STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED
REPEAL AND REPLACEMENT OF
20.2.70 NMAC – *OPERATING PERMITS*
AND TITLE V PROGRAM REVISION **No. EIB 25-10 (R)**

NEW MEXICO ENVIRONMENT DEPARTMENT'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

Pursuant to Subsection A of 20.1.1.302 NMAC, *Technical Testimony*, the Air Quality Bureau ("Bureau") of the Environmental Protection Division ("Division") of the New Mexico Environment Department ("Department") submits this Notice of Intent to Present Technical Testimony ("NOI") in the above captioned matter.

1. **Entity for whom the witnesses will testify**: The witnesses will testify for the Air Quality Bureau of the Environmental Protection Division of the Department.

2. **Identity of Witnesses**: The Department will call the following witnesses to present technical testimony at the public hearing:

   A. Neal Butt, Environmental Analyst, Advanced, Air Quality Bureau. Mr. Butt's resume describing his education and professional background is attached hereto as NMED Exhibit 1. Mr. Butt's direct testimony is attached hereto as NMED Exhibit 14

   B. Eric Peters, Control Strategies Program Staff Manager, Air Quality Bureau. Mr. Peters' resume describing his education and professional experience is attached hereto as NMED Exhibit 16. Mr. Peters' direct testimony is attached hereto as NMED Exhibit 17.

C. Julia Kuhn, Major Source Manager, Air Quality Bureau. Ms. Kuhn's resume describing her education and professional background is attached hereto as NMED Exhibit 19. Ms. Kuhn is not submitting pre-filed technical testimony, but will be available to answer questions.

3. **Hearing location(s)**: The Environmental Improvement Board ("Board") will hold the public hearing in this matter on July 18, 2025, beginning at 9:00 a.m., and continuing at the direction of the Board. The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building, 490 Old Santa Fe Trail, Santa Fe, NM 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at https://www.env.nm.gov/events-calendar/ under the calendar entry corresponding to the hearing start date. The Department's witnesses will attend the hearing in person and will be available on the virtual platform for questions and cross-examination from those participating virtually.

4. **Text of Recommended Modifications to the Proposed Regulatory Change.** The Department recommends that the Board adopt the proposed amendments to 20.2.70 NMAC, *Operating Permits*, which is part of the New Mexico Title V operating permit program, as shown in the Public Review Draft, which is Attachment 2 of the Petition for Rulemaking, filed March 12, 2025, and as amended by proposed floor amendments shown as NMED Exhibit 15.

5. **List of exhibits**: A complete list of exhibits the Department intends to offer into evidence in this matter is shown below. All of the Department's exhibits are submitted along with this Notice of Intent.

LIST OF EXHIBITS

NMED Exhibit 1 - Resume of Neal Butt

NMED Exhibit 2 - Federal Register: *Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program*: Final rule. 88 FR 47029, published 7/21/23, effective 8/21/23

NMED Exhibit 3 - Code of Federal Regulations: *Permit Content*, 40 CFR 70.6, as in effect on June 1, 2023

NMED Exhibit 4 - Fact Sheet: *Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program: Final Rule*

NMED Exhibit 5 - Letter from Cindy Hollenberg, AQB Bureau Chief, to David Garcia, EPA Region 6 Air and Radiation Director, dated August 21, 2024, requesting a one-year extension to the deadline to remove the Title V Emergency Affirmative Defense Provisions from the New Mexico Operating Permits Program

NMED Exhibit 6 - Letter from David Garcia, EPA Region 6 Air and Radiation Director, to Cindy Hollenberg, AQB Bureau Chief, dated September 16, 2024, granting AQB's request for deadline extension until August 21, 2025

NMED Exhibit 7 - *Air Quality Bureau Title V Operating Permit Issued under 20.2.70 NMAC Template version 01/22/2024*

NMED Exhibit 8 - List serve *Notice of Availability of Stakeholder Review Draft - Proposed Amendments to 20.2.70 NMAC, Operating Permits*, sent on February 3, 2025, to potentially affected parties and other stakeholders, outlining the AQB's proposal and soliciting comments

NMED Exhibit 8a - Publication of list serve notice (NMED Exhibit 8), in the Los Alamos Daily Post, the official newspaper of record in Los Alamos County, on February 5, 2025

NMED Exhibit 9 - Comments received on February 28, 2025, from the New Mexico State Records Center and Archives (SRCA)

NMED Exhibit 10 - Proposed version of 20.2.70 NMAC to be filed with the SRCA, without any redline or strikeout (i.e. "clean")

NMED Exhibit 11 - List serve notice of the availability of the Public Review Draft of 20.2.70 NMAC, in conjunction with the filing of the Petition for Regulatory Change, sent March 17, 2025

NMED Exhibit 12a - Posting of rulemaking information on the AQB "Proposed Air Quality Regulations & Plans" website

NMED Exhibit 12b - Posting of rulemaking information on the NMED "Public Notices" website, May 6, 2025

NMED Exhibit 12c - Posting of rulemaking information on the NM Sunshine Portal, April 24, 2025

NMED Exhibit 12d - Rulemaking information made available in NMED's district field offices (English and Spanish), April 23, 2025

NMED Exhibit 12e - Rulemaking information made available via List Serve (English and Spanish), April 21, 2025

NMED Exhibit 12f - Rulemaking information provided to the NM Legislative Council Service, for distribution to appropriate interim and standing legislative committees, April 23, 2025

NMED Exhibit 12g - Notice of proposed rulemaking published in the Albuquerque Journal (English and Spanish), May 4, 2025

NMED Exhibit 12h - Notice of proposed rulemaking published in the NM Register (English and Spanish), May 6, 2025

NMED Exhibit 12i - Notice of proposed rulemaking provided to the NM Land Grant Council, (English and Spanish), April 23, 2025

NMED Exhibit 12j - Notice of proposed rulemaking provided to the Pueblos, Nations, and Tribes, April 23, 2025

NMED Exhibit 13 - Letter sent to the Small Business Regulatory Advisory Commission, dated May 13, 2025, to comply with the Small Business Regulatory Relief Act, at 14-4A-1 NMSA 1978

NMED Exhibit 14 - Written Direct Testimony of Neal Butt

NMED Exhibit 15 - Proposed floor amendments to Public Review Draft

NMED Exhibit 16 - Resume of Eric Peters

NMED Exhibit 17 - Written Direct Testimony of Eric Peters

NMED Exhibit 18 - Resume of Julia Kuhn

6. Reservation of Rights

This *Notice of Intent* to present technical testimony is based on the Department's petition. 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,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

_/s/ Chris Vigil
Chris Vigil
Assistant General Counsel
121 Tijeras Dr. NE
Albuquerque, NM 87502
(505) 469-4969
christopherj.vigil@env.nm.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Intent to Present Technical Testimony* was served on the following parties by email on June 27, 2025.

Nicholas Maxwell
P.O. Box 1064
Hobbs, NM 88241
(575) 441-3560
inspector@sunshineaudit.com

/s/ *Chris Vigil*_____
Chris Vigil

N E A L T. B U T T

SUMMARY OF QUALIFICATIONS

- Expert in the promulgation of State Implementation Plans and rules governing air quality. Developed over 100 rule amendments and 9 stand-alone SIPs. Testified before environmental regulatory boards 52 times.
- Drafted 15 'Negative Declarations' for affected facilities.
- Over 27 years of experience in the field of Environmental Health, specializing in Air Quality, including: Regional Haze; Nonattainment; Transportation Conformity, Environmental Justice, VW Settlement and DERA grants.
- Provided staff support to the A/BC Air Quality Control Board for 120 monthly meetings and hearings.
- Excellent working relationship with EPA management and staff in Region VI office (Dallas).

EDUCATION:

Bachelor of Arts **Environmental Planning & Design (CRP)** *University of New Mexico* 2012

Pre-Management Development Program (with Distinction) = Two Years Supervisory Experience
City of Albuquerque Management Development Institute 2006

Associate of Applied Science **Criminal Justice (with Honors)** *TVI Community College* 2001

Hazardous Waste Management Certification **Waste Management Education & Research Consortium**
University of New Mexico 1999

Associate of Applied Science **Environmental Technology (with Highest Honors)** *TVI* 1998

Master of Science **Biology (Wildlife Management)** *University of North Dakota* 1993

Bachelor of Science **Biology (Zoology)** *University of New Mexico* 1989

PROFESSIONAL EXPERIENCE:

Environmental Analyst – Operational March 2014 – February 2022 **/ Advanced** February 2022 - Present
Planning Section, Air Quality Bureau, New Mexico Environment Department Santa Fe, NM

Serve as project manager developing control strategies to regulate air pollution emissions in New Mexico. Manage multiple projects with minimal supervision. Develop complex and potentially controversial concepts into detailed, functional air quality plans and regulations that meet the goals of the federal Clean Air Act and State statutes, initiatives and policies; collaborate with stakeholders with disparate interests to build consent; conduct public outreach; testify before the Environmental Improvement Board; and submit adopted plans, regulations and supporting legal documentation to EPA for approval. Research air quality issues, analyze data, prepare reports for management; perform technical review of proposed construction projects (Environmental Impact Reviews) and mining permit applications. Participated in compliance inspections of industrial facilities including Jal Gas Plant, WPX Energy, Tyrone Mine, and Pyramid Generating Station. Assist the Permitting Section with the review and issuance of Notices of Intent. Conversant with TEMPO permitting database. Designated by NMED Cabinet Secretary as Records Liaison Officer, to maintain permanent AQB Regulatory Archives.

Environmental Health Scientist July 2007 - March 2014
Control Strategies Section, Air Quality Division, Environmental Health Department Albuquerque, NM

Developed and implemented long range plans, programs and special projects in the field of municipal air quality. Served as *Air Quality Regulation Development Coordinator* promulgating state rules that govern air quality, through the Albuquerque – Bernalillo County Air Quality Control Board (AQCB), including research, drafting and editing of technical documents, hearing preparation, testimony, filing rules with the State Records Center & Archives, and submittal of rules and SIPs to EPA for approval. Coordinated internal committees, collaborated with other agencies, conducted public outreach and adhered to tight schedules and EPA Air Program Priorities. Served on interview panels to hire AQCB Liaison candidates.

Air Quality Planner May 2005 - July 2007
Control Strategies Section, Air Quality Division, Environmental Health Department Albuquerque, NM

Performed technical review of *Air Quality Impact Analyses* required for large-scale land use development plans using air quality emissions analysis modeling. Implemented the Carbon Monoxide Limited Maintenance Plan for the Bernalillo County nonattainment area. Served as liaison for transportation conformity to the Mid-Region Council of Governments (MRCOG), necessitating the review, analysis and technical consultation on transportation plans and project-level CO hot spot analyses, and facilitating interagency consultation. Promulgated air quality regulations and SIPs through the AQCB and submitted them to EPA for approval. Established effective working relationships with EPA, regulated industry, elected officials, other air agencies and the general public.

Environmental Health Specialist I October 2001 - May 2005
Control Strategies Section, Air Quality Division, Environmental Health Department Albuquerque, NM

Developed control strategies, regulations and SIPs used to improve air quality. Developed working knowledge of the principles and practices of environmental health and air quality, including federal, state and local laws, statutes, ordinances, codes, regulations and policies. Served as staff to the AQCB, Hearing Clerk, Custodian of Records and webmaster; planned hearings and monthly meetings, published public notices, solicited hearing officers, court reporters and interpreters; and managed electronic and paper records. Trained in New Mexico Administrative Code (NMAC).

Certified Field Training Officer April 1997 - October 2001
Albuquerque Animal Welfare Department Albuquerque, NM

Animal Control Officer October 1993 - July 1994
Corrales Police Department Corrales NM

Interpreted, applied, enforced and prosecuted federal, state and local animal welfare laws, statutes, ordinances, codes, regulations and policies. Followed established protocol for animal care and control including, impoundment, chemical tranquilization, bite investigation, quarantine, cruelty investigation, equine neglect, and hoarding behavior. Conducted training for Animal Control Officer Recruits. Assisted law enforcement with nuisance urban wildlife, protected species, game animals, poisonous snakes and protective custody situations. Job is very high profile requiring adept handling of confrontational situations and prudent enforcement of laws while maintaining positive public relations. Served on the U.S. Humane Society task force implementation team.

Lab Technician III October 1996 - December 1998
Advanced Materials Laboratory, Center for Radioactive Waste Management Albuquerque, NM

Assisted principal investigator with lab research on the bioremediation of uranium-contaminated soil and groundwater collected at sites in New Mexico, Arizona, and Germany. Assisted with research and field demonstration of in situ bioremediation as applied to a nitrate-contaminated groundwater plume located in Albuquerque's South Valley. Emphasis placed on analyzing the behavior of native bacteria under field-like conditions when supplemented with different types of nutrient amendments.

Biology Instructor August 1990 - December 1992
Department of Biology, University of North Dakota Grand Forks, ND

Taught introductory concepts of biology as applied in the lab, including: laboratory protocol; scientific method; report writing; microscopy; chromatography; enzymes; pH; diffusion; osmosis; plant biology; cell biology; anatomy and physiology; genetics; evolution; taxonomy; zoology; animal behavior; ecology; conservation biology; and botany. Responsible for lab safety, lab preparation, drafting and administering exams, and conferring with students.

County,[13] the finding of failure to attain the PM_{10} NAAQS does not apply to tribal areas, and the rule would not impose a burden on Indian reservation lands or other areas where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction within West Pinal County. Thus, this rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because the effect of this action is to trigger additional planning requirements under the CAA. This action does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations. There is no information in the record indicating that this action would be inconsistent with the stated goals of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and indigenous peoples.

K. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability. This rule makes factual determinations for specific entities and does not directly regulate any entities. The determination of a failure to attain by the attainment date and reclassification does not in itself create any new requirements beyond what is mandated by the CAA.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 13, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

Part 52, Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

■ 2. Section 52.126 is amended by adding paragraph (e) to read as follows:

§ 52.126 Control strategy and regulations: Particulate matter.

* * * * *

(e) Effective August 21, 2023, the EPA has determined that the West Pinal Serious PM_{10} nonattainment area failed to attain the 1987 24-hour PM_{10} NAAQS by the applicable attainment date of December 31, 2022. This determination triggers the requirements of CAA sections 179(d) and 189(d) for the State of Arizona to submit a revision to the Arizona SIP for West Pinal to the EPA by December 31, 2023. The SIP revision must, among other elements, demonstrate expeditious attainment of the 1987 PM_{10} NAAQS within the time period provided under CAA section 179(d) and provide for an annual reduction in the emissions of direct PM_{10} or a PM_{10} plan precursor pollutant within the area of not less than five percent until attainment.

[FR Doc. 2023–15339 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

[13] A map of Federally-Recognized Tribes in the EPA's Pacific Southwest (Region IX) is available at *https://www.epa.gov/tribal-pacific-sw/map-federally-recognized-tribes-epas-pacific-southwest-region-9.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2016–0186; FRL–8961–02–OAR]

RIN 2060–AV39

Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is removing the "emergency" affirmative defense provisions from the EPA's title V operating permit program regulations. These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances. These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the EPA's interpretation of the enforcement structure of the Clean Air Act (CAA or the Act) in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA's treatment of affirmative defenses across different CAA programs. Through this document, the EPA is also providing guidance on the implementation process resulting from

the removal of the emergency affirmative defense provisions from the EPA's regulations, including the need for some state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar title V affirmative defense provisions from their EPA-approved title V programs, and to remove similar provisions from individual operating permits.

DATES: This final rule is effective on August 21, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2016–0186. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Corey Sugerik, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504–05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–3223; email address: *sugerik.corey@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How is this Federal Register document organized?

The information presented in this preamble is organized as follows:

B. Does this action apply to me?

Entities potentially directly affected by this rulemaking include federal, state, local, and tribal air pollution control agencies that administer title V operating permit programs.[1] Entities potentially indirectly affected by this rulemaking include owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at *https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions.*

II. Background and Overview of the Final Action

The EPA has promulgated permitting regulations applicable to the operation of major and certain other sources of air pollutants under title V of the CAA. These regulations are codified in 40 CFR parts 70 and 71, which contain the requirements for state operating permit programs and the federal operating permit program, respectively. These regulations contained identical provisions establishing an affirmative defense that sources could assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances. These "emergency" provisions were located at 40 CFR 70.6(g) and 71.6(g).

In this action, the EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA, in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit—primarily the court's 2014 decision in *NRDC* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses[2] and will harmonize the EPA's treatment of affirmative defenses across different CAA programs. The EPA previously provided background on the title V emergency provisions and articulated its justification for this action in the preamble to the 2016 and 2022 proposed rules preceding this final rule.[3][4] Section III. of this document responds to significant comments we received on those proposals and provides additional information in support of this final rule.

As a consequence of the EPA's action to remove these provisions from 40 CFR 70.6(g), it will be necessary for any states that have adopted similar affirmative defense provisions in their part 70 operating permit programs to revise their part 70 programs to remove these provisions. In addition, individual operating permits that contain title V affirmative defenses based on 40 CFR 70.6(g) or similar state regulations will eventually need to be revised. The EPA discussed its expectations concerning how states will implement this rule in section V. of the preamble to the 2016 proposed rule and also requested

[1] This preamble makes frequent use of the term "state," usually meaning the state air pollution control agency that serves as the permitting authority. The use of the term "state" also applies to local, tribal, and U.S. territorial air pollution control agencies, where applicable.

[2] In newly issued and revised New Source Performance Standards (NSPS), emission guidelines for existing sources, and NESHAP regulations, the EPA has either omitted new affirmative defense provisions or removed existing affirmative defense provisions. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Final Rule, 80 FR 44771 (July 27, 2015); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule, 80 FR 72789 (November 20, 2015); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Final Rule, 81 FR 40956 (June 23, 2016).

[3] *See* Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, Proposed Rule, 81 FR 38645 (June 14, 2016); Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and the Federal Operating Permit Program, Proposed Rule, 87 FR 19042 (April 1, 2022).

[4] Docket No. EPA–HQ–OAR–2016–0186 comprises all supporting documents and public comments for both the 2016 and 2022 proposals.

comments on some of the aspects discussed. Additional information regarding these implementation considerations and the EPA's response to relevant comments received on these issues are included in section IV. of this document.

EPA expects that program revisions to remove the title V emergency defense provisions from state operating permit programs will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business, such as during periodic permit renewals or revisions. At the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

III. Response to Significant Comments

This section contains the EPA's response to significant comments regarding the EPA's proposed action to remove 40 CFR 70.6(g) and 71.6(g) and provides the EPA's justification for this final action. Comments and the EPA's responses are divided into four general topic areas: section III.A. of this document discusses the legal basis for this action in light of the *NRDC* decision; section III.B. discusses issues related to exemptions from emission limitations and the D.C. Circuit's 2008 decision in *Sierra Club* v. *EPA*, 551 F.3d 1019 (D.C. Cir. 2008); section III.C. discusses other legal and policy considerations; and section III.D. discusses various issues involving the consequences of removing the title V emergency affirmative defense provisions from operating permit programs, focusing primarily on the impact on sources.

A. Affirmative Defenses and the NRDC Decision

The following subsections address comments received concerning the *NRDC* decision and the EPA's legal basis for this action. Subsections III.A.1. and III.A.2. of this document address general comments either supporting or opposing the EPA's interpretation of the *NRDC* decision. Subsection III.A.3. addresses specific comments concerning the extent to which the *NRDC* decision should apply beyond the context of citizen-suit enforcement under CAA section 304, and how the decision should inform the EPA's treatment of affirmative defenses in the context of EPA-initiated judicial enforcement and administrative penalty actions under CAA sections 113(b) and (d). Specific comments that discuss the relationship between the *NRDC* decision and prior case law are presented in section III.C.2. of this document.

1. Support for the EPA's Interpretation of the CAA's Enforcement Structure in Light of the NRDC Decision

Comment: Multiple environmental and state commenters supported the EPA's view that, in light of *NRDC*, the title V emergency affirmative defense provisions should be removed because they impermissibly limit the authority of courts to decide appropriate penalties in private civil suits. Some commenters claimed that the EPA lacks the authority to create such provisions. Other state and industry commenters acknowledged that the *NRDC* decision limits the EPA's discretion to retain affirmative defense provisions, either altogether or in certain contexts. Commenters argued that when Congress wanted to limit the authority of courts, to allow an affirmative defense or to permit an extrajudicial entity to modify penalties, it did so expressly, citing CAA sections 113(e)(1), 113(c)(5)(C)–(D), and 113(d)(2)(B).

Some commenters asserted that the *NRDC* decision applies beyond the specific context of CAA section 112 standards because the court's rationale was based on CAA sections 113 and 304, not CAA section 112. Therefore, commenters concluded that the prohibition on affirmative defenses applies to any citizen-enforceable emission standards or limitations under the Act. Commenters claimed that *NRDC* is applicable to the title V emergency affirmative defense provisions because, like the hazardous air pollution standards at issue in *NRDC*, all other emission standards contained in title V operating permits are enforceable under CAA section 304. Some commenters further asserted that the fundamental principles underlying the *NRDC* decision with respect to affirmative defenses were reinforced by the D.C. Circuit's 2016 decision in *U.S. Sugar* v. *EPA*.[5]

Response: The EPA generally agrees with commenters supporting the legal basis for this action to remove the emergency affirmative defense provisions from the EPA's title V regulations. The EPA previously explained its legal rationale for this action in the 2016 and 2022 proposed rules.[6] Here, the EPA reiterates some of the primary legal principles guiding this current action.

The EPA's current interpretation of the CAA with respect to affirmative defenses is informed by the D.C. Circuit's *NRDC* decision. In *NRDC*, the D.C. Circuit vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for the portland cement industry, promulgated under CAA section 112. The D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Importantly, the court's decision did not turn upon any specific provisions of CAA section 112, but rather on the provisions of CAA sections 113 and 304. These provisions

[5] *U.S. Sugar Corp.* v. *EPA*, 830 F.3d 579 (D.C. Cir. 2016), *amended on rehearing on unrelated grounds*, *U.S. Sugar Corp* v. *EPA*, 844 F.3d 268 (D.C. Cir. 2016).

[6] *See* 81 FR 38649. As noted in the 2016 and 2022 proposals, the EPA has also previously explained its interpretation of the CAA in light of the *NRDC* decision at great length in multiple other documents, including documents supporting the EPA's 2015 SSM SIP Action. *See* 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; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States, Supplemental Notice of Proposed Rulemaking, 79 FR 55919, 55929 (September 17, 2014) (SSM SIP Action Supplemental Proposal); State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, Final Action, 80 FR 33839, 33851 (June 12, 2015) (SSM SIP Action); and Memorandum, Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy, 3–4 (September 30, 2021), available at *https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf* (September 2021 SSM SIP Memo).

pertain to enforcement of a wide variety of CAA requirements beyond section 112 standards, including enforcement of emission limits contained in title V permits. Thus, the mere fact that the court addressed the legality of an affirmative defense provision in the context of a section 112 NESHAP does not mean that the court's interpretation of sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning sections 113 and 304 would not apply to the title V emergency affirmative defense provisions, as well.

Notably, in 2016, the D.C. Circuit reaffirmed its *NRDC* opinion concerning affirmative defenses. In *U.S. Sugar,* the D.C. Circuit addressed various challenges to rules promulgated in 2011, including challenges urging that—in the absence of affirmative defenses—the EPA was required to address periods of malfunction in setting the applicable standards. Discussing *NRDC,* the *U.S. Sugar* opinion stated that the affirmative defense provision at issue in the *NRDC* case was "an impermissible intrusion on the judiciary's role." [7] The fact that the title V emergency affirmative defenses arguably apply more broadly (*i.e.,* to potentially numerous technology-based emission limits developed under multiple CAA program areas) than the affirmative defense at issue in *NRDC* potentially makes it even more intrusive on the judiciary's role.

In light of the *NRDC* decision and the EPA's reevaluation of the CAA, the EPA interprets the enforcement provisions in sections 113 and 304 of the CAA to preclude affirmative defense provisions that would operate to limit a court's authority or discretion to determine the appropriate remedy in an enforcement action. Section 304(a) grants the federal district courts jurisdiction to determine liability and to impose penalties in enforcement suits brought by citizens. Similarly, section 113(b) grants the federal district courts jurisdiction, in enforcement actions brought by the U.S. Department of Justice (DOJ) on behalf of the EPA, to determine liability and to impose remedies of various kinds, including injunctive relief and monetary penalties. These grants of jurisdiction come directly from Congress, and the EPA is not authorized to alter or eliminate this authority. With respect to monetary penalties, CAA section 113(e) lists various factors that courts and the EPA shall consider in the event of judicial or administrative enforcement for violations of CAA requirements, including title V permit conditions. Because Congress has already given federal courts the authority to determine what penalties are appropriate in the event of judicial enforcement for a violation of a title V permit provision, neither the EPA nor states should be able to alter or eliminate that authority by superimposing restrictions on the authority and discretion granted by Congress to the courts. Affirmative defense provisions by their nature limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from the explicit grants of authority in section 113(b) and section 113(e). Therefore, these provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. The emergency affirmative defense provisions that the EPA is removing from 40 CFR 70.6(g) and 71.6(g) purported to interfere with the authority of the courts to determine whether and to what extent penalties or other remedies were appropriate in judicial enforcement actions, conflicted with the holding of *NRDC,* and were contrary to the enforcement structure of the CAA. Thus, the EPA has determined that these provisions should be removed from the EPA's regulations.

Section IV.A. of this document contains additional information concerning the need for states to submit program revisions to remove similar title V affirmative defense provisions from EPA-approved state operating permit programs, and to remove similar provisions from individual operating permits.

2. Comments Suggesting That the NRDC Case Is a Narrow Decision That the EPA Is Incorrectly Extending or Misapplying

Comment: Some commenters stated that the D.C. Circuit's decision in *NRDC* v. *EPA* was limited to the particular facts or circumstances of that case and that the EPA's reliance on the decision to support removal of the title V emergency affirmative defense provisions is an incorrect extension or misapplication of the decision. Commenters generally claimed that the EPA should not apply the *NRDC* court's ruling to every corner of the CAA, including to the title V affirmative defense provisions within the EPA's regulations and state operating permit programs. Some commenters stated that the *NRDC* decision only invalidated an affirmative defense associated with a NESHAP issued in accordance with CAA section 112, and that the decision should be limited to those standards (or, even, to the specific standards for portland cement plants subject to that litigation). Commenters alleged that the D.C. Circuit provided no language to broaden its ruling. Some commenters focused on the specific statutory mandates involved in establishing section 112 standards. One commenter alleged that the D.C. Circuit held that once a section 112 standard is promulgated and established for all operating modes, no "gap" remains for the EPA to create an affirmative defense.

Other commenters focused on the differences between title V permits and the section 112 standards that the *NRDC* court considered. These commenters explained that title V permits contain numerous different underlying standards applicable to a source (such as standards developed under a State Implementation Plan (SIP) or under New Source Review Programs), as well as additional procedural and monitoring, reporting, and recordkeeping requirements. Thus, one commenter asserted that enforcement of title V permit requirements differs from enforcement of specific section 112 emission limits, and that the D.C. Circuit's logic prohibiting affirmative defenses does not apply to other types of applicable requirements in a title V permit, including substantive standards as well as administrative or procedural requirements.

Some commenters attempted to distinguish the title V emergency affirmative defense, which at least one commenter characterized as a defense to "liability" or "noncompliance," from the affirmative defense to "civil penalties" at issue in the *NRDC* case. One commenter claimed that the *NRDC* decision was based on the assumption that excess emissions automatically result in a violation of a section 112 standard, and therefore that the D.C. Circuit only addressed how affirmative defense provisions affect a court's authority to determine appropriate remedies *after* an actionable violation has been identified. Multiple commenters asserted that neither CAA section 113 nor the *NRDC* case speak to provisions that define when a violation has occurred. Some commenters also asserted that the *NRDC* decision involved an affirmative defense for malfunctions, not emergencies, and concluded that the EPA should not apply the decision to the title V emergency affirmative defense because malfunctions are not similar in nature to emergencies.

Some commenters also claimed more generally that the title V affirmative defense provisions do not impair a court's ability to decide whether a source has met its burden of

[7] *See U.S. Sugar,* 830 F.3d at 607.

demonstrating that an emergency has occurred and whether civil penalties are appropriate. Other commenters discussed the breadth of the *NRDC* case with respect to SIP provisions. Commenters asserted that the D.C. Circuit did not opine on the authority of the EPA or states to provide relief from noncompliance with technology-based SIP standards that are incorporated into title V operating permits. Commenters also claimed that the D.C. Circuit expressly reserved judgment concerning the validity of such defenses in SIPs,[8] and that states have discretion under the CAA to include affirmative defense provisions in their SIPs. These commenters attempted to distinguish SIPs from the section 112 standards at issue in the *NRDC* case. Multiple commenters also incorporated in their comment submissions various attachments related to the Startup, Shutdown, and Malfunction (SSM) SIP Action,[9] including comments submitted on the initial and supplemental SSM SIP Call proposals [10] as well as briefs filed in the ongoing SSM SIP Action litigation.[11] Portions of these attachments addressed the EPA's interpretation of the *NRDC* case.

Response: The EPA disagrees with commenters' assertions that the logic of the *NRDC* case was restricted to the context of section 112 standards, or to a single NESHAP standard. Most of these comments do not address the fundamental legal principles upon which the D.C. Circuit based its decision, or the EPA's explanation of these principles. Contrary to what some commenters suggest, the *NRDC* decision was not based on any statutory mandates specific to promulgating CAA section 112 standards. Instead, the decision was based on CAA sections 113 and 304, which apply broadly to the enforcement of a wide range of CAA requirements, including SIP requirements. Thus, any differences between section 112 standards and other standards contained in title V permits (or, for example, the difference between malfunctions and emergencies) are irrelevant to the legal principles upon which the *NRDC* decision was based, and which apply equally well to the EPA's title V regulations in 40 CFR 70.6(g) and 71.6(g), as discussed in the preceding subsection.

The EPA also disagrees that *NRDC* is distinguishable from the current action due to any functional differences between the affirmative defense at issue in *NRDC*, which some commenters characterized as a defense to a claim for civil penalties for violations, and the title V emergency affirmative defense, which commenters characterized as a defense to an action brought for noncompliance. Both the title V affirmative defense and the portland cement NESHAP malfunction affirmative defense (originally located at 40 CFR 63.1344) established an affirmative defense that a source could assert in actions brought under CAA sections 113 and 304, after an enforcement action had been initiated for an alleged violation.[12] Both affirmative defense provisions functioned in the same manner. The fact that the portland cement defense was confined to enforcement actions for penalties, whereas the title V provisions do not on their face contain such an explicit restriction and could potentially be read more broadly, is irrelevant to the fact that both provisions purported to interfere with the authority of courts to determine whether and to what extent relief is appropriate in a given case, including relief from penalties. Moreover, CAA section 304(a), upon which the D.C. Circuit relied, is not restricted to monetary penalties. The EPA has previously explained its position that affirmative defenses are inappropriate regardless of what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. The EPA also notes that the title V emergency affirmative defense provisions were explicitly restricted to noncompliance with technology-based emission limits (such as emission limits derived from a NESHAP similar to the ones the D.C. Circuit invalidated) and were never available as a defense in an enforcement case for violations of other types of title V permit requirements, contrary to some commenters' assertions.

Finally, the EPA disagrees with commenters' claims that the title V affirmative defense provisions would not impair a court's ability to decide whether civil penalties are appropriate because a source attempting to invoke the title V emergency affirmative defense would have the burden to prove that an emergency occurred and other demonstration requirements had been met. The affirmative defense provision formerly in the portland cement NESHAP was similarly structured, and the D.C. Circuit nonetheless found that those provisions impermissibly intruded into the judiciary's role to determine whether penalties are appropriate. Any comments challenging the holding of the D.C. Circuit in *NRDC* are beyond the scope of this rulemaking. To the extent that commenters suggested that a title V affirmative defense provision could be appropriate with respect to certain technology-based SIP requirements contained in a title V permit, the EPA disagrees. For the reasons previously discussed, affirmative defense provisions in title V permits are not appropriate with respect to any federally-enforceable requirements. To the extent that commenters discussed the relationship between the *NRDC* and *Sierra Club* cases and affirmative defense provisions contained within SIPs, and to the extent that commenters incorporated comments or briefs relevant to the SSM SIP Action but did not specifically explain how those comments were pertinent to the EPA's proposal to eliminate the title V emergency affirmative defense provisions, such comments are beyond the scope of this current rulemaking. Moreover, the EPA has previously responded to those comments and legal briefs in the appropriate venues.[13] To the extent that comments addressed issues relevant to this action, the EPA is responding to these comments in this document.

3. The NRDC Case As It Applies Beyond Citizen-Suit Enforcement Under CAA Section 304(a)

Comment: Many commenters argued that the *NRDC* decision only invalidated affirmative defenses that could be asserted in citizen suits brought under CAA section 304 in federal court. These commenters asserted that the *NRDC* case does not require the EPA to remove affirmative defenses with respect to either: (1) EPA-initiated civil judicial enforcement actions under section 113(b); or (2) administrative penalty actions brought under section 113(d). Many of these commenters recommended that instead of entirely

[8] Commenters cited *NRDC*, 749 F.3d at 1064 n.2.

[9] SSM SIP Action, 80 FR 33840.

[10] 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; Proposed Rule, 78 FR 12460 (February 22, 2013); SSM SIP Action Supplemental Proposal, 79 FR 55919.

[11] *Environmental Committee of the Florida Electric Power Coordinating Group, Inc.* v. *EPA*, No. 15–1239 (D.C. Cir.) (SSM SIP Action litigation).

[12] To the extent that commenters argue that the title V affirmative defenses function to define when a violation has occurred, these comments are addressed further in section III.B.1. of this document.

[13] *See* SSM SIP Action, 80 FR 33840, 33852 (noting that "[s]tates have great discretion in how to devise SIP provisions, but they do not have discretion to create provisions that contradict fundamental legal requirements of the CAA" and that "[t]he jurisdiction of federal courts to determine liability and to impose statutory remedies for violations of SIP emission limitations is one such fundamental requirement"); Initial Brief of Respondent EPA, SSM SIP Action Litigation (filed July 26, 2016).

removing the title V emergency affirmative defense provisions, the EPA should amend the provisions to clarify that they do not apply to any enforcement actions based on section 304, but only to actions based on sections 113(b) and (d).

First, regarding EPA-initiated enforcement under section 113(b), some commenters acknowledged the EPA's position (as explained in the 2016 proposed rule) that, because both sections 304 and 113(b) vest federal district courts with the ability to determine liability and assess penalties, the EPA's hands are tied with respect to its own civil enforcement. One commenter noted that the *NRDC* case did not directly speak to enforcement actions brought by the EPA under section 113(b). Other commenters claimed that section 113(b) does nothing to impede the EPA's ability to define the circumstances under which it is "appropriate" to initiate an enforcement action, and that this would not interfere with the authority of a court to determine liability and assess penalties in an eventual enforcement action. Some commenters suggested that the EPA could use the affirmative defense to define by rule when it would be appropriate to commence an enforcement action, and others noted that the practical effect of the defense is to define when the EPA will exercise its enforcement discretion to initiate an enforcement action in the courts.

Second, regarding the EPA's authority to assess administrative penalties under section 113(d), commenters cited language from the *NRDC* decision, wherein the D.C. Circuit noted that, although the EPA did not have discretion to determine whether civil penalties should be imposed by a court, the agency had discretion to determine whether to assess administrative penalties under section 113(d).[14] Various commenters similarly alleged that because CAA section 113(d) explicitly gives the EPA the authority to modify penalties, it therefore allows the EPA to establish an affirmative defense in the context of administrative enforcement. Some commenters claimed that retaining the title V affirmative defense for administrative enforcement is especially important because most penalties related to emission exceedances are imposed through administrative penalties sought by the agency, not as a result of citizen suits in federal court. Finally, some commenters suggested that the EPA could define when it would be appropriate to assess administrative penalties.

Commenters also made similar arguments with respect to the ability of states to determine when it would be appropriate to pursue enforcement action, whether through the courts or with respect to administrative penalties.

Response: The EPA disagrees with the claim that it would be appropriate to retain the title V affirmative defense provisions for use in EPA-initiated judicial enforcement or administrative penalty actions. First, as explained previously and as acknowledged by commenters, the logic of the *NRDC* case applies not only to citizen-suit actions under section 304(a), but also to judicial enforcement actions initiated by DOJ on behalf of the EPA pursuant to section 113(b). Like section 304(a), section 113(b) involves enforcement actions that are ultimately brought before federal courts. Therefore, any affirmative defense that could be asserted in an enforcement proceeding brought under section 113(b) would similarly infringe on the authority of courts to determine appropriate penalties. Regarding suggestions that the EPA could treat the affirmative defense as establishing criteria defining whether the EPA considers it "appropriate" to commence an enforcement action under section 113(b), the EPA finds that this is not necessary or appropriate. For the reasons provided in section III.D.2. of this document, the EPA has decided not to explicitly codify such an "enforcement discretion" type provision.

Second, the EPA acknowledges that *NRDC* does not address the EPA's authority to establish an affirmative defense to CAA section 113(d) administrative actions. However, such an affirmative defense is not necessary. As discussed further in section III.D.2., if a source believes it is unable to comply with emissions standards as a result of an emergency, the EPA may use its case-by-case enforcement discretion to determine whether to initiate enforcement, as appropriate. Further, as the D.C. Circuit recognized, in an EPA or citizen enforcement action, the court has the discretion to consider any defense raised and determine whether penalties are appropriate.[15] The same is true for EPA administrative actions. Moreover, assessment of penalties for violations in administrative proceedings and judicial proceedings should generally be consistent. *Cf.* CAA section 113(e), 42 U.S.C. 7413(e) (requiring both the Administrator of the EPA and the court to take specified criteria into account when assessing penalties). The EPA has previously explained this approach in various rules developed under CAA sections 111, 112, and 129.[16]

Section IV.A.3. of this document discusses similar issues regarding how states may be able to implement this rule by retaining or developing similar provisions that apply in the limited context of state-initiated administrative enforcement actions or judicial enforcement in state courts.

B. Exemptions and the Sierra Club Decision

In the 2016 proposed rule, the EPA noted that the D.C. Circuit in *Sierra Club* vacated an EPA rule that exempted sources from otherwise applicable emissions standards during periods of SSM because the SSM exemption violated the CAA requirement that such standards apply continuously. The EPA stated that, although the title V emergency affirmative defenses were not exemptions, if they were to be construed or treated as exemptions, they would run afoul of *Sierra Club* and also should be removed for that reason. The EPA received various comments relating to these issues.

1. Comments Suggesting That the Title V Emergency Provisions Create an Exemption to Emission Limits or Define Whether a Violation Has Occurred

Comment: Commenters presented differing perspectives on how the title V emergency affirmative defense provisions function. The majority of commenters addressing this topic supported the EPA's position that the title V affirmative defense provisions, by their terms, clearly function as an affirmative defense, rather than as exemptions or provisions that define when a violation occurs. Commenters supporting this perspective explained that applicable emission limits would still apply during an emergency, and exceedances would still constitute a

[14] *See NRDC*, 749 F.3d at 1063.

[15] *See NRDC*, 749 F.3d at 1064; *see also U.S. Sugar*, 830 F.3d at 609. ("[Sources] can argue that penalties should not be assessed because of an unavoidable malfunction" and courts "should not hesitate to exercise their judicial authority to craft appropriate civil remedies in the case of emissions exceedances caused by unavoidable malfunctions.").

[16] *See, e.g.*, National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final Rule, 79 FR 48073, 48082 n.3 (August 15, 2014); Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final Rule, 79 FR 79017, 79024 n.3 (December 31, 2014); National Emission Standards for Hazardous Air Pollutants: Polyvinyl Chloride and Copolymers Production Reconsideration; Proposed Rule, 85 FR 71490 n.16 (November 9, 2020).

violation, but sources could later assert the affirmative defense in an effort to demonstrate to either the agency or a judge that, despite a violation of the applicable requirement, there are valid reasons to excuse the source from some or all penalties associated with the violation. Another commenter noted the very strict conditions that a source attempting to claim the affirmative defense for an emergency would have to comply with and document in order to be eligible for the affirmative defense. Similarly, commenters acknowledged that asserting this defense would not automatically mean it was granted.

However, other commenters suggested that the affirmative defense provisions functionally serve as exemptions to applicable emission limits or define when a violation of an emission limit has occurred. For example, one commenter claimed that the title V affirmative defense provisions operate as an exemption, whereby no restriction or emission limit would exist in specific emergency circumstances. One commenter suggested that the affirmative defenses found in 40 CFR 70.6(g) are an affirmative defense to liability rather than an affirmative defense for the reduction of penalties, which the commenter claims was considered in *NRDC*. Other commenters claimed that the title V affirmative defense essentially provides criteria for the EPA, the state, or a court to consider when deciding whether excess emissions trigger a violation in the first instance, and these commenters attempted to distinguish the title V affirmative defense from the section 112 affirmative defense at issue in the *NRDC* decision. Environmental commenters stated that the emergency provisions could be interpreted to mean that, when their terms are met, a source did not violate the relevant emission limitation, thereby effectively providing an exemption. Environmental commenters also argued that this type of functional exemption would be illegal.

Finally, one commenter suggested that the EPA convert the emergency affirmative defense provisions into a narrowly tailored exemption from technology-based standards. The commenter asserted that this approach would be within the EPA's authority, and that an exemption would provide more consistency than the use of enforcement discretion alone.

Response: The EPA agrees with the majority of commenters that acknowledged that the title V emergency affirmative defense provisions did not create exemptions or otherwise define whether a violation has occurred, as stated in the proposal.[17] The provisions being removed through this action, found at 40 CFR 70.6(g)(2) and 71.6(g)(3) state, in part, "An emergency constitutes an affirmative defense to an action brought for noncompliance with . . . technology-based emission limitations." By their terms, these provisions explicitly purported to establish an affirmative defense to an enforcement action, not an exemption. Moreover, these provisions purported to establish an affirmative defense to an action brought for noncompliance with certain emission limits. So, before the defense would apply, alleged noncompliance with an emissions limitation would have already occurred, and an enforcement action (administrative or judicial) would have been brought because of such noncompliance. The title V affirmative defenses, like the affirmative defense provisions at issue in the *NRDC* case, were thus based on the establishment of an alleged violation of permitted emission limits in the first instance. Moreover, it would not have been the burden of the party bringing an action for noncompliance to negate any claimed emergency "exemption" to an otherwise applicable emission limit. Rather, it would clearly have been the source's burden in defending against such an action to properly assert and prove all the elements of the emergency affirmative defense.[18] The result of a successfully pled affirmative defense would be to provide the decision maker in an enforcement case with reasons why, despite violations of an emission limit, the source should not be held liable and assessed penalties (or potentially other forms of relief) for such noncompliance. Therefore, the EPA believes that the title V emergency affirmative defense provisions were not intended and should not be interpreted to function as an exemption or to otherwise define when a violation has occurred.

To the extent that the affirmative defense provisions could have been interpreted to provide an exemption or define whether a violation has occurred, the EPA reiterates that such an exemption would be impermissible under the EPA's interpretation of the CAA and in light of *Sierra Club*. Some commenters suggested that the EPA should interpret the affirmative defense to function as an affirmative defense to liability or to define whether the emission limitation applies and thus whether there is a "violation." But, if there is no "violation" when certain criteria or conditions for an affirmative defense are met, then there is, in effect, no emission limitation that applies when the criteria or conditions are met, and the affirmative defense would operate to create an exemption from the emission limitation. As discussed in the following subsection, and based on the EPA's interpretation of the *Sierra Club* decision, this would violate the basic CAA principle that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. For the same reasons, it is not appropriate to convert the title V emergency affirmative defense provisions into an exemption, as suggested by a commenter.

2. Comments Interpreting the Sierra Club Case With Respect to Exemptions From Emission Limitations

Comment: Commenters presented differing views on the EPA's interpretation of *Sierra Club*. Environmental commenters supported the EPA's conclusion that exemptions from emission limitations are unlawful, and that, to the extent that the title V emergency affirmative defense provisions could be interpreted as providing for an exemption, those provisions would be unlawful. Commenters noted that in the *Sierra Club* case, the D.C. Circuit held that sections 112 and 302(k), read together, require that there must be continuous section 112-compliant standards. Commenters claimed that the statutory terms "emission standard" and "emission limitation" mean the same thing, citing CAA section 302(k). Therefore, commenters asserted the court's holding in *Sierra Club* also applies to the emission limitations affected by the title V affirmative defenses. Environmental commenters further asserted that the fundamental principles underlying the *Sierra Club* decision with respect to exemptions were reinforced by the D.C. Circuit's *U.S. Sugar* decision.

However, a number of industry commenters challenged the EPA's interpretation of the *Sierra Club* case, arguing generally that the case has limited applicability beyond the context of section 112 standards. Some commenters asserted that *Sierra Club* is not relevant to the current rulemaking because the case was anchored to the unique language of CAA section 112 and only addressed exemptions under CAA section 112, rather than regulations in operating permit programs, SIP requirements, or New Source Performance Standards (NSPS) regulations. One commenter argued that because the *Sierra Club* decision was

[17] *See* 81 FR 38645, 38651.

[18] *See* 40 CFR 70.6(g)(4) (the "permittee . . . has the burden of proof").

limited to section 112 standards, the decision could at most be read to prohibit title V provisions excusing noncompliance with an underlying NESHAP provision.

Other commenters asserted that requirements that limit emissions on a continuous basis do not have to impose the same limitation at all times, and that the form of the limitation does not always have to be the same. For example, commenters noted that CAA section 302(k) includes design, equipment, work practice, and operational standards, which could apply during periods of operation not covered by a numerical emissions limitation. These commenters claim that the *Sierra Club* case did not approach the question of whether these different types of standards would be acceptable. One commenter also asserted that the emergency affirmative defense is not an exemption from continuously applicable emission limits.

Response: As discussed in the preceding subsection, the title V emergency affirmative defense provisions should not be interpreted to provide an exemption to emission limits or otherwise define when a violation of an emission limitation has occurred. However, as noted in the proposal, to the extent that the title V provisions could be interpreted as providing such an exemption, this would run afoul of the CAA requirement that emission limitations be continuous. *See* CAA section 302(k), 42 U.S.C. 7602(k). The EPA disagrees with commenters' assertions that the *Sierra Club* court's reasoning does not apply beyond section 112 standards. As the EPA has explained in depth in other documents, the same logic prohibiting exemptions from NESHAP emission limits applies to other emission limitations subject to the definition of "emission limitation" within section 302(k), including emission limits contained within a source's title V permit.[19] Finally, comments on whether it is appropriate to impose different types of emission limitations during different modes of operation may be relevant to standard-setting or other proceedings where such limitations are established, but these comments are not material to this rulemaking to remove the title V emergency affirmative defense provisions.

C. Other Legal and Policy Considerations

This section addresses comments involving other legal and policy considerations related to the EPA's removal of the title V emergency affirmative defense provisions.

1. Ongoing SSM SIP Action Litigation

Comment: Some state and industry commenters urged the EPA to delay finalizing this action until the ongoing SSM SIP Action litigation concludes. These commenters claimed that the EPA's rationale underlying this title V action depends on the same core legal issues involving the EPA's interpretation of the *NRDC* and *Sierra Club* cases, which the commenters claimed is currently under judicial review in the SSM SIP Action litigation. One commenter further asserted that an adverse ruling in the SSM SIP Action litigation would be dispositive of the issues involved here.

Response: The EPA disagrees with the commenters' suggestion to delay this final action. The EPA has no reason to delay moving forward with the removal of affirmative defense provisions from various CAA program areas, including title V, solely because litigants have challenged the SSM SIP Action. The EPA is confident of the strong legal and policy bases for this current action, as well as prior actions in the SSM SIP Action and numerous regulations promulgated under CAA sections 111, 112, and 129 that also address affirmative defense provisions. In fact, the EPA's interpretation of the CAA and its application of relevant court decisions was upheld by the D.C. Circuit.[20] The EPA also disagrees with commenters' assertions that an adverse decision with respect to the SSM SIP Action would necessarily undermine the legal justification for this rule, because the SSM SIP Action litigation could be decided on procedural or substantive grounds that would not be determinative for this action. For example, the ongoing SSM SIP Action litigation involves many issues that are unrelated to this current rulemaking.[21]

2. Consideration of Prior Case Law

Comment: Multiple state and industry commenters discussed court decisions involving SSM issues and affirmative defenses predating the *NRDC* cases. These commenters generally asserted that the EPA relied too heavily on the *NRDC* case in justifying the current action, and that the EPA failed to address the importance of prior case law and the relationship between these prior cases and the *NRDC* case.

Many of these commenters cited to the Fifth Circuit's *Luminant*[22] decision, where commenters asserted the court determined that affirmative defense provisions do not interfere with a court's jurisdiction to assess civil penalties or enforce the CAA, contrary to the D.C. Circuit's decision in *NRDC*. One commenter, acknowledging the differing outcomes of the *Luminant* and *NRDC* cases, asked the EPA to discuss this dissonance and claimed that the EPA should have sought *en banc* review of the *NRDC* decision before the full D.C. Circuit, or alternatively sought review by the Supreme Court. Another commenter suggested that the EPA should delay finalizing this rule because of the confusion in the courts resulting from the differing *NRDC* and *Luminant* decisions. Some commenters claimed that the *Luminant* case is more directly relevant to the current action than the *NRDC* case. One commenter asserted that the *Luminant* case would be controlling over the *NRDC* case in states within the Fifth Circuit's jurisdiction, including Texas. Some commenters noted that the *NRDC* case explicitly distinguished its holding from that of *Luminant* and avoided confronting the SIP issues discussed in *Luminant*. Similarly, some commenters cited the Eleventh Circuit's *Georgia Power*[23] case, which also involved affirmative defense provisions contained within a SIP. Some commenters also cited two cases where circuit courts upheld the EPA's ability to use affirmative defense provisions in Federal Implementation Plans (FIPs), including the Ninth Circuit's *Montana Sulphur*[24] decision and the Tenth Circuit's *Arizona Public*

[19] *See, e.g.,* SSM SIP Action, 80 FR 33892 ("Since the 2008 D.C. Circuit decision in *Sierra Club* v. *Johnson*, however, it has been clear that NSPS and NESHAP standards themselves cannot contain such exemptions. The reasoning of the court was that exemptions for SSM events are impermissible because they contradict the requirement that emission limitations be 'continuous' in accordance with the definition of that term in section 302(k). Although the court evaluated this issue in the context of EPA regulations under section 112, the EPA believes that this same logic extends to SIP provisions under section 110, which similarly must contain emission limitations as defined in the CAA. Section 110(a)(2)(A) requires states to have emission limitations in their SIPs to meet other CAA requirements, and any such emission limitations would similarly be subject to the definition of that term in section 302(k)."); *see also id.* at 33862.

[20] Specifically, the EPA's approach to addressing malfunction emissions in section 112 rules for major boilers and area boilers and section 111 and 129 rules for commercial and industrial solid waste incinerators was upheld by the D.C. Circuit in *U.S. Sugar.*

[21] For example, briefs filed in the SSM SIP Action litigation allege, among other things, that the EPA failed to make the showing required to issue a SIP call, which is a procedure specific to CAA section 110. *See* Brief of Industry Petitioners, SSM SIP Action Litigation (filed March 16, 2016).

[22] *Luminant Generation Co.* v. *EPA*, 714 F.3d 841 (5th Cir. 2013).

[23] *Sierra Club* v. *Georgia Power*, 443 F.3d 1346, 1357 (11th Cir. 2006).

[24] *Montana Sulphur & Chemical Co.* v. *EPA*, 666 F.3d 1174 (9th Cir. 2012).

Service[25] case. Other commenters cited to prior cases decided in the context of Clean Water Act regulations, including *Marathon Oil*[26] and *Essex Chemical*,[27] and claimed that these cases support the creation of mechanisms like affirmative defenses to account for the unforeseeable and uncontrollable failure of even the best technology.

Some commenters also addressed the D.C. Circuit's *U.S. Sugar* decision. One commenter claimed generally that the case did not undercut the EPA's basis for providing the title V emergency affirmative defense. Other commenters, however, claimed that *U.S. Sugar* reinforced the EPA's view that affirmative defense provisions that constrain or interfere with a court's authority under CAA sections 113 and 304 are inimical to the Act.

Response: The EPA acknowledges that various circuit court cases preceding the D.C. Circuit's *NRDC* decision, including the Fifth Circuit's *Luminant* decision, upheld the agency's prior interpretation of affirmative defense provisions in various contexts, including the authority of the EPA to approve affirmative defense provisions contained in SIPs and the authority of the EPA to create affirmative defense provisions in FIPs. In these decisions, the courts deferred to the EPA's prior interpretation of the CAA with respect to affirmative defense provisions.[28] While some courts found the EPA's former interpretation permissible, those courts did *not* determine that the EPA's former interpretation was the only or even the best permissible interpretation. As previously noted, it is well within the EPA's legal authority to now revise its interpretation to a different interpretation of the CAA.[29] Those prior decisions were based upon an interpretation of the CAA that the agency no longer holds, and therefore those prior decisions do not speak to the validity of the EPA's current policy with respect to affirmative defenses. The EPA further notes that the affirmative defense provisions at issue in the other court decisions cited by the commenters, including affirmative defenses in SIPs and FIPs, are not affected by this action.

In *NRDC*, however, the D.C. Circuit conclusively determined that the EPA's former interpretation of the CAA concerning affirmative defenses was not permissible with respect to section 112 standards promulgated by the EPA. The *NRDC* court vacated the affirmative defense provisions in that case, finding them without legal basis because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Because the *NRDC* decision interprets CAA sections 113 and 304 and addresses the legal basis for affirmative defense provisions, the EPA has reevaluated its interpretation of the CAA with respect to affirmative defense provisions in title V programs as well. Based on this reevaluation and the reasoning of the *NRDC* decision, the EPA has determined that it is appropriate to remove the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g), and to require removal of similar affirmative defense provisions from state operating permit programs and individual operating permits, because these provisions are not authorized by the CAA.

Finally, the EPA notes that the D.C. Circuit's *U.S. Sugar* decision further reinforced the principles underlying the *NRDC* decision. In *U.S. Sugar*, the D.C. Circuit, acknowledging that the EPA could not create an exemption or affirmative defense provision, deferred to the EPA's decision to rely on case-by-case enforcement discretion as the mechanism to handle excess emissions during malfunctions.[30] Arguments suggesting that prior cases, including *Marathon Oil* and *Essex Chemical*, require the EPA to provide affirmative defenses in such situations are contrary to the *U.S. Sugar* decision.

3. EPA's Historical Policies Concerning Affirmative Defense Provisions

Comment: A number of commenters addressed the EPA's historical policies concerning affirmative defenses,[31] including the title V emergency provisions and the policy considerations underlying this type of mechanism to address emissions in unusual situations. Many commenters discussed the EPA's initial decision to create the title V affirmative defense in the 1992 part 70 rule and 1996 part 71 rule. One commenter claimed that the EPA initially included the title V provisions to do what was right, even if the EPA did not concede that it was required. Commenters focused on the initial purpose of the emergency provisions, asserting that the affirmative defense provisions were a very limited, appropriate recognition that even properly designed and maintained technology is not infallible and can fail due to emergencies beyond the control of a source. Other commenters noted the EPA's prior approach that acknowledged that enforcement and the imposition of penalties might not be appropriate in certain situations beyond the control of the source. Commenters asserted that the *NRDC* decision does not undermine the policy reasons that initially informed the promulgation of affirmative defense provisions, and that these same policy reasons support the title V emergency affirmative defense provisions.

Commenters also claimed that the title V emergency provisions are consistent with decades of EPA policy, citing various rulemakings and guidance documents. Commenters also stated that these types of affirmative defense provisions were recognized by states long before the 1990 CAA Amendments and the title V operating permits program, and that the title V affirmative defense provisions have existed for over 25 years. Commenters also pointed to other EPA actions justifying affirmative defenses, including FIPs for Montana and New Mexico, EPA's briefs prepared for litigation in the *Luminant* case, and EPA's withdrawal of Texas' SIP Call. Commenters also noted that affirmative defense provisions are still contained in other regulations promulgated by the EPA, including NSPS and NESHAP standards.

Some commenters addressed the EPA's legal authority to change its policy on affirmative defenses. Commenters asserted that agencies are only permitted to change their existing interpretations when they offer a reasoned explanation for the change, citing various Supreme Court cases including *Encino Motorcars, LLC* v. *Navarro*[32] and *FCC* v. *Fox Television Stations*.[33] These commenters alleged that the EPA's action is arbitrary and capricious because the EPA has failed to provide an adequate justification for the agency's revised policy with respect to the title V affirmative defenses. However, other commenters acknowledged that the EPA may change its interpretation so long as the agency provides a reasoned explanation, and

[25] *Arizona Public Service* v. *EPA*, 562 F.3d 1116 (10th Cir. 2009).

[26] *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977).

[27] *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

[28] For example, the Fifth Circuit in *Luminant* held that the EPA's interpretation of the CAA at that time was a "permissible interpretation of section [113], warranting deference." 714 F.3d at 853.

[29] *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

[30] *U.S. Sugar*, 830 F.3d at 607–09.

[31] Some commenters also discussed the EPA's historical policy on exemptions prior to the *Sierra Club* case.

[32] 136 S. Ct. 2117 (2016).

[33] 556 U.S. 502 (2009).

agreed that the justifications provided by the EPA in the 2016 and 2022 proposed rules are sufficient.

Finally, some commenters discussed the perceived inequity or unfairness of the EPA's change in policy and removal of affirmative defense provisions, based in part on the supposition that sources have come to rely on these provisions. Specific comments addressing how the removal of the title V affirmative defense provisions could impact sources are discussed further in section III.D.2. of this document.

Response: The EPA acknowledges the underlying considerations supporting the EPA's past policies—especially the agency's recognition that even well-designed and appropriately operated equipment may sometimes fail due to circumstances beyond the control of the source (such as during emergencies) and that, in certain situations, enforcement for violations of technology-based standards may not be appropriate. This rule does not change that general recognition. As discussed in section III.D.2. of this document, the EPA continues to believe that enforcement may not be warranted under certain specific circumstances, such as during an emergency, as determined on a case-by-case basis by enforcement authorities. The EPA, states, citizens, and the courts retain the discretion and authority to consider such circumstances in evaluating how to respond to exceedances or violations. However, an affirmative defense provision that interferes with the authority of courts to assess penalties is no longer an appropriate or legally sound mechanism to address these situations.

The EPA also acknowledges its past policies regarding different mechanisms to account for excess emissions during periods of SSM and emergencies. Based on these former policies, the EPA previously established affirmative defense provisions in various other CAA program areas, including within previously promulgated FIPs and various NSPS and NESHAP regulations. However, since that time, decisions from the D.C. Circuit, including *Sierra Club* and *NRDC*, have established parameters under the CAA regarding legally permissible approaches for addressing excess emissions during periods of SSM or emergency events. In light of these decisions—particularly the 2014 *NRDC* decision—the EPA has concluded that certain aspects of its prior interpretation of the CAA were not legally permissible under the CAA. Thus, the EPA has revised its interpretation of the CAA with respect to affirmative defense provisions, and this revised interpretation provides the basis for the current action (and similar actions in other CAA program areas).

