.11.61.20 NMAC, a major stationary source or a GHG-only source shall continue to comply with all applicable federal or state requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL.

B. Definitions applicable to 20.11.61.20 NMAC.

(1) **Actuals PAL *for a major stationary source*** means a PAL based on the *baseline actual emissions* (as defined in Subsection I of 20.11.61.7 NMAC) of all *emissions units* (as defined in Subsection Y of 20.11.61.7 NMAC) at the source, that emit or have the potential to emit the PAL pollutant. **For a GHG-only source, actuals PAL** means a PAL based on the *baseline actual emissions* (as defined in Paragraph (13) of Subsection B of 20.11.61.20 NMAC) of all *emissions units* (as defined in Paragraph (14) of Subsection B of 20.11.61.20 NMAC) at the source, that emit or have the potential to emit GHGs.

(2) **Allowable emissions** means "allowable emissions" as defined in Subsection F of 20.11.61.7 NMAC, except as this definition is modified in accordance with the following.

(a) The allowable emissions for any emissions unit shall be calculated considering any emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit.

(b) An emissions unit's potential to emit shall be determined using the definition in Subsection SS of 20.11.61.7 NMAC, except that the words "or enforceable as a practical matter" should be added after "federally enforceable".

(3) **Small emissions unit** means an emissions unit that emits or has the potential to emit the PAL pollutant in an amount less than the significant level for that PAL pollutant, as defined in Subsection ZZ of 20.11.61.7 NMAC or in the act, whichever is lower. **For a GHG PAL issued on a CO_2 e basis, small emissions unit** means an emissions unit that emits or has the potential to emit less than the amount of GHGs on a CO_2 e basis defined as "significant" for the purposes of Paragraph (3) of Subsection CCC of 20.11.61.7 NMAC at the time the PAL permit is being issued.

(4) **Major emissions unit means:**

(a) Any emissions unit that emits or has the potential to emit 100 tons per year or more of the PAL pollutant in an attainment area; or

(b) any emissions unit that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant as defined by the act for nonattainment areas. For example, in accordance with the definition of major stationary source in Section 182(c) of the act, an emissions unit would be a major emissions unit for VOC if the emissions unit is located in a serious ozone nonattainment area and it emits or has the potential to emit 50 or more tons of VOC per year.

(c) For a GHG PAL issued on a CO_2 e basis, any emissions unit that emits or has the potential to emit equal to or greater than the amount of GHGs on a CO_2 e basis that would be sufficient for a new source to trigger permitting requirements under Subsection CCC of 20.11.61.7 NMAC at the time the PAL permit is being issued.

(5) **Plantwide applicability limitation (PAL)** means an emission limitation expressed on a mass basis in tons-per-year, or expressed in tpy CO_2 e for a CO_2 e-based GHG emission limitation, for a pollutant at a major stationary source or GHG-only source, that is enforceable as a practical matter and established source-wide in accordance with 20.11.61.20 NMAC.

(6) **PAL effective date** generally means the date of issuance of the PAL permit. However, the PAL effective date for an increased PAL is the date any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(7) **PAL effective period** means the period beginning with the PAL effective date and ending 10 years later.

(8) **PAL major modification** means, notwithstanding the definitions for *major modification, net emissions increase* and *subject to regulation* at Subsections II, PP and CCC of 20.11.61.7 NMAC respectively, any physical change in or change in the method of operation of the PAL source that causes it to emit the PAL pollutant at a level equal to or greater than the PAL.

(9) **PAL permit** means the major NSR permit, the minor NSR permit, or the state operating permit under a program that is approved into the SIP, or the title V permit issued by the department that establishes a PAL for a major stationary source or a GHG-only source.

(10) **PAL pollutant** means the pollutant for which a PAL is established at a major stationary source or a GHG-only source. For a GHG-only source, the only available PAL pollutant is GHGs.

(11) **Significant emissions unit** means an emissions unit that emits or has the potential to emit a PAL pollutant in an amount that is equal to or greater than the *significant level* (as defined in Subsection ZZ of 20.11.61.7 NMAC or in the act, whichever is lower) for that PAL pollutant, but less than the amount that would qualify the unit as a *major emissions unit* as defined in Paragraph (4) of Subsection B of 20.11.61.20 NMAC. For a GHG PAL issued on a CO_2 e basis, *significant emissions unit* means any emissions unit that emits or has the potential to emit GHGs on a CO_2 e basis in amounts equal to or greater than the amount that would qualify the unit as *small emissions unit* as defined in Paragraph (3) of Subsection B of 20.11.61.20 NMAC, but less than the amount that would qualify the unit as a *major emissions unit* as defined in Subparagraph (c) of Paragraph (4) of Subsection B of 20.11.61.20 NMAC.

(12) **GHG-only source** means any existing stationary source that emits or has the potential to emit GHGs in the amount equal to or greater than the amount of GHGs on a mass basis that would be sufficient for a new source to trigger permitting requirements for GHGs under Subsection KK of 20.11.61.7 NMAC and the amount of GHGs on a CO_2 e basis that would be sufficient for a new source to trigger permitting requirements for GHGs under Subsection CCC of 20.11.61.7 NMAC at the time the PAL permit is being issued, but does not emit or have the potential to emit any other non-GHG regulated NSR pollutant at or above the applicable major source threshold. A GHG-only source may only obtain a PAL for GHG emissions under 20.11.61.20 NMAC.

(13) **Baseline actual emissions *for a GHG PAL*** means the average rate, in tpy CO_2 e or tpy GHG, as applicable, at which the emissions unit actually emitted GHGs during any consecutive 24-month period selected by the owner or operator within the 10-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received by the administrator for a permit required under 40 CFR 52.21 or by the department for a permit required by a plan, whichever is earlier. For any existing electric utility steam generating unit, *baseline actual emissions for a GHG PAL* means the average rate, in tpy CO_2 e or tpy GHG, as applicable, at which the emissions unit actually emitted the GHGs during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding either the date the owner or operator begins actual construction of the project, except that the administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(a) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(b) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(c) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the stationary source must currently comply, had such stationary source been required to comply with such limitations during the consecutive 24-month period.

(d) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual GHG emissions and for adjusting this amount if required by Subparagraphs (b) and (c) of Paragraph (13) of Subsection B of 20.11.61.20 NMAC.

(14) **Emissions unit *with respect to GHGs*** means any part of a stationary source that emits or has the potential to emit GHGs. For purposes of 40 CFR 52.21, there are two types of emissions units as described in the following:

(a) a new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated;

(b) an existing emissions unit is any emissions unit that does not meet the requirements in Subparagraph (a) of Paragraph (14) of Subsection B of 20.11.61.20 NMAC.

(15) **Minor source** means any stationary source that does not meet the definition of *major stationary source* in Subsection KK of 20.11.61.7 NMAC for any pollutant at the time the PAL is issued.

C. Permit application requirements. As part of a permit application requesting a PAL, the owner or operator of a major stationary source or a GHG-only source shall submit the following information to the department for approval.

(1) A list of all emissions units at the source designated as small, significant or major based on their potential to emit. In addition, the owner or operator of the source shall indicate which, if any, federal or state applicable requirements, emission limitations, or work practices apply to each unit.

(2) Calculations of the baseline actual emissions (with supporting documentation). Baseline actual emissions are to include emissions associated not only with operation of the unit, but also emissions associated with startup, shutdown, and malfunction.

(3) The calculation procedures that the major stationary source owner or operator proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by Subsection M of 20.11.61.20 NMAC.

(4) As part of a permit application requesting a GHG PAL, the owner or operator of a major stationary source or a GHG-only source shall submit a statement by the source owner or operator that clarifies whether the source is an existing *major source* as defined in Subparagraphs (a) and (b) of Paragraph (1) of Subsection KK of 20.11.61.7 NMAC or a *GHG-only source* as defined in Paragraph (12) of Subsection B of 20.11.61.20 NMAC.

D. General requirements for establishing PALs.

(1) The department may establish a PAL at a major stationary source or a GHG-only source, provided that at a minimum, the following requirements are met.

(a) The PAL shall impose an annual emission limitation expressed on a mass basis in tons per year, or expressed in tpy CO_2 e, that is enforceable as a practical matter, for the entire major stationary source or GHG-only source. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source or GHG-only source owner or operator shall show that the sum of the monthly emissions from each emissions unit under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month

average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source or GHG-only source owner or operator shall show that the sum of the preceding monthly emissions from the PAL effective date for each emissions unit under the PAL is less than the PAL.

(b) The PAL shall be established in a PAL permit that meets the public participation requirements in Subsection E of 20.11.61.20 NMAC.

(c) The PAL permit shall contain all the requirements of Subsection G of 20.11.61.20 NMAC.

(d) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source or GHG-only source.

(e) Each PAL shall regulate emissions of only one pollutant.

(f) Each PAL shall have a PAL effective period of 10 years.

(g) The owner or operator of the major stationary source or GHG-only source with a PAL shall comply with the monitoring, recordkeeping, and reporting requirements provided in Subsections L through N of 20.11.61.20 NMAC for each emissions unit under the PAL through the PAL effective period.

(2) At no time during or after the PAL effective period are emissions reductions of a PAL pollutant that occur during the PAL effective period creditable as decreases for purposes of offsets under 40 CFR 51.165(a)(3)(ii) unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

E. Public participation requirements for PALs. PALs for existing major stationary sources or GHG-only sources shall be established, renewed, or increased, through a procedure that is consistent with 40 CFR 51.160 and 161. This includes the requirement that the department provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The department must address all material comments before taking final action on the permit.

F. Setting the 10-year actuals PAL level.

(1) Except as provided in Paragraph (2) of Subsection F of 20.11.61.20 NMAC, the actuals PAL level for a major stationary source or a GHG-only source shall be established as the sum of the *baseline actual emissions* (as defined in Subsection I of 20.11.61.7 NMAC or, for GHGs Paragraph (13) of Subsection B of 20.11.61.20 NMAC) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under Subsection ZZ of 20.11.61.7 NMAC or under the act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shutdown after this 24-month period must be subtracted from the PAL level. The department shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to become effective on the future compliance date(s) of any applicable federal or state regulatory requirement(s) that the department is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm NO_X to a new rule limit of 30 ppm, then the permit shall contain a future effective PAL level that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(2) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of adding the baseline actual emissions as specified in Paragraph (1) of Subsection F of 20.11.61.20 NMAC, the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.

(3) For CO_2 e based GHG PAL, the actuals PAL level shall be established as the sum of the GHGs *baseline actual emissions* (as defined in Paragraph (13) of Subsection B of 20.11.61.20 NMAC) of GHGs for each emissions unit at the source, plus an amount equal to the amount defined as "significant" on a CO_2 e basis for the purposes of Paragraph (3) of Subsection CCC of 20.11.61.7 NMAC at the time the PAL permit is being issued. When establishing the actuals PAL level for a CO_2 e-based PAL, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level. The department shall specify a reduced PAL level (in tpy CO_2 e) in the PAL permit to become effective on the future compliance date(s) of any applicable federal or state regulatory requirement(s) that the department is aware of prior to issuance of the PAL permit.

G. Contents of the PAL permit. The PAL permit shall contain, at a minimum, the following information.

(1) The PAL pollutant and the applicable source-wide emission limitation in tons per year or tpy CO_2 e.

(2) The PAL permit effective date and the expiration date of the PAL (PAL effective period).

(3) Specification in the PAL permit that if a major stationary source or a GHG-only source owner or operator applies to renew a PAL in accordance with Subsection J of 20.11.61.20 NMAC before the end of the PAL effective period, then the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a revised PAL permit is issued by the department.

(4) A requirement that emission calculations for compliance purposes include emissions from startups, shutdowns and malfunctions.

(5) A requirement that, once the PAL expires, the major stationary source or GHG-only source is subject to the requirements of Subsection I of 20.11.61.20 NMAC.

(6) The calculation procedures that the major stationary source or GHG-only source owner or operator shall use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by Paragraph (1) of Subsection M of 20.11.61.20 NMAC.

(7) A requirement that the major stationary source or GHG-only source owner or operator monitor all emissions units in accordance with the provisions under Subsection L of 20.11.61.20 NMAC.

(8) A requirement to retain the records required under Subsection M of 20.11.61.20 NMAC on site. Such records may be retained in an electronic format.

(9) A requirement to submit the reports required under Subsection N of 20.11.61.20 NMAC by the required deadlines.

(10) Any other requirements that the department deems necessary to implement and enforce the PAL.

(11) A permit for a GHG PAL issued to a GHG-only source shall also include a statement denoting that GHG emissions at the source will not be subject to regulation under Subsection CCC of 20.11.61.7 NMAC as long as the source complies with the PAL.

H. PAL effective period and reopening of the PAL permit.

(1) **PAL effective period.** The PAL effective period shall be 10 years.

(2) **Reopening of the PAL permit.**

(a) During the PAL effective period, the department shall reopen the PAL permit to:

(i) correct typographical/calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL;

(ii) reduce the PAL if the owner or operator of the major stationary source creates creditable emissions reductions for use as offsets under 40 CFR 51.165(a)(3)(ii); and

(iii) revise the PAL to reflect an increase in the PAL as provided under Subsection K of 20.11.61.20 NMAC.

(b) The department may reopen the PAL permit for the following:

(i) to reduce the PAL to reflect newly applicable federal requirements (for example, NSPS) with compliance dates after the PAL effective date;

(ii) to reduce the PAL consistent with any other requirement, that is enforceable as a practical matter, and that the department may impose on the major stationary source or GHG-only source under the plan; and

(iii) to reduce the PAL if the department determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or to an adverse impact on an air quality related values (AQRV) that has been identified for a federal class I area by a federal land manager and for which information is available to the general public.

(c) Except for the permit reopening in Item (i) of Subparagraph (a) of Paragraph (2) of Subsection H of 20.11.61.20 NMAC for the correction of typographical/calculation errors that do not increase the PAL level, all reopenings shall be carried out in accordance with the public participation requirements of Subsection E of 20.11.61.20 NMAC.

I. Expiration of a PAL. Any PAL that is not renewed in accordance with the procedures in Subsection J of 20.11.61.20 NMAC shall expire at the end of the PAL effective period, and the requirements in Subsection I of 20.11.61.20 NMAC shall apply.

(1) Each emissions unit, or each group of emissions units, that existed under the PAL shall comply with an allowable emission limitation under a revised permit established according to the procedures in Paragraph (1) of Subsection I of 20.11.61.20 NMAC.

(a) Within the time frame specified for PAL renewals in Paragraph (2) of Subsection J of 20.11.61.20 NMAC, the major stationary source or GHG-only source shall submit a proposed allowable emission limitation for each emissions unit, (or each group of emissions units, if such a distribution is more appropriate as decided by the department), by distributing the PAL allowable emissions for the major stationary source or GHG-

only source among each of the emissions units that existed under the PAL. If the PAL had not yet been adjusted for an applicable requirement that became effective during the PAL effective period, as required under Paragraph (5) of Subsection J of 20.11.61.20 NMAC, such distribution shall be made as if the PAL had been adjusted.

(b) The department shall decide whether and how the PAL allowable emissions will be distributed and issue a revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as the department determines is appropriate.

(2) Each emissions unit(s) shall comply with the allowable emission limitation on a 12-month rolling basis. The department may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS or CPMS to demonstrate compliance with the allowable emission limitation.

(3) Until the department issues the revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as required under Subparagraph (b) of Paragraph (1) of Subsection I of 20.11.61.20 NMAC, the source shall continue to comply with a source-wide, multi-unit emissions cap equivalent to the level of the PAL emission limitation.

(4) Any physical change or change in the method of operation at the major stationary source or GHG-only source will be subject to major NSR requirements if such change meets the definition of major modification in Subsection II of 20.11.61.7 NMAC.

(5) The major stationary source owner or operator shall continue to comply with any state or federal applicable requirements (BACT, RACT, NSPS, etc.) that may have applied either during the PAL effective period or prior to the PAL effective period except for those emission limitations that had been established pursuant to Subsection D of 20.11.61.12 NMAC, but were eliminated by the PAL in accordance with the provisions in Subparagraph (c) of Paragraph (2) of Subsection A of 20.11.61.20 NMAC.

J. Renewal of a PAL.

(1) The department shall follow the procedures specified in Subsection E of 20.11.61.20 NMAC in approving any request to renew a PAL for a major stationary source or a GHG-only source, and shall provide both the proposed PAL level and a written rationale for the proposed PAL level to the public for review and comment. During such public review, any person may propose a PAL level for the source for consideration by the department.

(2) **Application deadline.** A major stationary source or GHG-only source owner or operator shall submit a timely application to the department to request renewal of a PAL. A timely application is one that is submitted at least six months prior to, but not earlier than 18 months from, the date of permit expiration. This deadline for application submittal is to ensure that the permit will not expire before the permit is renewed. If the owner or operator of a major stationary source or GHG-only source submits a complete application to renew the PAL within this time period, then the PAL shall continue to be effective until the revised permit with the renewed PAL is issued.

(3) **Application requirements.** The application to renew a PAL permit shall contain the following information.

(a) The information required in Subsection C of 20.11.61.20 NMAC.

(b) A proposed PAL level.

(c) The sum of the potential to emit of all emissions units under the PAL, with supporting documentation.

(d) Any other information the owner or operator wishes the department to consider in determining the appropriate level for renewing the PAL.

(4) **PAL adjustment.** In determining whether and how to adjust the PAL, the department shall consider the options outlined in Subparagraphs (a) and (b) of Paragraph (4) Subsection J of 20.11.61.20 NMAC. However, in no case may any such adjustment fail to comply with Subparagraph (c) of Paragraph 4 of Subsection J of 20.11.61.20 NMAC.

(a) If the emissions level calculated in accordance with Subsection F of 20.11.61.20 NMAC is equal to or greater than 80 percent of the PAL level, the department may renew the PAL at the same level without considering the factors set forth in Subparagraph (b) of Paragraph (4) of Subsection J of 20.11.61.20 NMAC; or

(b) the department may set the PAL at a level that it determines to be more representative of the source's baseline actual emissions, or that it determines to be appropriate considering air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the source's voluntary emissions reductions, or other factors as specifically identified by the department in its written rationale.

(c) Notwithstanding Subparagraphs (a) and (b) of Paragraph (4) of Subsection J of 20.11.61.20 NMAC:

(i) if the potential to emit of the major stationary source or GHG-only source is less than the PAL, the department shall adjust the PAL to a level no greater than the potential to emit of the source; and

(ii) the department shall not approve a renewed PAL level higher than the current PAL, unless the major stationary source or GHG-only source has complied with the provisions of Subsection K of 20.11.61.20 NMAC, *Increasing a PAL during the PAL effective period.*

(5) If the compliance date for a state or federal requirement that applies to the PAL source occurs during the PAL effective period, and if the department has not already adjusted for such requirement, the PAL shall be adjusted at the time of PAL permit renewal or Title V permit renewal, whichever occurs first.

K. Increasing a PAL during the PAL effective period.

(1) The department may increase a PAL emission limitation only if the major stationary source or GHG-only source complies with the following provisions.

(a) The owner or operator of the major stationary source or GHG-only source shall submit a complete application to request an increase in the PAL limit for a PAL major modification. Such application shall identify the emissions unit(s) contributing to the increase in emissions so as to cause the major stationary or GHG-only source's emissions to equal or exceed its PAL.

(b) As part of this application, the major stationary source or GHG-only source owner or operator shall demonstrate that the sum of the baseline actual emissions of the small emissions units, plus the sum of the baseline actual emissions of the significant and major emissions units assuming application of BACT equivalent controls, plus the sum of the allowable emissions of the new or modified emissions unit(s), exceeds the PAL. The level of control that would result from BACT equivalent controls on each significant or major emissions unit shall be determined by conducting a new BACT analysis at the time the application is submitted, unless the emissions unit is currently required to comply with a BACT or LAER requirement that was established within the preceding 10 years. In such a case, the assumed control level for that emissions unit shall be equal to the level of BACT or LAER with which that emissions unit must currently comply.

(c) The owner or operator obtains a major NSR permit for all emissions unit(s) identified in Subparagraph (a) of Paragraph (1) of Subsection B of 20.11.61.20 NMAC, regardless of the magnitude of the emissions increase resulting from them, that is, no significant levels apply. These emissions unit(s) shall comply with any emissions requirements resulting from the major NSR process, for example, BACT, even though they have also become subject to the PAL or continue to be subject to the PAL.

(d) The PAL permit shall require that the increased PAL level shall be effective on the day any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(2) The department shall calculate the new PAL as the sum of the allowable emissions for each modified or new emissions unit, plus the sum of the baseline actual emissions of the significant and major emissions units (assuming application of BACT equivalent controls as determined in accordance with Subparagraph (b) of Paragraph (1) of Subsection K of 20.11.61.20 NMAC), plus the sum of the baseline actual emissions of the small emissions units.

(3) The PAL permit shall be revised to reflect the increased PAL level pursuant to the public notice requirements of Subsection E of 20.11.61.20 NMAC.

L. Monitoring requirements for PALs.

(1) **General requirements.**

(a) Each PAL permit must contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time *or CO_2 e per unit of time.* Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. Additionally, the information generated by such system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.

(b) The PAL monitoring system must employ one or more of the four general monitoring approaches meeting the minimum requirements set forth in Paragraph (2) of Subsection L of 20.11.61.20 NMAC and must be approved by the department.

(c) Notwithstanding Subparagraph (b) of Paragraph (1) of Subsection L of 20.11.61.20 NMAC, you may also employ an alternative monitoring approach that meets Subparagraph (a) of Paragraph (1) of Subsection L of 20.11.61.20 NMAC if approved by the department.

(d) Failure to use a monitoring system that meets the requirements of 20.11.61.20 NMAC renders the PAL invalid.

(2) **Minimum performance requirements for approved monitoring approaches.** The following are acceptable general monitoring approaches when conducted in accordance with the minimum requirements in Paragraphs (3) through (9) of Subsection L of 20.11.61.20 NMAC:

(a) mass balance calculations for activities using coatings or solvents;

(b) CEMS;
(c) CPMS or PEMS; and
(d) emission factors.

(3) **Mass balance calculations.** An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(a) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in or created by all materials used in or at the emissions unit;

(b) assume that the emissions unit emits all of the PAL pollutant that is contained in or created by any raw material or fuel used in or at the emissions unit, if it cannot otherwise be accounted for in the process; and

(c) where the vendor of a material or fuel, which is used in or at the emissions unit, publishes a range of pollutant content from such material, the owner or operator must use the highest value of the range to calculate the PAL pollutant emissions unless the department determines there is site-specific data or a site-specific monitoring program to support another content within the range.

(4) **CEMS.** An owner or operator using CEMS to monitor PAL pollutant emissions shall meet the following requirements:

(a) CEMS must comply with applicable performance specifications found in 40 CFR part 60, Appendix B; and

(b) CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(5) **CPMS or PEMS.** An owner or operator using CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements:

(a) the CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the emissions unit; and

(b) each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes, or at another less frequent interval approved by the department, while the emissions unit is operating.

(6) **Emission factors.** An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements:

(a) all emission factors shall be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(b) the emissions unit shall operate within the designated range of use for the emission factor, if applicable; and

(c) if technically practicable, the owner or operator of a significant emissions unit that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of PAL permit issuance, unless the department determines that testing is not required.

(7) A source owner or operator must record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for an emissions unit during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit.

(8) Notwithstanding the requirements in Paragraphs (3) through (7) of Subsection L of 20.11.61.20 NMAC, where an owner or operator of an emissions unit cannot demonstrate a correlation between the monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the emissions unit, the department shall, at the time of permit issuance:

(a) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(b) determine that operation of the emissions unit during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

(9) **Revalidation.** All data used to establish the PAL pollutant must be revalidated through performance testing or other scientifically valid means approved by the department. Such testing must occur at least once every five years after issuance of the PAL.

M. Recordkeeping requirements.

(1) The PAL permit shall require an owner or operator to retain a copy of all records necessary to determine compliance with any requirement of 20.11.61.20 NMAC and of the PAL, including a determination of each emissions unit's 12-month rolling total emissions, for five years from the date of such record.

(2) The PAL permit shall require an owner or operator to retain a copy of the following records, for the duration of the PAL effective period plus five years:

(a) a copy of the PAL permit application and any applications for revisions to the PAL; and

(b) each annual certification of compliance pursuant to 20.11.42 NMAC, *Operating Permits*, and the data relied on in certifying the compliance.

N. Reporting and notification requirements. The owner or operator shall submit semi-annual monitoring reports and prompt deviation reports to the department in accordance with 20.11.42 NMAC, *Operating Permits*. The reports shall meet the following requirements.

(1) **Semi-annual report.** The semi-annual report shall be submitted to the department within 30 days of the end of each reporting period. This report shall contain the following information.

(a) The identification of owner and operator and the permit number.

(b) Total annual emissions (expressed on a mass-basis in tons/year, or expressed in tpy CO_2 e) based on a 12-month rolling total for each month in the reporting period recorded pursuant to Paragraph (1) of Subsection M of 20.11.61.20 NMAC.

(c) All data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions.

(d) A list of any emissions units modified or added to the major stationary source or GHG-only source during the preceding six-month period.

(e) The number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken.

(f) A notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit, as provided by Paragraph (7) of Subsection L of 20.11.61.20 NMAC.

(g) A signed statement by the responsible official as defined by 20.11.42.7 NMAC certifying the truth, accuracy, and completeness of the information provided in the report.

(2) **Deviation report.** The major stationary source or GHG-only source owner or operator shall promptly submit reports of any deviations or exceedance of the PAL requirements, including periods where no monitoring is available. A report submitted pursuant to 40 CFR 70.6(a)(3)(iii)(B) shall satisfy this reporting requirement. The deviation reports shall be submitted within the time limits prescribed by the applicable program implementing 40 CFR 70.6(a)(3)(iii)(B). The reports shall contain the following information:

(a) the identification of owner and operator and the permit number;

(b) the PAL requirement that experienced the deviation or that was exceeded;

(c) emissions resulting from the deviation or the exceedance; and

(d) a signed statement by the responsible official as defined by 20.11.42.7 NMAC certifying the truth, accuracy, and completeness of the information provided in the report.

(3) **Revalidation results.** The owner or operator shall submit to the department the results of any revalidation test or method within three months after completion of such test or method.

O. Transition requirements.

(1) The department may not issue a PAL that does not comply with the requirements of Subsections A through O of 20.11.61.20 NMAC after March 3, 2003.

(2) The department may supersede any PAL which was established prior to March 3, 2003 with a PAL that complies with the requirements of Subsections A through O of 20.11.61.20 NMAC.

[20.11.61.20 NMAC - N, 1/23/06; A, 8/30/10; A, 1/10/11; A, 5/13/13]

20.11.61.21 PUBLIC PARTICIPATION AND NOTIFICATION:

A. The department shall, within 30 days after receipt of an application, review such application and determine whether it is administratively complete or there is any deficiency in the application or information submitted. To be deemed administratively complete, the application must meet the requirements of 20.11.61.13 NMAC in addition to the requirements of 20.11.41 NMAC. If the application is deemed:

(1) administratively complete, a letter to that effect shall be sent by certified mail to the applicant;

(2) administratively incomplete, a letter shall be sent by certified mail to the applicant stating what additional information or points of clarification are necessary to deem the application administratively complete; upon receipt of the additional information or clarification, the department shall promptly review such information and determine whether the application is administratively complete;

(3) administratively complete but no permit is required, a letter shall be sent by certified mail to the applicant informing the applicant of the determination.

B. For purposes of determining minor source baseline date pursuant to 40 CFR 51:

(1) an application is complete when it contains all the information necessary for processing the application; designating an application complete for purposes of 40 CFR 51 does not preclude the department from requesting or accepting any additional information; and

(2) in the event that additional information is submitted to remedy any deficiency in the application or information submitted, the date of receipt of the application shall be the date on which the department received all required information.

C. Within one year after receipt of a complete application, the department shall:

(1) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(2) Make available at the department district and local office nearest to the proposed source a copy of all materials the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(3) Notify the public by advertisement in a newspaper of general circulation in the area in which the proposed source would be constructed:

(a) of the application;

(b) the preliminary determination;

(c) the degree of increment consumption that is expected from the source or modification; and

(d) of the opportunity for comment at a public hearing as well as written public comment; the public comment period shall be for 30 days from the date of such advertisement.

(4) Send a copy of the notice of public comment to:

(a) the applicant;

(b) the administrator; and

(c) officials and agencies having jurisdiction over the location where the proposed construction would occur as follows: any other state or local air pollution control agencies; the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency; and any state, federal land manager, or Indian governing body whose lands may be affected by emissions from the source or modification.

(5) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations.

(6) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. The department shall make all comments available for public inspection in the same locations where the department made available preconstruction information relating to the proposed source or modification.

(7) Within 180 days after an application is deemed administratively complete, unless the director grants an extension not to exceed 90 days for good cause:

(a) make a final determination of whether construction should be approved, approved with conditions, or disapproved; and

(b) notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the department made available preconstruction information and public comments relating to the source.

[20.11.61.21 NMAC - N, 1/23/06; A, 8/30/10]

20.11.61.22 STACK HEIGHT CREDIT: The department shall review all applications in accordance with the provisions of 20.11.43 NMAC, *Stack Heights Requirements*.

[20.11.61.22 NMAC - Rp, 20.11.61.19 NMAC, 1/23/06]

20.11.61.23 EXCLUSIONS FROM INCREMENT CONSUMPTION:

A. Following a public hearing, the director may exclude the following concentrations in determining compliance with a maximum allowable increase:

(1) concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under Section 2 (a)

and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), over the emissions from such sources before the effective date of such an order;

(2) concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act, over the emissions from such sources before the effective date of such plan;

(3) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(4) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(5) concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources which are affected by plan revisions approved by the administrator as meeting the criteria specified in Subsection D of 20.11.61.23 NMAC.

B. If the plan provides that the concentrations to which Paragraph (1) or (2) of Subsection A of 20.11.61.23 NMAC refers, shall be excluded, it shall also provide that no exclusion of such concentrations shall apply more than five years after the effective date of the order to which Paragraph (1) of Subsection A of 20.11.61.23 NMAC refers, or the plan to which Paragraph (2) of Subsection A of 20.11.61.23 NMAC refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

C. [Reserved]

D. For purposes of excluding concentrations pursuant to Paragraph (5) of Subsection A of 20.11.61.23 NMAC, the administrator may approve a plan revision that:

(1) specifies the time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur such time is not to exceed 2 years in duration unless a longer time is approved by the administrator;

(2) specifies that the time period for excluding certain contributions in accordance with Paragraph (1) of Subsection D of 20.11.61.23 NMAC, is not renewable;

(3) allows no emissions increase from a stationary source which would:

(a) impact a class I area or an area where an applicable increment is known to be violated; or

(b) cause or contribute to the violation of a NAAQS;

(4) requires limitations to be in effect the end of the time period specified in accordance with Paragraph (1) of Subsection D of 20.11.61.23 NMAC, which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

[20.11.61.23 NMAC - Rp, 20.11.61.21 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.24 SOURCES IMPACTING FEDERAL CLASS I AREAS - ADDITIONAL REQUIREMENTS:

A. Notice to EPA. The department shall transmit to the administrator and the federal land manager a copy of each permit application relating to a major stationary source or major modification proposing to locate within 100 kilometers of any federal class I area. The complete permit application shall be transmitted within 30 days of receipt and 60 days prior to any public hearing on the application. The department shall include all relevant information in the permit application. Relevant information shall include an analysis of the proposed source's anticipated impacts on visibility in the federal class I area. The department shall consult with all affected federal land managers as to the completeness of the permit application and shall consider any analysis performed by the federal land manager concerning the impact of the proposed major stationary source or major modification on AQRV. This consideration shall include visibility, if such analysis is received within 30 days after the federal land manager receives a copy of the complete application. Additionally, the department shall notify any affected federal land manager within 30 days from the date the department receives a request for a pre-application meeting from a proposed source subject to 20.11.61 NMAC. Notice shall be provided to the administrator and federal land manager of every action related to the consideration of such permit. The department shall also provide the federal land manager and the administrator with a copy of the preliminary determination required under 20.11.61.21 NMAC and shall make available to them any materials used in making that determination. In any case where the department disagrees with the federal land manager's analysis of source impact on AQRV, the department shall, either explain its decision or give notice to the federal land manager as to where the explanation can be obtained. In the case where the department disagrees with the federal land manager's analysis, the department will also explain its

decision or give notice to the public by advertisement in a newspaper of general circulation in the area in which the proposed source would be constructed, as to where the decision can be obtained.

B. The department shall transmit to air quality control agencies of neighboring states and Indian governing bodies a copy of each permit application having the potential to affect federal class I areas or increment consumption in areas under their jurisdiction. The department shall also provide the affected air quality control agencies and Indian governing bodies with a copy of the preliminary determination required under 20.11.61.21 NMAC and shall make available to them any materials used in making that determination. The department shall include a provision for a 60 day comment period for the federal land managers before any public hearing on a permit application is held.

C. Denial - impact on AQRV: The federal land manager of any such lands may demonstrate to the department that the emissions from a proposed source or modification would have an adverse impact on the AQRV (including visibility), of those lands, notwithstanding that the change in air quality resulting from emissions from such proposed source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a federal class I area. If the department concurs with such demonstration, then the source shall not be issued a permit.

D. Class I waivers: The owner or operator of a proposed source or modification may demonstrate to the federal land manager that the emissions from such proposed source or modification would have no adverse impact on the AQRV of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a federal class I area. If the federal land manager concurs with such demonstration and so certifies to the department, the department may: *provided*, that the applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, $PM_{2.5}$, PM_{10} and oxides of nitrogen would not exceed the maximum allowable increases over minor source baseline concentrations for such pollutants, as shown in Table 5 of 20.11.61.30 NMAC.

E. For the case where the federal land manager does not perform an impact analysis with respect to visibility impairment in a federal class I area, the department may perform such an analysis. The department shall not issue the source a permit if the department determines that an adverse impact on visibility would occur. The adverse impact must be due, primarily, to the operation of the proposed source or modification.

F. Sulfur dioxide waiver by governor with FLM concurrence: The owner or operator of a proposed major stationary source or major modification, which cannot be approved under Subsection D of 20.11.61.24 NMAC, may demonstrate to the governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for a period of 24 hours or less applicable to any class I area and, in the case of federal mandatory class I areas, that a waiver from this requirement would not adversely affect the AQRV of the area (including visibility). The governor, after consideration of the federal land manager's recommendation (if any) and subject to his concurrence, may, after notice and public hearing, grant a waiver from such maximum allowable increase. If the waiver is granted, the department shall issue a permit to the owner or operator of the source or modification. Any owner or operator of a source or modification who obtains a permit under 20.11.61 NMAC shall comply with sulfur dioxide emissions limitations. These limitations do not allow increases of ambient concentrations, above the baseline concentration, to exceed the levels found in Table 6 of 20.11.61.31 NMAC for periods of 24 hours or less for more than 18 days, not necessarily consecutive, in any annual period.

G. Sulfur dioxide waiver by governor with the president's concurrence. In any case where the governor recommends a waiver in which the federal land manager does not concur, the recommendations of the governor and the federal land manager shall be transmitted to the president through the office of the governor. The president may approve the governor's recommendation if he finds that the waiver is in the national interest. If the waiver is approved, the department shall issue the permit. Any source or modification that obtains a permit under 20.11.61 NMAC shall comply with sulfur dioxide emissions limitations. These limitations do not allow increases in ambient concentrations, above the baseline concentration, to exceed the levels found in Table 6 of 20.11.61.31 NMAC for periods of 24 hours or less for more than 18 days, not necessarily consecutive, in any annual period.

[20.11.61.24 NMAC - Rp, 20.11.61.22 NMAC, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.25 RESTRICTIONS ON AREA CLASSIFICATIONS:

A. Mandatory federal class I areas:

(1) All of the following areas which were in existence on August 7, 1977, shall be class I areas and may not be redesignated:

(a) international parks (all of them);

(b) national wilderness areas which exceed 5,000 acres in size;
(c) national memorial parks which exceed 5,000 acres in size; and
(d) national parks which exceed 6,000 acres in size.

(2) **Specifically for New Mexico, these areas are:**
(a) Bandelier wilderness, administered by national park service (NPS);
(b) Bosque del Apache wilderness, administered by national fish and wildlife service (NFWS);
(c) Carlsbad caverns national park, administered by NPS;
(d) Gila wilderness, administered by national forest service (NFS);
(e) Pecos wilderness, administered by NFS;
(f) Salt Creek wilderness, administered by NFWS;
(g) San Pedro Parks wilderness, administered by NFS;
(h) Wheeler Peak wilderness, administered by NFS; and
(i) White Mountain wilderness, administered by NFS.

B. Areas which may be redesignated only as class I or class II:

(1) **The following areas may be redesignated only as class I or II:**
(a) an area which, as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, national primitive area, national preserve, national recreational area, national wild and scenic river, national wildlife refuge; and
(b) a national park or national wilderness area established after August 7, 1977 which exceeds 10,000 acres in size.

(2) **Specifically for New Mexico, these areas include (but are not necessarily limited to):**
(a) Apache Kid wilderness, administered by national forest service (NFS);
(b) Bandelier national monument, administered by national park service (NPS);
(c) Bitter Lake national wildlife refuge, administered by national fish and wildlife service (NFWS);
(d) Blue Range wilderness, administered by NFS;
(e) Bosque del Apache national wildlife refuge, administered by NFWS;
(f) Capitan mountains wilderness, administered by NFS;
(g) Cebolla wilderness, administered by bureau of land management (BLM);
(h) Chama River Canyon wilderness, administered by NFS;
(i) Cruces Basin wilderness, administered by NFS;
(j) De-na-zin wilderness, administered by BLM;
(k) El Malpais national monument, administered by NPS;
(l) Latir Peak wilderness, administered by NFS;
(m) Manzano mountain wilderness, administered by NFS;
(n) San Andres national wildlife refuge, administered by NFWS;
(o) Sandia Mountain wilderness, administered by NFS;
(p) Sevilleta national wildlife refuge, administered by NFWS;
(q) West Malpais wilderness, administered by BLM;
(r) White Sands national monument, administered by NPS; and
(s) Withington Wilderness, administered by NFS.

[20.11.61.25 NMAC - Rp, 20.11.61.20 NMAC, 1/23/06; A, 8/30/10]

20.11.61.26 TABLE 1 - PSD SOURCE CATEGORIES:

A. Carbon black plants (furnace process).
B. Charcoal production plants.
C. Chemical process plants (the term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS Codes 325193 or 312140).
D. Coal cleaning plants (with thermal dryers).
E. Coke oven batteries.
F. Fossil fuel boilers (or combinations thereof) totaling more than 250 million BTU/hr heat input.
G. Fossil fuel-fired steam electric plants of more than 250 million BTU/hr heat input.
H. Fuel conversion plants.
I. Glass fiber processing plants.
J. Hydrofluoric acid plants.
K. Iron and steel mills.

L. Kraft pulp mills.
M. Lime plants.
N. Municipal incinerators capable of charging more than 250 tons of refuse per day.
O. Nitric acid plants.
P. Petroleum refineries.
Q. Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels.
R. Phosphate rock processing plants.
S. Portland cement plants.
T. Primary aluminum ore reduction plants.
U. Primary copper smelters.
V. Primary lead smelters.
W. Primary zinc smelters.
X. Secondary metal production plants.
Y. Sintering plants.
Z. Sulfur recovery plants.
AA. Sulfuric acid plants.
BB. Taconite ore processing plants.

[20.11.61.26 NMAC - Rp, 20.11.61.23 NMAC, 1/23/06; A, 8/30/10]

20.11.61.27 TABLE 2 - SIGNIFICANT EMISSION RATES:

POLLUTANT		EMISSION RATE (TONS/YR)
Carbon monoxide		100
Fluorides		3
Lead		0.6
Municipal waste combustor:		
	Acid gases (measured as sulfur dioxide and hydrogen chloride)	40 (36 megagrams/year)
	Metals (measured as particulate matter)	15 (14 megagrams/year)
	Organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans)	0.0000035 (0.0000032 megagrams/yr)
Municipal solid waste landfill emissions (measured as NMOC)		50 (45 megagrams/year)
Nitrogen oxides		40
Ozone		40 VOC or NOx
Particulate Matter:		
	Particulate matter emissions	25
	PM_{10} emissions	15
	$PM_{2.5}$ emissions	10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under Subsection WW of 20.11.61.7 NMAC
Sulfur compounds		
	Hydrogen sulfide (H_2S)	10
	Reduced sulfur compounds (incl. H_2S)	10
	Sulfur dioxide	40
	Sulfuric acid mist	7
	Total reduced sulfur (incl. H_2S)	10
Any other regulated NSR pollutant that is not listed in this table		Any emission rate

Each regulated pollutant	Emission rate or net emissions increase associated with a major stationary source or major modification that causes an air quality impact of one microgram per cubic meter or greater (24-hr average) in any Class I Federal area located within 10 km of the source.