Following the 2016 proposal, the EPA continued to evaluate SSM provisions, including affirmative defenses, in SIPs. In October 2020, the EPA issued a guidance memorandum that, among other things, expressly superseded a portion of the EPA's interpretation of affirmative defenses presented in the 2015 SSM SIP Policy.[34] However, on September 30, 2021, the EPA issued a guidance memorandum that withdrew the October 2020 memorandum in its entirety and reinstated the legal and policy positions expressed in the 2015 SSM SIP Policy in their entirety.[35] Thus, the EPA's current interpretation of affirmative defenses in the context of SIPs is the interpretation set out in the 2015 SSM SIP Policy.

The EPA's revised interpretation following the *NRDC* decision was, and continues to be, well within the EPA's legal authority, and the EPA has properly exercised its authority to revise its interpretation of the CAA through the appropriate processes. The authority of an agency to change its interpretation of a statute is well-established, provided that it gives a reasoned explanation for the change.[36] The EPA disagrees with commenters that suggest that the EPA has not provided an adequate rationale for this shift in policy, either generally with respect to affirmative defenses or specifically with respect to the title V emergency affirmative defense provisions. The EPA has clearly articulated its revised interpretation of the CAA with respect to affirmative defenses, here and in other documents, including the 2016 proposed rule (as referenced in the 2022 proposed rule), based on the EPA's analysis of the *NRDC* decision.[37] Commenters have not substantiated their claim that the EPA's rationale is inadequate.

4. Consistency With Other CAA Program Areas

Comment: A number of commenters acknowledged and addressed the EPA's desire to ensure consistent agency policy with respect to affirmative defense provisions across different CAA program areas. However, some commenters asserted that consistency between the EPA's title V regulations and other CAA programs is not a rationale for taking this action. Other commenters disagreed that the title V provisions should be removed for consistency with actions like the 2015 SSM SIP Action, arguing that the two actions are distinguishable. Finally, some commenters claimed that removal of the title V affirmative defense would actually undermine the goal of consistency across CAA program areas, because title V permits incorporate emission limits developed under numerous CAA regulatory authorities, and because various NSPS, NESHAP, and SIP regulations currently still contain affirmative defense provisions.

One commenter also suggested that the EPA could resolve any inconsistency between the title V affirmative defense provisions and underlying standards that do not allow an affirmative defense by clarifying through an interpretive rule or rule revision that nationwide standards outweigh affirmative defense provisions under title V.

Response: The EPA is not removing the title V emergency affirmative defense provisions solely for the sake of consistency. Rather, as discussed in the proposal and in section III.A. of this document, these provisions present legal issues substantially similar to those that called for the removal of affirmative defense provisions from other regulations. In addition to the legal considerations supporting the current action, and as previously explained in the preamble to the 2016 proposed rule (as referenced in the 2022 proposal), the EPA believes that it is important to apply, as much as

[34] Memorandum, Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans, 6 (October 9, 2020), available at *https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sipsguidance-memo.pdf*. In 2020, EPA also took action relating to an SSM-related affirmative defense in a SIP for Texas, withdrawing a SSM "SIP call" in part because the SIP-based affirmative defense was deemed to not be inconsistent with the CAA. *See* 85 FR 7232 (February 7, 2020); *see also* 85 FR 23700 (April 28, 2020) (SIP call withdrawal relating to North Carolina) and 85 FR 73218 (November 17, 2020) (SIP call withdrawal relating to Iowa). Petitions for review of these withdrawal actions were filed in the United States Court of Appeals for the D.C. Circuit. *See Sierra Club* v. *EPA*, No. 20–1115.

[35] September 2021 SSM SIP Memo, *supra* note 5. This memorandum also announced an intent to revisit, among other things, the 2020 action withdrawing the SSM affirmative defense-related SIP call for Texas. Id. at 5. On December 17, 2021, the United States Court of Appeals for the D.C. Circuit granted the EPA's request for a voluntary remand of that 2020 Texas SIP call withdrawal action, as well as the similar SIP call withdrawal actions relating to North Carolina and Iowa, in light of EPA's stated intent to reconsider those actions. *Sierra Club* v. *EPA*, No. 20–1115.

[36] *See, e.g., Encino Motorcars*, 136 S. Ct. at 2125–26; *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *see also Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (agency must adequately explain the reasons for a reversal of policy).

[37] The EPA has clearly explained its general shift in policy with respect to affirmative defense provisions in other documents. *See, e.g.*, 81 FR 36849; SSM SIP Action Supplemental Proposal, 79 FR 55934; SSM SIP Action, 80 FR 33851.

reasonably possible, the EPA's policy concerning affirmative defense provisions consistently across CAA program areas. As previously explained, the EPA has removed affirmative defense provisions from numerous other CAA standards since the 2014 *NRDC* decision.[38] Based on the relationship between title V and these underlying standards, it is particularly important to remove the affirmative defense provisions from the title V program regulations. Title V permits include a wide range of substantive CAA requirements that apply to a source, including SIP provisions and standards developed under CAA sections 111, 112, and 129. Because the title V affirmative defense provisions applied independent of these underlying standards, the title V emergency affirmative defense might be asserted in civil actions or other proceedings involving noncompliance with title V permit terms reflecting standards from which the EPA has recently eliminated affirmative defenses. In this way, the continued presence of the title V affirmative defense provisions could effectively undermine the EPA's efforts to remove affirmative defenses from the underlying standards, as well as the efforts of states to revise SIPs to comply with the 2015 SSM SIP Action. The EPA acknowledges that not all affirmative defense provisions in the EPA's regulations have been removed as of the date of this rule. However, the fact that this is an ongoing process does not provide a basis for retaining or delaying removal of the title V affirmative defense provisions.

Moreover, the EPA does not believe that it would be appropriate to simply clarify in some manner—whether by revising the emergency affirmative defense rules or issuing guidance—that the title V affirmative defense would not apply where the underlying standards do not allow or provide for an affirmative defense. Although this approach could potentially reduce inconsistency between title V provisions and the underlying standards from which affirmative defenses have been removed, it would nonetheless fail to address the more fundamental problem that the title V affirmative defense provisions are, in and of themselves, inconsistent with the enforcement structure of the CAA and thus legally impermissible.

[38] 87 FR 19042, 19044, n. 3 (citing recent EPA rulemakings removing affirmative defense provisions).

5. Relationship to Other CAA Standards

Comment: Commenters raised a number of concerns involving the relationship between the title V emergency affirmative defense and other CAA standards, including section 112 NESHAP, section 111 NSPS, and SIPs. Comments specifically relating to SIPs are discussed in the following subsection.

Commenters claimed generally that the EPA has failed to consider how the CAA requirements related to enforcement must be harmonized with the CAA requirements relating to standard setting and permitting. One commenter claimed that the title V affirmative defense provisions avoid the need to address emergencies in each individual underlying standard, which the commenter characterized as an impractical approach. Another commenter asserted that the title V affirmative defense provisions have effectively become part of the underlying applicable standards, and other commenters suggested that the title V affirmative defense provisions are necessary to ensure that underlying technology-based standards are achievable and adequately demonstrated, taking into account costs. These commenters asserted that removing the affirmative defense would have the effect of making the underlying standards in a permit more stringent than those authorized by the governing standards, in that sources would be subject to a level of control technology that is technologically and economically infeasible. Other commenters suggested that if affirmative defenses are removed, either title V permits or underlying standards would need to provide some other way to account for malfunctions, such as through alternative emission limitations, work practice standards, or malfunction abatement plans.

Some commenters also claimed that the overlap between the title V emergency provisions and various malfunction provisions in NSPS and NESHAP regulations could cause confusion. However, other commenters recognized that the removal of the title V affirmative defense provisions should not have any impact on independent malfunction or emergency provisions contained in underlying technology-based standards.

Lastly, several environmental commenters asserted that EPA must go further and quickly remove "SSM loopholes" from other CAA programs, including section 111 NSPS, section 112 NESHAP, and SIPs.

Response: Many of the comments relating to malfunction emissions and the development of technology-based standards are either not directly related to the current rule to remove the title V emergency affirmative defense provisions or reflect a misunderstanding about the relationship between the title V affirmative defense provisions and underlying standards included within operating permits. As an initial matter, title V of the CAA does not generally impose new substantive requirements on a source. Rather, title V permits provide a vehicle to clarify in a single document the various CAA requirements applicable to a source. Although title V permits must contain conditions (such as monitoring, recordkeeping, and reporting provisions) necessary to assure compliance with all CAA requirements already applicable to a source, title V of the CAA does not provide the basis for making substantive changes to underlying applicable standards.[39] Therefore, title V permits are not an appropriate mechanism for addressing commenters' concerns related to the development of, for example, alternative emission limits, work practice standards, or malfunction abatement plans. These considerations may be more relevant in the context of developing specific SIP provisions or section 111, 112 or 129 standards.[40]

Moreover, the underlying standards, not the title V affirmative defense provisions, establish the appropriate level of emission controls, accounting for technological, economic, and other considerations, as appropriate. The title V emergency affirmative defense provisions are not, as some commenters suggested, part of the underlying applicable requirements themselves. The title V affirmative defense provisions operated independently from the specific standards and/or emission limits, as well as any emergency, malfunction, or upset provisions contained within underlying applicable

[39] 40 CFR 70.1(b) (requiring all title V sources to have a permit to operate that "assures compliance by the source with all applicable requirements" and stating that "title V does not impose substantive new requirements," although it does require imposition of fees and certain compliance measures).

[40] The D.C. Circuit's *U.S. Sugar* decision addressed arguments, raised in the context of challenges to NESHAPs issued under CAA section 112 that did not provide for an affirmative defense for unavoidable malfunctions, that such malfunctions must be accounted for either by an affirmative defense or by appropriate adjustments in the standard-setting itself. The D.C. Circuit upheld the EPA's decision to neither include an affirmative defense nor adjust the underlying standard, as requested by Petitioners, to account for malfunction periods. Instead, the court upheld the EPA's decision to use enforcement discretion to address exceedances that occur during malfunction periods.

requirements. Although the title V provisions provided for an affirmative defense in emergencies, removal of the affirmative defenses would not make underlying technology-based standards more stringent or otherwise have any effect on standards applicable to a source. The title V provisions merely provided an affirmative defense that a source, after having allegedly violated a technology-based emission limitation contained in its title V permit, could assert in an enforcement proceeding brought for alleged violations of the title V permit term reflecting the requirements of the underlying standard. Because the title V affirmative defense did not provide an exemption to any standard or define when a violation of a standard has occurred, a source's compliance status with the underlying standard itself—as well as the source's compliance status with the title V permit term—would not be affected by the presence or absence of an affirmative defense.

Finally, comments discussing the purported need to provide for or address excess emissions associated with malfunctions are immaterial because this action addresses the title V affirmative defense provisions for emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events. For further discussion, see section III.D.3. of this document.

6. Relationship to the 2015 SSM SIP Action

Comment: Multiple commenters addressed the relationship between this action and the 2015 SSM SIP Action. Some commenters asserted that the EPA's current action is based on the 2015 SSM SIP Action, or claimed that the two actions are related for various reasons. Other commenters claimed that the 2015 SSM SIP Action is not at issue in this rulemaking, disagreed with the EPA's statements that certain aspects of the 2015 SSM SIP Action are especially relevant, and attempted to distinguish the types of provisions at issue in the 2015 SSM SIP Action from those at issue here.

Some commenters also specifically discussed the need for states to develop SIP provisions that account for SSM situations (including work practice standards) and claimed that states should not be prohibited from including approved state SSM plans in title V permits. One commenter suggested that removing the title V affirmative defense provisions before SIP issues are resolved could prevent states from incorporating all applicable requirements, including SIP requirements, into title V permits, and another commenter asserted that this title V rule should be withdrawn while states modify their rules to address the 2015 SSM SIP Action. On the other hand, other commenters suggested that by promptly finalizing this title V rule, the EPA can better facilitate the coordination of SSM SIP revisions with title V program revisions and individual operating permit revisions.

Response: This current title V rule is related to the 2015 SSM SIP Action to the extent that each rule is based at least in part on the EPA's view that, in light of the *NRDC* decision, affirmative defense provisions are contrary to the enforcement structure of the CAA.[41] However, this title V action is not "based on" the 2015 SSM SIP Action, and the two actions are functionally independent rulemakings, each operating within distinct areas of the CAA's regulatory structure. Therefore, and for the reasons discussed in the preceding subsection discussing the relationship between title V and other CAA standards, this current action involving the title V affirmative defense provisions will not have any effect on states' ability to develop appropriate SIP provisions in response to the 2015 SSM SIP Action, and it will not affect states' ability to ensure that title V permits appropriately reflect all requirements applicable to a source, including revised SIP provisions. In fact, as some commenters indicated, it may be convenient for states to coordinate implementation of any title V permit changes related to the 2015 SSM SIP Action with permit changes related to this rulemaking. Issues regarding implementation of this rule are discussed further in section IV. of this document.

7. Title V of the CAA

Comment: Some commenters noted that while title V of the CAA does not establish or mandate affirmative defense provisions, neither does title V of the CAA prohibit the EPA from establishing affirmative defenses.

Response: The EPA acknowledges that title V of the CAA is silent with respect to affirmative defense provisions; it neither provides for such provisions nor explicitly prohibits them. However, the EPA interprets other provisions of the CAA that apply to enforcement of the title V operating permits program—including sections 113 and 304—to effectively prohibit the creation of affirmative defense provisions, as discussed in section III.A.1. of this document.

8. Constitutional Issues

Comment: Some commenters raised constitutional issues with the removal of the title V emergency affirmative defense provisions. Commenters argued that the imposition of penalties for any conduct that is unavoidable violates basic constitutional protections guaranteed by the Eighth Amendment and due process requirements. Commenters further asserted that explicit affirmative defense provisions are necessary to satisfy minimum constitutional standards, and that alternative approaches, such as the exercise of enforcement discretion, are not sufficient.

Response: The EPA disagrees with commenters with respect to these constitutional arguments. The comments suggest that without the title V affirmative defense, any penalty assessed for violation of a title V permit term during an emergency would be *per se* "excessive" or "arbitrary" and that the existing CAA enforcement provisions would be facially unconstitutional. The EPA disagrees. It should be reiterated, first, that the title V emergency affirmative defense has never been a required permit term and it has not universally been adopted by all permitting authorities for all permits. Even where the defense may be available, it is, by its own terms, very limited and narrowly circumscribed. Commenters have provided no information indicating that the defense has been asserted with any frequency or, indeed, at all. It is difficult to see how the removal from the EPA's regulations of a narrowly circumscribed, discretionary defense that apparently is infrequently asserted could render the CAA unconstitutional.

Moreover, the CAA does not mandate that EPA automatically initiate an enforcement action, let alone automatically assess a penalty, for a violation of a CAA requirement. EPA has absolute discretion on whether to initiate an enforcement action in any circumstance, including during an emergency.[42] If EPA chooses to initiate an enforcement action in a circumstance involving a violation during an emergency, and chooses to seek a penalty for that violation, the CAA establishes a maximum civil penalty in

[41] This legal rationale is not affected by any differences between affirmative defense provisions implicated by the 2015 SSM SIP Action and those implicated by this action.

[42] *Heckler* v. *Chaney*, 470 U.S. 821 (1985) (holding that decisions of agency not to undertake enforcement action are presumed unreviewable).

section 113(b)[43] but then expressly provides in section 113(e) that the EPA or the courts "shall take into consideration various criteria—including specifically, "good faith efforts to comply," and, more generally, "other factors as justice may require." Thus, the CAA on its face does not mandate the imposition of any penalty *automatically,* much less one that is *per se* excessive. The commenters fail to provide any specific support for their claim that the statutory penalty provisions of the CAA are facially unconstitutional, instead making only generalized claims.

In addition, *State Farm Mutual Auto Insurance Co.* v. *Campbell,*[44] a case cited by some commenters, provides no support for any claim that removal of the title V affirmative defense would somehow be unconstitutional. *State Farm* involved a claim that a jury award of $145 million in punitive damages was excessive and, accordingly, contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Reaffirming that the Fourteenth Amendment "prohibits the imposition of grossly excessive or arbitrary punishments," the Supreme Court held that, under the particular circumstances of the case, the punitive damages award was excessive and "an irrational and arbitrary deprivation of property."[45] Here, no penalties have been assessed at all, and *State Farm* provides no support for the conclusion that—absent the title V emergency affirmative defenses—the CAA's authorization, in accordance with various identified criteria, of possible penalties is necessarily unconstitutional.[46]

The EPA also disagrees with the claims that—absent the title V affirmative defenses—the penalty provisions of the CAA would be facially contrary to the Eighth Amendment. Again, if a party believes that the penalties assessed in a particular enforcement action violate the Eighth Amendment, it can raise that claim at the appropriate time. As with the commenters' due process arguments, Congress has addressed the potential for unfair—or unconstitutional—penalties by setting out various criteria to be considered in determining civil penalties. The penalty criteria in section 113(e) provide an opportunity to raise concerns about imposition of penalties in the event of an emergency similar to that afforded by the title V affirmative defenses, albeit directed at the courts' discretion. The commenters do not explain why they believe these explicit statutory factors do not provide sufficient protection against the imposition of an allegedly unconstitutionally excessive penalty.

D. Potential Impacts

This section discusses various issues involving the effects of removing the title V emergency affirmative defense provisions, focusing primarily on the impact on sources. Overall, the EPA does not believe that removing the emergency affirmative defense provisions will substantially affect the legal rights of title V sources or the decisions sources make when confronted with emergency situations. It is also important to reiterate that the EPA is basing the current action on its interpretation of the CAA in light of relevant caselaw indicating that these affirmative defense provisions must be removed because they are inconsistent with the enforcement structure of the CAA.

1. Scope and Use of Title V Affirmative Defense Provisions

Comment: Multiple state and industry commenters acknowledged the limited scope of the title V affirmative defense provisions, which apply only to emergency situations. Commenters also addressed the relationship between emergencies and malfunctions. While some commenters provided examples of situations that would constitute an emergency but not a malfunction, other commenters asserted that the terms "emergency" and "malfunction" are closely related in that they both relate to unexpected and unforeseen events.

A number of commenters further acknowledged the limited historical and potential use of the title V emergency affirmative defense provisions. However, commenters suggested that the rule could have greater impacts than might be apparent.

Environmental commenters, on the other hand, characterized large SSM exceedances as routine and claimed that large polluters have used affirmative defense provisions in many citizen enforcement actions. Additionally, these commenters asserted that excess emissions are often the result of operator errors, poor plant design, and a lack of preventive maintenance. Thus, commenters claimed that sources using SSM affirmative defense provisions have lacked an incentive to make investments in accident prevention. Finally, these commenters claimed that emissions during SSM and emergency events can be controlled.

Response: The EPA agrees with commenters that emphasized the limited scope of the title V emergency affirmative defense provisions. Unlike more general affirmative defense provisions addressing excess emissions during equipment malfunctions (which some commenters appear to address), the title V provisions being removed were specific to situations that qualify as an "emergency," defined as "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency." 40 CFR 70.6(g)(1). Thus, while the title V emergency affirmative defenses, like affirmative defenses for malfunctions, relate to events that are beyond the control of a source, the title V defenses would only have been available in a more extreme, limited set of circumstances. While it is possible for some overlap in malfunction and emergency situations to exist (*e.g.,* certain emergency events could potentially cause equipment malfunctions), the EPA believes that the majority of exceedances during malfunction events would not be attributable to "emergencies" as defined in the title V affirmative defense provisions. In addition, the title V affirmative defense provisions being removed contain various procedural requirements that must be met to assert the defense. *See* 40 CFR 70.6(g)(3). Moreover, as some commenters acknowledged and based on the best information available to the EPA, the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Comments contending that sources frequently or routinely have asserted affirmative defenses appear to relate to SSM affirmative defenses, rather than the narrower title V affirmative defense for emergencies. It is unlikely that the criteria for the title V emergency affirmative defense would have been met in such circumstances, as the title V provisions could not be asserted for (among other things) noncompliance caused by improperly designed equipment, lack of preventative

[43] The maximum statutory civil monetary penalty amounts are adjusted annually for inflation in 40 CFR part 19.

[44] 538 U.S. 406 (2003).

[45] *Id.* at 429.

[46] Additionally, *State Farm* involved a claim under the Fourteenth Amendment, which imposes limitations on the states, not the federal government. This discussion assumes, for the sake of argument, that the principles expressed in *State Farm* would also apply to claims under the Due Process Clause of the Fifth Amendment.

maintenance, careless or improper operation, or operator error.

For these reasons, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources. Further, as discussed in the following subsection, the EPA, state authorities, and other entities likely would consider the relevant circumstances—especially the relatively unusual, extreme, and unavoidable circumstances that would have qualified under the narrow definition of "emergency"—in deciding whether to pursue enforcement action or seek penalties, and sources remain free to argue to the court, in the event of an enforcement action, that penalties should not be assessed for these same reasons.

2. Alternatives to an Affirmative Defense: Discretion To Initiate Enforcement and the Discretion of Decision Makers To Determine Appropriate Remedies

Comment: Many commenters expressed concerns that removing the title V emergency affirmative defense provisions would result in less certainty or greater risk of liability to sources confronted with emergency situations. One commenter asserted that even if the EPA is not legally required to provide an affirmative defense in title V permits, the EPA should, to the maximum extent consistent with law, continue to provide and allow states to provide sources relief from the threat of enforcement for exceedances caused by emergencies. Another commenter claimed more generally that the EPA must find other ways to assure sources that they will not be subject to penalties if they operate to provide vital services in an emergency. Commenters generally requested additional guidance from the EPA to provide more certainty to sources in the absence of an explicitly codified affirmative defense.

Most commenters acknowledged the fact that even in the absence of an affirmative defense, the EPA, state, and citizens all retain the discretion to determine whether to bring an enforcement action, based on the unique circumstances of each case. Thus, most commenters acknowledged that not all exceedances of emission limits will automatically result in enforcement actions. One commenter asserted that the EPA routinely uses enforcement discretion to decide which alleged violations to pursue, and that such decisions are often made on the same principles codified in an affirmative defense. Other commenters asserted that the EPA does not intend for true emergencies to result in increased enforcement, and that the EPA's suggested enforcement discretion approach avoids forcing every violation to judicial resolution. Finally, one commenter asserted that the exercise of enforcement discretion by state permitting authorities is appropriate and consistent with CAA sections 113 and 304 and separation of power principles.

However, a number of commenters challenged the sufficiency of relying on enforcement discretion alone to handle excess emissions caused by emergencies. Commenters noted that explicitly codified affirmative defense provisions have the benefit of providing certainty to permittees, promoting consistency to agency actions, and promoting the creation and retention of records necessary to justify agency actions. Commenters claimed that relying on enforcement discretion alone would result in more uncertainty and jeopardy and less harmony among different CAA programs, because enforcement discretion policies may be unwritten and unavailable to the public. Other commenters noted, citing the *U.S. Sugar* decision, that federal and state policies regarding enforcement discretion do nothing to prevent citizens from pursuing enforcement. Some commenters also asserted that an enforcement discretion approach still leaves sources in the difficult position of choosing between proper emergency response and compliance with emission limits. Other commenters claimed that relying on enforcement discretion puts all power in the hands of the EPA, without any checks and balances, and asserted that this contradicts principles of cooperative federalism and exceeds the authority intended in the passage of the CAA.

Some commenters discussed how prior court decisions have treated enforcement discretion. One commenter claimed that the D.C. Circuit in *U.S. Sugar* acknowledged, but did not evaluate, the EPA's reliance on enforcement discretion, and the commenter alleged that the court appeared to have doubts that enforcement discretion alone is sufficient. Another commenter claimed that the *U.S. Sugar* decision did not validate the enforcement discretion approach beyond the context of section 112 standards. Other commenters cited to the 1973 D.C. Circuit opinion in *Portland Cement Assn.* v. *Ruckelshaus*[47] in support of their position that reliance on enforcement discretion is not a sufficient response to addressing excess emissions from malfunctions, and another commenter claimed that the 9th Circuit rejected the EPA's use of enforcement discretion in the 1977 *Marathon Oil*[48] Clean Water Act case.

Some commenters requested that the EPA provide additional guidance to clarify the circumstances under which permitting authorities (including the EPA) should exercise their discretion not to bring enforcement actions. Many commenters encouraged the use of the criteria contained in 40 CFR 70.6(g) in guiding permitting authorities' exercise of enforcement discretion. Some commenters asserted that states should be able to rely on those criteria when exercising their enforcement discretion. Other commenters urged the EPA: to make clear that the EPA would not expect to bring an enforcement action under circumstances meeting those criteria; to make clear that the EPA would continue to use its enforcement discretion in the case of emergency situations; and to create a strong policy statement that the EPA does not support civil penalties in situations meeting those criteria. Commenters, with one quoting a passage from the EPA's brief in the *U.S. Sugar* case, urged the EPA to more fully articulate certain standards for determining whether the EPA would pursue enforcement in a given situation, including consideration of the good faith efforts of a source to minimize emissions, which types of preventative and corrective actions would be considered, and the nature and extent of the root cause analysis that should be employed by sources to ascertain and rectify excess emissions. Another commenter claimed that it is appropriate for permitting authorities to take into account circumstances involving how a source mitigated damage to people and the environment in responding to an emergency.

Relatedly, one commenter suggested that instead of removing the affirmative defense provisions, the EPA should amend them to provide that the affirmative defense may be allowed, if specified conditions are met, at the discretion of the enforcement entity.

Commenters also acknowledged that even when an enforcement action is commenced, the ultimate decision makers also have the discretion to determine whether and to what extent penalties are appropriate in a given situation. Environmental commenters asserted that both the EPA and the *NRDC* court recognized that even

[47] 486 F.2d 375, 399 n.91 (D.C. Cir. 1973).

[48] *Marathon Oil Co* v. *EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977).

without an affirmative defense, sources are still free to argue to a court that they should be subject to lesser (or no) civil penalties for any number of reasons, including practical considerations or emergencies. Another commenter noted that the D.C. Circuit in *U.S. Sugar* confirmed that sources may still argue to a court that penalties should not be assessed in a given situation, and that sources may support these arguments with relevant facts, such as the source's compliance history and good faith efforts to comply with emission limits.

However, while some commenters acknowledged that the absence of an affirmative defense would not automatically result in the imposition of particular remedies, other commenters asserted that without an affirmative defense, sources would lack a legal defense in enforcement actions and would be liable for unforeseeable events outside of their control. One commenter claimed that this would be unjust, and that imposing an unjust system would foster disrespect for the law.

Finally, some commenters requested further guidance on how sources could make similar defenses in enforcement proceedings. Commenters requested that the EPA retain or narrow the definition of "emergency" in its regulations, as this definition could help guide a court's review of circumstances that are unlikely to warrant punishment, and could provide more certainty to sources.

Response: As discussed in detail in the 2016 proposal,[49] the EPA reiterates that the legal rights and obligations of individual sources potentially subject to enforcement proceedings will not be significantly affected by the removal of emergency affirmative defense provisions from their title V permits. The absence of an affirmative defense provision in a source's title V permit does not mean that all exceedances of emission limitations in a title V permit, including those resulting from an emergency, will automatically be subject to enforcement or automatically be subject to imposition of penalties or other remedies.

First, any entity that may bring an action to enforce title V permit provisions has enforcement discretion that they may exercise as they deem appropriate in any given circumstance. For example, if the excess emissions caused by an emergency occurred despite proper operation of the facility, and despite the permittee taking all reasonable steps to minimize such emissions, EPA or other relevant entities may well decide that no enforcement action is warranted in a specific case. In the event that an entity decides to bring an enforcement action, it may, nonetheless, take into account the emergency circumstances in deciding what remedies to seek.

The EPA appreciates that relying on enforcement discretion might afford less certainty to sources than an affirmative defense provision. However, as the EPA has explained, the latter approach is not legally consistent with the enforcement structure of the CAA, which among other things imposes a duty on the source to continually comply with emission limits and standards. Moreover, the EPA believes the exercise of enforcement discretion in lieu of a codified affirmative defense provision is both appropriate and sufficient to carry out the mandates established by Congress in the CAA in a fair and equitable fashion, a position that the D.C. Circuit upheld in its *U.S. Sugar* decision.[50] The EPA believes that it is unlikely that entities would initiate an enforcement action for emissions exceedances resulting solely from a true emergency situation that would have qualified under the narrow definition and particular requirements of the title V emergency affirmative defense provisions. The EPA also generally agrees with commenters that the conditions contained in the title V emergency provisions, including but not limited to the nature of the emergency event and the source's efforts to take all reasonable steps to minimize emissions during an emergency, would likely be important considerations to take into account when deciding whether to pursue enforcement, among all other relevant factors. Enforcement discretion decisions necessarily involve case-specific considerations, which should not be confined to the specific conditions contained in the title V emergency affirmative defense provisions.[51] Thus, the EPA will not, in the course of this rulemaking, provide explicit criteria that the EPA, states, or other entities should apply in determining whether to commence an enforcement action. Nothing in this action precludes the EPA from issuing such guidance in other appropriate proceedings or formats if the agency should subsequently determine that to be appropriate.

Second, even if an enforcement action is commenced for exceedances caused by an emergency, the absence of an explicitly defined affirmative defense provision does not affect a source's ability to demonstrate to the court (or to the EPA in an administrative enforcement action) that penalties or other kinds of relief are not warranted. Under section 113(e), courts (and the EPA in an administrative enforcement action) must consider various factors when assessing monetary penalties, including the source's compliance history, good faith efforts to comply for the duration of the violation, and "such other factors as justice may require." Thus, with or without an explicit affirmative defense, a source retains the ability to defend itself in an enforcement action and to oppose the imposition of particular remedies or to seek the reduction or elimination of monetary penalties, based on the specific facts and circumstances of the emergency event. The D.C. Circuit has noted that such justifications would be a "good argument . . . to make to the courts."[52] Thus, overall, elimination of the title V emergency affirmative defense provisions will not deprive sources of these defenses in potential enforcement actions. Sources retain all of the arguments they previously could have made. Congress vested the courts with the authority to judge how best to weigh the evidence in an enforcement action and to determine appropriate remedies. The EPA may not, through the title V affirmative defenses, restrict a court's ability to do so, and the EPA does not believe that it would be appropriate, in this action, to provide guidance to the courts with respect to what factors a court should or must consider.

For similar reasons, the EPA does not believe it would be appropriate or necessary to retain the definition of "emergency" or any of the other provisions formerly contained in 40 CFR 70.6(g) and 71.6(g) that were associated with the title V affirmative defense. These additional provisions, which were created solely for the purpose of supporting the title V affirmative defense and ensuring that it was narrowly tailored, no longer serve

[49] *See* 81 FR 38653.

[50] In its *U.S. Sugar* decision, the D.C. Circuit upheld the EPA's reliance on case-by-case enforcement discretion as a permissible and reasonable substitute for affirmative defense provisions in accounting for malfunctions within section 112 standards. *U.S. Sugar*, 830 F.3d at 607–09. The EPA believes that the D.C. Circuit's statements in *NRDC* and *U.S. Sugar* are more reflective of the court's current views concerning affirmative defenses and enforcement discretion than the much earlier decisions cited by commenters, including *Portland Cement Assn.* v. *Ruckelshaus*. Arguments suggesting that prior cases, including *Marathon Oil* and *Essex Chemical*, require the EPA to provide affirmative defenses in such situations are contrary to the D.C. Circuit's holdings.

[51] These considerations could potentially be much broader than the title V emergency affirmative defense provisions, and encompass situations where a source would never have been eligible for the emergency affirmative defense.

[52] *NRDC*, 749 F.3d at 1064.

a purpose in the EPA's part 70 and part 71 regulations. For example, the EPA does not believe that retaining a standalone definition of "emergency" without any context or application would be helpful to relevant entities determining whether to initiate enforcement or to the courts or an agency determining the appropriate remedies.

As explained in section III.A., affirmative defense provisions by their nature limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from the explicit grants of authority in section 113(b) and section 113(e). Therefore, these provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. Thus, it would not be appropriate to amend the title V affirmative defense provisions to provide that the affirmative defense may be allowed if specified conditions are met, at the discretion of the enforcement entity.

3. Impacts on the Decision Making and Planning of Sources Confronted With Emergency Situations

Comment: Industry commenters raised concerns involving how the removal of the title V affirmative defense provisions will affect how sources plan for and react to emergency situations. Many of these comments asserted that without an affirmative defense provision in their title V permits, sources confronted with an emergency situation would be forced to decide whether to (1) comply with operating permit requirements or (2) deal with the emergency situation in a manner protective of human safety or other public interests, at the risk of being held liable for violating permit terms. Specifically, some commenters asserted that facilities faced with the threat of liability may be less willing to shut down systems in an emergency, creating the risk of more catastrophic accidents. Other commenters suggested that sources might shut down earlier than would normally be the case, which could result in resource shortages that could impede emergency response efforts or area recovery. Commenters asserted that the affirmative defense provisions serve the important purpose of allowing sources the flexibility to continue or resume operations to provide vital services in times of emergency.

One industry commenter, citing discussion in the EPA's 2014 SSM SIP Action Supplemental Proposal, asserted that removing the affirmative defense provisions could result in an additional resource burden for sources, who could be forced to invest in facility improvements in order to protect the source from emergency situations.

Other commenters asserted similar arguments specifically concerning electric grid reliability, asserting that sources would have to weigh compliance obligations against the need to continue generating electricity to avert grid reliability problems. Some commenters generally claimed, without describing specific instances, that the title V emergency affirmative defense provisions, in addition to other available mechanisms for relief from penalties, have helped ensure reliable electric grid operation in emergency situations. Several commenters provided specific examples of these situations.

Commenters presented differing views of whether the definition of "emergency" in the title V affirmative defense provisions would encompass reliability or electric system emergencies. One commenter asserted that the definition of "emergency" should cover an extreme situation involving critical reliability concerns because the EPA has recognized that CAA rules need to account for the unique interconnected and interdependent operations of power plants. However, another commenter acknowledged that the definition may not be broad enough to cover this situation, but suggested that the EPA recognize that enforcement may be unwarranted not only for unit-specific emergencies, but also for situations where facilities are called upon to support reliability in the context of a larger electric system emergency.

Some commenters claimed that certain electric system operators cannot force a source to continue generating electricity in order to ensure system reliability if doing so would cause the source to violate an environmental requirement, such as a permit condition. Thus, these commenters expressed concern that without the title V affirmative defense—characterized by the commenters as an "exemption"—electric system operators would not be able to force a source to generate electricity in order to ensure system reliability. Other commenters discussed emergency generation orders issued by the Department of Energy (DOE) under section 202(c) of the Federal Power Act (FPA), 16 U.S.C. 824a(c), by which the DOE may require power plant owners to operate and generate electricity in certain emergency situations. While some commenters expressed concern that a source could face the risk of significant penalties for emissions exceedances resulting from complying with such an order, other commenters discussed an amendment to the FPA that excuses sources from compliance with environmental regulations when necessary to comply with DOE emergency orders. One commenter concluded that this FPA provision should be viewed as complementary to, rather than a substitute for, the title V emergency defense, and another asserted that this legislation indicates congressional support for an emergency defense when electric system reliability is at issue.

Commenters urged the EPA to consult with other agencies with expertise in reliability. Commenters also suggested that the EPA direct federal and state enforcement offices to engage in close consultation with relevant grid operators or reliability authorities prior to initiating enforcement actions where exceedances were caused by a demonstrated reliability need. Commenters also proposed that system operators should be able to submit a reliability analysis in the record of any enforcement proceeding and suggested that courts should not independently assess previously established reliability-related determinations.

Response: The EPA does not believe that the removal of the title V emergency affirmative defense provisions will significantly affect the decision making of sources confronted with emergency situations. Sources confronted with an emergency situation will always have to assess the risk of liability involved with courses of action that would result in exceedances of emission limits contained in title V permits as well as the underlying standards. The EPA does not believe that removing the title V affirmative defense provisions will affect this risk assessment. First, the title V emergency provisions did not provide guaranteed protection from liability. They simply created an affirmative defense that a source, having allegedly violated a technology-based emissions limit, could assert in narrowly defined circumstances after an enforcement action was initiated. Moreover, permittees seeking to assert the defense bore the burden of establishing that a number of required conditions were met.

Second, the incentives that exist for sources to behave in a prudent manner during emergencies remain largely unchanged, even without an explicit affirmative defense. As discussed in section III.D.2. of this document, sources can still argue all available

defenses to an alleged violation and/or assert that penalties should not be imposed, based on the particular circumstances. The ability to assert relevant considerations in this manner is not limited to the particular conditions associated with the title V emergency affirmative defense provisions. The EPA agrees that the need to avert catastrophic accidents, or to avert an electric reliability crisis, or any number of other public interest-related considerations, could be especially relevant to the decision whether to pursue enforcement or impose penalties. The EPA cannot, however, restrict or define—through the operation of an affirmative defense or otherwise—the evidence or considerations that a court may take into account when determining whether penalties should be assessed in a given situation.

Additionally, the EPA does not believe that removing the title V emergency affirmative defense provisions will have a significant effect on how sources plan for emergencies or invest in facility improvements in order to prepare for emergencies. The EPA notes that the comments received on this point, and the EPA's statements in the 2014 SSM Supplemental Proposal cited by commenters, are more relevant to preparing for excess emissions from equipment malfunctions than to preparing for emergencies. Moreover, as discussed previously, removing the affirmative defense provisions should not change the incentives that sources have to prepare for emergencies. Prudent behavior with respect to planning for emergency situations and minimizing emissions during an emergency to the maximum extent possible would be just as advantageous to a source seeking to reduce the possibility that enforcement will be initiated (or seeking to establish that penalties are not appropriate) as it would be to a source attempting to meet the criteria of a codified affirmative defense provision. The EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.[53]

Regarding specific comments concerning electric grid reliability, the EPA does not believe that the current action will have a measurable impact on electric grid reliability, and the EPA does not believe that it is necessary to consult with other agencies with expertise in reliability with respect to the limited actions being taken in this rule. As an initial matter, even if the EPA were to retain the existing title V emergency affirmative defense, the availability of that defense in different types of situations involving issues of grid reliability is uncertain. The EPA generally agrees with the commenters suggesting that most electric grid reliability situations would not have qualified as emergencies eligible for the title V affirmative defense, based on the narrow definition of "emergency" in the title V regulations being removed through this action.[54] However, again, nothing would prevent the consideration of reliability-related circumstances in determining whether to initiate enforcement or in deciding whether penalties are appropriate.

Additionally, contrary to the assertion of commenters, the removal of the affirmative defense provisions should not affect the ability of electric grid operators to request that sources generate electricity in order to avert grid reliability problems. Some of these comments were based on the mistaken premise that the title V affirmative defense provisions functioned as an exemption to emission limits.[55] Moreover, as other commenters note, Congress has provided various forms of relief in these situations, including the amendment to FPA section 202(c) (exempting sources from compliance with environmental regulations when necessary to comply with a DOE emergency order), as well as provisions such as CAA section 110(f) (authorizing state governors to temporarily suspend certain requirements where the President determines a national or regional energy emergency exists). The EPA cannot here provide any further guarantees in this regard in the form of an affirmative defense, exemption, or other mechanism that would run contrary to the CAA.

4. Perceived Benefits of the Requirements Associated With the Title V Affirmative Defense Provisions

Comment: Some commenters discussed perceived benefits of retaining affirmative defense provisions as written, in addition to the increased certainty and consistency that commenters believe the provisions provided. One commenter claimed that the various demonstration and reporting requirements in the title V emergency affirmative defense provisions serve as incentives for sources to prevent and minimize excess emissions during emergencies, an incentive that the commenter claimed would be lost if the affirmative defense was removed.

Response: The components of the title V emergency affirmative defense involving recordkeeping and reporting requirements and the obligation for a source to properly operate its facility and take all reasonable steps to minimize excess emissions (40 CFR 70.6(g)(3) and 71.6(g)(3)) were important to limit the scope of the defense and any potential for abuse. However, the EPA does not agree that removing the affirmative defense will eliminate the incentives for sources to appropriately prepare for and respond to emergency situations, to minimize excess emissions, to maintain proper records of such events, or to notify relevant authorities in a timely manner. Because the CAA requires continuous compliance with applicable emission limitations and emission standards, sources should properly operate and take steps to minimize excess emissions at all times. Sources still have an incentive to do all of these things in the event of an emergency, because doing so would continue to be in their best interests both for compliance purposes and for purposes of defending against an enforcement action. Again, the EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.

5. Environmental and Public Health Impacts

Comment: A number of commenters discussed the potential air quality and public health impacts of removing the title V affirmative defense provision. Industry commenters asserted that

[53] Additionally, as discussed in section III.D.3., the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Thus, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources.

[54] Again, the title V emergency provisions were only available for "sudden and reasonably unforeseeable events beyond the control of the source" requiring "immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency." 40 CFR 70.6(g)(1). This definition of "emergency" generally contemplated emergencies directly affecting the operations of a single source. In contrast, the need for one source to continue operating in response to reliability concerns would generally not involve any sort of emergency at that particular source, but rather would likely be motivated by circumstances occurring at a *different* source. For example, one source might be required to generate electricity to make up for power that another source was unable to generate due to an emergency at the other source.

[55] A source faced with demands to continue generating electricity would always have to decide whether doing so could cause it to exceed emission limits in its title V operating permit; the presence or absence of an affirmative defense that could later be asserted in an enforcement proceeding does not change this fact. For further discussion, *see* section III.B.1. of this document.

removing the affirmative defense provisions would not reduce emissions or provide any air quality benefits. Moreover, industry and state commenters claimed that the EPA has not made any demonstration that emissions during emergencies endanger public health or safety or have resulted in problems with attainment of the NAAQS. One commenter claimed that EPA action to remove the title V affirmative defense provisions would be arbitrary and capricious because the action would impose regulatory burdens without any significant benefit, and because the EPA failed to consider the costs and benefits of its proposed action.

On the other hand, environmental commenters claimed that affirmative defense provisions impermissibly allow large facilities to emit massive amounts of pollution in violation of applicable emission limits without consequence. These commenters provided extensive discussion of the health impacts of different pollutants and cited to numerical data and case studies involving the emissions of a number of large industrial facilities. The commenters asserted that this is an environmental justice issue, as these emissions impact surrounding communities, which the commenters claimed are often low-income communities or communities of color. Environmental commenters asserted that the impacts of climate change may increase the incidence of malfunctions due to extreme weather events.

Response: As previously explained, the EPA is removing the affirmative defense provisions from the title V program regulations because these provisions are inconsistent with the EPA's interpretation of the enforcement structure of the CAA. The EPA is not basing this current action on potential air quality benefits, or a weighing of costs and benefits, associated with the removal of these provisions. While the EPA acknowledges that there are benefits to reducing emissions, including reducing impacts to communities with environmental justice concerns, as previously explained, the purpose of this rulemaking is to eliminate the affirmative defense provisions that EPA finds to be inconsistent with the enforcement structure of the Clean Air Act. This action also does not take into account the impact of climate change on the incidence of malfunctions and, as previously explained, emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events.

E. Response to Comments Outside the Scope of This Action

Comment: Several industry commenters requested that EPA should consider removing hospital, medical, and infectious waste incinerators (HMIWI) as a title V source category or consider reducing program requirements applicable to HMIWIs. Separately, one commenter expressed disagreement with the EPA's return to its 2015 SSM SIP Policy.

Response: These comments are not relevant to the current rulemaking action and are outside the scope of this final rule.

IV. Implementation Considerations

This section provides guidance and addresses comments on various aspects related to implementing this final rule. First, as indicated in the 2016 and 2022 proposed rules, as a result of the EPA's removal of 40 CFR 70.6(g), state, local and tribal permitting authorities[56] whose part 70 programs contain impermissible affirmative defense provisions[57] must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved part 70 programs. The part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i), as specified in the guidance provided in the following subsections. In summary, the EPA expects that states with part 70 programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of this final rule—*i.e.*, by August 21, 2024. Other considerations associated with program revisions are discussed further in section IV.A. of this document.

States must also remove title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. The EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on an affirmative defense provision in an EPA-approved title V program). Additional considerations associated with permit revisions are discussed further in section IV.B. of this document.

A. Program Revisions

This section clarifies the EPA's expectations for how the final action to remove 40 CFR 70.6(g) will affect state programs and responds to comments involving these considerations. Specifically, this section describes the actions that some states will need to take in order to submit program revisions to remove impermissible affirmative defense provisions.

1. Necessity for State Program Revisions

As indicated in the 2016 and 2022 proposed rules, as a result of the removal of 40 CFR 70.6(g), the EPA has determined that it is necessary for states whose part 70 programs contain impermissible affirmative defense provisions to submit program revisions to the EPA to remove such provisions from their EPA-approved part 70 programs.[58] This determination is based on the EPA's interpretation of the enforcement structure of the CAA, as informed by the *NRDC* decision. The EPA's rationale concerning affirmative defenses, presented in section III.A. of this document, applies equally to affirmative defense provisions within state part 70 operating permit programs, which the EPA now considers to be impermissible. The term "impermissible affirmative defense provisions" as used throughout this section is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the CAA. This includes, but is not limited to, any provisions within EPA-approved part 70 programs that are similar to, based on, or function in similar ways to the provisions being removed from 40 CFR 70.6(g). For example, any title V provisions that establish an affirmative defense that could be asserted in a civil enforcement

[56] As noted previously, the term "state" is used generically throughout this section to refer to all state, local, U.S. territorial, and tribal permitting authorities that administer EPA-approved part 70 (title V) programs. *See* 40 CFR 70.2 and 71.2.

[57] As specified further in section IV.A.1. of this document, the term "impermissible affirmative defense provisions" is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the enforcement structure of the CAA.

[58] To the extent that this document refers to the need to remove affirmative defense provisions from part 70 programs, the EPA is referring to the need for states to submit program revisions to the EPA to remove such provisions from states' EPA-approved part 70 (title V) operating permit programs.

action involving alleged noncompliance with any federally-enforceable standards would be inconsistent with the enforcement structure of the CAA. Such provisions are impermissible regardless of whether the affirmative defense provisions are specific to emergency situations, and regardless of other criteria contained within such provisions. Any provisions in an EPA-approved part 70 program that establish an exemption to emission limitations as described in this document will similarly need to be removed. This action will not have any direct effect on affirmative defense provisions established under other CAA programs, such as the SIP or section 111, 112, or 129 programs.

2. EPA's Authority To Require State Program Revisions

Comment: Multiple commenters objected to the EPA's indication that, if the EPA finalized the removal of 70.6(g), it may be necessary for states with similar affirmative defense provisions to remove those provisions and submit program revisions.

A number of commenters discussed the legal authority by which the EPA could require state program revisions. Environmental commenters suggested that CAA section 502(b), read together with sections 502(d) and (i) and with 40 CFR 70.4, plainly authorizes the EPA to revise the minimum elements of operating permit program regulations when the Administrator determines that revisions are necessary to meet the requirements of the CAA. Other commenters argued that the EPA has no legal basis for imposing its policy preference on states, and some industry commenters claimed that nothing in the CAA authorizes the EPA to withdraw its final approval of a state title V permit program because the EPA prefers a particular improvement to what was already approved, claiming that this would be contrary to Congressional intent and the purpose of title V. One state commenter similarly claimed that requiring program revisions would fundamentally shift the careful balance between the state and the federal governments' regulatory partnership. Some commenters also claimed that requiring states to make title V program changes would constitute a challenge to the legality of state programs and would require a finding that there is no situation where the state program provisions can be applied in a way that is consistent with the Act. One commenter characterized state program revisions as an unfunded mandate, which the commenter asserted should not be imposed on states without a clear and compelling need. One commenter claimed that the EPA has impermissibly extended its interpretation of the *NRDC* case to state operating permit programs.

State commenters discussed the authority of states to tailor the details of their own title V program regulations and potential limits on the EPA's authority to dictate the fine particulars of state programs. One state commenter claimed that by removing the title V emergency affirmative defense provisions, the EPA would substantially raise the minimum elements required by the Act for state operating permit programs, citing 40 CFR 70.1(a). Other state commenters claimed that under title V, similar to CAA section 110 for SIPs, after the EPA sets minimum program requirements, states must meet these minimum requirements but have the authority and discretion to otherwise tailor their program to their specific state requirements, such as by providing for affirmative defenses. State commenters further asserted that the EPA's implementing regulations do not require a state's enforcement program to be set out in any particular manner, while acknowledging that states must have adequate authority to carry out all aspects of the program and submit a description of their enforcement program to the EPA, citing 40 CFR 70.4(b)(3) and (5). One state commenter noted that an acceptable enforcement program should include the ability to account for emissions during distinct periods of operation, including SSM.

Both state and industry commenters also highlighted the fact that the title V emergency provisions have always been discretionary, not required, elements of state programs. One commenter argued that because the affirmative defense provisions were initially discretionary, it should now be up to states to decide whether to retain them. The commenter claimed that this is a logical extension of a state's constitutional authority and that the EPA should not disturb state authorities by disapproving existing state permit programs that contain these provisions.

Response: The EPA agrees with those commenters who asserted that the CAA authorizes the EPA to revise its part 70 implementing regulations when necessary to conform to the CAA, including provisions of the CAA that apply to the enforcement of title V permit requirements. As the CAA and the EPA's implementing regulations are periodically updated to address evolving legal, policy, technical, and scientific information, so must state operating programs be updated. State part 70 program revisions, while infrequent, are a natural and necessary part of a complex regulatory program, and this process is entirely consistent with the principles of cooperative federalism established in title V of the CAA. As various commenters acknowledged, the EPA has the authority to establish the minimum elements for state title V programs. *See* CAA section 502. The EPA's part 70 regulations implement this authority. When the EPA must remove an element from its implementing regulations in order to maintain consistency with CAA requirements, it follows that it would also generally be necessary to revise EPA-approved state part 70 programs to meet the same minimum legal requirements required by the CAA. The EPA acknowledges that states may establish additional permitting requirements, but only to the extent they are not inconsistent with the CAA. *See* CAA section 506(a). States do not have discretion to implement provisions that are inconsistent with the enforcement structure of the CAA or the EPA's part 70 regulations.

As some commenters acknowledged, the EPA's existing part 70 implementing regulations clearly establish a framework by which state part 70 programs may need to occasionally be revised, including when the part 70 regulations are revised or modified. *See, e.g.,* 40 CFR 70.4(a) (if part 70 is revised and the Administrator determines that changes to approved state programs are necessary, states must submit program revisions); 70.4(i) (program revisions may be necessary when relevant federal or state statutes or regulations are modified). The EPA has the authority to approve or disapprove program revisions based on the requirements of the part 70 regulations and the CAA. *See* 40 CFR 70.4(i)(1), (2). Thus, the EPA has authority to require state title V program revisions.

To be clear, the final action being taken in this rule is the removal of the affirmative defense provisions from the EPA's regulations at 40 CFR 70.6(g) and 71.6(g). As a consequence of this regulatory action, it will be necessary for states with part 70 programs containing impermissible affirmative defense provisions to make conforming revisions to their part 70 programs. However, contrary to the assertions of some commenters, the EPA is not, at this time, disapproving or making any finding of deficiency or inadequacy with respect to any particular state program (such as a finding under 40 CFR 70.10), although this type of determination may be appropriate at a later time. This document clarifies the EPA's expectations for how the program revision process will unfold, based on

the EPA's existing implementing regulations and the EPA's longstanding experience in overseeing title V operating permit programs. The EPA intends that this guidance will be useful to permitting authorities and permit holders interested in understanding how removal of the affirmative defense provisions from the EPA's regulations will affect their programs and individual permits, respectively.

The EPA also reiterates, as multiple commenters acknowledged, that the title V affirmative defense provisions have always been discretionary elements of state permitting programs, and the EPA has never required states to adopt these provisions. In fact, a number of state part 70 programs do not appear to contain any such title V affirmative defense provisions. However, contrary to one commenter's assertion, the fact that these provisions were never required elements of state programs does not mean that they now must be deemed appropriate program elements or that states must be allowed to continue implementing them.

Finally, as explained in section V.D. below, this action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

3. Scope of Necessary Program Revisions

Comment: Commenters addressed various aspects of the scope of state program revisions that would be necessary following the removal of 40 CFR 70.6(g). First, some commenters claimed that part 70 program regulations that incorporate by reference 40 CFR 70.6(g) or any state affirmative defense provisions effectively function the same as regulations that expressly include an affirmative defense. Commenters claimed that if these provisions were not removed from state programs, they would create ambiguity and would undermine CAA enforcement. Therefore, these commenters asserted that part 70 program regulations that incorporate by reference any other affirmative defense provisions must also be removed from state programs.

Next, multiple commenters expressed support for the view that states may retain affirmative defense provisions that could be used for alleged noncompliance with permit requirements arising solely from state law. Some commenters asserted that the EPA has no authority to limit the ability of states to provide this type of state-only affirmative defense provision. Another commenter suggested that state-only affirmative defense provisions should be available not only for enforcement actions brought by state agencies, but also for enforcement actions brought by citizens or the EPA. However, other commenters indicated concern that sources could attempt to invoke state-only affirmative defense provisions in enforcement proceedings involving noncompliance with federal requirements, thereby undermining the enforcement of the CAA. These commenters suggested that the EPA provide guidance to clarify that if a state wishes to retain an affirmative defense for noncompliance with state-only requirements, the state must also include clarifying language in their regulations expressly limiting the applicability of such remaining affirmative defense provisions. Commenters also suggested that states identify these state-only program provisions in their title V program revisions.

Additionally, some commenters asserted that states should be able to circumscribe their own authority to enforce even federally enforceable requirements. Commenters suggested that states should be able to provide an affirmative defense to state-initiated enforcement (such as for administrative penalty proceedings) or otherwise restrict their ability to enforce alleged violations of federally-enforceable applicable requirements.

Finally, some commenters disagreed with the EPA's suggestion that states may retain portions of the emergency provisions, such as the definition of "emergency" or certain reporting requirements, for purposes of supporting other regulations that do not involve an affirmative defense. The commenters expressed concern that the presence of a definition of "emergency" or other recordkeeping, reporting, or work practice requirements could be interpreted as providing for an affirmative defense or otherwise excusing a source from compliance during these periods. However, these commenters also asserted that the EPA should encourage more readily accessible information about excess emission events, in order to better inform surrounding communities of air quality issues.

Response: As previously noted, all impermissible affirmative defense provisions, as specified in section IV.A.1. of this document, will need to be removed from EPA-approved part 70 programs. To reiterate, this encompasses provisions that are similar to, based on, or function in similar ways to the provisions in 40 CFR 70.6(g) that the EPA is removing in this action, including all provisions that effectively establish an affirmative defense that could be asserted in an enforcement action involving alleged noncompliance with any federally-enforceable standards. In light of comments received, the EPA is also providing clarification on various other topics related to the scope of necessary program revisions.

Regarding state part 70 provisions that incorporate other affirmative defense provisions by reference, as a general matter, the EPA agrees with commenters' assertions that incorporating a provision by reference may have the same legal effect as explicitly including the provision within a regulation. Thus, where a state part 70 program incorporates by reference another independently applicable affirmative defense that suffers the same infirmities as those provisions being removed from 40 CFR 70.6(g) and 71.6(g), the state provision incorporating the affirmative defense provision would generally need to be removed.[59]

Concerning the comments supporting the option for states to retain an affirmative defense as a "state-only" provision—which would apply solely to rights and responsibilities created by state law and would not apply to, interfere with, or otherwise affect any requirements or remedies under the CAA or federally-enforceable regulations—the EPA agrees that states have the discretion to develop such state-only provisions, as allowed under

[59] It may be possible that some state programs could incorporate 40 CFR 70.6(g) (or a similar state provision) by reference in such a manner as to leave it free from doubt that the incorporating provision would have no legal effect following the removal of 40 CFR 70.6(g) from the EPA's regulations (or following the removal of the state affirmative defense). However, the EPA believes that removal of the incorporating provision would nonetheless be the best practice to avoid the potential for confusion.

state law. However, any such provisions would only be available in enforcement actions brought solely under state law, and they would not be available in enforcement actions brought for alleged violations of any federally-enforceable requirements in a source's title V permit. This rulemaking would have no effect on, and does not preclude states from retaining or creating, such regulations unrelated to the state's EPA-approved part 70 program. State-only affirmative defense provisions that are included within individual operating permits would need to be clearly labeled to indicate their limited applicability. 40 CFR 70.6(b)(2).

However, notwithstanding the ability of states to create state-only affirmative defense provisions within their state regulations, any impermissible affirmative defense provisions contained *within* any EPA-approved part 70 programs will nonetheless need to be removed from the state's EPA-approved part 70 program. In such instances, the state would need to transmit to the EPA a program revision submittal to remove the affirmative defense provision from the body of regulations that comprise the state's official EPA-approved part 70 program. The EPA believes that the best practice for states would be to conduct a rulemaking to remove the affirmative defense provision from the state's current regulations (or to revise the state regulations to clarify the limited applicability of a state-only affirmative defense) and/or a legislative process to remove such provisions from a state statute, in addition to submitting the part 70 program revision to the EPA to formally remove the provision from the state's EPA-approved part 70 program. This would provide clarity for sources and the public and avoid any inconsistency between the state's EPA-approved part 70 program and the state's current regulations and/or statutes.

Regarding comments suggesting that states should be able to limit their own authority to enforce even federally enforceable requirements, as noted in section III.D.2. of this document, permitting authorities always retain the discretion to determine whether to initiate an enforcement action based on the circumstances of a given case. To the extent that a state develops an "enforcement discretion"-type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be appropriate under state rules.[60] However, among the minimum required elements of a title V permit program is the requirement that, consistent with EPA regulations, the permitting authority have adequate authority to assure compliance with applicable standards, requirements, and regulations, and to enforce permits, including the ability to recover civil penalties for each violation. *See* CAA section 502(b)(5), 42 U.S.C. 7661a(b)(5). EPA regulations further provide that approved title V programs must have appropriate enforcement authority, including the authority to seek injunctive relief and to assess or recover civil penalties for violations of any applicable requirement or permit condition. *See* 40 CFR 70.11. Thus, to the extent that states wish to describe certain aspects of their enforcement discretion policy within their part 70 program regulations, this could only be permissible provided that the provision does not effectively undermine or eliminate the state's ability to enforce its title V program, even under the circumstances previously covered by the affirmative defense. For example, it would likely not be permissible for a state to establish criteria that, when met, would effectively preclude the state from enforcing, even in part, a federally-enforceable standard. Nor would it be permissible for any such provision to limit the ability of the EPA or citizens to enforce any federally-enforceable permit terms or to interfere with the authority of the federal courts to determine whether and to what extent certain remedies are appropriate in a given case.

Finally, although states may not retain title V provisions establishing an affirmative defense to noncompliance with federal requirements, the EPA reiterates its position that states may choose to retain certain aspects of their existing program regulations—such as the definition of "emergency" and associated reporting and recordkeeping requirements—to support functions unrelated to an affirmative defense, such as prompt reporting requirements. The EPA disagrees with commenters' assertions that the presence of definitions or reporting and recordkeeping requirements associated with emergencies would necessarily imply that an affirmative defense exists or that exceedances of emission limits during emergencies are excused. To the contrary, and although the EPA is not retaining such provisions within its own regulations, states may decide that some of these provisions could potentially serve a useful function for state permitting authorities considering whether to pursue enforcement, for sources faced with the possibility of a state enforcement action, and for the public.