[20.11.61.27 NMAC - Rp, 20.11.61.24 NMAC, 1/23/06; A, 8/30/10; A, 1/10/11; A, 5/13/13]

20.11.61.28 TABLE 3 - SIGNIFICANT MONITORING CONCENTRATIONS:

POLLUTANT	AIR QUALITY CONCENTRATION micrograms per cubic meter ($\mu g/m^3$)	AVERAGING TIME
Carbon monoxide	575	8 hours
Fluorides	0.25	24 hours
Lead	0.1	3 months
Nitrogen dioxide	14	Annual
Ozone	**b**	
Particulate matter (PM_{10})	10	24 hours
Sulfur compounds		
Hydrogen sulfide (H_2S)	0.20	1 hour
Reduced sulfur compounds (incl. H_2S)	10	1 hour
Sulfur dioxide	13	24 hours
Sulfuric acid mist	**a**	
Total reduced sulfur (incl. H_2S)	10	1 hour

a - No acceptable monitoring techniques available at this time. Therefore, monitoring is not required until acceptable techniques are available.
b - No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

[20.11.61.28 NMAC - Rp, 20.11.61.25 NMAC, 1/23/06; A, 5/15/06; A, 8/30/10]

20.11.61.29 TABLE 4 - ALLOWABLE PSD INCREMENTS:

Pollutant	Maximum allowable increase micrograms per cubic meter ($\mu g/m^3$)		
	Class I	Class II	Class III
Nitrogen Dioxide			
annual arithmetic mean	2.5	25	50
Particulate Matter			
$PM_{2.5}$, annual arithmetic mean	1	4	8
$PM_{2.5}$, 24-hour maximum	2	9	18
PM_{10}, annual arithmetic mean	4	17	34
PM_{10}, 24-hour maximum	8[a]	30[a]	60[a]
Sulfur Dioxide			
annual arithmetic mean	2	20	40
24-hour maximum	5[a]	91[a]	182[a]
3-hour maximum	25[a]	512[a]	700[a]

a - Not to be exceeded more than once a year.

[20.11.61.29 NMAC - Rp, 20.11.61.26 NMAC, 1/23/06; A, 5/15/06; A, 8/30/10; A, 5/13/13]

20.11.61.30 TABLE 5 - MAXIMUM ALLOWABLE INCREASES FOR CLASS I VARIANCES:

Pollutant	Maximum allowable increase Micrograms per cubic meter ($\mu g/m^3$)
Nitrogen Dioxide	
annual arithmetic mean	25
Particulate Matter	
$PM_{2.5}$, annual arithmetic mean	4
$PM_{2.5}$, 24-hour maximum	9
PM_{10}, annual arithmetic mean	17
PM_{10}, 24-hour maximum	30
Sulfur Dioxide	
annual arithmetic mean	20
24-hour maximum	91
3-hour maximum	325

[20.11.61.30 NMAC - N, 1/23/06; A, 8/30/10; A, 5/13/13]

20.11.61.31 TABLE 6 - MAXIMUM ALLOWABLE INCREASE FOR SULFUR DIOXIDE WAIVER BY GOVERNOR:

Period of Exposure	Terrain Areas	
	Low	High
24-hr. maximum	36 $\mu g/m^3$	62 $\mu g/m^3$
3-hr. maximum	130 $\mu g/m^3$	221 $\mu g/m^3$

[20.11.61.31 NMAC - N, 1/23/06; A, 8/30/10]

HISTORY OF 20.11.61 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

Regulation No. 29, Prevention of Significant Deterioration, 1/3/85;
Regulation No. 29, Prevention of Significant Deterioration, 6/18/86;
Regulation No. 29, Prevention of Significant Deterioration, 3/16/89;
Regulation No. 29, Prevention of Significant Deterioration, 4/24/90;
Regulation No. 29, Prevention of Significant Deterioration, 2/26/93.

History of Repealed Material:

20 NMAC 11.61, Prevention of Significant Deterioration (filed 10/27/95) repealed 12/1/95.
20.11.61 NMAC, Prevention of Significant Deterioration (filed 8/30/02) repealed 1/23/06.

Other History:

Regulation No. 29, Prevention of Significant Deterioration, filed 2/26/93 renumbered, reformatted and replaced by 20 NMAC 11.61, Prevention of Significant Deterioration, filed 10/27/95.
20 NMAC 11.61, Prevention of Significant Deterioration, filed 10/27/95 replaced by 20 NMAC 11.61, Prevention of Significant Deterioration, filed 3/18/99.
20 NMAC 11.61, Prevention of Significant Deterioration, filed 3/18/99 renumbered, reformatted, amended, and replaced by 20.11.61 NMAC, Prevention of Significant Deterioration, effective 10/1/02.
20.11.61 NMAC, Prevention of Significant Deterioration (filed 8/30/02) was replaced by 20.11.61 NMAC, Prevention of Significant Deterioration, effective 1/23/06.

AQP Exhibit 1a

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

15 FEB 20 PM 2:39

IN THE MATTER OF THE PETITION TO AMEND 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT* DETERIORATION, AND SUBMIT THE ADOPTED 20.11.61 NMAC TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY FOR PROPOSED INCORPORATION INTO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2015-2

Air Quality Program,
Environmental Health Department,
City of Albuquerque, Petitioner

Petition to amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP).

1. The City of Albuquerque ("City"), by and through the Air Quality Program (AQP) of the Environmental Health Department (Department), asks the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) to adopt amendments to 20.11.61 NMAC, *Prevention Of Significant Deterioration*. The Amendments will be submitted to EPA as a revision to the SIP. This Petition includes a request for a hearing on these matters and permission to provide a court reporter and hearing officer for the hearing. The New Mexico Air Quality Control Act (Air Act), NMSA 1978, Sections 74-2-4 and 74-2-5.B(1) [1967 as amended through 2007] authorizes and requires the Air Board to adopt, amend, or replace air quality regulations and to adopt air quality plans (SIPs) under NMSA 1978, Section 74-2-5.B(2). As grounds, Petitioner states the following:

Background

2. The provisions governing state implementation of the Prevention of Signification Deterioration (PSD) permit program are contained in the CFR Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 166, *Prevention of Significant Deterioration of Air Quality*. The provisions governing direct federal implementation of PSD are found at Title 40, *Protection of Environment*, Part 52, *Approval and Promulgation of Implementation Plans*, Subpart A, *General Provisions*, Section 21, *Prevention of Significant Deterioration of Air Quality*. Albuquerque - Bernalillo County's implementation of the PSD program is governed by 20.11.61 NMAC, *Prevention of Significant Deterioration*. Under the PSD program, when a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause "significant" deterioration in air quality.

3. On April 10, 2013, the Air Board approved amendments to 20.11.61 NMAC, Sections 2, 5, 6, 7, 10, 11, 12, 14, 15, 18, 20, 23, 24, 27, 29 and 30, effective May 13, 2013. These amendments were required by several EPA rulemakings related to PSD, which revised the Code of Federal Regulations and thus required revisions to the SIP.

4. On July 26, 2013, New Mexico Environment Secretary Ryan Flynn submitted the amendments to 20.11.61 NMAC to EPA as a proposed SIP revision. EPA review of the proposed revision is underway.

Statement of Reasons

5. On February 12, 2015, EPA informed the Air Quality Program that it is unable to approve two particular portions of the proposed 2013 SIP revision. These portions are found in the currently effective (locally) version of 20.11.61 NMAC, in particular 20.11.61.7(CCC) NMAC and 20.11.61.11(B) NMAC. EPA stated that these provisions are not consistent with current federal PSD regulations and policy. On February 17, 2015, EPA informed AQP that it is unable to approve an additional portion of the proposed 2013 SIP revision, affecting 20.11.61.11(C) NMAC. This provision also is not consistent with current federal PSD regulations and policy.

A) EPA notes that the currently effective version of 20.11.61.7(CCC) NMAC includes language deferring the date at which certain pollutant sources are subject to PSD regulation of greenhouse gasses. This deferral is applied to sources that emit carbon dioxide resulting from the combustion or decomposition of certain organic material, which EPA refers to as "biogas." EPA notes that a federal court has vacated the biogas deferral regulation promulgated by EPA on July 20, 2011 (referenced in the list of Federal Register publications). The court decision was *Center for Biological Diversity v. Environmental Protection Agency*, 722 F.3d 401 (D.C. Cir. 2013). Because of this vacation of the rule, 20.11.61.7(CCC) NMAC is no longer consistent with federal regulations. Therefore, EPA has requested that this regulation be amended to remove language relating to a biogas deferral. The Air Quality Program's proposed draft of a revised 20.11.61 NMAC will carry out this amendment as requested by EPA.

B) EPA states that the currently effective versions of 20.11.61.11(B) and 20.11.61 11(C) NMAC are inconsistent with federal regulations found in 40 CFR 51.166, regarding applicability of PSD regulations to a permitted source. EPA notes that the versions of 20.11.61.11(B) and (C) in effect prior to the Air Board's amendment on April 10, 2013 were consistent with the federal regulation. Therefore, EPA has requested that these two NMAC sections be revised accordingly, reverting to the prior versions. The Air Quality Program's proposed draft of a revised 20.11.61 will carry out this amendment as requested by EPA.

6. The amendments EPA has requested must be made in order for EPA to approve two other pending SIP revisions. One is an infrastructure SIP for the 2010 National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO_2), approved by the Air Board on June 12, 2013 and submitted to EPA on July 26, 2013. This submission is now under review by EPA. The second pending SIP revision is an infrastructure SIP for the 2010 NAAQS for sulfur dioxide. AQP is petitioning the Board separately for adoption of this proposed SIP submittal and, upon Board approval, anticipates submitting it to EPA for review in July of 2015.

7. In light of the foregoing, AQP now petitions the Air Board for a hearing to amend 20.11.61 NMAC to conform to federal regulation and policy. The amendments are incorporated into the proposed Public Review Draft, included with this petition.

8. It is anticipated that the hearing on these amendments will take approximately one hour or less.

9. The proposed Public Review Draft of 20.11.61 NMAC, *Prevention of Significant Deterioration* is attached as AQP Exhibit #1.

Respectfully submitted,

Danny Nevarez
Deputy Director
Environmental Health Department
City of Albuquerque
One Civic Plaza NW, Suite 3023
Albuquerque NM 87103
(505) 768-2706

CERTIFICATION

I hereby certify that the original and 15 copies of this petition, entitled **Petition to Amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP)** were delivered to the following person on February 20, 2015:

Andrew Daffern
Air Quality Control Board Liaison
Environmental Health Department
One Civic Plaza, NW, Suite 3023
Albuquerque, New Mexico 87102

and that a copy was provided by email to:

Felicia Orth, Attorney to the Air Quality Control Board.

Danny Nevarez
Deputy Director
Environmental Health Department
City of Albuquerque

AQP Exhibit 1b

From: City of Albuquerque-Air Quality Program
To: Daffern, Andrew
Subject: Public Review Draft, 20.11.61 NMAC, Prevention of Significant Deterioration
Date: Friday, February 20, 2015 4:51:33 PM

Petition to amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP)

Click here to view a copy of this petition.

Click here to view a copy of the Public Review Draft.

This petition was filed on February 20, 2015 and the request for a hearing will be an item on the Air Quality Control Board Draft Agenda for the meeting scheduled for Wednesday, March 11, 2015, at 5:30 p.m., in the Vincent E. Griego Chambers, Basement Level, City Hall.

Please send comments on the Public Review Draft by April 1, 2015 to:

Ed Merta
Air Quality Regulation Development Coordinator
1 Civic Plaza NW
Room 3023, 3rd floor
Albuquerque NM 8702
(505) 768-2660
emerta@cabq.gov

Forward email

City of Albuquerque | One Civic Plaza NW | Albuquerque | NM | 87102

AQP Exhibit 2a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

FEB 12 2015

Mr. Isreal Tavarez
Environmental Health Manager
City of Albuquerque – Environmental Health Department
Air Quality Program – Permitting Division
P.O. Box 1293
Albuquerque, New Mexico 87103

RE: EPA Comments on Pending July 26, 2013 SIP Submittal – Revisions to Prevention of Significant Deterioration Regulation (Part 61)

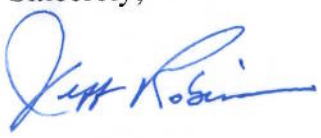
Dear Mr. Tavarez:

At your request, we are providing this comment letter to outline the changes that should be made to the Prevention of Significant Deterioration (PSD) regulation found in Title 20, Chapter 11, Part 61 of the New Mexico Administrative Code (Part 61) as submitted in the July 26, 2013, State Implementation Plan (SIP) revision. As part of our review, we identified two portions of Part 61 that are not consistent with current federal PSD regulations and policy. These provisions are identified below, along with the basis of our determination that further revisions are necessary.

- Applicability Provisions at 20.11.61.11(B) NMAC – The proposed revisions to Subsection B of Section 11 do not include a citation to the Public Notice requirements found at Subsection A of Section 21, which is not consistent with the federal applicability provisions found in 40 CFR 51.166(a)(7)(ii). We request that Subsection B be revised to include this citation. Please note that the current SIP-approved language at 20.11.61.11(B) NMAC is consistent with the federal PSD regulations.
- Definition of "Subject to Regulation" at 20.11.61.7(CCC) NMAC – The proposed revisions to Subsection CCC of Section 7 include the addition of the biogas deferral to the definition of "Subject to Regulation." The inclusion of this deferral is not consistent with the current federal PSD regulations. On July 12, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision to vacate the Biomass Deferral Rule. Furthermore, even without the 2013 vacation of the rule, the temporary deferral period would have expired on July 21, 2014. We request that the definition of "Subject to Regulation" be revised to remove the biogas deferral language found at 20.11.61.7(CCC)(2)(a) NMAC.

We look forward to continuing to work with the City of Albuquerque as we complete our review of the July 26, 2013 submittal and take action on the proposed SIP revisions. If you have any questions regarding our comments or request, please feel free to contact me at (214) 665-6435 or Ashley Mohr of my staff, at (214) 665-7289.

Sincerely,



Jeff Robinson
Chief
Air Permits Section

AQP Exhibit 2b

RE: Draft of Public Review for Revised City of Albuquerque Prevention of Significant Deterioration Regulation, Part 61

Mohr, Ashley [Mohr.Ashley@epa.gov]
Sent: Tuesday, February 17, 2015 10:09 AM
To: Tavarez, Isreal L.
Cc: Nieto, Margaret E.; Merta, Ed L.; Robinson, Jeffrey [Robinson.Jeffrey@epa.gov]

Isreal,

Thank you for providing the draft. The revisions are consistent with the requested revisions outlined in our February 12, 2015, letter and the federal PSD regulations.

Upon closer examination of the draft, I noticed that Subsection C under Section 11 of Part 61 should also be revised to be consistent with the federal rules and the proposed revisions to Subsection B included in the draft. Similar to the concerns we noted about Subsection B, Subsection C also does not include a reference to the Public Notice requirements found at Subsection A of Section 21. The current SIP-approved language at 20.11.61.11(C) NMAC (shown below) is consistent with the federal PSD regulations.

> C. No new major stationary source or major modification to which the requirements of Subsections A, B, C and D of 20.11.61.12 NMAC, Sections 20.11.61.13 NMAC through 20.11.61.18 NMAC, 20.11.61.21 NMAC and 20.11.61.24 NMAC apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

Sorry for any confusion regarding these requested revisions. Please let me know if you request a more formal request regarding the requested changes to Subsection C to be consistent with current federal PSD regulations or if you have any questions. Otherwise, I look forward to seeing a revised draft including the updates to Subsection C.

Thanks,

Ashley

THE POSITIONS or VIEWS CONTAINED IN THIS EMAIL DO NOT REPRESENT OFFICIAL EPA POLICY.

From: Tavarez, Isreal L. [mailto:ITavarez@cabq.gov]
Sent: Monday, February 16, 2015 11:59 AM
To: Mohr, Ashley
Cc: Nieto, Margaret E.; Merta, Ed L.
Subject: Draft of Public Review for Revised City of Albuquerque Prevention of Significant Deterioration Regulation, Part 61

Ashley,

Please find attached for your review. I believe I have captured the changes being requested. Thank you.

Take care,

Isreal

AQP Exhibit 3a

Parallel Processing Request Letter Examples & 40 CFR Part 51 Appendix V Language

Mohr, Ashley [Mohr.Ashley@epa.gov]

Sent: Friday, February 13, 2015 1:37 PM
To: Nieto, Margaret E.; Tavarez, Isreal L.; Merta, Ed L.
Cc: Wiley, Adina [Wiley.Adina@epa.gov]; Robinson, Jeffrey [Robinson.Jeffrey@epa.gov]; Olszewski, Joshua [olszewski.joshua@epa.gov]
Attachments: Letter_AR GHG SIP PACKAGE_~1.pdf (160 KB) ; Letter_LA CAIR NOx SIP 07_~1.pdf (44 KB) ; TX GHG FIP Rescission Lett~1.pdf (1 MB)

All –

Thanks again for getting together today to discuss the option to parallel process the upcoming Part 61 revisions. As promised, I have attached 3 examples of parallel processing request letters from Region 6 states. Please note that a bulk of the language in these letters is case-specific to the specific SIP revisions being made, but they do provide examples of requests we have received in the past. Please also note that the Louisiana and Arkansas examples reference previous rule adoption in their request letters. This is because these states are unique in that they have a two-step process where they adopt the revisions to their rules as a first step and the second step is actually to public notice their request to submit the adopted rules as a SIP revision. Their requests to EPA were to parallel process the second step of their SIP revision process. This differs from the rulemaking process for City of Albuquerque where the notice for rule revision and SIP submittal is combined in one step. The Texas rulemaking process is also a one step process so their letter references future adoption of revisions.

I also am providing a link to Appendix V of 40 CFR Part 51, which includes the parallel processing request requirements under Section 2.3 that Adina discussed during our call.

http://www.ecfr.gov/cgi-bin/text-idx?SID=f28dd8616396d26b1b608aff5eec0c36&node=ap40.2.51_11103.v&rgn=div9

Please do not hesitate to contact me if you have any additional questions.

Thanks,

Ashley

Ashley N.Q. Mohr
Environmental Scientist
Air Permits Section (6PD-R)
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202
(214) 665-7289
FAX (214) 665-6762
mohr.ashley@epa.gov

CITY OF ALBUQUERQUE

March 3, 2015

AQP Exhibit 3b

Ryan Flynn
Cabinet Secretary, NM Environment Department
Office of the Secretary
Harold Runnels Building
1190 Saint Francis Dr., PO Box 5469
Santa Fe, NM 87502-5469

Subject: Endorsement of request to EPA for parallel processing of proposed revision to the New Mexico State Implementation Plan for Air Quality (SIP) through the incorporation of an amended 20.11.61 NMAC, *Prevention of Significant Deterioration*

Dear Mr. Flynn:

I am writing to request your endorsement, on the Governor's behalf, of the attached draft transmittal letter to EPA, which requests that EPA approve a revision to the SIP through the conduct of "parallel processing." Parallel processing, 40 CFR 51, Appendix V, allows EPA to review a proposed SIP revision while the revision is still going through the state or local rulemaking process. EPA uses this procedure for revisions that are anticipated to be uncontroversial with no adverse comment, and a request for this procedure must come from the Governor or the Governor's designee.

The proposed revision of the SIP, attached, would amend 20.11.61 NMAC, *Prevention of Significant Deterioration*. EPA has requested this small amendment in correspondence with the Air Quality Program, City of Albuquerque Environmental Health Department (EHD). The amendments 1) will facilitate EPA's ongoing review of additional amendments to 20.11.61 NMAC, submitted to EPA on July 26, 2013 in response to EPA rulemaking, and 2) must be made in order for EPA to approve two other pending SIP revisions. EPA has indicated that conducting the parallel processing will enable them to approve this rule in a manner that will coincide with approval of the two other pending SIP revisions.
The proposed changes to 20.11.61 NMAC are as follows:

- 20.11.61.7(CCC) NMAC -- amended to remove biogas deferral, in accordance with Center for Biological Diversity v. EPA, 722 F.3d 401 (D.C. Cir. 2013).

- 20.11.61.11(B) and (C) NMAC – amended to revert to language in place prior to 2013 amendments sent to EPA for approval July 26, 2013. The 2013 amended language is inconsistent with federal regulations on permit applicability, 40 CFR 166(a)(7)(ii), because the amended language does not include a citation to public notice requirements at 20.11.61(A) NMAC.

PO Box 1293
Albuquerque
New Mexico 87103
www.cabq.gov

Once EPA receives the (attached draft) transmittal letter from the Governor's office, they can begin parallel processing of the proposed amendment. At the same time, the Air Quality Program will pursue the local rule-making process through the Albuquerque - Bernalillo County Air Quality Control Board (Air Board). Time is a factor at this point, since the Air Board's rulemaking process has begun. On February 20, 2015, the Air Quality Program petitioned the Board for a hearing on the proposed amendment. If the Board approves the request for a hearing, it is anticipated that the hearing will take place in late April, 2015. Following Air Board adoption of the amended regulation, EHD will seek your endorsement of a letter completing the remaining SIP submission requirements with required supporting documentation, as usual. Once your part of the SIP submittal process is complete, EHD will provide EPA with review copies of the proposed SIP.

Thank you for your assistance and patience in this matter. If you have questions or need clarification, please contact me or Margaret Nieto of my staff at (505) 768-2637.

Sincerely,

Mary Lou Leonard
Director
Albuquerque Environmental Health Department

cc: Honorable Susana Martinez, Governor, State of New Mexico
Richard Goodyear, Chief, Air Quality Bureau, NMED
Michael Vonderheide, Director, Environmental Protection Division, NMED
Bill Grantham, Assistant General Counsel, NMED
Kelsey Curran, Chair, Albuquerque - Bernalillo County Air Quality Control Board
Danny Nevarez, Deputy Director, Albuquerque EHD
Margaret Nieto, Control Strategies Manager, Air Quality Program, EHD

AQP Exhibit 3c

NEW MEXICO
ENVIRONMENT DEPARTMENT

Harold Runnels Building
1190 Saint Francis Drive (87505)
PO Box 5469, Santa Fe, NM 87502-5469
Phone (505) 827-2990 Fax (505) 827-1628
www.nmenv.state.nm.us

SUSANA MARTINEZ
Governor
JOHN A. SANCHEZ
Lieutenant Governor

RYAN FLYNN
Cabinet Secretary
BUTCH TONGATE
Deputy Secretary

March 4, 2015

Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Ave, Suite 1200
Dallas, TX 75202-2733

Subject: Request for parallel processing of proposed revision to the New Mexico State Implementation Plan for Air Quality (SIP) through the incorporation of an amended 20.11.61 NMAC, *Prevention of Significant Deterioration*

Dear Mr. Curry:

I am writing on behalf of Governor Susana Martinez to request that EPA conduct parallel processing and approval of the attached documentation which is the basis for a proposed revision to the New Mexico SIP. Specifically, I am submitting documentation for the amended regulation, 20.11.61 NMAC, *Prevention of Significant Deterioration* (PSD), including a copy of the Public Review Draft of the regulation. The proposed rule will apply exclusively to Bernalillo County, New Mexico.

The amended regulation would respond to EPA's request for a revision to the New Mexico SIP. On February 12, 2015, EPA informed the Air Quality Program, City of Albuquerque, Environmental Health Department (Air Quality Program), that EPA is unable to approve two particular portions of a proposed SIP revision submitted to EPA on July 26, 2013. These portions are found in the currently effective (locally) version of 20.11.61 NMAC, in particular 20.11.61.7(CCC) NMAC and 20.11.61.11(B) NMAC. EPA stated that these provisions are not consistent with current federal PSD regulations and policy. On February 17, 2015, EPA informed the Air Quality Program that EPA is unable to approve an additional portion of the proposed 2013 SIP revision, affecting 20.11.61.11(C) NMAC. This provision also is not consistent with current federal PSD regulations and policy.

In particular, EPA states that the currently effective versions of 20.11.61.11(B) and 20.11.61 11(C) NMAC are inconsistent with federal regulations found in 40 CFR 51.166, regarding applicability of PSD regulations to a permitted source. EPA notes that the versions of 20.11.61.11(B) and (C) in effect prior to the Air Board's amendment on April 10, 2013 were consistent with the federal regulation. Therefore, EPA has requested that these two NMAC

sections be revised accordingly, reverting to the prior versions. The Air Quality Program's proposed draft of a revised 20.11.61 will carry out this amendment as requested by EPA.

EPA has noted as well that the currently effective version of 20.11.61.7(CCC) NMAC includes language deferring the date at which certain pollutant sources are subject to PSD regulation of greenhouse gasses. This deferral is applied to sources that emit carbon dioxide resulting from the combustion or decomposition of certain organic material, which EPA refers to as "biogas." EPA notes that a federal court has vacated the biogas deferral regulation promulgated by EPA on July 20, 2011 (referenced in the list of Federal Register publications). The court decision was *Center for Biological Diversity v. Environmental Protection Agency*, 722 F.3d 401 (D.C. Cir. 2013). Because of this vacation of the rule, 20.11.61.7(CCC) NMAC is no longer consistent with federal regulations. Therefore, EPA has requested that this regulation be amended to remove language relating to a biogas deferral. The Air Quality Program's proposed draft of a revised 20.11.61 NMAC will carry out this amendment as requested by EPA.

The amendments EPA has requested must be made in order for EPA to approve two other pending SIP revisions. One is an infrastructure SIP for the 2010 National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO_2), approved by the Air Board on June 12, 2013 and submitted to EPA on July 26, 2013. This submission is now under review by EPA. The second pending SIP revision is an infrastructure SIP for the 2010 NAAQS for sulfur dioxide. The Air Quality Program has petitioned the Albuquerque Bernalillo County Air Quality Control Board (Air Board) for adoption of this proposed SIP submittal and, upon Board approval, anticipates submitting it to EPA for review in July of 2015.

The proposed schedule for adoption of the amended 20.11.61 NMAC is as follows. The City of Albuquerque, Environmental Health Department, Air Quality Program, has petitioned the Air Board for a public hearing on the proposed amendment to 20.11.61 NMAC. This petition was accompanied by a Public Review draft of the proposed amended regulation. The Air Board will consider the petition at a meeting scheduled for March 11, 2015 and decide whether or not to hold a hearing. The subsequent hearing on the amendment is currently expected to take place in late April, 2015 and no later than April 30. Following the hearing the Air Board on the same day as the hearing is expected to decide whether to adopt the amended regulation for submission to EPA and incorporation into the New Mexico SIP. Following adoption by the Air Board, submittal of the amended regulation to EPA is expected by May 31, 2015, with required SIP documentation, in accordance with all applicable requirements of 40 CFR 51.

Under state and local law, the Air Board and the Air Quality Program have the necessary legal authority to adopt and implement the amended 20.11.61 NMAC. Legislative authority for Albuquerque-Bernalillo County's air quality program is codified in the New Mexico Air Quality Control Act (Air Act), Chapter 74, *Environmental Improvement*, Article 2, *Air Pollution*, of the New Mexico Statutes Annotated 1978 (NMSA 1978). Section 4 of this statute authorizes the creation of a "local authority" by a New Mexico county or municipality meeting certain criteria if the county or municipality adopts an ordinance providing for the local administration and enforcement of the Air Act. Albuquerque and Bernalillo County meet these statutory criteria in the Air Act. The City of Albuquerque and Bernalillo County each adopted parallel ordinances by which they accepted the authority delegated by the Air Act, established the Air Board and

specified that the Air Board shall adopt regulations consistent with the Air Act and shall adopt a plan for the regulation, control, prevention or abatement of air pollution throughout Bernalillo County. These parallel ordinances provide that the Albuquerque Environmental Health Department is the administrative agency of the Air Board. The Air Quality Program is part of the Environmental Health Department. The Albuquerque and Bernalillo County ordinances are codified at Revised Ordinances of the City of Albuquerque (ROA) §§ 9-5-1 to -99 and Bernalillo County Ordinance 94-5 §§ 1 to -20 [codified at Art. II, Ch. 30, §§ 30-31 to 47.]

I certify that all documents submitted to the Regional Office in electronic form are exact duplicates of the hard copy documents.

Your favorable consideration of the foregoing request for parallel processing is appreciated. If you have any questions, please contact Mary Lou Leonard, Director of the Albuquerque Environmental Health Department (EHD), at (505) 768-2631.

Sincerely,

Ryan Flynn
Cabinet Secretary
New Mexico Environment Department

cc: Honorable Susana Martinez, Governor, State of New Mexico
Richard Goodyear, Chief, Air Quality Bureau, NMED
Michael Vonderheide, Director, Environmental Protection Division, NMED
Kelsey Curran, Chair, Albuquerque - Bernalillo County Air Quality Control Board
Danny Nevarez, Deputy Director, Albuquerque EHD
Margaret Nieto, Control Strategies Manager, Air Quality Program, EHD

AQP Exhibit 4

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Vincent E. Griego Chambers
Albuquerque-Bernalillo County Government Center
One Civic Plaza NW, Albuquerque, NM 87102

DRAFT MINUTES – March 11, 2015
Regular Meeting

AQCB MEMBERS PRESENT
Kelsey Curran, CIH (CITY), Chair
Jens Deichmann, Ph.D. (COUNTY)
Robert Goldstein, M.D. (COUNTY)
Augustine Grace III, P.E. (CITY)
Ms. Deborah L. Stover (COUNTY)
Lenton Malry, Ph.D. (BCPC LIAISON)

AQCB MEMBERS ABSENT
Ms. Jane Cudney-Black (CITY), Vice Chair
Dona Upson, M.D. (CITY)

EHD STAFF PRESENT
Mr. Andrew Daffern, AQCB Liaison
Mr. Fabian Macias, Air Quality Official
Mr. Ed Merta, Air Quality Regulation Development Coordinator
Ms. Mary Lou Leonard, Director
Mr. Danny Nevarez, Deputy Director, EHD
Ms. Margaret Nieto, EH Manager and AQCB Secretary
Ms. Felicia Orth, Air Board Attorney and Hearing Officer
Ms. Carol Parker, Assistant City Attorney
Mr. Damon Reyes, EH Manager
Mr. Cale Swanson, EH Supervisor
Mr. Isreal Tavarez, EH Manager

VISITORS PRESENT
Jim Peck, COA, Environmental Planning Commission
Mikaela Renz-Whitmore, COA, Planning Department

DRAFT MEETING MINUTES

CALL TO ORDER

The meeting was called to order by Chair Kelsey Curran at 5:34 p.m. on March 11, 2015 with five voting Board members present: Jens Deichmann, Augustine Grace, Kelsey Curran, Deborah Stover, and Robert Goldstein; and one non-voting member present: Lenton Malry. Not present were voting members Jane Cudney-Black and Dona Upson.

Item #1 **Approval of Agenda (Chair)**

A motion to approve the agenda was made by Member Deichmann and seconded by Member Grace. The motion was approved unanimously by a vote of 5-0.

Item #2 **Approval of February 11, 2015 Meeting Minutes (Chair)**

A motion to approve the February 11, 2015 meeting minutes was made by Member Deichmann and seconded by Member Stover. The motion was approved unanimously by a vote of 5-0.

PUBLIC COMMENT

There was no public comment.

ACTION ITEMS

Item #3 **Request for a Hearing in the Matter of the Petition to adopt a State Implementation Plan (SIP) for SO2 to address Sections 110(a)(1) and (2) of the Federal Clean Air Act (CAA), 42 U.S.C. § 7410(a)(1) and (2) hereafter referred to as the "SO2 Infrastructure SIP" (AQCB Petition No. 2015-1) -- Ed Merta, M.A., J.D., Esq., Air Quality Regulation Development Coordinator**

The Request for a Hearing was presented by Ed Merta, AQ Regulation Development Coordinator. Member Deichmann moved to grant the hearing request. The motion was seconded by Member Stover and unanimously approved by vote of 5-0.

Item #4 **Request for a Hearing in the Matter of the Petition to Amend 20.11.61 NMAC, Prevention of Significant Deterioration, and Submit the Adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for Proposed Incorporation into the New Mexico State Implementation Plan for Air Quality (SIP) (AQCB Petition No. 2015-2) -- Ed Merta, M.A., J.D., Esq., Air Quality Regulation Development Coordinator**

The Request for a Hearing was presented by Ed Merta, AQ Regulation Development Coordinator. Member Grace moved to grant the hearing request. The motion was seconded by Member Deichmann and unanimously approved by vote of 5-0.

REPORTS **Air Program Report. Staff available for questions.**

OTHER BUSINESS

Item #5 **Presentation: ABC to Z (Comprehensive Plan / Unified Development Ordinance) -- Mikaela Renz-Whitmore, Planner, COA Planning Department and Russell Brito, Planning Manager, COA Planning Department**

ABC to Z (Comprehensive Plan / Unified Development Ordinance) was presented by Mikaela Renz-Whitmore, Planner, COA Planning Department. Ms. Renz-Whitmore answered questions from the Board in a lively discussion about the process. Danny Nevarez added that the Air Quality Program is working with the Planning Department on outreach to the Air Quality stakeholder community.

- Chair Curran brought to the Board's attention a planned bike-sharing program for downtown Albuquerque that is scheduled to start May 15, 2015, as reported in the Albuquerque Journal. After discussion, various Board members expressed an interest in learning more details about the new program and if appropriate, sending a letter of encouragement and support for the program. Chair Curran

suggested that the item be included on the next meeting agenda for a possible presentation as well as taking action on sending a letter of support if that is the Board's inclination.

- Chair Curran noted that the date of the next Board meeting in April has been changed from April 8 to April 30 at 5:30.

- Member Deichmann reminded the Board that Board elections will be held at the April Board meeting.

ADJOURNMENT

Chair Kelsey Curran adjourned the meeting at 6:58 p.m.

NEXT SCHEDULED BOARD MEETING AND HEARING: April 30, 2015 – *moved from April 8, 2015.*

SUBMITTED:

Ms. Margaret Nieto date
Board Secretary/Env. Health Manager, Control Strategies Section,
Air Quality Program, Environmental Health Department.

READ AND APPROVED:

Kelsey Curran, CIH date
Chair
Albuquerque – Bernalillo County Air Quality Control Board

SEARCH RESULTS

NOTICE OF HEARING AND DATE CHANGE FOR REGULAR MEETING ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD The Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing on April 30, 2015 at 5:30 p.m. in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The purpose of the hearing is to consider the matter of AQCB Petition No. 2015-2, to amend 20.11.61 NMAC, Prevention of Significant Deterioration, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP). The regularly scheduled meeting date on April 8, 2015 has been changed to April 30, 2015. The proponent of this regulatory action is the City of Albuquerque, Environmental Health Department, Air Quality Program. The hearing will consider whether to adopt the proposed amended version of 20.11.61 NMAC, in order to bring the regulation into compliance with standards in the Code of Federal Regulations. An information sheet with further details on the subject matter of the hearing is available at: http://www.cabq.gov/airquality/air-quality-control-board/documents/ Part%2061%20Public%20Review%20Drafat.pdf. Following the hearing, the Air Board at its regular monthly meeting is expected to consider adopting the proposed amendments to 20.11.61 NMAC. The Public Review Draft of the amended 20.11.61 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft can also be found on the Air Quality Program web site at: http://www.cabq.gov/airquality/air-quality-control-board/documents/ Part%2061%20Public%20Review%20Draft.pdf. The hearing will be conducted in accordance with NMSA 74-2-6; Joint Air Quality Control Board Ordinance, Section 9-5-1-6, Adoption of Regulations, Notice and Hearing [ROA 1994]; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings [Ord. No. 94-5, Section 6, 2-2-94]; and 20.11.82 NMAC, Rulemaking Procedures-Air Quality Control Board; and other applicable procedures. All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Air Board a written notice of intent (NOI) to do so by 5:00 p.m. on April 14, 2015. The NOI shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background; (3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; (4) include the text of any recommended modifications to the proposed regulatory change; (5) list and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner. The NOI must be filed in hard copy form (original plus 15 copies of all documents) by 5:00 p.m. on April 14, 2015, with Andrew Daffern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102. Any member of the general public may present non-technical testimony at the hearing. No prior notification is required to present non-technical testimony. Any member of the public may also offer exhibits in connection with non-technical testimony, as long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file the written statement prior to the hearing, or submit it at the hearing. Written statements submitted prior to the hearing may be directed to the Air Quality Control Board Liaison, Andrew Daffern, at the above contact information. NOTICE FOR PERSON WITH DISABILITIES OR SPECIAL NEEDS: If you have

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? April, 2015
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19	20	21	22	23	24	25
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AQP Exhibit 5a

a disability or require special assistance to participate, including translation/inter-pretation service, or review of any agendas, minutes, or other public meeting documents, please contact Andrew Daffern, Air Quality Control Board liaison, by April 16, 2015, at (505) 768-2601, or adaffern@cabq.gov.TTY users requiring special assistance may call the New Mexico Relay at 1-800-659-8331. Journal: March 15, 2015

PUBLISHED ON: SUN MARCH 15, 2015

Notices of Rulemaking and Proposed Rules

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
NOTICE OF HEARING AND DATE CHANGE FOR REGULAR MEETING

The Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing on April 30, 2015 at 5:30 p.m. in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The purpose of the hearing is to consider the matter of AQCB Petition No. 2015-2, to amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP). The regularly scheduled meeting date on April 8, 2015 has been changed to April 30, 2015.

The proponent of this regulatory action is the City of Albuquerque, Environmental Health Department, Air Quality Program.

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The hearing will be conducted in accordance with NMSA § 74-2-6; Joint Air Quality Control Board Ordinance, Section 9-5-1-6, *Adoption of Regulations, Notice and Hearing* [ROA 1994]; Bernalillo County Ordinance, Section 30-35, *Adoption of Regulations, Notice and Hearings* [Ord. No. 94-5, Section 6, 2-2-94]; and 20.11.82 NMAC, *Rulemaking Procedures—Air Quality Control Board*; and other applicable procedures.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Air Board a written notice of intent (NOI) to do so by 5:00 p.m. on April 14, 2015. The NOI shall:

(1) identify the person for whom the witness(es) will testify;
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ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

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The proponent of this regulatory action is the City of Albuquerque, Environmental Health Department, Air Quality Program.

The hearing will consider whether to adopt the SO2 Infrastructure SIP and submit it to the U.S. Environmental Protection Agency as a proposed revision to the New Mexico State Implementation Plan. An Infrastructure SIP is required by the U.S. Environmental Protection agency to demonstrate compliance with a newly issued National Ambient Air Quality Standard. An information sheet with

AQP Exhibit 5c

From: City of Albuquerque-Air Quality Program
To: Daffern, Andrew
Subject: Notice of hearing on revision to 20.11.61 NMAC and date change for regular meeting, Albuquerque - Bernalillo County Air Quality Control Board
Date: Monday, March 16, 2015 4:13:13 PM

Notice of Hearing on Revision to 20.11.61 NMAC and Date Change for Regular Meeting, Albuquerque Bernalillo County Air Quality Control Board

The Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing on April 30, 2015 at 5:30 p.m. in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The purpose of the hearing is to consider the matter of AQCB Petition No. 2015-2, to amend 20.11.61 NMAC, *Prevention of Significant Deterioration*, and submit the adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for proposed incorporation into the New Mexico State Implementation Plan (SIP). The regularly scheduled meeting date on April 8, 2015 has been changed to April 30, 2015.

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AQP Exhibit 6

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Date: April 30, 2015 (Wednesday) **Time:** 5:30 p.m.	**Location:** Vincent E. Griego Chambers Albuquerque-Bernalillo County Government Center One Civic Plaza NW Albuquerque, NM 87102
General inquiries regarding this agenda may be directed to Andrew Daffern (505) 768-2601 (adaffern@cabq.gov). For documents related to each agenda item, please go to http://www.cabq.gov/airquality/air-quality-control-board/events/april-30-2015-air-quality-control-board-meeting	

Regular Monthly Meeting Draft Agenda

CALL TO ORDER

Item #1 Approval of Agenda (Chair)

Item #2 Approval of March 11, 2015 Meeting Minutes (Chair)

PUBLIC COMMENT

ACTION ITEMS

Item #3 Election of Chair and Vice Chair for 2015-2016 (Chair)
Nominations are as follows:

- Chair: Ms. Kelsey Curran,
- Vice Chair: Ms. Jane Cudney-Black

Item #4 Selection of Board members to serve as non-voting Advisory Member and Alternate to Mid-Region Council of Governments (MRCOG) Transportation Program Task Group (TPTG) and Transportation Coordinating Committee (TCC) (Chair)

- Advisory Member:
- Alternate:

OTHER BUSINESS

Item #5 BICI, Albuquerque's Downtown Pilot Bike Share presentation by Lola Bird, Executive Director, DowntownABQ MainStreet Initiative, and Valerie Hermanson, Transportation Planner, Mid-Region Council of Governments

Item #6 Discussion on possible action to send a letter of support for the Bike Sharing Program to Mayor Berry and City Council, City of Albuquerque; Bernalillo County Commissioners, and Dewey Cave, Exec. Director of the MRCOG

HEARINGS

- In the Matter of the Petition to adopt a State Implementation Plan (SIP) for SO_2 to address Sections 110(a)(1) and (2) of the Federal Clean Air Act (CAA), 42 U.S.C. § 7410(a)(1) and (2) hereafter referred to as the "SO_2 Infrastructure SIP" (AQCB Petition No. 2015-1) – Ed Merta, Air Quality Regulation Development Coordinator,

- In the Matter of the Petition to Amend 20.11.61 NMAC, Prevention of Significant Deterioration, and Submit the Adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for Proposed Incorporation into the New Mexico State Implementation Plan for Air Quality (SIP) (AQCB Petition No. 2015-2) - Ed Merta, Air Quality Regulation Development Coordinator,

ACTION ITEMS (cont'd.)