[60] The EPA has previously discussed an analogous issue in the context of SIPs. *See* SSM SIP Action, 80 FR 33855.

4. Timing Associated With Program Revisions

Comment: Multiple state and industry commenters requested that the EPA allow states additional time to submit any required part 70 program revisions. These commenters all asserted that 12 months is not sufficient time to conduct the administrative processes required to change part 70 program regulations, and suggested that anywhere between 18 and 36 months should be allowed, for various reasons. Some state commenters provided specific examples of the administrative actions associated with rulemakings that would necessitate additional time, including outreach, public hearings and comment periods, rule development, gubernatorial approval, legislative committee review, and legislative approval. One state commenter noted that many states face program and staff resource constraints based on other rulemaking obligations. Another state commenter predicted that necessary rule changes may take longer to promulgate because they will be controversial. Some commenters recommended providing additional time for state program revisions because these affirmative defense provisions are not currently causing any pressing problems with enforcement and there is no urgent need to change the provisions. Finally, one commenter suggested that additional time for state program revisions would be necessary to allow time for sources to implement measures to address the loss of the affirmative defense.

Other commenters, on the other hand, recommended a more limited time frame, while acknowledging the discretion that the EPA has under 40 CFR 70.4(a) to extend program revision deadlines. These commenters supported the EPA's default 12-month submission deadline with the possibility of an extended deadline of up to 24 months, on the grounds that states should be able to easily amend their operating permit rules within months, and that prompt action would facilitate the coordination of SIP revisions and title V revisions (and associated permit revisions). Environmental commenters urged the EPA to require states seeking an extension to specifically request additional time and to demonstrate good cause for the extension, and urged that

such requests be granted only under compelling circumstances. These commenters also suggested additional details concerning the required form, content, and timing of such an extension request.

Response: As discussed in the proposal, the necessary changes to part 70 programs arising from this rule should generally be relatively minor and straightforward, involving the removal of affirmative defense provisions from the state's part 70 program.[61] Because of the nature of the required revisions, the EPA continues to believe that most or many states should be able to complete the necessary program revisions within 12 months. However, the EPA again appreciates that some states may require more time to complete program revisions, based on a number of different factors associated with their administrative process, including the potential need for legislative approval. Therefore, the EPA is allowing states to submit a request to the appropriate EPA Regional office requesting an extension to this 12-month deadline and demonstrating why such an extension is necessary. Such extension requests should include detailed information concerning the steps that the state will take to revise its part 70 program, as well as the specific timing associated with each of these steps. The EPA understands that many states have lengthy rulemaking processes and expects that requests for extension that include the information identified here in sufficient detail would generally be approved. Nonetheless, the EPA will consider each program revision submission and extension request on a case-by-case basis. The EPA expects that each state with a part 70 program containing impermissible affirmative defense provisions will submit a program revision or request for an extension of time to the EPA by August 21, 2024.

5. Program Revision Submittal Details

Comment: Two state commenters discussed the details of any required program revision submittals. One state suggested requiring the following four components: (1) legal authorization to revise the state rules and part 70 program; (2) redlined changes to state rules; (3) timeline for planned removal of affirmative defense from each permit; and (4) a plan to make these changes to individual permits. Another state commenter requested additional clarity on what form of legal authority demonstration would be required for program revision submittals, and suggested that a rulemaking certification (certifying that the rules have been reviewed by legal counsel and have been found to be within the legal authority of the agency) would be sufficient and less burdensome than a formal opinion by the state Attorney General. One state commenter further expressed concern with the additional burden that would be associated with preparing and submitting a revised program plan. Finally, one commenter requested clarification of the EPA's intention to publish proposed program revisions in the **Federal Register** and provide a 30-day public comment period. They requested further clarification on whether the EPA intended to publish notice of approval in the **Federal Register** or issue a letter to state governors or their designees.

Response: As stated in the introduction to this section regarding program revisions, the part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i). The EPA's part 70 regulations provide that for state program revisions, the state should submit such documents as the EPA determines to be necessary. *See* 40 CFR 70.4(i)(2)(i). As noted in the 2016 proposal, the EPA expects that program revisions to remove the title V emergency defense provisions will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

Regarding one commenter's statements concerning the legal authority demonstration component, the EPA reiterates that this component could take various forms depending on the specific circumstances of each state, and a formal opinion by an Attorney General should not be required for the narrow program revisions implicated by this particular rule. For a revision involving only the removal of affirmative defense provisions, a certification indicating that the revisions are within the legal authority of the agency and followed all required administrative (including public participation) requirements should be sufficient. For other program revisions related to the removal of affirmative defense provisions, such as the inclusion of a narrowly tailored enforcement discretion provision, as discussed in section IV.A.3. of this document, the legal authority demonstration should also contain assurances that the state has adequate authority to enforce its part 70 program.[62]

It is unclear what the comments discussing a "revised program plan" refer to. The EPA believes that the plan described in this document, involving narrow program revision submittals to remove affirmative defense provisions, is appropriate. As noted in the 2016 proposal, states may, but need not, also include as part of their program revision submittals any other unrelated revisions to state program regulations.

6. Consequences of Failure To Submit Program Revisions

Comment: Some commenters requested that the EPA clarify the consequences for states that refuse to revise their operating permit regulations. Specifically, commenters cited to CAA sections 502(d) and (i) and discussed the possibility of notices of deficiency (NOD), sanctions, and the eventual withdrawal of permitting authority.

Response: Commenters are correct that the EPA has the authority under CAA sections 502(d) and (i), and as specified in the EPA's implementing regulations at 40 CFR 70.10, to issue NODs, issue sanctions, and potentially withdraw approval of part 70 programs under appropriate circumstances, potentially including the failure of a permitting authority to submit required program revisions to the EPA. The EPA would exercise this authority on a case-by-case basis for this element of the program, as it would with any other.

7. Discussion of State-Specific Program Provisions

Comment: In response to requests from the EPA for information about part 70 programs that contain affirmative defense provisions, various commenters discussed certain provisions in specifically identified state part 70

[61] As discussed in section IV.A.3. of this document, this particular revision to remove affirmative defense provisions from a state's EPA-approved part 70 program might not necessarily also involve a notice-and-comment rulemaking to revise the state's current administrative code, although the EPA believes this would be a best practice to ensure clarity.

[62] For example, the state should demonstrate that any such alternative provisions: do not interfere with the authority of courts to determine whether and to what extent certain remedies are appropriate in a given case; do not limit the ability of citizens or the EPA to pursue enforcement; and do not limit the state's ability to enforce its part 70 program, for example by establishing criteria that, when met, would effectively preclude the state from assessing or recovering penalties consistent with 40 CFR 70.11(a)(3).

programs that could be impacted by the final rule.[63] Several commenters also requested an update to the document titled "Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs" that was included in the docket during the 2016 rulemaking process.

Response: The EPA appreciates this additional information. As noted previously, the EPA is not taking any action in this final rule with respect to the adequacy or inadequacy of individual state programs, including specific programs identified in the 2016 document referenced by commenters. The EPA expects that permitting authorities with part 70 programs that have impermissible affirmative defense provisions will follow the process provided in section IV. of this document. EPA Regional offices will work closely with permitting authorities to provide support during this process. States with additional questions about the impact of this rule on their operating permit programs should contact the appropriate EPA Regional office for further assistance.

B. Permit Revisions

This section clarifies the EPA's expectations for the eventual removal of impermissible affirmative defense provisions from individual title V operating permits.

1. Scope of Permit Revisions

Comment: One commenter claimed that title V permits containing affirmative defenses derived from sources of authority other than 40 CFR 70.6(g) would not need to be revised.

Response: In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. For example, permit conditions that directly rely on 40 CFR 70.6(g) or 71.6(g) would need to be removed following the removal of these provisions from the EPA's regulations. Importantly, however, permit revisions would not be limited to permit conditions based on 40 CFR 70.6(g) and 71.6(g); any permit conditions that rely on a similarly impermissible title V affirmative defense provision contained in (or incorporated by reference into) a state's part 70 program would also have to be removed following state program revisions. On the other hand, and as the EPA explained in the 2016 proposal, this rule will not directly affect affirmative defense provisions contained in title V permits that are derived from independent applicable requirements, such as SIP, NSPS or NESHAP provisions. Finally, should a state decide to retain a "state-only" affirmative defense or enforcement discretion-type provision, it may need to eventually amend title V operating permits to explicitly state the limited applicability of the state-only provision. *See* 40 CFR 70.6(b)(2). The discussion provided in the following subsections applies to both the removal of affirmative defense provisions from permits and to the amendment or modification of such permit terms.

2. Burden, Mechanism, and Timing of Permit Revisions

Comment: State commenters and one tribal commenter claimed that the EPA underestimates the burden of removing affirmative defense provisions from individual permits, and challenged the EPA's statement in the proposal that "removal of affirmative defense provisions from permits should generally occur in the ordinary course of business and should require essentially no additional burden on states and sources." State commenters explained that thousands of existing operating permits would require some form of revision action to be processed by the state, and that revising certain general permits that apply to multiple sources would require an administrative process similar to a rulemaking.

Numerous state and industry commenters supported the EPA's suggestion that states may utilize a number of existing permit mechanisms to remove affirmative defense provisions from title V permits in the ordinary course of business, such as when the permitting authority next processes a permit renewal or significant permit modification for a source. One state commenter noted that this would be the most sensible and least disruptive and burdensome mechanism to complete permit revisions.

Commenters agreed with the EPA's initial suggestion that the removal of affirmative defense provisions from operating permits could be accomplished through the minor permit revision process and would not constitute a significant permit modification. Further, one state suggested that the EPA adopt a policy interpretation that removal of affirmative defense provisions could be accomplished through the administrative amendment process.

Some commenters also asserted that permit revisions should not be based on any other independent deadline or timeline, and that there is no urgency to remove the provisions. Other commenters, though, urged the EPA to encourage permitting authorities to exercise their discretion to remove the provisions as expeditiously as possible, on the earliest possible occasion.

Commenters also addressed the sequence of program revisions and permit revisions. One commenter expressed concern that potential ambiguity may arise if a source invokes an affirmative defense provision found in the permit, after the program revisions have been approved but the permit has not been amended. Lastly, one tribal commenter expressed its concern that making conforming revisions to permits before programmatic revisions would create inconsistencies that could undermine enforcement.

Response: The EPA acknowledges commenters' general assertions that a large number of existing title V permits across the nation will eventually need to be revised to remove title V affirmative defense provisions. However, the EPA disagrees that this will involve any extraordinary burden on states or sources. The need to occasionally revise individual title V permits is a natural, common, and required feature of the title V operating permits program. Title V operating permits, by their nature, include a wide variety of requirements applicable to a source, and permit changes are periodically necessary to incorporate new or modified applicable requirements, and to reflect physical or operational changes that occur at a source. The EPA's regulations, and all EPA-approved state part 70 programs, contain well-established mechanisms to account for various types of necessary revisions to title V permits. *See, e.g.,* 40 CFR 70.7(d)–(h). The permit revisions that will need to occur as a result of this rulemaking fit well within this existing regulatory framework for occasional permit revisions.

Moreover, the EPA expects permit changes to remove discretionary title V affirmative defense provisions to be a potentially less burdensome process than, for example, the process required to incorporate new applicable

[63] In the proposed rule, the EPA solicited comment on a document titled, "Title V Affirmative Defense Provisions in State, Local, and tribal Part 70 Programs" that was included in in the docket associated with this rulemaking (Docket ID No. EPA–HQ–OAR–2016–0186). This document contains a tentative list of part 70 programs that appear to contain affirmative defense provisions that could be affected by this action. The document was intended for informational purposes only and does not reflect any type of determination as to the adequacy or inadequacy of any specific program provisions. The EPA received comments involving provisions within the Texas and Georgia part 70 programs that purportedly incorporate by reference affirmative defense provisions.

requirements in a permit via permit reopening. *See, e.g.,* 40 CFR 70.7(f)(1)(i). As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business. For example, these revisions could be made when a state processes periodic permit renewals or other permit revisions. Additionally, states may utilize other existing mechanisms to effectuate these permit changes, consistent with each state's approved part 70 program regulations. For example, the EPA does not believe that a permit revision to simply remove a discretionary affirmative defense provision would require significant modification procedures, and permitting authorities may be able to process these changes as minor modifications. Also, in certain circumstances, it may be possible for some permit changes to be made using administrative permit amendment procedures, provided that the removal of the title V emergency provisions would satisfy one of the specific circumstances contemplated within each state's approved part 70 program regulations governing administrative amendments.[64] States may also be able to utilize other streamlined mechanisms for processing multiple permit revisions at once.

Regarding the timing of such permit changes, for state or tribal permitting agencies implementing the federal title V program or part 70 programs that directly rely on 40 CFR 70.6(g), any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should occur promptly after the effective date of this final rule. For states implementing part 70 programs that contain state affirmative defense provisions, any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should similarly occur promptly after the EPA's approval of the necessary part 70 program revisions.[65] Generally, states would be expected to remove title V affirmative defense provisions from permits (or clearly label remaining provisions as state-only) at the earliest possible occasion when each permit is next reviewed by the permitting authority, such as the next permit renewal or unrelated permit revision. Thus, at the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

It is important to note that while the EPA is not currently establishing any independent timeline for states to remove these provisions from individual permits, the EPA encourages states to begin removing these provisions from permits prior to the completion of any necessary part 70 program revisions. States may also find it convenient to remove these provisions in the course of completing revisions to permits related to the implementation of the 2015 SSM SIP Action.

3. EPA Objections to Permits

Comment: Some commenters urged the EPA to make clear that the agency will object to title V permits issued after the effective date of the final rule that incorporate or refer to title V affirmative defense provisions.

Response: As previously noted, the EPA expects that any necessary permit revisions will generally occur following program revisions to remove the underlying affirmative defense provisions from each permitting authority's part 70 program regulations. Therefore, although the EPA encourages states to remove title V emergency affirmative defense provisions from operating permits at the earliest possible opportunity (including during permit renewals that occur before program revisions take place), the EPA generally does not anticipate objecting to title V permits that contain emergency affirmative defense provisions during the Agency's 45-day review period until after the relevant permitting authority has made necessary corrections to its approved part 70 program. The Administrator will evaluate any petitions to object to proposed title V operating permits on a case-by-case basis. Statements in this document are not intended to prejudge such petition responses.

As noted in section IV.B.2. of this document, in those state or tribal areas that implement the federal title V program (in 40 CFR part 71) or where the operating permit program directly relies on or incorporates by reference 40 CFR 70.6(g), the EPA expects states to begin the process of removing impermissible affirmative defense provisions from operating permits promptly after the effective date of this final rule, as such permit revisions would not need to await state program revisions.

V. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for part 70 state operating permit programs) and 2060–0336 (for part 71 federal operating permit program). In this action, the EPA is removing certain provisions from the EPA's regulations, which should ultimately result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, some states will be required to submit program revisions to the EPA in order to remove affirmative defense provisions from their EPA-approved part 70 programs, and will eventually be required to remove provisions from individual permits. However, this action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, are not directly subject to the requirements of this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or

[64] In addition to specifying various types of permit changes for which the administrative amendment process would be appropriate, the EPA's regulations in 40 CFR 70.7(d) also provide states with the opportunity to specify additional criteria as part of their part 70 programs, if the EPA Administrator determines that those situations are similar to those specified in 40 CFR 70.7(d).

[65] 81 FR 38645, 38653, n. 35 (June 14, 2016) (acknowledging limits on state discretion where currently-approved state program regulations require inclusion of emergency affirmative defense provisions in state-issued title V permits).

uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. One tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. These tribal governments may be required to take certain actions, including a program revision (for the part 70 program) and eventual permit revisions, but these actions will not require substantial compliance costs. The EPA conducted outreach with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that outreach is provided in the rulemaking docket, Docket ID No. EPA–HQ–OAR–2016–0186, available at *http://www.regulations.gov.*

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action simply removes the emergency affirmative defense provisions from the EPA's operating permit program regulations. As a result of this action, it will also be necessary for some state, local, and tribal permitting authorities to remove similar affirmative defense provisions from their EPA-approved part 70 programs and from individual title V operating permits. These title V provisions existed independently from any specific environmental health standards, and their removal should not affect the establishment of, or compliance with, environmental health or safety standards. It is not practicable to predict whether the removal of these affirmative defense provisions will result in any significant difference in emissions and subsequently whether this action will have any positive or negative effect on people of color, low-income populations and/or Indigenous peoples. Information supporting this Executive Order review is contained in section III.D.5. of this document.

The EPA provided meaningful participation opportunities for people of color, low-income populations and/or Indigenous peoples or tribes in the development of the action through tribal outreach outlined in section V.F. of this document and summarized in the rulemaking docket, Docket ID No. EPA–HQ–OAR–2016–0186, as well as the standard opportunity to provide public comment on each proposal (2016 and 2022).

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

VI. Statutory Authority

The statutory authority for this action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator the authority to establish a federal operating permit program. Additionally, the Administrator determines that this action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine." 42 U.S.C. 7607(d)(1)(V).

VII. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, but "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This final action is "nationally applicable" within the meaning of CAA section 307(b)(1). In the alternative, to

the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of "nationwide scope or effect" within the meaning of CAA section 307(b)(1).[66] This final action revises both the regulatory requirements in 40 CFR part 70 that govern state, local, tribal, and U.S. territorial operating permit programs nationwide and the regulatory requirements in 40 CFR part 71 that govern federal operating permits nationwide.[67] Accordingly, this final action is a nationally applicable regulation or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the **Federal Register**.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action.

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 70.6 [Amended]

■ 2. In § 70.6, remove paragraph (g).

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 3. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 71.6 [Amended]

■ 4. In § 71.6, remove paragraph (g).

[FR Doc. 2023–15067 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

[66] In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

[67] In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the "nationwide scope or effect" exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

DEPARTMENT OF HOMELAND SECURITY

48 CFR Part 3052

[HSAR Case 2015–001; DHS Docket No. DHS–2017–0006]

RIN 1601–AA76

Homeland Security Acquisition Regulation; Safeguarding of Controlled Unclassified Information; Correction

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule; correction.

SUMMARY: The Office of Chief Procurement is correcting a final rule published in the **Federal Register** on June 21, 2023, titled *Safeguarding of Controlled Unclassified Information.* The final rule amended the Homeland Security Acquisition Regulation (HSAR) to address requirements for the safeguarding of Controlled Unclassified Information (CUI).

DATES: Effective July 21, 2023.

FOR FURTHER INFORMATION CONTACT: Shaundra Ford, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, (202) 447–0056, or email *HSAR@hq.dhs.gov.* When using email, include HSAR Case 2015–001 in the subject line.

SUPPLEMENTARY INFORMATION: This correction fixes the amendatory instruction for 3052.204–71, Contractor employee access, to clarify that the text in Alternate II should not be removed, and adds in 3052.212–70, Contract terms and conditions applicable to DHS acquisition of commercial items, two alternative clauses that were inadvertently not included in the final rule.

Correction

In FR Doc. 2023–11270 appearing on page 40560 in the **Federal Register** of Wednesday, June 21, 2023, the following corrections are made:

3052.204–71 [Corrected]

■ 1. On page 40598, in the second column, in part 3052, in amendment 6, the instruction "Revise clause 3052.204–71 to read as follows:" is corrected to read: "Revise section 3052.204–71 to read as follows:".

■ 2. On page 40599, in the third column, in section 3052.24–71, the regulatory text following Alternate I, starting with "Alternate II (June 2006)" to the end of the section, is corrected to read:

3052.24–71 [Corrected]

Alternate II (July 2023)

When the Department has determined contract employee access to controlled unclassified information or Government facilities must be limited to U.S. citizens and lawful permanent residents, but the contract will not require access to information resources, add the following paragraphs:

(g) Each individual employed under the contract shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by a Permanent Resident Card (USCIS I–551). Any exceptions must be approved by the Department's Chief Security Officer or designee.

(h) Contractors shall identify in their proposals, the names and citizenship of all non-U.S. citizens proposed to work under the contract. Any additions or deletions of non-U.S. citizens after contract award shall also be reported to the Contracting Officer.

(End of clause)

■ 3. On page 40603, in the third column, in part 3052, amendatory instruction 9 for section 3052.212–70 is corrected to read:

■ 9. In section 3052.212–70:

■ a. Revise the date of the clause; and

■ b. Amend paragraph (b) of the clause by:

■ i. Removing the entry for "3052.204–70";

■ ii. In the entry for "3052.204–71", adding the entry "Alternate II" following the entry "Alternate I"; and

■ iii. Adding in numerical order the entry "3052.204–72" followed by the

Displaying the eCFR in effect on 6/01/2023.

Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter C —Air Programs
Part 70 —State Operating Permit Programs

§ 70.6 Permit content.

(a) ***Standard permit requirements.*** Each permit issued under this part shall include the following elements:

(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include ARMs identified by the source in its part 70 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would apply as a result of implementing the ARM.

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

(ii) The permit shall state that, where an applicable requirement of the Act is more stringent than an applicable requirement of regulations promulgated under title IV of the Act, both provisions shall be incorporated into the permit and shall be enforceable by the Administrator.

(iii) If an applicable implementation plan allows a determination of an alternative emission limit at a part 70 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the State elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(2) ***Permit duration.*** The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources, and for a term not to exceed 5 years in the case of all other sources. Notwithstanding this requirement, the permitting authority shall issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and shall review such permits at least every 5 years.

(3) ***Monitoring and related recordkeeping and reporting requirements.***

(i) Each permit shall contain the following requirements with respect to monitoring:

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(ii) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, where applicable, the following:

(A) Records of required monitoring information that include the following:

(*1*) The date, place as defined in the permit, and time of sampling or measurements;

(*2*) The date(s) analyses were performed;

(*3*) The company or entity that performed the analyses;

(*4*) The analytical techniques or methods used;

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(*5*) The results of such analyses; and

(*6*) The operating conditions as existing at the time of sampling or measurement;

(B) Retention of records of all required monitoring data and support information for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(iii) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

(A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with § 70.5(d) of this part.

(B) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define “prompt” in relation to the degree and type of deviation likely to occur and the applicable requirements.

(4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under title IV of the Act or the regulations promulgated thereunder.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

(ii) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other applicable requirement.

(iii) Any such allowance shall be accounted for according to the procedures established in regulations promulgated under title IV of the Act.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(i) The permittee must comply with all conditions of the part 70 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(ii) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iii) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) The permit does not convey any property rights of any sort, or any exclusive privilege.

(v) The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

(7) A provision to ensure that a part 70 source pays fees to the permitting authority consistent with the fee schedule approved pursuant to § 70.9 of this part.

(8) ***Emissions trading.*** A provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

(9) Terms and conditions for reasonably anticipated AOSs identified by the source in its application as approved by the permitting authority. Such terms and conditions:

(i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the AOS under which it is operating;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such AOS; and

(iii) Must ensure that the terms and conditions of each AOS meet all applicable requirements and the requirements of this part. The permitting authority shall not approve a proposed AOS into the part 70 permit until the source has obtained all authorizations required under any applicable requirement relevant to that AOS.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:

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(i) Shall include all terms required under paragraphs (a) and (c) of this section to determine compliance;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions that allow such increases and decreases in emissions; and

(iii) Must meet all applicable requirements and requirements of this part.

(b) ***Federally-enforceable requirements.***

(1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

(2) Notwithstanding paragraph (b)(1) of this section, the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.

(c) ***Compliance requirements.*** All part 70 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document (including reports) required by a part 70 permit shall contain a certification by a responsible official that meets the requirements of § 70.5(d) for this part.

(2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the permitting authority or an authorized representative to perform the following:

(i) Enter upon the permittee's premises where a part 70 source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) As authorized by the Act, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with § 70.5(c)(8) of this part.

(4) Progress reports consistent with an applicable schedule of compliance and § 70.5(c)(8) of this part to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:

(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(i) The frequency (not less than annually or such more frequent periods as specified in the applicable requirement or by the permitting authority) of submissions of compliance certifications;

(ii) In accordance with § 70.6(a)(3) of this part, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information;

(C) The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in paragraph (c)(5)(iii)(B) of this section. The certification shall identify each deviation and take it into

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account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under part 64 of this chapter occurred; and

(D) Such other facts as the permitting authority may require to determine the compliance status of the source.

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority.

(6) Such other provisions as the permitting authority may require.

(d) ***General permits.***

(1) The permitting authority may, after notice and opportunity for public participation provided under § 70.7(h) of this part, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part 70 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part 70 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in regulations promulgated under title IV of the Act.

(2) Part 70 sources that would qualify for a general permit must apply to the permitting authority for coverage under the terms of the general permit or must apply for a part 70 permit consistent with § 70.5 of this part. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of § 70.5 of this part, provided that such applications meet the requirements of title V of the Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under § 70.7(h) of this part, the permitting authority may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

(e) ***Temporary sources.*** The permitting authority may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the permitting authority at least 10 days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

(f) ***Permit shield.***

(1) Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this paragraph or in any part 70 permit shall alter or affect the following:

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section;

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act; or

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(g) ***Emergency provision*** —

(1) ***Definition.*** An “emergency” means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) ***Effect of an emergency.*** An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

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(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

[57 FR 32295, July 21, 1992, as amended at 62 FR 54946, Oct. 22, 1997; 66 FR 12876, Mar. 1, 2001; 66 FR 55884, Nov. 5, 2001; 68 FR 38523, June 27, 2003; 74 FR 51439, Oct. 6, 2009; 79 FR 43667, July 28, 2014]

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FACT SHEET

Final Rule: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program

Action

- On July 12, 2023, the U.S. Environmental Protection Agency (EPA) removed the emergency affirmative defense provisions from Clean Air Act (CAA) operating permit program (title V) regulations. These provisions are found in EPA's regulations under title V of the CAA, located at 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 71.6(g) (applicable when EPA is the permitting authority).

- In 2016, EPA proposed a rule to remove these affirmative defense provisions from the title V regulations (81 FR 38645 (June 14, 2016), but withdrew it. On March 28, 2022, EPA re-proposed to remove the emergency affirmative defense provisions from the title V regulations(87 FR 19042).

- This final rule details expectations for implementation by permitting authorities, including the timing and mechanism of required title V program revisions and individual permit revisions.

- EPA expects it will be necessary for some state permitting authorities to make changes to their title V programs to remove the affirmative defense provisions.

- In order to implement the program revisions that may be necessary, title V affirmative defense provisions included within individual operating permits will also need to be removed. EPA expects these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons.

Background

- Title V of the Clean Air Act requires major sources of air pollutants, and certain other sources, to obtain and operate in compliance with an operating permit. Sources with these title V permits are required to certify compliance with the applicable requirements of their permits at least annually.

- EPA first promulgated the emergency affirmative defense provisions when it finalized its title V regulations for state operating permit programs in 1992 and in the regulations for the federal operating permit program in 1996.

- A stationary source can use this affirmative defense in an enforcement case to avoid liability for noncompliance with technology-based emission limits contained in the source's title V permit. To rely on the affirmative defense and avoid liability, the source must demonstrate that any excess emissions occurred as the result of an "emergency," as defined in the regulations, and the source must make a number of other demonstrations specified in the regulations.

- These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in title V permits.

- In 2014, the U.S. Court of Appeals for the D.C. Circuit issued its *NRDC v. EPA* decision (749 F.3d 1055). The court vacated a similar affirmative defense provision included in EPA's hazardous air pollutant regulations for the Portland Cement industry. The *NRDC v. EPA* case led EPA to reevaluate affirmative defense provisions in CAA programs.

Additional Information

- To download a copy of today's final action from the EPA website, go to "Current Regulations and Regulatory Actions" at the following address: https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions.

- For general information about this final rule, contact Corey Sugerik of EPA's Office of Air Quality Planning and Standards at (919) 541-3223 or sugerik.corey@epa.gov.

August 21, 2024

David Garcia
EPA Region 6 Air and Radiation Director
1201 Elm Street
Dallas, TX 75270

Topic: Final Rule: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program

David Garcia,

The New Mexico Environment Department (NMED) respectfully requests an extension to the timeline to remove the Title V Emergency Affirmative Defense Provision from our State Regulation(s). The authority to update the rules belongs to the Environmental Improvement Board (EIB). See Section 74-1-5, NMSA 1978.

NMED has identified other incongruities between the federal rule and the current NM Title V regulation and must also update the regulation to meet current New Mexico Administrative Code requirements and will need to address these changes at the same time the Affirmative Defense Provisions are removed. The itemized tasks and expected soonest and latest dates to accomplish these changes are outlined below.

Analyze deficiencies in Title V program regulation (20.2.70 NMAC). (August 2024)

Draft amendments to 20.2.70 NMAC. (August 2024)

Stakeholder outreach. (September 2024)

EPA Comment period. (October 2024 or combine with stakeholder outreach in September 2024)

Petition Environmental Improvement Board (EIB) for hearing. (October 2024 or November 2024)

Provide public notice of rulemaking hearing. (November 2024 or December 2024)

Publish hearing notice in New Mexico Register. (November 2024 or December 2024)

Conduct EIB hearing. (January 2025 or April 2025. EIB may break for legislative session).

EIB vote to adopt amendments. (January 2025 earliest or June 2025 latest)

Submit the hearing record and cover letter to EPA for the proposed revision to the Title V Program. (February 2025 or July 2025)

Note that 20.2.7 NMAC, Excess Emissions, also contains Emergency Affirmative Defense Provisions, but these are state-only provisions and are not included in the SIP or the Title V Program. These provisions do not need to be changed at this time.

Please grant an extension to remove the Title V Emergency Affirmative Defense Provisions from State Regulations until August 2025.

Cindy Hollenberg Digitally signed by Cindy Hollenberg
Date: 2024.08.21 14:49:18 -06'00'

Cindy Hollenberg
NMED/Air Quality Bureau
Bureau Chief (Acting)

REGION 6
DALLAS, TX 75270

September 16, 2024

Cindy Hollenberg
Acting Chief, Air Quality Bureau
New Mexico Environment Department
525 Camino de los Marquez
Suite 1A
Santa Fe, New Mexico 87505-1816

Via email eric.peters@env.nm.gov

RE: Extension Request for Removal of Title V Emergency Affirmative Defense Provisions from the New Mexico Operating Permits Program, from August 21, 2024, to August 21, 2025

Dear Ms. Hollenberg:

Thank you for your August 21, 2024, letter requesting the U.S. Environmental Protection Agency (EPA) grant an extension to the August 21, 2024, deadline for submitting a revision for the New Mexico Part 70 Operating Permits Program to remove emergency affirmative defense provisions. The New Mexico Environment Department (NMED) Aur Quality Bureau (AQB) is the Part 70 Operating Permits Program authority for New Mexico and has the responsibility for maintaining the program consistent with federal requirements. The EPA grants an extension to the NMED AQB as outlined below.

The program revision is intended to address the requirement to remove the emergency affirmative defense provisions as previously provided by 40 CFR §70.6(g) from the New Mexico Operating Permits Program. *See* 88 FR 47209 (July 21, 2023). You have requested an extension to the August 21, 2024, deadline because additional time is needed to complete the rulemaking process that will revise the New Mexico Operating Permits regulations. As requested by the EPA, you provided a description of your rulemaking process and a tentative schedule for the rulemaking process in your August 21, 2024, letter.

In accordance with the July 21, 2023, *Federal Register* action and the EPA Region 6 Delegations Manual, R6-7-114, Implementation of the Operating Permits Program, our office grants the NMED AQB the requested 12-month extension to the August 21, 2024, deadline. Please submit to our office the required revisions to the New Mexico Part 70 Operating Permits Program by **August 21, 2025**.

Please provide any updates on your rulemaking process for this revision to Ms. Adina Wiley, our State Implementation Plan Coordinator for Air Permits. If you have any questions regarding this matter, please feel free to contact me at (214) 665-7593, or Ms. Wiley at (214) 665-2115.

Sincerely,

David F. Garcia
Director
Air and Radiation Division

Air Quality Bureau
TITLE V OPERATING PERMIT
Issued under 20.2.70 NMAC

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PART B GENERAL CONDITIONS

B100 Introduction

A. Not Applicable

B101 Legal

A. Permit Terms and Conditions (20.2.70 sections 7, 201.B, 300, 301.B, 302, 405 NMAC)

(1) The permittee shall abide by all terms and conditions of this permit, except as allowed under Section 502(b)(10) of the Federal Act, and 20.2.70.302.H.1 NMAC. Any permit noncompliance is grounds for enforcement action, and significant or repetitious noncompliance may result in termination of this permit. Additionally, noncompliance with federally enforceable conditions of this permit constitutes a violation of the Federal Act. (20.2.70.302.A.2.a NMAC)

(2) Emissions trading within a facility (20.2.70.302.H.2 NMAC)

(a) The Department shall, if an applicant requests it, issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit in addition to any applicable requirements. Such terms and conditions shall include all terms and conditions required under 20.2.70.302 NMAC to determine compliance. If applicable requirements apply to the requested emissions trading, permit conditions shall be issued only to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval.

(b) The applicant shall include in the application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The Department shall not include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall require compliance with all applicable requirements.

(3) It shall not be a defense for the permittee in an enforcement action to claim that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit. (20.2.70.302.A.2.b NMAC)

(4) If the Department determines that cause exists to modify, reopen and revise, revoke and reissue, or terminate this permit, this shall be done in accordance with 20.2.70.405 NMAC. (20.2.70.302.A.2.c NMAC)

(5) The permittee shall furnish any information the Department requests in writing to determine if cause exists for reopening and revising, revoking and reissuing, or

terminating the permit, or to determine compliance with the permit. This information shall be furnished within the time period specified by the Department. Additionally, the permittee shall furnish, upon request by the Department, copies of records required by the permit to be maintained by the permittee. (20.2.70.302.A.2.f NMAC)

(6) A request by the permittee that this permit be modified, revoked and reissued, or terminated, or a notification by the permittee of planned changes or anticipated noncompliance, shall not stay any conditions of this permit. (20.2.70.302.A.2.d NMAC)

(7) This permit does not convey property rights of any sort, or any exclusive privilege. (20.2.70.302.A.2.e NMAC)

(8) In the case where an applicant or permittee has submitted information to the Department under a claim of confidentiality, the Department may also require the applicant or permittee to submit a copy of such information directly to the Administrator of the EPA. (20.2.70.301.B NMAC)

(9) The issuance of this permit, or the filing or approval of a compliance plan, does not relieve the permittee from civil or criminal liability for failure to comply with the state or Federal Acts, or any applicable state or federal regulation or law. (20.2.70.302.A.6 NMAC and the New Mexico Air Quality Control Act NMSA 1978, Chapter 74, Article 2)

(10) If any part of this permit is challenged or held invalid, the remainder of the permit terms and conditions are not affected and the permittee shall continue to abide by them. (20.2.70.302.A.1.d NMAC)

(11) A responsible official (as defined in 20.2.70.7.AE NMAC) shall certify the accuracy, truth and completeness of every report and compliance certification submitted to the Department as required by this permit. These certifications shall be part of each document. (20.2.70.300.E NMAC)

(12) Revocation or termination of this permit by the Department terminates the permittee's right to operate this facility. (20.2.70.201.B NMAC)

(13) The permittee shall continue to comply with all applicable requirements. For applicable requirements that will become effective during the term of the permit, the permittee shall meet such requirements on a timely basis. (Sections 300.D.10.c and 302.G.3 of 20.2.70 NMAC)

B. Permit Shield (20.2.70.302.J NMAC)

(1) Compliance with the conditions of this permit shall be deemed to be compliance with any applicable requirements existing as of the date of permit issuance and identified in Table 103.A. The requirements in Table 103.A are applicable to this facility with specific requirements identified for individual emission units.

(2) The Department has determined that the requirements in Table 103.B as identified in the permit application are not applicable to this source, or they do not impose any conditions in this permit.

(3) This permit shield does not extend to administrative amendments (Subsection A of 20.2.70.404 NMAC), to minor permit modifications (Subsection B of 20.2.70.404 NMAC), to changes made under Section 502(b)(10), changes under Paragraph 1 of subsection H of 20.2.70.302 of the Federal Act, or to permit terms for which notice has been given to reopen or revoke all or part under 20.2.70.405 and 20.2.70.302J(6).

(4) This permit shall, for purposes of the permit shield, identify any requirement specifically identified in the permit application or significant permit modification that the department has determined is not applicable to the source, and state the basis for any such determination. (20.2.70.302.A.1.f NMAC)

C. The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollutant control practices for minimizing emissions. (20.2.7.109 NMAC). The establishment of allowable malfunction emission limits does not supersede this requirement.

B102 Authority

A. This permit is issued pursuant to the federal Clean Air Act ("Federal Act"), the New Mexico Air Quality Control Act ("State Act") and regulations adopted pursuant to the State and Federal Acts, including Title 20, New Mexico Administrative Code, Chapter 2, Part 70 (20.2.70 NMAC) - Operating Permits.

B. This permit authorizes the operation of this facility. This permit is valid only for the named permittee, owner, and operator. A permit modification is required to change any of those entities.

C. The Department specifies with this permit, terms and conditions upon the operation of this facility to assure compliance with all applicable requirements, as defined in 20.2.70 NMAC at the time this permit is issued. (20.2.70.302.A.1 NMAC)

D. Pursuant to the New Mexico Air Quality Control Act NMSA 1978, Chapter 74, Article 2, all terms and conditions in this permit, including any provisions designed to limit this facility's potential to emit, are enforceable by the Department. All terms and conditions are enforceable by the Administrator of the United States Environmental Protection Agency ("EPA") and citizens under the Federal Act, unless the term or condition is specifically designated in this permit as not being enforceable under the Federal Act. (20.2.70.302.A.5 NMAC)

E. The Department is the Administrator for 40 CFR Parts 60, 61, and 63 pursuant to the Modification and Exceptions of Section 10 of 20.2.77 NMAC (NSPS), 20.2.78 NMAC (NESHAP), and 20.2.82 NMAC (MACT).

B103 Annual Fee

A. The permittee shall pay Title V fees to the Department consistent with the fee schedule in 20.2.71 NMAC - Operating Permit Emission Fees. The fees will be assessed and invoiced separately from this permit. (20.2.70.302.A.1.e NMAC)

B104 Appeal Procedures
(20.2.70.403.A NMAC)

A. Any person who participated in a permitting action before the Department and who is adversely affected by such permitting action, may file a petition for a hearing before the Environmental Improvement Board ("board"). The petition shall be made in writing to the board within thirty (30) days from the date notice is given of the Department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered, and attach a copy of the permitting action for which review is sought. Unless a timely request for a hearing is made, the decision of the Department shall be final. The petition shall be copied simultaneously to the Department upon receipt of the appeal notice. If the petitioner is not the applicant or permittee, the petitioner shall mail or hand-deliver a copy of the petition to the applicant or permittee. The Department shall certify the administrative record to the board. Petitions for a hearing shall be sent to:

For Mailing:
Administrator, New Mexico Environmental Improvement Board
P.O. Box 5469
Santa Fe, NM 87502-5469

For Hand Delivery:
Administrator, New Mexico Environmental Improvement Board
1190 St. Francis Drive, Harold Runnels Bldg.
Santa Fe, New Mexico 87505

B105 Submittal of Reports and Certifications

A. Stack Test Protocols and Stack Test Reports shall be submitted electronically to the Air Quality Bureau Compliance Reporting (AQBCR) system or as directed by the Department.

B. Excess Emission Reports shall be submitted as directed by the Department. (20.2.7.110 NMAC)

C. Compliance Certification Reports, Semi-Annual monitoring reports, compliance schedule progress reports, and any other compliance status information required by this permit shall

be certified by the responsible official and submitted to the mailing address below, or as directed by the Department:

Manager, Compliance and Enforcement Section
New Mexico Environment Department
Air Quality Bureau
525 Camino de los Marquez Suite 1
Santa Fe, NM 87505-1816

D. Compliance Certification Reports shall also be submitted to the Administrator through EPA's Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through the EPA's Central Data Exchange (CDX) Webpage located at www.epa.gov/CDX. (20.2.70.302.E.3 NMAC)

B106 NSPS and/or MACT Startup, Shutdown, and Malfunction Operations

A. If a facility is subject to a NSPS standard in 40 CFR 60, each owner or operator that installs and operates a continuous monitoring device required by a NSPS regulation shall comply with the excess emissions reporting requirements in accordance with 40 CFR 60.7(c).

B. If a facility is subject to a NSPS standard in 40 CFR 60, then in accordance with 40 CFR 60.8(c), operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.

C. If a facility is subject to a MACT standard in 40 CFR 63, then the facility is subject to the requirement for a Startup, Shutdown and Malfunction Plan (SSM) under 40 CFR 63.6(e)(3), unless specifically exempted in the applicable subpart. (20.2.70.302.A.1 and A.4 NMAC)

B107 Startup, Shutdown, and Maintenance Operations

A. The establishment of permitted startup, shutdown, and maintenance (SSM) emission limits does not supersede the requirements of 20.2.7.14.A NMAC. Except for operations or equipment subject to Condition B106, the permittee shall establish and implement a plan to minimize emissions during routine or predictable start up, shut down, and scheduled maintenance (SSM work practice plan) and shall operate in accordance with the procedures set forth in the plan. (20.2.7.14.A NMAC)

B108 General Monitoring Requirements
(20.2.70. 302.A and C NMAC)

A. These requirements do not supersede or relax requirements of federal regulations.

B. The following monitoring and/or testing requirements shall be used to determine compliance with applicable requirements and emission limits. Any sampling, whether by portable analyzer or EPA reference method, that measures an emission rate over the applicable averaging period greater than an emission limit in this permit constitutes noncompliance with this permit. The Department may require, at its discretion, additional tests pursuant to EPA Reference Methods at any time, including when sampling by portable analyzer measures an emission rate greater than an emission limit in this permit; but such requirement shall not be construed as a determination that the sampling by portable analyzer does not establish noncompliance with this permit and shall not stay enforcement of such noncompliance based on the sampling by portable analyzer.

C. If the emission unit is shutdown at the time when periodic monitoring is due to be completed, the permittee is not required to restart the unit for the sole purpose of conducting the monitoring. Using electronic or written mail, the permittee shall notify the Department's Compliance and Enforcement Section of a delay in emission tests prior to the deadline for completing the tests. Upon recommencing operation, the permittee shall submit pre-test notification(s) to the Department's Compliance and Enforcement Section and shall complete the monitoring.

D. The requirement for monitoring during any monitoring period is based on the percentage of time that the unit has operated. However, to invoke monitoring period exemptions at B108.D(2), hours of operation shall be monitored and recorded.

(1) If the emission unit has operated for more than 25% of a monitoring period, then the permittee shall conduct monitoring during that period.

(2) If the emission unit has operated for 25% or less of a monitoring period then the monitoring is not required. After two successive periods without monitoring, the permittee shall conduct monitoring during the next period regardless of the time operated during that period, except that for any monitoring period in which a unit has operated for less than 10% of the monitoring period, the period will not be considered as one of the two successive periods.

(3) If invoking the monitoring period exemption in B108.D(2), the actual operating time of a unit shall not exceed the monitoring period required by this permit before the required monitoring is performed. For example, if the monitoring period is annual, the operating hours of the unit shall not exceed 8760 hours before monitoring is conducted. Regardless of the time that a unit actually operates, a minimum of one of each type of monitoring activity shall be conducted during the five year term of this permit.

E. For all periodic monitoring events, except when a federal or state regulation is more stringent, three test runs shall be conducted at 90% or greater of the unit's capacity as stated in this permit, or in the permit application if not in the permit, and at additional loads when requested by the Department. If the 90% capacity cannot be achieved, the monitoring will be conducted at the maximum achievable load under prevailing operating conditions except when a federal or state regulation requires more restrictive test conditions. The load and the

parameters used to calculate it shall be recorded to document operating conditions and shall be included with the monitoring report.

F. When requested by the Department, the permittee shall provide schedules of testing and monitoring activities. Compliance tests from previous NSR and Title V permits may be re-imposed if it is deemed necessary by the Department to determine whether the source is in compliance with applicable regulations or permit conditions.

G. If monitoring is new or is in addition to monitoring imposed by an existing applicable requirement, it shall become effective 120 days after the date of permit issuance. For emission units that have not commenced operation, the associated new or additional monitoring shall not apply until 120 days after the units commence operation. All pre-existing monitoring requirements incorporated in this permit shall continue to apply from the date of permit issuance. All monitoring periods, unless stated otherwise in the specific permit condition or federal requirement, shall commence at the beginning of the 12 month reporting period as defined at condition A109.B.

H. Unless otherwise indicated by Specific Conditions or regulatory requirements, all instrumentation used for monitoring in accordance with applicable requirements including emission limits, to measure parameters including but not limited to flow, temperature, pressure and chemical composition, or used to continuously monitor emission rates and/or other process operating parameters, shall be subject to the following requirements:

(1) The owner or operator shall install, calibrate, operate and maintain monitoring instrumentation (monitor) according to the manufacturer's procedures and specifications and the following requirements.

(a) The monitor shall be located in a position that provides a representative measurement of the parameter that is being monitored.

(b) At a minimum, the monitor shall complete one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(c) At a minimum, the monitor shall be spanned to measure the normal range +/- 5% of the parameter that is being monitored.

(d) At least semi-annually, perform a visual inspection of all components of the monitor for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion.

(e) Recalibrate the monitor in accordance with the manufacturer's procedures and specifications at the frequency specified by the manufacturer, or every two years, whichever is less.

(2) Except for malfunctions, associated repairs, and required quality assurance or control activities (including calibration checks and required zero and span adjustments), the permittee shall operate and maintain all monitoring equipment at all times that the emissions unit or the associated process is operating.

(3) The monitor shall measure data for a minimum of 90 percent of the time that the emissions unit or the associated process is in operation, based on a calendar monthly average.

(4) The owner or operator shall maintain records in accordance with Section B109 to demonstrate compliance with the requirements in B108H (1)-(3) above, as applicable.

I. The permittee is not required to report a deviation for any monitoring or testing in a Specific Condition if the deviation was authorized in this General Condition B108.

B109 General Recordkeeping Requirements
(20.2.70.302.D NMAC)

A. The permittee shall maintain records to assure and verify compliance with the terms and conditions of this permit and any applicable requirements that become effective during the term of this permit. The minimum information to be included in these records is as follows (20.2.70.302.D.1 NMAC):

(1) Records required for testing and sampling:

(a) equipment identification (include make, model and serial number for all tested equipment and emission controls)

(b) date(s) and time(s) of sampling or measurements

(c) date(s) analyses were performed

(d) the qualified entity that performed the analyses

(e) analytical or test methods used

(f) results of analyses or tests

(g) operating conditions existing at the time of sampling or measurement

(2) Records required for equipment inspections and/or maintenance required by this permit:

(a) equipment identification number (including make, model and serial number)

(b) date(s) and time(s) of inspection, maintenance, and/or repair

(c) date(s) any subsequent analyses were performed (if applicable)

(d) name of the person or qualified entity conducting the inspection, maintenance, and/or repair

(e) copy of the equipment manufacturer's or the owner or operator's maintenance or repair recommendations (if required to demonstrate compliance with a permit condition)

(f) description of maintenance or repair activities conducted

(g) all results of any required parameter readings

(h) a description of the physical condition of the equipment as found during any required inspection

(i) results of required equipment inspections including a description of any condition which required adjustment to bring the equipment back into compliance and a description of the required adjustments

B. The permittee shall keep records of all monitoring data, equipment calibration, maintenance, and inspections, Data Acquisition and Handling System (DAHS) if used, reports, and other supporting information required by this permit for at least five (5) years from the time the data was gathered or the reports written. Each record shall clearly identify the emissions unit and/or monitoring equipment, and the date the data was gathered. (20.2.70.302.D.2 NMAC)

C. If the permittee has applied and received approval for an alternative operating scenario, then the permittee shall maintain a log at the facility, which documents, contemporaneously with any change from one operating scenario to another, the scenario under which the facility is operating. (20.2.70.302.A.3 NMAC)

D. The permittee shall keep a record describing off permit changes made at this source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under this permit, and the emissions resulting from those changes. (20.2.70.302.I.2 NMAC)

E. Unless otherwise indicated by Specific Conditions, the permittee shall keep the following records for malfunction emissions and routine and predictable emissions during startup, shutdown, and scheduled maintenance (SSM):

(1) The owner or operator of a source subject to a permit, shall establish and implement a plan to minimize emissions during routine or predictable startup, shutdown, and scheduled maintenance through work practice standards and good air pollution control practices. This requirement shall not apply to any affected facility defined in and subject to an emissions standard and an equivalent plan under 40 CFR Part 60 (NSPS), 40 CFR Part 63 (MACT), or an equivalent plan under 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas. (20.2.7.14.A NMAC) The permittee shall keep records of all sources subject to the plan to minimize emissions during routine or predictable SSM and shall record if the source is subject to an alternative plan and therefore, not subject to the plan requirements under 20.2.7.14.A NMAC.

(2) If the facility has allowable SSM emission limits in this permit, the permittee shall record all SSM events, including the date, the start time, the end time, a description of the event, and a description of the cause of the event. This record also shall include a copy of the manufacturer's, or equivalent, documentation showing that any maintenance qualified as scheduled. Scheduled maintenance is an activity that occurs at an established frequency pursuant to a written protocol published by the manufacturer or other reliable source. The authorization of allowable SSM emissions does not supersede any applicable federal or state standard. The most stringent requirement applies.

(3) If the facility has allowable malfunction emission limits in this permit, the permittee shall record all malfunction events to be applied against these limits. The permittee shall also include the date, the start time, the end time, and a description of the event. **Malfunction means** any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction. (20.2.7.7.E NMAC) The authorization of allowable malfunction emissions does not supersede any applicable federal or state standard. The most stringent requirement applies. This authorization only allows the permittee to avoid submitting reports under 20.2.7 NMAC for total annual emissions that are below the authorized malfunction emission limit.

(4) The owner or operator of a source shall meet the operational plan defining the measures to be taken to mitigate source emissions during malfunction, startup or shutdown. (20.2.72.203.A(5) NMAC)

B110 General Reporting Requirements
(20.2.70.302.E NMAC)

A. Reports of required monitoring activities for this facility shall be submitted to the Department on the schedule in section A109. Monitoring and recordkeeping requirements that are not required by a NSPS or MACT shall be maintained on-site or (for unmanned sites) at the nearest company office, and summarized in the semi-annual reports, unless alternative reporting requirements are specified in the equipment specific requirements section of this permit.

B. Reports shall clearly identify the subject equipment showing the emission unit ID number according to this operating permit. In addition, all instances of deviations from permit requirements, including those that occur during emergencies, shall be clearly identified in the reports required by section A109. (20.2.70.302.E.1 NMAC)

C. The permittee shall submit reports of all deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. These reports shall be submitted as follows:

(1) Deviations resulting in excess emissions as defined in 20.2.7.7 NMAC (including those classified as emergencies as defined in section B114.A) shall be reported in accordance with the timelines specified by 20.2.7.110 NMAC and in the semi-annual reports required in section A109. (20.2.70.302.E.2 NMAC)

(2) All other deviations shall be reported in the semi-annual reports required in section A109. (20.2.70.302.E.2 NMAC).

D. The permittee shall submit reports of excess emissions in accordance with 20.2.7.110.A NMAC.

E. Allowable Emission Limits for Excess Emissions Reporting for Flares and Other Regulated Sources with No Pound per Hour (pph) and/or Ton per Year (tpy) Emission Limits.

(1) When a flare has no allowable pph and/or tpy emission limits in Sections A106 and/or A107, the authorized allowable emissions include only the combustion of pilot and/or purge gas. Compliance is demonstrated by limiting the gas stream to the flare to only pilot and/or purge gas.

(2) For excess emissions reporting as required by 20.2.7 NMAC, the allowable emission limits are 1.0 pph and 1.0 tpy for each regulated air pollutant (except for H2S) emitted by that source as follows:

(a) For flares, when there are no allowable emission limits in Sections A106 and/or A107.

(b) For regulated sources with emission limits in Sections A106 or A107 represented by the less than sign ("<").

(c) For regulated sources that normally would not emit any regulated air pollutants, including but not limited to vents, pressure relief devices, connectors, etc.

(3) For excess emissions reporting as required by 20.2.7 NMAC for H2S, the allowable limits are 0.1 pph and 0.44 tpy for each applicable scenario addressed in paragraph (2) above.

F. Results of emission tests and monitoring for each pollutant (except opacity) shall be reported in pounds per hour (unless otherwise specified) and tons per year. Opacity shall be reported in percent. The number of significant figures corresponding to the full accuracy inherent in the testing instrument or Method test used to obtain the data shall be used to calculate and report test results in accordance with 20.2.1.116.B and C NMAC. Upon request by the Department, CEMS and other tabular data shall be submitted in editable, MS Excel format.

G. At such time as new units are installed as authorized by the applicable NSR Permit, the permittee shall fulfill the notification requirements in the NSR permit.

H. Periodic Emissions Test Reporting: The permittee shall report semi-annually a summary of the test results.

I. The permittee shall submit an emissions inventory report for this facility in accordance with the schedule in subparagraph (5), provided one or more of the following criteria is met in subparagraphs (1) to (4): (20.2.73 NMAC)

(1) The facility emits, or has the potential to emit, 5 tons per year or more of lead or lead compounds, or 100 tons per year or more of PM10, PM2.5, sulfur oxides, nitrogen oxides, carbon monoxide, or volatile organic compounds.

(2) The facility is defined as a major source of hazardous air pollutants under 20.2.70 NMAC (Operating Permits).

(3) The facility is located in an ozone nonattainment area and which emits, or has the potential to emit, 25 tons per year or more of nitrogen oxides or volatile organic compounds.

(4) Upon request by the department.

(5) The permittee shall submit the emissions inventory report by April 1 of each year, unless a different deadline is specified by the current operating permit.

J. Emissions trading within a facility (20.2.70.302.H.2 NMAC)

(1) For each such change, the permittee shall provide written notification to the department and the administrator at least seven (7) days in advance of the proposed changes. Such notification shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(2) The permittee and department shall attach each such notice to their copy of the relevant permit.

B111 General Testing Requirements

Unless otherwise indicated by Specific Conditions or regulatory requirements, the permittee shall conduct testing in accordance with the requirements in Sections B111A, B, C, D and E, as applicable.

A. Initial Compliance Tests

The permittee shall conduct initial compliance tests in accordance with the following requirements:

(1) Initial compliance test requirements from previous permits (if any) are still in effect, unless the tests have been satisfactorily completed. Compliance tests may be re-imposed if it is deemed necessary by the Department to determine whether the source is in compliance with applicable regulations or permit conditions. (20.2.72 NMAC Sections 210.C and 213)

(2) Initial compliance tests shall be conducted within sixty (60) days after the unit(s) achieve the maximum normal production rate. If the maximum normal production rate does not occur within one hundred twenty (120) days of source startup, then the tests must be conducted no later than one hundred eighty (180) days after initial startup of the source.

(3) The default time period for each test run shall be at least 60 minutes and each performance test shall consist of three separate runs using the applicable test method. For the purpose of determining compliance with an applicable emission limit, the arithmetic mean of results of the three runs shall apply. In the event that

a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond the owner or operator's control, compliance may, upon the Department approval, be determined using the arithmetic mean of the results of the two other runs.

(4) Testing of emissions shall be conducted with the emissions unit operating at 90 to 100 percent of the maximum operating rate allowed by the permit. If it is not possible to test at that rate, the source may test at a lower operating rate.

(5) Testing performed at less than 90 percent of permitted capacity will limit emission unit operation to 110 percent of the tested capacity until a new test is conducted.

(6) If conditions change such that unit operation above 110 percent of tested capacity is possible, the source must submit a protocol to the Department within 30 days of such change to conduct a new emissions test.

B. EPA Reference Method Tests

The test methods in Section B111.B(1) shall be used for all initial compliance tests and all Relative Accuracy Test Audits (RATAs), and shall be used if a permittee chooses to use EPA test methods for periodic monitoring. Test methods that are not listed in Section B111.B(1) may be used in accordance with the requirements at Section B111.B(2).

(1) All compliance tests required by this permit shall be conducted in accordance with the requirements of CFR Title 40, Part 60, Subpart A, General Provisions, and the following EPA Reference Methods as specified by CFR Title 40, Part 60, Appendix A:

(a) Methods 1 through 4 for stack gas flowrate

(b) Method 5 for particulate matter (PM)

(c) Method 6C for SO_2

(d) Method 7E for NO_X (test results shall be expressed as nitrogen dioxide (NO_2) using a molecular weight of 46 lb/lb-mol in all calculations (each ppm of NO/NO_2 is equivalent to 1.194 x 10-7 lb/SCF)

(e) Method 9 for visual determination of opacity

(f) Method 10 for CO

(g) Method 19 for particulate, sulfur dioxide and nitrogen oxides emission rates. In addition, Method 19 may be used in lieu of Methods 1-4 for stack gas flowrate. The permittee shall provide a contemporaneous fuel gas analysis (preferably on the day of the test, but no earlier than three months prior to the test date) and a recent fuel flow meter calibration certificate (within the most recent quarter) with the final test report.

(h) Method 7E or 20 for Turbines per §60.335 or §60.4400

(i) Method 22 for visual determination of fugitive emissions from material sources and smoke emissions from flares

(j) Method 25A for VOC reduction efficiency

(k) Method 29 for Metals

(l) Method 30B for Mercury from Coal-Fired Combustion Sources Using Carbon Sorbent Traps

(m) Method 201A for filterable PM_{10} and $PM_{2.5}$

(n) Method 202 for condensable PM

(o) Method 320 for organic Hazardous Air Pollutants (HAPs)

(2) Permittees may propose test method(s) that are not listed in Section B111.B(1). These methods may be used if prior approval is received from the Department.

C. Periodic Monitoring and Portable Analyzer Requirements for the Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters

Periodic emissions tests (periodic monitoring) shall be conducted in accordance with the following requirements:

(1) Periodic emissions tests may be conducted in accordance with EPA Reference Methods or by utilizing a portable analyzer. Periodic monitoring utilizing a portable analyzer shall be conducted in accordance with the requirements of the current version of ASTM D 6522. However, if a facility has met a previously approved Department criterion for portable analyzers, the analyzer may be operated in accordance with that criterion until it is replaced.

(2) The default time period for each test run shall be **at least** 20 minutes.

Each performance test shall consist of three separate runs. The arithmetic mean of results of the three runs shall be used to determine compliance with the applicable emission limit.

(3) Testing of emissions shall be conducted in accordance with the requirements at Section B108.E.

(4) During emissions tests, pollutant and diluent concentration shall be monitored and recorded. Fuel flow rate shall be monitored and recorded if stack gas flow rate is determined utilizing Reference Method 19. This information shall be included with the test report furnished to the Department.

(5) Stack gas flow rate shall be calculated in accordance with Reference Method 19 utilizing fuel flow rate (scf) determined by a dedicated fuel flow meter and fuel heating value (Btu/scf). The permittee shall provide a contemporaneous fuel gas analysis (preferably on the day of the test, but no earlier than three months prior to the test date) and a recent fuel flow meter calibration certificate (within the most

recent quarter) with the final test report. Alternatively, stack gas flow rate may be determined by using EPA Reference Methods 1-4.

(6) The permittee shall submit a notification and protocol for periodic emissions tests upon the request of the Department.

D. Initial Compliance Test and RATA Procedures

Permittees required to conduct initial compliance tests and/or RATAs shall comply with the following requirements:

(1) The permittee shall submit a notification and test protocol to the Department's Program Manager, Compliance and Enforcement Section, at least thirty (30) days before the test date and allow a representative of the Department to be present at the test. Proposals to use test method(s) that are not listed in Section B111.B(1) (if applicable) shall be included in this notification.

(2) Contents of test notifications, protocols and test reports shall conform to the format specified by the Department's Universal Test Notification, Protocol and Report Form and Instructions. Current forms and instructions are posted to NMED's Air Quality web site under Compliance and Enforcement Testing.

(3) The permittee shall provide (a) sampling ports adequate for the test methods applicable to the facility, (b) safe sampling platforms, (c) safe access to sampling platforms and (d) utilities for sampling and testing equipment.

(4) Where necessary to prevent cyclonic flow in the stack, flow straighteners shall be installed

E. General Compliance Test Procedures

The following requirements shall apply to all initial compliance and periodic emissions tests and all RATAs:

(1) Equipment shall be tested in the "as found" condition. Equipment may not be adjusted or tuned prior to any test for the purpose of lowering emissions, and then returned to previous settings or operating conditions after the test is complete.

(2) The stack shall be of sufficient height and diameter and the sample ports shall be located so that a representative test of the emissions can be performed in accordance with the requirements of EPA Reference Method 1 or the current version of ASTM D 6522, as applicable.

(3) Test reports shall be submitted to the Department no later than 30 days after completion of the test.

B112 Compliance

A. The Department shall be given the right to enter the facility at all reasonable times to verify the terms and conditions of this permit. Required records shall be organized by date and

subject matter and shall at all times be readily available for inspection. The permittee, upon verbal or written request from an authorized representative of the Department who appears at the facility, shall immediately produce for inspection or copying any records required to be maintained at the facility. Upon written request at other times, the permittee shall deliver to the Department paper or electronic copies of any and all required records maintained on site or at an off-site location. Requested records shall be copied and delivered at the permittee's expense within three business days from receipt of request unless the Department allows additional time. Required records may include records required by permit and other information necessary to demonstrate compliance with terms and conditions of this permit. (NMSA 1978, Section 74-2-13)

B. A copy of the most recent permit(s) issued by the Department shall be kept at the permitted facility or (for unmanned sites) at the nearest company office and shall be made available to Department personnel for inspection upon request. (20.2.70.302.G.3 NMAC)

C. Emissions limits associated with the energy input of a Unit, i.e. lb/MMBtu, shall apply at all times unless stated otherwise in a Specific Condition of this permit. The averaging time for each emissions limit, including those based on energy input of a Unit (i.e. lb/MMBtu) is one (1) hour unless stated otherwise in a Specific Condition of this permit or in the applicable requirement that establishes the limit. (20.2.70.302.A.1 and G.3 NMAC)

D. The permittee shall submit compliance certification reports certifying the compliance status of this facility with respect to all permit terms and conditions, including applicable requirements. These reports shall be made on the pre-populated Compliance Certification Report Form that is provided to the permittee by the Department, and shall be submitted to the Department and to EPA at least every 12 months. Please contact the Compliance Reporting Unit at submittals.aqb@state.nm.us for the most current form. Submit reports to the Air Quality Bureau Compliance Reporting (AQBCR) application located at: https://www.env.nm.gov/air-quality/compliance-and-enforcement/ or as directed by the Department. Additional guidance may be found at (20.2.70.302.E.3 NMAC).

E. The permittee shall allow representatives of the Department, upon presentation of credentials and other documents as may be required by law, to do the following (20.2.70.302.G.1 NMAC):

(1) enter the permittee's premises where a source or emission unit is located, or where records that are required by this permit to be maintained are kept;

(2) have access to and copy, at reasonable times, any records that are required by this permit to be maintained;

(3) inspect any facilities, equipment (including monitoring and air pollution control equipment), work practices or operations regulated or required under this permit; and

(4) sample or monitor any substances or parameters for the purpose of assuring compliance with this permit or applicable requirements or as otherwise authorized by the Federal Act.

B113 Permit Reopening and Revocation

A. This permit will be reopened and revised when any one of the following conditions occurs, and may be revoked and reissued when A(3) or A(4) occurs. (20.2.70.405.A.1 NMAC)

(1) Additional applicable requirements under the Federal Act become applicable to a major source three (3) or more years before the expiration date of this permit. If the effective date of the requirement is later than the expiration date of this permit, then the permit is not required to be reopened unless the original permit or any of its terms and conditions has been extended due to the Department's failure to take timely action on a request by the permittee to renew this permit.

(2) Additional requirements, including excess emissions requirements, become applicable to this source under Title IV of the Federal Act (the acid rain program). Upon approval by the Administrator, excess emissions offset plans will be incorporated into this permit.

(3) The Department or the Administrator determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms and conditions of the permit.

(4) The Department or the Administrator determines that the permit must be revised or revoked and reissued to assure compliance with an applicable requirement.

B. Proceedings to reopen or revoke this permit shall affect only those parts of this permit for which cause to reopen or revoke exists. Emissions units for which permit conditions have been revoked shall not be operated until new permit conditions have been issued for them. (20.2.70.405.A.2 NMAC)

B114 Emergencies

(20.2.70.304 NMAC)

A. An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.

B. An emergency constitutes an affirmative defense to an action brought for noncompliance with technology-based emission limitations contained in this permit if the permittee has

demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(2) This facility was at the time being properly operated;

(3) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards or other requirements in this permit; and

(4) The permittee submitted notice of the emergency to the Department within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of 20.2.70.302.E.2 NMAC. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

C. In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

D. This provision is in addition to any emergency or upset provision contained in any applicable requirement.

B115 Stratospheric Ozone
(20.2.70.302.A.1 NMAC)

A. If this facility is subject to 40 CFR 82, Subpart F, the permittee shall comply with the following standards for recycling and emissions reductions:

(1) Persons opening appliances for maintenance, service, repair, or disposal must comply with the required practices, except for motor vehicle air conditioners (MVAC) and MVAC-like appliances. (40 CFR 82.156)

(2) Equipment used during the maintenance, service, repair, or disposal of appliances must comply with the standards for recycling and recovery equipment. (40 CFR 82.158)

(3) Persons performing maintenance, service, repair, or disposal of appliances must be certified by an approved technician certification program. (40 CFR 82.161)

B116 Acid Rain Sources
(20.2.70.302.A.9 NMAC)

A. If this facility is subject to the federal acid rain program under 40 CFR 72, this section applies.

B. Where an applicable requirement of the Federal Act is more stringent than an applicable requirement of regulations promulgated under Title IV of the Federal Act, both provisions are incorporated into this permit and are federally enforceable.

C. Emissions exceeding any allowances held by the permittee under Title IV of the Federal Act or the regulations promulgated thereunder are prohibited.

D. No modification of this permit is required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit modification under any other applicable requirement.

E. The permittee may not use allowances as a defense to noncompliance with any other applicable requirement.

F. No limit is placed on the number of allowances held by the acid rain source. Any such allowance shall be accounted for according to the procedures established in regulations promulgated under Title IV of the Federal Act.

G. The acid rain permit is an enclosure of this operating permit.

B117 Risk Management Plan
(20.2.70.302.A.1 NMAC)

A. If this facility is subject to the federal risk management program under 40 CFR 68, this section applies.

B. The owner or operator shall certify annually that they have developed and implemented a RMP and are in compliance with 40 CFR 68.

C. If the owner or operator of the facility has not developed and submitted a risk management plan according to 40 CFR 68.150, the owner or operator shall provide a compliance schedule for the development and implementation of the plan. The plan shall describe, in detail, procedures for assessing the accidental release hazard, preventing accidental releases, and developing an emergency response plan to an accidental release. The plan shall be submitted in a method and format to a central point as specified by EPA prior to the date specified in 40 CFR 68.150.b.

PART C MISCELLANEOUS

C100 Supporting On-Line Documents

A. Copies of the following documents can be downloaded from NMED's web site under Compliance and Enforcement or requested from the Bureau.

(1) Excess Emission Form (for reporting deviations and emergencies)

(2) Compliance Certification Report Form

(3) Universal Stack Test Notification, Protocol and Report Form and Instructions

C101 Definitions

A. **"Daylight"** is defined as the time period between sunrise and sunset, as defined by the Astronomical Applications Department of the U.S. Naval Observatory. (Data for one day or a table of sunrise/sunset for an entire year can be obtained at http://aa.usno.navy.mil/. Alternatively, these times can be obtained from a Farmers Almanac or from http://www.almanac.com/rise/).

B. **"Decommission"** and **"Decommissioning"** applies to units left on site (not removed) and is defined as the complete disconnecting of equipment, emission sources or activities from the process by disconnecting all connections necessary for operation (i.e. piping, electrical, controls, ductwork, etc.).

C. **"Exempt Sources"** and **"Exempt Activities"** is defined as those sources or activities that are exempted in accordance with 20.2.72.202 NMAC. Note; exemptions are only valid for most 20.2.72 permitting action.

D. **"Fugitive emission"** means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. (20.2.70.7M NMAC)

E. **"Insignificant Activities"** means those activities which have been listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate. (20.2.70.7Q NMAC)

F. **"Malfunction"** for the requirements under 20.2.7 NMAC**,** means any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction.

G. **"Natural Gas"** is defined as a naturally occurring fluid mixture of hydrocarbons that contains 20.0 grains or less of total sulfur per 100 standard cubic feet (SCF) and is either

composed of at least 70% methane by volume or has a gross calorific value of between 950 and 1100 Btu per standard cubic foot. (40 CFR 60.331)

H. **"Natural Gas Liquids"** means the hydrocarbons, such as ethane, propane, butane, and pentane, that are extracted from field gas. (40 CFR 60.631)

I. **"National Ambient Air Quality Standards"** means the primary (health-based) and secondary (welfare-related) federal ambient air quality standards promulgated by the US EPA pursuant to Section 109 of the Federal Act. (20.2.72.7Q NMAC)

J. **"NO_2"** or **"Nitrogen dioxide"** means the chemical compound containing one atom of nitrogen and two atoms of oxygen, for the purposes of ambient determinations. The term **"nitrogen dioxide,"** for the purposes of stack emissions monitoring, shall include nitrogen dioxide (the chemical compound containing one atom of nitrogen and two atoms of oxygen), nitric oxide (the chemical compound containing one atom of nitrogen and one atom of oxygen), and other oxides of nitrogen which may test as nitrogen dioxide and is sometimes referred to as NOx or NO_2. (20.2.2.7U NMAC)

K. **"NOx"** see NO_2

L. "**Paved Road**" is a road with a permanent solid surface that can be swept essentially free of dust or other material to reduce air re-entrainment of particulate matter. To the extent these surfaces remain solid and contiguous they qualify as paved roads: concrete, asphalt, chip seal, recycled asphalt and other surfaces approved by the Department in writing.

M. **"Potential Emission Rate"** means the emission rate of a source at its maximum capacity to emit a regulated air contaminant under its physical and operational design, provided any physical or operational limitation on the capacity of the source to emit a regulated air contaminant, including air pollution 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 physical and operational design only if the limitation or the effect it would have on emissions is enforceable by the department pursuant to the Air Quality Control Act or the Federal Act. (20.2.72.7Y NMAC)

N. "**Restricted Area-Non Military**" is an area to which public entry is effectively precluded. Effective barriers include continuous fencing, continuous walls, or other continuous barriers approved by the Department, such as rugged physical terrain with a steep grade that would require special equipment to traverse. If a large property is completely enclosed by fencing, a restricted area within the property may be identified with signage only. Public roads cannot be part of a Restricted Area.

O. **"Shutdown"** for requirements under 20.2.72.7BB NMAC, means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose, except routine phasing out of batch process units.

P. **"SSM"** for requirements under 20.2.7 NMAC, means routine or predictable startup, shutdown, or scheduled maintenance.

(1) **"Shutdown"** for requirements under 20.2.7.7H NMAC, means the cessation of operation of any air pollution control equipment or process equipment.

(2) **"Startup"** for requirements under 20.2.7.7I NMAC, means the setting into operation of any air pollution control equipment or process equipment.

Q. **"Startup"** for requirements under 20.2.72.7DD NMAC, means the setting into operation of any air pollution control equipment, process equipment or process for any purpose, except routine phasing in of batch process units.

C102 Acronyms

2SLB ..... 2-stroke lean burn
4SLB ..... 4-stroke lean burn
4SRB ..... 4-stroke rich burn
acfm ..... actual cubic feet per minute
AFR ..... air fuel ratio
AP-42 ..... EPA Air Pollutant Emission Factors
AQB ..... Air Quality Bureau
AQCR ..... Air Quality Control Region
ASTM ..... American Society for Testing & Materials
Btu ..... British thermal unit
CAA ..... Clean Air Act of 1970 and 1990 Amendments
CEM ..... continuous emissions monitoring
cfh ..... cubic feet per hour
cfm ..... cubic feet per minute
CFR ..... Code of Federal Regulation
CI ..... compression ignition
CO ..... carbon monoxide
COMS ..... continuous opacity monitoring system
EIB ..... Environmental Improvement Board
EPA ..... United States Environmental Protection Agency
gr/100 cf ..... grains per one hundred cubic feet
gr/dscf ..... grains per dry standard cubic foot
GRI ..... Gas Research Institute
H_2S ..... hydrogen sulfide
HAP ..... hazardous air pollutant
hp ..... horsepower
IC ..... Internal Combustion
KW/hr ..... kilowatts per hour
lb/hr ..... pounds per hour
lb/MMBtu ..... pounds per million British thermal unit
MACT ..... Maximum Achievable Control Technology

MMcf/hr.....million cubic feet per hour
MMscf.....million standard cubic feet
N/A.....not applicable
NAAQS.....National Ambient Air Quality Standards
NESHAP .....National Emission Standards for Hazardous Air Pollutants
NG .....natural gas
NGL .....natural gas liquids
NMAAQS .....New Mexico Ambient Air Quality Standards
NMAC..... New Mexico Administrative Code
NMED.....New Mexico Environment Department
NMSA .....New Mexico Statues Annotated
NOx.....nitrogen oxides
NSCR ..... non-selective Catalytic Reduction
NSPS ..... New Source Performance Standard
NSR.....New Source Review
PEM .....parametric emissions monitoring
PM..... particulate matter (equivalent to TSP, total suspended particulate)
PM_{10} .....particulate matter 10 microns and less in diameter
$PM_{2.5}$ .....particulate matter 2.5 microns and less in diameter
pph.....pounds per hour
ppmv ..... parts per million by volume
PSD .....Prevention of Significant Deterioration
RATA.....relative accuracy test assessment
RICE .....reciprocating internal combustion engine
rpm ..... revolutions per minute
scfm..... standard cubic feet per minute
SI ..... spark ignition
SO_2 ..... sulfur dioxide
SSM.....Startup Shutdown Maintenance (see SSM definition)
TAP ..... Toxic Air Pollutant
TBD.....to be determined
THC.....total hydrocarbons
TSP.....Total Suspended Particulates
tpy .....tons per year
ULSD ..... ultra-low sulfur diesel
USEPA ..... United States Environmental Protection Agency
UTM..... Universal Transverse Mercator Coordinate System
UTMH.....Universal Transverse Mercator Horizontal
UTMV.....Universal Transverse Mercator Vertical
VHAP.....volatile hazardous air pollutant
VOC .....volatile organic compounds

From: New Mexico Environment Department
To: Butt, Neal, ENV
Subject: Notice of Availability of Stakeholder Review Draft - Proposed Amendments to 20.2.70 NMAC, Operating Permits
Date: Monday, February 3, 2025 3:34:22 PM

Air Quality Bureau

Regulatory and SIP Bulletin

Having trouble viewing this email? View it as a Web page.

The Air Quality Bureau ("Bureau") in the Environmental Protection Division of the New Mexico Environment Department proposes to repeal and replace 20.2.70 NMAC, *Operating Permits*, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in the New Mexico Title V Permit Program at 20.2.70.304 NMAC, *Emergency Provision*.

On July 12, 2023 (88 FR 47029), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program regulations at 40 CFR 70.6(g) (applicable to state/local/tribal permitting authorities) and 71.6(g) (applicable when EPA is the permitting authority).

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the EPA's interpretation of the enforcement structure of the CAA in light of recent court decisions from the U.S. Court of Appeals for the D.C. Circuit, specifically the Court's decision in *NRDC v. EPA*, 749 F.3d 1055. (D.C. Cir. 2014).

The July 12, 2023 EPA Rule requires state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar Title V affirmative defense provisions from their EPA-approved Title V programs, no later than August 21, 2024. On August 21, 2024, the Bureau submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

In order to implement the program revisions that may be necessary, Title V affirmative defense provisions included within individual operating permits will also need to be removed. EPA expects these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons. At the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of the federal rule change (August 21, 2023) (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 *Applicable Requirement*, and the current NM Title V permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC, which was repealed on November 30, 2018 (20.2.3.109 NMAC, *Total Suspended Particulates*). In addition, the Department must update the regulation to meet current New Mexico Administrative Code requirements per Subsection C of 1.24.11.9 NMAC, and will need to address these changes at the same time the affirmative defense provisions are removed.

The full text of the Bureau's proposed amendment to Part 70 and related documents are available for download at [https://www.env.nm.gov/air-quality/proposed-regs/] or in hard copy at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505. Comments concerning the proposed amendments must be received by the AQB by March 3, 2025. Submit comments to [Comment Portal]

For additional information concerning this bulletin, please contact Neal Butt, at (505) 629-2972 or neal.butt@env.nm.gov .

87502, (505) 827-2855, nd.coordinator@env.nm.gov. You may also visit our website at https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

NMED Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, New Mexico, 87505-1816
(505) 476-4300

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Notice Of Availability Of Stakeholder Review Draft – Proposed Amendments To 20.2.70 NMAC, Operating Permits

Submitted by Carol A. Clark on February 5, 2025 - 10:26 am

NMED News:

The Air Quality Bureau ("Bureau") in the Environmental Protection Division of the New Mexico Environment Department proposes to repeal and replace 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in the New Mexico Title V Permit Program at 20.2.70.304 NMAC, Emergency Provision.

July 12, 2023 (88 FR 47029), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program regulations at 40 CFR 70.6(g) (applicable to

NMED Exhibit 8a

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In order to implement the program revisions that may be necessary, Title V affirmative defense provisions included within individual operating permits will also need to be removed. EPA expects these permit changes will occur in the ordinary course of business as permits are periodically renewed, revised, or reopened for other reasons. At the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of the federal rule change (Aug. 21, 2023) (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC, which was repealed Nov. 30, 2018 (20.2.3.109 NMAC, Total Suspended Particulates). In addition, the Department must update the regulation to meet current New Mexico Administrative Code requirements per Subsection C of 1.24.11.9 NMAC, and will need to address these changes at the same time the affirmative defense provisions are removed.

NMED Exhibit 8a

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NMED Exhibit 8a

NMED Exhibit 8a

From:	Henderson, Nicholas, SRCA
To:	Butt, Neal, ENV
Cc:	Hejny, Jessica, ENV; Lopez, Shannon, ENV; Jones, Sara, ENV; Peters, Eric, ENV
Subject:	RE: Request for review of draft amendments to 20.2.70 NMAC, Operating Permits
Date:	Friday, February 28, 2025 8:39:58 AM
Attachments:	20_2_70 NMAC SRCA Review Draft 2-11-25.docx

Good morning Neal,

Thank you for getting this to me, see my comments in the document. When you send it back for another review after making corrections, please send it without the redline and strikeouts.

If you have any questions, let me know.

Nicholas Henderson
RULES ANALYST, NEW MEXICO REGISTER
ADMINISTRATIVE LAW DIVISION
EMAIL ADDRESS: nicholas.henderson@srca.nm.gov

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1205 Camino Carlos Rey,
Santa Fe, New Mexico 87507

From: Butt, Neal, ENV <Neal.Butt@env.nm.gov>
Sent: Tuesday, February 11, 2025 3:43 PM
To: Henderson, Nicholas, SRCA <nicholas.henderson@srca.nm.gov>
Cc: Hejny, Jessica, ENV <jessica.hejny@env.nm.gov>; Lopez, Shannon, ENV <shannon.lopez@env.nm.gov>; Jones, Sara, ENV <sara.jones@env.nm.gov>; Peters, Eric, ENV <eric.peters@env.nm.gov>
Subject: Request for review of draft amendments to 20.2.70 NMAC, Operating Permits

Good afternoon, Nicholas,

We are proposing amendments to 20.2.70 NMAC, *Operating Permits*, and plan on going to hearing in June. I would like to request that you review the attached draft and provide comments by February 28, 2025.

I understand that this rule will need to be repealed and replaced, and so there will not be any redline strikeout in the rule I file with you. However, I wanted show you where our proposed changes will be, so I used redline strikeout to indicate the substantive changes and yellow

highlighting to indicate non-substantive changes to capitalization and punctuation.

Please let me know if you have any questions.

Thank you,

Neal T. Butt
Environmental Analyst
NMED - Air Quality Bureau

8801 Horizon Blvd NE
Albuquerque, NM 87113
(505) 629-2972

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TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 70 OPERATING PERMITS

20.2.70.1 ISSUING AGENCY: Environmental Improvement Board.
[11/30/95; 20.2.70.1 NMAC - Rn, 20 NMAC 20.2.70.100, 06/14/02]

20.2.70.2 SCOPE: All persons who own or operate a major source or any other source required to obtain a permit under this Part.
[11/30/95; 20.2.70.2 NMAC - Rn, 20 NMAC 20.2.70.101, 06/14/02]

20.2.70.3 STATUTORY AUTHORITY: Environmental Improvement Act, ~~[NMSA 1978, section 74-1-8 (A)(4) and (7)]~~ Paragraphs (4) and (7) of Subsection A of Section 74-1-8 NMSA 1978, and Air Quality Control Act, ~~[NMSA 1978,]~~ Sections 74-2-1 et seq., NMSA 1978, including specifically, ~~[section 74-2-5 (A), (B), and (C) and (D)]~~ Subsections A, B, D and E of Section 74-2-5.
[11/30/95; 20.2.70.3 NMAC - Rn, 20 NMAC 20.2.70.102, 06/14/02]

20.2.70.4 DURATION: Permanent.
[11/30/95; 20.2.70.4 NMAC - Rn, 20 NMAC 20.2.70.103, 06/14/02]

20.2.70.5 EFFECTIVE DATE: ~~[11/30/95]~~ November 30, 1995, except where a later date is cited at the end of a section.
[11/30/95; 20.2.70.5 NMAC - Rn, 20 NMAC 20.2.70.I.104, 06/14/02; A, 9/6/06]
[The latest effective date of any section in this Part is ~~[01/01/2011]~~ 02/06/13.]

20.2.70.6 OBJECTIVE: The objective of this Part is to establish the requirements for obtaining an operating permit.
[11/30/95; 20.2.70.6 NMAC - Rn, 20 NMAC 20.2.70.105, 06/14/02]

20.2.70.7 DEFINITIONS: In addition to the terms defined in 20.2.2 NMAC (definitions), as used in this Part the following definitions shall apply.

A. **"Acid rain source"** has the meaning given to "affected source" in the regulations promulgated under Title IV of the federal act, and includes all sources subject to Title IV of the federal act.

B. **"Affected programs"** means all states, local air pollution control programs, and Indian tribes and pueblos, that are within 50 miles of the source.

C. **"Air pollutant"** means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used. This excludes water vapor, nitrogen (N2), oxygen (O2), and ethane.

D. **"Air pollution control equipment"** means any device, equipment, process or combination thereof, the operation of which would limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state. This includes, but is not limited to, sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection.

E. **"Applicable requirement"** means all of the following, as they apply to a Part 70 source or to an emissions unit at a Part 70 source (including requirements that have been promulgated or approved by the board or US EPA through rulemaking at the time of permit issuance but have future-effective compliance dates).

(1) Any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52.

(2) Any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent.

Commented [NH1]: All history notes need to be replaced and should look like the following [20.2.70.100 NMAC – Rp, 20.2.70.100 NMAC, xx/xx/2025]

Commented [NH2]: Add NMSA 1978

Commented [NH3]: Effective date of new rule will replace 11/30/95

(3) Any standard or other requirement under Section 111 of the federal act, including Section 111(d).

(4) Any standard or other requirement under Section 112 of the federal act, including any requirement concerning accident prevention under Section 112(r)(7) of the federal act.

(5) Any standard or other requirement of the acid rain program under Title IV of the federal act or the regulations promulgated thereunder.

(6) Any requirements established pursuant to Section 504(b) or Section 114(a)(3) of the federal act.

(7) Any standard or other requirement under Section 126(a)(1) and (c) of the federal act.

[~~(7)~~](8) Any standard or other requirement governing solid waste incineration under Section 129 of the federal act.

[~~(8)~~](9) Any standard or other requirement for consumer and commercial products under Section 183(e) of the federal act.

[~~(9)~~](10) Any standard or other requirement for tank vessels under Section 183(f) of the federal act.

[~~(10)~~](11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the federal act, unless the administrator has determined that such requirements need not be contained in a Title V permit.

[~~(11)~~](12) Any national ambient air quality standard or [~~.~~ **(12)** ~~Any~~] increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act. This means that general permits for temporary sources must consider these requirements, but they are not applicable for other operating permits under this Part.

[~~(13)~~](13) Any [~~regulation~~] rule adopted by the board pursuant to the New Mexico Air Quality Control Act, [~~Section 74-2-5(B) NMSA 1978~~] Subsection B of Section 74-2-5, NMSA 1978.

F. "CFR" means the Code of Federal Regulations.

G. "Draft permit" means a version of a permit which the department offers for public participation or affected program review.

H. "Emission limitation" means a requirement established by US EPA, the board, or the department, that limits the quantity, rate or concentration, or combination thereof, of emissions of regulated air pollutants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

I. "Emissions allowable under the permit" means:

(1) any state or federally enforceable permit term or condition that establishes an emission limit (including a work practice standard) requested by the applicant and approved by the department or determined at issuance or renewal to be required by an applicable requirement; or

(2) any federally enforceable emissions cap that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject.

J. "Emissions unit" means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any air pollutant listed pursuant to Section 112(b) of the federal act. This term is not meant to alter or affect the definition of the term "unit" for purposes of Title IV of the federal act.

K. "Federally enforceable" means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within the New Mexico state implementation plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including 40 CFR 51.165 and 40 CFR 51.166.

L. "Final permit" means the version of an operating permit issued by the department that has met all review requirements of 20.2.70.400 NMAC - 20.2.70.499 NMAC.

M. "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

N. "General permit" means an operating permit that meets the requirements of 20.2.70.303 NMAC.

O. "Greenhouse gas" for the purpose of this Part is defined as the aggregate group of the following six gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

P. "Hazardous air pollutant" means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act.

Q. "Insignificant activities" means those activities which have been listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate.

R. **"Major source"** means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person(s)) in which all of the pollutant emitting activities at such source belong to the same major group (i.e., all have the same two-digit code), as described in the standard industrial classification manual, 1987, and that is described in Paragraphs (1), (2) or (3) [~~below~~] of Subsection R of 20.2.70.7 NMAC.

(1) A major source under Section 112 of the federal act, which is defined as the following.

(a) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons or more per year of any hazardous air pollutant which has been listed pursuant to Section 112 (b) of the federal act, 25 or more tons per year of any combination of such hazardous air pollutants (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator), or such lesser quantity as the administrator may establish by rule. Notwithstanding the preceding sentence, hazardous emissions from any oil or gas exploration or production well (with its associated equipment) and hazardous emissions from any pipeline compressor or pump station shall not be aggregated with hazardous emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.

(b) For radionuclides, "major source" shall have the meaning specified by the administrator by rule.

(2) A major stationary source of air pollutants that directly emits or has the potential to emit, 100 or more tons per year of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of [~~this~~] Paragraph (2) of Subsection R of 20.2.70.7 NMAC, unless the source belongs to one of the following categories of stationary sources:

(a) coal cleaning plants (with thermal dryers);
(b) kraft pulp mills;
(c) portland cement plants;
(d) primary zinc smelters;
(e) iron and steel mills;
(f) primary aluminum ore reduction plants;
(g) primary copper smelters;
(h) municipal incinerators capable of charging more than 250 tons of refuse per day;
(i) hydrofluoric, sulfuric, or nitric acid plants;
(j) petroleum refineries;
(k) lime plants;
(l) phosphate rock processing plants;
(m) coke oven batteries;
(n) sulfur recovery plants;
(o) carbon black plants (furnace process);
(p) primary lead smelters;
(q) fuel conversion plant;
(r) sintering plants;
(s) secondary metal production plants;
(t) chemical process plants;
(u) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(v) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(w) taconite ore processing plants;
(x) glass fiber processing plants;
(y) charcoal production plants;
(z) fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(aa) any other stationary source category, which as of August 7, 1980, is being regulated under Section 111 or 112 of the federal act.

(3) A major stationary source as defined in Part D of Title I of the federal act, including:

(a) for ozone non-attainment areas, sources with the potential to emit 100 tons or more per year of volatile organic compounds or nitrogen oxides in areas classified as "marginal" or "moderate," 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as "severe," and 10 tons or more per year in areas classified as "extreme"; except that the references in [~~this Paragraph~~] Subparagraph (a) of Paragraph (3) of Subsection R of 20.2.70.7 NMAC to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply with respect to any source for which the administrator has made a finding, under Section 182(f)(1) or (2) of the federal act, that requirements under Section 182(f) of the federal act do not apply;

(b) for ozone transport regions established pursuant to Section 184 of the federal act, sources with the potential to emit 50 tons or more per year of volatile organic compounds;

(c) for carbon monoxide non-attainment areas (1) that are classified as "serious," and (2) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the administrator, sources with the potential to emit 50 tons or more per year of carbon monoxide; and

(d) for particulate matter (PM10) non-attainment areas classified as "serious," sources with the potential to emit 70 tons or more per year of PM10.

S. "Operating permit" or **"permit"** (unless the context suggests otherwise) means any permit or group of permits covering a source that is issued, renewed, modified or revised pursuant to this Part.

T. "Operator" means the person or persons responsible for the overall operation of a facility.

U. "Owner" means the person or persons who own a facility or part of a facility.

V. "Part" means an air quality control regulation under Title 20, Chapter 2 of the New Mexico Administrative Code, unless otherwise noted; as adopted or amended by the board.

W. "Part 70 source" means any source subject to the permitting requirements of this Part, as provided in 20.2.70.200 NMAC - 20.2.70.299 NMAC.

X. "Permit modification" means a revision to an operating permit that meets the requirements of significant permit modifications, minor permit modifications, or administrative permit amendments, as defined in 20.2.70.404 NMAC.

Y. "Permittee" means the owner, operator or responsible official at a permitted Part 70 source, as identified in any permit application or modification.

Z. "Portable source" means any plant that is mounted on any chassis or skids and which can be moved by the application of a lifting or pulling force. In addition, there shall be no cable, chain, turnbuckle, bolt or other means (except electrical connections) by which any piece of equipment is attached or clamped to any anchor, slab, or structure, including bedrock, that must be removed prior to the application of a lifting or pulling force for the purpose of transporting the unit. Portable sources may include sand and gravel plants, rock crushers, asphalt plants and concrete batch plants which meet this criteria.

AA. "Potential to emit" means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution 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 limitation is federally enforceable. The potential to emit for nitrogen dioxide shall be based on total oxides of nitrogen.

AB. "Proposed permit" means the version of a permit that the department proposes to issue and forwards to the administrator for review in compliance with 20.2.70.402 NMAC.

AC. "Regulated air pollutant" means the following:

(1) nitrogen oxides[~~, total suspended particulate matter,~~] or any volatile organic compounds;

(2) any pollutant for which a national ambient air quality standard has been promulgated;

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

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

(5) any pollutant subject to a standard promulgated under Section 112 or any other requirements established under Section 112 of the federal act, including Sections 112(g), (j), and (r), including the following;

(a) any pollutant subject to requirements under Section 112(j) of the federal act; if the administrator fails to promulgate a standard by the date established pursuant to Section 112(e) of the federal act, any pollutant for which a subject source would be a major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to Section 112(e) of the federal act; and

(b) any pollutant for which the requirements of Section 112(g)(2) of the federal act have been met, but only with respect to the individual source subject to a Section 112(g)(2) requirement; or

(6) any other pollutant subject to regulation as defined in Subsection AL of [~~this section~~] 20.2.70.7 NMAC.

AD. "Renewal" means the process by which a permit is reissued at the end of its term.

AE. "Responsible official" means one of the following:

(1) for a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(a) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(b) the delegation of authority to such representative is approved in advance by the department;

(2) for a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) for a municipality, state, federal or other public agency: either a principal executive officer or ranking elected official; for the purposes of this Part, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of US EPA); or

(4) for an acid rain source: the designated representative (as defined in Section 402(26) of the federal act) in so far as actions, standards, requirements, or prohibitions under Title IV of the federal act or the regulations promulgated thereunder are concerned; and for any other purposes under 40 CFR, Part 70.

AF. "Section 502(b)(10) changes" are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

AG. "Shutdown" means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose.

AH. "Solid waste incineration unit" means a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). The term "solid waste incineration unit" does not include:

(1) incinerators or other units required to have a permit under Section 3005 of the federal Solid Waste Disposal Act;

(2) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(3) qualifying small power production facilities, as defined in Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)), or qualifying cogeneration facilities, as defined in Section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(4) air curtain incinerators, provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations established by the administrator by rule.

AI. "Startup" means the setting into operation of any air pollution control equipment, process equipment or process for any purpose.

AJ. "Stationary source" or **"source"** means any building, structure, facility, or installation, or any combination thereof that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the federal act.

AK. "Subsidiary" means a business concern which is owned or controlled by, or is a partner of, the applicant or permittee.

AL. "Subject to regulation" means, for any air pollutant, that the pollutant is subject to either a provision in the act, or a nationally-applicable regulation codified by the administrator in Subchapter C of 40 CFR Chapter I, 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, unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tons per year CO_2e equivalent emissions;

(2) the term **"tons per year CO_2e equivalent emissions"** (CO_2e) shall represent the aggregate amount of GHGs emitted by the regulated activity, and shall be computed by multiplying the mass amount of emissions (tons per year), 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 40 CFR Part 98 - Global Warming Potentials, and summing the resultant value for each gas; for purposes of ~~[this]~~ Paragraph (2) of Subsection AL of 20.2.70.7 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);

(3) if a federal court stays, invalidates or otherwise renders unenforceable by the US EPA, in whole or in part, the prevention of significant deterioration and Title V greenhouse gas tailoring rule (75 FR 31514, June 3, 2010), the definition "subject to regulation" shall be enforceable by the department only to the extent that it is enforceable by US EPA.

AM. **"Temporary source"** means any plant that is situated in one location for a period of less than one year, after which it will be dismantled and removed from its current site or relocated to a new site. A temporary source may be semi-permanent, which means that is does not have to meet the requirements of a portable source. Temporary sources may include well head compressors which meet this criteria.

AN. **"Title I modification"** means any modification under Sections 111 or 112 of the federal act and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Parts C and D of the federal act.

[11/30/95; 20.2.70.7 NMAC - Rn, 20 NMAC 2.70.I.107, 06/14/02; A, 11/07/02; A, 09/06/06; A, 01/01/11; A, 02/06/13]

20.2.70.8 **AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS:** This Part amends and supersedes Air Quality Control Regulation ("AQCR") 770, - Operating Permits, filed November 15, 1993, as amended ("AQCR 770"). The original effective date of AQCR 770 was December 19, 1994, which was the effective date of approval, by the administrator, of the New Mexico operating permit program. (See 59 FR 59656, November 18, 1994).

A. All references to AQCR 770 in any other rule shall be construed as a reference to this Part.

B. The amendment and supersession of AQCR 770 shall not affect any administrative or judicial enforcement action pending on the effective date of such amendment nor the validity of any permit issued pursuant to AQCR 770.

[11/30/95; 20.2.70.8 NMAC - Rn, 20 NMAC 2.70.106, 06/14/02]

20.2.70.9 **DOCUMENTS:** Documents cited in this Part may be viewed at the New Mexico Environment Department, Air Quality Bureau, Runnels Building, 1190 Saint Francis Drive, Santa Fe, NM 87505 [1301 Siler Rd., Bldg. B, Santa Fe, NM 87507].

[11/30/95; 20.2.70.9 NMAC - Rn, 20 NMAC 2.70.108, 06/14/02; A, 01/01/11]

20.2.70.10 to 20.2.70.199 [RESERVED]

20.2.70.200 **PART 70 SOURCES:** Operating permits must be obtained from the department for the following sources:

A. any major source;

B. any source, including an area source, subject to a standard or other requirement promulgated under Section 111 -- Standards of Performance for New Stationary Sources, or Section 112 -- Hazardous Air Pollutants, of the federal act, but not including any source which:

(1) is exempted under Subsection B of 20.2.70.202 NMAC; or

(2) would be required to obtain a permit solely because it is subject to regulations or requirements under Section 112(r) of the federal act;

C. any acid rain source; and

D. any source in a source category so designated by the administrator, in whole or in part, by regulation, after notice and comment.
[11/30/95; 20.2.70.200 NMAC - Rn, 20 NMAC 2.70.200, 06/14/02]

20.2.70.201 REQUIREMENT FOR A PERMIT:

A. A Part 70 source may operate after the time that it is required to submit a timely and complete application under this Part only if:

(1) the source is in compliance with an operating permit issued by the department or EPA; or

(2) a timely permit (including permit renewal) application has been submitted consistent with 20.2.70.300 NMAC; the ability to operate under these circumstances shall cease if the applicant fails to submit by the deadline specified in writing by the department any additional information identified as being needed to process the application.

B. Revocation or termination of a permit by the department terminates the permittee's right to operate.

C. The submittal of a complete operating permit application shall not protect any source from any applicable requirement, including any requirement that the source have a preconstruction permit under Title I of the federal act or state regulations.

D, Requirement for permit under 20.2.72 NMAC.

(1) Part 70 sources that have an operating permit and do not have a permit issued under 20.2.72 NMAC or 20.2.74 NMAC shall submit a complete application for a permit under 20.2.72 NMAC within 180 days of September 6, 2006. The department shall consider and may grant reasonable requests for extension of this deadline on a case-by-case basis.

(2) Part 70 sources that do not have an operating permit or a permit under 20.2.72 NMAC upon the effective date of ~~[this subsection]~~ 20.2.70.201 NMAC shall submit an application for a permit under 20.2.72 NMAC within 60 days after submittal of an application for an operating permit.

(3) Paragraphs (1) and (2) of ~~[this]~~ Subsection D of 20.2.70.201 NMAC shall not apply to sources that have demonstrated compliance with both the national and state ambient air quality standards through dispersion modeling or other method approved by the department and that have requested incorporation of conditions in their operating permit to ensure compliance with these standards.
[11/30/95; 20.2.70.201 NMAC - Rn, 20 NMAC 2.70.II.201, 06/14/02; A, 9/6/06]

20.2.70.202 SOURCE CATEGORY EXEMPTIONS:

A. The following source categories are exempted from the obligation to obtain an operating permit:

(1) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 60, Subpart AAA -- Standards of Performance for New Residential Wood Heaters;

(2) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 61, Subpart M -- National Emission Standard for Hazardous Air Pollutants for Asbestos, Section 61.145, Standard for Demolition and Renovation;

(3) except as required under Sections 20.2.70.500 NMAC - 20.2.70.599 NMAC, any source that would be required to obtain a permit solely because of emissions of radionuclides; and

(4) any source in a source category exempted by the administrator, by regulation, after notice and comment.

B. Non-major sources, including those subject to Sections 111 or 112 of the federal act, are exempt from the obligation to obtain a Part 70 (20.2.70 NMAC) permit until such time that the administrator completes a rulemaking that requires such sources to obtain operating permits.

C. Any source exempted from the requirement to obtain an operating permit may opt to apply for a permit under this Part.

D. No permit for a solid waste incineration unit shall be issued by the department if a New Mexico state agency is responsible, in whole or in part, for the design and construction or operation of the unit. In such cases, applications shall be made to the administrator. Department review or approval of solid waste incineration units shall not constitute responsibility for the design, construction, or operation of the unit.
[11/30/95; 20.2.70.202 NMAC - Rn, 20 NMAC 2.70.202, 06/14/02]

20.2.70.203 EXISTING MAJOR SOURCES WHICH ARE NOT REQUIRED TO HAVE A PERMIT UNDER 20.2.72 NMAC (CONSTRUCTION PERMITS):

A. The owner or operator of any major source may reverse or avoid designation as a major source under this Part by obtaining a permit under 20.2.72 NMAC (Construction Permits) which includes federally enforceable conditions which restrict the potential to emit of the source to non-major emission rates. Such conditions may include emissions limitations, process restrictions [~~and/or~~] or limitations or both, restrictions on annual hours of operation, or other conditions which reduce the facility's potential to emit.

B. **[REPEALED]**

[11/30/95; A, 11/19/97; 20.2.70.203 NMAC - Rn, 20 NMAC 2.70.203, 06/14/02]

20.2.70.204 BERNALILLO COUNTY: For the operation of sources within Bernalillo County, the applicant shall make such applications to the air pollution control division of the Albuquerque environmental health department or its successor agency or authority.

[11/30/95; 20.2.70.204 NMAC - Rn, 20 NMAC 2.70.204, 06/14/02]

20.2.70.205 INDIAN TRIBAL JURISDICTION: The requirements of this Part do not apply to sources within Indian Tribal jurisdiction. For the operation of sources in that jurisdiction, the applicant should make such applications to the Tribal Authority or to the administrator, as appropriate.

[11/30/95; 20.2.70.205 NMAC - Rn, 20 NMAC 2.70.205, 06/14/02]

20.2.70.206 to 20.2.70.299 [RESERVED]

20.2.70.300 PERMIT APPLICATIONS:

A. Duty to apply. For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this Part.

B. Timely application. A timely application for a source applying for a permit under this Part is:

(1) for first time applications, one that is submitted within [~~twelve (~~] 12[)] months after the source commences operation as a Part 70 source;

(2) for purposes of permit renewal, one that is submitted at least [~~twelve (~~]12[)] months prior to the date of permit expiration;

(3) for the acid rain portion of permit applications for initial phase II acid rain sources under Title IV of the federal act, by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

C. Completeness of application.

(1) To be deemed complete, an application must provide all information required pursuant to Subsection D of 20.2.70.300 NMAC, except that applications for permit modifications need supply such information only if it is related to the proposed change.

(2) If, while processing an application, regardless of whether it has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response.

(3) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application or in a supplemental submittal shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide further information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(4) The applicant's ability to operate without a permit, as set forth in Paragraph (2) of Subsection A of 20.2.70.201 NMAC, shall be in effect from the date a timely application is submitted until the final permit is issued or disapproved, provided that the applicant adequately submits any requested additional information by the deadline specified by the department.

D. Content of application. Any person seeking a permit under this Part shall do so by filing a written application with the department. The applicant shall submit three [~~(3)~~] copies of the permit application, or more, as requested by the department. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under 20.2.71 NMAC (operating permit emission fees). Fugitive emissions shall be included in the permit application in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. All applications shall meet the following requirements.

(1) Be made on forms furnished by the department, which for the acid rain portions of permit applications and compliance plans shall be on nationally-standardized forms to the extent required by regulations promulgated under Title IV of the federal act.

(2) State the company's name and address (and, if different, plant name and address), together with the names and addresses of the owner(s), responsible official and the operator of the source, any subsidiaries or parent companies, the company's state of incorporation or principal registration to do business and corporate or partnership relationship to other permittees subject to this Part, and the telephone numbers and names of the owners' agent(s) and the site contact(s) familiar with plant operations.

(3) State the date of the application.

(4) Include a description of the source's processes and products (by standard industrial classification code) including any associated with alternative scenarios identified by the applicant, and a map, such as the 7.5-minute topographic quadrangle map published by the United States geological survey or the most detailed map available showing the exact location of the source. The location shall be identified by latitude and longitude or by Universal Transverse Mercator (UTM) coordinates.

(5) For all emissions of all air pollutants for which the source is major and all emissions of regulated air pollutants, provide all emissions information, calculations and computations for the source and for each emissions unit, except for insignificant activities (as defined in 20.2.70.7 NMAC). This shall include:

(a) a process flow sheet of all components of the facility which would be involved in routine operations and emissions;

(b) identification and description of all emissions points in sufficient detail to establish the basis for fees and applicability of requirements of the state and federal acts;

(c) emissions rates in tons per year, pounds per hour and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method;

(d) specific information such as that regarding fuels, fuel use, raw materials, or production rates, to the extent it is needed to determine or regulate emissions;

(e) identification and full description, including all calculations and the basis for all control efficiencies presented, of air pollution control equipment and compliance monitoring devices or activities;

(f) the maximum and standard operating schedules of the source, as well as any work practice standards or limitations on source operation which affect emissions of regulated pollutants;

(g) if requested by the department, an operational plan defining the measures to be taken to mitigate source emissions during startups, shutdowns and emergencies;

(h) other relevant information as the department may reasonably require or which are required by any applicable requirements (including information related to stack height limitations developed pursuant to Section 123 of the federal act); and

(i) for each alternative operating scenario identified by the applicant, all of the information required in Subparagraphs (a) through (h) [~~above~~] of Paragraph (5) of Subsection D of 20.2.70.300 NMAC, as well as additional information determined to be necessary by the department to define such alternative operating scenarios.

(6) Provide a list of insignificant activities (as defined in 20.2.70.7 NMAC) at the source, their emissions, to the extent required by the department, and any information necessary to determine applicable requirements.

(7) Provide a citation and description of all applicable air pollution control requirements, including:

(a) sufficient information related to the emissions of regulated air pollutants to verify the requirements that are applicable to the source; and

(b) a description of or reference to any applicable test method for determining compliance with each applicable requirement.

(8) Provide an explanation of any proposed exemptions from otherwise applicable requirements.

(9) Provide other specific information that may be necessary to implement and enforce other requirements of the state or federal acts or to determine the applicability of such requirements, including information necessary to collect any permit fees owed under 20.2.71 NMAC (operating permit emission fees).

(10) Provide certification of compliance, including all of the following.

(a) A certification, by a responsible official consistent with Subsection E of 20.2.70.300 NMAC, of the source's compliance status for each applicable requirement. For national ambient air quality standards, certifications shall be based on the following.

(i) For first time applications, this certification shall be based on modeling submitted with the application for a permit under 20.2.72 NMAC.

(ii) For permit renewal applications, this certification shall be based on compliance with the relevant terms and conditions of the current operating permit.

(b) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

(c) A statement that the source will continue to be in compliance with applicable requirements for which it is in compliance, and will, in a timely manner or at such schedule expressly required by the applicable requirement, meet additional applicable requirements that become effective during the permit term.

(d) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the department.

(e) A statement indicating the source's compliance status with any enhanced monitoring and compliance certification requirements of the federal act.

(11) For sources that are not in compliance with all applicable requirements at the time of permit application, provide a compliance plan that contains all of the following.

(a) A description of the compliance status of the source with respect to all applicable requirements.

(b) A narrative description of how the source will achieve compliance with such requirements for which it is not in compliance.

(c) A schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with such applicable requirements. The schedule of compliance shall be at least as stringent as that contained in any consent decree or administrative order to which the source is subject, and the obligations of any consent decree or administrative order shall not be in any way diminished by the schedule of compliance. Any such schedule of compliance shall be supplemental to, and shall not prohibit the department from taking any enforcement action for noncompliance with, the applicable requirements on which it is based.

(d) A schedule for submission of certified progress reports no less frequently than every six [~~(6)~~] months.

(e) For the portion of each acid rain source subject to the acid rain provisions of Title IV of the federal act, the compliance plan content requirements specified in [~~this~~] Paragraph (11) of Subsection D of 20.2.70.300 NMAC , except as specifically superseded by regulations promulgated under Title IV of the federal act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

E. Certification. Any document, including any application form, report, or compliance certification, submitted pursuant to this Part shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this Part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

[11/30/95; A, 11/14/98; 20.2.70.300 NMAC - Rn, 20 NMAC 2.70.III.300, 06/14/02; A, 9/6/06; A, 01/01/11]

20.2.70.301 CONFIDENTIAL INFORMATION PROTECTION:

A. All confidentiality claims made regarding material submitted to the department under this Part shall be reviewed under the provisions of the New Mexico Air Quality Control Act Section 74-2-11 NMSA 1978 and the New Mexico Inspection of Public Records Act, Sections 14-2-1 et seq. NMSA 1978.

B. In the case where an applicant or permittee has submitted information to the department under a claim of confidentiality, the department may also require the applicant or permittee to submit a copy of such information directly to the administrator.

C. An operating permit is a public record, and not entitled to protection under Section 114(c) of the federal act.

[11/30/95; 20.2.70.301 NMAC - Rn, 20 NMAC 2.70.301, 06/14/02]

20.2.70.302 PERMIT CONTENT:

A. Permit conditions.

(1) The department shall specify conditions upon a permit, including emission limitations and sufficient operational requirements and limitations, to assure compliance with all applicable requirements at the time of permit issuance or as specified in the approved schedule of compliance. The permit shall:

(a) for major sources, include all applicable requirements for all relevant emissions units in the major source;

(b) for any non-major source subject to 20.2.70.200 NMAC - 20.2.70.299 NMAC, include all applicable requirements which apply to emissions units that cause the source to be subject to this Part;

(c) specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based;

(d) include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit;

(e) include a provision to ensure that the permittee pays fees to the department consistent with the fee schedule in 20.2.71 NMAC (Operating Permit Emission Fees); and

(f) for purposes of the permit shield, identify any requirement specifically identified in the permit application or significant permit modification that the department has determined is not applicable to the source, and state the basis for any such determination.

(2) Each permit issued shall, additionally, include provisions stating the following.

(a) The permittee shall comply with all terms and conditions of the permit. Any permit noncompliance is grounds for enforcement action. In addition, noncompliance with federally enforceable permit conditions constitutes a violation of the federal act.

(b) It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

(c) The permit may be modified, reopened and revised, revoked and reissued, or terminated for cause in accordance with 20.2.70.405 NMAC.

(d) The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance shall not stay any permit condition.

(e) The permit does not convey any property rights of any sort, or any exclusive privilege.

(f) Within the period specified by the department, the permittee shall furnish any information that the department may request in writing to determine whether cause exists for reopening and revising, revoking and reissuing, or termination of the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the department copies of records required by the permit to be maintained.

(3) The terms and conditions for all alternative operating scenarios identified in the application and approved by the department:

(a) shall require that the permittee maintain a log at the permitted facility which documents, contemporaneously with any change from one operating scenario to another, the scenario under which the facility is operating; and

(b) shall, for each such alternative scenario, meet all applicable requirements and the requirements of this Part.

(4) The department may impose conditions regulating emissions during startup and shutdown.

(5) All permit terms and conditions which are required under the federal act or under any of its applicable requirements, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator and citizens under the federal act. The permit shall specifically designate as not being federally enforceable under the federal act any terms or conditions included in the permit that are not required under the federal act or under any of its applicable requirements.

(6) The issuance of a permit, or the filing or approval of a compliance plan, does not relieve any person from civil or criminal liability for failure to comply with the provisions of the Air Quality Control Act, the federal act, federal regulations thereunder, any applicable regulations of the board, and any other applicable law or regulation.

(7) The department may include part or all of the contents of the application as terms and conditions of the permit or permit modification. The department shall not apply permit terms and conditions upon emissions of regulated pollutants for which there are no applicable requirements, unless the source is major for that pollutant.

(8) Fugitive emissions from a source shall be included in the operating permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(9) The acid rain portion of operating permits for acid rain sources shall additionally:

(a) state that, where an applicable requirement of the federal act is more stringent than an applicable requirement of regulations promulgated under Title IV of the federal act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator; and

(b) contain a permit condition prohibiting emissions exceeding any allowances that the acid rain source lawfully holds under Title IV of the federal act or the regulations promulgated thereunder; no permit modification under this Part shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit modification under any other applicable requirement; no limit shall be placed on the number of allowances held by the acid rain source; the permittee may not use allowances as a defense to noncompliance with any other applicable requirement; any such allowance shall be accounted for according to the procedures established in regulations promulgated under Title IV of the federal act.

B. Permit duration. The department shall issue operating permits for a fixed term of five [~~(5)~~] years.

C. Monitoring.

(1) Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.

(2) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to Subsection E of 20.2.70.302 NMAC. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.

(3) The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.

D. Recordkeeping.

(1) The permit shall require recordkeeping sufficient to assure and verify compliance with the terms and conditions of the permit, including recordkeeping of:

(a) the date, place as defined in the permit, and time of sampling or measurements;

(b) the date(s) analyses were performed;

(c) the company or entity that performed the analyses;

(d) the analytical techniques or methods used;

(e) the results of such analyses; and

(f) the operating conditions existing at the time of sampling or measurement.

(2) Records of all monitoring data and support information shall be retained for a period of at least five [~~(5)~~] years from the date of the monitoring sample, measurement, report, or application. Supporting information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

E. Reporting. The permit shall require reporting sufficient to assure and verify compliance with the terms and conditions of the permit and all applicable requirements, including all of the following.

(1) Submittal of reports of any required monitoring at least every six [~~(6)~~] months. The reports shall be due to the department within [~~forty-five (~~] 45[~~)~~] days of the end of the permittee's reporting period. All instances of deviations from permit requirements, including emergencies, must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Subsection E of 20.2.70.300 NMAC.

(2) Prompt reporting of all deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The report shall be contained in the report submitted in accordance with the timeframe given in Paragraph (1) of [~~this section~~] Subsection E of 20.2.70.302 NMAC.

(3) Submittal of compliance certification reports at least every [~~twelve (~~] 12[~~)~~] months (or more frequently if so specified by an applicable requirement) certifying the source's compliance status with terms and conditions contained in the permit, including emission limitations, standards, or work practices. The reports shall be due to the department within [~~thirty (~~]30[~~)~~] days of the end of the permittee's reporting period. Such compliance certifications shall be submitted to the administrator as well as to the department and shall include:

(a) the identification of each term or condition of the permit that is the basis of the certification;

(b) the compliance status of the source;

(c) whether compliance was continuous or intermittent;

(d) the method(s) used for determining the compliance status of the source, currently and during the reporting period identified in the permit; and

(e) such other facts as the department may require to determine the compliance status of the source.

(4) Such additional provisions as may be specified by the administrator to determine the compliance status of the source.

F. Portable and temporary sources. The department may issue permits for portable and temporary sources which allow such sources to relocate without undergoing a permit modification. Such permits shall not apply to acid rain sources and shall include conditions to assure that:

(1) the source is installed at all locations in a manner conforming with the permit;

(2) the source shall comply with all applicable requirements and all other provisions of this Part at all authorized locations;

(3) the owner or operator shall notify the department in writing at least [~~fifteen (~~]15[~~)~~] calendar days in advance of each change in location;

(4) notification shall include a legal description of where the source is to be relocated and how long it will be located there; and

(5) emissions from the source shall not, at any location, result in or contribute to an exceedance of a national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal act; the department may require dispersion modeling to assure compliance at any location.

G. Compliance. To assure and verify compliance with the terms and conditions of the permit and with this Part, permits shall also include all the following.

(1) Require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow authorized representatives of the department to perform the following:

(a) enter upon the permittee's premises where a source is located or emission related activity is conducted, or where records must be kept under the conditions of the permit;

(b) have access to and copy any records that must be kept under the conditions of the permit;

(c) inspect any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(d) sample or monitor any substances or parameters for the purpose of assuring compliance with the permit or applicable requirements or as otherwise authorized by the federal act.

(2) Require that sources required under Paragraph (11) of Subsection D of 20.2.70.300 NMAC to have a schedule of compliance submit progress reports to the department at least semiannually, or more frequently if specified in the applicable requirement or by the department. Such progress reports shall be consistent with the schedule of compliance and requirements of Paragraph (11) of Subsection D of 20.2.70.300 NMAC and shall contain:

(a) dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(b) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(3) Include such other provisions as the department may require.

H. Operational flexibility.

(1) Section 502(b)(10) changes.

(a) The permittee may make Section 502(b)(10) changes, as defined in 20.2.70.7 NMAC, without applying for a permit modification, if those changes are not Title I modifications and the changes do not cause the facility to exceed the emissions allowable under the permit (whether expressed as a rate of emissions or in terms of total emissions).

(b) For each such change, the permittee shall provide written notification to the department and the administrator at least seven [~~(7)~~] days in advance of the proposed changes. Such notification shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(c) The permittee and department shall attach each such notice to their copy of the relevant permit.

(d) If the written notification and the change qualify under this provision, the permittee is not required to comply with the permit terms and conditions it has identified that restrict the change. If the change does not qualify under this provision, the original terms of the permit remain fully enforceable.

(2) Emissions trading within a facility.

(a) The department shall, if an applicant requests it, issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit in addition to any applicable requirements. Such terms and conditions shall include all terms and conditions required under 20.2.70.302 NMAC to determine compliance. If applicable requirements apply to the requested emissions trading, permit conditions shall be issued only to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval.

(b) The applicant shall include in the application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The department shall not include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall require compliance with all applicable requirements.

(c) For each such change, the permittee shall provide written notification to the department and the administrator at least seven [~~(7)~~] days in advance of the proposed changes. Such notification shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(d) The permittee and department shall attach each such notice to their copy of the relevant permit.

I. Off-permit changes.

(1) Permittees are allowed to make, without a permit modification, changes that are not addressed or prohibited by the operating permit, if:

(a) each such change meets all applicable requirements and shall not violate any existing permit term or condition;

(b) such changes are not subject to any requirements under Title IV of the federal act and are not Title I modifications;

(c) such changes are not subject to permit modification procedures under 20.2.70.404 NMAC; and

(d) the permittee provides contemporaneous written notice to the department and US EPA of each such change, except for changes that qualify as insignificant activities. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted and any applicable requirement that would apply as a result of the change.

(2) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

J. Permit shield.

(1) Except as provided in this Part, the department shall expressly include in a Part 70 (20.2.70 NMAC) permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(a) such applicable requirements are included and are specifically identified in the permit; or

(b) the department, in acting on the permit application or significant permit modification, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A Part 70 (20.2.70 NMAC) permit that does not expressly state that a permit shield exists for a specific provision shall be presumed not to provide such a shield for that provision.