Item #7 Decision on the Matter of the Petition to adopt a State Implementation Plan (SIP) for SO_2 to address Sections 110(a)(1) and (2) of the Federal Clean Air Act (CAA), 42 U.S.C. § 7410(a (1) and (2) hereafter referred to as the "SO_2 Infrastructure SIP" (AQCB Petition No. 2015-1)

Item #8 Decision on the Matter of the Petition to Amend 20.11.61 NMAC, Prevention of Significant Deterioration, and Submit the Adopted 20.11.61 NMAC to the U.S. Environmental Protection Agency for Proposed Incorporation into the New Mexico State Implementation Plan for Air Quality (SIP) (AQCB Petition No. 2015-2)

REPORTS Air Program Report. Staff available for questions.

ADJOURNMENT

NEXT SCHEDULED BOARD MEETING/HEARING: May 13-14, 2015

Members of the public who wish to address the Board, may do so by signing up with the Board Clerk and indicating either the agenda item they intend to address, or whether they wish to make a general public comment. Sign up must occur prior to the Board's consideration of each item. Each person will be given up to two minutes to speak.

Notice to persons with disabilities: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

AQP Exhibit 7

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT DETERIORATION*, AND SUBMIT THE ADOPTED 20.11.61 NMAC TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY FOR PROPOSED INCORPORATION INTO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2015-2

Air Quality Program,
Environmental Health Department,
City of Albuquerque, Petitioner

DIRECT TESTIMONY OF ED MERTA

Thank you, Madam Chair and members of the Board. My name is Ed Merta. I am the Air Quality Regulation Development Coordinator with the Air Quality Program, Control Strategies Division, City of Albuquerque Environmental Health Department. I am here to testify in the matter of the *Petition to Amend 20.11.61 NMAC, Prevention of Deterioration*, Air Quality Control Board Petition No. 2015-2. In support of my testimony, I now move that the Notice of Intent and its Exhibits, which are listed as AQP Exhibits 1 through 10 and include my full written testimony, be adopted while under oath and admitted into the record.

In this petition, the City of Albuquerque, by and through the Air Quality Program of the Environmental Health Department (EHD), asks the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) to adopt amendments to 20.11.61 NMAC, *Prevention ff Significant Deterioration*. EHD also asks the Air Board to approve

submission of the amended 20.11.61 NMAC to the U.S. Environmental Protection Agency (EPA) for proposed incorporation into the New Mexico State Implementation Plan for Air Quality.

I am testifying in favor of this proposed rulemaking, for the following reasons.

LEGAL REQUIREMENTS

The proposed amended 20.11.61 NMAC is governed by specific federal legal requirements. In particular, the provisions governing state implementation of the *Prevention of Signification Deterioration* (PSD) permit program are contained in the CFR Title 40, *Protection of Environment*, Part 51, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 166, *Prevention of Significant Deterioration of Air Quality*. The provisions governing direct federal implementation of PSD are found at Title 40, *Protection of Environment*, Part 52, *Approval and Promulgation of Implementation Plans*, Subpart A, *General Provisions*, Section 21, *Prevention of Significant Deterioration of Air Quality*. To implement PSD program requirements under federal provisions, the Air Board has previously adopted the existing version of 20.11.61 NMAC, *Prevention of Significant Deterioration*.

A PSD program sets a maximum amount of new air pollution that can legally be emitted in an area that is in attainment with a NAAQS. The goal is to prevent deterioration of the air quality from becoming "significant." Under a PSD program, whenever a new major source of a NAAQS pollutant is being constructed in an

attainment area, or an existing major source is undergoing a major modification, that source must obtain a PSD permit. That permit requires a demonstration, based on monitoring and modeling, that the source will not add more than the legally allowed amount of pollution to the air.

In addition to the above federal provisions, state and local law is also applicable to the proposed amended 20.11.61 NMAC, *Prevention of Significant Deterioration*. The New Mexico Air Quality Control Act (Air Act), NMSA 1978, Sections 74-2-4 and 74-2-5.B(1) [1967 as amended through 2007] authorizes and requires the Air Board to adopt, promulgate, publish, amend, and repeal air quality regulations. The Air Act, NMSA 1978, Section 74-2-5.B(2), also authorizes and requires the Air Board to adopt air quality plans. Under the Air Act, NMSA 1978, Section 74-2-6(B), a public hearing of the Board must be held before any regulation or emission control requirement can be adopted. Similarly, the Board is authorized and required to adopt, promulgate, publish, amend, and repeal air quality regulations and adopt plans under: City of Albuquerque Ordinances, Section 9-5-1-4(B); Bernalillo County Ordinances, Section 30-33(b). Local ordinances also require regulations and plans to be adopted only after a hearing of the Air Board, per: City of Albuquerque Ordinances, Section 9-5-1-6; Bernalillo County Ordinances, Section 30-35.

The process of amending the local PSD regulation for submission to EPA as a proposed SIP revision is governed by specific procedural requirements in federal law. The Clean Air Act, Section 110(I), requires that proposed SIP revisions be adopted after reasonable notice and public hearing. Additional specific procedural requirements regarding notice and hearing are laid out in the Code of Federal Regulations, 40 CFR § 51.102 and 40 CFR, Part 51, Appendix V, paragraph 2.1(g).

To demonstrate compliance with federal, state, and local procedural requirements in regard to the currently proposed 20.11.61 NMAC rulemaking by the Board, EHD is presenting the following: as AQP Exhibit 1, the Public Review Draft of the proposed 20.11.61 NMAC; as AQP Exhibit 1a, EHD's petition for this rulemaking; as AQP Exhibit 1b, the email notice of the petition; as AQP Exhibit 4, draft minutes of the Board's March 11, 2015 meeting, at which it approved EHD's request for this hearing; as AQP Exhibits 5a, 5b, and 5c, legal notices for this hearing; as AQP Exhibit 6, the draft agenda for the Board meeting and hearings scheduled for April 30, 2015. The rulemaking for the proposed amended 20.11.61 NMAC has been undertaken in accordance with the local regulation governing rulemaking proceedings, 20.11.82 NMAC, *Rulemaking Procedures -- Air Quality Control Board*.

EPA REGULATORY ACTION LEADING TO THIS RULEMAKING

The proposed amended 20.11.61 is required by several EPA rulemakings in recent years, which revised the Code of Federal Regulations as it applies to PSD. Because of these revisions, state and local air quality jurisdictions were legally required to amend their own PSD regulations to conform to federal requirements. EPA's new requirements were promulgated from 2008 to 2012, when EPA rulemaking resulted in extensive changes to PSD provisions relating to control of greenhouse gasses, fugitive emissions, and fine particulate matter less than 2.5 microns in diameter, or "$PM_{2.5}$."

The Air Board responded to EPA's rulemakings on PSD by adopting a series of amendments to 20.11.61 NMAC and submitting those amendments to EPA for proposed incorporation into the overall New Mexico SIP. The most recent such amendments

consisted of extensive revisions to 20.11.61 NMAC adopted by the Board at a hearing on April 10, 2013. These amendments made changes to 20.11.61 NMAC, Sections 2, 5, 6, 7, 10, 11, 12, 14, 15, 18, 20, 23, 24, 27, 29 and 30. The amended regulation, which is the current version, took effect locally May 13, 2013. The Board also approved submission of the amended version to EPA for review and proposed approval. On July 26, 2013, New Mexico Environment Secretary Ryan Flynn submitted the amended 20.11.61 NMAC to EPA as a proposed revision to the New Mexico SIP.

Further details on previous PSD rulemaking by EPA is available in records related to the Board's April 2013 hearing adopting the current 20.11.61 NMAC. These records are shown as AQP Exhibits 8a through 8f.

DESCRIPTION OF THE PROPOSED AMENDMENTS AND EPA'S RATIONALE

Recently, EPA began its review of the proposed SIP revision submitted with Board approval in 2013. As part of this review, on February 12, 2015, EPA contacted the Environmental Health Department, Air Quality Program, asking for additional amendments to two particular portions of the proposed SIP revision submitted in 2013 (thus requiring two amendments to the currently effective local PSD regulation). These portions are found in the currently effective 20.11.61.7(CCC) NMAC and 20.11.61.11(B) NMAC. EPA stated that these provisions are not consistent with current federal PSD regulations and policy. On February 17, 2015, EPA contacted EHD to ask for an additional amendment to a portion of the proposed SIP revision submitted in 2013 (thus

requiring a further amendment to the currently effective local PSD regulation). This additional portion is found in the currently effective 20.11.61.11(C) NMAC. This provision also, EPA states, is not consistent with current federal PSD regulations and policy. EPA's communications with the Department are shown as AQP Exhibits 2a and 2b.

EPA's basis for the requested revision to the currently effective version of 20.11.61.7(CCC) NMAC is as follows. That provision includes language deferring the date at which certain pollutant sources are subject to PSD regulation of greenhouse gasses. This deferral is applied to sources that emit carbon dioxide resulting from the combustion of biofuels, or the combustion or decomposition of certain organic material. EPA refers to this deferral as the "biogas deferral." EPA notes that a federal court has vacated the biogas deferral regulation promulgated by EPA on July 20, 2011. The court decision was *Center for Biological Diversity v. Environmental Protection Agency*, 722 F.3d 401 (D.C. Cir. 2013). The text of this court decision and opinion is shown as AQP Exhibit 9. Because the court vacated the rule, 20.11.61.7(CCC) NMAC is no longer consistent with federal regulations. Therefore, EPA has requested that the federal regulation be amended to remove language relating to a biogas deferral and bring the regulation up to date. The Air Quality Program's proposed draft of a revised 20.11.61 NMAC will carry out this amendment as requested by EPA.

The basis for the two other amendments requested by EPA is as follows. EPA states that the currently effective versions of 20.11.61.11(B) and 20.11.61 11(C) NMAC are inconsistent with federal regulations found in 40 CFR § 51.166, regarding applicability of PSD regulations to a permitted source. EPA states that this provision in

the CFR requires 20.11.61(B) and (C) NMAC to expressly include a citation to the public notice provisions appearing later in the same regulation, at 20.11.61.21(A) NMAC. The currently effective local versions of these two provisions do not include such a citation.

EPA further notes that the versions of 20.11.61.11(B) and (C) NMAC in effect prior to the Air Board's amendments on April 10, 2013 were consistent with the federal regulation at 40 CFR § 51.166. Therefore, the Air Quality Program's proposed draft of a revised 20.11.61 NMAC would revert the two provisions to their former versions. At the time the Board adopted the current version in April 2013, EHD supported the current language as clarifying PSD applicability provisions in the regulation. The current version, EHD concluded at the time, contained more specific language describing which particular PSD requirements applied or did not apply to a particular source. EHD had no indication at that time from EPA or elsewhere of any inconsistency with federal regulations; EPA did not point out such an inconsistency in its review. However, EPA's review in 2015 did in fact uncover such inconsistencies. The proposed amended 20.11.61 NMAC would remove them.

EPA PARALLEL PROCESSING OF THE PROPOSED AMENDMENTS

EPA has informed EHD that a procedure known as "parallel processing" is available in this instance in order to expedite EPA's review of the proposed amended 20.11.61 NMAC. Parallel processing allows EPA to review a proposed SIP revision by a state or local air authority while that authority is itself engaged in rulemaking, prior to completion of the state or local rulemaking process. This approach differs from the

normal SIP revision procedure, in which EPA's final review of a proposed SIP revision occurs only after the state or local air authority first completes its rulemaking proceeding before submitting a proposed SIP revision to EPA. Parallel processing must be initiated by a request to EPA from the governor of a state or the governor's designee. EPA utilizes parallel processing for proposed SIP revisions that are expected to be non-controversial and will not be further amended during the state or local rule-making process. Parallel processing is provided for in Appendix V, Section 2.3 of 40 CFR, Part 51. EPA's email to EHD describing this process is shown as AQP Exhibit 3a.

Following consultations with EPA on the nature of parallel processing, EHD initiated a request to EPA for the use of this process in regard to the proposed amended 20.11.61 NMAC. The Director of EHD contacted the Governor of New Mexico's designee for SIP-related submissions to EPA, New Mexico Environment Department Cabinet Secretary Ryan Flynn, asking that Secretary Flynn make a request to EPA for parallel processing. This letter is shown as AQP Exhibit 3b. Secretary Flynn responded by sending a letter to EPA requesting parallel processing. This letter is shown as AQP Exhibit 3c. Parallel processing by EPA of the proposed amended 20.11.61 NMAC is underway. Prior to EHD's request to EPA to begin that process, EHD consulted with EPA in formulating its proposed draft of a new regulation, thereby satisfying EHD's customary practice of submitting a draft regulation to EPA for comment prior to local rulemaking. I will discuss the involvement of other stakeholders later in my testimony.

IMPACT OF THE PROPOSED AMENDMENTS

EPA attaches particular urgency to submission of an amended 20.11.61 NMAC as a proposed SIP revision. This urgency is due in part to the need for EPA to clear its backlog of proposed SIP revisions. Revisions to the local PSD regulation are an important component in the multi-year work plan, agreed to by EHD and EPA, to address EPA's backlog of proposed SIP revisions.

Another reason for the urgency of adopting the proposed amended 20.11.61 NMAC is that such action will enable EPA to complete its review of the more extensive PSD amendments submitted to EPA as a proposed SIP revision in 2013. Once EPA has approved that revision, the local PSD permit program will be EPA approved in its entirety.

In addition, having an EPA approved PSD program is legally necessary in order for EPA to approve three other pending SIP revisions that must undergo EPA review. One is an Infrastructure SIP for the 2010 National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO_2), adopted by the Air Board on June 12, 2013 and submitted to EPA in July 2013. A second pending SIP revision is an Infrastructure SIP for the 2008 NAAQS for lead, adopted by the Board on January 11, 2012 and submitted to EPA in May 2012. The third pending SIP revision is an Infrastructure SIP for the 2010 NAAQS for sulfur dioxide, which is the subject of a separate rulemaking petition to this Board. Under EPA's interpretation of Clean Air Act Infrastructure SIP requirements, EPA can't approve these three Infrastructure SIPs until it first fully approves the local

PSD program. Background on EPA's interpretation of Clean Air Act Infrastructure SIP requirements regarding PSD is available in EPA's guidance on preparation of an Infrastructure SIP, shown as AQP Exhibit 10.

EHD does not anticipate any adverse impact on local sources resulting from adoption of the amended 20.11.61 NMAC. In part, this is because the proposed amendments are procedural, not substantive. They alter language in the regulation to align with federal regulations, but they do not require a regulated source to alter its behavior.

In addition, the local PSD regulation applies to only a very narrow category of sources, and so is rarely triggered. In particular, the regulation applies to construction projects that build or modify a major (i.e. potentially very large) stationary source of air pollutants in a NAAQS attainment area for one or more of those pollutants. Historically, such construction projects have seldom occurred locally. Only two PSD permits have been issued since 1977 in the local area. The first was on May 9, 1977, at a time when the local PSD program was still administered by the U.S. Environmental Protection Agency. On that date, EPA Region 6 issued a PSD permit for the Portland cement manufacturing facility currently operating in Tijeras, New Mexico. This facility is owned by Groupo Cementos Chihuahua and is known as the GCC Rio Grande, Inc. - Tijeras Plant. Its 1977 PSD permit was issued for construction of a finish mill at the plant, which was already in existence at the time. The second local issuance of a PSD permit, this time by the Environmental Health Department, occurred on March 9, 1998. This permit was for new construction to build a 150 megawatt simple cycle turbine electric generating station near the northeast corner of Rio Bravo and Broadway Blvd. SE in Albuquerque, New Mexico.

This station exists today and is known as the Rio Bravo Generating Station, owned by Public Service Company of New Mexico.

STAKEHOLDER REVIEW

In view of the previously noted urgency of the proposed amendments to 20.11.61 NMAC, and the non-substantive nature of the proposed amendments, EHD did not pursue its usual internal process of circulating a review draft of the proposed amended regulation prior to EHD's petition for rulemaking. That internal process is not required under the Air Board's rulemaking regulation, 20.11.82 NMAC. As an alternative, EHD decided, after consultation with EPA, to solicit stakeholder comments as part of the rulemaking procedures required under 20.11.82 NMAC. EHD pursued this approach in order to expedite the urgent rulemaking at EPA's request. Under the 20.11.82 NMAC procedures, stakeholders were afforded ample opportunity to comment on the proposed amended 20.11.61 NMAC by: circulation of the Public Review Draft (attached to EHD's petition for rulemaking), which is open to public comment; legal notice of the rulemaking hearing, which also makes the public aware of opportunities to comment; and the holding of the hearing itself, at which members of the public have further opportunity to comment. In sending notices of the above rulemaking actions, EHD specifically notified stakeholders likely to have an interest in amendments to the local PSD regulation, including PSD permit holders, environmental consultants and consulting organizations, Title V permit holders, and Synthetic Minor sources.

At the time of submission of this testimony as an exhibit attached to EHD's Notice of Intent, EHD has received no comment from any stakeholder on the proposed amended regulation.

That concludes my testimony, and I stand with my colleagues from the EHD Air Quality Program for questions.

AQP Exhibit 8a

AQD EXHIBIT 1

PENGAD 800-631-6989

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ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND 20.11.60 NMAC, *PERMITTING IN NONATTAINMENT AREAS*; 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT DETERIORATION*; AND 20.11.42 NMAC, *OPERATING PERMITS*. THE AMENDMENTS TO 20.11.42 NMAC ARE PROPOSED AS A REVISION TO THE TITLE V OPERATING PERMIT PROGRAM, AND THE AMENDMENTS TO 20.11.60 NMAC AND 20.11.61 NMAC ARE PROPOSED AS A REVISION TO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2013-1

Air Quality Division,
Environmental Health Department,
City of Albuquerque, Petitioner

Petition to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed As a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP)

The City of Albuquerque ("City"), by and through the Air Quality Division ("Division") of the Environmental Health Department ("Department"), asks the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") to adopt amendments to 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC will be submitted to EPA as a revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC will be submitted to EPA as a revision to the SIP. This Petition includes a request for a hearing on these matters and permission to provide a court reporter and hearing officer for the hearing. The New Mexico Air Quality Control Act ("Air Act"), NMSA 1978, Sections 74-2-4 and 74-2-5.B(1) [1967 as amended through 2007] authorizes and requires the Air Board to adopt, amend, or replace air quality regulations and to adopt air quality plans (SIPs) under NMSA 1978, Section 74-2-5.B(2). As grounds, Petitioner states the following:

1. The provisions governing state implementation of the Nonattainment New Source Review (NNSR) permit program are contained in the CFR, Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I,

Review of New Sources and Modifications, Section 165, *Permit Requirements*. Albuquerque - Bernalillo County's implementation of this program is governed by 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

2. The provisions governing state implementation of the Prevention of Signification Deterioration (PSD) permit program are contained in the CFR Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 166, *Prevention of Significant Deterioration of Air Quality*. The provisions governing direct federal implementation of PSD are found at Title 40, *Protection of Environment*, Part 52, *Approval and Promulgation of Implementation Plans*, Subpart A, *General Provisions*, Section 21, *Prevention of Significant Deterioration of Air Quality*. Albuquerque - Bernalillo County's implementation of the PSD program is governed by 20.11.61 NMAC, *Prevention of Significant Deterioration*.

3. The provisions governing major source operating permits pursuant to Title V of the Clean Air Act (CAA) are contained in 40 CFR Part 70, *State Operating Permit Programs*, and, within Albuquerque - Bernalillo County, at 20.11.42 NMAC, *Operating Permits*.

4. On **May 16, 2008**, the U.S. Environmental Protection Agency (EPA) promulgated "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)", effective 7/15/08 [Federal Register Vol. 73, No. 96, 28321-50]. These amendments affect 40 CFR 51.165, and have already been incorporated into the currently effective version of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21, and all but one amendment has been incorporated into the currently effective version of 20.11.61 NMAC. This remaining amendment adds an additional exemption for stationary sources, and is cited as 20.11.61.18.D.(3) NMAC in the proposed draft. The department has the discretion to exempt a proposed major stationary source or major modification from *Air Quality Analysis And Monitoring Requirements*, with respect to monitoring for a particular pollutant if. . .the pollutant is **not** listed in Table 3 of 20.11.61.28 NMAC, *Significant Monitoring Concentrations:*

5. On **October 20, 2010**, the EPA promulgated "PSD for $PM_{2.5}$ - Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)", effective 12/20/10 [Federal Register Vol. 75, No. 202, 64864-907]. These amendments affect 40 CFR 51.165, and have been incorporated into the proposed draft of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21 and have been incorporated into the proposed draft of 20.11.61 NMAC. One exception is for an amendment that would have been inserted at 20.11.61.15.B.(2) NMAC, re: "SILs" [see 40 CFR 51.166.(k)(2) & 52.21(k)(2)], but which EPA has conceded to be vacated and remanded to EPA, in response to *Sierra Club v. EPA*, another exception is the proposed SMC for $PM_{2.5}$ at 20.11.61.28 NMAC which was also vacated by the US Court of Appeals [Case No . 10-1413, decided January 22, 2013] (Document at http://www.cadc.uscourts.gov/internet/opinions.nsf/3964717CAD7BDA0085257AFB0055425F/$file/10-1413-1416378.pdf

Docket at http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA%25E2%2580%2593HQ%25E2%2580%2593OAR%25E2%2580%25932006%25E2%2580%25930605). Incorporation of changes to the federal PSD rule into the local PSD rule are required not only to keep the local PSD program up to date, but is also required for the Infrastructure SIP for the 2010 Nitrogen Dioxide (NO_2) National Ambient Air Quality Standards (NAAQS) because EPA requires that any i-SIP submittal should address any new or revised PSD program requirements. The NO_2 i-SIP is anticipated to be submitted to EPA in May, 2013.

"When a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause "significant" deterioration in air quality.

This final rule establishes several components for making PSD permitting determinations for fine particle pollution. These components address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program and include: increments, SILs, and a SMC.

PSD Increments (Increments)
A system of "increments" is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. An increment is the maximum allowable increase in ambient concentrations of a pollutant in an area. Increases above that level will be considered to significantly deteriorate air quality and cannot be allowed.

EPA set the PSD increments for $PM_{2.5}$ using the "percent of NAAQS" approach that Congress used to establish the original increments for particulate matter (PM) and sulfur dioxide (SO_2) in 1977. EPA also used this approach to establish NO_2 increment regulations on October 12, 2005. This approach treats $PM_{2.5}$ as a new pollutant, and does not impact the existing annual and 24-hour increments for PM, measured as "PM_{10}."

Significant Impact Levels (SILs)
SILs are a screening tool used to determine whether a proposed source's emissions will have a "significant" impact on air quality in the area. If an individual facility projects an increase in air quality impacts less than the corresponding SIL, its impact is said to be *de minimis* and the permit applicant would not be required to perform a more comprehensive, cumulative modeling analysis. A cumulative analysis involves measuring the impact of the new facility in addition to impacts from other existing sources in the area. If a cumulative modeling analysis indicates a violation of the NAAQS, the SILs may also be used to determine whether the proposed source's impact on a modeled violation is significant enough that it is considered to "cause or contribute to" the modeled violation of the NAAQS or increment.

EPA proposed SILs for $PM_{2.5}$ by scaling the existing SILs for PM_{10} by the ratio of the $PM_{2.5}$ NAAQS to the PM_{10} NAAQS for each applicable averaging period (annual and 24-hour)", but the U.S. Court of Appeals vacated and remanded to the EPA for further

consideration the portions of EPA's rule addressing 'SILs', except for the parts of EPA's rule codifying $PM_{2.5}$ SILs in 40 CFR § 56.165(b)(2).

Significant Monitoring Concentration (SMC)
The SMC, is a screening tool that may be used to determine if a source must submit to the permitting authority 1 year of pre-construction air quality monitoring data prior to constructing or modifying a facility.

If a proposed source's predicted impact is less than the SMC, the source's impact may be considered *de minimis* for monitoring purposes, and the reviewing authority (i.e. Department) could exempt the applicant from the preconstruction monitoring requirement. The reviewing authority also may exempt the applicant from the monitoring requirement if the existing air quality in the area is shown to be less than the SMC.

EPA based its final SMC for $PM_{2.5}$ on the "Lowest Detection Concentration" for ambient $PM_{2.5}$ concentrations - 2 µg/m3 (24-hour average). To account for uncertainty with precision, sample handling, and monitor variability, etc. to establish an SMC of 4 µg/m3 (24-hour average) for $PM_{2.5}$." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20100929factsheet.pdf)
The U.S. Court of Appeals has granted the Sierra Club's petition as to the parts of EPA' rule establishing a $PM_{2.5}$ SMC and vacated them because these parts of the rule exceed EPA's statutory authority [See 42 U.S.C. § 7607(d)(9)(c).

6. On **March 30, 2011**, the EPA promulgated "PSD and NNSR: Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions", effective 3/30/11 [Federal Register Vol. 76, No. 61, 17548-56]. These amendments affect 40 CFR 51.165, 51.166 and 52.21, and have been incorporated into the proposed drafts of 20.11.60 NMAC, and 20.11.61 NMAC.

This "interim rule to stays a December 2008 rule known as "the Fugitive Emissions Rule", which established new provisions for how fugitive emissions, those that do not pass through a stack, chimney, vent, or other similar opening, should be treated for NSR permitting. This stay replaces the stay EPA issued on March 31, 2010, that was to be effective through October 3, 2011.

The March 2010 stay of the Fugitive Emissions Rule inadvertently covered portions of the NSR permitting requirements in the CFR that should not have been stayed." This March 30, 2011 action stays the 2008 Fugitive Emissions Rule as originally intended and reverts the regulatory text back to the language that existed prior to the Fugitive Emissions Rule amendments that EPA is currently reconsidering.

The final rule will remain in effect until EPA completes its reconsideration of how fugitive emissions should be treated in the NSR permitting program.." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20110308fefactsheet.pdf)

7. On **July 20, 2011**, EPA promulgated "Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the PSD and Title V Programs", effective 7/20/11. "State, local, and tribal permitting authorities may adopt the deferral at their option but the deferral is effective upon publication for the PSD and Title V permit programs that are implemented by EPA." [Federal Register Vol. 76, No. 139, 43490-43508]. These amendments affect 40 CFR 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC. They also affect 40 CFR 70, *State Operating Permit Programs*, at 70.2, *Definitions*, and have been incorporated into the proposed draft of 20.11.42 NMAC, *Operating Permits*, at 20.11.42.7.II.(2) NMAC.

"This final action defers, for a period of three years, the application of the PSD and Title V permitting requirements to CO_2 emissions from bioenergy and other biogenic stationary sources (biogenic CO_2).

During this three year deferral period, EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources.

Biogenic CO_2 emissions
Biogenic CO_2 emissions are emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon. Examples include,: CO_2 generated from:

- the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- the combustion of biogas;
- fermentation during ethanol production;
- combustion of the biological fraction of municipal solid waste or biosolids; or tire-derived fuel; and
- combustion of biological material,." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/Biogenic_Fact_Sheet_June_2011.pdf)

Adoption of the biomass deferral provisions will allow the Division to avoid the need to determine net carbon cycle impacts for bio-energy projects until EPA has adopted a consistent and practical framework for such calculations, and avoid spending valuable time and resources evaluating sources that may have *de minimis*, neutral or positive impact on net CO_2 levels in the atmosphere.

8. On **July 12, 2012**, EPA promulgated "PSD and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits", effective 8/13/12 [Federal Register Vol. 77, No. 134, 41051-75]. These amendments affect 40 CFR 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC.

This "final rule that does not revise the GHG permitting thresholds that were established in Step 1 and Step 2 of the GHG Tailoring Rule. These emissions thresholds determine when CAA permits under the NSR PSD and title V Operating Permit programs are required for new and existing industrial facilities.

After evaluating comments on the proposed rule, and assessing the progress of GHG permitting to date, EPA has determined that state permitting authorities have not had sufficient time to develop necessary permitting infrastructure and to increase their GHG permitting expertise and capacity. By the same token, EPA and the state permitting authorities have not had the opportunity to develop and implement streamlining approaches. Therefore, at this time, it is not appropriate to apply PSD and Title V permitting requirements to additional, smaller sources of GHG emissions.

EPA is also finalizing an approach to assist state and local permitting authorities in streamlining the administration of PSD permits for GHGs. This action will improve the usefulness of plantwide applicability limitations (PALs) for GHG emissions by allowing GHG PALs to be established on a CO_2e basis in addition to the already available mass-basis.

Plantwide Applicability Limit (PAL)
A PAL is an emissions limit applied source-wide rather than to specific emissions points. With a PAL, a source can make changes to the facility without triggering PSD permitting requirements as long as emissions do not increase above the limit established by the PAL. This would allow companies to respond rapidly to changing market conditions while protecting the environment. EPA is also revising its regulations to allow a source that emits or has the potential to emit GHGs at levels above 100,000 tpy CO_2e but that have emissions of other regulated pollutants at minor source levels to apply for a GHG PAL while still maintaining its minor source status." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20120702fs.pdf)

Adoption of the PAL amendments for GHGs would allow the Division to provide greater operational flexibility to permitted sources by issuing GHG PALs to GHG-only sources without requiring the sources to become a major source. GHG-only sources could obtain a GHG PAL and remain a minor source as long as their GHG emissions remain below the PAL.

9. On **October 25, 2012**, EPA promulgated "Implementation of the NSR Program for $PM_{2.5}$: Amendment to the Definition of "Regulated NSR Pollutant" Concerning Condensable Particulate Matter", **effective 12/24/12** [Federal Register Vol. 77, No. 207, 65107-19]. These amendments affect 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC

These amendments to EPA's rules for the CAA NSR permitting program regard the definition of "regulated NSR pollutant," clarifying when "condensable particulate matter" should be measured.

"Condensable particulate matter is not directly emitted as a solid or liquid at the stack. Instead gaseous emissions such as sulfuric acid mist, ammonium sulfate, and certain metal vapors condense upon cooling and dilution in the ambient air to form solid or liquid particles following discharge from the stack.

When an industrial facility applies for a NSR permit to construct or modify an emissions source, it must show that it does not interfere with an area's ability to meet or maintain the NAAQS. Since EPA has established NAAQS for $PM_{2.5}$ and PM_{10}, and condensable particulate matter emissions contribute to monitored levels of $PM_{2.5}$ and PM_{10}, then the impact of those emissions on monitored air quality levels of $PM_{2.5}$ and PM_{10} must be considered as part of a source's permit.

This final rule continues to require that condensable particulate matter be included as part of the emissions measurements for regulation of $PM_{2.5}PM_{10}$.

This final rule removes the inadvertent requirement in the 2008 $PM_{2.5}$ NSR Implementation Rule, that measurements of condensable particulate matter emissions be included as part of the measurement and regulation of "particulate matter emissions."

The terminology "particulate matter emissions" includes particles that are significantly larger than either $PM_{2.5}$ or PM_{10}, and is used primarily to measure compliance with the EPA's existing New Source Performance Standards for particulate matter. The amount of "particulate matter emissions" that a source has the potential to emit is not intended to be used for determining whether an area can attain or maintain either of the existing sets of standards for particle pollution." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20121012fs.pdf)

10. It is anticipated that the hearing will take approximately 1 hour or less.

11. The proposed Public Review Drafts of 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*, are attached as AQD Exhibits #1a, 1b, & 1c respectively.

Respectfully submitted,

Mary Lou Leonard, Director
Environmental Health Department
City of Albuquerque

CERTIFICATION

I hereby certify that the original and 15 copies of this **Petition to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed As a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP)**, were delivered to the following person on January 29, 2013.

Elizabeth Jones
Air Quality Control Board Liaison
Environmental Health Department
One Civic Plaza, NW, Suite 3023
Albuquerque, New Mexico 87102

and that a copy was provided to:

Bill Grantham, Attorney to the Air Quality Control Board
at wggrantham@gmail.com

Mary Lou Leonard, Director,
Environmental Health Department
City of Albuquerque

AQP Exhibit 8b

BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND 20.11.60 NMAC, *PERMITTING IN NONATTAINMENT AREAS*; 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT DETERIORATION*; AND 20.11.42 NMAC, *OPERATING PERMITS*. THE AMENDMENTS TO 20.11.42 NMAC ARE PROPOSED AS A REVISION TO THE TITLE V OPERATING PERMIT PROGRAM, AND THE AMENDMENTS TO 20.11.60 NMAC AND 20.11.61 NMAC ARE PROPOSED AS A REVISION TO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2013-1

Air Quality Division,
Environmental Health Department,
City of Albuquerque, Petitioner

CITY OF ALBUQUERQUE'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

Pursuant to 20.11.82.20 NMAC, *Rulemaking Procedures – Air Quality Control Board*, the City of Albuquerque Environmental Health Department, Air Quality Division ("the Division") hereby submits its Notice of Intent to present technical testimony (NOI) in this proceeding.

1. **The person for whom the witness will testify.**

   City of Albuquerque Environmental Health Department, Air Quality Division

2. **The name and qualifications of each technical witness.**

   Neal T. Butt. Environmental Health Scientist, Control Strategies Section, Air Quality Division. M.S. Biology (Wildlife Biology), University of North Dakota; B.S. Biology (Zoology), University of New Mexico; B.A. Environmental Planning & Design, UNM; A.A.S. Criminal Justice, Central New Mexico Community College; A.A.S. Environmental Protection

Technology, CNM; WERC Waste Management Certificate, UNM Chemical & Nuclear Engineering Department. Employed by the City of Albuquerque's Environmental Health Department for 15 + years; the last 12 of which have been in the Air Quality Division.

Chief responsibility is to promulgate air quality legislation through the Albuquerque – Bernalillo County Air Quality Control Board for implementation within the County of Bernalillo, including research, drafting and editing of technical documents, hearing preparation, testifying, and submittal to EPA for approval. Develop and implement long range plans, programs and special projects in the field of municipal environmental health. Research and refine strategies for achieving improved environmental health standards. Collaborate with other disciplines, follow schedules and budget commitments, work independently, and problem solve.

Isreal Tavarez. Environmental Health Manager, Permitting Section, Air Quality Division. M.S. Chemical Engineering, New Mexico State University; B.S. Chemical Engineering, NMSU. Registered Professional Engineer (New Mexico). Employed by the City of Albuquerque's Environmental Health Department, Air Quality Division for 17 + years. Previously employed by the State of New Mexico, Air Quality Bureau (1994-1996).

Main responsibility is to manage the air quality stationary source permitting program which includes reviewing and approving all air quality stationary source permits to ensure the permits are issued in accordance with local, state, and federal regulations.

Dario Rocha. Supervisor, Permitting and Technical Analysis Section, Air Quality Division. B.S. Mechanical Engineering, New Mexico State University. Employed by the City

of Albuquerque's Environmental Health Department, Air Quality Division for 13 + years. Previously employed by the State of New Mexico, Air Quality Bureau (1997-2000).

Chief responsibility is to supervise and direct staff in the Permitting & Technical Analysis Section for the Air Quality Division. Assign air quality permit applications for NSR and Title V air permitting programs. Make applicability determinations for air quality permitting. Review and approve portable stationary source relocations within Bernalillo County. Prepare air quality permits for minor and major stationary sources. Responsible for ensuring all air quality permits for minor and major stationary sources are issued or denied within their respective regulatory or statutory timeframes. Responsible for ensuring that stationary source air quality emissions inventories are prepared in accordance with 40 CFR 51 Subpart A.

3. <u>Summary and Estimated Duration of Testimony</u>

Mr. Butt's written testimony is attached as AQD Exhibit # 3. Mr. Butt will testify that this revision to the SIP should be approved. As grounds, Petitioner states the following:

1. The provisions governing state implementation of the Nonattainment New Source Review (NNSR) permit program are contained in the CFR, Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 165, *Permit Requirements*. Albuquerque - Bernalillo County's implementation of this program is governed by 20.11.60 NMAC, *Permitting in Nonattainment Areas*.

2. The provisions governing state implementation of the Prevention of Signification Deterioration (PSD) permit program are contained in the CFR Title 40, *Protection of*

Environment, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 166, *Prevention of Significant Deterioration of Air Quality*. The provisions governing direct federal implementation of PSD are found at Title 40, *Protection of Environment*, Part 52, *Approval and Promulgation of Implementation Plans*, Subpart A, *General Provisions*, Section 21, *Prevention of Significant Deterioration of Air Quality*. Albuquerque - Bernalillo County's implementation of the PSD program is governed by 20.11.61 NMAC, *Prevention of Significant Deterioration*.

3. The provisions governing major source operating permits pursuant to Title V of the Clean Air Act (CAA) are contained in 40 CFR Part 70, *State Operating Permit Programs*, and, within Albuquerque - Bernalillo County, at 20.11.42 NMAC, *Operating Permits*.

4. On **May 16, 2008**, the U.S. Environmental Protection Agency (EPA) promulgated "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)", effective 7/15/08 [Federal Register Vol. 73, No. 96, 28321-50]. These amendments affect 40 CFR 51.165, and have already been incorporated into the currently effective version of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21, and all but one amendment has been incorporated into the currently effective version of 20.11.61 NMAC. This remaining amendment adds an additional exemption for stationary sources, and is cited at 20.11.61.18.D.(3) NMAC in the proposed draft. The department has the discretion to exempt a proposed major stationary source or major modification from *Air Quality Analysis And Monitoring Requirements*, with respect to monitoring for a particular pollutant if. . .the pollutant is ***not*** listed in Table 3 of 20.11.61.28 NMAC, *Significant Monitoring Concentrations:*

5. On **October 20, 2010**, the EPA promulgated "PSD for $PM_{2.5}$ - Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)", effective 12/20/10 [Federal Register Vol. 75, No. 202, 64864-907]. These amendments affect 40 CFR 51.165, and have been incorporated into the proposed draft of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21 and have been incorporated into the proposed draft of 20.11.61 NMAC. One exception is for an amendment that would have been inserted at 20.11.61.15.B.(2) NMAC, re: "SILs" [see 40 CFR 51.166.(k)(2) & 52.21(k)(2)], but which EPA has conceded to be vacated and remanded to EPA, in response to *Sierra Club v. EPA*. Another exception is the proposed SMC for $PM_{2.5}$ at 20.11.61.28 NMAC which was also vacated by the US Court of Appeals [Case No. 10-1413, decided January 22, 2013] (Document at http://www.cadc.uscourts.gov/internet/opinions.nsf/3964717CAD7BDA0085257AFB0055425F/$file/10-1413-1416378.pdf

Docket at

http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA%25E2%2580%2593HQ%25E2%2580%2593OAR%25E2%2580%25932006%25E2%2580%25930605). Incorporation of changes to the federal PSD rule into the local PSD rule are required not only to keep the local PSD program up to date, but is also required for the Infrastructure SIP for the 2010 Nitrogen Dioxide (NO_2) National Ambient Air Quality Standards (NAAQS) because EPA requires that any i-SIP submittal should address any new or revised PSD program requirements. The NO_2 i-SIP is anticipated to be submitted to EPA in June, 2013.

"When a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause "significant" deterioration in air quality.

This final rule establishes several components for making PSD permitting determinations for fine particle pollution. These components address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program and include: increments, SILs, and a SMC.

PSD Increments (Increments)

A system of "increments" is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. An increment is the maximum allowable increase in ambient concentrations of a pollutant in an area. Increases above that level will be considered to significantly deteriorate air quality and cannot be allowed.

EPA set the PSD increments for $PM_{2.5}$ using the "percent of NAAQS" approach that Congress used to establish the original increments for particulate matter (PM) and sulfur dioxide (SO_2) in 1977. EPA also used this approach to establish NO_2 increment regulations on October 12, 2005. This approach treats $PM_{2.5}$ as a new pollutant, and does not impact the existing annual and 24-hour increments for PM, measured as "PM_{10}."

Significant Impact Levels (SILs)

SILs are a screening tool used to determine whether a proposed source's emissions will have a "significant" impact on air quality in the area. If an individual facility projects an increase in air quality impacts less than the corresponding SIL, its impact is said to be *de minimis* and the permit applicant would not be required to perform a more comprehensive, cumulative modeling analysis. A cumulative analysis involves measuring the impact of the new facility in addition to impacts from other existing sources in the area. If a cumulative modeling analysis indicates a violation of the NAAQS, the SILs may also be used to determine whether the proposed source's impact on a modeled violation is significant enough that it is considered to "cause or contribute to" the modeled violation of the NAAQS or increment.

EPA proposed SILs for $PM_{2.5}$ by scaling the existing SILs for PM_{10} by the ratio of the $PM_{2.5}$ NAAQS to the PM_{10} NAAQS for each applicable averaging period (annual and 24-hour)", but the U.S. Court of Appeals vacated and remanded to the EPA for further consideration the portions of EPA's rule addressing 'SILs', except for the parts of EPA's rule codifying $PM_{2.5}$ SILs in 40 CFR § 56.165(b)(2).

Significant Monitoring Concentration (SMC)

The SMC, is a screening tool that may be used to determine if a source must submit to the permitting authority one year of pre-construction air quality monitoring data prior to constructing or modifying a facility.

If a proposed source's predicted impact is less than the SMC, the source's impact may be considered *de minimis* for monitoring purposes, and the reviewing authority (i.e. Department)

could exempt the applicant from the preconstruction monitoring requirement. The reviewing authority also may exempt the applicant from the monitoring requirement if the existing air quality in the area is shown to be less than the SMC.

EPA based its final SMC for $PM_{2.5}$ on the "Lowest Detection Concentration" for ambient $PM_{2.5}$ concentrations - 2 µg/m3 (24-hour average). To account for uncertainty with precision, sample handling, and monitor variability, etc. to establish an SMC of 4 µg/m3 (24-hour average) for $PM_{2.5}$." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20100929factsheet.pdf)
The U.S. Court of Appeals has granted the Sierra Club's petition as to the parts of EPA' rule establishing a $PM_{2.5}$ SMC and vacated them because these parts of the rule exceed EPA's statutory authority [See 42 U.S.C. § 7607(d)(9)(c).

6. On **March 30, 2011**, the EPA promulgated "PSD and NNSR: Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions", effective 3/30/11 [Federal Register Vol. 76, No. 61, 17548-56]. These amendments affect 40 CFR 51.165, 51.166 and 52.21, and have been incorporated into the proposed drafts of 20.11.60 NMAC, and 20.11.61 NMAC.

This "interim rule to stays a December 2008 rule known as "the Fugitive Emissions Rule", which established new provisions for how fugitive emissions, those that do not pass through a stack, chimney, vent, or other similar opening, should be treated for NSR permitting. This stay replaces the stay EPA issued on March 31, 2010, that was to be effective through October 3, 2011.

The March 2010 stay of the Fugitive Emissions Rule inadvertently covered portions of the NSR permitting requirements in the CFR that should not have been stayed." This March 30, 2011 action stays the 2008 Fugitive Emissions Rule as originally intended and reverts the regulatory text back to the language that existed prior to the Fugitive Emissions Rule amendments that EPA is currently reconsidering.

The final rule will remain in effect until EPA completes its reconsideration of how fugitive emissions should be treated in the NSR permitting program." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20110308fefactsheet.pdf)

7. On **July 20, 2011**, EPA promulgated "Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the PSD and Title V Programs", effective 7/20/11. "State, local, and tribal permitting authorities may adopt the deferral at their option but the deferral is effective upon publication for the PSD and Title V permit programs that are implemented by EPA." [Federal Register Vol. 76, No. 139, 43490-43508]. These amendments affect 40 CFR 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC. They also affect 40 CFR 70, *State Operating Permit Programs*, at 70.2, *Definitions*, and have been incorporated into the proposed draft of 20.11.42 NMAC, *Operating Permits*, at 20.11.42.7.II.(2) NMAC.

"This final action defers, for a period of three years, the application of the PSD and Title V permitting requirements to CO_2 emissions from bioenergy and other biogenic stationary sources (biogenic CO_2).

During this three year deferral period, EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources.

Biogenic CO_2 emissions

Biogenic CO_2 emissions are emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon. Examples include, CO_2 generated from:

- the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- the combustion of biogas;
- fermentation during ethanol production;
- combustion of the biological fraction of municipal solid waste or biosolids; or tire-derived fuel; and
- combustion of biological material,." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/Biogenic_Fact_Sheet_June_2011.pdf)

Adoption of the biomass deferral provisions will allow the Division to avoid the need to determine net carbon cycle impacts for bio-energy projects until EPA has adopted a consistent

and practical framework for such calculations, and avoid spending valuable time and resources evaluating sources that may have *de minimis*, neutral or positive impact on net CO_2 levels in the atmosphere.

8. On **July 12, 2012**, EPA promulgated "PSD and Title V Greenhouse Gas (GHG) Tailoring Rule Step 3 and GHG Plantwide Applicability Limits", effective 8/13/12 [Federal Register Vol. 77, No. 134, 41051-75]. These amendments affect 40 CFR 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC.

This "final rule that does not revise the GHG permitting thresholds that were established in Step 1 and Step 2 of the GHG Tailoring Rule. These emissions thresholds determine when CAA permits under the NSR PSD and Title V Operating Permit programs are required for new and existing industrial facilities.

After evaluating comments on the proposed rule, and assessing the progress of GHG permitting to date, EPA has determined that state permitting authorities have not had sufficient time to develop necessary permitting infrastructure and to increase their GHG permitting expertise and capacity. By the same token, EPA and the state permitting authorities have not had the opportunity to develop and implement streamlining approaches. Therefore, at this time, it is not appropriate to apply PSD and Title V permitting requirements to additional, smaller sources of GHG emissions.

EPA is also finalizing an approach to assist state and local permitting authorities in streamlining the administration of PSD permits for GHGs. This action will improve the usefulness of PALs for GHG emissions by allowing GHG PALs to be established on a CO_2e basis in addition to the already available mass-basis.

Plantwide Applicability Limit (PAL)

A PAL is an emissions limit applied source-wide rather than to specific emissions points. With a PAL, a source can make changes to the facility without triggering PSD permitting requirements as long as emissions do not increase above the limit established by the PAL. This would allow companies to respond rapidly to changing market conditions while protecting the environment. EPA is also revising its regulations to allow a source that emits or has the potential to emit GHGs at levels above 100,000 tpy CO_2e but that have emissions of other regulated pollutants at minor source levels to apply for a GHG PAL while still maintaining its minor source status." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20120702fs.pdf)

Adoption of the PAL amendments for GHGs would allow the Division to provide greater operational flexibility to permitted sources by issuing GHG PALs to GHG-only sources without requiring the sources to become a major source. GHG-only sources could obtain a GHG PAL and remain a minor source as long as their GHG emissions remain below the PAL.

9. On **October 25, 2012**, EPA promulgated "Implementation of the NSR Program for $PM_{2.5}$: Amendment to the Definition of "Regulated NSR Pollutant" Concerning Condensable Particulate Matter", **effective 12/24/12** [Federal Register Vol. 77, No. 207, 65107-19]. These

amendments affect 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC

These amendments to EPA's rules for the CAA NSR permitting program regard the definition of "regulated NSR pollutant," clarifying when "condensable particulate matter" should be measured.

"Condensable particulate matter is not directly emitted as a solid or liquid at the stack. Instead gaseous emissions such as sulfuric acid mist, ammonium sulfate, and certain metal vapors condense upon cooling and dilution, in the ambient air, to form solid or liquid particles following discharge from the stack.

When an industrial facility applies for a NSR permit to construct or modify an emissions source, it must show that it does not interfere with an area's ability to meet or maintain the NAAQS. Since EPA has established NAAQS for $PM_{2.5}$ and PM_{10}, and *condensable particulate matter* emissions contribute to monitored levels of $PM_{2.5}$ and PM_{10}, then the impact of those emissions on monitored air quality levels of $PM_{2.5}$ and PM_{10} must be considered as part of a source's permit.

This final rule continues to require that *condensable particulate matter* be included as part of the emissions measurements for regulation of $PM_{2.5}PM_{10}$.

This final rule removes the inadvertent requirement in the 2008 $PM_{2.5}$ NSR Implementation Rule, that measurements of *condensable particulate matter* emissions be included as part of the measurement and regulation of '*particulate matter emissions*.'"

The terminology "'*particulate matter emissions*' includes particles that are significantly larger than either $PM_{2.5}$ or PM_{10}, and is used primarily to measure compliance with the EPA's existing New Source Performance Standards for particulate matter. The amount of '*particulate matter emissions*' that a source has the potential to emit is not intended to be used for determining whether an area can attain or maintain either of the existing sets of standards for particle pollution." (EPA Fact Sheet, http://www.epa.gov/nsr/documents/20121012fs.pdf)

4. Text of Recommended Revisions to the New Mexico State Implementation Plan

The Division recommends adoption of the proposed amendments to 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits* as proposed in the Public Review Drafts, shown as AQD Exhibits # 1a, #1b and #1c respectively, which are attached to the Petition to Amend, shown as AQD Exhibit #1, filed January 29, 2013. The Amendments to 20.11.42 NMAC will be submitted to EPA as a revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC will be submitted to EPA as a revision to the SIP.
Mr. Butt's testimony is anticipated to take approximately 30 minutes.

5. List and Description of Exhibits

The Division has attached the following exhibits to this NOI:

Exhibit Number	Title of Exhibit
AQD Exhibit 1	Petition to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed As a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP)
AQD Exhibit 1a	Public Review Draft 20.11.60 NMAC, *Permitting In Nonattainment Areas* {attached to AQD Exhibit 1}
AQD Exhibit 1b	Public Review Draft 20.11.61 NMAC, *Prevention Of Significant Deterioration* {attached to AQD Exhibit 1}
AQD Exhibit 1c	Public Review Draft 20.11.42 NMAC, *Operating Permits* {attached to AQD Exhibit 1}
AQD Exhibits 2a/b/c	Notice of Proposed Rulemaking: Albuquerque Journal, 2/17/13 {2a}; NM Register, 2/28/13 {2b}; and Air Quality Announce List Serve, 2/15/13 {2c}
AQD Exhibits 3	Direct Testimony
AQD Exhibit 4	Staff Proposed Floor Amendments

6. **Reservation of Rights**

This NOI is based on the Division's Petition. The Division reserves the right to call any person to testify and to present any exhibit in response to another NOI or public comment filed in this matter or to any testimony or exhibit offered at the public hearing. The Division also

reserves the right to call any person as a rebuttal witness and to present any exhibit in support thereof.

Respectfully submitted,

Neal Butt
Environmental Health Scientist
Air Quality Division
Environmental Health Department
One Civic Plaza, NW, Suite 3023
Albuquerque, New Mexico 87102
(505) 768-2660

CERTIFICATION

I hereby certify that on March 20 2013, an original and 15 copies of this NOI, with attached exhibits were delivered to the following person for filing.

Elizabeth Jones
Air Quality Control Board Liaison
Air Quality Division
Environmental Health Department
One Civic Plaza, NW, Suite 3023
Albuquerque, New Mexico 87103

And that on March 20 2013, a copy of this NOI with attached exhibits was sent to the Attorney for the Board, Bill Grantham, at the following e-mail address:

wggrantham@gmail.com

Neal Butt
Environmental Health Scientist
Air Quality Division
Environmental Health Department

AQP Exhibit 8c

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

***Chair*, Dona Upson, M. D., City** | **Ms. Jane Cudney-Black, City**
Ms. Kelsey Curran, City | **Mr. Jens Deichmann, County**
Robert Goldstein, M. D., County | **Dr. Naomi Kistin, County**
Mr. Jack Sullivan, City | **Non-voting members: BCPC Liaison-Dr. Lenton Malry; COA/EPC Liaison-vacant; Secretary to the Board-Ms. Margaret Nieto, COA/AQD**

Date: April 10, 2013 (Wednesday) **Time:** 5:30 p.m.	**Location:** Vincent E. Griego Chambers Albuquerque-Bernalillo County Government Center One Civic Plaza NW Albuquerque, NM 87102
General inquires regarding this agenda may be directed to Elizabeth Jones (505) 768-2601 (ejones@cabq.gov). For documents related to each agenda item, please go to http://www.cabq.gov/airquality/air-quality-control-board/events/air-quality-control-board-meeting-april-10-2013/	

Hearing

Proposal to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed as a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP) - (AQCB Petition No. 2013-1).

Regular Monthly Meeting Draft Agenda

CALL TO ORDER

Item #1 Approval of Agenda (Chair)

Item #2 Approval of March 13, 2013 Meeting Minutes (Chair)

PUBLIC COMMENT

Public Comment will be limited to items unrelated to Action Items on the Agenda. Comments related to Action Items will be heard when the Item is heard.

ACTION ITEMS

Item #3 Decision on Proposal to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed as a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP) - (AQCB Petition No. 2013-1, Resolution # 2013-2) – Neal Butt, EH Scientist, AQD

Item #4 Election of Chair and Vice Chair for 2013-2014 (Chair)

Item #5 Selection of Board members to serve as non-voting advisory member and alternate to Mid-Region Council of Governments (MRCOG) Transportation Program Task Group (TPTG) and Transportation Coordinating Committee (TCC) (Chair)

Item #6 Selection of Board member to serve as Liaison to the Governor's Task Force on Environmental Justice (Chair)

Item #7 Acceptance of Final 2011 Regional Sulfur Dioxide (SO_2) Emissions and Milestone Report – Neal Butt, EH Scientist, AQD

Item #8 Request for a hearing in the matter of the Petition to Adopt a State Implementation Plan (SIP) for NO_2 to Address Sections 110(a)(1) and (2) of the Federal Clean Air Act (CAA), 42 U.S.C. § 7410(a)(1) and (2), hereafter referred to as the "NO_2 Infrastructure SIP" (AQCB Petition No. 2013-3) – Neal Butt, EH Scientist, AQD

Item #9 Request for a hearing in the matter of the Petition to Amend the State Boards State Implementation Plan (SIP) to Satisfy the Requirements of the Clean Air Act Section 128(a)- State Boards [§7428, U.S.C.A.]; hereafter referred to as the "State Boards SIP Revision" (AQCB Petition No. 2013-4) – Neal Butt, EH Scientist, AQD

REPORTS Division Report. Staff available for questions.

OTHER BUSINESS

Item #10 Notification of Order Dismissing the Hearing on the Merits Regarding the Denial of a Wood Burning Exemption, Michael S. Fulp, Petitioner (AQCB Petition No. 2013-2) – Bill Grantham, Attorney for the AQCB (held over from March 13, 2013 AQCB meeting agenda)

ADJOURNMENT

NEXT SCHEDULED BOARD MEETING: May 8, 2013 5:30 p.m.

Members of the public who wish to address the Board, may do so by signing up with the Board Clerk and indicating either the agenda item they intend to address, or whether they wish to make a general public comment. Sign up must occur prior to the Board's consideration of each item. Each person will be given up to two minutes to speak.

Notice to persons with disabilities: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

AQP Exhibit 8d

[Direct Testimony for Petition to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed As a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP)]

SLIDE 1

Thank you Chairman / Madam Chair _____, and members of the Board. My name is Neal Butt. I am an Environmental Health Scientist with the Air Quality Division, Control Strategies Section. I am here to respectfully request a hearing before the Air Board,

IN THE MATTER OF THE PETITION TO AMEND 20.11.60 NMAC, *PERMITTING IN NONATTAINMENT AREAS*; 20.11.61 NMAC, *PREVENTION OF SIGNIFICANT DETERIORATION*; AND 20.11.42 NMAC, *OPERATING PERMITS*. THE AMENDMENTS TO 20.11.42 NMAC ARE PROPOSED AS A REVISION TO THE TITLE V OPERATING PERMIT PROGRAM, AND THE AMENDMENTS TO 20.11.60 NMAC AND 20.11.61 NMAC ARE PROPOSED AS A REVISION TO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

AQCB Petition No. 2013-1

SLIDE 2

The provisions governing state implementation of the Nonattainment New Source Review (NNSR) permit program are contained in the CFR, Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 165, *Permit Requirements*. Albuquerque - Bernalillo County's implementation of this program is governed by 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

The provisions governing state implementation of the Prevention of Signification Deterioration (PSD) permit program are contained in the CFR Title 40, *Protection of Environment*, Part 51, *Requirements for Submittal of Implementation Plans*, Subpart I, *Review of New Sources and Modifications*, Section 166, *Prevention of Significant Deterioration of Air Quality*. The provisions governing direct federal implementation of PSD are found at Title 40, *Protection of Environment*, Part 52, *Approval and Promulgation of Implementation Plans*, Subpart A, *General Provisions*, Section 21, *Prevention of Significant Deterioration of Air Quality*. Albuquerque - Bernalillo County's implementation of the PSD program is governed by 20.11.61 NMAC, *Prevention of Significant Deterioration*.

The provisions governing major source operating permits pursuant to Title V of the Clean Air Act (CAA) are contained in 40 CFR Part 70, *State Operating Permit Programs*, and, in Albuquerque - Bernalillo County, at 20.11.42 NMAC, *Operating Permits*.

SLIDE 3

On **May 16, 2008**, the U.S. Environmental Protection Agency (EPA) promulgated "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)", effective 7/15/08 [Federal Register Vol. 73, No. 96, 28321-50]. These amendments affect 40 CFR 51.165, and have already been incorporated into the currently effective version of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21, and all but one amendment has been incorporated into the currently effective version of 20.11.61 NMAC. This remaining amendment adds an additional stationary source exemption, and is cited as 20.11.61.18.D.(3) NMAC in the proposed draft.

SLIDE 4

On **October 20, 2010**, the EPA promulgated "PSD for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) - Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)", effective 12/20/10 [Federal Register Vol. 75, No. 202, 64864-907]. These amendments affect 40 CFR 51.165, and have been incorporated into the proposed draft of 20.11.60 NMAC. These amendments also affect 40 CFR 51.166 and 52.21 and have been incorporated into the proposed draft of 20.11.61 NMAC. One exception is for an amendment that would have been inserted at 20.11.61.15.B.(2) NMAC, re: "SILs" [see 40 CFR 51.166.(k)(2) & 52.21(k)(2)], but which EPA has conceded to be vacated and remanded to EPA, in response to *Sierra Club v. EPA*; another exception is the proposed SMC for $PM_{2.5}$ at 20.11.61.28 NMAC, which was also vacated by the US Court of Appeals [Case No . 10-1413, decided January 22,

2013]. Incorporation of changes to the federal PSD rule into the local PSD rule are required not only to keep the local PSD program up to date, but is also required for the Infrastructure SIP ("i-SIP") for the 2010 Nitrogen Dioxide (NO_2) NAAQS because EPA requires that any i-SIP submittal should address any new or revised PSD program requirements. The NO2 i-SIP is anticipated to be submitted to EPA in June, 2013.

SLIDE 5

On **March 30, 2011**, the EPA promulgated "PSD and NNSR: Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions", effective 3/30/11 [Federal Register Vol. 76, No. 61, 17548-56]. These amendments affect 40 CFR 51.165, 51.166 and 52.21, and have been incorporated into the proposed drafts of 20.11.60 NMAC, and 20.11.61 NMAC.

SLIDE 6

On **July 20, 2011**, EPA promulgated "Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the PSD and Title V Programs", effective 7/20/11. "State, local, and tribal permitting authorities may adopt the deferral at their option but the deferral is effective upon publication for the PSD and Title V permit programs that are implemented by EPA." [Federal Register Vol. 76, No. 139, 43490-43508]. These amendments affect 40 CFR 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC. They also affect 40 CFR 70, *State Operating*

Permit Programs, at 70.2, *Definitions*, and have been incorporated into the proposed draft of 20.11.42 NMAC, *Operating Permits*, at 20.11.42.7.II.(2) NMAC.

Adoption of the biomass deferral provisions will allow the Division to avoid the need to determine net carbon cycle impacts for bio-energy projects until EPA has adopted a consistent and practical framework for such calculations, and prevent the Division from spending valuable time and resources evaluating sources that may have de minimis, neutral or positive impact on net CO_2 levels in the atmosphere.

SLIDE 7

On **July 12, 2012**, EPA promulgated "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits", effective 8/13/12 [Federal Register Vol. 77, No. 134, 41051-75]. These amendments affect 40 CFR 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC.

Adoption of the PAL amendments for GHGs would allow the Division to provide greater operational flexibility to permitted sources by issuing GHG PALs to GHG-only sources without requiring the sources to become a major source. GHG-only sources could obtain a GHG PAL and remain a minor source as long as their GHG emissions remain below the PAL.

SLIDE 8

On **October 25, 2012**, EPA promulgated "Implementation of the NSR Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$): Amendment to the Definition of "Regulated NSR Pollutant" Concerning Condensable Particulate Matter", **effective 12/24/12** [Federal Register Vol. 77, No. 207, 65107-19]. These amendments affect 51.166 and 52.21, and have been incorporated into the proposed draft of 20.11.61 NMAC

SLIDE 9

This hearing has been legally noticed as shown by AQD Exhibits 2a, 2b, and 2c. There have not been any negative comments received regarding this proposal, only a verbal "No comment" received by EPA. Therefore, the Environmental Health Department of the City of Albuquerque, by and through the Air Quality Division, respectfully asks the Albuquerque-Bernalillo County Air Quality Control Board to adopt amendments to 20.11.60 NMAC, *Permitting In Nonattainment Areas* shown as AQD Exhibit #1a; 20.11.61 NMAC, *Prevention Of Significant Deterioration*, shown as AQD Exhibit #1b; and 20.11.42 NMAC, *Operating Permits*, shown as AQD Exhibit #1c; and submit the amended 20.11.42 NMAC to EPA as a proposed revision to the Title V Operating Permit Program, and the amended 20.11.60 NMAC and 20.11.61 NMAC as proposed revisions to the New Mexico State Implementation Plan for Air Quality (SIP).

SLIDE 10

Questions

That concludes my testimony, and I request that exhibits 1, 1a, 1b, 1c, 2a, 2b, 2c, 3 and 4 be moved into the record {"so moved"}, and I stand for questions

AQP Exhibit 8e

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

MINUTES – April 10, 2013
Regular Meeting
Vincent E. Griego chambers
Albuquerque-Bernalillo County Government Center
One Civic Plaza NW, Albuquerque, NM 87102

AQCB MEMBERS PRESENT
Dr. Dona Upson (City), Chair
Ms. Kelsey Curran (City), Vice Chair
Ms. Jane Cudney-Black (City)
Mr. Jens Deichmann (County)
Dr. Lenton Malry (BCPC Liaison)
Mr. Jack Sullivan (City)

AQCB MEMBERS ABSENT
Dr. Naomi Kistin (County)
Robert A. Goldstein, M.D. (County)

STAFF PRESENT
Mr. Neal Butt, EH Scientist, AQD
Mr. Bill Grantham, Air Board Attorney
Ms. Liz Jones, AQCB Liaison
Ms. Adelia Kearny, Deputy City Attorney
Ms. Mary Lou Leonard, Director, EHD
Mr. Fabian Macias, Air Quality Official
Mr. Danny Nevarez, EH Technical Program Manager II, EHD
Ms. Margaret Nieto, AQCB Secretary, EH Supervisor
Mr. Dario Rocha, EH Supervisor, AQD
Mr. Isreal Tavarez, EH Manager, Permitting
Mr. Bill Westmoreland, Deputy Director, EHD

VISITORS PRESENT.
Mr. Jonas Berge
Mr. Andy Carrasco
Dr. Margaret Menache
Mr. Pat Toledo
Mr. Doug Vancil
Ms. Julie Vancil, Julie's Hair Studio

Hearing

Proposal to Amend 20.11.60 NMAC, *Permitting In Nonattainment Areas*; 20.11.61 NMAC, *Prevention Of Significant Deterioration*; and 20.11.42 NMAC, *Operating Permits*. The Amendments to 20.11.42 NMAC Are Proposed as a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP) - (AQCB Petition No. 2013-1).

Hearing Officer Bill Grantham opened the hearing at 5:40 pm with Air Quality Control Board (Board) members Dr. Dona Upson, Ms. Kelsey Curran, Ms. Jane Cudney-Black, Mr. Jens Deichmann, Dr. Lenton Malry and Mr. Jack Sullivan present. Neal Butt, Environmental Health Scientist, AQD provided testimony. Isreal Tavarez, Permitting Section Manager, Dario Rocha, Permitting Technical Analysis Supervisor and Neal Butt answered

questions posed by Hearing Officer Grantham. There were no public comments. After hearing testimony and discussion, Hearing Officer Grantham closed the hearing at 6:10 pm.

Meeting Minutes

CALL TO ORDER

The meeting was called to order by Chair Dr. Dona Upson at 6:10 pm on April 10, 2013 with six Board members present: Chair Dr. Dona Upson, Ms. Jane Cudney-Black, Ms. Kelsey Curran, Mr. Jens Deichmann, Dr. Lenton Malry and Mr. Jack Sullivan.

The Environmental Health Department Director, Ms. Mary Lou Leonard, welcomed the new members Ms. Cudney-Black and Mr. Deichmann to the Board.

Item #1 **Approval of Agenda (Chair)**

A motion to approve the agenda was made by Member Curran, seconded by Member Sullivan and approved by a unanimous vote of 5-0.

Item #2 **Approval of March 13, 2013 Meeting Minutes (Chair)**

A motion to approve the March 13, 2013 minutes was made by Member Deichmann, seconded by member Curran and approved by a unanimous vote of 5-0.

PUBLIC COMMENT

Public comment was made regarding Smith's Food & Drug Centers, Inc.'s Hearing on the Merits Regarding Authority to Construct Permit #2037-M1 by Mr. Pat Toledo, Mr. Andy Carrasco and Ms. Julie Vancil.

ACTION ITEMS

Item #3 **Decision on Proposal to Amend 20.11.60 NMAC, *Permitting in Nonattainment Areas;* 20.11.61 NMAC, *Prevention of Significant Deterioration; and* 20.11.42 NMAC, *Operating Permits.* The Amendments to 20.11.472 NMAC are proposed as a Revision to the Title V Operating Permit Program, and the Amendments to 20.11.60 NMAC and 20.11.61 NMAC Are Proposed As a Revision to the New Mexico State Implementation Plan for Air Quality (SIP) – (AQCB Petition No. 2013-1, Resolution # 2013-2) – Neal Butt, EH Scientists, AQD**

Member Curran read Resolution 2013-2 into the record with the following amendments:

1. On page 8, line 23 of exhibit #1b PRD 20.11.61 NMAC, Prevention of Significant Deterioration, insert the following after "Clean Unit" and delete "{" and add: "as defined in 40 CFR 51.166 (b)(3)(iii)(c) & FR Vol 76 No. 61, 3/30/11, p. 14554."
2. On page 2 line 11 of Resolution 2013-2 add an "s" to "Exhibit" and insert "and 4a" after "4".

A motion to adopt amended Resolution 2013-2 was made by Member Sullivan, seconded by Member Curran and passed with a unanimous vote of 5-0.

The hearing and decision was recorded and transcribed by Court Reporter Peggy Jo Gonzales with Bean & Associates. The transcript is available for review during business hours in the office of the Board's Hearing Clerk located at One Civic Plaza NW, Suite 3023, Albuquerque NM 87103.

Item #4 **Election of Chair and Vice Chair for 2013-2014 (Chair)**

Member Deichmann made a motion to re-elect Dr. Upson to Chair. The motion was seconded by Member Curran and approved by a unanimous vote of 5-0.

Member Sullivan made a motion to elect Member Curran to Vice Chair. The motion was seconded by Member Deichmann and approved by a unanimous vote of 5-0.

Item #5 **Selection of Board members to serve as non-voting advisory member and alternate to Mid-Region council of Governments (MRCOG) Transportation Program Task Group (TPTG) and Transportation Coordinating committee (TCC) (Chair)**

Member Sullivan made a motion to elect himself as the non-voting advisory member to MRCOG TPTG and TCC. The motion was seconded by Member Deichmann and approved by a unanimous vote of 5-0. Member Curran made a motion to elect herself as alternate non-voting advisory member to MRCOG TPTG and TCC. The motion was seconded by Member Deichmann and approved by a unanimous vote of 5-0.

Item # 6 **Selection of Board member to serve as Liaison to the Governor's Task Force on Environmental Justice (Chair)**

Chair Dr. Upson made a motion to elect Member Kistin to serve as the Liaison to the governor's Task Force on Environmental Justice. The Motion was seconded by Member Deichmann and approved by a unanimous vote of 5-0.

Item # 7 **Acceptance of Final 2011 Regional Sulfur Dioxide (SO_2) Emissions Milestone Report – Neal Butt, EH Scientist, AQD**

Mr. Neal Butt presented the report to the Board. A Motion to accept the report was made by Member Deichmann, seconded by Member Sullivan and passed unanimously with a vote of 5-0.

Item # 8 **Request for a hearing in the matter of the petition to Adopt a State Implementation Plan (SIP) for NO_2 to Address Sections 110(a)(1) and (2) of the Federal Clean Air Act (CAA), 42 U.S.C. § 7410(a)(1) and (2), hereafter referred to as the "NO_2 Infrastructure SIP" (AQCB Petition No. 2013-3) – Neal Butt, EH Scientist, AQD**

Mr. Neal Butt presented the Division's request for a hearing, which included a request for a hearing officer and a court reporter. A motion to grant the request for a hearing on the

petition was made by Member Deichmann, seconded by Member Sullivan and approved by a unanimous vote of 5-0.

Item # 9 **Request for a hearing in the matter of the petition to Amend the State Boards State Implementation Plan (SIP) to Satisfy the Requirements of the Clean Air Act Section 128(a)- State Boards [§7428, U.S.C.A.]; hereafter referred to as the "State Boards SIP Revision" (AQCB Petition No. 2013-4) – Neal Butt, EH Scientist, AQD**

Mr. Neal Butt presented the Division's request for a hearing, which included a request for a hearing officer and a court reporter. A motion to grant the request for a hearing on the petition was made by Member Curran, seconded by Dr. Upson and approved by a unanimous vote of 5-0.

REPORTS **Division Report**

Dr. Upson stated that this will be Deputy Director Mr. Bill Westmoreland's last Board meeting before his retirement at the end of April.

OTHER BUSINESS

Item # 10 **Notification of Order Dismissing the Hearing on the Merits Regarding the Denial of a Wood Burning Exemption, Michael S. Fulp, Petitioner (AQCB Petition No. 2013-2) – Bill Grantham, Attorney for the AQCB**

Mr. Grantham presented the notification of the Order Dismissing the Hearing on the Merits Regarding the Denial of a Wood burning Exemption to the Board, stating that this was a matter of housekeeping.

ADJOURNMENT

Chair, Dr. Dona Upson, adjourned the meeting at 7:02 pm.

NEXT SCHEDULED BOARD MEETING:

- May 8, 2013 5:30 pm.

SUBMITTED:

Margaret Nieto 5/8/13

Ms. Margaret Nieto date
Board Secretary/Env. Health Supervisor, Control Strategies Section
Air Quality Div., Environmental Health Department

READ AND APPROVED:

Dona Upson MD 5/8/13

Dona Upson M.D. date
Chair
Albuquerque – Bernalillo County Air Quality Control Board

AQP Exhibit 8f

NEW MEXICO
ENVIRONMENT DEPARTMENT

Office of the Secretary

Harold Runnels Building
1190 Saint Francis Drive (87505)
P.O. Box 5469, Santa Fe, NM 87502
Phone: (505) 827-2855 Fax: (505) 827-2836
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SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

RYAN FLYNN
Cabinet Secretary

BUTCH TONGATE
Deputy Secretary

July 26, 2013

Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region VI (6-RA)
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Subject: Proposed revision to the New Mexico State Implementation Plan for Air Quality (SIP) through the incorporation of an amended 20.11.60 NMAC, *Permitting in Nonattainment Areas* and 20.11.61 NMAC, *Prevention of Significant Deterioration*, and 20.11.42, *Operating Permits*, as an update to the Title V Program

Dear Mr. Curry:

I am writing on behalf of Governor Susana Martinez to request approval of the attached documentation which will serve as the basis for a revision to the New Mexico SIP. Specifically, I am submitting documentation for the amended regulations, 20.11.60 NMAC, *Permitting in Nonattainment Areas* and 20.11.61 NMAC, *Prevention of Significant Deterioration*. In addition, I am requesting approval of an update to the Title V Program through the incorporation of an amended 20.11.42 NMAC, *Operating Permits*. All three of these rules apply exclusively to Bernalillo County, New Mexico.

The Albuquerque - Bernalillo County Air Quality Control Board (Air Board) adopted these amendments at their regular monthly meeting on April 10, 2013, following a public hearing held the same evening. The public hearing was held in accordance with the public notice, State laws and constitution, and public hearing requirements of 40 CFR 51.102. The amended regulations were filed with the NM State Records Center on April 12, 2013, and became effective locally on May 13, 2013. To facilitate your review, two hard copies of this SIP submittal, along with three exact duplicates in electronic form are enclosed. I believe that the submitted materials provide adequate documentation to support the requested SIP revision.

To facilitate your review and processing, the following materials are enclosed:

1) SIP Completeness Checklist pursuant to 40 CFR 51;

2) Hearing record, including transcript and exhibits;

3) Comments and responses;

4) The proposed SIP revision for 20.11.60 NMAC, 20.11.61 NMAC and Title V Program update for 20.11.42 NMAC adopted by the Air Board; and

5) Other supporting documentation.

Your favorable consideration of this request is appreciated. If you have any questions, please contact Mary Lou Leonard, Director of the Albuquerque Environmental Health Department (EHD), at (505) 768-2631.

Sincerely,

Ryan Flynn
Cabinet Secretary
NM Environment Department

cc: Honorable Susana Martinez, Governor, State of New Mexico
Richard Goodyear, Acting Chief, Air Quality Bureau, NMED
Mary Rose, Acting Manager, Environmental Protection Division, NMED
Dr. Dona Upson, Chair, Albuquerque - Bernalillo County Air Quality Control Board
Mary Lou Leonard, Director, Albuquerque Environmental Health Department
Danny Nevarez, Acting Deputy Director, Albuquerque EHD
Margaret Nieto, Control Strategies Section Supervisor, Air Quality Division, EHD

Enclosures

722 F.3d 401
CENTER FOR BIOLOGICAL DIVERSITY, et al., Petitioners
v.
ENVIRONMENTAL PROTECTION AGENCY and Lisa Perez Jackson, Respondents
American Forest & Paper Association, Inc., et al., Intervenors.
Nos. 11–1101, 11–1285, 11–1328, 11–1336.
United States Court of Appeals,
District of Columbia Circuit.
Argued April 8, 2013.
Decided July 12, 2013.

[722 F.3d 403]

On Petitions for Review of Administrative Action of the Environmental Protection Agency. Ann Brewster Weeks argued the cause for petitioners. With her on the briefs were Lisa J. Zak, Frank Rambo, Morgan Butler, Kevin P. Bundy, Vera P. Pardee, Brendan R. Cummings, David D. Doniger, Meleah A. Geertsma, and Nathaniel S.W. Lawrence. Jonathan F. Lewis entered an appearance.

Perry M. Rosen, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief was Scott Jordan, Attorney, U.S. Environmental Protection Agency.

Roger R. Martella Jr. argued the cause for respondent-intervenors. With him on the brief were Timothy K. Webster, Lisa E. Jones, Joel F. Visser, Charles H. Knauss, Shannon S. Broome, Norman W. Fichthorn, and Allison D. Wood. William R. Murray Jr. entered an appearance.

D. Cameron Prell, Neal Cabral, and Lisa Sharp were on the brief for amicus curiae National Association of Clean Water Agencies in support of respondents.

Before: HENDERSON, TATEL, and KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.
Concurring opinion filed by Circuit Judge KAVANAUGH.

Dissenting opinion filed by Circuit Judge HENDERSON.

[722 F.3d 404]

TATEL, Circuit Judge:

As part of its ongoing effort to limit the emission of greenhouse gases, the Environmental Protection Agency issued a rule deferring regulation of "biogenic" carbon dioxide—non-fossil-fuel carbon dioxide sources such as ethanol—for three years. Citing scientific uncertainty over how to account for biogenic carbon dioxide's unique role in the carbon cycle, EPA justified this "Deferral Rule" on the basis of the *de minimis*, one-step-at-a-time, and administrative necessity doctrines. Several environmental groups now petition for review, arguing that EPA's invocation of these doctrines was arbitrary and capricious. For the reasons set forth below, we vacate the Deferral Rule.

I.

Under the Clean Air Act, if EPA determines that an "air pollutant ... may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), it must regulate that air pollutant under the Prevention of Significant Deterioration of Air Quality (PSD) and Title V permitting programs. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132–44 (D.C.Cir.2012) (per curiam). The PSD program, which applies to areas of the country that are classified as in "attainment" or "unclassifiable" for any national

ambient air quality standard, 42 U.S.C. §§ 7407(d)(1)(A), 7471, requires certain specified "major emitting facilit[ies]," such as iron and steel mills, to obtain state-issued construction permits if they have the potential to emit over 100 tons per year (tpy) of "any air pollutant," and all other sources to obtain such permits if they have the potential to emit over 250 tpy, *id.*§§ 7475, 7479(1). Under the PSD program, sources need permits before starting a construction or modification project. *See id.*§§ 7411(a)(4), 7475, 7479(2)(C). To obtain a PSD permit, covered sources must install the "best available control technology" (BACT) for all regulated air pollutants—even for air pollutants whose emissions levels are insufficient to trigger the PSD permitting requirement. *Id.*§ 7475(a)(4). In other words, if a source emits two regulated air pollutants—say sulfur dioxide and particulate matter—but triggers the PSD permitting requirement only because it emits 500 tpy of sulfur dioxide, it must install BACT for both. The Title V program requires *operational* permits for stationary sources that have the potential to emit at least 100 tpy of any regulated air pollutant. *See id.* §§ 7661–7661f.

In response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), EPA published an Endangerment Finding for greenhouse gases—a "well-mixed" and "aggregate" group of six gases, including carbon dioxide (CO2). *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* ("Endangerment Finding"), 74 Fed.Reg. 66,496, 66,499 (Dec. 15, 2009). Based on that finding, EPA issued a "cascading series of greenhouse gas-related rules and regulations." *Coalition for Responsible Regulation,* 684 F.3d at 114. Partnering with the National Highway Traffic Safety Administration, EPA first promulgated the Tailpipe Rule, which established motor-vehicle emissions standards for greenhouse gases. *See Light–Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,* 75 Fed.Reg. 25,324 (May 7, 2010). Because the "Tailpipe Rule automatically triggered regulation of stationary greenhouse gas emitters under" the PSD and Title V permitting programs, EPA then issued two rules "phasing in stationary

[722 F.3d 405]

source greenhouse gas regulation." *Coalition for Responsible Regulation,* 684 F.3d at 115. In the Timing Rule, EPA concluded that major stationary emitters of greenhouse gases became subject to the PSD and Title V permitting requirements on January 2, 2011—the same date greenhouse gases were subjected to regulation under the Tailpipe Rule. *See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs,* 75 Fed.Reg. 17,004, 17,007 (Apr. 2, 2010). And in the Tailoring Rule, EPA, recognizing that literal application of the PSD and Title V emissions thresholds would cover millions of sources, "tailored" the statutory thresholds to "reliev[e] [the] overwhelming permitting burden[ ] that would ... fall on permitting authorities and sources." *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* ("Tailoring Rule"), 75 Fed.Reg. 31,514, 31,516 (June 3, 2010). The Tailoring Rule staggers the applicability of the PSD and Title V permitting programs, "starting with the largest [greenhouse gas] emitters." *Id.* at 31,514. Under Step One of the Tailoring Rule, which became effective January 2, 2011, the PSD and Title V permitting programs apply only to " 'anyway' PSD [and Title V] sources, that is, sources that are subject to PSD [and Title V] anyway due to their emissions of conventional pollutants," i.e., non-greenhouse-gas pollutants. *Id.* at 31,567. Under Step Two of the Tailoring Rule, which became effective six months later, the PSD and Title V permitting programs apply to sources with the potential to emit specified amounts of greenhouse gases. *See id.* at 31,516. In *Coalition for Responsible Regulation, Inc. v. EPA*, this court upheld the Endangerment Finding and Tailpipe Rule as neither arbitrary nor capricious, concluded that the PSD and Title V permitting programs were unambiguously triggered when

EPA issued the Tailpipe Rule, and rejected challenges to the Timing and Tailoring Rules on standing grounds. *See Coalition for Responsible Regulation*, 684 F.3d at 113–14.

This case involves biogenic carbon dioxide emissions, which EPA defines as carbon dioxide emissions "directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon." *Deferral for CO2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs* ("Deferral Rule"), 76 Fed.Reg. 43,490, 43,493 (July 20, 2011). Biogenic carbon dioxide emissions are generated from, among other things, "the biological decomposition of waste in landfills, wastewater treatment[,] or manure management processes," "fermentation during ethanol production," and the "combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material." *Id.* To use a familiar example, power plants running on coal emit fossil-fuel carbon dioxide whereas power plants burning feedstocks emit biogenic carbon dioxide.

Unlike fossil fuels that emit greenhouse gases only through human-induced combustion, biogenic sources emit carbon dioxide via both natural and anthropogenic processes. A forest fire, for example, will emit biogenic carbon dioxide regardless of whether it was sparked by lightning or as part of a clear-cutting operation. Dead trees emit carbon dioxide as part of the decomposition process. *See Deferral for CO2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs: Proposed Rule* ("Proposed Deferral Rule"), 76 Fed.Reg. 15,249, 15,252–54 (Mar. 21, 2011).

[722 F.3d 406]

Significantly for the issue before us, biogenic carbon dioxide has a "unique role and impact ... in the carbon cycle." Deferral Rule, 76 Fed.Reg. at 43,496. "Through relatively rapid photosynthesis, plants absorb CO2 from the atmosphere and add it to their biomass, which contains roughly 50% carbon by weight, through a process called sequestration." Proposed Deferral Rule, 76 Fed.Reg. at 15,252. Carbon dioxide emitted by fossil-fuel combustion is reabsorbed over millennia, leading to a long carbon "debt" period. By contrast, carbon dioxide released by biogenic sources will be sequestered when new plants are grown. The extent to which biogenic sources can serve as a carbon "sink" will depend on the type of source and its life cycle. *See id.* at 15,252–54. Given biogenic carbon dioxide's role in the carbon cycle, many state and federal programs treat biofuels as "renewable resources and promote bioenergy projects when they are a way to address climate change." Deferral Rule, 76 Fed.Reg. at 43,492. But to be clear, once carbon dioxide is released into the atmosphere, "it is not possible to distinguish between the radiative forcing associated with a molecule of CO2 originating from a biogenic source and one originating from the combustion of fossil fuel." Proposed Deferral Rule, 76 Fed.Reg. at 15,254. In layman's terms, the atmosphere makes no distinction between carbon dioxide emitted by biogenic and fossil-fuel sources.