(3) Nothing in this Section or in any Part 70 (20.2.70 NMAC) permit shall alter or affect the following:

(a) the provisions of Section 303 of the federal act - Emergency Powers, including the authority of the administrator under that Section, or the provisions of the New Mexico Air Quality Control Act, Section 74-2-10 NMSA 1978;

(b) the liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(c) the applicable requirements of the acid rain program, consistent with Section 408(a) of the federal act; or

(d) the ability of US EPA to obtain information from a source pursuant to Section 114 of the federal act, or the department to obtain information subject to the New Mexico Air Quality Control Act, Section 74-2-13 NMSA 1978.

(4) The permit shield shall remain in effect if the permit terms and conditions are extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC.

(5) The permit shield shall extend to terms and conditions that allow emission increases and decreases as part of emissions trading within a facility pursuant to Paragraph (2) of Subsection H of 20.2.70.302 NMAC, and to all terms and conditions under each operating scenario included pursuant to Paragraph (3) of Subsection A of 20.2.70.302 NMAC.

(6) The permit shield shall not extend to administrative amendments under Subsection A of 20.2.70.404 NMAC, to minor permit modifications under Subsection B of 20.2.70.404 NMAC, to Section 502(b)(10) changes under Paragraph (1) of Subsection H of 20.2.70.302 NMAC, or to permit terms or conditions for which notice has been given to reopen or revoke all or part under 20.2.70.405 NMAC.

[11/30/95; A, 11/14/98; 20.2.70.302 NMAC - Rn, 20 NMAC 2.70.III.302, 06/14/02; A, 9/6/06; A, 08/01/08]

20.2.70.303 GENERAL PERMITS:

A. Issuance of general permits.

(1) The department may, after notice and opportunity for public participation and US EPA and affected program review, issue a general permit covering numerous similar sources. Such sources shall be generally homogenous in terms of operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.

(2) Any general permit shall comply with all requirements applicable to other operating permits and shall identify criteria by which sources may qualify for the general permit.

B. Authorization to operate under a general permit.

(1) The owner or operator of a Part 70 source which qualifies for a general permit must:

(a) apply to the department for coverage under the terms of the general permit; or

(b) apply for an operating permit consistent with 20.2.70.300 NMAC.

(2) The department may, in the general permit, provide for applications which deviate from the requirements of Subsection D of 20.2.70.300 NMAC, provided that such applications meet the requirements of the federal act and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The department shall review the application for authorization to operate under a general permit for completeness within [~~thirty (~~]30[~~)~~] days after its receipt of the application.

(3) The department shall authorize qualifying sources which apply for coverage under the general permit to operate under the terms and conditions of the general permit. The department shall take final action on a general permit authorization request within [~~ninety (~~]90[~~)~~] days of deeming the application complete.

(4) The department may grant a request for authorization to operate under a general permit without repeating the public participation procedures required under 20.2.70.401 NMAC. Such an authorization shall not be a permitting action for purposes of administrative review under New Mexico Air Quality Control Act [~~section 74-2-7.H NMSA 1978~~] Subsection H of Section 74-2-7, NMSA 1978. Permitting action for the purposes of Section 74-2-7 NMSA 1978 shall be the issuance of the general permit.

(5) Authorization to operate under a general permit shall not be granted for acid rain sources unless otherwise provided in regulations promulgated under Title IV of the federal act.

(6) The permittee shall be subject to enforcement action for operation without an operating permit if the source is later determined not to qualify for the conditions and terms of the general permit.

[11/30/95; 20.2.70.303 NMAC - Rn, 20 NMAC 2.70.303, 06/14/02]

20.2.70.304 [~~EMERGENCY PROVISION:~~

~~**A.** An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.~~

~~**B.** An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the permittee has demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~**(1)** an emergency occurred and that the permittee can identify the cause(s) of the emergency;~~

~~**(2)** the permitted facility was at the time being properly operated;~~

~~**(3)** during the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards or other requirements in the permit; and~~

~~**(4)** the permittee submitted notice of the emergency to the department within 2 working days of the time when emission limitations were exceeded due to the emergency; this notice fulfills the requirement of Paragraph (2) of Subsection E of 20.2.70.302 NMAC; this notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~**C.** In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.~~

~~**D.** This provision is in addition to any emergency or upset provision contained in any applicable requirement.~~] [RESERVED]

[11/30/95; 20.2.70.304 NMAC - Rn, 20 NMAC 2.70.III.304, 06/14/02; A, 9/6/06; A, 08/01/08]

20.2.70.305 to 20.2.70.399 [RESERVED]

20.2.70.400 ACTION ON PERMIT APPLICATIONS:

A. A permit (including permit renewal) or permit modification shall only be issued if all of the following conditions have been met:

(1) the department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 20.2.70.303 NMAC;

(2) except for administrative and minor permit modifications, the department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;

(3) except for administrative amendments, the department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;

(4) the conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and

(5) the administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within [~~that Section~~] 20.2.70.402 NMAC.

B. The department shall, within [~~sixty (~~]60[~~)~~] days after its receipt of an application for a permit or significant permit modification, review such application for completeness. Unless the department determines that an application is not complete, requests additional information or otherwise notifies the applicant of incompleteness within [~~sixty (~~]60[~~)~~] days of receipt of an application, the application shall be deemed complete. When additional information is requested by the department prior to ruling an application complete, receipt of such information shall be processed as a new application for purposes of [~~this Section~~] 20.2.70.400 NMAC. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

C. The department shall take final action on each permit application (including a request for permit renewal) within [~~eighteen (~~]18[~~)~~] months after an application is ruled complete by the department, except that:

(1) for sources in operation on or before December 19, 1994 and which submit to the department timely and complete applications in accordance with 20.2.70.300 NMAC, the department shall take final action on one-third of such applications annually over a period not to exceed three [~~(3)~~] years after such effective date;

(2) any complete permit application containing an early reduction demonstration under Section 112(i)(5) of the federal act shall be acted on within nine [~~(9)~~] months of deeming the application complete; and

(3) the acid rain portion of permits for acid rain sources shall be acted upon in accordance with the deadlines in Title IV of the federal act and the regulations promulgated thereunder.

D. If a timely and complete application for a permit renewal is submitted, consistent with 20.2.70.300 NMAC, but the department has failed to issue or disapprove the renewal permit before the end of the term of the

previous permit, then the permit shall not expire and all the terms and conditions of the permit shall remain in effect until the renewal permit has been issued or disapproved.

E. Permits being renewed are subject to the same procedural requirements, including those for public participation, affected program and US EPA review, that apply to initial permit issuance.

F. The department shall state within the draft permit the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).

G. The department shall grant or disapprove the permit based on information contained in the department's administrative record. The administrative record shall consist of the application, any additional information submitted by the applicant, any evidence or written comments submitted by interested persons, any other evidence considered by the department, and, if a public hearing is held, the evidence submitted at the hearing.

H. If the department grants or disapproves a permit or permit modification, the department shall notify the applicant by certified mail of the action taken and the reasons therefor. If the department grants a permit or modification, the department shall mail the permit or modification, including all terms and conditions, to the applicant by certified mail.

I. Voluntary discontinuation. Upon request by the permittee, the department shall permanently discontinue a Part 70 (20.2.70 NMAC) permit. Permit discontinuance terminates the permittee's right to operate the source under the permit. The department shall confirm the permit discontinuance by certified letter to the permittee.

J. No permit shall be issued by failure of the department to act on an application or renewal.

[11/30/95; 20.2.70.400 NMAC - Rn, 20 NMAC 2.70.400, 06/14/02]

20.2.70.401 PUBLIC PARTICIPATION:

A. Proceedings for all permit issuances (except administrative and minor permit modifications, pursuant to Paragraph (2) of Subsection A of 20.2.70.400 NMAC) [~~(~~]including renewals[~~)~~], significant permit modifications, reopenings, revocations and terminations, and all modifications to the department's list of insignificant activities, shall include public notice and provide an opportunity for public comment. The department shall provide [~~thirty (~~]30[~~)~~] days for public and affected program comment. The department may hold a public hearing on the draft permit, a proposal to suspend, reopen, revoke or terminate a permit, or for any reason it deems appropriate, and shall hold such a hearing in the event of significant public interest. The department shall give notice of any public hearing at least [~~thirty (~~]30[~~)~~] days in advance of the hearing.

B. Public notice and notice of public hearing shall be given by publication in a newspaper of general circulation in the area where the source is located or in a state publication designed to give general public notice, to persons on a mailing list developed by the department, including those who request in writing to be on the list, and by other means if necessary to assure adequate notice to the affected public.

C. The public notice shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the emissions change(s) involved in any permit modification;

(6) the name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, and relevant supporting materials;

(7) a brief description of the comment procedures required by the department; and

(8) as appropriate, a statement of procedures to request a hearing, or the time and place of any scheduled hearing.

D. Notice of public hearing shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the name, address and telephone number of a person from whom interested persons may obtain additional information;

(6) a brief description of hearing procedures; and

(7) the time and place of the scheduled hearing.

E. Public hearings shall be held in the geographic area likely to be impacted by the source. The time, date, and place of the hearing shall be determined by the department. The department shall appoint a hearing

officer. A transcript of the hearing shall be made at the request of either the department or the applicant and at the expense of the person requesting the transcript. At the hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

F. The department shall keep a record of the commenters and also of the issues raised during the public participation process so that the administrator may fulfill his or her obligation under Section 505(b)(2) of the federal act to determine whether a citizen petition may be granted. Such records shall be available to the public upon request.

G. The department shall provide such notice and opportunity for participation by affected programs as is provided for by 20.2.70.402 NMAC.

[11/30/95; 20.2.70.401 NMAC - Rn, 20 NMAC 2.70.401, 06/14/02]

20.2.70.402 REVIEW BY THE ADMINISTRATOR AND AFFECTED PROGRAMS:

A. Notification: The department shall not issue an operating permit (including permit renewal or reissuance), minor permit modification or significant permit modification, until affected programs and the administrator have had an opportunity to review the proposed permit as required under [~~this Section~~] 20.2.70.402 NMAC. Permits for source categories waived by the administrator from this requirement and any permit terms or conditions which are not required under the federal act or under any of its requirements are not subject to administrator review or approval.

(1) Within [~~(5)~~] five days of notification by the department that the application has been determined complete, the applicant shall provide a copy of the complete permit application (including the compliance plan and all additional materials submitted to the department) directly to the administrator. The permit or permit modification shall not be issued without certification to the department of such notification. The department shall provide to the administrator a copy of each draft permit, each proposed permit, each final operating permit, and any other relevant information requested by the administrator.

(2) The department shall provide notice of each draft permit to any affected program on or before the time that the department provides this notice to the public under 20.2.70.401 NMAC, except to the extent that minor permit modification procedures require the timing of the notice to be different.

(3) The department shall keep for five [~~(5)~~] years such records and submit to the administrator such information as the administrator may reasonably require to ascertain whether the state program complies with the requirements of the federal act or related applicable requirements.

B. Responses to objections:

(1) No permit for which an application must be transmitted to the administrator under this Part shall be issued by the department if the administrator, after determining that issuance of the proposed permit would not be in compliance with applicable requirements, objects to such issuance in writing within [~~forty-five (~~]45[~~)~~] days of receipt of the proposed permit and all necessary supporting information.

(2) If the administrator does not object in writing under Paragraph (1) of Subsection B of 20.2.70.402 NMAC, any person may, within [~~sixty (~~]60[~~)~~] days after the expiration of the administrator's 45-day review period, petition the administrator to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in 20.2.70.401 NMAC, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the administrator objects to the permit as a result of a petition filed under [~~this~~] Paragraph (2) of Subsection B of 20.2.70.402 NMAC, the department shall not issue the permit until the administrator's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to the administrator's objection.

(3) The department, as part of the submittal of the proposed permit to the administrator (or as soon as possible after the submittal for minor permit modification procedures allowed under Subsection B of 20.2.70.404 NMAC), shall notify the administrator and any affected program in writing of any refusal by the department to accept all recommendations for the proposed permit that the affected program submitted during the public or affected program review period. The notice shall include the department's reasons for not accepting any such recommendation. The department is not required to accept recommendations that are not based on federally enforceable applicable requirements.

[11/30/95; 20.2.70.402 NMAC - Rn, 20 NMAC 2.70.402, 06/14/02]

20.2.70.403 PETITIONS FOR REVIEW OF FINAL ACTION:

A. Hearing before the board:

(1) Any person who participated in a permitting action before the department and who is adversely affected by such permitting action may file a petition for hearing before the board. For the purposes of [~~this Section~~] 20.2.70.403 NMAC, permitting action shall include the failure of the department to take final action on an application for a permit (including renewal) or permit modification within the time specified in this Part.

(2) The petition shall be made in writing to the board within [~~thirty (~~]30[~~)~~] days from the date notice is given of the department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered as required by [~~this~~] Paragraph (2) of Subsection A of 20.2.70.403 NMAC, and attach a copy of the permitting action for which review is sought. Unless a timely request for hearing is made, the decision of the department shall be final. The petition shall be copied simultaneously to the department upon receipt of the appeal notice. If the petitioner is not the applicant or permittee, the petitioner shall mail or hand-deliver a copy of the petition to the applicant or permittee. The department shall certify the administrative record to the board.

(3) If a timely request for hearing is made, the board shall hold a hearing within [~~sixty (~~]60[~~)~~] days of receipt of the petition in accordance with New Mexico Air Quality Control Act Section 74-2-7 NMSA 1978.

B. Judicial review:

(1) Any person who is adversely affected by an administrative action taken by the board pursuant to Subsection A of 20.2.70.403 NMAC may appeal to the court of appeals in accordance with New Mexico Air Quality Control Act, Section 74-2-9 NMSA 1978. Petitions for judicial review must be filed no later than [~~thirty (~~]30[~~)~~] days after the administrative action.

(2) The judicial review provided for by 20.2.70.403 NMAC shall be the exclusive means for obtaining judicial review of the terms and conditions of the permit.

[11/30/95; 20.2.70.403 NMAC - Rn, 20 NMAC 2.70.403, 06/14/02; A, 08/01/08]

20.2.70.404 PERMIT MODIFICATIONS:

A. Administrative permit amendments:

(1) An administrative permit amendment is one that:

(a) corrects typographical errors;

(b) provides for a minor administrative change at the source, such as a change in the address or phone number of any person identified in the permit;

(c) incorporates a change in the permit solely involving the retiring of an emissions unit;

(d) requires more frequent monitoring or reporting by the permittee; or

(e) any other type of change which has been determined by the department and the administrator to be similar to those in [~~this~~] Paragraph (1) of Subsection A of 20.2.70.404 NMAC.

(2) Changes in ownership or operational control of a source may be made as administrative amendments provided that:

(a) a written agreement, containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee, has been submitted to the department, and either the department has determined that no other change in the permit is necessary, or changes deemed necessary by the department have been made;

(b) the new owners have submitted the application information required in Paragraph (2) of Subsection D of 20.2.70.300 NMAC;

(c) no grounds exist for permit termination, as set out in Subparagraphs (b) and (c) of Paragraph (3) of Subsection A of 20.2.70.405 NMAC; and

(d) the permittee has published a public notice of the change in ownership of the source in a newspaper of general circulation in the area where the source is located.

(3) The department may incorporate administrative permit amendments without providing notice to the public or affected programs, provided that it designates any such permit modifications as administrative permit amendments and submits a copy of the revised permit to the administrator.

(4) The department shall take no more than [~~sixty (~~]60[~~)~~] days from receipt of a request for an administrative permit amendment to take final action on such request. The permittee may implement the changes outlined in Subparagraphs (a) through (d) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC immediately upon submittal of the request for the administrative amendment. The permittee may implement the changes outlined in Subparagraph (e) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC or Paragraph (2) of Subsection A of 20.2.70.404 NMAC upon approval of the administrative amendment by the department.

B. Minor permit modifications:

(1) Minor permit modification procedures may be used only for those permit modifications that:

(a) do not violate any applicable requirement;

(b) do not involve relaxation of existing monitoring, reporting, or recordkeeping requirements in the permit;

(c) do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(d) do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include any federally enforceable emissions cap assumed to avoid classification as a Title I modification and any alternative emissions limit approved pursuant to regulations promulgated under Section 112(i)(5) of the federal act;

(e) are not Title I modifications; and

(f) are not required by the department to be processed as a significant modification pursuant to Subsection C of 20.2.70.404 NMAC.

(2) A permittee shall not submit multiple minor permit modification applications that may conceal a larger modification that would not be eligible for minor permit modification procedures. The department may, at its discretion, require that multiple related minor permit modification applications be submitted as a significant permit modification.

(3) An application requesting the use of minor permit modification procedures shall meet the requirements of Subsections C and D of 20.2.70.300 NMAC and shall include:

(a) a description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(b) the applicant's suggested draft permit;

(c) certification by a responsible official, consistent with Subsection E of 20.2.70.300 NMAC, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(d) if the requested permit modification would affect existing compliance plans or schedules, related progress reports, or certification of compliance requirements, an outline of such effects.

(4) The department shall, within [~~thirty (~~]30[.)] days after its receipt of an application for a minor permit modification, review such application for completeness. Unless the department determines that an application is not complete, requests additional information or otherwise notifies the applicant of incompleteness within [~~thirty (~~]30[.)] days of receipt of an application, the application shall be deemed complete. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

(5) Within five [~~(5)~~] working days of notification by the department that the minor permit modification application has been determined complete, the applicant shall meet its obligation under Subsection A of 20.2.70.402 NMAC to notify the administrator of the requested permit modification. The department promptly shall send any notice required under Paragraph (2) of Subsection A of 20.2.70.402 NMAC and Subsection B of 20.2.70.402 NMAC to the administrator and affected programs.

(6) The permittee may make the change proposed in its minor permit modification application immediately after such application is deemed complete. After the permittee makes the change allowed by the preceding sentence, and until the department takes any of the actions specified in Paragraph (7) of Subsection B of 20.2.70.404 NMAC below, the permittee must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the permittee need not comply with the existing permit terms and conditions it seeks to modify. If the permittee fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(7) The department may not issue a final minor permit modification until after the administrator's 45-day review period of the proposed permit modification or until US EPA has notified the department that the administrator will not object to issuance of the permit modification, although the department may approve the permit modification prior to that time. Within [~~ninety (~~]90[(] days of ruling the application complete under minor permit modification procedures or within [~~fifteen (~~]15[.)] days after the end of the administrator's 45-day review period, whichever is later, the department shall:

(a) issue the permit modification as it was proposed;

(b) disapprove the permit modification application;

(c) determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(d) revise the draft permit modification and transmit to the administrator the new proposed permit modification as required by Subsection A of 20.2.70.402 NMAC.

C. Significant permit modifications:

(1) A significant permit modification is:

(a) any revision to an operating permit that does not meet the criteria under the provisions for administrative permit amendments under Subsection A of 20.2.70.404 NMAC or for minor permit modifications under Subsection B of 20.2.70.404 NMAC above;

(b) any modification that would result in any relaxation in existing monitoring, reporting or recordkeeping permit terms or conditions;

(c) any modification for which action on the application would, in the judgment of the department, require decisions to be made on significant or complex issues; and

(d) changes in ownership which do not meet the criteria of Paragraph (2) of Subsection A of 20.2.70.404 NMAC.

(2) For significant modifications which are not required to undergo preconstruction permit review and approval, changes to the source which qualify as significant permit modifications shall not be made until the department has issued the operating permit modification.

(3) For significant modifications which have undergone preconstruction permit review and approval, the permittee shall:

(a) before commencing operation, notify the department in writing of any applicable requirements and operating permit terms and conditions contravened by the modification, emissions units affected by the change, and allowable emissions increases resulting from the modification; and

(b) within [~~twelve (~~]12[~~)~~] months after commencing operation, file a complete operating permit modification application.

(4) Where an existing operating permit would specifically prohibit such change, the permittee must obtain an operating permit modification before commencing operation or implementing the change.

(5) Significant permit modifications shall meet all requirements of this Part for permit issuance, including those for applications, public participation, review by affected programs and review by the administrator.

(6) The department shall complete review on the majority of significant permit modification applications within nine [~~(9)~~] months after the department rules the applications complete.

D. Modifications to acid rain sources: Administrative permit amendments and permit modifications for purposes of the acid rain portion of the permit shall be governed by regulations promulgated by the administrator under Title IV of the federal act.

[11/30/95; 20.2.70.404 NMAC - Rn, 20 NMAC 2.70.404, 06/14/02]

20.2.70.405 PERMIT REOPENING, REVOCATION OR TERMINATION:

A. Action by the department:

(1) Each permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised for any of the following, and may be revoked and reissued for Subparagraphs (c) or (d) of [~~the following~~] Paragraph (1) of Subsection A of 20.2.70.405 NMAC:

(a) additional applicable requirements under the federal act become applicable to a major source with a remaining permit term of three [~~(3)~~] or more years. Such a reopening shall be completed not later than [~~eighteen (~~]18[~~)~~] months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms or conditions have been extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC;

(b) additional requirements (including excess emissions requirements) become applicable to a source under the acid rain program promulgated under Title IV of the federal act. Upon approval by the administrator, excess emissions offset plans shall be deemed to be incorporated into the permit;

(c) the department or the administrator determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the permit; or

(d) the department or the administrator determines that the permit must be revised or revoked and reissued to assure compliance with the applicable requirements.

(2) Proceedings to reopen and revise, or revoke and reissue, a permit shall affect only those parts of the permit for which cause to reopen or revoke exists. Units for which permit conditions have been revoked shall not be operated until permit reissuance. Reopenings shall be made as expeditiously as practicable.

(3) A permit, or an authorization to operate under a general permit, may be terminated when:

(a) the permittee fails to meet the requirements of an approved compliance plan;

(b) the permittee has been in significant or repetitious non-compliance with the operating permit terms or conditions;

(c) the applicant or permittee has exhibited a history of willful disregard for environmental laws of any state or Tribal authority, or of the United States;

(d) the applicant or permittee has knowingly misrepresented a material fact in any application, record, report, plan, or other document filed or required to be maintained under the permit;

(e) the permittee falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under the permit;

(f) the permittee fails to pay fees required under the fee schedule in 20.2.71 NMAC (Operating Permit Emission Fees); or

(g) the administrator has found that cause exists to terminate the permit.

(4) The department shall, by certified mail, provide a notice of intent to the permittee at least [~~thirty (~~]30[~~)~~] days in advance of the date on which a permit is to be reopened or revoked, or terminated, except that the department may provide a shorter time period in the case of an emergency. The notice shall state that the permittee may, within 30 [~~(thirty)~~] days of receipt, submit comments or request a hearing on the proposed permit action.

B. Action by the administrator: Within [~~ninety (~~]90[~~(~~] days, or longer if the administrator extends this period, after receipt of written notification that the administrator has found that cause exists to terminate, modify or revoke and reissue a permit, the department shall forward to the administrator a proposed determination of termination, modification, or revocation and reissuance, as appropriate. Within [~~ninety (~~]90[~~(~~] days from receipt of an administrator objection to a proposed determination, the department shall address and act upon the administrator's objection.

C. Compliance orders: Notwithstanding any action which may be taken by the department or the administrator under Subsections A and B of 20.2.70.405 NMAC, a compliance order issued pursuant to New Mexico Air Quality Control Act Section 74-2-12 NMSA 1978 may include a suspension or revocation of any permit or portion thereof.

[11/30/95; 20.2.70.405 NMAC - Rn, 20 NMAC 2.70.405, 06/14/02]

20.2.70.406 CITIZEN SUITS: Pursuant to Section 304 of the federal act, 42 USC 7604, any person may commence certain civil actions under the federal act.

[11/30/95; 20.2.70.406 NMAC - Rn, 20 NMAC 2.70.406, 06/14/02]

20.2.70.407 VARIANCES: Pursuant to New Mexico Air Quality Control Act Section 74-2-8 NMSA 1978, applicants and permittees may seek a variance from the non-federally enforceable provisions of this Part.

[11/30/95; 20.2.70.407 NMAC - Rn, 20 NMAC 2.70.407, 06/14/02]

20.2.70.408 ENFORCEMENT: Notwithstanding any other provision in the New Mexico state implementation plan approved by the administrator, any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of the terms or conditions of a permit issued pursuant to this Part.

A. Information from the use of the following methods is presumptively credible evidence of whether a violation has occurred at the source:

(1) a monitoring or information gathering method approved for the source pursuant to this Part and incorporated in an operating permit; or

(2) compliance methods specified in the New Mexico state implementation plan.

B. The following testing, monitoring or information gathering methods are presumptively credible testing, monitoring or information gathering methods:

(1) any federally enforceable monitoring or testing methods, including those in 40 CFR Parts 51, 60, 61 and 75; and

(2) other testing, monitoring or information gathering methods that produce information comparable to that produced by any method under Subsection A of 20.2.70.408 NMAC or Paragraph (1) of Subsection B of 20.2.70.408 NMAC.
[11/30/95; 20.2.70.408 NMAC - Rn, 20 NMAC 2.70.408, 06/14/02]

20.2.70.409 NMAC to 20.2.70.499 NMAC [RESERVED]

20.2.70.500 NMAC to 20.2.70.599 NMAC [RESERVED]

HISTORY OF 20.2.70 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.
EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93.

History of Repealed Material: [RESERVED]

Other History:
EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93 was **renumbered** into first version of the New Mexico Administrative Code as 20 NMAC 2.70, Operating Permits, filed 10/30/95;
20 NMAC 2.70, Operating Permits, filed 10/30/95 was **renumbered, reformatted and replaced** by 20.2.70 NMAC, Operating Permits, effective 06/14/02.

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 70 OPERATING PERMITS

20.2.70.1 ISSUING AGENCY: Environmental Improvement Board.
[20.2.70.1 NMAC - Rp, 20.2.70.1 NMAC, xx/xx/25]

20.2.70.2 SCOPE: All persons who own or operate a major source or any other source required to obtain a permit under this Part.
[20.2.70.2 NMAC - Rp, 20.2.70.2 NMAC, xx/xx/25]

20.2.70.3 STATUTORY AUTHORITY: Environmental Improvement Act, Paragraphs (4) and (7) of Subsection A of Section 74-1-8 NMSA 1978, and Air Quality Control Act, Sections 74-2-1 et seq., NMSA 1978, including specifically, Subsections A, B, D and E of Section 74-2-5 NMSA 1978.
[20.2.70.3 NMAC - Rp, 20.2.70.3 NMAC, xx/xx/25]

20.2.70.4 DURATION: Permanent.
[20.2.70.4 NMAC - Rp, 20.2.70.4 NMAC, xx/xx/25]

20.2.70.5 EFFECTIVE DATE: Month, Day, 2025, except where a later date is cited at the end of a section.
[20.2.70.5 NMAC - Rp, 20.2.70.5 NMAC, xx/xx/25]

20.2.70.6 OBJECTIVE: The objective of this Part is to establish the requirements for obtaining an operating permit.
[20.2.70.6 NMAC - Rp, 20.2.70.6 NMAC, xx/xx/25]

20.2.70.7 DEFINITIONS: In addition to the terms defined in 20.2.2 NMAC (definitions), as used in this Part the following definitions shall apply.

A. **"Acid rain source"** has the meaning given to "affected source" in the regulations promulgated under Title IV of the federal act, and includes all sources subject to Title IV of the federal act.

B. **"Affected programs"** means all states, local air pollution control programs, and Indian tribes and pueblos, that are within 50 miles of the source.

C. **"Air pollutant"** means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used. This excludes water vapor, nitrogen (N2), oxygen (O2), and ethane.

D. **"Air pollution control equipment"** means any device, equipment, process or combination thereof, the operation of which would limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state. This includes, but is not limited to, sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection.

E. **"Applicable requirement"** means all of the following, as they apply to a Part 70 source or to an emissions unit at a Part 70 source (including requirements that have been promulgated or approved by the board or US EPA through rulemaking at the time of permit issuance but have future-effective compliance dates).

(1) Any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52.

(2) Any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent.

(3) Any standard or other requirement under Section 111 of the federal act, including Section 111(d).

(4) Any standard or other requirement under Section 112 of the federal act, including any requirement concerning accident prevention under Section 112(r)(7) of the federal act.

(5) Any standard or other requirement of the acid rain program under Title IV of the federal act or the regulations promulgated thereunder.

(6) Any requirements established pursuant to Section 504(b) or Section 114(a)(3) of the federal act.

(7) Any standard or other requirement under Section 126(a)(1) and (c) of the federal act.

(8) Any standard or other requirement governing solid waste incineration under Section 129 of the federal act.

(9) Any standard or other requirement for consumer and commercial products under Section 183(e) of the federal act.

(10) Any standard or other requirement for tank vessels under Section 183(f) of the federal act.

(11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the federal act, unless the administrator has determined that such requirements need not be contained in a Title V permit.

(12) Any national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act. This means that general permits for temporary sources must consider these requirements, but they are not applicable for other operating permits under this Part.

(13) Any rule adopted by the board pursuant to the New Mexico Air Quality Control Act, Subsection B of Section 74-2-5, NMSA 1978.

F. "CFR" means the Code of Federal Regulations.

G. "Draft permit" means a version of a permit which the department offers for public participation or affected program review.

H. "Emission limitation" means a requirement established by US EPA, the board, or the department, that limits the quantity, rate or concentration, or combination thereof, of emissions of regulated air pollutants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

I. "Emissions allowable under the permit" means:

(1) any state or federally enforceable permit term or condition that establishes an emission limit (including a work practice standard) requested by the applicant and approved by the department or determined at issuance or renewal to be required by an applicable requirement; or

(2) any federally enforceable emissions cap that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject.

J. "Emissions unit" means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any air pollutant listed pursuant to Section 112(b) of the federal act. This term is not meant to alter or affect the definition of the term "unit" for purposes of Title IV of the federal act.

K. "Federally enforceable" means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within the New Mexico state implementation plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including 40 CFR 51.165 and 40 CFR 51.166.

L. "Final permit" means the version of an operating permit issued by the department that has met all review requirements of 20.2.70.400 NMAC - 20.2.70.499 NMAC.

M. "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

N. "General permit" means an operating permit that meets the requirements of 20.2.70.303 NMAC.

O. "Greenhouse gas" for the purpose of this Part is defined as the aggregate group of the following six gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

P. "Hazardous air pollutant" means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act.

Q. "Insignificant activities" means those activities which have been listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate.

R. "Major source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person(s)) in which all of the pollutant emitting activities at such source belong to the same major group (i.e., all have the same two-digit

code), as described in the standard industrial classification manual, 1987, and that is described in Paragraphs (1), (2) or (3) of Subsection R of 20.2.70.7 NMAC.

(1) A major source under Section 112 of the federal act, which is defined as the following.

(a) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons or more per year of any hazardous air pollutant which has been listed pursuant to Section 112 (b) of the federal act, 25 or more tons per year of any combination of such hazardous air pollutants (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator), or such lesser quantity as the administrator may establish by rule. Notwithstanding the preceding sentence, hazardous emissions from any oil or gas exploration or production well (with its associated equipment) and hazardous emissions from any pipeline compressor or pump station shall not be aggregated with hazardous emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.

(b) For radionuclides, "major source" shall have the meaning specified by the administrator by rule.

(2) A major stationary source of air pollutants that directly emits or has the potential to emit, 100 or more tons per year of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of Paragraph (2) of Subsection R of 20.2.70.7 NMAC, unless the source belongs to one of the following categories of stationary sources:

(a) coal cleaning plants (with thermal dryers);
(b) kraft pulp mills;
(c) portland cement plants;
(d) primary zinc smelters;
(e) iron and steel mills;
(f) primary aluminum ore reduction plants;
(g) primary copper smelters;
(h) municipal incinerators capable of charging more than 250 tons of refuse per day;
(i) hydrofluoric, sulfuric, or nitric acid plants;
(j) petroleum refineries;
(k) lime plants;
(l) phosphate rock processing plants;
(m) coke oven batteries;
(n) sulfur recovery plants;
(o) carbon black plants (furnace process);
(p) primary lead smelters;
(q) fuel conversion plant;
(r) sintering plants;
(s) secondary metal production plants;
(t) chemical process plants;
(u) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(v) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(w) taconite ore processing plants;
(x) glass fiber processing plants;
(y) charcoal production plants;
(z) fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(aa) any other stationary source category, which as of August 7, 1980, is being regulated under Section 111 or 112 of the federal act.

(3) A major stationary source as defined in Part D of Title I of the federal act, including:

(a) for ozone non-attainment areas, sources with the potential to emit 100 tons or more per year of volatile organic compounds or nitrogen oxides in areas classified as "marginal" or "moderate," 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as "severe," and 10

tons or more per year in areas classified as "extreme," except that the references in Subparagraph (a) of Paragraph (3) of Subsection R of 20.2.70.7 NMAC to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply with respect to any source for which the administrator has made a finding, under Section 182(f)(1) or (2) of the federal act, that requirements under Section 182(f) of the federal act do not apply;

(b) for ozone transport regions established pursuant to Section 184 of the federal act, sources with the potential to emit 50 tons or more per year of volatile organic compounds;

(c) for carbon monoxide non-attainment areas (1) that are classified as "serious," and (2) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the administrator, sources with the potential to emit 50 tons or more per year of carbon monoxide; and

(d) for particulate matter (PM10) non-attainment areas classified as "serious," sources with the potential to emit 70 tons or more per year of PM10.

S. "Operating permit" or **"permit"** (unless the context suggests otherwise) means any permit or group of permits covering a source that is issued, renewed, modified or revised pursuant to this Part.

T. "Operator" means the person or persons responsible for the overall operation of a facility.

U. "Owner" means the person or persons who own a facility or part of a facility.

V. "Part" means an air quality control regulation under Title 20, Chapter 2 of the New Mexico Administrative Code, unless otherwise noted; as adopted or amended by the board.

W. "Part 70 source" means any source subject to the permitting requirements of this Part, as provided in 20.2.70.200 NMAC - 20.2.70.299 NMAC.

X. "Permit modification" means a revision to an operating permit that meets the requirements of significant permit modifications, minor permit modifications, or administrative permit amendments, as defined in 20.2.70.404 NMAC.

Y. "Permittee" means the owner, operator or responsible official at a permitted Part 70 source, as identified in any permit application or modification.

Z. "Portable source" means any plant that is mounted on any chassis or skids and which can be moved by the application of a lifting or pulling force. In addition, there shall be no cable, chain, turnbuckle, bolt or other means (except electrical connections) by which any piece of equipment is attached or clamped to any anchor, slab, or structure, including bedrock, that must be removed prior to the application of a lifting or pulling force for the purpose of transporting the unit. Portable sources may include sand and gravel plants, rock crushers, asphalt plants and concrete batch plants which meet this criteria.

AA. "Potential to emit" means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution 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 limitation is federally enforceable. The potential to emit for nitrogen dioxide shall be based on total oxides of nitrogen.

AB. "Proposed permit" means the version of a permit that the department proposes to issue and forwards to the administrator for review in compliance with 20.2.70.402 NMAC.

AC. "Regulated air pollutant" means the following:

(1) nitrogen oxides or any volatile organic compounds;

(2) any pollutant for which a national ambient air quality standard has been promulgated;

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

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

(5) any pollutant subject to a standard promulgated under Section 112 or any other requirements established under Section 112 of the federal act, including Sections 112(g), (j), and (r), including the following;

(a) any pollutant subject to requirements under Section 112(j) of the federal act; if the administrator fails to promulgate a standard by the date established pursuant to Section 112(e) of the federal act, any pollutant for which a subject source would be a major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to Section 112(e) of the federal act; and

(b) any pollutant for which the requirements of Section 112(g)(2) of the federal act have been met, but only with respect to the individual source subject to a Section 112(g)(2) requirement; or

(6) any other pollutant subject to regulation as defined in Subsection AL of 20.2.70.7 NMAC.

AD. "Renewal" means the process by which a permit is reissued at the end of its term.

AE. "Responsible official" means one of the following:

(1) for a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(a) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(b) the delegation of authority to such representative is approved in advance by the department;

(2) for a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) for a municipality, state, federal or other public agency: either a principal executive officer or ranking elected official; for the purposes of this Part, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of US EPA); or

(4) for an acid rain source: the designated representative (as defined in Section 402(26) of the federal act) in so far as actions, standards, requirements, or prohibitions under Title IV of the federal act or the regulations promulgated thereunder are concerned; and for any other purposes under 40 CFR Part 70.

AF. "Section 502(b)(10) changes" are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

AG. "Shutdown" means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose.

AH. "Solid waste incineration unit" means a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). The term "solid waste incineration unit" does not include:

(1) incinerators or other units required to have a permit under Section 3005 of the federal Solid Waste Disposal Act;

(2) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(3) qualifying small power production facilities, as defined in Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)), or qualifying cogeneration facilities, as defined in Section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(4) air curtain incinerators, provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations established by the administrator by rule.

AI. "Startup" means the setting into operation of any air pollution control equipment, process equipment or process for any purpose.

AJ. "Stationary source" or **"source"** means any building, structure, facility, or installation, or any combination thereof that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the federal act.

AK. "Subsidiary" means a business concern which is owned or controlled by, or is a partner of, the applicant or permittee.

AL. "Subject to regulation" means, for any air pollutant, that the pollutant is subject to either a provision in the act, or a nationally-applicable regulation codified by the administrator in Subchapter C of 40 CFR Chapter I, 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, unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tons per year CO_2e equivalent emissions;

(2) the term **"tons per year CO_2e equivalent emissions"** (CO_2e) shall represent the aggregate amount of GHGs emitted by the regulated activity, and shall be computed by multiplying the mass

amount of emissions (tons per year), 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 40 CFR Part 98 - Global Warming Potentials, and summing the resultant value for each gas; for purposes of Paragraph (2) of Subsection AL of 20.2.70.7 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);

(3) if a federal court stays, invalidates or otherwise renders unenforceable by the US EPA, in whole or in part, the prevention of significant deterioration and Title V greenhouse gas tailoring rule (75 FR 31514, June 3, 2010), the definition "subject to regulation" shall be enforceable by the department only to the extent that it is enforceable by US EPA.

AM. "Temporary source" means any plant that is situated in one location for a period of less than one year, after which it will be dismantled and removed from its current site or relocated to a new site. A temporary source may be semi-permanent, which means that it does not have to meet the requirements of a portable source. Temporary sources may include well head compressors which meet this criteria.

AN. "Title I modification" means any modification under Sections 111 or 112 of the federal act and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Parts C and D of the federal act.

[20.2.70.7 NMAC - Rp, 20.2.70.7 NMAC, xx/xx/25]

20.2.70.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS: This Part amends and supersedes Air Quality Control Regulation ("AQCR") 770, - Operating Permits, filed November 15, 1993, as amended ("AQCR 770"). The original effective date of AQCR 770 was December 19, 1994, which was the effective date of approval, by the administrator, of the New Mexico operating permit program. (See 59 FR 59656, November 18, 1994).

A. All references to AQCR 770 in any other rule shall be construed as a reference to this Part.

B. The amendment and supersession of AQCR 770 shall not affect any administrative or judicial enforcement action pending on the effective date of such amendment nor the validity of any permit issued pursuant to AQCR 770.

[20.2.70.8 NMAC - Rp, 20.2.70.8 NMAC, xx/xx/25]

20.2.70.9 DOCUMENTS: Documents cited in this Part may be viewed at the New Mexico Environment Department, Air Quality Bureau. [As of April 2013, the Air Quality Bureau is located at 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico 87505]

[20.2.70.9 NMAC - Rp, 20.2.70.9 NMAC, xx/xx/25]

20.2.70.10 to 20.2.70.199 [RESERVED]

20.2.70.200 PART 70 SOURCES: Operating permits must be obtained from the department for the following sources:

A. any major source;

B. any source, including an area source, subject to a standard or other requirement promulgated under Section 111 -- Standards of Performance for New Stationary Sources, or Section 112 -- Hazardous Air Pollutants, of the federal act, but not including any source which:

(1) is exempted under Subsection B of 20.2.70.202 NMAC; or

(2) would be required to obtain a permit solely because it is subject to regulations or requirements under Section 112(r) of the federal act;

C. any acid rain source; and

D. any source in a source category so designated by the administrator, in whole or in part, by regulation, after notice and comment.

[20.2.70.200 NMAC - Rp, 20.2.70.200 NMAC, xx/xx/25]

20.2.70.201 REQUIREMENT FOR A PERMIT:

A. A Part 70 source may operate after the time that it is required to submit a timely and complete application under this Part only if:

(1) the source is in compliance with an operating permit issued by the department or EPA; or

(2) a timely permit (including permit renewal) application has been submitted consistent with 20.2.70.300 NMAC; the ability to operate under these circumstances shall cease if the applicant fails to submit by the deadline specified in writing by the department any additional information identified as being needed to process the application.

B. Revocation or termination of a permit by the department terminates the permittee's right to operate.

C. The submittal of a complete operating permit application shall not protect any source from any applicable requirement, including any requirement that the source have a preconstruction permit under Title I of the federal act or state regulations.

D. Requirement for permit under 20.2.72 NMAC.

(1) Part 70 sources that have an operating permit and do not have a permit issued under 20.2.72 NMAC or 20.2.74 NMAC shall submit a complete application for a permit under 20.2.72 NMAC within 180 days of September 6, 2006. The department shall consider and may grant reasonable requests for extension of this deadline on a case-by-case basis.

(2) Part 70 sources that do not have an operating permit or a permit under 20.2.72 NMAC upon the effective date of 20.2.70.201 NMAC shall submit an application for a permit under 20.2.72 NMAC within 60 days after submittal of an application for an operating permit.

(3) Paragraphs (1) and (2) of Subsection D of 20.2.70.201 NMAC shall not apply to sources that have demonstrated compliance with both the national and state ambient air quality standards through dispersion modeling or other method approved by the department and that have requested incorporation of conditions in their operating permit to ensure compliance with these standards.

[20.2.70.201 NMAC - Rp, 20.2.70.201 NMAC, xx/xx/25]

20.2.70.202 SOURCE CATEGORY EXEMPTIONS:

A. The following source categories are exempted from the obligation to obtain an operating permit:

(1) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 60, Subpart AAA -- Standards of Performance for New Residential Wood Heaters;

(2) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 61, Subpart M -- National Emission Standard for Hazardous Air Pollutants for Asbestos, Section 61.145, Standard for Demolition and Renovation;

(3) except as required under Sections 20.2.70.500 NMAC - 20.2.70.599 NMAC, any source that would be required to obtain a permit solely because of emissions of radionuclides; and

(4) any source in a source category exempted by the administrator, by regulation, after notice and comment.

B. Non-major sources, including those subject to Sections 111 or 112 of the federal act, are exempt from the obligation to obtain a Part 70 (20.2.70 NMAC) permit until such time that the administrator completes a rulemaking that requires such sources to obtain operating permits.

C. Any source exempted from the requirement to obtain an operating permit may opt to apply for a permit under this Part.

D. No permit for a solid waste incineration unit shall be issued by the department if a New Mexico state agency is responsible, in whole or in part, for the design and construction or operation of the unit. In such cases, applications shall be made to the administrator. Department review or approval of solid waste incineration units shall not constitute responsibility for the design, construction, or operation of the unit.

[20.2.70.202 NMAC - Rp, 20.2.70.202 NMAC, xx/xx/25]

20.2.70.203 EXISTING MAJOR SOURCES WHICH ARE NOT REQUIRED TO HAVE A PERMIT UNDER 20.2.72 NMAC (CONSTRUCTION PERMITS):

A. The owner or operator of any major source may reverse or avoid designation as a major source under this Part by obtaining a permit under 20.2.72 NMAC (Construction Permits) which includes federally enforceable conditions which restrict the potential to emit of the source to non-major emission rates. Such conditions may include emissions limitations, process restrictions or limitations or both, restrictions on annual hours of operation, or other conditions which reduce the facility's potential to emit.

B. [REPEALED]

[20.2.70.203 NMAC - Rp, 20.2.70.203 NMAC, xx/xx/25]

20.2.70.204 BERNALILLO COUNTY: For the operation of sources within Bernalillo County, the applicant shall make such applications to the air pollution control division of the Albuquerque environmental health department or its successor agency or authority.
[20.2.70.204 NMAC - Rp, 20.2.70.204 NMAC, xx/xx/25]

20.2.70.205 INDIAN TRIBAL JURISDICTION: The requirements of this Part do not apply to sources within Indian Tribal jurisdiction. For the operation of sources in that jurisdiction, the applicant should make such applications to the Tribal Authority or to the administrator, as appropriate.
[20.2.70.205 NMAC - Rp, 20.2.70.205 NMAC, xx/xx/25]

20.2.70.206 to 20.2.70.299 [RESERVED]

20.2.70.300 PERMIT APPLICATIONS:

A. Duty to apply. For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this Part.

B. Timely application. A timely application for a source applying for a permit under this Part is:

(1) for first time applications, one that is submitted within 12 months after the source commences operation as a Part 70 source;

(2) for purposes of permit renewal, one that is submitted at least 12 months prior to the date of permit expiration;

(3) for the acid rain portion of permit applications for initial phase II acid rain sources under Title IV of the federal act, by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

C. Completeness of application.

(1) To be deemed complete, an application must provide all information required pursuant to Subsection D of 20.2.70.300 NMAC, except that applications for permit modifications need supply such information only if it is related to the proposed change.

(2) If, while processing an application, regardless of whether it has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response.

(3) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application or in a supplemental submittal shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide further information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(4) The applicant's ability to operate without a permit, as set forth in Paragraph (2) of Subsection A of 20.2.70.201 NMAC, shall be in effect from the date a timely application is submitted until the final permit is issued or disapproved, provided that the applicant adequately submits any requested additional information by the deadline specified by the department.

D. Content of application. Any person seeking a permit under this Part shall do so by filing a written application with the department. The applicant shall submit three copies of the permit application, or more, as requested by the department. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under 20.2.71 NMAC (Operating Permit Emissions Fees). Fugitive emissions shall be included in the permit application in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. All applications shall meet the following requirements.

(1) Be made on forms furnished by the department, which for the acid rain portions of permit applications and compliance plans shall be on nationally-standardized forms to the extent required by regulations promulgated under Title IV of the federal act.

(2) State the company's name and address (and, if different, plant name and address), together with the names and addresses of the owner(s), responsible official and the operator of the source, any subsidiaries or parent companies, the company's state of incorporation or principal registration to do business and corporate or partnership relationship to other permittees subject to this Part, and the telephone numbers and names of the owners' agent(s) and the site contact(s) familiar with plant operations.

(3) State the date of the application.

(4) Include a description of the source's processes and products (by standard industrial classification code) including any associated with alternative scenarios identified by the applicant, and a map, such as the 7.5-minute topographic quadrangle map published by the United States geological survey or the most detailed map available showing the exact location of the source. The location shall be identified by latitude and longitude or by Universal Transverse Mercator (UTM) coordinates.

(5) For all emissions of all air pollutants for which the source is major and all emissions of regulated air pollutants, provide all emissions information, calculations and computations for the source and for each emissions unit, except for insignificant activities (as defined in 20.2.70.7 NMAC). This shall include:

(a) a process flow sheet of all components of the facility which would be involved in routine operations and emissions;

(b) identification and description of all emissions points in sufficient detail to establish the basis for fees and applicability of requirements of the state and federal acts;

(c) emissions rates in tons per year, pounds per hour and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method;

(d) specific information such as that regarding fuels, fuel use, raw materials, or production rates, to the extent it is needed to determine or regulate emissions;

(e) identification and full description, including all calculations and the basis for all control efficiencies presented, of air pollution control equipment and compliance monitoring devices or activities;

(f) the maximum and standard operating schedules of the source, as well as any work practice standards or limitations on source operation which affect emissions of regulated pollutants;

(g) if requested by the department, an operational plan defining the measures to be taken to mitigate source emissions during startups, shutdowns and emergencies;

(h) other relevant information as the department may reasonably require or which are required by any applicable requirements (including information related to stack height limitations developed pursuant to Section 123 of the federal act); and

(i) for each alternative operating scenario identified by the applicant, all of the information required in Subparagraphs (a) through (h) of Paragraph (5) of Subsection D of 20.2.70.300 NMAC, as well as additional information determined to be necessary by the department to define such alternative operating scenarios.

(6) Provide a list of insignificant activities (as defined in 20.2.70.7 NMAC) at the source, their emissions, to the extent required by the department, and any information necessary to determine applicable requirements.

(7) Provide a citation and description of all applicable air pollution control requirements, including:

(a) sufficient information related to the emissions of regulated air pollutants to verify the requirements that are applicable to the source; and

(b) a description of or reference to any applicable test method for determining compliance with each applicable requirement.

(8) Provide an explanation of any proposed exemptions from otherwise applicable requirements.

(9) Provide other specific information that may be necessary to implement and enforce other requirements of the state or federal acts or to determine the applicability of such requirements, including information necessary to collect any permit fees owed under 20.2.71 NMAC (Operating Permit Emissions Fees).

(10) Provide certification of compliance, including all of the following.

(a) A certification, by a responsible official consistent with Subsection E of 20.2.70.300 NMAC, of the source's compliance status for each applicable requirement. For national ambient air quality standards, certifications shall be based on the following.

(i) For first time applications, this certification shall be based on modeling submitted with the application for a permit under 20.2.72 NMAC.

(ii) For permit renewal applications, this certification shall be based on compliance with the relevant terms and conditions of the current operating permit.

(b) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

(c) A statement that the source will continue to be in compliance with applicable requirements for which it is in compliance, and will, in a timely manner or at such schedule expressly required by the applicable requirement, meet additional applicable requirements that become effective during the permit term.

(d) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the department.

(e) A statement indicating the source's compliance status with any enhanced monitoring and compliance certification requirements of the federal act.

(11) For sources that are not in compliance with all applicable requirements at the time of permit application, provide a compliance plan that contains all of the following.

(a) A description of the compliance status of the source with respect to all applicable requirements.

(b) A narrative description of how the source will achieve compliance with such requirements for which it is not in compliance.

(c) A schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with such applicable requirements. The schedule of compliance shall be at least as stringent as that contained in any consent decree or administrative order to which the source is subject, and the obligations of any consent decree or administrative order shall not be in any way diminished by the schedule of compliance. Any such schedule of compliance shall be supplemental to, and shall not prohibit the department from taking any enforcement action for noncompliance with, the applicable requirements on which it is based.

(d) A schedule for submission of certified progress reports no less frequently than every six months.

(e) For the portion of each acid rain source subject to the acid rain provisions of Title IV of the federal act, the compliance plan content requirements specified in Paragraph (11) of Subsection D of 20.2.70.300 NMAC, except as specifically superseded by regulations promulgated under Title IV of the federal act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

E. Certification. Any document, including any application form, report, or compliance certification, submitted pursuant to this Part shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this Part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

[20.2.70.300 NMAC - Rp, 20.2.70.300 NMAC, xx/xx/25]

20.2.70.301 CONFIDENTIAL INFORMATION PROTECTION:

A. All confidentiality claims made regarding material submitted to the department under this Part shall be reviewed under the provisions of the New Mexico Air Quality Control Act Section 74-2-11 NMSA 1978 and the New Mexico Inspection of Public Records Act, Sections 14-2-1 et seq. NMSA 1978.

B. In the case where an applicant or permittee has submitted information to the department under a claim of confidentiality, the department may also require the applicant or permittee to submit a copy of such information directly to the administrator.

C. An operating permit is a public record, and not entitled to protection under Section 114(c) of the federal act.

[20.2.70.301 NMAC - Rp, 20.2.70.301 NMAC, xx/xx/25]

20.2.70.302 PERMIT CONTENT:

A. Permit conditions.

(1) The department shall specify conditions upon a permit, including emission limitations and sufficient operational requirements and limitations, to assure compliance with all applicable requirements at the time of permit issuance or as specified in the approved schedule of compliance. The permit shall:

(a) for major sources, include all applicable requirements for all relevant emissions units in the major source;

(b) for any non-major source subject to 20.2.70.200 NMAC - 20.2.70.299 NMAC, include all applicable requirements which apply to emissions units that cause the source to be subject to this Part;

(c) specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based;

(d) include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit;

(e) include a provision to ensure that the permittee pays fees to the department consistent with the fee schedule in 20.2.71 NMAC (Operating Permit Emissions Fees); and

(f) for purposes of the permit shield, identify any requirement specifically identified in the permit application or significant permit modification that the department has determined is not applicable to the source, and state the basis for any such determination.

(2) Each permit issued shall, additionally, include provisions stating the following.

(a) The permittee shall comply with all terms and conditions of the permit. Any permit noncompliance is grounds for enforcement action. In addition, noncompliance with federally enforceable permit conditions constitutes a violation of the federal act.

(b) It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

(c) The permit may be modified, reopened and revised, revoked and reissued, or terminated for cause in accordance with 20.2.70.405 NMAC.

(d) The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance shall not stay any permit condition.

(e) The permit does not convey any property rights of any sort, or any exclusive privilege.

(f) Within the period specified by the department, the permittee shall furnish any information that the department may request in writing to determine whether cause exists for reopening and revising, revoking and reissuing, or termination of the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the department copies of records required by the permit to be maintained.

(3) The terms and conditions for all alternative operating scenarios identified in the application and approved by the department:

(a) shall require that the permittee maintain a log at the permitted facility which documents, contemporaneously with any change from one operating scenario to another, the scenario under which the facility is operating; and

(b) shall, for each such alternative scenario, meet all applicable requirements and the requirements of this Part.

(4) The department may impose conditions regulating emissions during startup and shutdown.

(5) All permit terms and conditions which are required under the federal act or under any of its applicable requirements, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator and citizens under the federal act. The permit shall specifically designate as not being federally enforceable under the federal act any terms or conditions included in the permit that are not required under the federal act or under any of its applicable requirements.

(6) The issuance of a permit, or the filing or approval of a compliance plan, does not relieve any person from civil or criminal liability for failure to comply with the provisions of the Air Quality Control Act, the federal act, federal regulations thereunder, any applicable regulations of the board, and any other applicable law or regulation.

(7) The department may include part or all of the contents of the application as terms and conditions of the permit or permit modification. The department shall not apply permit terms and conditions upon emissions of regulated pollutants for which there are no applicable requirements, unless the source is major for that pollutant.

(8) Fugitive emissions from a source shall be included in the operating permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(9) The acid rain portion of operating permits for acid rain sources shall additionally:

(a) state that, where an applicable requirement of the federal act is more stringent than an applicable requirement of regulations promulgated under Title IV of the federal act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator; and

(b) contain a permit condition prohibiting emissions exceeding any allowances that the acid rain source lawfully holds under Title IV of the federal act or the regulations promulgated thereunder; no permit modification under this Part shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit modification under

any other applicable requirement; no limit shall be placed on the number of allowances held by the acid rain source; the permittee may not use allowances as a defense to noncompliance with any other applicable requirement; any such allowance shall be accounted for according to the procedures established in regulations promulgated under Title IV of the federal act.

B. Permit duration. The department shall issue operating permits for a fixed term of five years.

C. Monitoring.

(1) Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.

(2) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to Subsection E of 20.2.70.302 NMAC. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.

(3) The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.

D. Recordkeeping.

(1) The permit shall require recordkeeping sufficient to assure and verify compliance with the terms and conditions of the permit, including recordkeeping of:

(a) the date, place as defined in the permit, and time of sampling or measurements;

(b) the date(s) analyses were performed;

(c) the company or entity that performed the analyses;

(d) the analytical techniques or methods used;

(e) the results of such analyses; and

(f) the operating conditions existing at the time of sampling or measurement.

(2) Records of all monitoring data and support information shall be retained for a period of at least five years from the date of the monitoring sample, measurement, report, or application. Supporting information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

E. Reporting. The permit shall require reporting sufficient to assure and verify compliance with the terms and conditions of the permit and all applicable requirements, including all of the following.

(1) Submittal of reports of any required monitoring at least every six months. The reports shall be due to the department within 45 days of the end of the permittee's reporting period. All instances of deviations from permit requirements, including emergencies, must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Subsection E of 20.2.70.300 NMAC.

(2) Prompt reporting of all deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The report shall be contained in the report submitted in accordance with the timeframe given in Paragraph (1) of Subsection E of 20.2.70.302 NMAC.

(3) Submittal of compliance certification reports at least every 12 months (or more frequently if so specified by an applicable requirement) certifying the source's compliance status with terms and conditions contained in the permit, including emission limitations, standards, or work practices. The reports shall be due to the department within 30 days of the end of the permittee's reporting period. Such compliance certifications shall be submitted to the administrator as well as to the department and shall include:

(a) the identification of each term or condition of the permit that is the basis of the certification;

(b) the compliance status of the source;

(c) whether compliance was continuous or intermittent;

(d) the method(s) used for determining the compliance status of the source, currently and during the reporting period identified in the permit; and

(e) such other facts as the department may require to determine the compliance status of the source.

(4) Such additional provisions as may be specified by the administrator to determine the compliance status of the source.

F. Portable and temporary sources. The department may issue permits for portable and temporary sources which allow such sources to relocate without undergoing a permit modification. Such permits shall not apply to acid rain sources and shall include conditions to assure that:

(1) the source is installed at all locations in a manner conforming with the permit;

(2) the source shall comply with all applicable requirements and all other provisions of this Part at all authorized locations;

(3) the owner or operator shall notify the department in writing at least 15 calendar days in advance of each change in location;

(4) notification shall include a legal description of where the source is to be relocated and how long it will be located there; and

(5) emissions from the source shall not, at any location, result in or contribute to an exceedance of a national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal act; the department may require dispersion modeling to assure compliance at any location.

G. Compliance. To assure and verify compliance with the terms and conditions of the permit and with this Part, permits shall also include all the following.

(1) Require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow authorized representatives of the department to perform the following:

(a) enter upon the permittee's premises where a source is located or emission related activity is conducted, or where records must be kept under the conditions of the permit;

(b) have access to and copy any records that must be kept under the conditions of the permit;

(c) inspect any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(d) sample or monitor any substances or parameters for the purpose of assuring compliance with the permit or applicable requirements or as otherwise authorized by the federal act.

(2) Require that sources required under Paragraph (11) of Subsection D of 20.2.70.300 NMAC to have a schedule of compliance submit progress reports to the department at least semiannually, or more frequently if specified in the applicable requirement or by the department. Such progress reports shall be consistent with the schedule of compliance and requirements of Paragraph (11) of Subsection D of 20.2.70.300 NMAC and shall contain:

(a) dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(b) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(3) Include such other provisions as the department may require.

H. Operational flexibility.

(1) Section 502(b)(10) changes.

(a) The permittee may make Section 502(b)(10) changes, as defined in 20.2.70.7 NMAC, without applying for a permit modification, if those changes are not Title I modifications and the changes do not cause the facility to exceed the emissions allowable under the permit (whether expressed as a rate of emissions or in terms of total emissions).

(b) For each such change, the permittee shall provide written notification to the department and the administrator at least seven days in advance of the proposed changes. Such notification shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(c) The permittee and department shall attach each such notice to their copy of the relevant permit.

(d) If the written notification and the change qualify under this provision, the permittee is not required to comply with the permit terms and conditions it has identified that restrict the change. If the change does not qualify under this provision, the original terms of the permit remain fully enforceable.

(2) Emissions trading within a facility.

(a) The department shall, if an applicant requests it, issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit in addition to any applicable requirements. Such terms and conditions shall include all terms and conditions required under 20.2.70.302 NMAC to determine compliance. If applicable requirements apply to the requested emissions trading,

permit conditions shall be issued only to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval.

(b) The applicant shall include in the application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The department shall not include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall require compliance with all applicable requirements.

(c) For each such change, the permittee shall provide written notification to the department and the administrator at least seven days in advance of the proposed changes. Such notification shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(d) The permittee and department shall attach each such notice to their copy of the relevant permit.

I. Off-permit changes.

(1) Permittees are allowed to make, without a permit modification, changes that are not addressed or prohibited by the operating permit, if:

(a) each such change meets all applicable requirements and shall not violate any existing permit term or condition;

(b) such changes are not subject to any requirements under Title IV of the federal act and are not Title I modifications;

(c) such changes are not subject to permit modification procedures under 20.2.70.404 NMAC; and

(d) the permittee provides contemporaneous written notice to the department and US EPA of each such change, except for changes that qualify as insignificant activities. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted and any applicable requirement that would apply as a result of the change.

(2) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

J. Permit shield.

(1) Except as provided in this Part, the department shall expressly include in a Part 70 (20.2.70 NMAC) permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(a) such applicable requirements are included and are specifically identified in the permit; or

(b) the department, in acting on the permit application or significant permit modification, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A Part 70 (20.2.70 NMAC) permit that does not expressly state that a permit shield exists for a specific provision shall be presumed not to provide such a shield for that provision.

(3) Nothing in Subsection J of 20.2.70.302 NMAC or in any Part 70 (20.2.70 NMAC) permit shall alter or affect the following:

(a) the provisions of Section 303 of the federal act - Emergency Powers, including the authority of the administrator under that Section, or the provisions of the New Mexico Air Quality Control Act, Section 74-2-10 NMSA 1978;

(b) the liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(c) the applicable requirements of the acid rain program, consistent with Section 408(a) of the federal act; or

(d) the ability of US EPA to obtain information from a source pursuant to Section 114 of the federal act, or the department to obtain information subject to the New Mexico Air Quality Control Act, Section 74-2-13 NMSA 1978.

(4) The permit shield shall remain in effect if the permit terms and conditions are extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC.

(5) The permit shield shall extend to terms and conditions that allow emission increases and decreases as part of emissions trading within a facility pursuant to Paragraph (2) of Subsection H of 20.2.70.302

NMAC, and to all terms and conditions under each operating scenario included pursuant to Paragraph (3) of Subsection A of 20.2.70.302 NMAC.

(6) The permit shield shall not extend to administrative amendments under Subsection A of 20.2.70.404 NMAC, to minor permit modifications under Subsection B of 20.2.70.404 NMAC, to Section 502(b)(10) changes under Paragraph (1) of Subsection H of 20.2.70.302 NMAC, or to permit terms or conditions for which notice has been given to reopen or revoke all or part under 20.2.70.405 NMAC.

[20.2.70.302 NMAC - Rp, 20.2.70.302 NMAC, xx/xx/25]

20.2.70.303 GENERAL PERMITS:

A. Issuance of general permits.

(1) The department may, after notice and opportunity for public participation and US EPA and affected program review, issue a general permit covering numerous similar sources. Such sources shall be generally homogenous in terms of operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.

(2) Any general permit shall comply with all requirements applicable to other operating permits and shall identify criteria by which sources may qualify for the general permit.

B. Authorization to operate under a general permit.

(1) The owner or operator of a Part 70 source which qualifies for a general permit must:

(a) apply to the department for coverage under the terms of the general permit; or

(b) apply for an operating permit consistent with 20.2.70.300 NMAC.

(2) The department may, in the general permit, provide for applications which deviate from the requirements of Subsection D of 20.2.70.300 NMAC, provided that such applications meet the requirements of the federal act and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The department shall review the application for authorization to operate under a general permit for completeness within 30 days after its receipt of the application.

(3) The department shall authorize qualifying sources which apply for coverage under the general permit to operate under the terms and conditions of the general permit. The department shall take final action on a general permit authorization request within 90 days of deeming the application complete.

(4) The department may grant a request for authorization to operate under a general permit without repeating the public participation procedures required under 20.2.70.401 NMAC. Such an authorization shall not be a permitting action for purposes of administrative review under New Mexico Air Quality Control Act Subsection H of Section 74-2-7, NMSA 1978. Permitting action for the purposes of Section 74-2-7 NMSA 1978 shall be the issuance of the general permit.

(5) Authorization to operate under a general permit shall not be granted for acid rain sources unless otherwise provided in regulations promulgated under Title IV of the federal act.

(6) The permittee shall be subject to enforcement action for operation without an operating permit if the source is later determined not to qualify for the conditions and terms of the general permit.

[20.2.70.303 NMAC - Rp, 20.2.70.303 NMAC, xx/xx/25]

20.2.70.304 [RESERVED]

[20.2.70.304 NMAC - Rp, 20.2.70.304 NMAC, xx/xx/25]

20.2.70.305 to 20.2.70.399 [RESERVED]

20.2.70.400 ACTION ON PERMIT APPLICATIONS:

A. A permit (including permit renewal) or permit modification shall only be issued if all of the following conditions have been met:

(1) the department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 20.2.70.303 NMAC;

(2) except for administrative and minor permit modifications, the department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;

(3) except for administrative amendments, the department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;

(4) the conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and

(5) the administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within 20.2.70.402 NMAC.

B. The department shall, within 60 days after its receipt of an application for a permit or significant permit modification, review such application for completeness. Unless the department determines that an application is not complete, requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. When additional information is requested by the department prior to ruling an application complete, receipt of such information shall be processed as a new application for purposes of 20.2.70.400 NMAC. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

C. The department shall take final action on each permit application (including a request for permit renewal) within 18 months after an application is ruled complete by the department, except that:

(1) for sources in operation on or before December 19, 1994 and which submit to the department timely and complete applications in accordance with 20.2.70.300 NMAC, the department shall take final action on one-third of such applications annually over a period not to exceed three years after such effective date;

(2) any complete permit application containing an early reduction demonstration under Section 112(i)(5) of the federal act shall be acted on within nine months of deeming the application complete; and

(3) the acid rain portion of permits for acid rain sources shall be acted upon in accordance with the deadlines in Title IV of the federal act and the regulations promulgated thereunder.

D. If a timely and complete application for a permit renewal is submitted, consistent with 20.2.70.300 NMAC, but the department has failed to issue or disapprove the renewal permit before the end of the term of the previous permit, then the permit shall not expire and all the terms and conditions of the permit shall remain in effect until the renewal permit has been issued or disapproved.

E. Permits being renewed are subject to the same procedural requirements, including those for public participation, affected program and US EPA review, that apply to initial permit issuance.

F. The department shall state within the draft permit the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).

G. The department shall grant or disapprove the permit based on information contained in the department's administrative record. The administrative record shall consist of the application, any additional information submitted by the applicant, any evidence or written comments submitted by interested persons, any other evidence considered by the department, and, if a public hearing is held, the evidence submitted at the hearing.

H. If the department grants or disapproves a permit or permit modification, the department shall notify the applicant by certified mail of the action taken and the reasons therefor. If the department grants a permit or modification, the department shall mail the permit or modification, including all terms and conditions, to the applicant by certified mail.

I. Voluntary discontinuation. Upon request by the permittee, the department shall permanently discontinue a Part 70 (20.2.70 NMAC) permit. Permit discontinuance terminates the permittee's right to operate the source under the permit. The department shall confirm the permit discontinuance by certified letter to the permittee.

J. No permit shall be issued by failure of the department to act on an application or renewal.

[20.2.70.400 NMAC - Rp, 20.2.70.400 NMAC, xx/xx/25]

20.2.70.401 PUBLIC PARTICIPATION:

A. Proceedings for all permit issuances (except administrative and minor permit modifications, pursuant to Paragraph (2) of Subsection A of 20.2.70.400 NMAC) including renewals, significant permit modifications, reopenings, revocations and terminations, and all modifications to the department's list of insignificant activities, shall include public notice and provide an opportunity for public comment. The department shall provide 30 days for public and affected program comment. The department may hold a public hearing on the draft permit, a proposal to suspend, reopen, revoke or terminate a permit, or for any reason it deems appropriate, and shall hold such a hearing in the event of significant public interest. The department shall give notice of any public hearing at least 30 days in advance of the hearing.

B. Public notice and notice of public hearing shall be given by publication in a newspaper of general circulation in the area where the source is located or in a state publication designed to give general public notice, to persons on a mailing list developed by the department, including those who request in writing to be on the list, and by other means if necessary to assure adequate notice to the affected public.

C. The public notice shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the emissions change(s) involved in any permit modification;

(6) the name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, and relevant supporting materials;

(7) a brief description of the comment procedures required by the department; and

(8) as appropriate, a statement of procedures to request a hearing, or the time and place of any scheduled hearing.

D. Notice of public hearing shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the name, address and telephone number of a person from whom interested persons may obtain additional information;

(6) a brief description of hearing procedures; and

(7) the time and place of the scheduled hearing.

E. Public hearings shall be held in the geographic area likely to be impacted by the source. The time, date, and place of the hearing shall be determined by the department. The department shall appoint a hearing officer. A transcript of the hearing shall be made at the request of either the department or the applicant and at the expense of the person requesting the transcript. At the hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

F. The department shall keep a record of the commenters and also of the issues raised during the public participation process so that the administrator may fulfill his or her obligation under Section 505(b)(2) of the federal act to determine whether a citizen petition may be granted. Such records shall be available to the public upon request.

G. The department shall provide such notice and opportunity for participation by affected programs as is provided for by 20.2.70.402 NMAC.

[20.2.70.401 NMAC - Rp, 20.2.70.401 NMAC, xx/xx/25]

20.2.70.402 REVIEW BY THE ADMINISTRATOR AND AFFECTED PROGRAMS:

A. Notification: The department shall not issue an operating permit (including permit renewal or reissuance), minor permit modification or significant permit modification, until affected programs and the administrator have had an opportunity to review the proposed permit as required under 20.2.70.402 NMAC. Permits for source categories waived by the administrator from this requirement and any permit terms or conditions which are not required under the federal act or under any of its requirements are not subject to administrator review or approval.

(1) Within five days of notification by the department that the application has been determined complete, the applicant shall provide a copy of the complete permit application (including the compliance plan and all additional materials submitted to the department) directly to the administrator. The permit or permit modification shall not be issued without certification to the department of such notification. The department shall provide to the administrator a copy of each draft permit, each proposed permit, each final operating permit, and any other relevant information requested by the administrator.

(2) The department shall provide notice of each draft permit to any affected program on or before the time that the department provides this notice to the public under 20.2.70.401 NMAC, except to the extent that minor permit modification procedures require the timing of the notice to be different.

(3) The department shall keep for five years such records and submit to the administrator such information as the administrator may reasonably require to ascertain whether the state program complies with the requirements of the federal act or related applicable requirements.

B. Responses to objections:

(1) No permit for which an application must be transmitted to the administrator under this Part shall be issued by the department if the administrator, after determining that issuance of the proposed permit

would not be in compliance with applicable requirements, objects to such issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information.

(2) If the administrator does not object in writing under Paragraph (1) of Subsection B of 20.2.70.402 NMAC, any person may, within 60 days after the expiration of the administrator's 45-day review period, petition the administrator to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in 20.2.70.401 NMAC, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the administrator objects to the permit as a result of a petition filed under Paragraph (2) of Subsection B of 20.2.70.402 NMAC, the department shall not issue the permit until the administrator's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to the administrator's objection.

(3) The department, as part of the submittal of the proposed permit to the administrator (or as soon as possible after the submittal for minor permit modification procedures allowed under Subsection B of 20.2.70.404 NMAC), shall notify the administrator and any affected program in writing of any refusal by the department to accept all recommendations for the proposed permit that the affected program submitted during the public or affected program review period. The notice shall include the department's reasons for not accepting any such recommendation. The department is not required to accept recommendations that are not based on federally enforceable applicable requirements.

[20.2.70.402 NMAC - Rp, 20.2.70.402 NMAC, xx/xx/25]

20.2.70.403 PETITIONS FOR REVIEW OF FINAL ACTION:

A. Hearing before the board:

(1) Any person who participated in a permitting action before the department and who is adversely affected by such permitting action may file a petition for hearing before the board. For the purposes of 20.2.70.403 NMAC, permitting action shall include the failure of the department to take final action on an application for a permit (including renewal) or permit modification within the time specified in this Part.

(2) The petition shall be made in writing to the board within 30 days from the date notice is given of the department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered as required by Paragraph (2) of Subsection A of 20.2.70.403 NMAC, and attach a copy of the permitting action for which review is sought. Unless a timely request for hearing is made, the decision of the department shall be final. The petition shall be copied simultaneously to the department upon receipt of the appeal notice. If the petitioner is not the applicant or permittee, the petitioner shall mail or hand-deliver a copy of the petition to the applicant or permittee. The department shall certify the administrative record to the board.

(3) If a timely request for hearing is made, the board shall hold a hearing within 60 days of receipt of the petition in accordance with New Mexico Air Quality Control Act Section 74-2-7 NMSA 1978.

B. Judicial review:

(1) Any person who is adversely affected by an administrative action taken by the board pursuant to Subsection A of 20.2.70.403 NMAC may appeal to the court of appeals in accordance with New Mexico Air Quality Control Act, Section 74-2-9 NMSA 1978. Petitions for judicial review must be filed no later than 30 days after the administrative action.

(2) The judicial review provided for by 20.2.70.403 NMAC shall be the exclusive means for obtaining judicial review of the terms and conditions of the permit.

[20.2.70.403 NMAC - Rp, 20.2.70.403 NMAC, xx/xx/25]

20.2.70.404 PERMIT MODIFICATIONS:

A. Administrative permit amendments:

(1) An administrative permit amendment is one that:

(a) corrects typographical errors;

(b) provides for a minor administrative change at the source, such as a change in the address or phone number of any person identified in the permit;

(c) incorporates a change in the permit solely involving the retiring of an emissions unit;

(d) requires more frequent monitoring or reporting by the permittee; or

(e) any other type of change which has been determined by the department and the administrator to be similar to those in Paragraph (1) of Subsection A of 20.2.70.404 NMAC.

(2) Changes in ownership or operational control of a source may be made as administrative amendments provided that:

(a) a written agreement, containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee, has been submitted to the department, and either the department has determined that no other change in the permit is necessary, or changes deemed necessary by the department have been made;

(b) the new owners have submitted the application information required in Paragraph (2) of Subsection D of 20.2.70.300 NMAC;

(c) no grounds exist for permit termination, as set out in Subparagraphs (b) and (c) of Paragraph (3) of Subsection A of 20.2.70.405 NMAC; and

(d) the permittee has published a public notice of the change in ownership of the source in a newspaper of general circulation in the area where the source is located.

(3) The department may incorporate administrative permit amendments without providing notice to the public or affected programs, provided that it designates any such permit modifications as administrative permit amendments and submits a copy of the revised permit to the administrator.

(4) The department shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such request. The permittee may implement the changes outlined in Subparagraphs (a) through (d) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC immediately upon submittal of the request for the administrative amendment. The permittee may implement the changes outlined in Subparagraph (e) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC or Paragraph (2) of Subsection A of 20.2.70.404 NMAC upon approval of the administrative amendment by the department.

B. Minor permit modifications:

(1) Minor permit modification procedures may be used only for those permit modifications that:

(a) do not violate any applicable requirement;

(b) do not involve relaxation of existing monitoring, reporting, or recordkeeping requirements in the permit;

(c) do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(d) do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include any federally enforceable emissions cap assumed to avoid classification as a Title I modification and any alternative emissions limit approved pursuant to regulations promulgated under Section 112(i)(5) of the federal act;

(e) are not Title I modifications; and

(f) are not required by the department to be processed as a significant modification pursuant to Subsection C of 20.2.70.404 NMAC.

(2) A permittee shall not submit multiple minor permit modification applications that may conceal a larger modification that would not be eligible for minor permit modification procedures. The department may, at its discretion, require that multiple related minor permit modification applications be submitted as a significant permit modification.

(3) An application requesting the use of minor permit modification procedures shall meet the requirements of Subsections C and D of 20.2.70.300 NMAC and shall include:

(a) a description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(b) the applicant's suggested draft permit;

(c) certification by a responsible official, consistent with Subsection E of 20.2.70.300 NMAC, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(d) if the requested permit modification would affect existing compliance plans or schedules, related progress reports, or certification of compliance requirements, an outline of such effects.

(4) The department shall, within 30 days after its receipt of an application for a minor permit modification, review such application for completeness. Unless the department determines that an application is not

complete, requests additional information or otherwise notifies the applicant of incompleteness within 30 days of receipt of an application, the application shall be deemed complete. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

(5) Within five working days of notification by the department that the minor permit modification application has been determined complete, the applicant shall meet its obligation under Subsection A of 20.2.70.402 NMAC to notify the administrator of the requested permit modification. The department promptly shall send any notice required under Paragraph (2) of Subsection A of 20.2.70.402 NMAC and Subsection B of 20.2.70.402 NMAC to the administrator and affected programs.

(6) The permittee may make the change proposed in its minor permit modification application immediately after such application is deemed complete. After the permittee makes the change allowed by the preceding sentence, and until the department takes any of the actions specified in Paragraph (7) of Subsection B of 20.2.70.404 NMAC below, the permittee must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the permittee need not comply with the existing permit terms and conditions it seeks to modify. If the permittee fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(7) The department may not issue a final minor permit modification until after the administrator's 45-day review period of the proposed permit modification or until US EPA has notified the department that the administrator will not object to issuance of the permit modification, although the department may approve the permit modification prior to that time. Within 90 days of ruling the application complete under minor permit modification procedures or within 15 days after the end of the administrator's 45-day review period, whichever is later, the department shall:

(a) issue the permit modification as it was proposed;

(b) disapprove the permit modification application;

(c) determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(d) revise the draft permit modification and transmit to the administrator the new proposed permit modification as required by Subsection A of 20.2.70.402 NMAC.

C. Significant permit modifications:

(1) A significant permit modification is:

(a) any revision to an operating permit that does not meet the criteria under the provisions for administrative permit amendments under Subsection A of 20.2.70.404 NMAC or for minor permit modifications under Subsection B of 20.2.70.404 NMAC above;

(b) any modification that would result in any relaxation in existing monitoring, reporting or recordkeeping permit terms or conditions;

(c) any modification for which action on the application would, in the judgment of the department, require decisions to be made on significant or complex issues; and

(d) changes in ownership which do not meet the criteria of Paragraph (2) of Subsection A of 20.2.70.404 NMAC.

(2) For significant modifications which are not required to undergo preconstruction permit review and approval, changes to the source which qualify as significant permit modifications shall not be made until the department has issued the operating permit modification.

(3) For significant modifications which have undergone preconstruction permit review and approval, the permittee shall:

(a) before commencing operation, notify the department in writing of any applicable requirements and operating permit terms and conditions contravened by the modification, emissions units affected by the change, and allowable emissions increases resulting from the modification; and

(b) within 12 months after commencing operation, file a complete operating permit modification application.

(4) Where an existing operating permit would specifically prohibit such change, the permittee must obtain an operating permit modification before commencing operation or implementing the change.

(5) Significant permit modifications shall meet all requirements of this Part for permit issuance, including those for applications, public participation, review by affected programs and review by the administrator.

(6) The department shall complete review on the majority of significant permit modification applications within nine months after the department rules the applications complete.

D. Modifications to acid rain sources: Administrative permit amendments and permit modifications for purposes of the acid rain portion of the permit shall be governed by regulations promulgated by the administrator under Title IV of the federal act.

[20.2.70.404 NMAC - Rp, 20.2.70.404 NMAC, xx/xx/25]

20.2.70.405 PERMIT REOPENING, REVOCATION OR TERMINATION:

A. Action by the department:

(1) Each permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised for any of the following, and may be revoked and reissued for Subparagraphs (c) or (d) of Paragraph (1) of Subsection A of 20.2.70.405 NMAC:

(a) additional applicable requirements under the federal act become applicable to a major source with a remaining permit term of three or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms or conditions have been extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC;

(b) additional requirements (including excess emissions requirements) become applicable to a source under the acid rain program promulgated under Title IV of the federal act. Upon approval by the administrator, excess emissions offset plans shall be deemed to be incorporated into the permit;

(c) the department or the administrator determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the permit; or

(d) the department or the administrator determines that the permit must be revised or revoked and reissued to assure compliance with the applicable requirements.

(2) Proceedings to reopen and revise, or revoke and reissue, a permit shall affect only those parts of the permit for which cause to reopen or revoke exists. Units for which permit conditions have been revoked shall not be operated until permit reissuance. Reopenings shall be made as expeditiously as practicable.

(3) A permit, or an authorization to operate under a general permit, may be terminated when:

(a) the permittee fails to meet the requirements of an approved compliance plan;

(b) the permittee has been in significant or repetitious non-compliance with the operating permit terms or conditions;

(c) the applicant or permittee has exhibited a history of willful disregard for environmental laws of any state or Tribal authority, or of the United States;

(d) the applicant or permittee has knowingly misrepresented a material fact in any application, record, report, plan, or other document filed or required to be maintained under the permit;

(e) the permittee falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under the permit;

(f) the permittee fails to pay fees required under the fee schedule in 20.2.71 NMAC (Operating Permit Emissions Fees); or

(g) the administrator has found that cause exists to terminate the permit.

(4) The department shall, by certified mail, provide a notice of intent to the permittee at least 30 days in advance of the date on which a permit is to be reopened or revoked, or terminated, except that the department may provide a shorter time period in the case of an emergency. The notice shall state that the permittee may, within 30 days of receipt, submit comments or request a hearing on the proposed permit action.

B. Action by the administrator: Within 90 days, or longer if the administrator extends this period, after receipt of written notification that the administrator has found that cause exists to terminate, modify or revoke and reissue a permit, the department shall forward to the administrator a proposed determination of termination, modification, or revocation and reissuance, as appropriate. Within 90 days from receipt of an administrator objection to a proposed determination, the department shall address and act upon the administrator's objection.

C. Compliance orders: Notwithstanding any action which may be taken by the department or the administrator under Subsections A and B of 20.2.70.405 NMAC, a compliance order issued pursuant to New Mexico Air Quality Control Act Section 74-2-12 NMSA 1978 may include a suspension or revocation of any permit or portion thereof.

[20.2.70.405 NMAC - Rp, 20.2.70.405 NMAC, xx/xx/25]

20.2.70.406 CITIZEN SUITS: Pursuant to Section 304 of the federal act, 42 USC 7604, any person may commence certain civil actions under the federal act.
[20.2.70.406 NMAC - Rp, 20.2.70.406 NMAC, xx/xx/25]

20.2.70.407 VARIANCES: Pursuant to New Mexico Air Quality Control Act Section 74-2-8 NMSA 1978, applicants and permittees may seek a variance from the non-federally enforceable provisions of this Part.
[20.2.70.407 NMAC - Rp, 20.2.70.407 NMAC, xx/xx/25]

20.2.70.408 ENFORCEMENT: Notwithstanding any other provision in the New Mexico state implementation plan approved by the administrator, any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of the terms or conditions of a permit issued pursuant to this Part.

A. Information from the use of the following methods is presumptively credible evidence of whether a violation has occurred at the source:

(1) a monitoring or information gathering method approved for the source pursuant to this Part and incorporated in an operating permit; or

(2) compliance methods specified in the New Mexico state implementation plan.

B. The following testing, monitoring or information gathering methods are presumptively credible testing, monitoring or information gathering methods:

(1) any federally enforceable monitoring or testing methods, including those in 40 CFR Parts 51, 60, 61 and 75; and

(2) other testing, monitoring or information gathering methods that produce information comparable to that produced by any method under Subsection A of 20.2.70.408 NMAC or Paragraph (1) of Subsection B of 20.2.70.408 NMAC.
[20.2.70.408 NMAC - Rp, 20.2.70.408 NMAC, xx/xx/25]

20.2.70.409 NMAC to 20.2.70.499 NMAC [RESERVED]

20.2.70.500 NMAC to 20.2.70.599 NMAC [RESERVED]

HISTORY OF 20.2.70 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.
EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93.

History of Repealed Material: [RESERVED]

Other History:
EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93 was **renumbered** into first version of the New Mexico Administrative Code as 20 NMAC 2.70, Operating Permits, filed 10/30/95;
20 NMAC 2.70, Operating Permits, filed 10/30/95 was **renumbered, reformatted and replaced** by 20.2.70 NMAC, Operating Permits, effective 06/14/02.

From: New Mexico Environment Department
To: Butt, Neal, ENV
Subject: NMED Petitions EIB to Adopt Amendments to 20.2.70 NMAC - Operating Permits
Date: Monday, March 17, 2025 12:00:11 PM

Air Quality Bureau

Regulatory and SIP Bulletin

Having trouble viewing this email? View it as a Web page.

NMED petitions the Environmental Improvement Board (EIB) to adopt New Mexico's proposed amendments to 20.2.70 NMAC, *Operating Permits*.

On March 12, 2025, NMED petitioned the Environmental Improvement Board (EIB) to adopt New Mexico's proposed amendments to 20.2.70 NMAC, *Operating Permits*. The Petition for Regulatory Change and Public Review Draft are now available on NMED's docketed matters website: https://www.env.nm.gov/opf/docketed-matters/. To locate the petition and proposed draft, select the "Environmental Improvement Board" tab, and then select "EIB 25-10: In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – *Operating Permits* and Title V Program Revision." NMED plans to request a hearing to consider and take possible action on the petition at the Board's March 28, 2025, regular monthly meeting. The meeting agenda will be posted on the EIB's website at least 72 hours prior to the meeting: https://www.env.nm.gov/opf/environmental-improvement-board/.

For additional information concerning this bulletin, please contact Neal Butt at (505) 629-2972 or Neal.Butt@env.nm.gov . Additional information on the Air Quality Bureau's Proposed Air Quality Regulations and Plans is available at https://www.env.nm.gov/air-quality/proposed-regs/.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 & 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, or if you believe that you have been discriminated against with respect to a NMED program or activity, you may contact: Kate Cardenas, Non-

Discrimination Coordinator, NMED, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov. You may also visit our website at https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

NMED Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, New Mexico, 87505-1816
(505) 476-4300

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Proposed Air Quality Regulations and Plans

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Page Contents:

The menu below provides rapid access to the latest information and updates on proposed, new and amended air quality regulations and New Mexico State Implementation Plan (SIP) additions and amendments. Please check this webpage periodically for updates.

For information on policies and procedures for air quality permitting, please go to the Permitting Home Page.

Current Proposed Changes to Air Quality Regulations and Plans

The following are summaries of proposed new air quality regulations and proposed amendments to existing regulations and the New Mexico State Implementation Plan (SIP). [return to top of page]

Proposed Air Quality Permitting Fee Updates (20.2.71 NMAC and 20.2.75 NMAC)

On March 7, 2024, the Air Quality Bureau (AQB) petitioned the Environmental Improvement Board to repeal and replace 20.2.71 NMAC, *Operating Permit Fees* (Part 71), and 20.2.75 NMAC, *Construction Permit Fees* (Part 75), to increase air permit fees to cover the costs of administering and implementing the requirements of the New Mexico Air Quality Control Act and federal Clean Air Act.

The full text of the Bureau's proposed amendments to Part 71 and 75 and related documents are available for download on the Environmental Improvement Board's Docketed Matters webpage or in hard copy at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505.

NMED Exhibit 12a

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the meeting should contact Dana Bahar no later than 5:00 p.m. on March 15, 2024 at dana.bahar@env.nm.gov. TDD or TDY users please access this number via the New Mexico Relay Network (Albuquerque TDD users: (505) 275-7333; outside of Albuquerque: 1-800-659-1779; TTY users: 1-800-659-8331).

For additional information or questions about this bulletin, please contact either Dana Bahar at dana.bahar@env.nm.gov or Michelle Miano at michelle.miano@env.nm.gov.

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El 7 de marzo de 2024, la Oficina de Calidad del Aire (AQB, por sus siglas en inglés) presentó una petición a la Junta de Mejora Ambiental para derogar y reemplazar la Parte 71, *Tarifas de Permisos de Operación* y la Parte 75, *Tarifas de Permisos de Construcción* para aumentar las tarifas de los permisos de aire para cubrir los costos de administración e implementación de los requisitos de la Ley de Control de Calidad del Aire de Nuevo México y la Ley Federal de Aire Limpio.

El texto completo de las enmiendas propuestas por la Oficina a los documentos relacionados con las Partes 71 y 75 están disponibles para descargar en la página web Docketed Matters de la Junta de Mejoramiento Ambiental o en copia impresa en la oficina principal de la Oficina, 525 Camino de los Márquez, Santa Fe, Nuevo México, 87505.

Las personas que requieran servicios de interpretación de idiomas o que tengan una discapacidad que necesiten un lector, un amplificador, un intérprete de lenguaje de señas calificado o cualquier otra forma de ayuda o servicio auxiliar para asistir o participar en la reunión deben comunicarse con Dana Bahar a más tardar a las 5:00 p. m. el 15 de marzo de 2024 en dana.bahar@env.nm.gov. Los usuarios de TDD o TDY pueden acceder a este número a través de New Mexico Relay Network (usuarios de TDD de Albuquerque: (505) 275-7333; fuera de Albuquerque: 1-800-659-1779; usuarios de TTY: 1-800-659-8331).

Para obtener información adicional o preguntas sobre este boletín, comuníquese con Dana Bahar en dana.bahar@env.nm.gov o con Michelle Miano en michelle.miano@env.nm.gov.

[volver al principio de la página]

Proposed Emission Guidelines for Greenhouse Gases from Existing Oil and Gas Sources (OOOOc)

EPA issued a final rule on March 8, 2024, to control emissions of greenhouse gas (GHG) from existing oil and gas sources that commenced construction, modification, or reconstruction on or before December 6, 2022. This rule is codified in the Federal Register as 40 CFR Part 60 subpart OOOOc under Clean Air Act (CAA) section 111(d). The NMED Air Quality Bureau is developing a New Mexico Administrative Code (NMAC) rule based on the EPA model rule. NMED is required to submit the plan to the EPA by March 9, 2026. This rule will impact certain existing sources of greenhouse gas emissions from oil and gas facilities. Owners and operators of the GHG emissions facilities are required to comply with this rule after 36 months of the submission of the state plan, aside from any longer compliance schedules determined by the state as required of the remaining useful life and other factors (RULOF) of the GHG source categories.

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Proposed Incorporation by Reference of Federal NSPS, NESHAP and MACT Rules

NMED proposes the incorporation into the New Mexico Administrative Code (NMAC) several new or revised federal rules promulgated under 40 CFR Parts 60, 61 and 63 for which New Mexico has been delegated enforcement authority: Standards of Performance for New Stationary Sources; National Emission Standards for Hazardous Air Pollutants; and Maximum Achievable Control Technology for Hazardous Air Pollutants for Source Categories, respectively. These new or revised federal rules would be incorporated by reference into 20.2.77 NMAC – New Source Performance Standards (NSPS); 20.2.78 NMAC – Emission Standards for Hazardous Air Pollutants (NESHAP); and 20.2.82 NMAC – Maximum Achievable Control Technology for Source Categories of Hazardous Air Pollutants (MACT). The Department also requests that the Environmental Improvement Board remove the end date of incorporation in 20.2.77 and 20.2.78 NMAC to implement and enforce all previously adopted and all future NSPS and NESHAP requirements.

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Proposed Guidelines for Greenhouse Gas Emissions for Electric Utility Generating Units

Effective as of July 8, 2024; the EPA, under section 111 of the Clean Air Act, issued new greenhouse gas (GHG) performance standards for new, modified, and reconstructed fossil fuel-fired electric generating units (EGU). This new rule in accordance to 40 CFR Part 60 Subpart UUUUb, shall implement the reduction of GHG from coal-fired power plants and new gas-fired turbines through the use of more stringent emission limits, carbon capture and sequestration, and improved efficiency measures. These EGUs must meet emission rates based on the expected duration of their continued operation. Units that plan to operate beyond 2039 must meet a 90% carbon capture standard by 2032. Units that commit to cease operations by 2039 must meet an emission rate by 2030 based on co-firing 40% natural gas. Units that plan to cease operations before 2031 have no emission reduction obligations according to the federal rule.

To this extent, the State must develop and implement a plan that is appropriately stringent, efficient and cost-effective for EGUs to be able to transition into these new emission guidelines and enhancing accountability in emissions reporting. The ultimate goal of 40 CFR Part 60 Subpart UUUUb—Emission Guidelines for Greenhouse Gas Emissions for Electric Utility Generating Units is to mitigate greenhouse gas and the health and environmental effects it has by regulating the emissions from EGUs.

NSPS and Emissions Guidelines for GHG Emissions from Fossil Fuel-Fired Electrical Generating Units is the Federal Register publication of New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.
Emission Guidelines for Greenhouse Gas Emissions for Electric Utility Generating Units (40 CFR Part 60 Subpart UUUUb) is the model rule for electric utility GHG emissions.
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Proposed Good Neighbor State Implementation Plan Certification for the 2015 Ozone National Ambient Air Quality Standard

The New Mexico Environment Department (NMED) announces a public hearing on New Mexico's proposed Good Neighbor State Implementation Plan (SIP) Certification for the 2015 ozone National Ambient Air Quality Standard (NAAQS). The purpose of the hearing is to consider the matter of EIB 21-

05 to certify that New Mexico has an adequate, federally-approved SIP that addresses CAA Section 110(a)(2)(D)(i) regarding interstate transport of air pollution in this submittal. The proposed certification confirms to the U.S. Environmental Protection Agency ("EPA") that the State of New Mexico has the required "infrastructure" in place under the current SIP to implement, maintain, and enforce the revised 2015 Ozone NAAQS and fulfills its "good neighbor" obligations under the CAA.

All comments must be received by 5:00 PM MDT on April 22, 2021 in order for NMED to include a response in the hearing record. Anyone may present technical testimony, non-technical testimony or provide written or oral comments at the hearing. Please see the public hearing notice below for detailed instructions for participation.

Proposed Good Neighbor SIP
Limited English Proficiency/Public Involvement Plan
Public Comment and Hearing Notice – English
Public Comment and Hearing Notice – Spanish
2015 Ozone NAAQS Infrastructure SIP
EPA Approval
[return to top of page]

Proposed Title V update (20.2.70 NMAC) to remove emergency provisions and update applicable requirements

EPA requires emergency provisions to be removed from the Title V operating program. During this update, NMED also plans to align "applicable requirements" more closely with the EPA language for these requirements. The process to update these regulations is underway and must be completed by August 21, 2025.

NMED Petition to Repeal and Replace 20.2.70 NMAC documents the petition filed before EIB to repeal and replace 20.2.70 NMAC – Operating permits and Title V program revision.
70.2.70 NMAC Stakeholder Review Draft identifies the proposed changes to 20.2.70 NMAC.
Comment Portal provides a link to the comment collection portal for this action.
English Notice of Proposed Rulemaking 20.2.70 NMAC Operating Permits provides legal ads in English
Spanish Notice of Proposed Rulemaking 20.2.70 NMAC Operating Permits provides legal ads in Spanish
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Recently Approved Changes to Air Quality Regulations and Plans

The following are summaries of recently approved changes to New Mexico air quality regulations and the New Mexico State Implementation Plan. These changes were approved by either the Environmental Improvement Board or U.S. EPA within the last two years. Please check this webpage periodically for updates.

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Carbon dioxide emission standards for coal-fired electric generating facilities

The New Mexico Environmental Department (NMED) announces a new rulemaking to develop emission standards for new and existing electric generating facilities, 20.2.101 NMAC, Carbon Dioxide Emission Standards for Coal-Fired Electric Generating Facilities.

During the 2019 legislative session, Senate Bill 489 introduced the Energy Transition Act (ETA), which was later signed into law by Governor Michelle Lujan Grisham. The ETA sets statewide renewable energy standards and establishes a pathway for a low-carbon energy transition away from coal. The ETA requires the Environmental Improvement Board (EIB) to promulgate a rule that limits carbon dioxide emissions from certain electric generating facilities under their jurisdiction to 1,100 pounds per megawatt-hour on or after January 1, 2023. The EIB's jurisdiction does not include Bernalillo County or Tribal lands.

The New Mexico Environmental Improvement Board will hold a public hearing on October 26, 2022, to consider the NMED's proposed new rulemaking targeting carbon dioxide emissions from coal-fired electric generating facilities.

This webpage provides information regarding the rulemaking hearing and key documents. Please visit the Environmental Improvement Board website for further hearing information.

20.2.101 NMAC draft rule contains the proposed regulatory language.
Energy transition Act Document describes the basis for the new rulemaking.
AQB Overview and Rulemaking describes the AQB and its approach to making rules.
Environmental Groups' Comment document compiles comments received on initial proposals.
Notice of rulemaking hearing to consider adoption of proposed 20.2.101 NMAC – carbon dioxide emission standards for coal-fired electric generating facilities, EIB 22-28 (R)
Aviso de audiencia de reglamentación para considerar la adopción de la propuesta 20.2.101 NMAC – normas de emisiones de dióxido de carbono para instalaciones generadoras de electricidad a base de carbón, EIB 22-28 (R)
Energy Transition Act presentation September 1, 2022.
20.2.101 NMAC Carbon Dioxide Emission Standards for Coal-Fired Electic Generating Facilities, Filed Rule.
20.2.101 NMAC, Carbon Dioxide Emission Standards for Coal-Fired Electic Generating Facilities, Filed Transmittal Form.
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Dust Mitigation Plan and Fugitive Dust Rule

On September 16, 2016, the Administrator for the U.S. Environmental Protection Agency (EPA) signed revisions to the Exceptional Events Rule with the final rule published in the Federal Register on October 3, 2016. The federal Clean Air Act (Section 319(b)(3)(A)) identifies five guiding principles for developing implementing regulations of exceptional events:

Protection of public health is the highest priority;

NMED Exhibit 12a

All ambient air quality data should be included in a timely manner in an appropriate federal air quality database that is accessible to the public;
Timely information should be provided to the public in any case in which the air quality is unhealthy;
Each state must take necessary measures to safeguard public health regardless of the source of the air pollution; and
Air quality data should be carefully screened to ensure that events not likely to recur are represented accurately in all monitoring data and analyses.
Section V of the preamble to the final rule (81 FR 68270) addresses mitigation and requires the development of mitigation plans in areas with "historically documented" or "known seasonal" exceptional events. These events must be of the same type and pollutant (i.e., high wind dust/PM10) and recur annually or seasonally. Doña Ana and Luna Counties in southern New Mexico were identified by EPA as areas required to be covered by mitigation plans. NMED developed a single mitigation plan for the two counties and a copy may be found below.

Dust Mitigation Plan for Doña Ana and Luna Counties

NMED developed a fugitive dust rule in conjunction with the mitigation plan to detail mandatory measures to abate certain controllable sources in Doña Ana and Luna Counties. A public hearing was held on September 28, 2018 in Las Cruces and the board adopted the rule on October 26, 2018. Copies of the final rule, hearing transcripts and statement of reasons to adopt the rule are provided below.

20.2.23 NMAC, *Fugitive Dust Control*, (Applicable in Doña Ana and Luna Counties only)
Hearing Transcript
Deliberations Transcript
Transmittal Form and Statement of Reasons to Adopt
For questions related to the dust mitigation plan or fugitive dust rule, please contact Armando Paz at (575) 629-3242 or armando.paz@state.nm.us. To stay up to date on the progress of this regulatory action, please visit our website, www.env.nm.gov/air-quality/ and sign up for the Regulatory and SIP or Border Air Quality listserv bulletins.

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Good Neighbor State Implementation Plan Certification for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard

The New Mexico Environment Department (NMED) announces an opportunity to comment on and request a public hearing on New Mexico's proposed Good Neighbor State Implementation Plan (SIP) Certification for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard (NAAQS). The proposed Good Neighbor SIP Certification addresses Clean Air Act (CAA) Section 110(a)(2)(D)(i)(I), to confirm to the U.S. Environmental Protection Agency (EPA) that the State of New Mexico has the required "infrastructure" to implement, maintain, and enforce the 2010 Nitrogen Dioxide NAAQS and fulfills its "good neighbor" obligations under the CAA.

All comments or requests for a public hearing must be received by May 17, 2021.* If a request for a public hearing is received during the 30-day public comment period, a hearing date, time and location will be announced at a later date.

Proposed NO_2 Good Neighbor SIP
Public Comment and Hearing Notice
Aviso de Oportunidad de Audencia Pública y Comentarios Certificación de Infraestrutura Propuesta para el Estándar Nacional de Calidad del Aire Ambiental de Nuevo México para el Dióxido de Nitrógeno 2010
EPA approval of NO_2 Transport, Good Neighbor, SIP

*The revised public comment closing date is May 17, 2021, not May 15, 2021 as published in the Albuquerque Journal.

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Incorporation by Reference of federal NSPS, NESHAP and MACT rules

A public hearing was held November 17, 2023 where the Environmental Improvement Board unanimously approved amendments to the dates of incorporation by reference contained in 20.2.77 NMAC (New Source Performance Standards), 20.2.78 NMAC (Emission Standards for Hazardous Air Pollutants), and 20.2.82 NMAC (Maximum Achievable Control Technology Standards for Source Categories of Hazardous Air Pollutants). The previous update for Parts 77, 78 and 82 was January 15, 2017. Since the most recent date of incorporation, there have been 119 changes to various federal New Source Performance Standards, Emission Standards for Hazardous Air Pollutants, and Maximum Achievable Control Technology Standards. Adoption of the incorporation by reference amendments changes the "through date" in Parts 77, 78 and 82 that reference the final rulings made at the federal level through June 28, 2023.

New Mexico Environmental Improvement Board Notice of Rulemaking Hearing_on 2023-11-17 is the announcement for the incorporation by reference rule.
Junta de Mejora Ambiental de Nuevo México Aviso de Audiencia de Reglamentación is the Spanish version of the announcement for the incorporation by reference rule.
Notice of Public Meeting NM EIB 2023-11-17 is the meeting notice that includes the links to join the meeting online.
Notice of Intent 23-52(R) is the NMED notice of intent to present technical testimony for the incorporation by reference rule.
Exhibit 16, Sunshine Portal public notice is a copy of the public notice posted on the official government transparency portal of new Mexico.
Exhibit 17, Field Office public notice documentation is documentation of the request to post public notices at NMED field offices.
New Mexico State Records Center and Archive filing of NMAC sections 20.2.77, 78, and 82.
EIB Final Order and Statement of Reasons for EIB 23-52
Please contact Armando Paz at **armando.paz@env.nm.gov** or at (505) 629-5025 for additional information.

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Infrastructure State Implementation Plan Certification for the 2015 Ozone National Ambient Air Quality Standard

The New Mexico Environment Department (NMED) submitted New Mexico's proposed Infrastructure State Implementation Plan (iSIP) Certification for the 2015 ozone National Ambient Air Quality Standard (NAAQS) to the EPA on November 16, 2018. The iSIP certification addresses elements of a Clean Air Act (CAA) Section 110(a)(2), to confirm to the EPA that the State of New Mexico has the required "infrastructure" to implement, maintain, and enforce the 2015 ozone NAAQS, promulgated on October 1, 2015 (80 FR 65291, October 26, 2015).

NMED Exhibit 12a

This certification does not address CAA Section 110(a)(2)(D)(i)(I), which prohibits emissions from New Mexico that significantly contribute to nonattainment or interfere with maintenance of a NAAQS in a downwind state. This section is often referred to as the "Good Neighbor Provision" and will be addressed in a future submission to EPA.

NM's 2015 Ozone NAAQS iSIP
84 FR 49057 2015 O3 TSP Approval
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Municipal Solid Waste Landfills – New Source Performance Standards and Emission Guidelines

In August 2016, EPA issued revised standards for both new and existing municipal solid waste landfills (MSWLs). The New Source Performance Standards at 40 CFR 60 Subpart XXX apply to landfills constructed or modified after July 17, 2014. The Emission Guidelines at 40 CFR 60 Subpart Cf apply to landfills constructed or modified on or prior to this date. Both of these federal rules aim to reduce landfill gas emissions. The New Source Performance Standard were incorporated by reference into the New Mexico Administrative Code (NMAC) on April 28, 2017.

Subpart Cf, promulgated under Section 111(d) of the Clean Air Act, requires that states, tribes and local authorities with jurisdiction over existing landfills develop a plan to implement the emission guidelines. One aspect of that state plan, for New Mexico, is the amendment of 20.2.64 NMAC – *Municipal Solid Waste Landfills* (Part 64).

On April 28, 2017, the Environmental Improvement Board unanimously approved the adoption of the State Plan implementing the emission guidelines and the repeal and replacement of Part 64.

Public Notice in English and Spanish
Petition for Hearing EIB 16-06 (R)
Original Plan Hearing Record (1996)
Notice of Intent to present technical testimony – filed 4/7/17
- Exhibits 1-3: Witness resumes
- Exhibit 4: Written testimony (Hollenberg)
- Exhibits 5 and 11: Proposed State Plan
- Exhibits 6 , 9 and 10: Proposed Part 64 Revisions
- Exhibits 7 and 8: Subpart Cf and Guidance Doc excerpts
- Exhibit 12: EPA Letter re Increments of Progress
- Exhibits 13 and 15 – 23: NMED Outreach Efforts
- Exhibits 14, 25 and 26: Industry comments and NMED response
- Exhibits 24 and 27: Small Business RAC letter and response
- Exhibit 28: Proposed Order and Statement of Reasons

EIB 16-06 (R) Order and Statement of Reasons 05022017
FR – MSW Landfill 11 Sept 2019

NMED submitted the approved State Plan implementing the Emission Guidelines in early May, 2017. On May 31, 2017, the EPA issued a 90-day stay on both the NSPS and EGs. This 90-day stay expired on August 29, 2017. Therefore, the 2016 federal rules are currently in effect. However, EPA is reconsidering several issues in these final rules. EPA does "not plan to prioritize" the review of submitted state plans and issuance of a Federal Plan for states that failed to submit a state plan. For more information on these rules and rule history, visit EPA's web page for landfills.

Please contact Neal Butt at (505) 629-2972 or neal.butt@state.nm.us if you have questions or comments concerning the State Plan development. For questions regarding implementation of the emission guidelines, contact EPA Region 6 (Boyce.Kenneth@epa.gov).

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Negative Declarations

Negative Declarations may be submitted to the U.S. EPA when Emissions Guidelines are finalized for existing sources. Emissions Guidelines require States, Tribes and Local Agencies to develop plans to implement the guidelines (rules) for sources within their jurisdictions that meet the applicability criteria. When a State, Tribe or Local Agency does not have an applicable source covered by the rule, a letter to U.S. EPA stating such may be submitted in lieu of an implementing plan. This is termed a "Negative Declaration."

On June 27, 2018, NMED submitted a Negative Declaration, which was clarified and reaffirmed in a June 15, 2020 Negative Declarationfor Commercial/Industrial Solid Waste Incinerators (CISWI) to EPA. (effective December 16, 2020) 85 FR 72967

On February 11, 2014, NMED submitted a Negative Declaration for Hospital Medical Infectious Waste Incinerators (HMIWI) to EPA. (effective April 1, 2021) 86 FR 12109

On October 11, 2007, NMED submitted a Negative Declaration, which was clarified and reaffirmed in a June 15, 2020 Negative Declaration, for Other Solid Waste Incinerators (OSWI) to EPA. (effective May 5, 2021) 86 FR 17543.

Please contact Neal Butt at (505) 629-2972 or neal.butt@state.nm.us if you have questions or comments concerning Negative Declarations.

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Nonattainment Area Permit Amendments (20.2.79 NMAC)

The Air Quality Bureau (AQB) of the New Mexico Environment Department (Department) intends to propose to the Environmental Improvement Board (EIB), amendments to 20.2.79 NMAC, *Permits – Nonattainment Areas* ("Part 79"), to make technical and administrative corrections to the rule. Part 79 specifies permitting requirements for any new major stationary source or major modification of an existing source located within a designated nonattainment area; or located within an area designated attainment or unclassifiable and will emit a regulated pollutant that significantly impacts a nonattainment area for the same pollutant.

The U.S. Environmental Protection Agency (EPA) designated a part of Doña Ana County near the Sunland Park area as a marginal nonattainment area for the 2015 ozone National Ambient Air Quality Standard ("2015 O_3 NAAQS") on August 3, 2018, requiring the AQB to develop a State Implementation Plan ("SIP") revision that includes a nonattainment permitting rule (i.e., Part 79) and submit it to EPA by August 3, 2021.

NMED Exhibit 12a

In December 2018, EPA promulgated the 2015 O_3 NAAQS implementation rule, which specifies nonattainment area SIP requirements. This final rule, referred to as the 2015 O_3 SIP Requirements Rule ("2015 O_3 SRR"), is largely an update to the previous implementing regulations promulgated for the 2008 O_3 NAAQS, and does not contain significant revisions from that previous rule.

The 2015 O_3 SRR addresses a range of nonattainment area SIP requirements New Mexico must meet for implementation of the 2015 O_3 NAAQS, including transportation conformity, nonattainment new source review ("NNSR"), emissions inventories, and emissions statement deadlines for SIP submissions and compliance with emission control measures in the SIP.

Pursuant to the 2015 O_3 SRR, NMED submitted a baseline Emissions Inventory and Emissions Statement to EPA by the specified deadline of August 3, 2020. For more information see /air-quality/dona-ana-2/

As part of the effort to comply with the 2015 O_3 SRR, the AQB analyzed Part 79 to determine if it was adequate to implement and enforce the standard. The AQB compared Part 79 with 40 CFR 51.165, *Permit Requirements*, and identified cross-reference inconsistencies and typographical errors that are addressed in the proposed revision.

Documents related to the proposed draft amendments to Part 79 are provided below.

All comments must be received by 5:00 PM MDT on May 21, 2021 in order for NMED to include a response in the hearing record. Anyone may present technical testimony, non-technical testimony or provide written or oral comments at the hearing. Please see the public hearing notice below for detailed instructions for participation.

Stakeholder Review Draft – 20.2.79 NMAC
Summary of Proposed Amendments and Rationale
Petition for Regulatory Change – 20.2.79.NMAC – Hearing No. EIB 21-07(R)
Sunland Park Nonattainment Area-Public Involvement Plan (PIP)
Sunland Park Nonattainment Area-Limited English Proficiency (LEP) Services Evaluation
Notice of Virtual Rulemaking Hearing for Proposed Amendments to 20.2.79 NMAC on June 25, 2021
Aviso de Audiencia de Reglamentacion por Internet para Considerar Propuesta de Enmendas a 20.2.79 NMAC el 25 de junio de 2021
Notice of Intent to Present Technical Testimony
NMED Exhibit 1 – Petition for Regulatory Change; Attachment 1 – Statement of Reasons; and Attachment 2 – Proposed Amendments to 20.2.79
NMED Exhibit 2 – Direct Testimony – Neal Butt
NMED Exhibit 3 – Resumes
NMED Exhibit 4 – Stakeholder Outreach Documentation
NMED Exhibit 5 – Summary of Proposed Changes to 20.2.79 NMAC with rationale for each change
NMED Exhibit 6 – Public Notice
NMED Exhibit 7 – State Records Center formatting revisions to 20.2.79 NMAC Public Review Draft
NMED Exhibit 8 – Small Business Regulatory Relief Act Letter
NMED Exhibit 9a – Federal Register Notice: 2015 Ozone NAAQS 80 FR 65292, October 26, 2015
NMED Exhibit 9b – Federal Register Notice: Nonattainment Area designation 83 FR 25820, June 4, 2018
NMED Exhibit 9c – Federal Register Notice: 2015 ozone NAAQS implementation rule 83 FR 62998, December 6, 2018MED Ex 9c 2015 SIP Requirements Rule 83 FR 62998 12-6-18
NMED Exhibit 10 – Proposed Order and Statement of Reasons
NMED Exhibit 11 – Stakeholder Comment from WEG and response from NMED
Please contact Neal Butt at (505) 629-2972 or neal.butt@state.nm.us if you have questions or comments concerning the proposed amendments.

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Petroleum Processing Facility Regulation Repeal (20.2.37 NMAC)

At a public hearing held August 12, 2016, the Environmental Improvement Board unanimously approved the repeal of 20.2.37 NMAC. Part 37 was adopted in 1974
and specifies emissions limits and other operating requirements for existing (constructed prior to July 1, 1974) and new petroleum refineries and natural gas processing facilities. This rule regulates emissions from several processes associated with petroleum processing facilities and has not been substantially revised since 1984. The rule was identified in the November 2012 Improving Environmental Permitting Report for potential revision or repeal. The Air Quality Bureau has conducted a thorough analysis of the rule as well as other similar federal rules that apply to this industry, and has concluded that the rule can be repealed without a relaxation of emissions controls or an adverse effect on air quality

Part 37 Notice of Intent EIB 16-02(R)
Public Notice (Part 37 EIB Hearing – English Notice and Part 37 EIB Hearing – Spanish Notice)
Part 37 Signed Statement of Reasons
Part 37 Notice of Intent EIB 16-02(R)
Please contact Mark Jones at mark.jones@state.nm.us or at (505) 566-9746 for additional information.

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Revisions to the New Mexico State Implementation Plan Regarding Startup, Shutdown and Malfunctions

A public hearing, held September 9, 2016, approved revisions to the State Implementation Plan (SIP) for New Mexico. The SIP revisions are in response to a final action issued by the U.S. Environmental Protection Agency (EPA). On June 12, 2015, the EPA published its final action to ensure states have plans in place that are fully consistent with the Clean Air Act and recent court decisions concerning startup, shutdown and malfunction (SSM) operations.

In response to this final action, the New Mexico Environment Department Air Quality Bureau proposed revisions to the State Implementation Plan (SIP). These SIP revisions entail removing applicable sections of 20.2.7 NMAC – Excess Emissions during Malfunction, Startup, Shutdown, or Scheduled Maintenance from the SIP. The proposal was unanimously approved by the Environmental Improvement Board on September 9, 2016.

NMED Exhibit 12a

Part 7 Proposed Revisions – Excess Emissions
Part 7 EIB Hearing – English Notice
Part 7 EIB Hearing – Spanish Notice
Signed Order – EIB Hearing 16-03 (R)
SOR 16-03(R)
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SO_2 Data Requirements Rule (SO_2 DRR) – Implementation of the 2010 1-hour Sulfur Dioxide Primary National Ambient Air Quality Standard

The U.S. EPA requires each State to supply information regarding sources that emit greater than 2,000 tons per year of sulfur dioxide in order to determine compliance with the 2010 1-hour primary standard. The schedule of required information includes:

January 15, 2016 – List of Sources – Sulfur dioxide states include for applicability to the Data Requirements Rule
July 1, 2016 – Approach – Air Quality Characterization – Sulfur dioxide (modeling or monitoring) for determining whether the source does or does not violate the standard
December 2016 – Revised Protocol
January 1, 2017 – Installation of monitors (if monitoring is the approach chosen)
January 13, 2017 – Final Modeling (actual emissions)
August 2017 – EPA SO_2 Disagreements Document
December 20, 2017 – EPA Attainment Designation for New Mexico (Round 3)
The Round 4 2010 SO_2 NAAQS Designations action was signed by the EPA Administrator, Andrew Wheeler, on December 21, 2020, pursuant to a court-ordered deadline of December 31, 2020. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, Acting Administrator Jane Nishida re-signed the same action on March 10, 2021 for publication in the *Federal Register*. Attainment/nonattainment designations for New Mexico were completed in December 2017. For more information on the 2010 SO_2 NAAQS and the Round 3 area designations, visit EPA's Round 3 2010 SO_2 NAAQS Designations webpage.

In accordance with the ongoing requirements in the federal rule, NMED must submit annual reports of the San Juan Generating Station's SO_2 emissions by July 1st of each year following designation. The purpose of this report is to analyze whether or not new modeling is required for areas that employed modeling of actual emissions for characterization. The fourth annual report for San Juan Generating Station (SJGS) is now available for review and public comment before submission to EPA. The report shows that SO_2 emissions continue to decrease from the modeling years of 2013-2015. 2018 emissions decreased significantly because two units were shut down in December 2017. The 2020 one-hour average and the one-hour maximum SO2 emissions showed decreases over the 2019 emissions. The three-year average for 2018-2020 showed decreased emissions when compared to the modeled three-year average for 2013-2015. Also, the annual maxima for 2018-2020 as well as the 99th percentile of 1-hour maxima for 2018-2020 significantly decreased from the modeled years of 2013-2015. Therefore, NMED recommends that new modeling should not be required at this time.

Draft 2022 Annual Report, SO2 Emissions for San Juan Generating Station – 5/6/2022
Draft 2021 Annual Report SO_2 DRR Report – SO_2 Emissions for SJGS – 5/11/2021
Public Involvement Plan for SJGS SO_2 Report – 5/15/2020
Notice of Availability Report Availability – 5/11/2021
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Total Suspended Particulate NM Ambient Air Quality Standard Repeal

The Improving Environmental Permitting Initial Report recommended that the Air Quality Bureau consider the NM Ambient Air Quality Standards (NMAAQS) for Total Suspended Particulate (TSP) for repeal.

The NM standards were adopted in 1969, prior to the adoption of the National Ambient Air Quality Standards (NAAQS) in 1971. The U.S. Environmental Protection Agency (EPA) revised its standards in 1987, replacing TSP with particulate matter less than 10 microns (PM_{10}). The NM TSP standards were retained, to protect the public from soiling and nuisance effects of larger particulates (dust).

The Air Quality Bureau studied the issue and determined that a repeal of the TSP standards will not cause a deterioration in air quality; the current federal air quality standards for PM_{10} and $PM_{2.5}$ are protective of public health. A repeal also eased the permitting burden for regulated sources and the Air Quality Bureau. A hearing was scheduled for September 28, 2018 in Las Cruces.

Public Notice of Rulemaking Hearing: Repeal of TSP Standard (English and Spanish)
In part to address soiling and nuisance effects of windblown dust, the Air Quality Bureau developed a dust mitigation plan and associated fugitive dust rule that applies in areas that are in danger of violating the PM_{10} NAAQS. (See *"Dust Mitigation Plan and Fugitive Dust Rule"* above.)

On September 28, 2018, the Environmental Improvement Board (EIB) held a public hearing in Las Cruces, NM to consider the proposed repeal of the NM Ambient Air Quality Standard for TSP contained in Section 109 of 20.2.3 NMAC. The EIB unanimously approved the proposal at its October 26, 2018 meeting in Santa Fe. The effective date of the repealed standard was November 30, 2018.

The "Notice if Intent for 18-04 (R)" includes written testimony, proposed rule amendments, a noninterference demonstration under CAA 110(l), and copies of public notices and affidavits of publication.

Notice of Intent for EIB Hearing 18-04 (R)
EIB Hearing 18-04 Transcript
EIB 18-04 Deliberations Transcript
Final Order/SOR/NMAC Transmittal – TSP Repeal
Governor's Designee Letter – TSP Repeal
84 FR 49057 2015 O3 TSP Approval
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NMED Exhibit 12a

Recent EPA Approvals of Regulatory Changes and Plans

The following are links to recently approved regulatory changes or plans. To view all EPA approvals related to the State Implementation Plan, please visit the electronic code of federal regulations.