In the Tailoring Rule, EPA acknowledged that "biomass or biogenic fuels and feedstocks could play [a role] in reducing anthropogenic [greenhouse gas] emissions." Tailoring Rule, 75 Fed.Reg. at 31,590–91. Yet responding to numerous requests that the Tailoring Rule exempt biogenic carbon dioxide emissions, EPA stated that because it "ha[d] not analyzed the administrative burden of permitting projects that specifically involve biogenic CO2 emissions," it would not take a "final position" on whether an exemption or "different treatment of biomass combustion" was warranted. *Id.* at 31,591. As a result, the Timing and Tailoring Rules require biogenic carbon dioxide sources to obtain PSD and Title V permits.

Shortly after promulgating the Tailoring Rule, EPA issued a Call for Information seeking technical and scientific information to "evaluat[e] different accounting approaches" for measuring biogenic carbon dioxide emissions.

Call for Information: Information on Greenhouse Gas Emissions Associated with Bioenergy an Other Biogenic Sources, 75 Fed.Reg. 41,173, 41,174 (July 15, 2010). Specifically, EPA sought information about how to treat biogenic carbon dioxide sources differently for purposes of measuring the emissions that trigger the PSD and Title V permitting programs. For example, EPA requested comments on how to "determin[e] the net impact on the atmosphere of CO2 emissions" and the "appropriate spatial/geographic scale for conducting this determination." *Id.* at 41,176. Then in March 2011, EPA, citing its ongoing efforts to understand the unique characteristics of biogenic carbon dioxide, issued a notice of proposed rulemaking seeking comment on whether it should defer regulation of these sources for a three-year period. *See*Proposed Deferral Rule, 76 Fed.Reg. at 15,251. Simultaneously, it published a guidance document for determining BACT for biogenic carbon dioxide emissions from "anyway" sources that were regulated under the PSD permitting program at Step One of the Tailoring Rule. *See* Office of Air and Radiation, U.S. EPA, Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production (Mar.2011).

[722 F.3d 407]

Based on comments and studies received during the notice-and-comment period, and following up on the Call for Information, EPA issued a rule—the one challenged here—postponing regulation of biogenic carbon dioxide sources for three years. In support of this so-called Deferral Rule, EPA repeatedly emphasized that "the issue of accounting for the net atmospheric impact of biogenic CO2 emissions is complex enough that further consideration ... is warranted." Deferral Rule, 76 Fed.Reg. at 43,492. It explained:

> The information collected to this point underscores the complexity and uncertainty associated with accounting for biogenic emissions of CO2 and indicates that at present attempting to determine the net carbon cycle impact of particular facilities combusting particular types of biomass feedstocks would require extensive analysis and would therefore entail extensive workload requirements by many of the permitting authorities. In contrast to other sources of [greenhouse gas] emissions, these uncertainties and complexities are exacerbated because of the unique role and impact biogenic sources of CO2 have in the carbon cycle. Further, methodologies are not sufficiently developed to assure that various permitting authorities would be able to perform the necessary calculations reasonably and consistently to determine the net atmospheric impact in many, if not all, instances.

Id. at 43,496. To dispel these uncertainties, EPA announced that "[d]uring the three-year deferral period" it would "conduct a detailed examination of the science associated with biogenic CO2 emissions from stationary sources." *Id.* at 43,492. EPA justified the Deferral Rule by invoking three principles of administrative law: the *de minimis*, one-step-at-a-time, and administrative necessity doctrines. *See id.* at 43,496–99. For instance, EPA reasoned that it would be a waste of resources to regulate a biogenic carbon dioxide source that has a *de minimis* impact on the net carbon cycle. *See id.* at 43,499.

The Deferral Rule exempts from regulation biogenic carbon dioxide sources that trigger the PSD and Title V permitting programs at Step Two of the Tailoring Rule. The rule accomplishes this by amending the regulatory definition of "greenhouse gases" to exclude biogenic carbon dioxide. Thus, biogenic carbon dioxide sources that have the potential to emit over the statutory thresholds, as modified by the Tailoring Rule, need not obtain a PSD or Title V permit. *See id.* at 43,493. The so-called "anyway" sources that obtained PSD and Title V permits during Step One of the Tailoring Rule, however, must still install BACT for their biogenic carbon dioxide emissions. *See id.* at 43,500–01.

The Deferral Rule contains a sunset provision: absent further agency action, on July 21, 2014, biogenic carbon dioxide will be regulated under the PSD and Title V programs, as modified by the Tailoring Rule. *See id.* at 43,490, 43,507. Although the Deferral Rule is a temporary regulation, it functions, in effect, as a permanent exemption from the PSD permitting requirement for any biogenic carbon dioxide source constructed during the three-year deferral period. *See id.* at 43,499. Exempted sources would have to obtain PSD permits only if they undertake a modification project after the deferral period ends. *See id.* The Deferral Rule is also voluntary. "Each state may decide if it wishes to adopt the deferral and proceed accordingly." *Id.* at 43,502. At least one State, Massachusetts, is currently regulating biogenic carbon dioxide sources at Step Two of the Tailoring Rule. *See* Oral Arg. Tr. 3–4.

[722 F.3d 408]

Center for Biological Diversity and several other environmental organizations now petition for review. "We review the actions of the EPA to determine whether they are '(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations.' " *American Farm Bureau Federation v. EPA*, 559 F.3d 512, 519 (D.C.Cir.2009) (per curiam) (quoting 42 U.S.C. § 7607(d)(9)) (alternation in original).

II.

Before considering the merits of petitioners' challenge, we must determine whether this case is ripe for review. *See In re Aiken County*, 645 F.3d 428, 434 (D.C.Cir.2011) (explaining that the "ripeness doctrine, even in its prudential aspect, is a threshold inquiry"). Under the prudential ripeness doctrine, invoked by our dissenting colleague, *see* dissenting op. at 419–20, courts look at two factors in deciding whether to stay their hand: the "fitness of the issues for judicial decision" and "the extent to which withholding a decision will cause hardship to the parties." *American Petroleum Institute v. EPA*, 683 F.3d 382, 387 (D.C.Cir.2012) (internal quotation marks omitted).

The Deferral Rule satisfies the first factor because it functions as an exemption from the PSD permit requirement for those sources constructed during the deferral period. *See supra* at 407; Oral Arg. Tr. 13 (EPA conceding that the Deferral Rule permanently exempts sources constructed between July 2011 and July 2014). To be sure, once the deferral period ends, these sources' "biogenic CO2 emissions would have to be appropriately considered in any applicability determinations ... conduct[ed] for *future* stationary source permitting purposes." Deferral Rule, 76 Fed.Reg. at 43,499 (emphasis added). But under the PSD program, a source would be required to obtain a permit only for "a major modification determination." *Id.* Given this, the question before us is whether EPA may exempt certain biogenic carbon dioxide *sources*—not just the air pollutant itself—from the PSD program. This is the type of "purely legal" and "sufficiently final" issue that is "fit [ ] ... for judicial decision" and can be resolved without resort to the prudential ripeness doctrine. *American Petroleum Institute*, 683 F.3d at 387 (internal quotation marks omitted).

Regarding the second factor, the parties will suffer hardship if we decline to decide this issue. We know from oral argument that a biogenic carbon dioxide source in Allendale, South Carolina, has been constructed without a PSD permit, meaning that it has emitted more pollution than it otherwise would have but for the Deferral Rule. *See* Oral Arg. Tr. 5–6, 10. There may well be other such sources. Our dissenting colleague principally relies on a March 2012 declaration for the proposition that the number of sources impacted by the Deferral Rule is negligible. But we have no idea how many biogenic carbon dioxide sources have been constructed since March 2012, nor do we have any basis for predicting how many biogenic carbon dioxide sources will be constructed during the next year. Because the

Deferral Rule authorizes certain sources to emit more pollutants than they would otherwise be allowed to under the Tailoring Rule, this dispute is ripe for review.

III.

Petitioners argue that the Deferral Rule violates the Clean Air Act's plain language. They rely on the statute's definition

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of "major emitting facility": any "stationary source[ ]" that "emit[s], or ha[s] the potential to emit," certain specified amounts of "any air pollutant." 42 U.S.C. § 7479(1). Because EPA regulates carbon dioxide as an "air pollutant," petitioners contend that the agency has no authority to exempt any sources of carbon dioxide, including biogenic sources, from the PSD permitting program. Acknowledging the scientific uncertainty about biogenic carbon dioxide's role in the carbon cycle, petitioners argue that EPA can regulate biogenic sources under the PSD permitting program while accounting for their unique qualities at the BACT stage. For its part, EPA believes that it has authority under the Clean Air Act to treat biogenic carbon dioxide sources differently because these sources have unique characteristics that were "unquestionably unforeseen when Congress enacted [the] PSD" program. Respondent's Br. 40. This statutory analysis, however, appears nowhere in the Deferral Rule. Instead, the Deferral Rule rests on the *de minimis*, one-step-at-a-time, and administrative necessity doctrines. Because the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943), the Deferral Rule must stand or fall on the merits of EPA's invocation of these doctrines.

We can easily reject EPA's use of the *de minimis* doctrine, which allows agencies to grant regulatory "exemption[s] when the burdens of regulation yield a gain of trivial or no value." *Alabama Power Co. v. Costle*, 636 F.2d 323, 360–61 (D.C.Cir.1979). In the Deferral Rule, EPA stated that it had authority to exempt biogenic carbon dioxide sources that have "a negligible or positive impact on the carbon cycle and net atmospheric CO2 levels." Deferral Rule, 76 Fed.Reg. at 43,499. In its appellate brief, however, EPA expressly disavows this doctrine, explaining that the Deferral Rule has a three-year sunset provision whereas the *de minimis* doctrine "is used to establish *permanent* exemptions." Respondent's Br. 35. Given this concession, the Deferral Rule cannot be sustained under the *de minimis* doctrine.

The one-step-at-a-time doctrine, which EPA does defend, authorizes agencies to promulgate regulations in a piecemeal fashion. EPA explains that it is proceeding one-step-at-a-time—that is, postponing regulation of biogenic carbon dioxide for three years-in order to give it time to study the science underlying these sources and determine its precise regulatory approach. *See*Deferral Rule, 76 Fed.Reg. at 43,497 ("EPA has ... deferr[ed] the applicability of PSD and Title V to biogenic emissions of CO2 from stationary sources for only as long as necessary for EPA to complete the needed scientific study of these emissions, develop an accounting framework, and as appropriate conduct rulemaking specific to the unique nature and characteristics of these emission sources."). According to petitioners, however, federal agencies have no authority to invoke the one-step-at-a-time doctrine "to diverge from [a] clear statutory mandate," and here, they argue, the Clean Air Act unambiguously requires regulation of all carbon dioxide from whatever source. Petitioners' Br. 56. But we need not decide whether the one-step-at-a-time doctrine can justify an agency's non-compliance with a clear statutory mandate or whether the Clean Air Act unambiguously requires the regulation of all carbon dioxide from whatever source because, as we shall explain, EPA's invocation of the one-step-at-a-time doctrine was arbitrary and capricious.

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See Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 477 (D.C.Cir.1998) (determining whether agency's reliance on the one-step-at-a-time doctrine was arbitrary and capricious).

The one-step-at-a-time doctrine rests on the notion that "[s]ince agencies have great discretion to treat a problem partially, we [sh]ould not strike down [a regulation] if it [is] a first step toward a complete solution." *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C.Cir.1989). Eschewing a precise doctrinal test for invoking the doctrine, we have remarked that the one-step-at-a-time inquiry "is in essence a pragmatic one." *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C.Cir.1984). We have observed that incremental regulation is especially appropriate in response to evolving economic and technological conditions. *See id.* at 1210–11. We have also imposed outer limits on the one-step-at-a-time doctrine: "it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all." *Grand Canyon Air Tour Coalition*, 154 F.3d at 477. Although the "circumstances under which [an] agency may defer [regulation] ... are [in]capable of being captured in a single doctrine," *National Association of Broadcasters*, 740 F.2d at 1210, an agency invoking the one-step-at-a-time doctrine must, at a minimum, articulate (1) what it believes the statute requires and (2) how it intends to achieve that goal. Otherwise, reviewing courts will have no basis for evaluating whether the agency is in fact taking "a first step toward a complete solution." *City of Las Vegas*, 891 F.2d at 935. EPA itself put it well: "Courts will accept an initial step towards full compliance with a statutory mandate, as long as the agency is headed towards full compliance." Deferral Rule, 76 Fed.Reg. at 43,498.

In this case, however, EPA failed to explain in the Deferral Rule what "full compliance" with the "statutory mandate" means. Specifically, although the Deferral Rule spends pages explaining the scientific uncertainty about biogenic carbon dioxide sources, the additional research EPA plans to undertake, and why three more years of study are warranted, the rule—as opposed to EPA's brief here—nowhere offers an interpretation of the Clean Air Act that would allow the agency to treat biogenic carbon dioxide sources differently. This deficiency is not merely the result of scientific uncertainty. For example, this would be a very different case had the Deferral Rule interpreted the Clean Air Act as requiring permits only for biogenic carbon dioxide sources with an adverse impact on the net carbon cycle and explained that the agency had deferred regulation due to scientific uncertainty over which sources meet that standard. Under those circumstances, we could have determined whether EPA had correctly interpreted the statute and properly invoked the one-step-at-a-time doctrine. Here, by contrast, we simply have no idea what EPA believes constitutes "full compliance" with the statute. In other words, the Deferral Rule is one step towards ... what? Without a clear answer to that question, EPA has no basis for invoking the one-step-at-a-time doctrine.

EPA next invokes the administrative necessity doctrine, which permits an agency to "avoid implementing a statute ... by showing that attainment of the statutory objectives is impossible." *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C.Cir.1983). Under this doctrine, the agency must also adopt the narrowest feasible exemption. *See id.* (criticizing the agency

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for failing to explore "less taxing ways to enforce the law").

Emphasizing both the possibility that biogenic carbon dioxide sources might have a negligible impact on the net carbon cycle and the "extensive workload of processing permit applications," EPA found that requiring permits for these sources "would frustrate the goals ... sought to [be] accomplish[ed] in the Tailoring Rule." Deferral Rule, 76 Fed.Reg. at 43,496. In doing so, EPA rejected a proposed middle-

ground option: requiring biogenic carbon dioxide sources to obtain permits but only if they fail to make "any effort to take into account net carbon cycle impacts." *Id.* Under this approach, all biogenic carbon dioxide sources that would have triggered the modified statutory thresholds would have had to take some steps to reduce their emissions, either voluntarily to avoid the PSD permit requirement or by installing BACT as a condition of obtaining a permit. EPA rejected this approach because it "could result in regulation of sources with trivial or positive impacts on the net carbon cycle." *Id.*

Without deciding whether the middle-ground option could pass muster under the statute, we agree with petitioners that EPA's rejection of that option was arbitrary and capricious. EPA has conceded "the possibility ... that more detailed examination of the science of biogenic CO2 will demonstrate that ... some biogenic feedstocks ... have a *significant impact* on the net carbon cycle." *Id.* at 43,498 (emphasis added). As to these sources, the middle-ground option would have had the practical effect of reducing their emissions; by contrast, the Deferral Rule, which functions as a permanent exemption, does not. EPA's reason for rejecting the middle-ground option—that it would regulate biogenic sources with a trivial impact—though perhaps accurate, is thus non-responsive. Given EPA's obligation to adopt the narrowest exemption possible, it should have explained why it rejected an option that would have reduced emissions from sources the Deferral Rule permanently exempts. *See Sierra Club,* 719 F.2d at 464 (remanding regulation because there was "no evidence that EPA ha[d] adequately explored ... regulatory alternatives").

This omission is especially troublesome because EPA has demonstrated that, notwithstanding the scientific uncertainty about measuring biogenic carbon dioxide emissions at the PSD applicability stage, the unique characteristics of these sources can be factored in at the BACT stage. The Deferral Rule still requires "anyway" sources that obtained PSD permits under Step One of the Tailoring Rule to regulate biogenic carbon dioxide emissions. To assist those sources and permitting authorities in developing BACT standards, EPA issued a detailed thirty-three page report on biogenic carbon dioxide. Presumably, permitting authorities are able to handle the scientific complexity of regulating biogenic carbon dioxide as to these "anyway" sources. Furthermore, since the Deferral Rule is voluntary, States may regulate biogenic carbon dioxide sources under Step Two of the Tailoring Rule. Indeed, Massachusetts is currently doing just that.

Finally, for the first time in its brief, EPA relies on the absurd results doctrine, which embodies "the long-standing rule that a statute should not be construed to produce an absurd result." *Mova Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1068 (D.C.Cir.1998). As EPA sees it, because "emissions of CO2 derived from certain forms of biomass may not only fail to endanger public health and welfare, but in fact may benefit the public by reducing the net emissions of CO2," Respondent's Br. 59, it would run

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afoul of congressional intent to regulate them. Responding to petitioners' contention that EPA's reliance on the absurd results doctrine is post hoc, the agency points to several passages in the Deferral Rule that mention the doctrine. These references fall into two groups. The first, and by far the larger, appears in a summary of the Tailoring Rule's legal reasoning. According to EPA, the Deferral Rule fully incorporates the Tailoring Rule's rationales, including the absurd results doctrine. *See* Respondent's Br. 59. But the Deferral Rule cannot rest on the Tailoring Rule's invocation of the absurd results doctrine for a simple reason: the two rules are aimed at different absurd results. The Tailoring Rule was intended to alleviate the crushing administrative burden on permitting authorities and sources, *see*Tailoring Rule, 75 Fed.Reg. at 31,547; the Deferral Rule, by contrast, was intended to avoid regulation of biogenic carbon dioxide sources that have a negligible impact on the net carbon cycle. The second group, which appears in a

section justifying the Deferral Rule itself, mentions the absurd results doctrine only by analogy to the *de minimis* and administrative necessity doctrines. These passing references, however, fall far short of satisfying EPA's "fundamental" obligation to "set forth the reasons for its actions." *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 949 (D.C.Cir.2004) (per curiam). For these reasons, we agree with petitioners that EPA's reliance on the absurd results doctrine is indeed post hoc. *See Calpine Corp. v. FERC*, 702 F.3d 41, 46 (D.C.Cir.2012) (explaining that an "agency decision[ ] may not be affirmed on grounds not actually relied upon by the agency").

Because the Deferral Rule cannot be justified under any of the administrative law doctrines relied on by EPA, this opinion, contrary to our dissenting colleague's suggestion, *see* dissenting op. at 419, leaves for another day the question whether the agency has authority under the Clean Air Act to permanently exempt biogenic carbon dioxide sources from the PSD permitting program. If and when EPA adopts a permanent exemption for some or all biogenic carbon dioxide sources, we will have the benefit of three years of scientific study, as well as fully briefed and contextualized arguments about EPA's authority under the Clean Air Act.

IV.

For the foregoing reasons, we grant the petitions for review and vacate the Deferral Rule.

So ordered.

KAVANAUGH, Circuit Judge, concurring:

Under this Court's recent precedent in *Coalition for Responsible Regulation, Inc. v. EPA*, this should be an easy case. The primary question presented is whether EPA has statutory authority to issue the Deferral Rule and thereby temporarily exempt biogenic carbon dioxide from the PSD and Title V permitting programs. In my view, the answer is no. This Court has ruled that the statute requires pre-construction and operating permits for stationary sources that emit or have the potential to emit certain specified amounts of an air pollutant, including carbon dioxide. There is zero basis in the text of the Clean Air Act for EPA to distinguish biogenic carbon dioxide from other sources of carbon dioxide that EPA is required (under our precedent) to regulate for purposes of the PSD and Title V permitting programs. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132–44 (D.C.Cir.2012).

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As a policy matter, EPA may have very good reasons to temporarily exempt biogenic carbon dioxide from the PSD and Title V permitting programs. But Congress sets the policy in the statutes it enacts; EPA has discretion to act only within the statutory limits set by Congress. The statute does not give EPA the authority to distinguish a stationary source's emissions of biogenic carbon dioxide from emissions of other forms of carbon dioxide for purposes of these permitting programs.[1]

EPA cites three administrative law doctrines that, according to EPA, give it authority to grant the temporary exemption. But in addition to the reasons given in Judge Tatel's opinion for the Court, which I join in full, I would say that none of those doctrines applies in this case for an even more fundamental reason: The doctrines do not trump the fact that EPA simply lacks statutory authority to distinguish biogenic carbon dioxide from other forms of carbon dioxide for purposes of the PSD and Title V permitting programs.

First, EPA relies on the one-step-at-a-time doctrine, which allows an agency to take incremental steps toward achieving a statutory mandate if taking incremental steps is consistent with the statutory text. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477–78 (D.C.Cir.1998) (rule not arbitrary and capricious because it would achieve statutory mandate in conjunction with other proposed rules within a

reasonable timeframe). An agency typically invokes that doctrine in response to a claim that an agency is exercising its statutory discretion in an arbitrary and capricious manner.

But EPA has no such statutory discretion here. Under the statute as this Court has interpreted it, EPA *must* regulate carbon dioxide under the PSD and Title V permitting programs. *Coalition for Responsible Regulation*, 684 F.3d at 144 (Clean Air Act "requires PSD and Title V permits for major emitters of greenhouse gases"). And there is no basis in the statute for distinguishing biogenic carbon dioxide from other forms of carbon dioxide.

Second, EPA cites the administrative necessity doctrine, which can excuse agency non-compliance with a statute if the agency lacks sufficient funds or resources. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C.Cir.1979) (shortage of funds, of "time, or of the technical personnel needed to administer a program" grants agency authority "to cope with the administrative impossibility of applying the commands of the substantive statute"). But EPA has the funds and resources to apply the PSD and Title V programs to biogenic carbon dioxide. Indeed, in the Deferral Rule, EPA acknowledged that it has the resources to "apply PSD and Title V to all facilities with biogenic CO2 emissions that emit at or above the Tailoring Rule thresholds." 76 Fed.Reg. 43,490, 43,496 (July 20, 2011).

EPA decided against that option, however, because EPA thought it might be bad policy. Specifically, EPA said that "it is conceivable that as a result of the scientific examination of biogenic CO2 emissions, [EPA] could conclude that the net carbon cycle impact for some biomass feedstocks is trivial, negative, or positive." *Id.* EPA reached that conclusion because it thinks that regrowth of plant life—and the resulting

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recapture of carbon dioxide—might "offset" emissions of biogenic carbon dioxide. But the statute forecloses that kind of "offsetting" approach because the statute measures emissions from stationary sources that "emit" (or have the potential to emit) air pollutants. *See*42 U.S.C. §§ 7475(a), 7479(1). The statute does not allow EPA to exempt those sources' emissions of a covered air pollutant just because the effects of those sources' emissions on the atmosphere might be offset in some other way.

Relatedly, EPA suggests that it has appropriately balanced the costs and benefits of regulating biogenic carbon dioxide under the PSD and Title V programs. But EPA is not permitted to substitute its view of the costs and benefits of regulation for Congress's view of the costs and benefits of regulation. *See Sierra Club v. EPA*, 719 F.2d 436, 462 (D.C.Cir.1983) (EPA not permitted to create exemption "based upon its perceptions of the costs and benefits of enforcing the law"); *Alabama Power Co.*, 636 F.2d at 357 ("[T]here exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits."). Allowing an agency to substitute its own policy choices for Congress's policy choices in this manner would undermine core separation of powers principles. The Constitution gives Congress the legislative power to set policy in the first instance, and agencies then must act within those statutory boundaries—even if the agency believes it possesses expertise or policy views superior to Congress's. *See Federal Power Commission v. Texaco*, 417 U.S. 380, 400, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974) (agencies cannot use administrative necessity "to overturn congressional assumptions embedded into the framework of regulation" by Congress); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir.1977) (doctrine not a "revisory power" granting agency authority to act "inconsistent with the clear intent of the relevant statute").

Third, EPA has also invoked the absurd results doctrine. The crux of EPA's position is that it would be absurd to interpret the Clean Air Act in a way that would require EPA to regulate biogenic carbon dioxide. But with EPA having

already applied the PSD and Title V programs to carbon dioxide (and with this Court having agreed with that interpretation of the statute), there is certainly nothing absurd about applying those programs to *biogenic* carbon dioxide. It is hardly absurd for Congress to tackle the problem of emissions from the smokestack in the first instance. And the fact that an exemption for biogenic carbon dioxide would be better policy (in EPA's view) does not make it absurd to apply the statute to biogenic carbon dioxide. *See Landstar Express America, Inc. v. Federal Maritime Commission,* 569 F.3d 493, 498 (D.C.Cir.2009) ("A statutory outcome is absurd if it defies rationality."). If it would be better overall to exempt biogenic carbon dioxide from these permitting programs, EPA can always recommend that Congress do so.[2]

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All of that said, I have mixed feelings about this case. That's because I believe, contrary to this Circuit's precedent, that the PSD statute does not cover carbon dioxide, whether biogenic or not. *See Coalition for Responsible Regulation, Inc. v. EPA,* No. 09–1322 (D.C.Cir.2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). And as I see it, EPA's decision to temporarily exempt biogenic carbon dioxide from regulation simply highlights the legal problems in applying the PSD program to greenhouse gases, including carbon dioxide, in the first place. To review the bidding: EPA has read the PSD statute broadly to cover not just the NAAQS pollutants but also greenhouse gases, although EPA expressly recognized that such an interpretation would lead to a result that was "so contrary to what Congress had in mind" and "in fact so undermines what Congress attempted to accomplish with the PSD requirements" that "it should be avoided under the 'absurd results' doctrine." 74 Fed.Reg. 55,292, 55,310 (Oct. 27, 2009). To try to deal with those admittedly absurd results, EPA then has repeatedly re-written the statute—first in the Tailoring Rule and now in the Deferral Rule. But the absurdities and anomalies flowing from EPA's statutory interpretation just underscore how flawed EPA's interpretation was from the get-go. EPA could have adopted a narrower interpretation of the PSD statute that would have avoided those absurdities and, to boot, would have been more consistent with the statutory text and structure. What we are left with now is a statute that is a far cry from what Congress intended or enacted. So EPA is necessarily making it up as it goes along. That is not how the administrative process is supposed to work.

In saying that, I do not want to diminish EPA's vital public objectives in addressing global warming. The task of dealing with global warming is urgent and important at the national and international level. My concern about EPA's approach does not stem from policy beliefs (courts don't have the authority or the expertise to assess policy well anyway) but rather from separation of powers principles.

But EPA's broad interpretation of the statute was upheld by this Court in *Coalition for Responsible Regulation.* Although I respectfully think the case was wrongly decided on this issue, that's water over the dam in this Court. We are bound to apply that precedent. Under that case's interpretation of the governing statute, EPA is required to regulate carbon dioxide under the PSD and Title V permitting programs. There is no statutory basis for exempting biogenic carbon dioxide.

KAREN LECRAFT HENDERSON, Circuit Judge, dissenting:

We must decide whether the Environmental Protection Agency (EPA) may temporarily defer regulation of biogenic carbon dioxide (CO2) emissions against a backdrop of uncertain but expanding scientific knowledge and rapid regulatory changes. Deferral for CO2 Emissions from Bioenergy, 76 Fed.Reg. 43,490 (July 20, 2011) (Deferral Rule). I believe EPA can—and should—defer regulation until it has the time it says it needs to study and resolve the issue it is charged with regulating.

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I would therefore uphold the Deferral Rule. Alternatively, given that the Deferral Rule expires or will be superseded in a matter of months—and by then EPA will have at least crystallized the issue before us—we should hold the case in abeyance as unripe. Accordingly, I respectfully dissent.

I.

The Deferral Rule delays for three years—from July 20, 2011 until July 21, 2014—the EPA's factoring in of biogenic CO2 emissions "when determining whether a stationary source meets the" emissions thresholds for permitting under the Prevention of Significant Deterioration (PSD) and Title V permitting systems of the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.**See*Deferral Rule, 76 Fed.Reg. at 43,492. In so deferring, EPA has used, correctly, I believe, the long-recognized step-at-a-time regulatory procedure. This procedure recognizes the reality and complexity of administrative regulation. "In an ideal world ... agencies would act only after comprehensive consideration of how all available alternatives comported with a well-defined policy objective...." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C.Cir.1984). Nonetheless, "administrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken." *Id.* Thus, "agencies have great discretion to treat a problem partially" and we will "not strike down [a regulation] if it [is] a first step toward a complete solution, even if we thought it 'should' " have been finished. *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C.Cir.1989). Moreover, "nothing in the [Administrative Procedure Act] precludes an agency from collecting data and monitoring real-world experience with regulatory standards before adopting new standards governing periods of time far into the future—especially in cases, as here, that involve unpredictable technological change. Indeed, gathering evidence *before* making a long-term decision is eminently sensible." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C.Cir.2004); *see also id.* at 1262–63 (agency's temporarily declining to make crash test requirements stricter was not arbitrary and capricious because it "offered rational reasons for adopting an 'interim final rule' establishing the unbelted crash test speed through August 2006 only" while it undertook "multi-year effort to obtain additional data").

The Deferral Rule must be read in light of the fact that EPA did not regulate greenhouse gases (GHGs) under the CAA *at all* until the end of 2009, *see*Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed.Reg. 66,496 (Dec. 15, 2009), and did not regulate them under PSD and Title V until 2011, *see*Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed.Reg. 31,514, 31,521 (June 3, 2010) (Tailoring Rule). By postponing regulation of biogenic CO2 emissions under PSD and Title V, the Deferral Rule simply keeps in place the pre–2011 status quo. The question, then, is whether the petitioners can compel EPA to act before July 21, 2014.[1]

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Although the step-at-a-time doctrine is "pragmatic" and cannot be "captured in a single doctrinal formulation," we ask two questions when an agency uses it to "defer resolution of problems." *Nat'l Ass'n of Broadcasters*, 740 F.2d at 1210. First, we ask whether the agency (1) has "made some estimation, based upon evolving economic and technological conditions, as to the nature and magnitude of the problem it will have to confront when it comes to resolve the postponed issue"; and (2) "whether it was reasonable, in the context of the decisions made in the proceeding under review, for the agency to have deferred the issue." *Id.* at 1210–11. Regarding the second question, "postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results." *Id.* at 1211;*see also*

Massachusetts v. EPA, 549 U.S. 497, 527, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). I believe EPA's rationale for the Deferral Rule easily fits within this framework.

EPA has reasonably attempted to balance its acknowledged CAA duty to regulate GHGs with the reality that both EPA itself as well as other permitting authorities have limited resources and experience in this area. The Tailoring Rule, which EPA promulgated in 2010, created a phase-in process whereby, at first, only the largest GHG emitters would be subject to PSD and Title V on the basis of GHG emissions. Tailoring Rule, 75 Fed.Reg. at 31,516. The phase-in was necessary both to alleviate high costs to permitting authorities, *id.* at 31,533, and to give EPA time to decide how to permanently implement GHG regulation, *id.* at 31,526. EPA promulgated the Deferral Rule because of similar cost and scientific uncertainty. Specifically, EPA did not know in 2011 which, if any, biofuel feedstocks cause a net increase in atmospheric CO2 levels when used as fuel for a stationary source. Deferral Rule, 76 Fed.Reg. at 43,492. EPA was concerned that, if it regulated all sources' biogenic CO2 emissions without taking net increase *vel non* into account, its regulation of the sources could result in high cost but negligible benefit. [2] EPA also concluded that immediate, one-size-fits-all regulation of biogenic CO2 could be counterproductive by discouraging the construction of low-net-carbon stationary facilities. *Id.* at 43,496. Absent deferral, EPA concluded, permitting authorities—primarily, states—would face a heavy administrative burden due to, *inter alia*, the need to take the carbon cycle into account in determining best available control technology (BACT) during the permitting process.

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See id. at 43,492;*see also id.* at 43,496 ("[T]he extensive workload associated with analyzing and accounting for biogenic CO2 emissions as part of processing permit applications from biomass facilities justifies exempting those sources for a period of time...."). While EPA attempted to alleviate the administrative burden by promulgating interim guidance to help permitting authorities conduct BACT analysis for biogenic CO2 emissions—explaining that in some instances, combustion of biomass can be considered BACT—the case-by-case analysis that permitting authorities, without the Deferral Rule, would be required to undertake immediately "would likely be prohibitively time-consuming and complex." EPA Office of Air & Radiation, *Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production* 23 (Mar.2011), http:// www. epa. gov/nsr/ghgdocs/bioenergyguidance.pdf.
Accordingly, EPA promulgated the Deferral Rule as an "initial step toward full compliance" with the statutory mandate to regulate GHGs. Deferral Rule, 76 Fed.Reg. at 43,498. The Deferral Rule expires on July 21, 2014, at which time biogenic CO2 emissions will automatically be treated like all other CO2 emissions unless, on or before that date, EPA "undertake[s] additional rulemaking to clarify the applicability of PSD and Title V permitting requirements." *Id.* (citing *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 476–77 (D.C.Cir.1998)); *see also id.* at 43,494 (quoting *Massachusetts*, 549 U.S. at 524, 127 S.Ct. 1438 (agencies may implement regulatory programs over time, "refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.")). In the meantime, EPA planned to study the science and ultimately either establish an appropriate carbon accounting framework for biogenic CO2 emissions or, to repeat, allow the Deferral Rule to expire and treat biogenic CO2 emissions like other CO2 emissions.

My colleagues attack the Deferral Rule because it "nowhere offers an interpretation of the Clean Air Act that would allow the agency to treat biogenic carbon dioxide sources differently." Maj. Op. 409–10. But EPA is not *permanently* treating biogenic CO2 emissions

differently. As the Deferral Rule explains, EPA believes, based on the evidence currently in its possession, that further study may support a decision to give special treatment to some biogenic emissions. Deferral Rule, 76 Fed.Reg. 43,496;*see also id.* at 43,499 ("EPA believes based on information currently before the Agency that at least some biomass feedstocks ... have a negligible impact on the net carbon cycle, or possibly even a positive net effect."). If further study does not bear this out, EPA has implicitly acknowledged that it will treat biogenic CO2 emissions as it does other CO2 emissions. *Cf. id.* at 43,498 ("[EPA] will be using the three-year deferral period to better understand the science associated with biogenic CO2 emissions and to explore *whether or not* a Permanent exemption is permissible...." (emphasis added)).[3]

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To be sure, in *Coalition for Responsible Regulation v. EPA,* 684 F.3d 102 (D.C.Cir.2012), we held that "once the Tailpipe Rule set motor-vehicle emission standards for greenhouse gases, they became a regulated pollutant under the Act, requiring PSD and Title V greenhouse permitting." *Id.* at 115. But, just as EPA proceeded gradually in regulating GHGs under the Tailoring Rule, EPA has delayed its regulation of a specific GHG *via* the Deferral Rule.[4] The fact that EPA is *required* to take action does not preclude it from phasing in the action using the step-at-a-time method. In *Grand Canyon Air Tour,* the Congress required the Federal Aviation Administration (FAA), within 120 days of enactment of the Overflights Act, to "prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon." *See*154 F.3d at 460. After the FAA promulgated only interim measures, the Grand Canyon Trust challenged it as "too little" and "too late." *Id.* at 473. We rejected its challenge, declaring that, although "it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all.... the FAA has not taken that course here. It has never defended the Final Rule as the sole means for [satisfying the statute], but only as the first of three steps." *Id.* at 477;*cf. Ala. Power Co. v. Costle,* 636 F.2d 323, 357 (D.C.Cir.1979) ("Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent...."). While the CAA requires EPA to regulate CO2, it does not foreclose, as one step toward full compliance, EPA's deferring regulation of a unique type of CO2 in order to study whether EPA can—and should—treat it differently. EPA does not defend the Deferral Rule as the sole or final means of dealing with biogenic CO2 emissions nor has it thumbed its nose at the Congress. By July 21, 2014, EPA will take its next step—either by regulating biogenic CO2 emissions like other CO2 emissions by default (*i.e.,* the expiration of the Deferral Rule) or by handling biogenic CO2 emissions specifically.

The necessary implication of the majority opinion is that, no matter the results of EPA's study, EPA lacks authority to treat biogenic CO2 emissions differently from other emissions. The CAA defines a major emitting source (*i.e.,* a source subject to PSD and Title V permitting requirements) as a source that "emit[s] or [has] the potential to emit" above-threshold amounts of a regulated pollutant "from" the source. 42 U.S.C. § 7479(1). The petitioners believe, and my colleagues apparently agree, this language precludes EPA from considering "off-site" factors, such as the carbon cycle of the biomass used as a source's fuel, in determining whether the source is subject to PSD. But the language has *not* precluded EPA from recognizing *de minimis* exceptions from the statute. Under the *de minimis* doctrine, "[c]ourts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." *Ala. Power,* 636 F.2d at 360. Unless the Congress has been "extraordinarily rigid," we will uphold an exemption from the statute's literal terms "when the burdens of regulation

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yield a gain of trivial or no value." *Id.* at 360–61. PSD and Title V are meant to protect against harm resulting from the emission of regulated pollutants, *see, e.g.*,42 U.S.C. § 7470, and EPA has found that GHGs such as CO2 cause harm by accumulating in excess amounts in the atmosphere, *see, e.g.*,Tailoring Rule, 75 Fed.Reg. at 31,519. If EPA's review shows, however, that the combustion of certain biomass feedstocks has no effect on—or even reduces—atmospheric CO2 levels, EPA could then use this information to support a *de minimis* exception to the regulation of certain biogenic CO2 emissions. *Cf. Ala. Power*, 636 F.2d at 330 ("[T]he application of BACT requirements to the emission of all pollutants ... no matter how miniscule ... could impose severe administrative [and economic] burdens.... [T]he proper way to resolve this difficulty is to define a de minimis standard...."). Exempting from regulation a source with a negligible—and particularly, a beneficial—effect on atmospheric CO2 levels would be perfectly consistent with the overarching PSD and Title V permitting regime—a regime which expressly does not regulate "minor" sources that cause little harm because they release below-threshold levels of pollutants. *See*42 U.S.C. §§ 7479(1), 7661(2), 7602(j). Given the availability of a *de minimis* exception, it is not as though, as the majority necessarily assumes, that the Deferral Rule delays the inevitable.[5]

In sum, EPA's decision to stop and think before regulating in a complex—and changing—area is eminently reasonable.

II.

Alternatively, under the prudential ripeness doctrine, I believe we should not have reached the merits of this case. The ripeness doctrine prevents the court from prematurely adjudicating a dispute. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The doctrine comes "from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). "The ripeness doctrine, even in its prudential aspect, is a threshold inquiry...." *In re Aiken Cnty.*, 645 F.3d 428, 434 (D.C.Cir.2011). The court stays its hand so the "administrative process [can] run its course before binding parties to a judicial decision." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C.Cir.2012) (challenge to EPA rule continuing to regulate certain materials held unripe because EPA subsequently issued NPRM significantly changing regulatory scheme). This doctrine gives "the challenging party [time] to convince the agency to alter a tentative position," "provides the agency an opportunity to correct its own mistakes and to apply its expertise," narrows the legal and factual issues at play and "comports with our theoretical role as the governmental branch of last resort." *Id.* at 386–87 (quotation marks omitted). It thus "ensures that Article III courts make decisions only when they have to, and then, only once." *Id.* at 387.

We consider two factors in assessing prudential ripeness: (1) the "fitness of the issues for judicial decision" and (2) "the

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extent to which withholding a decision will cause hardship to the parties." *Id.* (quotation marks omitted).

A. Fitness for Review

The first factor—fitness—is "meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Id.* (quotation marks omitted). We must consider, *inter alia*, "whether [the issue] is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Id.* (quotation marks omitted). An issue is particularly unfit for review if, by staying our hand temporarily, we need never address it. *See Nat'l Treasury Emps. Union v.*

United States, 101 F.3d 1423, 1431 (D.C.Cir.1996). We

> decline to review "tentative" agency positions because doing so "severely compromises the interests" the ripeness doctrine protects: "The agency is denied full opportunity to apply its expertise and to correct errors or modify positions in the course of a proceeding, the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position."

Am. Petroleum Inst., 683 F.3d at 387 (quoting *Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 31 (D.C.Cir.1984)).

The Deferral Rule—a temporary rule that expires or will be replaced by July 21, 2014—is not fit for review. First, by staying our hand, we would give the petitioners an opportunity to convince EPA to promulgate a rule more to their liking. If EPA promulgated such a rule, or simply allowed the Deferral Rule to expire on July 21, 2014, the petitioners' challenge could be resolved. *See also Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483 (5th Cir.2005) (EPA decision to defer permit requirements for certain oil and gas construction sites unripe because "[g]iven that EPA has specifically stated its intent to examine, during the Deferral Period, the issue of how best to resolve questions ... regarding section 402(*l*)(2) of the Clean Water Act, any interpretation we would provide would necessarily prematurely cut off EPA's interpretive process" (quotation marks omitted)).