NM Regulations:

Part 1 (effective September 22, 2015) 80 FR 43964
Part 2 (effective March 27, 2015) 80 FR 3884
Part 12 Repeal (effective July 13, 2015) 80 FR 33191
Part 20 Repeal (effective October 21, 2020) 85 FR 59194
Part 79 (effective December 16, 2022) EPA Approval of NM Ozone SIP 2022 (87 FR 68632)
Part 98 Repeal (effective July 20, 2015) 80 FR 34835
Part 99 (effective July 20, 2015) 80 FR 34835
Other:

Infrastructure for the 2015 Ozone National Ambient Air Quality Standards and Repeal of State Regulations for Total Suspended Particulate (effective October 18, 2019) 84 FR 49057 2015 O3 TSP Approval
FR – MSW Landfill 11 Sept 2019
Infrastructure and Transport for 2008 lead (Pb) NAAQS (effective July 13, 2015) 80 FR 33191
Infrastructure for the 2008 ozone NAAQS (effective July 24, 2015) 80 FR 36246, to include: Good Neighbor SIP for the 2008 ozone NAAQS (effective June 3, 2020) 85 FR 26361
Infrastructure for the 2010 NO2 NAAQS (effective July 24, 2015) 80 FR 36246
Infrastructure for 2010 SO2 NAAQS (effective November 13, 2015) 80 FR 61751

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NMED Exhibit 12a

Public Notices

This page lists public notices for rulemakings, permitting actions and any appeals of the action. Any rulemaking hearing or specific permitting or enforcement matter appealed to a board, commission or Environment Department Secretary is found on our Docketed Matters webpage once it is docketed.

Page Search: Search Page

Statewide/Across Multiple Counties

Public Hearing Notice: Repeal and Replacement of 20.2.70 NMAC, Operating Permits and Title V Program Revision

- Environmental Improvement Board Notice of Rulemaking Hearing to Consider Repeal and Replacement Of 20.2.70 NMAC, *Operating Permits* and Title V Program Revision, EIB 25-10 (R)
- Aviso De Audiencia De La Junta De Mejora Ambiental De Nuevo México Sobre Una Propuesta De Reglamentación Para Considerar La Derogación Y Reemplazo De 20.2.70 NMAC, Permisos De Operación Y Revisión Del Programa Del Título V, EIB 25-10 (R)
- Records from the rulemaking are available on NMED's Docketed Matters page https://www.env.nm.gov/opf/docketed-matters/
- Public Involvement Plan – Proposed Repeal & Replacement of 20.2.70 NMAC, Operating Permits, and Title V Permit Program Revision

Public Hearing Notice: Regional Haze State Implementation Plan Revision for the Second Planning Period and Proposed Companion Rule 20.2.68 NMAC

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance – January 23rd, 2025

2026 Multi-Sector General Permit for Stormwater Discharges from Industrial Facilities

Ozone Precursor Rule – Alternative Compliance Plan Proposal – Kinder Morgan, Inc.

Public Informational Meeting – Former PNM Santa Fe Generating Station, Drilling Activities

NMED Exhibit 12b

Clean Transportation Fuel Standard Advisory Committee Meeting Announcements

Air Quality Permit Fees – Repeal and Replacement of 20.2.71 NMAC AND 20.2.75 NMAC

Continuation of Rulemaking Hearing – New Mexico Environment Department's Proposed Water Reuse Regulations, Ground and Surface Water Protection – Supplemental Requirements For Water Reuse (20.6.8 NMAC)

Draft Air Quality Bureau 2024 Annual Air Quality Monitoring Network Review

UNIVERSAL WASTE SYSTEMS, INC FOR A SOLID WASTE FACILITY PERMIT

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance – March 6, 2024

Ozone Precursor Rule – Alternative Compliance Plan Proposal – Kinder Morgan, Inc.

Ozone Precursor Rule – Alternative Compliance Plan Proposal – Energy Transfer Company

PUBLIC MEETING NOTICE: MIRTAC ANNUAL MEETING 12/08/2023 9:00AM MST

Public Comment Period – New Mexico Environment Department's Proposed Water Reuse Regulations, Ground and Surface Water Protection – Supplemental Requirements For Water Reuse (20.6.8 NMAC)

Voluntary Remediation Oversight Revision

Public Hearing Notice: Advanced Clean Cars & Advanced Clean Trucks Environmental Improvement Board Notice of Rulemaking Hearing

Public Meeting Notice: New Mexico Environmental Improvement Board Notice of Rulemaking Hearing

Ozone Precursor Rule – Alternative Compliance Plan Proposal – Enterprise Products

Ozone Precursor Rule – Alternative Compliance Plan Proposal – Kinder Morgan

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance – May 19, 2023

Ozone Precursor Rule – Alternative Emissions Standards Proposal – El Paso Natural Gas

Title V Air Curtain Incinerator General Operating Permit

Public Meeting Notice: April 28, 2023, Environmental Improvement Board. Amendments to Occupational Health and Safety-General Provisions, 11.5.16 NMAC / Audiencia Publica: 28 abril de 2023, Enmiendas propuestas a 11.5.16 NMAC de la Seguridad y Salud Ocupacional-Disposiciones Generales

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance – January 26, 2023

Adoption of Amendments to Radiation Protection Rules, 20.3 NMAC (EIB 22-35) / Adopcion de las Enmiendas Mejora Del Medio Ambiente a 20.3 NMAC (EIB 22-35)

Proposed Rulemaking-Air Quality Bureau: proposed carbon dioxide emission standards for coal-fired electric generating facilities

NMED Exhibit 12b

Public Meeting Notice: June 21, 2022, Radiation Technical Advisory Council. Amendments to Radiation Protection Rules, 20.3 NMAC.

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance-RAID Award Meeting

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance

Proposed Amendments to 20.3.20 NMAC Medical Imaging and Radiation Therapy Licensure

Freeport-McMoRan Chino Mines Co – Chino Mine

New report tracks Environment Department's performance in protecting public health, environment

Public Meeting Notice: Meeting of Recycling and Illegal Dumping Alliance

Adoption of Amendments to 20.3.1 NMAC, 20.3.3 NMAC, 20.3.4 NMAC, 20.3.5 NMAC, 20.3.7 NMAC, 20.3.12 NMAC, and 20.3.15 NMAC of the Radiation Protection Regulations/ 20.3.5 NMAC, 20.3.7 NMAC, 20.3.12 NMAC y 20.3.15 NMAC de los Reglamentos de Protección Radiológica

Proposed Good Neighbor State Implementation Plan Certification for the 2015 Ozone National Ambient Air Quality Standard

Bernalillo County

Catron County

Chaves County

Cibola County

Colfax County

NMED Exhibit 12b

Curry County

Dona Ana County

Eddy County

Grant County

Guadalupe County

Harding County

Hidalgo County

Lea County

Lincoln County

Los Alamos County

Luna County

McKinley County

Mora County

Otero County

Quay County

Rio Arriba County

Roosevelt County

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Sandoval County

San Juan County

San Miguel County

Santa Fe County

Sierra County

Socorro County

Taos County

Torrance County

Valencia County

NMED Exhibit 12b

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Rule Hearing Search

20.2.70

Hearing Date: All

Comments Deadline Date: All

Agency: ----

Search

Return to Search Results

Proposed Rule Name:
Repeal and replacement of 20.2.70 NMAC, Operating Permits

Agency:
Environment Department

Purpose:
The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt the proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

Summary:
In addition to the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable

How to submit Comments:
From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [**https://nmed.commentinput.com/?id=ci5hWrFaZ (https://nmed.commentinput.com/?id=ci5hWrFaZ)**] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, **pamela.jones@env.nm.gov (mailto:pamela.jones@env.nm.gov)** .

When are comments due:
7/18/2025 12:00 PM

Hearing Date:
7/18/2025 9:00 AM

Public Hearing Location:
The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. 7/18/2025 (9:00 AM -12:00 PM)

How to participate:
Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [**https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140 (https://www.env.nm.gov/events-calendar/?**

NMED Exhibit 12c

concentrations of total suspended particulate (“TSP”) in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC.

Administratives Codes:

https://www.srca.nm.gov/parts/title20/20.002.0070.html

Rule Complete Copy :

The full text of the Department’s proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED’s Proposed Air Quality Regulations and Plans webpage at [**https://www.env.nm.gov/air-quality/proposed-regs/ (https://www.env.nm.gov/air-quality/proposed-regs/)**]; or in hard copy during regular business hours at the Air Quality Bureau’s main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or **neal.butt@env.nm.gov (mailto:neal.butt@env.nm.gov)**

Corrections:

Click Here to access Rule Corrections (https://www.env.nm.gov/air-quality/proposed-regs/)

Rule Explanatory Statement:

Click Here to access the Rule Explanatory Statement (https://www.env.nm.gov/air-quality/proposed-regs/)

Related New Mexico Register Publications:

Not available

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Neal Butt
neal.butt@nm.env.gov
(505) 629-2972

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trumbaEmbed=view%3Devent%26eventid%3D182246140)], under the calendar entry corresponding to the hearing start date.

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, **pamela.jones@env.nm.gov (mailto:pamela.jones@env.nm.gov)**.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

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File	File Name	File Type	Description

NMED Exhibit 12c

SUNSHINE NM.COM

NMED Exhibit 12c

From:	Butt, Neal, ENV
To:	Chavez, William, ENV
Cc:	Polgar, Brian, ENV; Peters, Eric, ENV; Vigil, Christopher J, ENV; Hejny, Jessica, ENV; Lopez, Shannon, ENV; Jones, Sara, ENV
Subject:	Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)
Date:	Wednesday, April 23, 2025 9:22:00 AM
Attachments:	2025-04-22 English Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx 2025-04-22 Spanish Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx

Good morning, Bill,

Could you please make this notice available in each of your field offices? A Spanish-language version is attached along with the English version.

Please let me know if you have any questions regarding this matter.

Thank you,

Neal T. Butt
Environmental Analyst
NMED - Air Quality Bureau

8801 Horizon Blvd NE
Albuquerque, NM 87113
(505) 629-2972

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Twitter @NMEnvDep | #iamNMED

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in

conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms

based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; and other applicable procedures.

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Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the

hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov .

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MÉXICO SOBRE UNA PROPUESTA DE REGLAMENTACIÓN PARA CONSIDERAR LA DEROGACIÓN Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACIÓN Y REVISIÓN DEL PROGRAMA DEL TÍTULO V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo México (la "Junta") celebrará una audiencia pública a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) – En el Asunto de la Propuesta de Derogación y Reemplazo de 20.2.70 NMAC – Permisos de Operación y Revisión del Programa del Título V. La Junta podrá tomar una decisión sobre la propuesta de derogación y reemplazo, así como sobre la revisión del Título V, al finalizar la audiencia, o bien podrá convocar una reunión después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizará en formato híbrido para permitir la participación tanto presencial como virtual. La audiencia presencial se llevará a cabo en edificio del Capitolio del Estado de Nuevo México (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo México 87505. La información detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia está disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusión de la audiencia se pueden enviar comentarios a través del portal de comentarios públicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electrónico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El propósito de la audiencia es que la Junta considere y tome posibles medidas sobre una petición de NMED que solicita a la Junta que adopte la derogación y el reemplazo propuestos por Nuevo México de 20.2.70 NMAC, Permisos de Operación, para abordar un mandato de la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés), que ordena la eliminación de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operación del Título V de Nuevo México, 20.2.70.304 NMAC, Disposición de Emergencia. Además, la EPA presentó un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definición de "Requisito Aplicable", en la Subsección E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Párrafo (7) de la Subsección E de 20.2.70.7 NMAC. El Departamento también ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulación vigente de permisos de operación del Título V de Nuevo México, en los párrafos (11) y (12) de la Subsección E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspensión" en el párrafo (1) de la Subsección AC de 20.2.70.7 NMAC. Específicamente, los límites para las concentraciones máximas permisibles de Partículas en Suspensión Totales ("TSP" por sus siglas en inglés) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estándares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Partículas en Suspensión Totales, fueron derogados, a partir del 30 de noviembre de 2018. El

Departamento también debe actualizar la regulación para cumplir con los requisitos actuales del Código Administrativo de Nuevo México, en la Subsección C de 1.24.11.9 NMAC, que exige que “Cuando una agencia enmiende una parte que no se presentó con el estilo y formato vigentes, volverá a formatear la parte completa (o utilizará el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordará estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentará a la EPA como una revisión del programa del Título V de Nuevo México.

El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA eliminó las disposiciones de defensa afirmativa de “emergencia” de las regulaciones del programa de permisos de operación de la Ley de Aire Limpio (“CAA” por sus siglas en inglés) (Título V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos.

Estas disposiciones establecían una defensa afirmativa que las fuentes estacionarias podrían haber hecho valer para evitar la responsabilidad en casos de aplicación presentados por el incumplimiento de los límites de emisiones basados en la tecnología contenidos en el permiso del Título V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de “emergencia” que califican.

Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operación ni de los permisos de operación individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Título V.

La EPA está eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretación actual de la EPA de la estructura de aplicación de la CAA, a la luz de decisiones judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decisión de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales (“NRDC” por sus siglas en inglés) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014).

Las autoridades estatales, locales y tribales encargadas de la concesión de permisos cuyos programas del Título V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Título V aprobados por la EPA. La EPA espera que los estados con programas del Título V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revisión del programa o una solicitud de prórroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a más tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presentó una carta a la EPA solicitando una prórroga

de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedió la solicitud.

Los estados también deben eliminar las disposiciones de defensa afirmativa basadas en el Título V contenidas en los permisos de operación individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA prevé que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periódicas de permisos u otras modificaciones de permisos no relacionadas. A más tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revisión del permiso o renovación periódica del permiso para la fuente que se produzca después de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los términos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobación por parte de la EPA de las revisiones del programa estatal, para los términos del permiso basados en una disposición de defensa afirmativa en un programa del Título V aprobado por la EPA.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la información relacionada, incluida la información técnica, puede consultarse en la página web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniéndose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevará a cabo de conformidad con los Procedimientos de Reglamentación de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Sección 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intención de presentar testimonio técnico en la audiencia deberá presentar un Aviso de Intención de presentar testimonio técnico ante la administradora de la Junta. El Aviso de Intención deberá: (1) identificar a la persona para quien el testigo o los testigos testificarán; (2) identificar a cada testigo técnico que la persona tiene la intención de presentar y declarar las cualificaciones de ese testigo, incluida una descripción de su historial académico y laboral; (3) si la audiencia se llevará a cabo en varias ubicaciones, indicar la ubicación o ubicaciones en las que estarán presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa; (5) incluir el texto de cualquier modificación recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se prevé que esa persona ofrezca en la audiencia, incluida cualquier declaración propuesta de los motivos para la adopción de las normas.

Los avisos de intención de presentar testimonio técnico deberán ser recibidos por la Junta a más tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el número de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intención de presentar testimonio técnico deberán enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del público podrá testificar en la audiencia. No se requiere aviso previo para presentar testimonio no técnico. Las personas también podrán presentar pruebas instrumentales no técnicas en relación con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaración por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, deberá presentar la declaración por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretación de idiomas o tengan una discapacidad y necesiten un lector, amplificador, intérprete de lenguaje de señas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 días antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este número a través de Relay New Mexico.

El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminación implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su versión modificada. Sección 504 de la Ley de Rehabilitación de 1973; la Ley contra la Discriminación por Edad de 1975; el Título IX de las Enmiendas a la Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, políticas o procedimientos de no discriminación del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminación del Departamento de Medio Ambiente de Nuevo México, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminación identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber cómo y dónde presentar una queja por discriminación.

From: New Mexico Environment Department
To: Butt, Neal, ENV
Subject: Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)
Date: Monday, April 21, 2025 3:07:42 PM

Air Quality Bureau

Regulatory and SIP Bulletin

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NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative

defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct

testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

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(505) 476-4300

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From: New Mexico Environment Department
To: Butt, Neal, ENV
Subject: Aviso De Audiencia De La Junta De Mejora Ambiental De Nuevo México Sobre Una Propuesta De Reglamentación Para Considerar La Derogación Y Reemplazo De 20.2.70 NMAC, Permisos De Operación Y Revisión Del Programa Del Título V, EIB 25-10 (R)
Date: Monday, April 21, 2025 3:08:47 PM

Air Quality Bureau

Regulatory and SIP Bulletin

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Aviso De Audiencia De La Junta De Mejora Ambiental De Nuevo México Sobre Una Propuesta De Reglamentación Para Considerar La Derogación Y Reemplazo De 20.2.70 NMAC, Permisos De Operación Y Revisión Del Programa Del Título V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo México (la "Junta") celebrará una audiencia pública a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) – En el Asunto de la Propuesta de Derogación y Reemplazo de 20.2.70 NMAC – Permisos de Operación y Revisión del Programa del Título V. La Junta podrá tomar una decisión sobre la propuesta de derogación y reemplazo, así como sobre la revisión del Título V, al finalizar la audiencia, o bien podrá convocar una reunión después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizará en formato híbrido para permitir la participación tanto presencial como virtual. La audiencia presencial se llevará a cabo en edificio del Capitolio del Estado de Nuevo México (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo México 87505. La información detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia está disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusión de la audiencia se pueden enviar comentarios a través del portal de comentarios públicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electrónico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El propósito de la audiencia es que la Junta considere y tome posibles medidas sobre una petición de NMED que solicita a la Junta que adopte la derogación y el reemplazo

propuestos por Nuevo México de 20.2.70 NMAC, Permisos de Operación, para abordar un mandato de la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés), que ordena la eliminación de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operación del Título V de Nuevo México, 20.2.70.304 NMAC, Disposición de Emergencia. Además, la EPA presentó un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definición de "Requisito Aplicable", en la Subsección E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Párrafo (7) de la Subsección E de 20.2.70.7 NMAC. El Departamento también ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulación vigente de permisos de operación del Título V de Nuevo México, en los párrafos (11) y (12) de la Subsección E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspensión" en el párrafo (1) de la Subsección AC de 20.2.70.7 NMAC. Específicamente, los límites para las concentraciones máximas permisibles de Partículas en Suspensión Totales ("TSP" por sus siglas en inglés) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estándares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Partículas en Suspensión Totales, fueron derogados, a partir del 30 de noviembre de 2018. El Departamento también debe actualizar la regulación para cumplir con los requisitos actuales del Código Administrativo de Nuevo México, en la Subsección C de 1.24.11.9 NMAC, que exige que "Cuando una agencia enmiende una parte que no se presentó con el estilo y formato vigentes, volverá a formatear la parte completa (o utilizará el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordará estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentará a la EPA como una revisión del programa del Título V de Nuevo México.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la información relacionada, incluida la información técnica, puede consultarse en la página web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniéndose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevará a cabo de conformidad con los Procedimientos de Reglamentación de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Sección 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier

persona que tenga la intención de presentar testimonio técnico en la audiencia deberá presentar un Aviso de Intención de presentar testimonio técnico ante la administradora de la Junta. El Aviso de Intención deberá: (1) identificar a la persona para quien el testigo o los testigos testificarán; (2) identificar a cada testigo técnico que la persona tiene la intención de presentar y declarar las cualificaciones de ese testigo, incluida una descripción de su historial académico y laboral; (3) si la audiencia se llevará a cabo en varias ubicaciones, indicar la ubicación o ubicaciones en las que estarán presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa; (5) incluir el texto de cualquier modificación recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se prevé que esa persona ofrezca en la audiencia, incluida cualquier declaración propuesta de los motivos para la adopción de las normas.

Los avisos de intención de presentar testimonio técnico deberán ser recibidos por la Junta a más tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el número de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intención de presentar testimonio técnico deberán enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del público podrá testificar en la audiencia. No se requiere aviso previo para presentar testimonio no técnico. Las personas también podrán presentar pruebas instrumentales no técnicas en relación con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaración por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, deberá presentar la declaración por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretación de idiomas o tengan una discapacidad y necesiten un lector, amplificador, intérprete de lenguaje de señas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 días antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este número a través de Relay New Mexico.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminación identificada anteriormente o visitar [https://www.env.nm.gov/non-employee-discrimination-complaint-page/] para saber cómo y dónde presentar una queja por discriminación.

For additional information concerning this bulletin, please contact Neal Butt at (505) 629-2972 or Neal.Butt@env.nm.gov . Additional information on the Air Quality Bureau's Proposed Air Quality Regulations and Plans is available at [https://www.env.nm.gov/air-quality/proposed-regs/]

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 & 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, or if you believe that you have been discriminated against with respect to a NMED program or activity, you may contact: Kate Cardenas, Non-Discrimination Coordinator, NMED, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov. You may also visit our website at https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

NMED Air Quality Bureau
525 Camino de los Marquez, Suite 1
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From:	Butt, Neal, ENV
To:	lcs@nmlegis.gov
Cc:	Polgar, Brian, ENV; Peters, Eric, ENV; Vigil, Christopher J, ENV; Hejny, Jessica, ENV; Lopez, Shannon, ENV; Jones, Sara, ENV
Subject:	FW: Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)
Date:	Wednesday, April 23, 2025 9:27:00 AM
Attachments:	2025-04-22 English Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx 2025-04-22 Spanish Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx

Good morning,

Pursuant to the State Rules Act (14-4-5.2 A NMSA 1978), this notice is being provided to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees. A Spanish-language version is attached along with the English version.

Please let me know if you have any questions regarding this matter.

Thank you,

Neal T. Butt
Environmental Analyst
NMED - Air Quality Bureau

8801 Horizon Blvd NE
Albuquerque, NM 87113
(505) 629-2972

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Twitter @NMEnvDep | #iamNMED

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in

conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms

based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; and other applicable procedures.

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Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

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AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MÉXICO SOBRE UNA PROPUESTA DE REGLAMENTACIÓN PARA CONSIDERAR LA DEROGACIÓN Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACIÓN Y REVISIÓN DEL PROGRAMA DEL TÍTULO V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo México (la "Junta") celebrará una audiencia pública a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) – En el Asunto de la Propuesta de Derogación y Reemplazo de 20.2.70 NMAC – Permisos de Operación y Revisión del Programa del Título V. La Junta podrá tomar una decisión sobre la propuesta de derogación y reemplazo, así como sobre la revisión del Título V, al finalizar la audiencia, o bien podrá convocar una reunión después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizará en formato híbrido para permitir la participación tanto presencial como virtual. La audiencia presencial se llevará a cabo en edificio del Capitolio del Estado de Nuevo México (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo México 87505. La información detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia está disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusión de la audiencia se pueden enviar comentarios a través del portal de comentarios públicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electrónico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El propósito de la audiencia es que la Junta considere y tome posibles medidas sobre una petición de NMED que solicita a la Junta que adopte la derogación y el reemplazo propuestos por Nuevo México de 20.2.70 NMAC, Permisos de Operación, para abordar un mandato de la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés), que ordena la eliminación de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operación del Título V de Nuevo México, 20.2.70.304 NMAC, Disposición de Emergencia. Además, la EPA presentó un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definición de "Requisito Aplicable", en la Subsección E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Párrafo (7) de la Subsección E de 20.2.70.7 NMAC. El Departamento también ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulación vigente de permisos de operación del Título V de Nuevo México, en los párrafos (11) y (12) de la Subsección E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspensión" en el párrafo (1) de la Subsección AC de 20.2.70.7 NMAC. Específicamente, los límites para las concentraciones máximas permisibles de Partículas en Suspensión Totales ("TSP" por sus siglas en inglés) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estándares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Partículas en Suspensión Totales, fueron derogados, a partir del 30 de noviembre de 2018. El

Departamento también debe actualizar la regulación para cumplir con los requisitos actuales del Código Administrativo de Nuevo México, en la Subsección C de 1.24.11.9 NMAC, que exige que “Cuando una agencia enmiende una parte que no se presentó con el estilo y formato vigentes, volverá a formatear la parte completa (o utilizará el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordará estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentará a la EPA como una revisión del programa del Título V de Nuevo México.

El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA eliminó las disposiciones de defensa afirmativa de “emergencia” de las regulaciones del programa de permisos de operación de la Ley de Aire Limpio (“CAA” por sus siglas en inglés) (Título V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos.

Estas disposiciones establecían una defensa afirmativa que las fuentes estacionarias podrían haber hecho valer para evitar la responsabilidad en casos de aplicación presentados por el incumplimiento de los límites de emisiones basados en la tecnología contenidos en el permiso del Título V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de “emergencia” que califican.

Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operación ni de los permisos de operación individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Título V.

La EPA está eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretación actual de la EPA de la estructura de aplicación de la CAA, a la luz de decisiones judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decisión de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales (“NRDC” por sus siglas en inglés) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014).

Las autoridades estatales, locales y tribales encargadas de la concesión de permisos cuyos programas del Título V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Título V aprobados por la EPA. La EPA espera que los estados con programas del Título V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revisión del programa o una solicitud de prórroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a más tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presentó una carta a la EPA solicitando una prórroga

de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedió la solicitud.

Los estados también deben eliminar las disposiciones de defensa afirmativa basadas en el Título V contenidas en los permisos de operación individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA prevé que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periódicas de permisos u otras modificaciones de permisos no relacionadas. A más tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revisión del permiso o renovación periódica del permiso para la fuente que se produzca después de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los términos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobación por parte de la EPA de las revisiones del programa estatal, para los términos del permiso basados en una disposición de defensa afirmativa en un programa del Título V aprobado por la EPA.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la información relacionada, incluida la información técnica, puede consultarse en la página web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniéndose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevará a cabo de conformidad con los Procedimientos de Reglamentación de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Sección 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intención de presentar testimonio técnico en la audiencia deberá presentar un Aviso de Intención de presentar testimonio técnico ante la administradora de la Junta. El Aviso de Intención deberá: (1) identificar a la persona para quien el testigo o los testigos testificarán; (2) identificar a cada testigo técnico que la persona tiene la intención de presentar y declarar las cualificaciones de ese testigo, incluida una descripción de su historial académico y laboral; (3) si la audiencia se llevará a cabo en varias ubicaciones, indicar la ubicación o ubicaciones en las que estarán presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa; (5) incluir el texto de cualquier modificación recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se prevé que esa persona ofrezca en la audiencia, incluida cualquier declaración propuesta de los motivos para la adopción de las normas.

Los avisos de intención de presentar testimonio técnico deberán ser recibidos por la Junta a más tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el número de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intención de presentar testimonio técnico deberán enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del público podrá testificar en la audiencia. No se requiere aviso previo para presentar testimonio no técnico. Las personas también podrán presentar pruebas instrumentales no técnicas en relación con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaración por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, deberá presentar la declaración por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretación de idiomas o tengan una discapacidad y necesiten un lector, amplificador, intérprete de lenguaje de señas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 días antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este número a través de Relay New Mexico.

El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminación implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su versión modificada. Sección 504 de la Ley de Rehabilitación de 1973; la Ley contra la Discriminación por Edad de 1975; el Título IX de las Enmiendas a la Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, políticas o procedimientos de no discriminación del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminación del Departamento de Medio Ambiente de Nuevo México, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminación identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber cómo y dónde presentar una queja por discriminación.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF

Details for NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF

May 4, 2025

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R) The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal. The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe,

NM 87502, pamela.jones@env.nm.gov . The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed. The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program. On July 12,

2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority. These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances. These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits. The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014). State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted. States must also remove Title V-based affirmative defense provisions

contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program. The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov . The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if

the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules. Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov. Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing. Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico. NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented

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by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov . If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination. Journal: May 4, 2025

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AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO

Details for AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO

May 4, 2025

AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MEXICO SOBRE UNA PROPUESTA DE REGLAMENTACION PARA CONSIDERAR LA DEROGACION Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACION Y REVISION DEL PROGRAMA DEL TITULO V, EIB 25-10 (R) La Junta de Mejora Ambiental de Nuevo Mexico (la "Junta") celebrara una audiencia publica a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) En el Asunto de la Propuesta de Derogacion y Reemplazo de 20.2.70 NMAC Permisos de Operacion y Revision del Programa del Titulo V. La Junta podra tomar una decision sobre la propuesta de derogacion y reemplazo, asi como sobre la revision del Titulo V, al finalizar la audiencia, o bien podra convocar una reunion después de la misma para considerar las medidas a tomar sobre la propuesta. La audiencia se realizara en formato hibrido para permitir la participacion tanto presencial como virtual. La audiencia presencial se llevara a cabo en edificio del Capitolio del Estado de Nuevo Mexico (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo Mexico 87505. La informacion detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia esta disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?

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trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusion de la audiencia se pueden enviar comentarios a traves del portal de comentarios publicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electronico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov. El proposito de la audiencia es que la Junta considere y tome posibles medidas sobre una peticion de NMED que solicita a la Junta que adopte la derogacion y el reemplazo propuestos por Nuevo Mexico de 20.2.70 NMAC, Permisos de Operacion, para abordar un mandato de la Agencia de Proteccion Ambiental de los Estados Unidos (EPA, por sus siglas en ingles), que ordena la eliminacion de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operacion del Titulo V de Nuevo Mexico, 20.2.70.304 NMAC, Disposicion de Emergencia. Ademas, la EPA presento un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definicion de "Requisito Aplicable", en la Subseccion E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Parrafo (7) de la Subseccion E de 20.2.70.7 NMAC. El Departamento tambien ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulacion vigente de permisos de operacion del Titulo V de Nuevo Mexico, en los parrafos (11) y (12) de la Subseccion E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspension" en el parrafo (1) de la Subseccion AC de 20.2.70.7 NMAC. Especificamente, los limites para las concentraciones maximas permisibles de Particulas en Suspension Totales ("TSP" por sus siglas en ingles) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estandares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Particulas en Suspension Totales, fueron derogados, a partir del 30 de

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noviembre de 2018. El Departamento tambien debe actualizar la regulacion para cumplir con los requisitos actuales del Codigo Administrativo de Nuevo Mexico, en la Subseccion C de 1.24.11.9 NMAC, que exige que "Cuando una agencia enmiende una parte que no se presento con el estilo y formato vigentes, volvera a formatear la parte completa (o utilizara el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordara estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa. La norma de reemplazo, de ser adoptada, se presentara a la EPA como una revision del programa del Titulo V de Nuevo Mexico. El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA elimino las disposiciones de defensa afirmativa de "emergencia" de las regulaciones del programa de permisos de operacion de la Ley de Aire Limpio ("CAA" por sus siglas en ingles) (Titulo V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos. Estas disposiciones establecian una defensa afirmativa que las fuentes estacionarias podrian haber hecho valer para evitar la responsabilidad en casos de aplicacion presentados por el incumplimiento de los limites de emisiones basados en la tecnologia contenidos en el permiso del Titulo V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de "emergencia" que califican. Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operacion ni de los permisos de operacion individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Titulo V. La EPA esta eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretacion actual de la EPA de la estructura de aplicacion de la CAA, a la luz de decisiones

judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decision de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales ("NRDC" por sus siglas en ingles) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014). Las autoridades estatales, locales y tribales encargadas de la concesion de permisos cuyos programas del Titulo V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Titulo V aprobados por la EPA. La EPA espera que los estados con programas del Titulo V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revision del programa o una solicitud de prorroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a mas tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presento una carta a la EPA solicitando una prorroga de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedio la solicitud. Los estados tambien deben eliminar las disposiciones de defensa afirmativa basadas en el Titulo V contenidas en los permisos de operacion individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA preve que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periodicas de permisos u otras modificaciones de permisos no relacionadas. A mas tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revision del permiso o renovacion periodica del permiso para la fuente que se produzca despues de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los terminos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobacion por parte de la EPA de las revisiones del programa estatal, para los terminos del permiso basados en una disposicion de defensa afirmativa

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en un programa del Titulo V aprobado por la EPA. El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, asi como la informacion relacionada, incluida la informacion tecnica, puede consultarse en la pagina web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniendose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov . La audiencia se llevara a cabo de conformidad con los Procedimientos de Reglamentacion de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Seccion 74-2-6 NMSA; y otros procedimientos aplicables. Todas las personas interesadas tendran una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intencion de presentar testimonio tecnico en la audiencia debera presentar un Aviso de Intencion de presentar testimonio tecnico ante la administradora de la Junta. El Aviso de Intencion debera: (1) identificar a la persona para quien el testigo o los testigos testificaran; (2) identificar a cada testigo tecnico que la persona tiene la intencion de presentar y declarar las cualificaciones de ese testigo, incluida una descripcion de su historial academico y laboral; (3) si la audiencia se llevara a cabo en varias ubicaciones, indicar la ubicacion o ubicaciones en las que estaran presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo tecnico en forma narrativa; (5) incluir el texto de cualquier modificacion recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se preve que esa persona ofrezca en la audiencia, incluida cualquier declaracion propuesta de los motivos para la adopcion de las normas. Los avisos de intencion de presentar

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testimonio tecnico deberan ser recibidos por la Junta a mas tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el numero de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intencion de presentar testimonio tecnico deberan enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov Cualquier persona del publico podra testificar en la audiencia. No se requiere aviso previo para presentar testimonio no tecnico. Las personas tambien podrán presentar pruebas instrumentales no tecnicas en relacion con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaracion por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, debera presentar la declaracion por escrito antes de la audiencia o durante la misma. Las personas que requieran servicios de interpretacion de idiomas o tengan una discapacidad y necesiten un lector, amplificador, interprete de lenguaje de senas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 dias antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este numero a traves de Relay New Mexico. El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administracion de sus programas o actividades, segun lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminacion implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su version modificada. Seccion 504 de la Ley de Rehabilitacion de 1973; la Ley contra la Discriminacion por Edad de 1975; el Titulo IX de las Enmiendas a la Educacion de 1972; y la Seccion 13 de las Enmiendas a la Ley Federal de Control de la Contaminacion del Agua de 1972. Si tiene alguna pregunta sobre

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este aviso o sobre cualquiera de los programas, politicas o procedimientos de no discriminacion del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminacion del Departamento de Medio Ambiente de Nuevo Mexico, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov. Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminacion identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber como y donde presentar una queja por discriminacion. Journal: May 4, 2025

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Affidavit of Publication

STATE OF NEW MEXICO } SS
COUNTY OF BERNALILLO }

Ad Cost:	$461.14
Ad Number:	218840
Account Number:	1089544
Classification:	GOVERNMENT LEGALS

I, Bernadette Gonzales, the undersigned, Legal Representative of the Albuquerque Journal, on oath, state that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, chapter 167, Session Laws of 1937, and payment of fees has been made of assessed and a copy of which is hereto attached, was published in said publication in the daily edition, 1 time on the following date:

May 4, 2025

That said newspaper was regularly issued and circulated on those dates.
SIGNED:

Legal Representative

Subscribed to and sworn to me this 5th day of May 2025.

David Lindsey Montoya
Notary Public
County Bernalillo
ID#: 1140229
My commission expires: 04-26-2027

STATE OF NEW MEXICO
NOTARY PUBLIC
DAVID LINDSEY MONTOYA
COMMISSION NUMBER 1140229
EXPIRATION DATE 04-26-2027

NMED AIR QUALITY BUREAU
525 CAMINO DE LOS MARQUEZ SUITE 1
SANTA FE, NM 87505

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov .

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

Journal: May 4, 2025

Affidavit of Publication

STATE OF NEW MEXICO } SS
COUNTY OF BERNALILLO }

Ad Cost:	$534.90
Ad Number:	218850
Account Number:	1089544
Classification:	GOVERNMENT LEGALS

I, Bernadette Gonzales, the undersigned, Legal Representative of the Albuquerque Journal, on oath, state that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, chapter 167, Session Laws of 1937, and payment of fees has been made of assessed and a copy of which is hereto attached, was published in said publication in the daily edition, 1 time on the following date:

May 4, 2025

That said newspaper was regularly issued and circulated on those dates.
SIGNED:

Legal Representative

Subscribed to and sworn to me this 5th day of May 2025.

David Lindsey Montoya
Notary Public

County Bernalillo
ID#: 1140229
My commission expires: 04-26-2027

STATE OF NEW MEXICO
NOTARY PUBLIC
DAVID LINDSEY MONTOYA
COMMISSION NUMBER 1140229
EXPIRATION DATE 04-26-2027

NMED AIR QUALITY BUREAU
525 CAMINO DE LOS MARQUEZ SUITE 1
SANTA FE, NM 87505

AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MEXICO SOBRE UNA PROPUESTA DE REGLAMENTACION PARA CONSIDERAR LA DEROGACION Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACION Y REVISION DEL PROGRAMA DEL TITULO V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo Mexico (la "Junta") celebrara una audiencia publica a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) En el Asunto de la Propuesta de Derogacion y Reemplazo de 20.2.70 NMAC Permisos de Operacion y Revision del Programa del Titulo V. La Junta podra tomar una decision sobre la propuesta de derogacion y reemplazo, asi como sobre la revision del Titulo V, al finalizar la audiencia, o bien podra convocar una reunion después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizara en formato hibrido para permitir la participacion tanto presencial como virtual. La audiencia presencial se llevara a cabo en edificio del Capitolio del Estado de Nuevo Mexico (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo Mexico 87505. La informacion detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia esta disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view-%3Devent%26eventid%3D182-246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusion de la audiencia se pueden enviar comentarios a traves del portal de comentarios publicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electronico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El proposito de la audiencia es que la Junta considere y tome posibles medidas sobre una peticion de NMED que solicita a la Junta que adopte la derogacion y el reemplazo propuestos por Nuevo Mexico de 20.2.70 NMAC, Permisos de Operacion, para abordar un mandato de la Agencia de Proteccion Ambiental de los Estados Unidos (EPA, por sus siglas en ingles), que ordena la eliminacion de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operacion del Titulo V de Nuevo Mexico, 20.2.70.304 NMAC, Disposicion de Emergencia. Ademas, la EPA presento un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definicion de "Requisito Aplicable", en la Subseccion E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Parrafo (7) de la Subseccion E de 20.2.70.7 NMAC. El Departamento tambien ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulacion vigente de permisos de operacion del Titulo V de Nuevo Mexico, en los parrafos (11) y (12) de la Subseccion E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspension" en el parrafo (1) de la Subseccion AC de 20.2.70.7 NMAC. Especificamente, los limites para las concentraciones maximas permisibles de Particulas en Suspension Totales ("TSP" por sus siglas en ingles) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estandares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Particulas en Suspension Totales, fueron derogados, a partir del 30 de noviembre de 2018. El Departamento tambien debe actualizar la regulacion para cumplir con los requisitos actuales del Codigo Administrativo de Nuevo Mexico, en la Subseccion C de 1.24.11.9 NMAC, que exige que "Cuando una agencia enmiende una parte que no se presento con el estilo y formato vigentes, volvera a formatear la parte completa (o utilizara el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordara estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentara a la EPA como una revision del programa del Titulo V de Nuevo Mexico.

El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA elimino las disposiciones de defensa afirmativa de "emergencia" de las regulaciones del programa de permisos de operacion de la Ley de Aire Limpio ("CAA" por sus siglas en ingles) (Titulo V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos.

Estas disposiciones establecian una defensa afirmativa que las fuentes estacionarias podrian haber hecho valer para evitar la responsabilidad en casos de aplicacion presentados por el incumplimiento de los limites de emisiones basados en la tecnologia contenidos en el permiso del Titulo V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de "emergencia" que califican.

Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operacion ni de los permisos de operacion individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Titulo V.

La EPA esta eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretacion actual de la EPA de la estructura de aplicacion de la CAA, a la luz de decisiones judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decision de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales ("NRDC" por sus siglas en ingles) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014).

Las autoridades estatales, locales y tribales encargadas de la concesion de permisos cuyos programas del Titulo V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Titulo V aprobados por la EPA. La EPA espera que los estados con programas del Titulo V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revision del programa o una solicitud de prorroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a mas tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presento una carta a la EPA solicitando una prorroga de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedio la solicitud.

Los estados tambien deben eliminar las disposiciones de defensa afirmativa basadas en el Titulo V contenidas en los permisos de operacion individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA preve que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periodicas de permisos u otras modificaciones de permisos no relacionadas. A mas tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revision del permiso o renovacion periodica del permiso para la fuente que se produzca despues de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los terminos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobacion por parte de la EPA de las revisiones del programa estatal, para los terminos del permiso basados en una disposicion de defensa afirmativa en un programa del Titulo V aprobado por la EPA.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la informacion relacionada, incluida la informacion tecnica, puede consultarse en la pagina web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniendose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevara a cabo de conformidad con los Procedimientos de Reglamentacion de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Seccion 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendran una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intencion de presentar testimonio tecnico en la audiencia debera presentar un Aviso de Intencion de presentar testimonio tecnico ante la administradora de la Junta. El Aviso de Intencion debera: (1) identificar a la persona para quien el testigo o los testigos testificaran; (2) identificar a cada testigo tecnico que la persona tiene la intencion de presentar y declarar las cualificaciones de ese testigo, incluida una descripcion de su historial academico y laboral; (3) si la audiencia se llevara a cabo en varias ubicaciones, indicar la ubicacion o ubicaciones en las que estaran presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo tecnico en forma narrativa; (5) incluir el texto de cualquier modificacion recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se preve que esa persona ofrezca en la audiencia, incluida cualquier declaracion propuesta de los motivos para la adopcion de las normas.

Los avisos de intencion de presentar testimonio tecnico deberan ser recibidos por la Junta a mas tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el numero de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intencion de presentar testimonio tecnico deberan enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del publico podra testificar en la audiencia. No se requiere aviso previo para presentar testimonio no tecnico. Las personas tambien podrán presentar pruebas instrumentales no tecnicas en relacion con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaracion por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, debera presentar la declaracion por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretacion de idiomas o tengan una discapacidad y necesiten un lector, amplificador, interprete de lenguaje de senas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 dias antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este numero a traves de Relay New Mexico.

El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administracion de sus programas o actividades, segun lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminacion implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su version modificada. Seccion 504 de la Ley de Rehabilitacion de 1973; la Ley contra la Discriminacion por Edad de 1975; el Titulo IX de las Enmiendas a la Educacion de 1972; y la Seccion 13 de las Enmiendas a la Ley Federal de Control de la Contaminacion del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, politicas o procedimientos de no discriminacion del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminacion del Departamento de Medio Ambiente de Nuevo Mexico, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminacion identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber como y donde presentar una queja por discriminacion.

Journal: May 4, 2025

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov. TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MÉXICO SOBRE UNA PROPUESTA DE REGLAMENTACIÓN PARA CONSIDERAR LA DEROGACIÓN Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACIÓN Y REVISIÓN DEL PROGRAMA DEL TÍTULO V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo México (la "Junta") celebrará una audiencia pública a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) – En el Asunto de la Propuesta de Derogación y Reemplazo de 20.2.70 NMAC – Permisos de Operación y Revisión del Programa del Título V. La Junta podrá tomar una decisión sobre la propuesta de derogación y reemplazo, así como sobre la revisión del Título V, al finalizar la audiencia, o bien podrá convocar una reunión después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizará en formato híbrido para permitir la participación tanto presencial como virtual. La audiencia presencial se llevará a cabo en edificio del Capitolio del Estado de Nuevo México (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo México 87505. La información detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia está disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusión de la audiencia se pueden enviar comentarios a través del portal de comentarios públicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electrónico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El propósito de la audiencia es que la Junta considere y tome posibles medidas sobre una petición de NMED que solicita a la Junta que adopte la derogación y el reemplazo propuestos por Nuevo México de 20.2.70 NMAC, Permisos de Operación, para abordar un mandato de la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés), que ordena la eliminación de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operación del Título V de Nuevo México, 20.2.70.304 NMAC, Disposición de Emergencia. Además, la EPA presentó un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definición de "Requisito Aplicable", en la Subsección E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Párrafo (7) de la Subsección E de 20.2.70.7 NMAC. El Departamento también ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulación vigente de permisos de operación del Título V de Nuevo México, en los párrafos (11) y (12) de la Subsección E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspensión" en el párrafo (1) de la Subsección AC de 20.2.70.7 NMAC. Específicamente, los límites para las concentraciones máximas permisibles de Partículas en Suspensión Totales ("TSP" por sus siglas en inglés) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estándares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Partículas en Suspensión Totales, fueron derogados, a partir del 30 de noviembre de 2018. El Departamento también debe actualizar la regulación para cumplir con los requisitos actuales del Código Administrativo de Nuevo México, en la Subsección C de 1.24.11.9 NMAC, que exige que "Cuando una agencia enmiende una parte que no se presentó con el estilo y formato vigentes, volverá a formatear la parte completa (o utilizará el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordará estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentará a la EPA como una revisión del programa del Título V de Nuevo México.

El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA eliminó las disposiciones de defensa afirmativa de "emergencia" de las regulaciones del programa de permisos de operación de la Ley de Aire Limpio ("CAA" por sus siglas en inglés) (Título V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos.

Estas disposiciones establecían una defensa afirmativa que las fuentes estacionarias podrían haber hecho valer para evitar la responsabilidad en casos de aplicación presentados por el incumplimiento de los límites de emisiones basados en la tecnología contenidos en el permiso del Título V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de "emergencia" que califican.

Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operación ni de los permisos de operación individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Título V.

La EPA está eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretación actual de la EPA de la estructura de aplicación de la CAA, a la luz de decisiones judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decisión de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales ("NRDC" por sus siglas en inglés) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014).

Las autoridades estatales, locales y tribales encargadas de la concesión de permisos cuyos programas del Título V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Título V aprobados por la EPA. La EPA espera que los estados con programas del Título V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revisión del programa o una solicitud de prórroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a más tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presentó una carta a la EPA solicitando una prórroga de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedió la solicitud.

Los estados también deben eliminar las disposiciones de defensa afirmativa basadas en el Título V contenidas en los permisos de operación individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA prevé que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periódicas de permisos u otras modificaciones de permisos no relacionadas. A más tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revisión del permiso o renovación periódica del permiso para la fuente que se produzca después de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los términos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobación por parte de la EPA de las revisiones del programa estatal, para los términos del permiso basados en una disposición de defensa afirmativa en un programa del Título V aprobado por la EPA.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la información relacionada, incluida la información técnica, puede consultarse en la página web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniéndose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevará a cabo de conformidad con los Procedimientos de Reglamentación de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Sección 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intención de presentar testimonio técnico en la audiencia deberá presentar un Aviso de Intención de presentar testimonio técnico ante la administradora de la Junta. El Aviso de Intención deberá: (1) identificar a la persona para quien el testigo o los testigos testificarán; (2) identificar a cada testigo técnico que la persona tiene la intención de presentar y declarar las cualificaciones de ese testigo, incluida una descripción de su historial académico y laboral; (3) si la audiencia se llevará a cabo en varias ubicaciones, indicar la ubicación o ubicaciones en las que estarán presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa; (5) incluir el texto de cualquier modificación recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se prevé que esa

persona ofrezca en la audiencia, incluida cualquier declaración propuesta de los motivos para la adopción de las normas.

Los avisos de intención de presentar testimonio técnico deberán ser recibidos por la Junta a más tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el número de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intención de presentar testimonio técnico deberán enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del público podrá testificar en la audiencia. No se requiere aviso previo para presentar testimonio no técnico. Las personas también podrán presentar pruebas instrumentales no técnicas en relación con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaración por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, deberá presentar la declaración por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretación de idiomas o tengan una discapacidad y necesiten un lector, amplificador, intérprete de lenguaje de señas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 días antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este número a través de Relay New Mexico.

El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminación implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su versión modificada. Sección 504 de la Ley de Rehabilitación de 1973; la Ley contra la Discriminación por Edad de 1975; el Título IX de las Enmiendas a la Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, políticas o procedimientos de no discriminación del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminación del Departamento de Medio Ambiente de Nuevo México, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminación identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber cómo y dónde presentar una queja por discriminación.

INVOICE

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#	Product or service	Description	Qty	Rate	Amount
1.	**NM Register - 431902**	New Mexico Environmental Improvement Board Notice of Rulemaking Hearing To Consider Repeal and Replacement of 20.2.70 NMAC, Operating Permits and Title V Program Revision, EIB 25-10 (R), hearing date: 7/18/2025	54	$3.00	$162.00
2.	**NM Register - 431902**	Aviso De Audiencia De La Junta De Mejora Ambiental De Nuevo Mexico Sobre una Propuesta De Reglamentaction Para Considerar La Derogacion Y Reemplazo De 20/2/70 NMAC, Permisos De Operaction Y Revision Del Programa Del Titulo V, EIB 25-10 (R), hearing date: 7/18/2025	62	$3.00	$186.00

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Affidavit of Publication in New Mexico Register

I, Matthew Ortiz, certify that the agency noted on Invoice # 8141 has published legal notice of rulemaking or rules in the NEW MEXICO REGISTER, VOLUME XXXVI, that payment has been assessed for said legal notice of rulemaking or rules, which appears on the publication date and in the issue number noted on Invoice # 8141, and that Invoice # 8141 has been sent electronically to the person(s) listed on the *Billing Information Sheet* provided by the agency.

Affiant: _____
Matthew Ortiz

Subscribed, sworn and acknowledged before me this 8th day of May 2025.

Notary Public: _____
My Commission Expires: 1/22/2028

PAMELA ANNE LUJAN Y VIGIL
Notary Public
State of New Mexico
Comm. # 2001927
My Comm. Exp. Jan 22, 2028

From:	Butt, Neal, ENV
To:	nmlandgrantcouncil@unm.edu
Cc:	Polgar, Brian, ENV; Peters, Eric, ENV; Vigil, Christopher J, ENV; Hejny, Jessica, ENV; Lopez, Shannon, ENV; Jones, Sara, ENV
Subject:	Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)
Date:	Wednesday, April 23, 2025 9:18:00 AM
Attachments:	2025-04-22 English Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx 2025-04-22 Spanish Notice of Proposed Rulemaking 20_2_70 NMAC Operating Permits.docx

Dear Sir or Madam,

This notice is being provided to you to pass along to the respective representatives of the Land Grants located in New Mexico. A Spanish-language version is attached along with the English version.

If you have questions regarding this notice, please contact me at:

Neal T. Butt
Environmental Analyst
NMED - Air Quality Bureau

8801 Horizon Blvd NE
Albuquerque, NM 87113
(505) 629-2972

Neal.Butt@env.nm.gov
www.env.nm.gov
Twitter @NMEnvDep | #iamNMED

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in

conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

On July 12, 2023 (88 FR 47029, 7/21/23), the EPA removed the "emergency" affirmative defense provisions from Clean Air Act ("CAA") operating permit program (Title V) regulations at 40 CFR 70.6(g), which is applicable to state, local, and tribal permitting authorities, and 71.6(g), applicable when EPA is the permitting authority.

These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances.

These emergency affirmative defense provisions have never been required elements of state operating permit programs or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.

The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("NRDC") v. EPA, 749 F.3d 1055. (D.C. Cir. 2014).

State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. The EPA expects that states with Title V programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of EPA's final rule. (i.e., by August 21, 2024). On August 21, 2024, the Department submitted a letter to EPA requesting an extension of this deadline until August 21, 2025. On September 17, 2024, this request was granted.

States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of EPA's final rule (i.e. August 21, 2023), for permit terms

based on 40 CFR 70.6(g) or 71.6(g); or (2) the EPA's approval of state program revisions, for permit terms based on an affirmative defense provision in an EPA-approved title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the

hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact Kate Cardenas, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov .

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

AVISO DE AUDIENCIA DE LA JUNTA DE MEJORA AMBIENTAL DE NUEVO MÉXICO SOBRE UNA PROPUESTA DE REGLAMENTACIÓN PARA CONSIDERAR LA DEROGACIÓN Y REEMPLAZO DE 20.2.70 NMAC, PERMISOS DE OPERACIÓN Y REVISIÓN DEL PROGRAMA DEL TÍTULO V, EIB 25-10 (R)

La Junta de Mejora Ambiental de Nuevo México (la "Junta") celebrará una audiencia pública a partir del 18 de julio de 2025 a las 9:00 a. m. para considerar la EIB 25-10 (R) – En el Asunto de la Propuesta de Derogación y Reemplazo de 20.2.70 NMAC – Permisos de Operación y Revisión del Programa del Título V. La Junta podrá tomar una decisión sobre la propuesta de derogación y reemplazo, así como sobre la revisión del Título V, al finalizar la audiencia, o bien podrá convocar una reunión después de la misma para considerar las medidas a tomar sobre la propuesta.

La audiencia se realizará en formato híbrido para permitir la participación tanto presencial como virtual. La audiencia presencial se llevará a cabo en edificio del Capitolio del Estado de Nuevo México (Roundhouse), ubicado en 490 Old Santa Fe Trail, Santa Fe, Nuevo México 87505. La información detallada sobre la hora, el lugar y las instrucciones para unirse virtualmente a la audiencia está disponible en el calendario de eventos del Departamento de Medio Ambiente de Nuevo México ("NMED") en [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], en la entrada del calendario correspondiente a la fecha de inicio de la audiencia. Desde ahora y hasta la conclusión de la audiencia se pueden enviar comentarios a través del portal de comentarios públicos del NMED en [https://nmed.commentinput.com/?id=ci5hWrFaZ] o por correo electrónico o correo postal a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

El propósito de la audiencia es que la Junta considere y tome posibles medidas sobre una petición de NMED que solicita a la Junta que adopte la derogación y el reemplazo propuestos por Nuevo México de 20.2.70 NMAC, Permisos de Operación, para abordar un mandato de la Agencia de Protección Ambiental de los Estados Unidos (EPA, por sus siglas en inglés), que ordena la eliminación de ciertas disposiciones de defensa afirmativa en el Programa de Permisos de Operación del Título V de Nuevo México, 20.2.70.304 NMAC, Disposición de Emergencia. Además, la EPA presentó un comentario al Departamento, indicando que uno de los "Requisitos Aplicables" citados en 40 CFR 70.2.(7) falta en la definición de "Requisito Aplicable", en la Subsección E de 20.2.70.7 NMAC. Para abordar esta deficiencia, se propone un nuevo texto en el Párrafo (7) de la Subsección E de 20.2.70.7 NMAC. El Departamento también ha identificado una incongruencia entre la norma federal en 40 CFR 70.2, Requisito Aplicable y la regulación vigente de permisos de operación del Título V de Nuevo México, en los párrafos (11) y (12) de la Subsección E de 20.2.70.7 NMAC. Asimismo, existe una referencia obsoleta al "total de material particulado en suspensión" en el párrafo (1) de la Subsección AC de 20.2.70.7 NMAC. Específicamente, los límites para las concentraciones máximas permisibles de Partículas en Suspensión Totales ("TSP" por sus siglas en inglés) en el aire ambiente, previamente estipulados en 20.2.3 NMAC, Estándares de Calidad del Aire Ambiental, en 20.2.3.109 NMAC, Partículas en Suspensión Totales, fueron derogados, a partir del 30 de noviembre de 2018. El

Departamento también debe actualizar la regulación para cumplir con los requisitos actuales del Código Administrativo de Nuevo México, en la Subsección C de 1.24.11.9 NMAC, que exige que “Cuando una agencia enmiende una parte que no se presentó con el estilo y formato vigentes, volverá a formatear la parte completa (o utilizará el reformateo realizado por el centro de registros) y adoptar oficialmente los requisitos de estilo y formato vigentes junto con la enmienda». El Departamento abordará estos cambios al mismo tiempo que se eliminen las disposiciones de defensa afirmativa.

La norma de reemplazo, de ser adoptada, se presentará a la EPA como una revisión del programa del Título V de Nuevo México.

El 12 de julio de 2023 (88 FR 47029, 21/7/23), la EPA eliminó las disposiciones de defensa afirmativa de “emergencia” de las regulaciones del programa de permisos de operación de la Ley de Aire Limpio (“CAA” por sus siglas en inglés) (Título V) en 40 CFR 70.6(g), que se aplica a las autoridades de permisos estatales, locales y tribales, y 71.6(g), aplicable cuando la EPA es la autoridad de permisos.

Estas disposiciones establecían una defensa afirmativa que las fuentes estacionarias podrían haber hecho valer para evitar la responsabilidad en casos de aplicación presentados por el incumplimiento de los límites de emisiones basados en la tecnología contenidos en el permiso del Título V de la fuente, siempre que la fuente demostrara que el exceso de emisiones se produjo debido a circunstancias de “emergencia” que califican.

Estas disposiciones de defensa afirmativa de emergencia nunca han sido elementos obligatorios de los programas estatales de permisos de operación ni de los permisos de operación individuales. No obstante, algunos programas estatales, locales y tribales han adoptado dichas disposiciones e incluyen estas defensas afirmativas en los permisos del Título V.

La EPA está eliminando las disposiciones de defensa afirmativa de emergencia de 40 CFR 70.6(g) y 71.6(g) porque son inconsistentes con la interpretación actual de la EPA de la estructura de aplicación de la CAA, a la luz de decisiones judiciales previas del Tribunal de Apelaciones de los Estados Unidos para el Circuito de D.C., principalmente la decisión de 2014 del Tribunal en el caso Consejo de Defensa de los Recursos Naturales (“NRDC” por sus siglas en inglés) contra la EPA, 749 F.3d 1055 (D.C. Cir. 2014).

Las autoridades estatales, locales y tribales encargadas de la concesión de permisos cuyos programas del Título V contengan disposiciones de defensa afirmativa inadmisibles deben presentar revisiones del programa a la EPA para eliminar dichas disposiciones inadmisibles de sus programas del Título V aprobados por la EPA. La EPA espera que los estados con programas del Título V que contengan disposiciones de defensa afirmativa inadmisibles le presenten una revisión del programa o una solicitud de prórroga dentro de los 12 meses posteriores a la fecha de entrada en vigor de la norma final de la EPA. (es decir, a más tardar el 21 de agosto de 2024). El 21 de agosto de 2024, el Departamento presentó una carta a la EPA solicitando una prórroga

de este plazo hasta el 21 de agosto de 2025. El 17 de septiembre de 2024, se concedió la solicitud.

Los estados también deben eliminar las disposiciones de defensa afirmativa basadas en el Título V contenidas en los permisos de operación individuales. La EPA insta a los estados a eliminar estas disposiciones lo antes posible. La EPA prevé que cualquier cambio necesario en los permisos se produzca en el curso normal de sus operaciones, a medida que los estados procesan las renovaciones periódicas de permisos u otras modificaciones de permisos no relacionadas. A más tardar, los estados deben eliminar las disposiciones de defensa afirmativa de los permisos individuales durante la siguiente revisión del permiso o renovación periódica del permiso para la fuente que se produzca después de cualquiera de las dos: (1) la fecha de entrada en vigor de la norma final de la EPA (es decir, el 21 de agosto de 2023), para los términos de los permisos basados en 40 CFR 70.6(g) o 71.6(g); o (2) la aprobación por parte de la EPA de las revisiones del programa estatal, para los términos del permiso basados en una disposición de defensa afirmativa en un programa del Título V aprobado por la EPA.

El texto completo de las enmiendas propuestas por la Oficina a la Parte 70, así como la información relacionada, incluida la información técnica, puede consultarse en la página web de Regulaciones y Planes de Calidad del Aire Propuestos del NMED: [https://www.env.nm.gov/air-quality/proposed-regs/]; o en formato impreso durante el horario normal de oficina, en la principal Oficina ubicada en 525 Camino de los Marquez, Santa Fe, NM, 87505; o poniéndose en contacto con Neal Butt llamando al (505) 629-2972 o en neal.butt@env.nm.gov .