Second, even assuming EPA issues a superseding rule to which the petitioners object, the Deferral Rule will crystallize the issues raised by their challenge. *See, e.g., Am. Petroleum Inst.*, 683 F.3d at 388 ("In the ongoing rulemaking, EPA could change its mind and keep the transfer-based exclusion, in which case the issue goes away; or, if EPA stays the course and abolishes the transfer-based exclusion, the dispute will become concrete and straightforward."); *Nat'l Treasury*, 101 F.3d at 1431 ("[W]hile the broad legal theory advanced by appellants may be as complete as it ever will, the facts upon which its resolution may depend are not 'fully crystallized'...."). The current dispute is whether EPA may postpone regulatory action based on insufficient information. If EPA promulgated a superseding rule exempting biogenic CO2 from regulation, the dispute would be whether EPA may promulgate a permanent (or at least more crystallized) exemption. *See*Deferral Rule, 76 Fed.Reg. at 43,492–93;*see also Am. Petroleum Inst.*, 683 F.3d at 387 (finding lack of ripeness when "EPA responds that the pyrophoric properties of

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the catalysts warrant further consideration to make sure they will not be discarded during transfer").[6]

To be sure, "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way." *Am. Petroleum Inst.*, 683 F.3d at 388. While EPA has not yet proposed a final rule, it has also not engaged in a "thinly veiled attempt to evade review," *id.*, but instead committed itself to act by a date certain—July 21, 2014. *See* Oral Arg. Tr. 28–29 (Apr. 8, 2013) (EPA's Science Advisory Board has issued final report now being analyzed); *see also Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C.Cir.2012) ("We take the government at its word and will hold it to it.").

For the foregoing reasons, I believe the Deferral Rule is not fit for review at this time.

B. Hardship to the Parties

"To outweigh the[ ] institutional interests in the deferral of review, any hardship caused by that deferral must be *immediate and significant.*

Considerations of hardship that might result from delaying review will *rarely* overcome the ... fitness problems inherent in attempts to review tentative positions." *Am. Petroleum Inst.*, 683 F.3d at 389 (emphases added) (quotation marks omitted).

The petitioners argue, and my colleagues agree, Maj. Op. 407–08, that the hardship caused by the Deferral Rule is especially serious because the Deferral Rule could result in a "permanent" exemption from PSD permitting. Specifically, a stationary source constructed during the deferral period without obtaining a PSD permit (because of its temporary biogenic CO2 exemption) could, in theory, escape permitting forever because a PSD permit would then be required *only if* the source is modified. *See*42 U.S.C. § 7475(a). It is possible, then, that even if EPA decides to regulate biogenic CO2 emissions like all other CO2 emissions, a source constructed during the deferral period would never need to obtain a PSD permit if it remains unmodified.

The Deferral Rule does not open the floodgates as the petitioners and my colleagues fear. It allows a source to avoid PSD permitting only if (1) it has the potential to emit CO2 as a result of biogenic emissions; (2) its potential to emit biogenic CO2 exceeds Tailoring Rule thresholds; (3) it is not otherwise subject to PSD permitting based on its potential to emit other pollutants or non-biogenic CO2 emissions; *and* (4) it is able to obtain a minor source (non-PSD) permit and commence construction [7] no later than July 21, 2014. And a source could *permanently* avoid PSD permitting *only if* it met the above requirements *and* never underwent a "major modification determination." *See*

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Deferral Rule, 76 Fed.Reg. at 43,499.[8] At oral argument, the petitioners were able to name only one source—a facility located in Allendale, South Carolina—that has been able to avoid PSD permitting "in direct reliance on" the Deferral Rule. Oral Arg. Tr. 5–6, 10. The intervenors describe the number of sources that could take advantage of the Deferral Rule as "a handful," Oral Arg. Tr. 32. The petitioners submitted with their opening brief the declaration of Ranajit Sahu, an environmental, mechanical and chemical consultant, listing eight sources he reviewed that had obtained "minor source" (non-PSD) permits but "[e]scape[d] PSD [d]ue to the Biomass Exemption:" the Allendale facility plus seven others. Sahu Decl. at 14, 20–24. Six of them, however, obtained their minor source permits *before* the Deferral Rule was promulgated. *Compare* Sahu Decl. 22–24 (referencing Biogreen, Concord, Dorchester, Kershaw, Kamath Falls, Mancelona and Menominee facilities), *with* Sahu Decl. 5 (Biogreen obtained permit on December 15, 2010; Dorchester and Kershaw obtained permits on June 30, 2011; Klamath Falls obtained permit on December 30, 2010; Mancelona obtained permit on February 9, 2010; and Menominee obtained permit on May 11, 2011). If any of these sources commenced construction before July 2011, as is likely, the Deferral Rule would not affect that source because no source was subject to PSD based solely on CO2 emissions before that date.[9]

To sum up, not only is this case unfit for review but the hardship of which the petitioners complain is hyperbolically overblown. The Deferral Rule does not deregulate scores of polluters.[10] Instead, it temporarily maintains the heretofore long-time status quo [11] for a limited number of

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stationary sources that—until July 1, 2011—had never been subject to regulation as a major source under PSD. Given these circumstances, and our role as "the governmental branch of last resort," *Aiken Cnty.*, 645 F.3d at 434, I believe we should deny the petition; in the alternative, we should hold the case in abeyance pending either the expiration of the Deferral Rule on July 21, 2014 or EPA action taken by that date.[12]

Notes:

[1.] Under current precedent, for EPA to exempt biogenic carbon dioxide, it presumably would have to tinker with the Endangerment Finding. Unless EPA does so, there is no statutory basis for exempting biogenic carbon dioxide from the PSD and Title V permitting programs.

[2.] To be sure, the Executive may decline to follow a statutory mandate or prohibition applicable to the Executive if the President concludes that it is unconstitutional, unless and until a final Court order says otherwise. But EPA has not claimed that the statutory requirement to apply these permitting programs to biogenic carbon dioxide would be unconstitutional. It is also true that the Executive possesses a significant degree of prosecutorial discretion to decline to initiate criminal or civil enforcement actions against violators of a federal law. But EPA's decision here is not such a nonenforcement action, and EPA has not claimed otherwise. *See Massachusetts v. EPA*, 549 U.S. 497, 527–28, 533, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (explaining difference between prosecutorial discretion and agency's choice whether to regulate); *see generally In re Aiken County*, No. 11–1271, slip op. at 2 n. 1 (D.C.Cir.2012) (Kavanaugh, J., concurring) (describing prosecutorial discretion); *Seven–Sky v. Holder*, 661 F.3d 1, 50 n. 43 (D.C.Cir.2011) (Kavanaugh, J., dissenting) (referring to possibility that a President might exercise prosecutorial discretion not to seek civil penalties against those who fail to comply with health insurance mandate).* * *

[1.] Our review is highly deferential. *See Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 57 (D.C.Cir.2002) ("The policy originates in past decisions; FERC did not here decide to continue it, in the sense of confronting the substance and making an affirmative decision; it decided only that it would defer substantive treatment to a different—and necessarily later—context. In essence, then, the claim is of a violation of the [Administrative Procedure Act]'s mandate that an agency decide matters within a reasonable time, and calls on us to compel agency action unlawfully withheld or unreasonably delayed. Our review is [therefore] highly deferential." (quotation marks and citations omitted)).

[2.] Earlier, EPA had predicted that, had it not adopted the Tailoring Rule's phase-in approach, permitting authorities would have faced a 140–fold increase in PSD permitting activity, or $1.5 billion in additional annual costs; and a 400–fold increase in Title V permitting activity, or $21 billion in additional annual costs. Tailoring Rule, 75 Fed.Reg. at 31,539–40. Even under the phase-in approach, EPA projected a 42% increase in administrative costs per year. *Id.* at 31,540, Table V–1. In the Deferral Rule, EPA reasoned that "requiring regulation of biogenic sources of CO2 at this time may," *inter alia*, "exacerbate[ ] the regulatory burdens ... the Tailoring Rule was intended to avoid." Deferral Rule, 76 Fed.Reg. at 43,499.

[3.] Contrary to my colleagues' suggestion, the step-at-a-time doctrine does not require that an agency articulate precisely what constitutes full compliance with the statute at the time it takes an incremental step. *Compare* Maj. Op. 410 (criticizing EPA because "we simply have no idea what EPA believes constitutes 'full compliance' with the statute"), *with Pub. Citizen*, 374 F.3d at 1263 (permitting agency to delay "a final decision regarding the maximum test speed for unbelted dummy testing" until agency completed gathering information and analysis). The rationale for a deferral period is that delay is necessary to allow the agency to determine what it is *unable* to determine at the time, *i.e.*, full compliance with a statutory mandate.

[4.] In *Coalition for Responsible Regulation*, we rejected a challenge to the Tailoring Rule, albeit on lack of standing. 684 F.3d at 113–14.

[5.] Moreover, to the extent it could be shown that the CAA is so "extraordinarily rigid" as to bar EPA from considering off-site activity in determining a stationary source's "potential to emit" CO2, EPA is *also* studying "the nature of

the fuel combusted on site at the 'stack,' " which does not involve off-site activity. Br. of Resp'ts 49. If EPA concludes it cannot consider off-site activity, it could adjust its regulation using only on-site activity like stack combustion.

[6.] The majority opinion does not bar EPA from ultimately exempting biogenic CO2 from PSD and Title V regulation. Instead, my colleagues strike down a temporary agency position almost certain to be recast. They thus threaten the "integrity of [the] administrative process ... by piecemeal review of the substantive underpinnings of a rule." *Pub. Citizen,* 740 F.2d at 31;*see also Am. Petroleum Inst.,* 683 F.3d at 388 ("[T]o the extent API and EPA dispute whether some sort of transfer-based exclusion for hazardous secondary materials is necessary to comport with the concept of 'discard,' that issue also is best addressed once EPA finally decides whether to eliminate the transfer-based exclusion it adopted in the 2008 Rule.").

[7.]Tailoring Rule, 75 Fed.Reg. at 31,594 ("PSD preconstruction permitting requirements do not generally preclude a source from continuing actual construction that began before the source was a source required to obtain a PSD permit.").

[8.] The petitioners seem to concede that the hardship they face is remediable. Br. for Pet'rs 26 ("[E]ven if the plants commence construction under the illegal Exemption, upon a reversal of the Exemption they can be required to source more sustainably grown fuel and/or comply with more stringent limits requiring full operation and maintenance of their pollution control equipment.").

[9.] While Sahu avers that "many" of the six facilities "have not commenced construction," he does not identify any of the "many." Sahu Decl. 20.

[10.] In discussing the hardship prong, the majority declares that "we have no idea how many biogenic carbon dioxide sources have been constructed since March 2012." Maj. Op. 407–08. This assertion is way off the mark. The petitioners themselves could name only one source meeting the Deferral Rule exception. Their expert's affidavit isolated only eight, six of which might not fit the exception. *See supra* p. 423 & n. 9. If the petitioners have not been able to establish severe harm by now, we should not attempt to fill the jurisdictional gap in their challenge.

[11.] As an aside—my colleagues do not address this point—what the petitioners complain of is not massive deregulation but instead temporary maintenance of the status quo. Significantly, the harm they allege does not come from unregulated biogenic CO2 emissions; rather, their primary alleged harm is that the Deferral Rule allows for the less strict regulation of emissions of certain *non*-CO2 pollutants (such as particulate matter and nitrogen oxides) from biogenic CO2 emitters. But if a stationary source—biogenic or otherwise—has the potential to emit above-threshold amounts of a regulated pollutant other than GHGs, it must obtain a PSD permit and meet BACT not only for the pollutant(s) that made it subject to PSD but also for *all* pollutants emitted over certain thresholds (even for a pollutant not emitted in a quantity sufficient by itself to subject the source to PSD). *See* Deferral Rule, 76 Fed.Reg. at 43,493. While the Deferral Rule exempts from PSD a source whose biogenic CO2 emissions alone make it subject to PSD, it does not allow a source with the potential to emit above-threshold quantities of other regulated pollutants to escape regulation. *See id.* at 43,492 ("This deferral applies only to biogenic CO2 emissions and does not affect non-GHG pollutants or other GHGs ... emitted from the combustion of biomass fuel."). The Deferral Rule's effect on PSD applicability, then, is minimal: as noted earlier, it simply preserves the pre-July 2011 status quo. Before July 1, 2011, a stationary source was subject to PSD if it had the potential to emit certain quantities of pollutants *other* than CO2. Under the Tailoring Rule, a source that was not otherwise subject to PSD became, as of July 1, 2011, subject to PSD based on its GHG emissions. The Deferral Rule exempts from this

set of newly-regulated sources those subject to PSD based only on their *biogenic* CO2 emissions. Preserving the status quo for this limited category for—now—only a matter of months does not constitute "immediate and significant" hardship.

[12.] As my colleagues note, Maj. Op. 407–08, the Deferral Rule makes it *optional* for permitting authorities (e.g., states) not to regulate biogenic CO2 emissions during the deferral period but they identify only a single state—Massachusetts—that continues to regulate biogenic CO2 emissions. Maj. Op. 407–08. That only one permitting authority has seen fit to regulate biogenic CO2 emissions during the life of the Deferral Rule underscores the reasonableness of EPA's decision to study the science before imposing burdensome regulatory obligations to achieve uncertain and potentially negligible benefits.

AQP Exhibit 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

SEP 13 2013

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)

FROM: Stephen D. Page, Director Michael Koerber for
Office of Air Quality Planning and Standards

TO: Regional Air Directors, Regions 1 – 10

The purpose of this memorandum is to distribute non-binding guidance from the U.S. Environmental Protection Agency on the requirements of certain provisions of the Clean Air Act (CAA) titled, "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)."

Sections 110(a)(1) and 110(a)(2) of the CAA direct each state to develop and submit to the EPA a plan that provides for the implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS).[1] Moreover, section 110(a)(1) requires that each state make a new SIP submission within 3 years after promulgation of a new or revised primary or secondary NAAQS, for approval into the existing SIP to assure that the SIP meets the applicable requirements for such new or revised NAAQS. This type of SIP submission is commonly referred to as an "infrastructure SIP."

The attached guidance, developed with the benefit of extensive written comments from state and local air agencies on a draft version, provides advice on the development of infrastructure SIPs for the 2008 ozone NAAQS, the 2010 nitrogen dioxide NAAQS, the 2010 sulfur dioxide NAAQS, and the 2012 fine particulate matter ($PM_{2.5}$) NAAQS, as well as infrastructure SIPs for new or revised NAAQS promulgated in the future. This guidance does not address CAA section 110(a)(2)(D)(i)(I), which concerns interstate pollution transport affecting attainment and maintenance of the NAAQS. The EPA expects to issue guidance in the future with respect to section 110(a)(2)(D)(i)(I).

Section 110(a)(1) directs each state to make an infrastructure SIP submission to the EPA within 3 years of promulgation of a new or revised NAAQS,[2] after reasonable notice and public hearing.[3] Section

[1] These CAA sections and this guidance may also apply, as appropriate under the Tribal Authority Rule in 40 CFR Part 49, to an Indian tribe that receives a determination of eligibility for treatment as a state for purposes of administering a tribal air quality management program under section 110(a) of the CAA. This memorandum and the guidance uses the term "air agency" to refer to a state or tribe that develops and submits an infrastructure SIP, except when quoting or paraphrasing a CAA section or EPA regulation that uses the term "state."

[2] The Administrator may specify a shorter period.

110(a)(2) specifies the substantive elements that infrastructure SIP submissions need to address, as appropriate, for EPA approval. Many of the elements listed in section 110(a)(2) relate to the general information and authorities that constitute the basic structural requirements for a SIP needed for an air agency's overall air quality management program to be effective – elements that have been required to be in place since the initial SIPs were submitted in response to the CAA of 1970. Other elements listed in section 110(a)(2) relate to SIP requirements that have been added in successive amendments to the CAA since 1970. Although the 110(a)(2) requirements do not explicitly distinguish among the different criteria pollutants or different NAAQS, the structural SIP provisions needed to meet these requirements may depend on the particular new or revised NAAQS whose promulgation has triggered the requirement for a new infrastructure SIP submission. For example, a new or revised NAAQS may be accompanied by new ambient monitoring requirements tailored to that NAAQS or new prevention of significant deterioration program requirements. Overall, the requirement for a new infrastructure SIP submission provides an opportunity for the air agency, the public and the EPA to review the basics of the air quality management program in light of each new or revised NAAQS.

We acknowledge that air agencies continue to express concerns about the EPA's issuance of timely guidance to assist their efforts to implement a new or revised NAAQS. Our goal in providing the attached guidance document is to provide air agencies with recommendations in order to develop infrastructure SIPs that will meet the CAA requirements for recently promulgated NAAQS. The EPA will work to assist air agencies in the development and completion of these infrastructure SIPs so they may be submitted as soon as possible.

The attached guidance is also intended to provide comprehensive recommendations for infrastructure SIPs for new or revised NAAQS promulgated in the future. Our expectation is that this guidance will help to address the timeliness concerns expressed by air agencies and serve as guidance to address infrastructure SIP requirements for future NAAQS. As a result, the EPA intends that air agencies may continue to rely on this guidance for preparing infrastructure SIP submissions necessary for future NAAQS revisions, until such time as this guidance is supplemented or replaced by future guidance. Moreover, as air agencies and the EPA develop and act upon infrastructure SIP submissions through notice-and-comment rulemaking, the EPA anticipates that additional clarity will be provided about the best means to meet the statutory requirements.

Although this guidance provides recommendations for the development and review of infrastructure SIPs for multiple NAAQS, we are not recommending whether an air agency should or should not make a single infrastructure SIP submission to address requirements for more than one NAAQS simultaneously. Air agencies should consult with the appropriate EPA Regional Office for advice regarding combining infrastructure SIP submissions for multiple NAAQS.

Please share this guidance with the air agencies in your Region.

For Further Information

If you have any questions concerning this guidance, please contact H. Lynn Dail, at (919) 541-2363, *dail.lynn@epa.gov*, or Lisa Sutton, at (919) 541-3450, *sutton.lisa@epa.gov*.

Attachment

[3] The EPA's rules provide that a public hearing must be offered by the air agency, but is only required if a request is made.

Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)

September 2013

List of Selected Acronyms and Abbreviations

AERMOD	American Meteorological Society/EPA Regulatory Model
AMTIC	Ambient Monitoring Technology Information Center
AQI	Air Quality Index
CAA	Clean Air Act
CMAQ	Community Multi-scale Air Quality [Model]
CAMx	Comprehensive Air Quality Model with Extensions
CFR	Code of Federal Regulations
CSAPR	Cross-State Air Pollution Rule
EPA	Environmental Protection Agency
EGU	Electric generating unit
FIP	Federal implementation plan
FR	Federal Register
GHG	Greenhouse gases
IBR	Incorporation by reference
NAAQS	National Ambient Air Quality Standards
NO_2	Nitrogen dioxide
NOAA	National Oceanic and Atmospheric Administration
NPS	National Park Service
NSR	New Source Review
OAQPS	Office of Air Quality Planning and Standards
Pb	Lead
$PM_{2.5}$	Fine particulate matter
ppm	Parts per million
PSD	Prevention of significant deterioration
RAVI	Reasonably Attributable Visibility Impairment
SHL	Significant harm level
SIP	State implementation plan (also, if indicated by the context, a tribal implementation plan)
SO_2	Sulfur dioxide
SSM	Startup, shutdown, and malfunction
TAR	Tribal Authority Rule
TIP	Tribal Implementation Plan
UBR	Unavoidable breakdown rule
$\mu g/m^3$	Micrograms per cubic meter

Table of Contents

Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)

I. Introduction

Under Clean Air Act (CAA) sections 110(a)(1) and 110(a)(2), each state[1] is required to submit a state implementation plan (SIP)[2] that provides for the implementation, maintenance, and enforcement of each primary or secondary national ambient air quality standard (NAAQS). Moreover, section 110(a)(1) and section 110(a)(2) require each state to make this new SIP submission within 3 years after promulgation of a new or revised NAAQS.[3] This type of SIP submission is commonly referred to as an "infrastructure SIP."

Section 110(a)(1) generally directs each state to submit an infrastructure SIP to the U.S. Environmental Protection Agency after reasonable notice and public hearing.[4] Section 110(a)(2) specifies the substantive elements these submissions need to address, as applicable, for the EPA's approval. The subsections of section 110(a)(2) list a variety of requirements, some of which address authority, some of which address substantive requirements, and some of which consist of a combination of authority and substantive requirements. The conceptual purpose of an

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[1] These CAA sections and this guidance may also apply, as appropriate under the Tribal Authority Rule (TAR) in 40 CFR part 49, to an Indian tribe that receives a determination of eligibility for treatment as a state for purposes of administering a tribal air quality management program under section 110(a) of the CAA. Tribes should look to the TAR and engage their respective EPA Regional Offices in discussing how this guidance may impact the development and approvability of their tribal implementation plans (TIPs). We encourage states to provide outreach and engage in discussions with tribes about their SIPs as they are being developed.

[2] In the CAA and in this guidance, "plan," "SIP," and "TIP" may, depending on context, refer either to (i) all or part of the existing state (or tribal) implementation plan (*i.e.*, the collection of all submissions previously approved by the EPA as meeting CAA requirements) or (ii) a submission that adds to or modifies the existing plan as directed by section 110(a)(l).

[3] The Administrator may specify a shorter period.

[4] The EPA rules provide that a public hearing must be offered by the air agency but is only required if a request is made.

infrastructure SIP submission is to assure that the air agency's[5] SIP contains the necessary structural requirements for the new or revised NAAQS, whether by establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both. Overall, the infrastructure SIP submission process provides an opportunity for the responsible air agency, the public, and the EPA to review the basic structural requirements of the air agency's air quality management program in light of each new or revised NAAQS.

This non-binding guidance[6] provides recommendations for air agencies' development and the EPA's review of infrastructure SIPs for the 2008 ozone primary and secondary NAAQS,[7] the 2010 primary nitrogen dioxide (NO_2) NAAQS,[8] the 2010 primary sulfur dioxide (SO_2) NAAQS,[9] and the 2012 primary fine particulate matter ($PM_{2.5}$) NAAQS,[10] as well as

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[5] This guidance uses the term "air agency" to generally refer to a state, territory, or tribe that develops and submits an infrastructure SIP or TIP, except when quoting or paraphrasing a CAA section or a EPA regulation that uses the term "state."

[6] None of the recommendations contained in this guidance are binding or enforceable against any person, and no part of the guidance or the guidance as a whole constitutes final agency action that could injure any person or represent the consummation of agency decision making. Only final actions taken to approve or disapprove SIP submissions that implement any of the recommendations in this guidance would be final actions for purposes of CAA section 307(b). Therefore, this guidance is not judicially reviewable. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can" is intended to describe the EPA's policies and recommendations. Mandatory terminology such as "must" and "required" is intended to describe controlling legal requirements under the terms of the CAA and the EPA regulations. Neither such language nor anything else in this document is intended to or does establish legally binding requirements in and of itself.

[7] The EPA revised the levels of the primary and secondary 8-hour ozone standards to 0.075 parts per million (ppm). 40 CFR 50.15. 73 FR 16436 (March 27, 2008).

[8] The EPA revised the primary NO_2 standard by adding a 1-hour level of 100 parts per billion (ppb), while retaining the previous annual primary and secondary standards. 40 CFR 50.11(b) and (f). 75 FR 6474 (February 9, 2010). The EPA has also recently reviewed the air quality criteria and the secondary NAAQS for nitrogen oxides and sulfur oxides and retained the current NO_2 and SO_2 secondary standards, 77 FR 20218 (April 3, 2012).

[9] On June 2, 2010, the EPA established a new 1-hour SO_2 standard at a level of 75 ppb. 40 CFR 50.17. This rule also provided for the automatic future revocation of the previous annual and 24-hour SO_2 NAAQS for most areas following 1 year after designation under the new NAAQS. 40 CFR 50.4(e). The previous 3-hour secondary standard remains in place indefinitely. 40 CFR 50.5. 75 FR 35520 (June 22, 2010). The EPA has also recently reviewed the air quality criteria and the secondary NAAQS for nitrogen oxides and sulfur oxides and retained the current NO_2 and SO_2 secondary standards, 77 FR 20218 (April 3, 2012).

[10] The EPA revised the annual $PM_{2.5}$ standard by lowering the level to 12.0 micrograms per cubic meter ($\mu g/m^3$). 78 FR 3086 (January 15, 2013).

infrastructure SIPs for new or revised NAAQS promulgated in the future. As a result, air agencies may continue to rely on this guidance for developing infrastructure SIPs for future new or revised NAAQS until this guidance is supplemented or replaced by future guidance. This guidance does not address section 110(a)(2)(D)(i)(I), which concerns interstate pollution transport affecting attainment and maintenance of the NAAQS. The EPA expects to issue guidance in the future with respect to this section of the CAA.

Section II of this document provides general guidance for the development of infrastructure SIPs, and section III presents guidance on the individual elements (and sub-elements) that constitute an infrastructure SIP.

II. General Guidance on Infrastructure SIPs

Which elements of CAA 110(a)(2) affect infrastructure SIPs?

Infrastructure SIP elements are addressed in portions of section 110(a)(2) of the CAA. Under this section, states are required to develop and maintain an air quality management program that meets various basic structural requirements, including, but not limited to: enforceable emission limitations; an ambient monitoring program; an enforcement program; air quality modeling capabilities; and adequate personnel, resources, and legal authority.

Although, as stated in section I of this document, infrastructure SIPs are required to be submitted within 3 years after the promulgation of a new or revised NAAQS, the EPA interprets section 110(a)(2) to exclude two elements that could not be governed by the 3-year submission deadline of section 110(a)(1). Both these elements pertain to part D, in title I of the CAA, which addresses SIP requirements and submission deadlines for designated nonattainment areas for a NAAQS. Therefore, the following elements are considered by the EPA to be outside the scope of infrastructure SIP actions: (1) section 110(a)(2)(C) to the extent that it refers to permit programs (known as "nonattainment new source review") under part D; and (2) section 110(a)(2)(I) in its entirety, which addresses SIP revisions for nonattainment areas. Both these elements pertain to SIP revisions that collectively are referred to as a nonattainment SIP or an attainment plan, which would be due by the dates statutorily prescribed under subparts 2 through 5 under part D, extending as far as 10 years following area designations for some elements. Because the CAA directs states to submit these plan elements on a separate schedule, the EPA does not believe it is necessary for states to include these elements in the infrastructure SIP submission due 3 years after adoption or revision of a NAAQS. While an infrastructure SIP submission is not expected to meet the requirements for a nonattainment SIP, the scope of an infrastructure SIP does not exclude geographical areas that have been designated nonattainment for the new or revised NAAQS or an earlier NAAQS for the same pollutant. Sections 110(a)(1) and 110(a)(2) reflect the congressional intent that each air agency have an air quality program, covering all

geographical areas of the state, that includes the specified air agency authorities, requirements, and activities.

The infrastructure SIP submission requirement does not move up the date for any required submission of a part D plan for areas designated nonattainment for the new NAAQS. However, in order to cover all parts of the state or area of Indian country, an infrastructure SIP submission may reference pre-existing SIP emission limits or other rules contained in part D plans for the predecessor to the relevant new or revised NAAQS. It may also include recently adopted emission limits that are intended to be part of the not-yet-submitted part D plan for the new or revised NAAQS. To avoid confusion about the legal effect of the EPA's action on an infrastructure SIP submission, we intend to make clear in each final action that EPA approval of the infrastructure SIP submission is solely with regard to whether the submission meets particular infrastructure SIP required elements (as opposed to nonattainment SIP elements). This means that the EPA may approve a submission as meeting the air agency's obligation under section 110(a)(1) and 110(a)(2) stemming from the particular new or revised NAAQS, without necessarily determining whether the submission meets the applicable requirements for nonattainment SIPs under part D of title I of the CAA for the same or any other NAAQS. An approval on this basis will make the referenced or newly submitted SIP emission limits or other rules federally enforceable, and will make clear that there has been no disapproval of an applicable required SIP submission and thus that there is no federal implementation plan (FIP) obligation stemming from CAA section 110(a)(1) or (2).[11]

Developing and Submitting an Infrastructure SIP Submission

Upon the promulgation of a new or revised NAAQS, the infrastructure SIP process should begin with the air agency's review of the adequacy of its existing SIP provisions for

[11]In general, a finding by the EPA that an air agency has failed to submit a complete SIP or an action by the EPA to disapprove a SIP or SIP element initiates a FIP obligation, if the submission is required by the CAA. Mandatory sanctions would not apply under CAA section 179 because the failure to submit a SIP is neither with respect to a submission that is required under CAA title I part D nor in response to a SIP call under CAA section 110(k)(5). Some of the sections of this guidance document address FIP implications on individual elements more specifically.

purpose of meeting the infrastructure SIP requirements for the new or revised NAAQS. In order to develop an infrastructure SIP submission, an air agency may cite existing EPA-approved provisions and/or adopt new or revised statutory authorities and regulations, as necessary, in order to address each element of the infrastructure SIP. Further, with respect to a given NAAQS, an air agency may elect to make multiple submissions; each addressing some but not all elements or sub-elements of section 110(a)(2) so long as those submissions meet all of the infrastructure requirements in the aggregate. An air agency may also elect to make one submission to address infrastructure SIP requirements for multiple NAAQS, if it represents the submission as such during its adoption process and in its transmittal to the EPA. Of course, such a submission to address multiple NAAQS should establish how the air agency believes that the SIP meets each of the requirements of section 110(a)(2), as applicable, for each of the relevant NAAQS.

It is important that the SIP submission demonstrate the authority of the responsible air agency (or agencies, if responsibility for implementation is shared, *e.g.*, between state and local agencies) to implement the new or revised NAAQS that has triggered the need for the infrastructure SIP submission. This can be an issue for approval if an older underlying legal authority enumerates specific ambient standards by pollutant, indicator, averaging period, level, and/or date of promulgation but does not include the new or revised NAAQS in its list. Air agencies are encouraged to discuss any situations of this type with their respective EPA Regional Offices.

We encourage each air agency to consult with the appropriate EPA Regional Office, to consider the completeness of the submission, and to consider how the submission satisfies the applicable EPA regulations governing approval of infrastructure SIP submissions in 40 CFR part 51 ("Requirements for Preparation, Adoption, and Submittal of Implementation Plans"). The regulations are referenced in this document, some with overlapping provisions across subparts, and include the following:

- Subpart A – Air Emissions Reporting Requirements
- Subpart F – Procedural Requirements
- Subpart G – Control Strategy
- Subpart H – Prevention of Air Pollution Emergency Episodes

- Subpart I – Review of New Sources and Modifications
- Subpart J – Ambient Air Quality Surveillance
- Subpart K – Source Surveillance
- Subpart L – Legal Authority
- Subpart M – Intergovernmental Consultation
- Subpart O – Miscellaneous Plan Content Requirements
- Subpart P – Protection of Visibility
- Subpart Q – Reports

Once the air agency has made one or more infrastructure SIP submissions, the EPA will evaluate the submission(s) for completeness. The EPA's criteria for determining completeness of a SIP submission are codified at 40 CFR part 51 appendix V and are discussed in a later subsection of this guidance. An air agency's familiarity with the EPA's regulatory completeness criteria will benefit the air agency during the process of developing an approvable submission.

The EPA's review can be expedited if a SIP submission includes a detailed explanation of how the existing EPA-approved SIP in combination with any newly submitted provisions meets each of the applicable requirements of section 110(a)(2). The EPA expects the submissions to include a description of the correlation between each infrastructure element and an equivalent set of statutory, regulatory, and/or non-regulatory provisions, as appropriate, that are part of or (for some elements) are referred to by the existing SIP or the new submission. (Refer to section III for more detail on submission requirements for each individual element.) When an air agency's infrastructure SIP submission more clearly identifies the CAA element(s) being met by the SIP and how they are met, the EPA can more easily determine whether the submission is complete and approvable with respect to that element.

Certifications

Where an air agency determines that the provisions in or referred to by its existing EPA-approved SIP are adequate with respect to a given infrastructure SIP element (or subelement) even in light of the promulgation of a new or revised NAAQS, the air agency may make a SIP submission in the form of a certification. This type of infrastructure SIP submission may, *e.g.*,

take the form of a letter to the EPA from the Governor or her/his designee containing a "certification" (or declaration) that the already-approved SIP contains or references provisions that satisfy all or some of the requirements of section 110(a)(2), as applicable, for purposes of implementing the new or revised NAAQS. In such a case, the submission would not need to include a paper copy of the relevant pre-existing provisions (*e.g.*, rules or statutes).[12] Rather, the certification submission should provide citations to the state, local, or tribal statutes, regulations, or non-regulatory measures, as appropriate, in or referenced by the already EPA-approved SIP that meet particular infrastructure SIP element requirements and should include an explanation as to how those existing provisions meet the relevant requirements. The air agency should consult with its EPA Regional Office on the wording of this type of infrastructure SIP submission prior to making its submission. As for any other SIP submission, an air agency (unless the EPA has approved a request for parallel processing) would need to provide reasonable notice and

[12] In contrast, where an air agency's infrastructure SIP submission seeks the EPA's approval of or references a new provision (*e.g.*, a rule or statute) that has not already been approved, or submitted for approval, into the SIP, a complete SIP submission should include at least one hard copy and an exact duplicate electronic version of the adopted provisions (unless otherwise agreed to by the air agency and the Regional Office). Memorandum dated April 6, 2011, from Janet McCabe, titled "Regional Consistency for the Administrative Requirements of State Implementation Plans and the Use of Letter Notices." The EPA is investigating means to provide for states a method to transmit SIP submissions electronically with no requirement for paper copy submissions.

opportunity for comment prior to submitting a certification SIP submission to the EPA.[13] This "reasonable notice and public hearing" requirement for approvable infrastructure SIP submissions appears at sections 110(a)(1) and the introductory text of section 110(a)(2), and it has much the same wording as the more generally applicable procedural requirement at section 110(l) of the CAA ("Plan Revisions"). *See* CAA sections 110(a)(1) and (2) and 110(l). Compliance with this procedural requirement is verified through an additional certification by the air agency that a public hearing (if one was requested) was held in accordance with the EPA's regulatory procedural requirements for public hearings.[14] *See* 40 CFR 51.102 and 40 CFR part 51, appendix V, paragraph 2.1(g).

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[13] The EPA regulations at 40 CFR part 51 appendix V provide that a public hearing must always be offered and that a hearing must be held if requested. The EPA has received comment that when all of the elements in an existing infrastructure SIP were previously subject to a public comment process, including the opportunity for public hearing(s), when they were first submitted for the EPA's approval and incorporation into the SIP, no public comment requirements should apply to a "certification" infrastructure submission. The EPA believes this suggested interpretation is inconsistent with the plain text of section 110(a)(1) of the CAA. Section 110(a)(1) first provides that "[e]ach State shall, *after reasonable notice and public hearings*, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a [primary NAAQS] (or any revision thereof) … a plan [*i.e.*, infrastructure SIP] which provides for implementation, maintenance, and enforcement of such primary standard." The clause "after reasonable notice and public hearings" is most naturally read as imposing that procedure on the immediately following phrase, "adopt and submit," the direct object of which is the infrastructure SIP itself. The suggested interpretation would instead apply the phrase "after reasonable notice and public hearings" to SIP revisions submitted before the promulgation of the new or revised primary NAAQS, despite the complete absence of a reference to those earlier SIP revisions in section 110(a)(1). Any possible residual ambiguity is removed by the last sentence of section 110(a)(1), which requires an infrastructure SIP for a secondary NAAQS to be considered (unless a separate public hearing is provided) "at the hearing required by the first sentence of this paragraph." The only possible interpretation of this sentence is that there must be an opportunity for public hearing for the infrastructure SIPs for both the primary and secondary NAAQS. This is a reasonable interpretation because it informs the public that the SIP is being revised and allows for comment as to whether the air agency's earlier approved regulations also satisfy the relevant obligation stemming from the promulgation of the new or revised NAAQS. Furthermore, the next footnote explains that the EPA has recently clarified procedures for providing notice and opportunity for comment that reduce the burden on air agencies while still assuring adequate notice to the public.

[14] Additional guidance regarding how an air agency may submit a SIP or a SIP revision can be found in a memorandum dated April 6, 2011, from Janet McCabe, Deputy Assistant Administrator, Office of Air and Radiation, to Regional Administrators, titled "Regional Consistency for the Administrative Requirements of State Implementation Plans and the Use of 'Letter Notices'." Refer also to a memorandum dated Nov. 22, 2011, jointly from Janet McCabe, Deputy Assistant Administrator, Office of Air and Radiation, and Becky Weber, Director, Air and Waste Management Division, Region 7, to Air Division Directors, Regions 1-10, titled "Guidelines for Preparing Letters Submitting State Implementation Plans (SIPs) to EPA and for Preparing Public Notices for SIPs." These guidance memos identify certain streamlining approaches that are available to an air agency, depending on the situation.

As with any SIP submission, the EPA's review can be expedited if a SIP certification submission includes a detailed explanation of how the existing SIP meets each of the applicable requirements of section 110(a)(2). This should include a description of the correlation between each infrastructure element and an equivalent set of statutory, regulatory, and/or non-regulatory provisions, as appropriate, that are part of or are referenced by the existing SIP. When an air agency's infrastructure certification submission more clearly identifies the CAA element(s) being met by the SIP and how they are met, the EPA can more easily determine whether the submission is complete and approvable with respect to that element.

Determining Completeness of an Infrastructure SIP Submission

Section 110(k)(2) directs the EPA to take final action on a SIP submission within 1 year after the submission is determined to be complete under section 110(k)(l). If the EPA makes an affirmative finding that a SIP submission is complete, the date of the finding establishes the "completeness date" for the submission. If, however, the EPA makes no affirmative completeness finding, then the submission is deemed complete by operation of law on the date 6 months after the submission date. A finding that an infrastructure SIP submission is complete does not necessarily mean that the submission is approvable; the completeness review only addresses whether the air agency has provided information sufficient to commence formal EPA review for approvability. Refer to 40 CFR part 51 appendix V ("Criteria for Determining the Completeness of Plan Submissions").

Historically, when reviewing infrastructure SIP submissions, the EPA has operated on the basis that the elements and sub-elements of section 110(a)(2) for a given NAAQS are, for the most part, severable.[15] The EPA may elect to make a finding of failure to submit in whole or in part, based upon whether a state has made a complete infrastructure SIP submission for the relevant elements of section 110(a)(2). For a state that has not made any infrastructure SIP

[15] See, *e.g.*, 76 FR 81371 (December 28, 2011), "Approval and Promulgation of Implementation Plans; Texas; Infrastructure and Interstate Transport Requirements for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS, Final Rule," where the EPA approved severable portions of infrastructure SIP revisions submitted by Texas.

submission, the EPA generally will make a finding with respect to all of the relevant elements.[16] For a state that has made a SIP submission but whose submission is incomplete for some of the relevant elements, the EPA generally will issue a finding of failure to submit only with respect to those elements. This separation makes clear what mandatory EPA duty subsequently exists with respect to each element or subelement. If the EPA has made separate findings as to the completeness of submissions for two or more elements (and sub-elements), the 12-month statutory deadline for EPA action to approve or disapprove the elements for which the air agency has made a complete submission and the 24-month statutory deadline for EPA action to promulgate FIPs for incomplete elements would apply separately. The EPA intends to continue its practice of acting on infrastructure SIP elements together or separately, as appropriate.

Any SIP submission is deemed by operation of law to be complete six months after submission, unless the EPA has before that date made an affirmative finding that the submission is complete or incomplete. Any inconsistency between the scope of the submission as described in the pre-submission public notice of the SIP submission and the actual submission, or between the description of the scope of the submission in the transmittal letter to the EPA and the actual substantive coverage of the submission can create ambiguity as to which infrastructure SIP elements in fact have been submitted and thus are capable of becoming complete by operation of law (and triggering a deadline for the EPA's action) and which have in fact not yet been submitted.[17] To provide clarity for all parties, air agencies should be very clear and accurate in the wording of their public notices and transmittal letters. It is also advisable for the air agency to discuss this wording with its EPA Regional Office before submission. On its part, an EPA Regional Office, in receipt of a submission with any inconsistencies of the type described, should consider steps it can take or ask the air agency to take prior to the six-month point in order to avoid the creation of ambiguity or an incorrect result as to which SIP elements have actually

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[16] Under the TAR, a tribe is not subject to deadlines for certain planning requirements (including submission of infrastructure SIPs). *See* 63 FR 7254 (Feb. 12, 1998) for more information.

[17] The EPA's experience is that the existence of a FIP for PSD or regional haze may increase the risk of such inconsistencies occurring inadvertently. FIP-related aspects are discussed in more detail in the next section of this guidance.

been submitted and are complete and consequently subject to a statutory deadline for the EPA action.

Section 2.3 of 40 CFR part 51 appendix V waives certain completeness requirements if the EPA has granted an air agency request for parallel processing of the submission. Under the parallel processing approach, the EPA proposes to approve a draft SIP submission so that final approval can be given more quickly after the final adoption of any new measures as state, local, or tribal law and conclusion of the public comment process normally required for any SIP submission. The EPA intends to grant requests for parallel processing of infrastructure SIP submissions if (1) the only missing elements of completeness are final state adoption of rules or other provisions and/or conclusion of the public comment process for the SIP submission, including evidence thereof as specified in section 2.3 of appendix V, and (2) the schedule provided by the air agency for the conclusion of the adoption process and/or the public comment process for the SIP submission is reasonably expeditious.[18] In such a case, the EPA generally would also either make a finding of completeness for the submission or allow it to become complete by operation of law. If both these conditions are not met, the EPA will not grant the parallel processing request. However, the EPA generally will not make a finding of failure to submit a complete SIP but may be required to do so if under a court order.

Effect of a Federal Implementation Plan on an Infrastructure SIP

The CAA directs states to submit SIPs to the EPA for approval. In some cases, and for various reasons, the EPA may have previously determined that an air agency had not satisfied a SIP requirement, and so accordingly promulgated a FIP to address the gap in the SIP. The infrastructure SIP process can be affected when an air agency is currently subject to a FIP that is related to an infrastructure SIP element. Therefore, this section describes the potential impact of pre-existing FIPs on the infrastructure SIP process. This explanation is relevant not only for air

[18] With regard to the 1992 EPA Memorandum from John Calcagni, Air Quality Management Division, OAQPS, to EPA Air Division Directors, Regions I through X, "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (Act) Deadlines," October 29, 1992, note that the EPA no longer considers the section titled "Requests for Parallel Process to Meet Act Deadlines" to be its guidance for infrastructure SIPs that are submitted with requests for parallel processing.

agencies that currently have a FIP in effect but also for air agencies that may be subject to a FIP in the future.

The EPA's obligation to promulgate a FIP is set out in section 110(c) of the CAA. A FIP may be triggered if the EPA takes any of the following actions: (1) the EPA finds that a state has failed to make a required SIP submission; (2) the EPA finds that a required submission was incomplete; or (3) the EPA disapproves a required SIP submission in whole or in part. If the EPA takes one of these actions, section 110(c) obligates the EPA to promulgate a FIP within 2 years of the action, a deadline that is commonly referred to as a "FIP clock." In order to remove the EPA's FIP obligation, the state must make a SIP submission that meets the applicable CAA requirements and is approved by the EPA prior to the EPA's promulgation of a FIP. Whenever the EPA promulgates a FIP for a state air agency, the FIP rulemaking will identify the specific CAA provisions that required the promulgation of the FIP, and the FIP will be codified in the appropriate section of 40 CFR part 52.

Under the TAR, a tribe is not subject to deadlines for planning requirements (including submission of infrastructure SIPs).[19] In general, the concept of failure to submit a complete implementation plan does not apply in tribal situations, and there is no FIP clock started if a tribe has not submitted an infrastructure TIP. Under the TAR, in the absence of an approved tribal implementation plan the EPA will promulgate a FIP for one or more infrastructure SIP elements when and if it is necessary and appropriate to do so. For example, the EPA has promulgated new source review FIPs to govern permitting of sources in Indian country.

If the EPA has promulgated a FIP, then this means that the EPA has previously determined that the air agency's SIP did not meet some CAA requirement as of the date of promulgation of that FIP. While the intent and effect of the FIP is to achieve the same air quality protection as the SIP should have achieved, it is the EPA's interpretation of sections 110(a)(1) and 110(a)(2) that the EPA cannot give "credit" for the FIP when determining whether an air agency has met any later obligations under these sections.

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[19] *See* 63 FR 7254 (February 12, 1998) for more information on the TAR.

As an example of a FIP that affects the infrastructure SIP submission process, we note that, for various reasons, several states do not have EPA-approved major source preconstruction permit programs in their SIPs for prevention of significant deterioration (PSD) as required by part C of title I of the CAA. The EPA has promulgated a set of PSD rules which establish authority for the EPA (or an air agency to which the EPA has delegated authority to administer the federal PSD program)[20] to issue preconstruction permits to major stationary sources in any area not covered by a PSD program in a SIP.[21] The EPA has also promulgated FIPs for each area without a SIP-approved PSD program, indicating that this set of federal PSD rules applies in that area.[22] Such a PSD FIP may be relevant to infrastructure Element C, Element J, Element D(i)(II), and the portion of Element D(ii) related to notification to other states. As another example, the EPA has promulgated full or partial FIPs to address reasonably attributable visibility impairment (RAVI) and regional haze for some air agencies.[23] A RAVI FIP or a regional haze FIP may be relevant to Element D(i)(II). These linkages are further discussed in the section pertaining to each of these elements.

The infrastructure SIP process will vary to some extent depending on whether or not the air agency's SIP submission purports to, and actually does, satisfy infrastructure SIP requirements that are currently being met by means of a FIP, as explained in the following paragraphs.

Consider an air agency that is currently subject to a FIP that is relevant to certain infrastructure SIP elements makes a submission and states in a general way in the transmittal letter that the submission satisfies all elements of CAA section 110(a)(2), or if it specifically states that the submission satisfies the elements to which the FIP is relevant, the EPA would

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[20] The EPA is planning on extending the opportunity for delegation of new source review permitting to qualified tribes.

[21] *See* 40 CFR 52.21; Prevention of Significant Deterioration of Air Quality.

[22] *See*, *e.g.*, 40 CFR 52.738 for the PSD program applicable to sources in Illinois.

[23] Some of these regional haze FIPs relied on the Cross-State Air Pollution Rule (CSAPR), which was subsequently vacated by the U.S. Court Appeals for the D.C. Circuit. *EME Homer City Generation, L.L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The Supreme Court has accepted the EPA's petition for it to review the D.C. Circuit's decision. Air agencies should consult with their EPA Regional Offices regarding the current status of this litigation and the implications if any for infrastructure SIP submissions.

evaluate whether the submission, in fact, contains existing or new substantive provisions to address the section 110(a)(2) requirement presently covered by the FIP. If the submission does not substantively address the elements or sub-elements presently covered by the FIP, then the EPA Regional Office should encourage the air agency to clarify its intentions as to which elements have been submitted. The air agency might then clarify that it has made no submission for certain elements, in which case the EPA would not make a finding of complete submission for those elements and those elements could not become complete by operation of law. (The EPA may make a finding of failure to submit for those elements.) In the absence of such a clarification, the EPA Regional Office should determine that the air agency has failed to make a complete submission for those elements. Such a finding generally would create an obligation for the EPA to adopt a FIP within 24 months. However, based on the PSD FIP example and to the extent that the SIP deficiency is addressed by continuing to implement the existing PSD FIP, the EPA would have no additional FIP obligation under section 110(c) and the air agency would not have to take any further action for the current FIP-based permitting process to continue operating. Mandatory sanctions would not apply under CAA section 179 because such a finding of failure to submit a complete SIP was made neither with respect to a submission that is required under CAA title I part D nor in response to a SIP call under CAA section 110(k)(5).

To provide further clarity, consider how the following three scenarios may prompt differing EPA actions.

First scenario. Under this scenario, the transmittal letter for the infrastructure SIP submission makes clear that the submission is not intended to satisfy certain elements that can be addressed by continuing to apply the FIP. In this situation, the EPA would make a completeness finding that extends only to the SIP elements actually submitted by the air agency, and a finding that other relevant applicable elements were not submitted.[24] The EPA would be required to take action only on the elements that were submitted, within 12 months after those elements have been determined to be complete. The overall infrastructure SIP would not be approvable with

[24] If, instead, the submission that clearly addressed only some required elements has become complete at the 6-month point by operation of law, the EPA would still consider the air agency to not have made a complete submission for the missing elements.

respect to the elements that were not submitted, and thus the EPA could only partially approve the overall infrastructure SIP.[25]

Second scenario. Under the second scenario, suppose the air agency makes a SIP submission that references the existence of a PSD FIP and asserts that the existence of the FIP is a sufficient basis for EPA approval of the submission with respect to these elements. The EPA would not consider the existence of the PSD FIP, even if referenced in the submission, as meeting completeness or approvability criteria for these elements. This is because a FIP is not a state plan and thus cannot serve to satisfy the state's obligation to submit a SIP. The EPA's action on the SIP submission would indicate that the air agency has not met the underlying statutory obligations in section 110(a)(2) with respect to Elements C and J. However, when the SIP deficiency is being addressed by the existing PSD FIP, the EPA would have no additional FIP obligation under section 110(c) and the state would not have to take any further action for the current FIP-based permitting process to continue operating. In this example, the EPA may be able to approve a state-developed SIP later, if the air agency develops and submits a SIP meeting all statutory and regulatory requirements relevant to Elements C and J.

Third scenario. Under this scenario, the transmittal letter for the infrastructure SIP submission explicitly or implicitly indicates that the submission is intended to satisfy all required elements (including the elements that may be addressed by continuing to apply the existing PSD FIP), and the 6-month point has passed without any clarification by the air agency or any finding by the EPA Regional Office regarding completeness. In this situation, the EPA will generally treat the submission as having been intended to address all the required elements and to be complete for all elements. The 12-month clock for EPA action on the submission would apply to all elements and the EPA would proceed to disapprove the submission for the same elements with respect to the subject NAAQS that were previously addressed in the context of earlier NAAQS by the FIP. However, similar to the first scenario in which the SIP deficiency has

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[25] *Note*: Because an infrastructure SIP is not a required plan submission under part D of title I of the CAA, disapproval of (or a finding of failure to submit) an infrastructure SIP or element thereof does not trigger mandatory sanctions under CAA section 179, unless the submission was required in response to a SIP call under section 110(k)(5) of the CAA.

already been addressed, to the extent that the existing FIP addresses the deficiency, the EPA would have no additional FIP obligation under section 110(c) and the state would not have to take any further action for the current FIP-based permitting process to continue operations. As in the first scenario, the EPA may be able to approve a state-developed SIP later, if the air agency develops and submits a SIP meeting all statutory and regulatory requirements relevant to Elements C and J.

For some state air agencies and some sources in Indian country, there are RAVI or regional haze FIPs in place that may be relevant to the subelement of Element D(i)(II) related to interference with measures by another state to protect visibility. This subelement is sometimes referred to as the "visibility transport" prong or simply, as "prong 4." While fully approved RAVI and regional haze SIPs can be relied upon in satisfying this subelement, as explained later in this document, it may be possible in some cases for the element to be satisfied even if there is a FIP in place. Air agencies in this situation should read the section on Element D(i)(II) and consult with their respective EPA Regional Offices on this aspect of their infrastructure SIP submission.

If a new submission in fact does address the substance of the element or subelement covered by a FIP, the EPA would review the submission and may approve the infrastructure SIP. The EPA may also withdraw the FIP that had been addressing that element or subelement for previous NAAQS, if all relevant CAA requirements are met by the SIP.

III. Guidance on Individual Infrastructure SIP Elements

The EPA interprets section 110(a)(1) and section 110(a)(2) to require infrastructure SIP submissions to meet the elements of section 110(a)(2), as applicable. As described in section II, the EPA interprets the portion of section 110(a)(2)(C) that pertains to a permitting program that applies to nonattainment NSR within nonattainment areas, and the requirements of section 110(a)(2)(I) that pertain to the specific requirements for attainment plans for designated nonattainment areas, to be outside the scope of the infrastructure SIP requirements because of the separate statutory schedules for area designations and submission of attainment plans provided elsewhere in the CAA. With respect to the remaining elements of section 110(a)(2), subsections (A) through (M), the CAA imposes an obligation on states to address those elements, as appropriate, within the 3-year infrastructure SIP submission deadline. This section provides recommendations to air agencies about how to make infrastructure SIP submissions to meet these remaining relevant elements, as applicable.

Element A – Section 110(a)(2)(A): Emission Limits and Other Control Measures

> *Each such plan shall –*
>
> *(A) 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 appropriate to meet the applicable requirements of this Chapter.*

To satisfy Element A, an air agency's submission should identify existing EPA-approved SIP provisions or new SIP provisions that the air agency has adopted and submitted for EPA approval that limit emissions of pollutants relevant to the subject NAAQS, including precursors of the relevant NAAQS pollutant where applicable. Emissions limitations and other control measures needed to attain the NAAQS in areas designated nonattainment for that NAAQS will be due on a different schedule from the section 110 infrastructure elements and will be reviewed and acted upon with regard to approvability for the specific purposes of such an attainment plan under CAA title I part D through a separate process at a later time. *See* "Which elements of CAA

110(a)(2) affect infrastructure SIPs?" in section II of this guidance for additional discussion of this distinction.

There are two issues that relate to Element A for which we are providing general guidance. These are whether air agencies would need to correct the following in order for the EPA to approve their infrastructure SIP submissions: (1) previously approved emissions limitations that may treat startup, shutdown, and malfunction (SSM) events inconsistently with the CAA as interpreted by our longstanding guidance on excess emissions (the EPA's SSM Policy) and more recently by multiple courts; and (2) previously approved SIP provisions for "director's variance" or "director's discretion" that purport to allow revisions to or exemptions from SIP emission limitations with limited public process or without requiring further approval by the EPA.[26] The guidance provided here is consistent with the EPA interpretations articulated in provisions in several recent EPA final actions on SIPs.[27, 28]

In recent infrastructure SIP actions, the EPA has drawn an important distinction with respect to SSM issues and director's discretion issues in this particular context. The EPA does not interpret section 110(a)(2) to require air agencies and the EPA to address potentially deficient

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[26] For further description of EPA's SSM Policy, *see*, *e.g.*, a memorandum dated September 20, 1999, titled, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. Also, the EPA issued a proposed action on February 12, 2013, titled "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction." This rulemaking responds to a petition for rulemaking filed by the Sierra Club that concerns SSM provisions in 39 states' SIPs. It clarifies and restates the EPA's SSM SIP policy.

[27] *See*, *e.g.*, a SIP call issued to Utah (72 FR 21639, Apr. 18, 2010) concerning treatment of malfunction events under Utah's "unavoidable breakdown rule" (UBR). The EPA determined that Utah's SIP was substantially inadequate because its UBR allowed operators of CAA-regulated facilities to avoid enforcement actions when they suffer an unexpected and unavoidable equipment malfunction. In this SIP call, the EPA called on Utah to promulgate a new UBR that conforms to the EPA's interpretation of the CAA. Litigants maintained that the SIP call was arbitrary and capricious and asked the Tenth Circuit Court to vacate it. The Court denied the petition for review of the Utah SIP call. *U.S. Magnesium, LLC v. EPA*, U.S. Court of Appeals, No. 09-1269, January 14, 2011.

[28] As another example that presents the EPA's position on infrastructure SIPs with respect to this issue, *see* the preamble language in the final rule published in the *Federal Register* on July 13, 2011 (76 FR 41075), "Approval and Promulgation of Air Quality Implementation Plans; Illinois; Indiana; Michigan; Minnesota; Ohio; Wisconsin; Infrastructure SIP Requirements for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." In section II of the preamble, the EPA described at length the position summarized in this guidance regarding existing provisions related to excess emissions during periods of SSM and existing provisions related to "director's variance" or "director's discretion."

pre-existing SIP provisions of these types in the context of acting on an infrastructure SIP submission. The EPA considers this a reasonable interpretation of the CAA in such a context. The EPA notes that it has alternative tools in the CAA to address existing SIP deficiencies of this type, in appropriate circumstances.

However, any "new" provisions in the infrastructure SIP submission that are relevant to SSM (*e.g.*, any newly created enforcement discretion provisions, affirmative defense provisions, or special emissions limitations that apply during SSM periods but that have not already been approved by the EPA) should be consistent with the EPA's policy on what types of SSM provisions are permissible in SIPs under the CAA. For instance, new provisions as part of an approvable SIP submission cannot allow an air director the discretion to determine whether an instance of excess emissions is a violation of an emission limitation, because such a determination could bar the EPA and citizens from enforcing applicable requirements. Similarly, new provisions in a SIP for the exercise of enforcement discretion with regard to SSM events may only apply to state or tribal government personnel so that they do not limit enforcement by the EPA or citizens. Excess emissions, including those occurring during SSM periods, might prevent attainment and maintenance of the NAAQS and compliance with other applicable CAA requirements. The EPA views all periods of excess emissions as violations of the applicable emission limitation. Therefore, if an infrastructure SIP contains provisions that have not already been approved by the EPA, and that impermissibly exempt from enforcement excess emissions that may occur at a facility during SSM periods or that otherwise are inconsistent with the EPA's interpretation of the CAA as outlined in its SSM Policy, the EPA will not propose to fully approve the submission as meeting section 110(a)(1) and (2) requirements.

With regard to "director's discretion" to revise emission limits, any "new" provisions in the infrastructure SIP submission (*i.e.*, provisions that have not already been approved by the EPA) should be consistent with the EPA's interpretation of the CAA as expressed in its policy regarding director's discretion.[29]

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[29] *See* 77 FR 34309 and 34311 (June 11, 2012). "Approval and Promulgation of Implementation Plans; Tennessee; 110(a)(1) and (2) Infrastructure Requirements for the 1997 Annual and 2006 24-Hour Fine Particulate National Ambient Air Quality Standards, Proposed Rule."

The EPA will continue to consider for approval, as it has in recent final SIP actions,[30] SIPs that provide for a limited affirmative defense to civil penalties for excess emissions occurring during properly demonstrated and documented malfunction periods.

In summary, the EPA in recent final actions on infrastructure SIP submissions has maintained that the CAA does not require that new infrastructure SIP submissions address *existing* potentially inadequate provisions concerning SSM or director's discretion in order to be approved as meeting the CAA section 110(a)(1) and (2) requirements triggered by the new or revised NAAQS. The EPA's stated position has been that it can approve an infrastructure SIP submission, even if the infrastructure SIP may incorporate by reference previously approved SIP provisions that are or may not be consistent with the EPA's SSM Policy and its policy on director's discretion to revise emission limits. The EPA articulated this position in a number of infrastructure SIP actions taken in 2011, noting in the preambles for those actions that existing provisions for SSM and director's discretion may be dealt with separately, outside the context of acting on an air agency's new infrastructure SIP submission.[31] However, if an air agency submits an infrastructure SIP submission that would create a *new* SIP provision related to SSM that is inconsistent with the EPA's interpretation of the requirements of the CAA, the EPA may disapprove it. We intend to continue this practice and affirm it as part of this guidance.

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[30] *See* 75 FR 68989 at 68992 (November 10, 2010), "Approval and Promulgation of Implementation Plans; Texas: Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities." In *Luminant Generation Co. v. EPA*, No. 10-60934, 2012 WL 4841615 (5th Cir. 2012), the Court upheld the EPA's approval of an affirmative defense for malfunctions and disapproval of an affirmative defense provision in a SIP submission that pertained to "planned activities," which included startup, shutdown, and maintenance. The EPA disapproved this provision, in part because it provided an affirmative defense for maintenance. The Court rejected challenges to the EPA's disapproval of this provision, holding that under *Chevron* step 2, the EPA's interpretation of the CAA was reasonable. *See* also the *Federal Register* notice signed on February 12, 2013, restating the EPA's policy on affirmative defense provisions and proposing 36 SIP calls to correct affirmative defense and other SSM-related SIP provisions.

[31] As one example of preamble language that presents the EPA's position on infrastructure SIPs with respect to this issue, *see* the final rule published in the *Federal Register* on July 13, 2011 (76 FR 41075), "Approval and Promulgation of Air Quality Implementation Plans; Illinois; Indiana; Michigan; Minnesota; Ohio; Wisconsin; Infrastructure SIP Requirements for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." In section II of the preamble, the EPA described at length the position summarized here regarding existing provisions related to excess emissions during periods of SSM and existing provisions related to "director's variance" or "director's discretion."

Element B – Section 110(a)(2)(B): Ambient Air Quality Monitoring/Data System

> *Each such plan shall –*
>
> *(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to –*
>
> *(i) monitor, compile, and analyze data on ambient air quality, and*
>
> *(ii) upon request, make such data available to the Administrator.*

To meet Element B requirements, the best practice for an air agency submitting an infrastructure SIP would be to submit, for inclusion into the SIP (if not already part of the SIP), the statutory or regulatory provisions that provide the air agency or official with the authority and responsibility to perform the actions listed in the bullets below along with a narrative explanation of how the provisions meet the requirements of this element.[32]

- Monitor air quality for the relevant NAAQS pollutant(s) at appropriate locations in accordance with the EPA's ambient air quality monitoring network requirements. *See* the EPA's Ambient Monitoring Technology Information Center (AMTIC) website, 40 CFR part 53 ("Ambient Air Monitoring Reference and Equivalent Methods"), and 40 CFR part 58 ("Ambient Air Quality Surveillance"). *See* also 40 CFR 51.190 (referencing 40 CFR part 58).[33]
- Submit data to the EPA's Air Quality System (AQS) in a timely manner in accordance with 40 CFR part 58. Under 40 CFR part 58, subpart B ("Monitoring Network"), for example, *see* 40 CFR 58.16 ("Data submittal and archiving requirements").
- Provide to the EPA Regional Office information regarding air quality monitoring activities, including a description of how the air agency has complied with monitoring requirements, and an explanation of any proposed changes to the network.

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[32] The EPA recognizes that some air agencies may have general authorizing provisions that do not specifically enumerate specific activities but do implicitly authorize the air agency to perform such activities, in which case inclusion of those provisions would meet the intent of this best practice.

[33] Note that despite the recent reorganization of 40 CFR part 58 without a corresponding conforming update of the cross-reference to part 58 in 40 CFR 51.190, all requirements under part 58 must still be met.

Submission of annual monitoring network plans consistent with the EPA's ambient air monitoring regulations is one way of providing this information. Under 40 CFR part 58, subpart B, *see, e.g.*, 40 CFR 58.10 ("Annual monitoring network plan and periodic network assessment").

- Obtain the EPA's approval of any planned changes to monitoring sites or to the network plan, consistent with applicable requirements in 40 CFR 58.14 ("System Modification").

If an air agency chooses not to include the relevant statute or regulation in its SIP, then the air agency should provide a reference or citation to the authority provisions along with a narrative explanation of how the provisions meet the requirements of this element, as well as a copy of the relevant authority to accompany the SIP as required by 40 CFR 51.231.

For any new or revised NAAQS, the infrastructure SIP submission should provide assurance that the state will meet changes in monitoring requirements related to the new or revised NAAQS.

Element C – Section 110(a)(2)(C): Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources.

Each such plan shall –

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and 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 of this Subchapter.

This element consists of three sub-elements; enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources; and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (*i.e.*, the major source

PSD program).[34,35] While this section outlines the general requirements for approvability of an infrastructure SIP with respect to Element C, air agencies previously subject to FIPs with respect to this element for major source PSD in the context of earlier NAAQS have the option, as discussed in more detail below and in Section II: "Which elements of CAA 110(a)(2) affect infrastructure SIPs?", to remain subject to those FIPs as the remedy for infrastructure SIP deficiencies for a new or revised NAAQS.

Enforcement: To satisfy this subelement, an infrastructure SIP submission should identify the statutes, regulations, or other provisions in the existing SIP (or new provisions that are submitted as part of the infrastructure SIP to be incorporated into the SIP) that provide for enforcement of those emission limits and control measures that the air agency has identified in its submission for purposes of satisfying Element A (Emissions limits and other control measures).

Regulation of minor sources and minor modifications: To satisfy the subelement for pre-construction regulation of the modification and construction of minor stationary sources and the minor modification of major stationary sources, an infrastructure SIP submission should identify the existing EPA-approved SIP provisions and/or include new provisions that govern the minor source pre-construction program that regulates emissions of the relevant NAAQS pollutant(s). The EPA rules addressing SIP requirements for pre-construction regulatory programs that apply to minor sources and minor modifications are at 40 CFR sections 51.160 through 51.164.

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[34] The terms "major" and "minor" categorize a stationary source or a modification of a stationary source, for NSR applicability purposes, in terms of an annual emissions rate (tons per year) or change in annual emission rate for a pollutant. The pre-construction minor NSR program generally applies to minor stationary sources and minor modification projects at major stationary sources. A major "stationary source" is defined in the applicable PSD or nonattainment NSR regulations. Some air agencies exempt small minor sources and modifications from pre-construction regulatory requirements.

[35] As explained in section II of this document, the EPA considers evaluation of permit provisions that implement CAA title I part D (the major source nonattainment NSR program) to generally be outside the scope of infrastructure SIP actions. Hence, to address the sub-element regarding major source permitting, only the major source permitting program applicable in areas designated attainment or unclassifiable is an issue. In contrast, because part D does not impose any special requirements for permitting of minor sources in nonattainment areas, the infrastructure SIP due 3 years after a new or revised NAAQS should address Element C with regard to minor sources in unclassifiable, attainment, and nonattainment areas, without regard to designation.

Preconstruction PSD permitting of major sources:[36] To satisfy the subelement regarding the PSD program required by CAA title I part C, an infrastructure SIP submission should demonstrate that one or more air agencies has the authority to implement a comprehensive PSD permit program under CAA title I part C, for all PSD-subject sources located in areas that are designated attainment or unclassifiable for one or more NAAQS. The infrastructure SIP submission should also identify the existing SIP provisions that govern the major source PSD program. As explained in more detail below, to be approvable the infrastructure SIP submission should also address any new or revised PSD permitting program requirements for which the deadline for SIP submissions has passed as of the date of EPA's proposed action on the infrastructure submission.

The SIP permitting provisions that implement CAA title I part C (the PSD program) govern preconstruction review and permitting of any new or modified major stationary sources of air pollutants regulated under the CAA (as well as any precursors to the formation of those pollutants when identified for regulation by the Administrator) in areas designated as attainment or unclassifiable. The EPA rules providing the minimum requirements for approvable PSD programs can be found generally at 40 CFR 51.166 (general provisions for PSD programs approved in SIPs) and 40 CFR 51.307 (specific provisions pertaining to new source review for potential impacts on air quality related values in Class I areas).

The EPA interprets Element C to mean that each infrastructure SIP submission for a particular NAAQS would need to demonstrate that the air agency has a complete PSD permitting program in place covering the requirements for all regulated NSR pollutants, including greenhouse gases (GHG), in order to demonstrate that the SIP meets Element C.[37]

Element C requires that each infrastructure SIP contain a permitting program "as required by part C." CAA title I part C is applicable to all pollutants subject to regulation under the CAA. *See*, *e.g.*, CAA section 165(a)(4). There is no specific language in the last clause of Element C

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[36] The discussion here of the PSD portion of Element C also applies in full to the PSD portion of Element J.

[37] *See*, *e.g.*, 77 FR 64737 (October 23, 2012), "Partial Approval and Partial Disapproval of Air Quality State Implementation Plans; Nevada; Infrastructure Requirements for Ozone and Fine Particulate Matter."

that restricts its application to only those provisions of CAA title I part C that pertain to the particular new or revised NAAQS addressed by the particular infrastructure SIP action. Because the scope of CAA title I part C is comprehensive (covering all pollutants subject to regulation under the CAA, including GHG), the EPA likewise reads the unrestricted reference to CAA title I part C in Element C to mean that this provision has the same scope as CAA title I part C itself. Thus, an infrastructure SIP submission for any one of the recently revised NAAQS must be "comprehensive" in that it would need to meet all CAA title I part C requirements for other regulated NSR pollutants as well.

The broad scope of Element C with respect to major source PSD permitting raises the question of how the EPA will proceed when the timing of requirements for multiple, related SIP submissions (*e.g.*, for mandatory PSD SIP revisions) impacts the ability of the air agency and the EPA to address certain substantive issues in the infrastructure SIP submission in a reasonable fashion. It is appropriate for the EPA to take into consideration the timing of related requirements for SIP submissions in determining what an air agency can reasonably be expected to have addressed in an infrastructure SIP submission for a NAAQS at the time when the EPA acts on such submission. The EPA does not consider it reasonable to interpret Element C to require the EPA to propose to disapprove an air agency's infrastructure SIP submission because the air agency had not submitted a PSD permitting program revision that was not yet due as of the date of EPA's proposed action. Because it would be unreasonable to propose such a disapproval, the EPA likewise does not consider it reasonable to take final disapproval action under such circumstances. In other words, the EPA interprets these CAA sections to allow the EPA to approve an infrastructure SIP submission for the major source PSD permitting subelement of Element C (and Element J) provided that the EPA has already approved or is simultaneously approving the air agency's SIP submission(s)[38] with respect to all structural PSD permitting program revision requirements that were due under the EPA regulations or the CAA on or before the date of the EPA's proposed action on the infrastructure SIP submission. To adopt a different approach, by which the EPA could not act on an infrastructure SIP or at least

[38] These submissions may be submitted separately or together with the infrastructure SIP submission on which the EPA is proposing action.

could not approve an infrastructure SIP whenever there was any impending revision to the PSD permitting program regulations required by another collateral rulemaking action, would result in regulatory gridlock and make it impracticable or impossible for the EPA to act on infrastructure SIPs if the EPA had recently revised its PSD permitting regulations but the submission required by such revisions was not yet due. The EPA believes that such an outcome would be an unreasonable reading of the statutory process for the infrastructure SIPs contemplated in sections 110(a)(1) and (2).

Consequently, the EPA generally plans to proceed as follows. The EPA may propose to approve an infrastructure SIP submission with respect to the major source PSD permitting subelement of Element C if the air agency has submitted, in a timely manner, all structural PSD permitting program provisions for which the SIP submission deadline has passed as of the date of the proposed approval.[39] Subject to consideration of public comments on the proposed action, the EPA believes it may proceed to fully approve an infrastructure submission with respect to Element C if all such structural PSD permitting program submissions have been or are being simultaneously fully approved into the SIP. The EPA does not intend to treat any structural PSD permitting program requirement for which the SIP submission deadline falls *after* the date of the EPA's proposed action on the infrastructure SIP as a required criterion for approval of the infrastructure SIP. The PSD permitting program revisions treated in this manner may include not only those related to the new or revised NAAQS whose promulgation has triggered the need for a new infrastructure SIP submission but also those related to any other regulated NSR pollutants as required by CAA title I part C and 40 CFR part 51.166.[40]

If an air agency lacks a PSD permitting program in its existing EPA-approved SIP addressing all regulated NSR pollutants, and it is already subject to a FIP, then major stationary

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[39] Structural PSD program provisions include provisions necessary for the PSD program to address all regulated sources and NSR pollutants, including GHG. Structural PSD program provisions do not include provisions which under 40 CFR 51.166 are at the option of the air agency, such as the option for air agencies to provide grandfathering of complete permit applications with respect to the 2012 $PM_{2.5}$ NAAQS.

[40] *See, e.g.*, "Approval and Promulgation of Implementation Plans; Mississippi: New Source Review – Prevention of Significant Deterioration; Fine Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards," 77 FR 59095 (September 26, 2012), a recent infrastructure SIP approval action that addressed a state's PSD SIP status with respect to the 2008 $PM_{2.5}$ NSR Rule.

sources within its jurisdiction are subject to the federal PSD permitting requirements in 40 CFR 52.21. Some air agencies are subject to a FIP for PSD permitting of all regulated NSR pollutants, and fewer air agencies are subject to a FIP for PSD permitting that is limited to particular pollutants (such as GHG). For sources subject to a pre-existing FIP for PSD permitting, either the EPA Regional Office issues PSD permits or, in instances where federal authority is delegated by the EPA Regional Office to it, the state or local air agency issues the PSD permits under the FIP (and tribes might be delegated in the same manner in the future). The EPA recognizes that some states have indicated a preference to operate under an EPA-administered PSD permitting program. Many air agencies have for some time been delegated the authority to implement a PSD FIP program. Other states have implemented their SIP-approved PSD permitting program. When an area is already subject to a FIP for PSD permitting (whether or not a state, local, or tribal air agency has been delegated federal authority to implement the PSD FIP), the air agency may choose to continue to rely on the PSD FIP to have permits issued pursuant to the FIP. If so, the EPA could not fully approve the infrastructure SIP submission with respect to Element C; however, the EPA anticipates that there would be no adverse consequences to the air agency or to sources from this lack of full approval of the infrastructure SIP. Mandatory sanctions would not apply under CAA section 179 because the failure to submit a PSD SIP is neither with respect to a submission that is required under CAA title I part D, nor in response to a SIP call under CAA section 110(k)(5). This relationship between a pre-existing FIP and the EPA's action on an infrastructure SIP element is also explained in section II of this document.

The EPA has maintained that the CAA allows the EPA to approve infrastructure SIP submissions that do not implement the NSR Reform Rules promulgated mainly in 2002.[41] We articulated this position in a number of infrastructure SIP final actions taken in 2011, noting in the preambles for those actions that existing SIP provisions for PSD programs that have not

[41] The NSR rules have undergone a series of improvements over many years. Significant reforms were promulgated in a rulemaking commonly referred to as the "2002 NSR Reform Rules," which were published in the *Federal Register* at 67 FR 80186 (December 31, 2002).

addressed the NSR Reform Rules may be dealt with separately, outside the context of acting on a state's infrastructure SIP.[42]

Air agencies may wish to reduce the need to amend their major source PSD rules after each new or revised NAAQS by writing them so that their coverage of pollutants and NAAQS automatically updates with the promulgation of a new or revised NAAQS, and/or so that the specific PSD program requirements automatically update to stay matched with the federal PSD program requirements in 40 CFR 52.21. Depending on state or tribal law provisions, it may be possible to do one or both of these through the use of "rolling" incorporation by reference (IBR). An advantage of the rolling IBR approach is that it enables air agencies to quickly implement requirements of the CAA that may be immediately applicable to regulated sources upon the effective date of the new or revised NAAQS and before the deadline for air agencies to make infrastructure SIP submissions to the EPA. For example, one of the PSD program requirements is the requirement under section 165(a)(3) of the CAA that a permit applicant show it will not cause or contribute to a violation of any NAAQS. This requirement generally[43] applies to any NAAQS in effect on the date a PSD permit decision is issued and is not deferred until an infrastructure SIP submission is due. Where permissible under state or tribal law, a rolling IBR approach is advisable to enable air agencies to implement this type of CAA requirement immediately upon the effective date of a NAAQS, thus ensuring that there is a mechanism in place for regulated sources in the state or an area of Indian country to meet CAA requirements resulting from a new or revised NAAQS as soon as it becomes applicable.

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[42] As one example of the preamble language that presents the EPA's position on infrastructure SIPs with respect to the issue of NSR Reform, *see* the final rule published in the *Federal Register* on July 13, 2011, "Approval and Promulgation of Air Quality Implementation Plans; Illinois; Indiana; Michigan; Minnesota; Ohio; Wisconsin; Infrastructure SIP Requirements for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." 76 FR 41075. In section II of the preamble, the EPA applied the described position to existing provisions for PSD programs in light of the "NSR Reform Rules" that we promulgated mainly in 2002; *see* 67 FR 80186 (Dec. 31, 2002).

[43] In some circumstances, the EPA has authorized "grandfathering" of pending PSD permit applications. *See* 78 FR 3086, January 15, 2012.

Elements D(i)(I) and (II) – Section 110(a)(2)(D)(i): Interstate Pollution Transport

> *Each such plan shall –*
>
> *(D) contain adequate provisions –*
>
> *(i) prohibiting, consistent with the provisions of this subchapter, 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 such national primary or secondary ambient air quality standard, or*
>
> *(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility.*

Section 110(a)(2)(D)(i) contains two subsections: (D)(i)(I) and (D)(i)(II). Section 110(a)(2)(D)(i)(I) addresses any emissions activity in one state that contributes significantly to nonattainment, or interferes with maintenance, of the NAAQS in another state. The EPA sometimes refers to these requirements as prong 1 (significant contribution to nonattainment) and prong 2 (interference with maintenance). Neither prong 1 nor prong 2 is addressed in this guidance. This guidance does not modify any prior statements by the EPA with respect to prongs 1 and 2 and does not address, discuss, or in any way alter any requirements set forth in either prong.

Element D(i)(II) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required of any other state to prevent significant deterioration of air quality or from interfering with measures required of any other state to protect visibility (referring to visibility in Class I areas). The EPA sometimes refers to these requirements under subsection 110(a)(2)(D)(i)(II) as prong 3 (interference with PSD) and prong 4 (interference with visibility protection). The EPA interprets section 110(a)(2) to require air agencies to address prong 3 and prong 4 as part of each infrastructure SIP submission.

Prong 3: Under section 110(a)(2)(D)(i)(II), SIPs would need to have provisions prohibiting emissions that would interfere with measures required to be in any other air agency's

SIP under part C of the CAA to prevent significant deterioration of air quality. Because part C requires an air agency's PSD permitting program to address all pollutants subject to regulation under the CAA, the EPA interprets prong 3 to mean that the infrastructure SIP submission should have provisions to prevent emissions of any regulated pollutant from interfering with any other air agency's comprehensive PSD permitting program, in addition to the new or revised NAAQS that is the subject of the infrastructure submission. Moreover, the infrastructure SIP should address the potential for such interference by sources throughout the jurisdiction of the air agency.

One way to meet prong 3 ("interference with PSD"), specifically with respect to those in-state sources and pollutants that are subject to PSD permitting, is through an air agency's confirmation in its infrastructure SIP submission that new major sources and major modifications are subject to a comprehensive EPA-approved PSD permitting program in the SIP that applies to all regulated NSR pollutants and that satisfies the requirements of the EPA's PSD implementation rule(s), as discussed above for purposes of Element C. This is because in order to be approved by the EPA, a major source PSD permitting program would need to fully consider source impacts on air quality in other states.

In-state sources not subject to PSD for any one or more of the pollutants subject to regulation under the CAA because they are in a nonattainment area for a NAAQS related to those particular pollutants may also have the potential to interfere with PSD in an attainment or unclassifiable area of another state. The EPA cannot ignore this potential when reviewing an infrastructure SIP for this prong. The EPA will consider and may rely on an air agency's EPA-approved nonattainment NSR provisions in determining whether a SIP satisfies prong 3 with respect to sources located in areas subject to nonattainment NSR for any one or more pollutants

and thus not subject to PSD permitting for those NAAQS pollutants. [44] SIP revisions to address nonattainment NSR requirements for any new or revised NAAQS are, however, due on a separate timeframe under section 172(b) of the CAA and are not subject to the timeframe for submission of infrastructure SIPs under section 110(a)(1). Therefore, a fully approved nonattainment NSR program with respect to any previous NAAQS may generally be considered by the EPA as adequate for purposes of meeting the requirement of prong 3 with respect to sources and pollutants subject to such program. Also, if an air agency makes a submission indicating that it issues permits pursuant to 40 CFR part 51 appendix S in a nonattainment area because a nonattainment NSR program for a particular NAAQS pollutant has not yet been approved by the EPA for that area, that permitting program may generally be considered by the EPA as adequate for purposes of meeting the requirements of prong 3 with respect to sources and pollutants subject to such program. Such reliance for infrastructure purposes would not constitute approval under CAA title I part D, and the EPA will explain this in the preambles to any proposed or final actions that rely on this rationale to support the conclusion that prong 3 is satisfied.

For an air agency without an EPA-approved major source PSD program and/or, where required, an EPA-approved nonattainment NSR program, it may still be possible for the EPA to also find, given the facts of the situation, that other SIP provisions and/or physical condition are adequate to prohibit interference with other air agencies' measures to prevent significant deterioration of air quality.

Prong 4: Under section 110(a)(2)(D)(i)(II), an infrastructure SIP submission cannot be approved with respect to prong 4 (visibility transport) until the EPA has issued final approval of SIP provisions that the EPA has found to adequately address any contribution of that state's

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[44] Refer, *e.g.*, to a memorandum issued by William T. Harnett, Director, OAQPS/AQPD, "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards," dated August 15, 2006. According to that 2006 Harnett memo, in section 5, "[t]he implementation of a PSD and NNSR permitting program in each state serves to prevent significant deterioration in neighboring states and thus largely satisfies the requirements of section 110(a)(2)(D)(i)(II) of the CAA." Nevertheless, nonattainment-related provisions, although identified in section 110(a)(2) of the CAA, are considered by the EPA to be outside the scope of infrastructure SIP actions, as discussed in section II of this guidance.

sources to impacts on visibility program requirements in other states. The EPA interprets this prong to be pollutant-specific, such that the infrastructure SIP submission need only address the potential for interference with protection of visibility caused by the pollutant (including precursors) to which the new or revised NAAQS applies. Carbon monoxide does not affect visibility, so an infrastructure SIP for any future new or revised NAAQS for carbon monoxide need only state this fact in order to meet prong 4. Significant impacts from lead (Pb) emissions from stationary sources are expected to be limited to short distances from the source and most, if not all, Pb stationary sources are located at distances from Class I areas such that visibility impacts would be negligible. Although Pb can be a component of coarse and fine particles, Pb generally comprises a small fraction of coarse and fine particles. Furthermore, when evaluating the extent to which Pb could impact visibility, Pb-related visibility impacts were found to be insignificant (*e.g.*, less than 0.10 percent).[45] Although we anticipate that Pb emissions will contribute only negligibly to visibility impairment in Class I areas, the air agency's submission of an infrastructure SIP for a new or revised Pb NAAQS should include an explanation in support of the air agency's conclusion (and, if appropriate, should include control measures in its submission to limit impacts in other states).

One way in which prong 4 may be satisfied for any relevant NAAQS is through an air agency's confirmation in its infrastructure SIP submission that it has an approved regional haze SIP that fully meets the requirements of 40 CFR 51.308 or 51.309. 40 CFR 51.308 and 51.309 specifically require that a state participating in a regional planning process include all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process. *See*, for example, 40 CFR 51.308(d)(3)(ii). A fully approved regional haze SIP will ensure that emissions from sources under an air agency's jurisdiction are not interfering with measures required to be included in other air agencies' plans to protect visibility. However, if the air agency has submitted a 5-year progress report SIP that indicates that the regional haze SIP is deficient with respect to ensuring reasonable progress toward natural visibility conditions in a

[45] Memorandum from Mark Schmidt, OAQPS, "Ambient Pb's Contribution to Class I Area Visibility Impairment," June 17, 2011.

Class I area in another state, the infrastructure SIP submission would need to explain how nevertheless the overall SIP satisfies prong 4.

After the next round of regional haze SIPs become due in 2018, the EPA may find it appropriate to supplement the guidance provided here regarding the relationship between regional haze SIPs and prong 4.

A number of air agencies do not have fully approved regional haze SIPs in place and instead have FIPs in place, which cannot be relied upon to satisfy prong 4.[46] The presence of a regional haze FIP does not necessarily require disapproval of the infrastructure SIP for prong 4. A state air agency may elect to satisfy prong 4 by providing, as an alternative to relying on its regional haze SIP alone, a demonstration in its infrastructure SIP submission that emissions within its jurisdiction do not interfere with other air agencies' plans to protect visibility. Such an infrastructure SIP submission would need to include measures to limit visibility-impairing pollutants and ensure that the reductions conform with any mutually agreed regional haze reasonable progress goals for mandatory Class I areas in other states.[47]

If the EPA determines the SIP to be incomplete or partially disapproves an infrastructure SIP submission for prong 4, a FIP obligation will be created. If a FIP or FIPs are already in effect that correct all regional haze SIP deficiencies, there will be no additional practical consequences from the partial disapproval for the affected air agency, the sources within its jurisdiction, or the

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[46] Some approved regional haze SIPs have relied on the fact that electric generating units (EGUs) in the state must comply with a FIP previously promulgated by the EPA as part of the CSAPR to satisfy best achievable retrofit technology requirements for EGUs. In this limited way, if a regional haze SIP of this type has itself been approved by the EPA, it is possible for FIP provisions to be taken into account by the EPA in determining whether an infrastructure SIP may be approved for prong 4.

[47] As examples of the possibility that an infrastructure SIP submission can satisfy prong 4 even though the regional haze SIP has not been fully approved, *see*: (i) "Approval and Promulgation of State Implementation Plans; State of Colorado; Interstate Transport of Pollution Revisions for the 1997 8-Hour Ozone and 1997 PM2.5 NAAQS: 'Interference With Visibility' Requirement – Final Rule", 76 FR 22036 (April 20, 2011); and (ii) "Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards – Final Rule," 78 FR 14681 (March 7, 2013). In the first action, the EPA approved the infrastructure SIP submission with respect to prong 4 without having approved a regional haze SIP, based on the state's demonstration that it does not interfere with other states' measures to protect visibility through their regional haze SIPs. In the second proposed action, the EPA approved Kentucky's submission with respect to prong 4 based on the partial approval of its regional haze SIP and its CSAPR SIP.

EPA. The EPA will not be required to take further action with respect to prong 4 because the FIP already in place would satisfy the requirements with respect to prong 4. In addition, unless the infrastructure SIP submission is required in response to a SIP call under CAA section 110(k)(5), mandatory sanctions under CAA section 179 would not apply because the deficiencies are not with respect to a submission that is required under CAA title I part D. Nevertheless, the EPA continues to encourage all air agencies that may be subject to full or partial FIPs for regional haze requirements to consider adopting additional SIP provisions that would allow the EPA to fully approve the regional haze SIP and thus to withdraw the FIP and approve the infrastructure SIP with respect to prong 4.

Element D(ii) – Section 110(a)(2)(D)(ii): Interstate Pollution Abatement and International Air Pollution

> *Each such plan shall –*
>
> *(D) contain adequate provisions –*
>
> *(ii) insuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).*

Element D(ii) is satisfied when an infrastructure SIP ensures compliance with the applicable requirements of CAA sections 126(a), 126(b) and (c), and 115.

Interstate Pollution Abatement:

> *Sec. 126. (a) Each applicable implementation plan shall –*
>
> *(1) require each major proposed new (or modified) source –*
>
> *(A) subject to part C (relating to significant deterioration of air quality) or*
>
> *(B) which may significantly contribute to levels of air pollution in excess of the national ambient air quality standards in any air quality control region outside the State in which such source intends to locate (or make such modification), to provide written notice to all nearby States the air pollution levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted by the State providing notice, and*
>
> *(2) identify all major existing stationary sources which may have the impact described in paragraph (1) with respect to new or modified sources and provide notice to all nearby States of the identity of such sources not later than three months after the date of enactment of the Clean Air Act Amendments of 1977.*

Under section 126(a)(1) of the CAA, each SIP would need to contain provisions requiring each new or modified major source required by CAA title I part C to be subject to PSD to notify neighboring air agencies of potential impacts from the source. Consistent with EPA's interpretation of part C with respect to the requirements of Element C, the notification requirements apply to potential impacts from all PSD-regulated pollutants, not only the new or revised NAAQS for which the infrastructure SIP submission is being made. Section 126(a)(1) also requires that each SIP contain provisions requiring each new or modified major source to provide similar notification if it may significantly contribute to levels of pollution in excess of a NAAQS in any air quality control region outside of the state in which the source is located.

Air agencies with PSD programs that have been approved into their SIPs should already have a regulatory provision in place, consistent with 40 CFR 51.166(q)(2)(iv), which requires the permitting authority to notify air agencies whose lands may be affected by emissions from that source. Inasmuch as the information that the permitting authority provides to other air agencies is submitted by the source to the permitting authority, the EPA considers the notification by the permitting authority to satisfy the requirement of CAA section 126(a)(1)(A) that a new or modified major source subject to part C notify neighboring air agencies of its potential downwind impact.

A state that is subject to a FIP for its PSD program may not have an infrastructure SIP that satisfies Element D(ii) with respect to section 126(a)(1) of the CAA, depending on the scope of the gap in the SIP that led to the PSD FIP. Where some or all pollutants in a state are subject to a PSD FIP, the EPA may find the infrastructure SIP submission to be incomplete with respect to Element D(ii) and could not fully approve the infrastructure SIP submission with respect to Element D(ii) if the approved SIP has no other provision meeting the notification requirements of section 126(a)(1). Nonetheless, as noted above, the EPA anticipates that there would be no adverse consequences to the air agency or to sources within its jurisdiction from this lack of full approval. The EPA would not likely be required to take further action with respect to notification under this element, because the federal PSD rules should fully address the notification issue through the requirements of 40 CFR 52.21(q) and 40 CFR 124.10(c)(vii) and thus satisfy the FIP

requirement triggered by the disapproval of the infrastructure SIP.[48] In addition, unless the infrastructure SIP submission is required in response to a SIP call under CAA section 110(k)(5), mandatory sanctions under CAA section 179 would not apply because the deficiencies are not with respect to a submission that is required under CAA title I part D.

The EPA notes that the requirement stated in CAA section 126(a)(2) was a one-time obligation on states that does not apply to the EPA's review of infrastructure SIP submissions.

Interstate Pollution Abatement:

> *Section 126...*
>
> *(b) Any State or political subdivision may 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)(ii) or this section. Within 60 days after receipt of any petition under this subsection and after public hearing, the Administrator shall make such a finding or deny the petition.*
>
> *(c) Notwithstanding any permit which may have been granted by the State in which the source is located (or intends to locate), it shall be a violation of [this section and] the applicable implementation plan in such State –*
>
> *(1) for any major proposed new (or modified) source with respect to which a finding has been made under subsection (b) to be constructed or to operate in violation of [this section and] the prohibition of section 110(a)(2)(D)(ii) or this section, or*
>
> *(2) for any major existing source to operate more than three months after such finding has been made with respect to it.*
>
> *The Administrator may permit the continued operation of a source referred to in paragraph (2) beyond the expiration of such three-month period if such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 110(a)(2)(D)(ii) as expeditiously as practicable, but in no case later than three years after the date of such finding. Nothing in the preceding sentence shall be construed to preclude any such source from being eligible for an enforcement order under section 113(d) after the expiration of such period during which the Administrator has permitted continuous operation.*

[48] 40 CFR part 124, including 124.10(c)(vii), provides for EPA notification to states whose lands may be affected by emissions from the source and applies to all federal PSD permits issued in accordance with 40 CFR 52.21.

Please note that the EPA has concluded that the cross-reference in CAA section 126(b) to CAA section 110(a)(2)(D)(ii) is a scrivener's error and that Congress intended to refer to section 110(a)(2)(D)(i). *See Appalachian Power Co. v. EPA, 249 F.3d -1032, 1040-44 (D.C. Cir. 2001).* Section 110(a)(2)(D)(i), in short, prohibits any source or emissions activity in a state from emitting any amount of air pollutant which will contribute significantly to nonattainment or interfere with maintenance of the NAAQS in another state. (42 U.S.C. § 7410.)

The required content of an infrastructure SIP with respect to Element D(ii) is affected by sections 126(b) and 126(c) of the CAA only if: (1) the Administrator has, in response to a petition, made a finding under section 126(b) of the CAA that emissions from a source or sources within the air agency's jurisdiction emit prohibited amounts of air pollution relevant to the new or revised NAAQS for which the infrastructure SIP submission is being made; and (2) under section 126(c) of the CAA, the Administrator has required the source or sources to cease construction, cease or reduce operations, or comply with emissions limitations and compliance schedule requirements for continued operation. Where appropriate, the EPA recommends that an infrastructure SIP submission concerning section 126(c) include a statement to the following effect: "No source or sources within the state [or tribal area] are the subject of an active finding under section 126 of the CAA with respect to the particular NAAQS at issue." Otherwise, where a source or sources within the air agency's jurisdiction are subject to such a finding and there are substantive SIP requirements imposed by the Administrator under section 126(c) of the CAA, then we encourage the air agency to consult with its EPA Regional Office.

International Air Pollution:

> *Sec. 115. (a) Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.*
>
> *(b) The notice of the Administrator shall be deemed to be a finding under section 110(a)(2)(H)(ii) which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a). Any foreign country so affected by*

> *such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.*

Section 115 of the CAA authorizes the Administrator to require a state to revise its SIP under certain conditions to alleviate international transport into another country. Because of the appearance of the phrase "applicable requirements of section[]…115" in Element D(ii), the EPA interprets this requirement to be NAAQS-specific. That is, when acting on an infrastructure SIP submission for a new or revised NAAQS, the EPA will look to whether the Administrator has made a finding with respect to emissions of the particular NAAQS pollutant and its precursors, if applicable. Where appropriate, the EPA recommends that infrastructure SIP submission requirements concerning section 115 include a statement to the following effect: "There are no final findings under section 115 of the CAA against this state [or tribal area] with respect to the particular NAAQS at issue." If there are one or more final findings under section 115 of the CAA, then we encourage the air agency to consult with its EPA Regional Office.

Element E – Section 110(a)(2)(E): Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies

Each such plan shall –

> *(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision.*

Subelement (i): The SIP should provide necessary assurances[49] that the air agency has adequate personnel and funding to implement the relevant NAAQS. In accordance with the EPA's regulations at 40 CFR part 51, subpart M ("Intergovernmental Consultation"), the infrastructure SIP submission should identify the organizations that will participate in developing, implementing, and enforcing the EPA-approved SIP provisions related to the new or revised NAAQS and thus require resources for doing so. The infrastructure SIP submission should identify the responsibilities of such organizations and include related agreements among the organizations. For compliance with section 110(a)(2)(E), *see* 40 CFR 51.240 ("General plan requirements"). Also, in accordance with the EPA's regulations at 40 CFR part 51, subpart O ("Miscellaneous Plan Content Requirements"), the infrastructure SIP submission should describe the resources that are available to these organizations for carrying out the SIP. Resources to be described should include: (1) those available to these organizations as of the date of infrastructure SIP submission; (2) those considered necessary during the 5 years following infrastructure SIP submission; and (3) projections regarding acquisition of the described resources. For compliance with section 110(a)(2)(E) with respect to resources, *see* 40 CFR 51.280 ("Resources").

Further, the infrastructure SIP submission should assure that the responsible state, local, and/or regional agencies, or a tribal authority, have adequate authority under statutes, rules, and regulations to carry out SIP obligations with respect to the relevant NAAQS. *See* the EPA's regulations at 40 CFR part 51, subpart L ("Legal Authority") and subpart O. In accordance with the EPA's regulations at subpart L, the infrastructure SIP submission should show that the responsible organizations have the legal authority to carry out the provisions identified in the SIP submission.

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[49] As with any SIP submission, the EPA's review can be expedited if a SIP submission for this element includes a detailed explanation of how the existing SIP (supplemented by any new provisions included in the submission) meets each of the applicable requirements of section 110(a)(2)(E)(i). This should include a description of the correlation between the requirements of this element and an equivalent set of statutory, regulatory, and/or non-regulatory provisions, as appropriate. When an air agency's infrastructure submission more clearly identifies each CAA element being met by the SIP submission and explains how it is met, the EPA can more easily determine whether the submission is complete and approvable with respect to that element.

In accordance with 40 CFR 51.231, the infrastructure SIP submission should identify the provisions of law or regulations that the air agency determines provide the necessary authority, and the air agency should submit copies of those laws or regulations with the infrastructure SIP submission. If an official, legal copy of a particular law or regulation has already been provided to the EPA in an earlier SIP submission, that copy only needs to be referenced with sufficient specificity to avoid ambiguity, rather than a new copy submitted.[50] For compliance with section 110(a)(2)(E) with respect to legal authority, *see* 40 CFR 51.230 and 40 CFR 51.231.

Having reviewed and approved air agency SIP submissions with respect with this element, the EPA expects that it would be unusual for air agencies to need to make SIP revisions regarding personnel, funding, or legal authority in order to satisfy this subelement. However, for any new or revised NAAQS, the air agency should explain in the infrastructure SIP submission how resources and personnel and legal authority are adequate and provide any additional assurances needed to meet changes in resource requirements by the new or revised NAAQS.

Subelement (ii):

State Boards:

The infrastructure SIP submission (possibly in combination with earlier submissions already approved by the EPA) would need to include the statutory or regulatory provisions that impose the requirements mandated by CAA section 128 pertaining to certain boards, bodies, and personnel involved in approving permits or enforcement orders. Because CAA section 110(a)(2)(e)(ii) directs states to “provide requirements that the state comply with the

[50] Refer to a memorandum dated November 22, 2011, jointly from Janet McCabe, Deputy Assistant Administrator, Office of Air and Radiation, and Becky Weber, Director, Air and Waste Management Division, Region 7, to Air Division Directors, Regions 1-10, titled "Guidelines for Preparing Letters Submitting State Implementation Plans (SIPs) to EPA and for Preparing Public Notices for SIPs."

requirements respecting state boards under section 128,"[51] the provisions that implement CAA section 128 would need to be contained within the SIP. That is, the EPA would not approve an infrastructure SIP submission that only provides a narrative description of existing air agency laws, rules, and regulations that are not approved into the SIP to address CAA section 128 requirements. If an existing rule regarding conflict of interest and disclosure requirements has been adopted under the authority of a state or tribal law, the rule would need to be included in the SIP submission, but the authorizing law would not. If the state or tribal law is self-executing and there is no rule that could be included in the SIP, then the law would need to be incorporated into the SIP. Inclusion of an existing law in the SIP does not prevent the state legislature or tribal council from amending that law at a later date as a matter of state law, although eventually the EPA-approved SIP will need to be updated with any such amendment in order to revise the federally enforceable SIP.

All air agencies are subject to the provisions of CAA section 128. However, if there is no board or body authorized to approve permits or enforcement orders under the CAA, then a negative declaration to that effect may serve to satisfy the "board or body" requirements under paragraph (a)(1) of CAA section 128. It is the EPA's stated interpretation that a multi-member board or body that has authority under state or tribal law to hear appeals of CAA permits or

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[51] *Sec. 128. (a) Not later than the date one year after the date of the enactment of this section, each applicable implementation plan shall contain requirements that –*

(1) any board or body which approves permits or enforcement orders under this Act shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Act, and

(2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of (paragraphs (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

enforcement orders is considered to have authority to "approve" those permits or enforcement orders. Accordingly, the requirements of section 128(a)(1) related to public interest and limitations on sources of income are applicable to such a board or body and would need to be met through provisions incorporated into the SIP.[52,53]

The provisions of section 128(a)(2), which concern disclosure of potential conflicts of interest, would need to be substantively met by provisions incorporated into the SIP, regardless of whether it is a board, some other body, or the head of an executive agency that has responsibility for approving permits or enforcement orders in that state or an area of Indian country. It is the EPA's stated interpretation that a multi-member board or body that has authority under state or tribal law to hear appeals of CAA permits or enforcement orders is considered to have authority to "approve" those permits or enforcement orders. Accordingly, the requirement of section 128(a)(2) related to disclosure is applicable to such a board or body and would need to be met through provisions incorporated into the SIP.

In 1978, the EPA issued a guidance memorandum recommending ways air agencies could meet the requirements of section 128, including suggested interpretations of certain terms in section 128.[54] EPA has not issued further guidance or regulations of general applicability on the subject since that time. However, as part of its actions on several infrastructure SIP submissions, the EPA has more recently proposed certain interpretations of section 128 as applied to these specific submissions, invited comment on these interpretations, and finalized its actions. Within those actions, EPA has thus provided additional interpretation of the terms of section 128 given specific facts and circumstances, consistent with the statutory requirements.

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[52] The EPA expressed this interpretation in a proposed action on the infrastructure SIP for Arizona. June 27, 2012. "Partial Approval and Disapproval of Air Quality Implementation Plans; Arizona: Infrastructure Requirement for Ozone and Fine Particulate Matter." 77 FR 38239. This action was finalized on November 5, 2012, 77 FR 66398.

[53] "Approval and Promulgation of State Implementation Plans; Hawaii Infrastructure Requirements for the 1997 8-Hour Ozone and the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards." 77 FR 47530 (August 9, 2012). The EPA's action on the infrastructure SIP for Arizona referenced the proposal for this action on the infrastructure SIP for Hawaii.

[54] *See* Memorandum from David O. Bickart to Regional Air Directors, "Guidance to States for Meeting Conflict of Interest Requirements of Section 128," Suggested Definitions, March 2, 1978.

See, *e.g.*, EPA's proposed (77 FR 44555, July 30, 2012) and final (77 FR 66398, November 5, 2012) actions on an infrastructure SIP submission from Arizona. Unlike the recommendations of the 1978 guidance memorandum, in this action the EPA interpreted the term "state board" to exclude an individual official. As in the 1978 guidance memorandum, in this action the EPA interpreted the requirement regarding representation of the public interest and limitations on income to apply to a board that does not issue permits and compliance orders but does hear appeals of permits and compliance orders. The EPA notes that air agencies in different jurisdictions may have very different organizational structures and very different allocations of authorities and responsibilities with respect to permits and enforcement orders. Thus, the EPA recommends that air agencies consult with their respective EPA Regional Offices about the most appropriate method for assuring that the requirements of section 110(a)(2)(E)(ii) and section 128 are met in that jurisdiction under the relevant facts and circumstances.

Subelement (iii): The infrastructure SIP submission should provide necessary assurances[55] that the state retains responsibility for ensuring adequate implementation of SIP obligations with respect to relevant NAAQS. A state may authorize a local or regional agency to carry out the SIP or a portion of the SIP within that agency's jurisdiction, if the SIP demonstrates that the local agency has the necessary legal authority. However, in these cases the infrastructure SIP submission needs to also provide assurances that the state air agency retains responsibility for ensuring adequate implementation of the SIP. Under subpart L, *see* 40 CFR 51.232 ("Assignment of legal authority to local agencies").

[55] As with any SIP submission, the EPA's review can be expedited if a SIP submission for this element includes a detailed explanation of how the existing SIP meets each of the applicable requirements of section 110(a)(2)(E)(i). This should include a description of the correlation between the requirements of this element and an equivalent set of statutory, regulatory, and/or non-regulatory provisions, as appropriate, that are part of the existing SIP. When an air agency's infrastructure submission more clearly identifies each CAA element being met by the SIP submission and explains how the element is met, the EPA can more easily determine whether the submission is complete and approvable with respect to that element.

Element F – Section 110(a)(2)(F): Stationary Source Monitoring and Reporting

> *Each such plan shall –*
>
> *(F) require, as may be prescribed by the Administrator –*
>
> *(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,*
>
> *(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and*
>
> *(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this Chapter, which reports shall be available at reasonable times for public inspection.*

Subelement (i): The EPA's rules regarding how SIPs would need to address requirements for source monitoring are contained in 40 CFR 51.212 ("Testing, inspection, enforcement, and compliance"). This EPA regulation requires SIPs to provide for a program of periodic testing and inspection of stationary sources, to provide for the identification of allowable test methods, and to exclude any provision that would prevent the use of any credible evidence of noncompliance. The infrastructure SIP submission should describe the air agency's program for source testing, reference the statutory authority for the air agency's program, and certify the absence of any provision preventing the use of any credible evidence.

Subelement (ii): To address periodic reporting requirements, the infrastructure SIP submission should include air agency requirements providing for periodic reporting of emissions and emissions-related data by sources to the air agency, as required by the following emissions reporting requirements: 40 CFR 51.211 ("Emissions reports and recordkeeping"); 40 CFR sections 51.321 through 51.323 ("Source Emissions and State Action Reporting"); and the EPA's Air Emissions Reporting Rule, 40 CFR part 51, subpart A ("Air Emissions Reporting Requirements").[56] We note that the section 51.321 requirement that emissions reports from states be made through the appropriate EPA Regional Office has been superseded in practice, as these data are now to be reported electronically through a centralized data portal pursuant to 40 CFR

[56] 40 CFR sections 51.321 through 51.323 nominally address emission reporting but merely cross-reference to subpart A.

51.45(b), which refers to the website *http://www.epa.gov/ttn/chief* for the latest information on data reporting procedures. However, states should consult with the appropriate EPA Regional Office as they prepare and submit these data. All states have existing periodic source reporting of emissions and emission inventory reporting practices. Thus for any new or revised NAAQS, the infrastructure SIP may be able to certify existing authority and commitments and provide any additional assurance needed to meet changes in reporting and inventory requirements associated with the new or revised NAAQS.

Subelement (iii): The infrastructure SIP submission should reference and describe existing air agency requirements that have been approved into the SIP by the EPA, or include air agency requirements being newly submitted, that provide for the following: (1) correlation[57] by the air agency of emissions reports by sources with applicable emission limitations or standards; and (2) the public availability of emission reports by sources. Under 40 CFR part 51 subpart G, 40 CFR 51.116 ("Data availability"), contains the requirements for correlating data. Correlation with applicable emissions limitations or standards is relevant only for those reports of source emissions that reflect the test method(s) and averaging period(s) specified in applicable emission limitations or standards. Thus, source reports of annual, ozone season, or summer day emissions used by the air agency to create the annual and triennial emission inventory submission to the EPA under 40 CFR part 51 subpart A in general would not need to be correlated with specific emission limitations or standards, as many sources do not have applicable emission limitations defined for those averaging periods. However, if the sources have applicable emissions limitations that are defined for these averaging periods, then they would need to be correlated.

[57] As defined in 40 CFR 51.116(c), the term "correlated" means "presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under the applicable emission limitations or other measures."

Element G – Section 110(a)(2)(G): Emergency Powers

Each such plan shall –

(G) provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority.

Section 303 of the CAA provides authority to the EPA Administrator to seek a court order to restrain any source from causing or contributing to emissions that present an "imminent and substantial endangerment to public health or welfare, or the environment." The EPA has interpreted section 110(a)(2)(G) as imposing two basic requirements for purposes of an infrastructure SIP submission.

To meet Element G requirements, the best practice for an air agency submitting an infrastructure SIP would be to submit, for inclusion into the SIP (if not already part of the SIP), the statutory or regulatory provisions that provide the air agency or official with authority comparable to that of the EPA Administrator under section 303 (*see*, *e.g.*, 40 CFR 51.230(c)), along with a narrative explanation of how they meet the requirements of this element.[58] If an air agency chooses not to include the relevant statute or regulation in its SIP, then the air agency should provide a reference or citation to the authority provisions, along with a narrative explanation of how the provisions meet the requirements of this element, as well as a copy of the relevant authority to accompany the SIP as required by 40 CFR 51.231.

The air agency is also required to submit, for approval into the SIP (if not already part of the SIP), an adequate contingency plan to implement the air agency's emergency episode authority. This can be met by submitting a plan that meets the applicable requirements of 40 CFR part 51, subpart H (40 CFR 51.150 through 51.153) ("Prevention of Air Pollution Emergency Episodes") for the relevant NAAQS if the NAAQS is covered by those regulations.

The EPA's subpart H regulations provide specific ambient levels for contingency plan purposes for most NAAQS. In the case of the 2006 $PM_{2.5}$ NAAQS, for which the EPA has not

[58] The EPA recognizes that some air agencies may have general authorizing provisions that do not specifically enumerate specific activities but do implicitly authorize the air agency to perform such activities, in which case inclusion of those provisions would meet the intent of this best practice.

yet promulgated regulations that provide the ambient levels to classify different priority levels, the EPA has recommended these levels through guidance.[59]

Subpart H includes criteria for classification of areas into priority regions, based on ambient air concentrations of the particular pollutant being addressed. The currently applicable priority classifications for regions for each state can be found in 40 CFR part 52 subparts B through DDD (*see* sections titled "Classification of Regions"). As noted above, the air agency's infrastructure SIP submission would need to include the contingency plan, if one is required and has not yet been approved by the EPA. If an area is classified as a Priority I, IA, or II region for a specified pollutant, then the infrastructure SIP should contain an emergency contingency plan meeting the specific requirements of 40 CFR 51.151 and 51.152, as appropriate, with respect to that pollutant. For such areas, the infrastructure submission should demonstrate that the air agency's existing EPA-approved SIP already contains an adequate contingency plan, if that is the case; otherwise, the submission should include the substantive SIP revisions necessary to meet the emergency contingency plan requirements with respect to that pollutant.

Specifically, if an area is classified as a Priority I region for a specified pollutant, the area's contingency plan (with respect to that pollutant) would need to include provisions that trigger actions to prevent air quality concentrations from reaching a "significant harm level" (SHL), which represents an imminent and substantial endangerment to public health. *See* 40 CFR 51.151 and the more detailed explanation below. Each implementation plan for a Priority I, IA, or II region would need to include a contingency plan that provides for taking certain specified actions. Specifically, 40 CFR sections 51.152(b) and (c) state that:

> *(b) Each contingency plan for a Priority I region must provide for the following:*
>
> *(1) Prompt acquisition of forecasts of atmospheric stagnation conditions and of updates of such forecasts as frequently as they are issued by the National Weather Service.*
>
> *(2) Inspection of sources to ascertain compliance with applicable emission control action requirements.*

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[59] *See* a memorandum from William T. Harnett, Director, Air Quality Policy Division, OAQPS, to Regional Air Division Directors, Regions I through X, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)." (September 25, 2009).

> *(3) Communications procedures for transmitting status reports and orders as to emission control actions to be taken during an episode stage, including procedures for contact with public officials, major emission sources, public health, safety, and emergency agencies and news media.*
>
> *(c) Each plan for a Priority IA and II region must include a contingency plan that meets, as a minimum, the requirements of paragraphs (b)(1) and (b)(2) of this section. Areas classified as Priority III do not need to develop episode plans.*

To satisfy a Priority I, IA, or II region's contingency plan requirements under 40 CFR 51.152(b)(1) regarding forecasts of atmospheric stagnation conditions, an infrastructure SIP submission may cite existing ambient monitoring and forecasting networks (such as *AIRNow*).[60]

Areas that maintain air quality at ambient levels lower that the concentrations listed in sections 51.150(b), (c), and (d), with respect to the pollutants listed, are classified as Priority III regions. These areas are subject to the requirements of CAA Element G. However, according to 40 CFR 51.152(c), areas classified as Priority III regions are not required to develop emergency episode plans, which the EPA has interpreted to mean the contingency plans otherwise required under Element G.

In a final rulemaking signed on December 14, 2012, to revise the $PM_{2.5}$ NAAQS, the EPA retained the pre-existing level of 500 $\mu g/m^3$, 24-hour average, for the Air Quality Index (AQI) value of 500 and did not establish an SHL for $PM_{2.5}$.[61] In addition, there is currently no established SHL for Pb. For those pollutants for which there is an SHL, the SHL is an important part of air pollution Emergency Episode Plans. Even in the absence of an SHL, the EPA believes that the central components of a contingency plan would be to reduce emissions from the source(s) at issue (if necessary by curtailing operations of Pb or $PM_{2.5}$ sources) and public communication as needed. In addition, if an air agency believes, based on its inventory of Pb or

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[60] The EPA, in partnership with National Oceanic and Atmospheric Administration (NOAA), National Park Service (NPS), and tribal, state, and local agencies, developed the *AIRNow* website (*see* http://www.airnow.gov) to provide easy public access to national air quality information. The website offers daily AQI forecasts as well as real-time AQI conditions for over 300 cities across the U.S. and provides links to more detailed state and local air quality websites.

[61] *See* 78 FR 3086 (January 15, 2013), "National Ambient Air Quality Standards for Particulate Matter." The published version is posted at http://www.gpo.gov/fdsys/pkg/FR-2013-01-15/pdf/2012-30946.pdf.

$PM_{2.5}$ sources and historic ambient monitoring data, that it does not need a more specific contingency plan beyond having authority to restrain any source from causing or contributing to an imminent and substantial endangerment, then the air agency could provide such a detailed rationale as part of its SIP submission. Additionally, because smoke from fires has the potential to be the cause of extremely high levels of $PM_{2.5}$, the EPA recommends that air quality-triggered responses incorporated into an Emergency Episode Plan for $PM_{2.5}$ be developed through a collaborative process working with state and tribal air quality, forestry, and agricultural agencies, federal land management agencies, private land managers, and the public.

An episode in which concentrations of NO_2 or SO_2 approach the SHL is likely to be due to a single facility's equipment malfunction. Accordingly, as part of a SIP to satisfy a Priority I region's contingency plan requirements, an infrastructure SIP submission for an NO_2 NAAQS or an SO_2 NAAQS may specify the facility-specific or equipment-specific measures to be taken in the event of an air pollution emergency.

In accordance with 40 CFR 51.152(d)(1) and (2), the Administrator may either: (i) exempt portions of a Priority I, IA, or II region that have been designated as attainment or unclassifiable under section 107 of the CAA from the requirements of 40 CFR 51.152 to develop an emergency episode contingency plans, or (ii) limit the requirements pertaining to emission control actions in Priority I regions to certain areas or to certain major sources. Air agencies interested in such an exemption or limitation in appropriate circumstances should contact their respective EPA Regional Offices.

Appendix L to 40 CFR part 51 provides example regulations that air agencies could use to develop contingency plans and inform decisions concerning air pollution emergency episodes. The example regulations provided in appendix L reflect generally recognized ways of preventing air pollution from reaching levels that would cause imminent and substantial endangerment to the health of persons located within affected areas. States with Priority I, IA, or II areas are directed by subpart H to have emergency episode contingency plans that contain alert levels for SO_2, PM_{10}, carbon monoxide, NO_2, and ozone, but air agencies are not required to adopt the appendix L example regulations.

Element H – Section 110(a)(2)(H): SIP Revisions

> *Each such plan shall –*
>
> *(H) provide for revision of such plan –*
>
> *(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and*
>
> *(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter.*

To demonstrate that the requirements under Element H are met, the best practice for an air agency submitting an infrastructure SIP would be to submit, for inclusion into the SIP (if not already part of the SIP), the statutory or regulatory provisions that provide the air agency or official with the authority to perform the following actions along with a narrative explanation of how they meet the requirements of this element: (1) revise its section 110 plan from time to time as may be necessary to take into account revisions of such primary or secondary NAAQS or the availability of improved or more expeditious methods of attaining such standards; and (2) revise the plan in the event the Administrator finds the plan to be substantially inadequate to attain the NAAQS or otherwise meet all applicable CAA requirements.[62]

If an air agency chooses not to include the relevant statute or regulation in its SIP, then the air agency should provide a reference or citation to the authority provisions, along with a narrative explanation of how the provisions meet the requirements of this element, as well as a copy of the relevant authority to accompany the SIP as required by 40 CFR 51.231. More information may be found under 40 CFR part 51, subpart F ("Procedural Requirements"), specifically, 40 CFR 51.104 ("Revisions").

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[62] The EPA recognize that some air agencies may have general authorizing provisions that do not specifically enumerate specific activities but do implicitly authorize the air agency to perform such activities, in which case inclusion of those provisions would meet the intent of this best practice.

Element I – Section 110(a)(2)(I): Plan Revisions for Nonattainment Areas

> *Each such plan shall –*
>
> *(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas).*

As noted earlier in this document, the EPA does not expect infrastructure SIP submissions to address subsection 110(a)(2)(I). The specific SIP submissions for designated nonattainment areas, as required under CAA title I part D, are subject to a different submission schedule[63] than those for section 110 infrastructure elements and will be reviewed and acted upon through a separate process. Air agencies do not need to address Element I in an infrastructure SIP submission. For clarity's sake, to better inform the public comment process on the SIP submission, the air agency may wish to clearly state that Element I is not being addressed and reiterate in the infrastructure SIP submission that, according to the EPA's interpretation of the CAA this element does not need to be addressed in the context of an infrastructure SIP submission.

Element J – Section 110(a)(2)(J): Consultation with Government Officials, Public Notification, and PSD and Visibility Protection

> *Each such plan shall –*
>
> *(J) meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection)....*

This element contains four separable sub-elements: consultation with identified officials on certain air agency actions; public notification; prevention of significant deterioration; and visibility protection.

Consultation with identified officials on certain actions:

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[63] These elements are typically referred to as nonattainment SIP or attainment plan elements and are due by the dates prescribed under subparts 2 through 5 of part D, extending as far as 10 years following designation for some elements.

Sec. 121. In carrying out the requirements of this Act requiring applicable implementation plans to contain –

(1) any transportation controls, air quality maintenance plan requirements or preconstruction review of direct sources of air pollution, or

(2) any measure referred to –

(A) in part D (pertaining to nonattainment requirements), or

(B) in part C (pertaining to prevention of significant deterioration),

and in carrying out the requirements of section 113(d) (relating to certain enforcement orders), the State shall provide 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, effective with respect to any such requirement which is adopted more than one year after the date of enactment of the Clean Air Act Amendments of 1977 as part of such plan. Such process shall be in accordance with regulations promulgated by the Administrator to assure adequate consultation. The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation. Only a general purpose unit of local government, regional agency, or council of governments adversely affected by action of the Administrator approving any portion of a plan referred to in this subsection may petition for judicial review of such action on the basis of a violation of the requirements of this section.

The infrastructure SIP submission would need to show that there is an established process for 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 plan applies, consistent with CAA section 121, which lists the specific types of actions for which such consultation is required. If the relevant statute is self-executing such that there is no associated regulation or other documents such as a memorandum of understanding, then the statute would need to be included in the SIP. If a regulation or other document meeting the CAA requirements exists, then the regulation or other document would need to be included in the SIP submission, and the authorizing statute should be referenced but the statute is not required to be part of the EPA-approved SIP. Under the requirements of 40 CFR 51.240, the SIP would need to identify organizations “that will participate in developing, implementing, and enforcing the plan and the responsibilities of such organizations.” The plan should also include

any related agreements or memoranda of understanding among the organizations. *See* subpart M ("Intergovernmental Consultation").

Public Notification:

> *Section 127. (a) Each State plan shall contain measures which will be effective to notify the public during any calendar [year] on a regular basis of instances or areas in which any national primary ambient air quality standard is exceeded or was exceeded during any portion of the preceding calendar year to advise the public of the health hazards associated with such pollution, and to enhance public awareness of the measures which can be taken to prevent such standards from being exceeded and the ways in which the public can participate in regulatory and other efforts to improve air quality. Such measures may include the posting of warning signs on interstate highway access points to metropolitan areas or television, radio, or press notices or information.*
>
> *(b) The Administrator is authorized to make grants to States to assist in carrying out the requirements of subsection (a).*

The infrastructure SIP submission would need to show that the air agency does the following: regularly notifies the public of instances or areas in which the new or revised primary NAAQS was exceeded; advises the public of the health hazards associated with such exceedances; and enhances public awareness of measures that can prevent such exceedances and of ways in which the public can participate in regulatory and other efforts to improve air quality. 40 CFR 51.285 ("Public notification"), repeats the language of CAA section 127.

Prevention of significant deterioration: The approvability of an air agency's PSD program is essential to the approvability of an infrastructure SIP submission with respect to CAA section 110(a)(2)(J). The requirements for Element J in relation to a comprehensive PSD permitting program are the same as described earlier in this document with respect to Element C. Generally, every PSD-related requirement of Element C applies, including the requirement that the PSD permitting program address all regulated pollutants. Please refer to that section.

Visibility protection: Under 40 CFR part 51 subpart P, implementing the visibility requirements of CAA title I, part C, states are subject to requirements for RAVI, new source review for possible impacts on air quality related values in Class I areas, and regional haze planning. Specific requirements stemming from these CAA sections are codified at 40 CFR

part 51 subpart P. However, when the EPA establishes or revises a NAAQS, these requirements under part C do not change. The EPA believes that there are no new visibility protection requirements under part C as a result of a revised NAAQS. Therefore, there are no newly applicable visibility protection obligations pursuant to Element J after the promulgation of a new or revised NAAQS. Air agencies do not need to address the visibility subelement of Element J in an infrastructure SIP submission. For clarity's sake, to better inform the public comment process on the SIP submission, the air agency may wish to clearly state that the visibility subelement of Element J is not being addressed, and reiterate in the submission that according to EPA's interpretation of the CAA this element does not need to be addressed.

Element K – Section 110(a)(2)(K): Air Quality Modeling and Submission of Modeling Data

> *Each such plan shall –*
>
> *(K) provide for –*
>
> *(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and*
>
> *(ii) the submission, upon request, of data related to such air quality modeling to the Administrator.*

To meet Element K, the best practice would be for an air agency to submit, for inclusion into the SIP (if not already part of the SIP), the statutory or regulatory provisions that provide the air agency or official with the authority to perform the following actions along with a narrative explanation of how the provisions meet the requirements of this element[64]: (1) conduct air quality modeling to predict the effect on ambient air quality of any emissions of any air pollutant for which a NAAQS has been promulgated, and (2) provide such modeling data to the EPA Administrator upon request.

[64] The EPA recognizes that some air agencies may have general authorizing provisions that do not specifically enumerate specific activities but do implicitly authorize the air agency to perform such activities, in which case inclusion of those provisions would meet the intent of this best practice.

If an air agency chooses not to include the relevant statute or regulations in its SIP, then the air agency should provide a reference or citation to the authority provisions, along with a narrative explanation of how they meet the requirements of this element, as well as a copy of the relevant authority to accompany the SIP as required by 40 CFR 51.231.

Element L – Section 110(a)(2)(L): Permitting Fees

> *Each such plan shall –*
>
> *(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover –*
>
> *(i) the reasonable costs of reviewing and acting upon any application for such a permit, and*
>
> *(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),*
>
> *until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter.*

Currently, every state has an EPA-approved fee program under CAA title V. However, this fee program is not required to be part of the EPA-approved SIP. The infrastructure SIP should provide citations to the regulations providing for collection of permitting fees under the state's EPA-approved Title V permit program. These citations to the EPA-approved title V regulations will not cause the title V program to be treated as part of the EPA-approved SIP, and the EPA will not re-review the title V program itself in the context of reviewing infrastructure SIP submissions. *See* 40 CFR 70.9 ("Fee determination and certification") and 40 CFR part 70, appendix A ("Approval Status of State and Local Operating Permits Programs"). If the state title V program fees cover all CAA permitting, implementation, and enforcement for new and modified major sources as well as existing major sources, this reference to the title V program will satisfy this element. If a state's approved title V permit program fees do not cover the reasonable costs of reviewing and acting upon applications for PSD and NNSR permits for major

sources[65] (along with the reasonable costs of implementing and enforcing the terms and conditions of PSD and NNSR permits), then the air agency should contact its Regional Office regarding what needs to be in the submission to fulfill this Element.

Element M – Section 110(a)(2)(M): Consultation and Participation by Affected Local Entities

> *Each such plan shall –*
>
> *(M) provide for consultation and participation by local political subdivisions affected by the plan.*

To satisfy Element M, the SIP should provide for consultation with affected local political subdivisions. As part of an infrastructure SIP submission, an air agency may simply identify its policies or procedures that allow and promote such consultation. For example, the infrastructure SIP submission may cite a policy wherein the air agency, before adopting or amending a plan, policy, or program, will consult with the regional planning coalition composed of local political subdivisions potentially affected by the action and explain how such information is used in the development of a SIP submission to the EPA for approval into the SIP. The normal public hearing process prior to adoption and submission of a SIP revision may also be cited as a component of the provisions for consultation, since leaders of political subdivisions have the opportunity to participate in that public process.

For Further Information

If you have any questions concerning this guidance, please contact Mr. H. Lynn Dail, by telephone at (919) 541-2363, or by email at *dail.lynn@epa.gov*, or Ms. Lisa Sutton, by telephone at (919) 541-3450 or by email at *sutton.lisa@epa.gov*.

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[65] Substantive NNSR provisions will not be reviewed as part of the EPA's action on the infrastructure SIP submission. *See* discussion in Section II, "Which elements of CAA 110(a)(2) affect infrastructure SIPs?"