La audiencia se llevará a cabo de conformidad con los Procedimientos de Reglamentación de la Junta de Mejora Ambiental, 20.1.1 NMAC; la Ley de Mejora Ambiental, 74-1-9 NMSA 1978; la Ley de Control de la Calidad del Aire, Sección 74-2-6 NMSA; y otros procedimientos aplicables.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos relevantes, oralmente y por escrito; para presentar pruebas instrumentales; e interrogar a los testigos. Cualquier persona que tenga la intención de presentar testimonio técnico en la audiencia deberá presentar un Aviso de Intención de presentar testimonio técnico ante la administradora de la Junta. El Aviso de Intención deberá: (1) identificar a la persona para quien el testigo o los testigos testificarán; (2) identificar a cada testigo técnico que la persona tiene la intención de presentar y declarar las cualificaciones de ese testigo, incluida una descripción de su historial académico y laboral; (3) si la audiencia se llevará a cabo en varias ubicaciones, indicar la ubicación o ubicaciones en las que estarán presentes los testigos; (4) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa; (5) incluir el texto de cualquier modificación recomendada al cambio regulatorio propuesto; y (6) enumerar y adjuntar todas las pruebas instrumentales que se prevé que esa persona ofrezca en la audiencia, incluida cualquier declaración propuesta de los motivos para la adopción de las normas.

Los avisos de intención de presentar testimonio técnico deberán ser recibidos por la Junta a más tardar a las 5:00 p. m. del 27 de junio de 2025, e indicar el número de expediente (EIB 25-10 (R)) y la fecha de la audiencia (18 de julio de 2025). Los avisos de intención de presentar testimonio técnico deberán enviarse a Pamela Jones, administradora de la Junta, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov

Cualquier persona del público podrá testificar en la audiencia. No se requiere aviso previo para presentar testimonio no técnico. Las personas también podrán presentar pruebas instrumentales no técnicas en relación con su testimonio, siempre que la prueba instrumental no repita indebidamente el testimonio. Si desea presentar una declaración por escrito para que conste en actas, en lugar de prestar testimonio oral en la audiencia, deberá presentar la declaración por escrito antes de la audiencia o durante la misma.

Las personas que requieran servicios de interpretación de idiomas o tengan una discapacidad y necesiten un lector, amplificador, intérprete de lenguaje de señas cualificado o cualquier otro tipo de servicio o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones al menos 14 días antes de la audiencia o lo antes posible llamando al (505) 660-4305 o en pamela.jones@env.nm.gov. Los usuarios de TDD o TDY pueden llamar al 7-1-1 o al 800-659-8331 para acceder a este número a través de Relay New Mexico.

El NMED no discrimina por motivos de raza, color, nacionalidad, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigen las leyes y normativas aplicables. NMED es responsable de coordinar las iniciativas de cumplimiento y de recibir consultas sobre los requisitos de no discriminación implementados por 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, en su versión modificada. Sección 504 de la Ley de Rehabilitación de 1973; la Ley contra la Discriminación por Edad de 1975; el Título IX de las Enmiendas a la Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, políticas o procedimientos de no discriminación del NMED, puede comunicarse con Kate Cardenas, coordinadora de no discriminación del Departamento de Medio Ambiente de Nuevo México, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov.

Si cree que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la coordinadora de no discriminación identificada anteriormente o visitar https://www.env.nm.gov/non-employeediscrimination-complaint-page/ para saber cómo y dónde presentar una queja por discriminación.

From:	Butt, Neal, ENV
To:	Butt, Neal, ENV
Cc:	Polgar, Brian, ENV; Peters, Eric, ENV; Vigil, Christopher J, ENV; Hejny, Jessica, ENV; Lopez, Shannon, ENV; Jones, Sara, ENV; Becker, Kathryn, OSE
Subject:	FW: Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)
Date:	Wednesday, April 23, 2025 9:33:44 AM

Dear Sir or Madam,

I hope this notice finds you well. I am writing to provide you with an update related to the New Mexico Environment Department's rulemaking to repeal and replace 20.2.70 NMAC, *Operating Permits*, and proposed revision to the Title V operating permit program. A Spanish-language version of this notice is available upon request.

If you have questions regarding this notice, please contact me at:

Neal

Neal T. Butt
Environmental Analyst
NMED - Air Quality Bureau

8801 Horizon Blvd NE
Albuquerque, NM 87113
(505) 629-2972

Neal.Butt@env.nm.gov
www.env.nm.gov
Twitter @NMEnvDep | #iamNMED

From: New Mexico Environment Department <nmed@public.govdelivery.com>
Sent: Monday, April 21, 2025 3:08 PM
To: Butt, Neal, ENV <Neal.Butt@env.nm.gov>
Subject: Environmental Improvement Board Notice of Rulemaking Hearing to Consider the Repeal & Replacement of 20.2.70 NMAC, Operating Permits And Title V Program Revision, EIB 25-10 (R)

Air Quality Bureau

Regulatory and SIP Bulletin

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NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING TO CONSIDER REPEAL AND REPLACEMENT OF 20.2.70 NMAC, OPERATING PERMITS AND TITLE V PROGRAM REVISION, EIB 25-10 (R)

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning on July 18, 2025, at 9:00 a.m. to consider EIB 25-10 (R) – In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits and Title V Program Revision. The Board may make a decision on the proposed repeal and replacement and Title V revision at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

The hearing will be conducted in a hybrid format to allow for both in-person and virtual participation. The in-person hearing will be held at the New Mexico State Capitol Building (Roundhouse), 490 Old Santa Fe Trail, Santa Fe, New Mexico 87505. Detailed information concerning the time and location and instructions on how to join the hearing virtually is available on the New Mexico Environment Department ("NMED") events calendar at [https://www.env.nm.gov/events-calendar/?trumbaEmbed=view%3Devent%26eventid%3D182246140], under the calendar entry corresponding to the hearing start date. From now until the conclusion of the hearing, comments may be submitted via the NMED public comment portal at [https://nmed.commentinput.com/?id=ci5hWrFaZ] or via electronic or physical mail to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov .

The purpose of the hearing is for the Board to consider and take possible action on a petition by NMED requesting the Board to adopt New Mexico's proposed repeal and replacement of 20.2.70 NMAC, Operating Permits, to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in New Mexico's Title V Operating Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V operating permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. The Department must also update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the records center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will address these changes at the same time as the affirmative defense provisions are removed.

The replacement rule, if adopted, will be submitted to the EPA as a revision to New Mexico's Title V program.

The full text of the Bureau's proposed amendments to Part 70, and related information, including technical information, may be reviewed on NMED's Proposed Air Quality Regulations and Plans web page at [https://www.env.nm.gov/air-quality/proposed-regs/]; or in hard copy during regular business hours at the Bureau's main office, 525 Camino de los Marquez, Santa Fe, New Mexico, 87505; or by contacting Neal Butt at (505) 629-2972, or neal.butt@env.nm.gov .

The hearing will be conducted in accordance with Rulemaking Procedures - Environmental Improvement Board, 20.1.1 NMAC; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Air Quality Control Act, Section 74-2-6 NMSA 1978; 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 and in writing; to introduce exhibits; and to examine witnesses. Any person who intends to present technical testimony at the hearing shall file a Notice of Intent to present technical testimony with the Board Administrator. The Notice of Intent shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness the person intends to present and state the qualifications of that

witness, including a description of their educational and work background; (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present; (4) include a copy of the direct testimony of each technical witness in narrative form; (5) include the text of any recommended modifications to the proposed regulatory change; and (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent to present technical testimony must be received by the Board no later than 5:00 pm on June 27, 2025, and should reference the docket number (EIB 25-10 (R)) and date of the hearing (July 18, 2025). Notices of intent to present technical testimony shall be submitted to Pamela Jones, Board Administrator, P.O. Box 5469, Santa Fe, NM 87502, pamela.jones@env.nm.gov.

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing.

Persons requiring language interpretation services or having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing should contact Pamela Jones at least 14 days prior to the hearing or as soon as possible at (505) 660-4305 or pamela.jones@env.nm.gov . TDD or TDY users please dial 7-1-1 or 800-659-8331 to access this number via Relay New Mexico.

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

For additional information concerning this bulletin, please contact Neal Butt at (505) 629-2972 or Neal.Butt@env.nm.gov . Additional information on the Air Quality Bureau's Proposed Air Quality Regulations and Plans is available at [https://www.env.nm.gov/air-quality/proposed-regs/]

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 & 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, or if you believe that you have been discriminated against with respect to a NMED program or activity, you may contact: Kate Cardenas, Non-Discrimination Coordinator, NMED, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@env.nm.gov. You may also visit our website at https://www.env.nm.gov/non-employee-discrimination-complaint-page/ to learn how and where to file a complaint of discrimination.

NMED Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, New Mexico, 87505-1816

(505) 476-4300

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May 13, 2025

Small Business Regulatory Advisory Commission
c/o Kim Sewell
New Mexico Economic Development Department
1100 St. Francis Drive
Santa Fe, New Mexico 87501
kim.sewell@edd.nm.gov

Re: Proposed New Regulations at 20.2.70 NMAC – *Operating Permits*

Dear Commission Members:

The New Mexico Environment Department ("Department") hereby provides notice to the Small Business Regulatory Advisory Commission, pursuant to the Small Business Regulatory Relief Act ("Act"), NMSA 1978, Sections 14-4A-1 to -6 (2005), that the Environmental Protection Division, Air Quality Bureau ("Bureau") has filed a Petition for Regulatory Change with the Environmental Improvement Board ("Board"), requesting the Board to set a hearing to consider proposed new regulations at 20.2.70 NMAC – *Operating Permits*. A copy of the proposed regulations is attached. This regulatory change is required to address a mandate by the U.S. Environmental Protection Agency ("EPA") directing the removal of certain affirmative defense provisions in the New Mexico Title V Permit Program at 20.2.70.304 NMAC, Emergency Provision. In addition, EPA provided a comment to the Department, indicating that one of the "Applicable Requirements" cited at 40 CFR 70.2.(7) is missing from the definition of "Applicable Requirement", at Subsection E of 20.2.70.7 NMAC. To address this deficiency, a new text is proposed at Paragraph (7) of Subsection E of 20.2.70.7 NMAC. The Department has also identified an incongruity between the federal rule at 40 CFR 70.2 Applicable Requirement, and the current NM Title V permit regulation at Paragraphs (11) and (12) of Subsection E of 20.2.70.7 NMAC. There is also an outdated reference to "total suspended particulate matter" at Paragraph (1) of Subsection AC of 20.2.70.7 NMAC. Specifically, the limits for maximum allowable concentrations of total suspended particulate ("TSP") in the ambient air previously stipulated by 20.2.3 NMAC, Ambient Air Quality Standards, at 20.2.3.109 NMAC, Total Suspended Particulates, were repealed, effective November 30, 2018. In addition, the Department must update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which requires that "When an agency amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the Records Center) and officially adopt the current style and formatting requirements in conjunction with the amendment". The Department will need to address these changes at the same time as the affirmative defense provisions are removed.

The Department has requested that the Board hold a hearing on the proposed regulations (Docket No. EIB 25-10 (R)) beginning on July 18, 2025. To view the Department's Petition for Regulatory Change, and for details regarding the hearing please check the Department's Docketed Matters website at https://www.env.nm.gov/opf/docketed-matters/. The hearing will be conducted in accordance with the Board's Rulemaking Procedures at 20.1.1 NMAC.

If you require further information about these proposed regulations, you can reach me by phone at (505) 469-4696 or by email at christopherj.vigil@env.nm.gov.

Sincerely,

/s/ Chris Vigil
Chris Vigil
Assistant General Counsel
New Mexico Environment Department

Attachment: Proposed Part 20.2.70 NMAC – Operating Permits

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 70 OPERATING PERMITS

20.2.70.1 ISSUING AGENCY: Environmental Improvement Board.
[11/30/95; 20.2.70.1 NMAC - Rn, 20 NMAC 20.2.70.100, 06/14/02]

20.2.70.2 SCOPE: All persons who own or operate a major source or any other source required to obtain a permit under this Part.
[11/30/95; 20.2.70.2 NMAC - Rn, 20 NMAC 20.2.70.101, 06/14/02]

20.2.70.3 STATUTORY AUTHORITY: Environmental Improvement Act, [~~NMSA 1978, section 74-1-8 (A)(4) and (7)~~] Paragraphs (4) and (7) of Subsection A of Section 74-1-8 NMSA 1978, and Air Quality Control Act, [~~NMSA 1978,~~] Sections 74-2-1 et seq., NMSA 1978, including specifically, [~~section 74-2-5 (A), (B), and (C) and (D)~~] Subsections A, B, D and E of Section 74-2-5 NMSA 1978.
[11/30/95; 20.2.70.3 NMAC - Rn, 20 NMAC 20.2.70.102, 06/14/02]

20.2.70.4 DURATION: Permanent.
[11/30/95; 20.2.70.4 NMAC - Rn, 20 NMAC 20.2.70.103, 06/14/02]

20.2.70.5 EFFECTIVE DATE: [~~11/30/95~~] November 30, 1995, except where a later date is cited at the end of a section.
[11/30/95; 20.2.70.5 NMAC - Rn, 20 NMAC 20.2.70.I.104, 06/14/02; A, 9/6/06]
[The latest effective date of any section in this Part is [~~01/01/2011~~] 02/06/13.]

20.2.70.6 OBJECTIVE: The objective of this Part is to establish the requirements for obtaining an operating permit.
[11/30/95; 20.2.70.6 NMAC - Rn, 20 NMAC 20.2.70.105, 06/14/02]

20.2.70.7 DEFINITIONS: In addition to the terms defined in 20.2.2 NMAC (definitions), as used in this Part the following definitions shall apply.

A. "Acid rain source" has the meaning given to "affected source" in the regulations promulgated under Title IV of the federal act, and includes all sources subject to Title IV of the federal act.

B. "Affected programs" means all states, local air pollution control programs, and Indian tribes and pueblos, that are within 50 miles of the source.

C. "Air pollutant" means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used. This excludes water vapor, nitrogen (N2), oxygen (O2), and ethane.

D. "Air pollution control equipment" means any device, equipment, process or combination thereof, the operation of which would limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state. This includes, but is not limited to, sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection.

E. "Applicable requirement" means all of the following, as they apply to a Part 70 source or to an emissions unit at a Part 70 source (including requirements that have been promulgated or approved by the board or US EPA through rulemaking at the time of permit issuance but have future-effective compliance dates).

(1) Any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52.

(2) Any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent.

(3) Any standard or other requirement under Section 111 of the federal act, including Section 111(d).

(4) Any standard or other requirement under Section 112 of the federal act, including any requirement concerning accident prevention under Section 112(r)(7) of the federal act.

(5) Any standard or other requirement of the acid rain program under Title IV of the federal act or the regulations promulgated thereunder.

(6) Any requirements established pursuant to Section 504(b) or Section 114(a)(3) of the federal act.

(7) Any standard or other requirement under Section 126(a)(1) and (c) of the federal act.

[~~(7)~~](8) Any standard or other requirement governing solid waste incineration under Section 129 of the federal act.

[~~(8)~~](9) Any standard or other requirement for consumer and commercial products under Section 183(e) of the federal act.

[~~(9)~~](10) Any standard or other requirement for tank vessels under Section 183(f) of the federal act.

[~~(10)~~](11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the federal act, unless the administrator has determined that such requirements need not be contained in a Title V permit.

[~~(11)~~](12) Any national ambient air quality standard or [~~.~~ **~~(12)~~** ~~Any~~] increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act. This means that general permits for temporary sources must consider these requirements, but they are not applicable for other operating permits under this Part.

[~~(13)~~](13) Any [~~regulation~~] rule adopted by the board pursuant to the New Mexico Air Quality Control Act, [~~Section 74-2-5(B) NMSA 1978~~] Subsection B of Section 74-2-5, NMSA 1978.

F. "CFR" means the Code of Federal Regulations.

G. "Draft permit" means a version of a permit which the department offers for public participation or affected program review.

H. "Emission limitation" means a requirement established by US EPA, the board, or the department, that limits the quantity, rate or concentration, or combination thereof, of emissions of regulated air pollutants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

I. "Emissions allowable under the permit" means:

(1) any state or federally enforceable permit term or condition that establishes an emission limit (including a work practice standard) requested by the applicant and approved by the department or determined at issuance or renewal to be required by an applicable requirement; or

(2) any federally enforceable emissions cap that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject.

J. "Emissions unit" means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any air pollutant listed pursuant to Section 112(b) of the federal act. This term is not meant to alter or affect the definition of the term "unit" for purposes of Title IV of the federal act.

K. "Federally enforceable" means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within the New Mexico state implementation plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including 40 CFR 51.165 and 40 CFR 51.166.

L. "Final permit" means the version of an operating permit issued by the department that has met all review requirements of 20.2.70.400 NMAC - 20.2.70.499 NMAC.

M. "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

N. "General permit" means an operating permit that meets the requirements of 20.2.70.303 NMAC.

O. "Greenhouse gas" for the purpose of this Part is defined as the aggregate group of the following six gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

P. "Hazardous air pollutant" means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act.

Q. "Insignificant activities" means those activities which have been listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate.

R. "Major source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person(s)) in which all of the pollutant emitting activities at such source belong to the same major group (i.e., all have the same two-digit code), as described in the standard industrial classification manual, 1987, and that is described in Paragraphs (1), (2) or (3) [~~below~~] of Subsection R of 20.2.70.7 NMAC.

(1) A major source under Section 112 of the federal act, which is defined as the following.

(a) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons or more per year of any hazardous air pollutant which has been listed pursuant to Section 112 (b) of the federal act, 25 or more tons per year of any combination of such hazardous air pollutants (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator), or such lesser quantity as the administrator may establish by rule. Notwithstanding the preceding sentence, hazardous emissions from any oil or gas exploration or production well (with its associated equipment) and hazardous emissions from any pipeline compressor or pump station shall not be aggregated with hazardous emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.

(b) For radionuclides, "major source" shall have the meaning specified by the administrator by rule.

(2) A major stationary source of air pollutants that directly emits or has the potential to emit, 100 or more tons per year of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of [~~this~~] Paragraph (2) of Subsection R of 20.2.70.7 NMAC, unless the source belongs to one of the following categories of stationary sources:

(a) coal cleaning plants (with thermal dryers);
(b) kraft pulp mills;
(c) portland cement plants;
(d) primary zinc smelters;
(e) iron and steel mills;
(f) primary aluminum ore reduction plants;
(g) primary copper smelters;
(h) municipal incinerators capable of charging more than 250 tons of refuse per day;
(i) hydrofluoric, sulfuric, or nitric acid plants;
(j) petroleum refineries;
(k) lime plants;
(l) phosphate rock processing plants;
(m) coke oven batteries;
(n) sulfur recovery plants;
(o) carbon black plants (furnace process);
(p) primary lead smelters;
(q) fuel conversion plant;
(r) sintering plants;
(s) secondary metal production plants;
(t) chemical process plants;
(u) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(v) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(w) taconite ore processing plants;
(x) glass fiber processing plants;
(y) charcoal production plants;
(z) fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(aa) any other stationary source category, which as of August 7, 1980, is being regulated under Section 111 or 112 of the federal act.

(3) A major stationary source as defined in Part D of Title I of the federal act, including:

(a) for ozone non-attainment areas, sources with the potential to emit 100 tons or more per year of volatile organic compounds or nitrogen oxides in areas classified as "marginal" or "moderate," 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as "severe," and 10 tons or more per year in areas classified as "extreme"; except that the references in [~~this Paragraph~~] Subparagraph (a) of Paragraph (3) of Subsection R of 20.2.70.7 NMAC to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply with respect to any source for which the administrator has made a finding, under Section 182(f)(1) or (2) of the federal act, that requirements under Section 182(f) of the federal act do not apply;

(b) for ozone transport regions established pursuant to Section 184 of the federal act, sources with the potential to emit 50 tons or more per year of volatile organic compounds;

(c) for carbon monoxide non-attainment areas (1) that are classified as "serious," and (2) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the administrator, sources with the potential to emit 50 tons or more per year of carbon monoxide; and

(d) for particulate matter (PM10) non-attainment areas classified as "serious," sources with the potential to emit 70 tons or more per year of PM10.

S. "Operating permit" or **"permit"** (unless the context suggests otherwise) means any permit or group of permits covering a source that is issued, renewed, modified or revised pursuant to this Part.

T. "Operator" means the person or persons responsible for the overall operation of a facility.

U. "Owner" means the person or persons who own a facility or part of a facility.

V. "Part" means an air quality control regulation under Title 20, Chapter 2 of the New Mexico Administrative Code, unless otherwise noted; as adopted or amended by the board.

W. "Part 70 source" means any source subject to the permitting requirements of this Part, as provided in 20.2.70.200 NMAC - 20.2.70.299 NMAC.

X. "Permit modification" means a revision to an operating permit that meets the requirements of significant permit modifications, minor permit modifications, or administrative permit amendments, as defined in 20.2.70.404 NMAC.

Y. "Permittee" means the owner, operator or responsible official at a permitted Part 70 source, as identified in any permit application or modification.

Z. "Portable source" means any plant that is mounted on any chassis or skids and which can be moved by the application of a lifting or pulling force. In addition, there shall be no cable, chain, turnbuckle, bolt or other means (except electrical connections) by which any piece of equipment is attached or clamped to any anchor, slab, or structure, including bedrock, that must be removed prior to the application of a lifting or pulling force for the purpose of transporting the unit. Portable sources may include sand and gravel plants, rock crushers, asphalt plants and concrete batch plants which meet this criteria.

AA. "Potential to emit" means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution 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 limitation is federally enforceable. The potential to emit for nitrogen dioxide shall be based on total oxides of nitrogen.

AB. "Proposed permit" means the version of a permit that the department proposes to issue and forwards to the administrator for review in compliance with 20.2.70.402 NMAC.

AC. "Regulated air pollutant" means the following:

(1) nitrogen oxides[~~, total suspended particulate matter,~~] or any volatile organic compounds;

(2) any pollutant for which a national ambient air quality standard has been promulgated;

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

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

(5) any pollutant subject to a standard promulgated under Section 112 or any other requirements established under Section 112 of the federal act, including Sections 112(g), (j), and (r), including the following;

(a) any pollutant subject to requirements under Section 112(j) of the federal act; if the administrator fails to promulgate a standard by the date established pursuant to Section 112(e) of the federal act, any pollutant for which a subject source would be a major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to Section 112(e) of the federal act; and

(b) any pollutant for which the requirements of Section 112(g)(2) of the federal act have been met, but only with respect to the individual source subject to a Section 112(g)(2) requirement; or

(6) any other pollutant subject to regulation as defined in Subsection AL of [~~this section~~] 20.2.70.7 NMAC.

AD. "Renewal" means the process by which a permit is reissued at the end of its term.

AE. "Responsible official" means one of the following:

(1) for a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(a) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(b) the delegation of authority to such representative is approved in advance by the department;

(2) for a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) for a municipality, state, federal or other public agency: either a principal executive officer or ranking elected official; for the purposes of this Part, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of US EPA); or

(4) for an acid rain source: the designated representative (as defined in Section 402(26) of the federal act) in so far as actions, standards, requirements, or prohibitions under Title IV of the federal act or the regulations promulgated thereunder are concerned; and for any other purposes under 40 CFR, Part 70.

AF. "Section 502(b)(10) changes" are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

AG. "Shutdown" means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose.

AH. "Solid waste incineration unit" means a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). The term "solid waste incineration unit" does not include:

(1) incinerators or other units required to have a permit under Section 3005 of the federal Solid Waste Disposal Act;

(2) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(3) qualifying small power production facilities, as defined in Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)), or qualifying cogeneration facilities, as defined in Section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(4) air curtain incinerators, provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations established by the administrator by rule.

AI. "Startup" means the setting into operation of any air pollution control equipment, process equipment or process for any purpose.

AJ. "Stationary source" or **"source"** means any building, structure, facility, or installation, or any combination thereof that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the federal act.

AK. "Subsidiary" means a business concern which is owned or controlled by, or is a partner of, the applicant or permittee.

AL. "Subject to regulation" means, for any air pollutant, that the pollutant is subject to either a provision in the act, or a nationally-applicable regulation codified by the administrator in Subchapter C of 40 CFR Chapter I, 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, unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tons per year CO_2e equivalent emissions;

(2) the term **"tons per year CO_2e equivalent emissions"** (CO_2e) shall represent the aggregate amount of GHGs emitted by the regulated activity, and shall be computed by multiplying the mass amount of emissions (tons per year), 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 40 CFR Part 98 - Global Warming Potentials, and summing the resultant value for each gas; for purposes of [~~this~~] Paragraph (2) of Subsection AL of 20.2.70.7 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);

(3) if a federal court stays, invalidates or otherwise renders unenforceable by the US EPA, in whole or in part, the prevention of significant deterioration and Title V greenhouse gas tailoring rule (75 FR 31514, June 3, 2010), the definition "subject to regulation" shall be enforceable by the department only to the extent that it is enforceable by US EPA.

AM. **"Temporary source"** means any plant that is situated in one location for a period of less than one year, after which it will be dismantled and removed from its current site or relocated to a new site. A temporary source may be semi-permanent, which means that is does not have to meet the requirements of a portable source. Temporary sources may include well head compressors which meet this criteria.

AN. **"Title I modification"** means any modification under Sections 111 or 112 of the federal act and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Parts C and D of the federal act.

[11/30/95; 20.2.70.7 NMAC - Rn, 20 NMAC 2.70.I.107, 06/14/02; A, 11/07/02; A, 09/06/06; A, 01/01/11; A, 02/06/13]

20.2.70.8 **AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS:** This Part amends and supersedes Air Quality Control Regulation ("AQCR") 770, - Operating Permits, filed November 15, 1993, as amended ("AQCR 770"). The original effective date of AQCR 770 was December 19, 1994, which was the effective date of approval, by the administrator, of the New Mexico operating permit program. (See 59 FR 59656, November 18, 1994).

A. All references to AQCR 770 in any other rule shall be construed as a reference to this Part.

B. The amendment and supersession of AQCR 770 shall not affect any administrative or judicial enforcement action pending on the effective date of such amendment nor the validity of any permit issued pursuant to AQCR 770.

[11/30/95; 20.2.70.8 NMAC - Rn, 20 NMAC 2.70.106, 06/14/02]

20.2.70.9 **DOCUMENTS:** Documents cited in this Part may be viewed at the New Mexico Environment Department, Air Quality Bureau, Runnels Building, 1190 Saint Francis Drive, Santa Fe, NM 87505 [1301 Siler Rd., Bldg. B, Santa Fe, NM 87507].

[11/30/95; 20.2.70.9 NMAC - Rn, 20 NMAC 2.70.108, 06/14/02; A, 01/01/11]

20.2.70.10 to 20.2.70.199 [RESERVED]

20.2.70.200 **PART 70 SOURCES:** Operating permits must be obtained from the department for the following sources:

A. any major source;

B. any source, including an area source, subject to a standard or other requirement promulgated under Section 111 -- Standards of Performance for New Stationary Sources, or Section 112 -- Hazardous Air Pollutants, of the federal act, but not including any source which:

(1) is exempted under Subsection B of 20.2.70.202 NMAC; or

(2) would be required to obtain a permit solely because it is subject to regulations or requirements under Section 112(r) of the federal act;

C. any acid rain source; and

D. any source in a source category so designated by the administrator, in whole or in part, by regulation, after notice and comment.

[11/30/95; 20.2.70.200 NMAC - Rn, 20 NMAC 2.70.200, 06/14/02]

20.2.70.201 REQUIREMENT FOR A PERMIT:

A. A Part 70 source may operate after the time that it is required to submit a timely and complete application under this Part only if:

(1) the source is in compliance with an operating permit issued by the department or EPA; or

(2) a timely permit (including permit renewal) application has been submitted consistent with 20.2.70.300 NMAC; the ability to operate under these circumstances shall cease if the applicant fails to submit by the deadline specified in writing by the department any additional information identified as being needed to process the application.

B. Revocation or termination of a permit by the department terminates the permittee's right to operate.

C. The submittal of a complete operating permit application shall not protect any source from any applicable requirement, including any requirement that the source have a preconstruction permit under Title I of the federal act or state regulations.

D, Requirement for permit under 20.2.72 NMAC.

(1) Part 70 sources that have an operating permit and do not have a permit issued under 20.2.72 NMAC or 20.2.74 NMAC shall submit a complete application for a permit under 20.2.72 NMAC within 180 days of September 6, 2006. The department shall consider and may grant reasonable requests for extension of this deadline on a case-by-case basis.

(2) Part 70 sources that do not have an operating permit or a permit under 20.2.72 NMAC upon the effective date of [~~this subsection~~] 20.2.70.201 NMAC shall submit an application for a permit under 20.2.72 NMAC within 60 days after submittal of an application for an operating permit.

(3) Paragraphs (1) and (2) of [~~this~~] Subsection D of 20.2.70.201 NMAC shall not apply to sources that have demonstrated compliance with both the national and state ambient air quality standards through dispersion modeling or other method approved by the department and that have requested incorporation of conditions in their operating permit to ensure compliance with these standards.

[11/30/95; 20.2.70.201 NMAC - Rn, 20 NMAC 2.70.II.201, 06/14/02; A, 9/6/06]

20.2.70.202 SOURCE CATEGORY EXEMPTIONS:

A. The following source categories are exempted from the obligation to obtain an operating permit:

(1) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 60, Subpart AAA -- Standards of Performance for New Residential Wood Heaters;

(2) all sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR Part 61, Subpart M -- National Emission Standard for Hazardous Air Pollutants for Asbestos, Section 61.145, Standard for Demolition and Renovation;

(3) except as required under Sections 20.2.70.500 NMAC - 20.2.70.599 NMAC, any source that would be required to obtain a permit solely because of emissions of radionuclides; and

(4) any source in a source category exempted by the administrator, by regulation, after notice and comment.

B. Non-major sources, including those subject to Sections 111 or 112 of the federal act, are exempt from the obligation to obtain a Part 70 (20.2.70 NMAC) permit until such time that the administrator completes a rulemaking that requires such sources to obtain operating permits.

C. Any source exempted from the requirement to obtain an operating permit may opt to apply for a permit under this Part.

D. No permit for a solid waste incineration unit shall be issued by the department if a New Mexico state agency is responsible, in whole or in part, for the design and construction or operation of the unit. In such cases, applications shall be made to the administrator. Department review or approval of solid waste incineration units shall not constitute responsibility for the design, construction, or operation of the unit.

[11/30/95; 20.2.70.202 NMAC - Rn, 20 NMAC 2.70.202, 06/14/02]

20.2.70.203 EXISTING MAJOR SOURCES WHICH ARE NOT REQUIRED TO HAVE A PERMIT UNDER 20.2.72 NMAC (CONSTRUCTION PERMITS):

A. The owner or operator of any major source may reverse or avoid designation as a major source under this Part by obtaining a permit under 20.2.72 NMAC (Construction Permits) which includes federally enforceable conditions which restrict the potential to emit of the source to non-major emission rates. Such conditions may include emissions limitations, process restrictions [~~and/or~~] or limitations or both, restrictions on annual hours of operation, or other conditions which reduce the facility's potential to emit.

B. **[REPEALED]**

[11/30/95; A, 11/19/97; 20.2.70.203 NMAC - Rn, 20 NMAC 2.70.203, 06/14/02]

20.2.70.204 BERNALILLO COUNTY: For the operation of sources within Bernalillo County, the applicant shall make such applications to the air pollution control division of the Albuquerque environmental health department or its successor agency or authority.

[11/30/95; 20.2.70.204 NMAC - Rn, 20 NMAC 2.70.204, 06/14/02]

20.2.70.205 INDIAN TRIBAL JURISDICTION: The requirements of this Part do not apply to sources within Indian Tribal jurisdiction. For the operation of sources in that jurisdiction, the applicant should make such applications to the Tribal Authority or to the administrator, as appropriate.

[11/30/95; 20.2.70.205 NMAC - Rn, 20 NMAC 2.70.205, 06/14/02]

20.2.70.206 to 20.2.70.299 [RESERVED]

20.2.70.300 PERMIT APPLICATIONS:

A. Duty to apply. For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this Part.

B. Timely application. A timely application for a source applying for a permit under this Part is:

(1) for first time applications, one that is submitted within [~~twelve (~~] 12[~~)~~] months after the source commences operation as a Part 70 source;

(2) for purposes of permit renewal, one that is submitted at least [~~twelve (~~]12[~~)~~] months prior to the date of permit expiration;

(3) for the acid rain portion of permit applications for initial phase II acid rain sources under Title IV of the federal act, by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

C. Completeness of application.

(1) To be deemed complete, an application must provide all information required pursuant to Subsection D of 20.2.70.300 NMAC, except that applications for permit modifications need supply such information only if it is related to the proposed change.

(2) If, while processing an application, regardless of whether it has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response.

(3) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application or in a supplemental submittal shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide further information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(4) The applicant's ability to operate without a permit, as set forth in Paragraph (2) of Subsection A of 20.2.70.201 NMAC, shall be in effect from the date a timely application is submitted until the final permit is issued or disapproved, provided that the applicant adequately submits any requested additional information by the deadline specified by the department.

D. Content of application. Any person seeking a permit under this Part shall do so by filing a written application with the department. The applicant shall submit three [~~(3)~~] copies of the permit application, or more, as requested by the department. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under 20.2.71 NMAC (operating permit emission fees). Fugitive emissions shall be included in the permit application in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. All applications shall meet the following requirements.

(1) Be made on forms furnished by the department, which for the acid rain portions of permit applications and compliance plans shall be on nationally-standardized forms to the extent required by regulations promulgated under Title IV of the federal act.

(2) State the company's name and address (and, if different, plant name and address), together with the names and addresses of the owner(s), responsible official and the operator of the source, any subsidiaries or parent companies, the company's state of incorporation or principal registration to do business and corporate or partnership relationship to other permittees subject to this Part, and the telephone numbers and names of the owners' agent(s) and the site contact(s) familiar with plant operations.

(3) State the date of the application.

(4) Include a description of the source's processes and products (by standard industrial classification code) including any associated with alternative scenarios identified by the applicant, and a map, such as the 7.5-minute topographic quadrangle map published by the United States geological survey or the most detailed map available showing the exact location of the source. The location shall be identified by latitude and longitude or by Universal Transverse Mercator (UTM) coordinates.

(5) For all emissions of all air pollutants for which the source is major and all emissions of regulated air pollutants, provide all emissions information, calculations and computations for the source and for each emissions unit, except for insignificant activities (as defined in 20.2.70.7 NMAC). This shall include:

(a) a process flow sheet of all components of the facility which would be involved in routine operations and emissions;

(b) identification and description of all emissions points in sufficient detail to establish the basis for fees and applicability of requirements of the state and federal acts;

(c) emissions rates in tons per year, pounds per hour and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method;

(d) specific information such as that regarding fuels, fuel use, raw materials, or production rates, to the extent it is needed to determine or regulate emissions;

(e) identification and full description, including all calculations and the basis for all control efficiencies presented, of air pollution control equipment and compliance monitoring devices or activities;

(f) the maximum and standard operating schedules of the source, as well as any work practice standards or limitations on source operation which affect emissions of regulated pollutants;

(g) if requested by the department, an operational plan defining the measures to be taken to mitigate source emissions during startups, shutdowns and emergencies;

(h) other relevant information as the department may reasonably require or which are required by any applicable requirements (including information related to stack height limitations developed pursuant to Section 123 of the federal act); and

(i) for each alternative operating scenario identified by the applicant, all of the information required in Subparagraphs (a) through (h) [~~above~~] of Paragraph (5) of Subsection D of 20.2.70.300 NMAC, as well as additional information determined to be necessary by the department to define such alternative operating scenarios.

(6) Provide a list of insignificant activities (as defined in 20.2.70.7 NMAC) at the source, their emissions, to the extent required by the department, and any information necessary to determine applicable requirements.

(7) Provide a citation and description of all applicable air pollution control requirements, including:

(a) sufficient information related to the emissions of regulated air pollutants to verify the requirements that are applicable to the source; and

(b) a description of or reference to any applicable test method for determining compliance with each applicable requirement.

(8) Provide an explanation of any proposed exemptions from otherwise applicable requirements.

(9) Provide other specific information that may be necessary to implement and enforce other requirements of the state or federal acts or to determine the applicability of such requirements, including information necessary to collect any permit fees owed under 20.2.71 NMAC (operating permit emission fees).

(10) Provide certification of compliance, including all of the following.

(a) A certification, by a responsible official consistent with Subsection E of 20.2.70.300 NMAC, of the source's compliance status for each applicable requirement. For national ambient air quality standards, certifications shall be based on the following.

(i) For first time applications, this certification shall be based on modeling submitted with the application for a permit under 20.2.72 NMAC.

(ii) For permit renewal applications, this certification shall be based on compliance with the relevant terms and conditions of the current operating permit.

(b) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

(c) A statement that the source will continue to be in compliance with applicable requirements for which it is in compliance, and will, in a timely manner or at such schedule expressly required by the applicable requirement, meet additional applicable requirements that become effective during the permit term.

(d) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the department.

(e) A statement indicating the source's compliance status with any enhanced monitoring and compliance certification requirements of the federal act.

(11) For sources that are not in compliance with all applicable requirements at the time of permit application, provide a compliance plan that contains all of the following.

(a) A description of the compliance status of the source with respect to all applicable requirements.

(b) A narrative description of how the source will achieve compliance with such requirements for which it is not in compliance.

(c) A schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with such applicable requirements. The schedule of compliance shall be at least as stringent as that contained in any consent decree or administrative order to which the source is subject, and the obligations of any consent decree or administrative order shall not be in any way diminished by the schedule of compliance. Any such schedule of compliance shall be supplemental to, and shall not prohibit the department from taking any enforcement action for noncompliance with, the applicable requirements on which it is based.

(d) A schedule for submission of certified progress reports no less frequently than every six [~~(6)~~] months.

(e) For the portion of each acid rain source subject to the acid rain provisions of Title IV of the federal act, the compliance plan content requirements specified in [~~this~~] Paragraph (11) of Subsection D of 20.2.70.300 NMAC , except as specifically superseded by regulations promulgated under Title IV of the federal act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

E. Certification. Any document, including any application form, report, or compliance certification, submitted pursuant to this Part shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this Part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

[11/30/95; A, 11/14/98; 20.2.70.300 NMAC - Rn, 20 NMAC 2.70.III.300, 06/14/02; A, 9/6/06; A, 01/01/11]

20.2.70.301 CONFIDENTIAL INFORMATION PROTECTION:

A. All confidentiality claims made regarding material submitted to the department under this Part shall be reviewed under the provisions of the New Mexico Air Quality Control Act Section 74-2-11 NMSA 1978 and the New Mexico Inspection of Public Records Act, Sections 14-2-1 et seq. NMSA 1978.

B. In the case where an applicant or permittee has submitted information to the department under a claim of confidentiality, the department may also require the applicant or permittee to submit a copy of such information directly to the administrator.

C. An operating permit is a public record, and not entitled to protection under Section 114(c) of the federal act.

[11/30/95; 20.2.70.301 NMAC - Rn, 20 NMAC 2.70.301, 06/14/02]

20.2.70.302 PERMIT CONTENT:

A. Permit conditions.

(1) The department shall specify conditions upon a permit, including emission limitations and sufficient operational requirements and limitations, to assure compliance with all applicable requirements at the time of permit issuance or as specified in the approved schedule of compliance. The permit shall:

(a) for major sources, include all applicable requirements for all relevant emissions units in the major source;

(b) for any non-major source subject to 20.2.70.200 NMAC - 20.2.70.299 NMAC, include all applicable requirements which apply to emissions units that cause the source to be subject to this Part;

(c) specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based;

(d) include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit;

(e) include a provision to ensure that the permittee pays fees to the department consistent with the fee schedule in 20.2.71 NMAC (Operating Permit Emission Fees); and

(f) for purposes of the permit shield, identify any requirement specifically identified in the permit application or significant permit modification that the department has determined is not applicable to the source, and state the basis for any such determination.

(2) Each permit issued shall, additionally, include provisions stating the following.

(a) The permittee shall comply with all terms and conditions of the permit. Any permit noncompliance is grounds for enforcement action. In addition, noncompliance with federally enforceable permit conditions constitutes a violation of the federal act.

(b) It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

(c) The permit may be modified, reopened and revised, revoked and reissued, or terminated for cause in accordance with 20.2.70.405 NMAC.

(d) The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance shall not stay any permit condition.

(e) The permit does not convey any property rights of any sort, or any exclusive privilege.

(f) Within the period specified by the department, the permittee shall furnish any information that the department may request in writing to determine whether cause exists for reopening and revising, revoking and reissuing, or termination of the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the department copies of records required by the permit to be maintained.

(3) The terms and conditions for all alternative operating scenarios identified in the application and approved by the department:

(a) shall require that the permittee maintain a log at the permitted facility which documents, contemporaneously with any change from one operating scenario to another, the scenario under which the facility is operating; and

(b) shall, for each such alternative scenario, meet all applicable requirements and the requirements of this Part.

(4) The department may impose conditions regulating emissions during startup and shutdown.

(5) All permit terms and conditions which are required under the federal act or under any of its applicable requirements, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator and citizens under the federal act. The permit shall specifically designate as not being federally enforceable under the federal act any terms or conditions included in the permit that are not required under the federal act or under any of its applicable requirements.

(6) The issuance of a permit, or the filing or approval of a compliance plan, does not relieve any person from civil or criminal liability for failure to comply with the provisions of the Air Quality Control Act, the federal act, federal regulations thereunder, any applicable regulations of the board, and any other applicable law or regulation.

(7) The department may include part or all of the contents of the application as terms and conditions of the permit or permit modification. The department shall not apply permit terms and conditions upon emissions of regulated pollutants for which there are no applicable requirements, unless the source is major for that pollutant.

(8) Fugitive emissions from a source shall be included in the operating permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(9) The acid rain portion of operating permits for acid rain sources shall additionally:

(a) state that, where an applicable requirement of the federal act is more stringent than an applicable requirement of regulations promulgated under Title IV of the federal act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator; and

(b) contain a permit condition prohibiting emissions exceeding any allowances that the acid rain source lawfully holds under Title IV of the federal act or the regulations promulgated thereunder; no permit modification under this Part shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit modification under any other applicable requirement; no limit shall be placed on the number of allowances held by the acid rain source; the permittee may not use allowances as a defense to noncompliance with any other applicable requirement; any such allowance shall be accounted for according to the procedures established in regulations promulgated under Title IV of the federal act.

B. Permit duration. The department shall issue operating permits for a fixed term of five [~~(5)~~] years.

C. Monitoring.

(1) Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.

(2) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to Subsection E of 20.2.70.302 NMAC. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.

(3) The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.

D. Recordkeeping.

(1) The permit shall require recordkeeping sufficient to assure and verify compliance with the terms and conditions of the permit, including recordkeeping of:

(a) the date, place as defined in the permit, and time of sampling or measurements;

(b) the date(s) analyses were performed;

(c) the company or entity that performed the analyses;

(d) the analytical techniques or methods used;

(e) the results of such analyses; and

(f) the operating conditions existing at the time of sampling or measurement.

(2) Records of all monitoring data and support information shall be retained for a period of at least five [~~(5)~~]years from the date of the monitoring sample, measurement, report, or application. Supporting information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

E. Reporting. The permit shall require reporting sufficient to assure and verify compliance with the terms and conditions of the permit and all applicable requirements, including all of the following.

(1) Submittal of reports of any required monitoring at least every six [~~(6)~~] months. The reports shall be due to the department within [~~forty-five (~~] 45[~~)~~] days of the end of the permittee's reporting period. All instances of deviations from permit requirements, including emergencies, must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Subsection E of 20.2.70.300 NMAC.

(2) Prompt reporting of all deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The report shall be contained in the report submitted in accordance with the timeframe given in Paragraph (1) of [~~this section~~] Subsection E of 20.2.70.302 NMAC.

(3) Submittal of compliance certification reports at least every [~~twelve (~~] 12[~~)~~] months (or more frequently if so specified by an applicable requirement) certifying the source's compliance status with terms and conditions contained in the permit, including emission limitations, standards, or work practices. The reports shall be due to the department within [~~thirty (~~]30[~~)~~] days of the end of the permittee's reporting period. Such compliance certifications shall be submitted to the administrator as well as to the department and shall include:

(a) the identification of each term or condition of the permit that is the basis of the certification;

(b) the compliance status of the source;

(c) whether compliance was continuous or intermittent;

(d) the method(s) used for determining the compliance status of the source, currently and during the reporting period identified in the permit; and

(e) such other facts as the department may require to determine the compliance status of the source.

(4) Such additional provisions as may be specified by the administrator to determine the compliance status of the source.

F. Portable and temporary sources. The department may issue permits for portable and temporary sources which allow such sources to relocate without undergoing a permit modification. Such permits shall not apply to acid rain sources and shall include conditions to assure that:

(1) the source is installed at all locations in a manner conforming with the permit;

(2) the source shall comply with all applicable requirements and all other provisions of this Part at all authorized locations;

(3) the owner or operator shall notify the department in writing at least [~~fifteen (~~]15[~~)~~] calendar days in advance of each change in location;

(4) notification shall include a legal description of where the source is to be relocated and how long it will be located there; and

(5) emissions from the source shall not, at any location, result in or contribute to an exceedance of a national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal act; the department may require dispersion modeling to assure compliance at any location.

G. Compliance. To assure and verify compliance with the terms and conditions of the permit and with this Part, permits shall also include all the following.

(1) Require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow authorized representatives of the department to perform the following:

(a) enter upon the permittee's premises where a source is located or emission related activity is conducted, or where records must be kept under the conditions of the permit;

(b) have access to and copy any records that must be kept under the conditions of the permit;

(c) inspect any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(d) sample or monitor any substances or parameters for the purpose of assuring compliance with the permit or applicable requirements or as otherwise authorized by the federal act.

(2) Require that sources required under Paragraph (11) of Subsection D of 20.2.70.300 NMAC to have a schedule of compliance submit progress reports to the department at least semiannually, or more frequently if specified in the applicable requirement or by the department. Such progress reports shall be consistent with the schedule of compliance and requirements of Paragraph (11) of Subsection D of 20.2.70.300 NMAC and shall contain:

(a) dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(b) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(3) Include such other provisions as the department may require.

H. Operational flexibility.

(1) Section 502(b)(10) changes.

(a) The permittee may make Section 502(b)(10) changes, as defined in 20.2.70.7 NMAC, without applying for a permit modification, if those changes are not Title I modifications and the changes do not cause the facility to exceed the emissions allowable under the permit (whether expressed as a rate of emissions or in terms of total emissions).

(b) For each such change, the permittee shall provide written notification to the department and the administrator at least seven [~~(7)~~] days in advance of the proposed changes. Such notification shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(c) The permittee and department shall attach each such notice to their copy of the relevant permit.

(d) If the written notification and the change qualify under this provision, the permittee is not required to comply with the permit terms and conditions it has identified that restrict the change. If the change does not qualify under this provision, the original terms of the permit remain fully enforceable.

(2) Emissions trading within a facility.

(a) The department shall, if an applicant requests it, issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit in addition to any applicable requirements. Such terms and conditions shall include all terms and conditions required under 20.2.70.302 NMAC to determine compliance. If applicable requirements apply to the requested emissions trading, permit conditions shall be issued only to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval.

(b) The applicant shall include in the application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The department shall not include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall require compliance with all applicable requirements.

(c) For each such change, the permittee shall provide written notification to the department and the administrator at least seven [~~(7)~~] days in advance of the proposed changes. Such notification shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(d) The permittee and department shall attach each such notice to their copy of the relevant permit.

I. Off-permit changes.

(1) Permittees are allowed to make, without a permit modification, changes that are not addressed or prohibited by the operating permit, if:

(a) each such change meets all applicable requirements and shall not violate any existing permit term or condition;

(b) such changes are not subject to any requirements under Title IV of the federal act and are not Title I modifications;

(c) such changes are not subject to permit modification procedures under 20.2.70.404 NMAC; and

(d) the permittee provides contemporaneous written notice to the department and US EPA of each such change, except for changes that qualify as insignificant activities. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted and any applicable requirement that would apply as a result of the change.

(2) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

J. Permit shield.

(1) Except as provided in this Part, the department shall expressly include in a Part 70 (20.2.70 NMAC) permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(a) such applicable requirements are included and are specifically identified in the permit; or

(b) the department, in acting on the permit application or significant permit modification, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A Part 70 (20.2.70 NMAC) permit that does not expressly state that a permit shield exists for a specific provision shall be presumed not to provide such a shield for that provision.

(3) Nothing in this Section or in any Part 70 (20.2.70 NMAC) permit shall alter or affect the following:

(a) the provisions of Section 303 of the federal act - Emergency Powers, including the authority of the administrator under that Section, or the provisions of the New Mexico Air Quality Control Act, Section 74-2-10 NMSA 1978;

(b) the liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(c) the applicable requirements of the acid rain program, consistent with Section 408(a) of the federal act; or

(d) the ability of US EPA to obtain information from a source pursuant to Section 114 of the federal act, or the department to obtain information subject to the New Mexico Air Quality Control Act, Section 74-2-13 NMSA 1978.

(4) The permit shield shall remain in effect if the permit terms and conditions are extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC.

(5) The permit shield shall extend to terms and conditions that allow emission increases and decreases as part of emissions trading within a facility pursuant to Paragraph (2) of Subsection H of 20.2.70.302 NMAC, and to all terms and conditions under each operating scenario included pursuant to Paragraph (3) of Subsection A of 20.2.70.302 NMAC.

(6) The permit shield shall not extend to administrative amendments under Subsection A of 20.2.70.404 NMAC, to minor permit modifications under Subsection B of 20.2.70.404 NMAC, to Section 502(b)(10) changes under Paragraph (1) of Subsection H of 20.2.70.302 NMAC, or to permit terms or conditions for which notice has been given to reopen or revoke all or part under 20.2.70.405 NMAC.

[11/30/95; A, 11/14/98; 20.2.70.302 NMAC - Rn, 20 NMAC 2.70.III.302, 06/14/02; A, 9/6/06; A, 08/01/08]

20.2.70.303 GENERAL PERMITS:

A. Issuance of general permits.

(1) The department may, after notice and opportunity for public participation and US EPA and affected program review, issue a general permit covering numerous similar sources. Such sources shall be generally homogenous in terms of operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.

(2) Any general permit shall comply with all requirements applicable to other operating permits and shall identify criteria by which sources may qualify for the general permit.

B. Authorization to operate under a general permit.

(1) The owner or operator of a Part 70 source which qualifies for a general permit must:

(a) apply to the department for coverage under the terms of the general permit; or

(b) apply for an operating permit consistent with 20.2.70.300 NMAC.

(2) The department may, in the general permit, provide for applications which deviate from the requirements of Subsection D of 20.2.70.300 NMAC, provided that such applications meet the requirements of the federal act and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The department shall review the application for authorization to operate under a general permit for completeness within [~~thirty (~~]30[~~)~~] days after its receipt of the application.

(3) The department shall authorize qualifying sources which apply for coverage under the general permit to operate under the terms and conditions of the general permit. The department shall take final action on a general permit authorization request within [~~ninety (~~]90[~~)~~] days of deeming the application complete.

(4) The department may grant a request for authorization to operate under a general permit without repeating the public participation procedures required under 20.2.70.401 NMAC. Such an authorization shall not be a permitting action for purposes of administrative review under New Mexico Air Quality Control Act [~~section 74-2-7.H NMSA 1978~~] Subsection H of Section 74-2-7, NMSA 1978. Permitting action for the purposes of Section 74-2-7 NMSA 1978 shall be the issuance of the general permit.

(5) Authorization to operate under a general permit shall not be granted for acid rain sources unless otherwise provided in regulations promulgated under Title IV of the federal act.

(6) The permittee shall be subject to enforcement action for operation without an operating permit if the source is later determined not to qualify for the conditions and terms of the general permit.

[11/30/95; 20.2.70.303 NMAC - Rn, 20 NMAC 2.70.303, 06/14/02]

20.2.70.304 [~~EMERGENCY PROVISION:~~

~~**A.** An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.~~

~~**B.** An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the permittee has demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~**(1)** an emergency occurred and that the permittee can identify the cause(s) of the emergency;~~

~~**(2)** the permitted facility was at the time being properly operated;~~

~~**(3)** during the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards or other requirements in the permit; and~~

~~**(4)** the permittee submitted notice of the emergency to the department within 2 working days of the time when emission limitations were exceeded due to the emergency; this notice fulfills the requirement of Paragraph (2) of Subsection E of 20.2.70.302 NMAC; this notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~**C.** In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.~~

~~**D.** This provision is in addition to any emergency or upset provision contained in any applicable requirement.~~] [RESERVED]

[11/30/95; 20.2.70.304 NMAC - Rn, 20 NMAC 2.70.III.304, 06/14/02; A, 9/6/06; A, 08/01/08]

20.2.70.305 to 20.2.70.399 [RESERVED]

20.2.70.400 ACTION ON PERMIT APPLICATIONS:

A. A permit (including permit renewal) or permit modification shall only be issued if all of the following conditions have been met:

(1) the department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 20.2.70.303 NMAC;

(2) except for administrative and minor permit modifications, the department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;

(3) except for administrative amendments, the department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;

(4) the conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and

(5) the administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within [~~that Section~~] 20.2.70.402 NMAC.

B. The department shall, within [~~sixty (~~]60[~~)~~] days after its receipt of an application for a permit or significant permit modification, review such application for completeness. Unless the department determines that an application is not complete, requests additional information or otherwise notifies the applicant of incompleteness within [~~sixty (~~]60[~~)~~] days of receipt of an application, the application shall be deemed complete. When additional information is requested by the department prior to ruling an application complete, receipt of such information shall be processed as a new application for purposes of [~~this Section~~] 20.2.70.400 NMAC. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

C. The department shall take final action on each permit application (including a request for permit renewal) within [~~eighteen (~~]18[~~)~~] months after an application is ruled complete by the department, except that:

(1) for sources in operation on or before December 19, 1994 and which submit to the department timely and complete applications in accordance with 20.2.70.300 NMAC, the department shall take final action on one-third of such applications annually over a period not to exceed three [~~(3)~~] years after such effective date;

(2) any complete permit application containing an early reduction demonstration under Section 112(i)(5) of the federal act shall be acted on within nine [~~(9)~~] months of deeming the application complete; and

(3) the acid rain portion of permits for acid rain sources shall be acted upon in accordance with the deadlines in Title IV of the federal act and the regulations promulgated thereunder.

D. If a timely and complete application for a permit renewal is submitted, consistent with 20.2.70.300 NMAC, but the department has failed to issue or disapprove the renewal permit before the end of the term of the

previous permit, then the permit shall not expire and all the terms and conditions of the permit shall remain in effect until the renewal permit has been issued or disapproved.

E. Permits being renewed are subject to the same procedural requirements, including those for public participation, affected program and US EPA review, that apply to initial permit issuance.

F. The department shall state within the draft permit the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).

G. The department shall grant or disapprove the permit based on information contained in the department's administrative record. The administrative record shall consist of the application, any additional information submitted by the applicant, any evidence or written comments submitted by interested persons, any other evidence considered by the department, and, if a public hearing is held, the evidence submitted at the hearing.

H. If the department grants or disapproves a permit or permit modification, the department shall notify the applicant by certified mail of the action taken and the reasons therefor. If the department grants a permit or modification, the department shall mail the permit or modification, including all terms and conditions, to the applicant by certified mail.

I. Voluntary discontinuation. Upon request by the permittee, the department shall permanently discontinue a Part 70 (20.2.70 NMAC) permit. Permit discontinuance terminates the permittee's right to operate the source under the permit. The department shall confirm the permit discontinuance by certified letter to the permittee.

J. No permit shall be issued by failure of the department to act on an application or renewal.

[11/30/95; 20.2.70.400 NMAC - Rn, 20 NMAC 2.70.400, 06/14/02]

20.2.70.401 PUBLIC PARTICIPATION:

A. Proceedings for all permit issuances (except administrative and minor permit modifications, pursuant to Paragraph (2) of Subsection A of 20.2.70.400 NMAC) [~~(~~]including renewals[~~)~~], significant permit modifications, reopenings, revocations and terminations, and all modifications to the department's list of insignificant activities, shall include public notice and provide an opportunity for public comment. The department shall provide [~~thirty (~~]30[~~)~~] days for public and affected program comment. The department may hold a public hearing on the draft permit, a proposal to suspend, reopen, revoke or terminate a permit, or for any reason it deems appropriate, and shall hold such a hearing in the event of significant public interest. The department shall give notice of any public hearing at least [~~thirty (~~]30[~~)~~] days in advance of the hearing.

B. Public notice and notice of public hearing shall be given by publication in a newspaper of general circulation in the area where the source is located or in a state publication designed to give general public notice, to persons on a mailing list developed by the department, including those who request in writing to be on the list, and by other means if necessary to assure adequate notice to the affected public.

C. The public notice shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the emissions change(s) involved in any permit modification;

(6) the name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, and relevant supporting materials;

(7) a brief description of the comment procedures required by the department; and

(8) as appropriate, a statement of procedures to request a hearing, or the time and place of any scheduled hearing.

D. Notice of public hearing shall identify:

(1) the affected facility;

(2) the names and addresses of the applicant or permittee and its owners;

(3) the name and address of the department;

(4) the activity or activities involved in the permit action;

(5) the name, address and telephone number of a person from whom interested persons may obtain additional information;

(6) a brief description of hearing procedures; and

(7) the time and place of the scheduled hearing.

E. Public hearings shall be held in the geographic area likely to be impacted by the source. The time, date, and place of the hearing shall be determined by the department. The department shall appoint a hearing

officer. A transcript of the hearing shall be made at the request of either the department or the applicant and at the expense of the person requesting the transcript. At the hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

F. The department shall keep a record of the commenters and also of the issues raised during the public participation process so that the administrator may fulfill his or her obligation under Section 505(b)(2) of the federal act to determine whether a citizen petition may be granted. Such records shall be available to the public upon request.

G. The department shall provide such notice and opportunity for participation by affected programs as is provided for by 20.2.70.402 NMAC.

[11/30/95; 20.2.70.401 NMAC - Rn, 20 NMAC 2.70.401, 06/14/02]

20.2.70.402 REVIEW BY THE ADMINISTRATOR AND AFFECTED PROGRAMS:

A. Notification: The department shall not issue an operating permit (including permit renewal or reissuance), minor permit modification or significant permit modification, until affected programs and the administrator have had an opportunity to review the proposed permit as required under [~~this Section~~] 20.2.70.402 NMAC. Permits for source categories waived by the administrator from this requirement and any permit terms or conditions which are not required under the federal act or under any of its requirements are not subject to administrator review or approval.

(1) Within [~~(5)~~] five days of notification by the department that the application has been determined complete, the applicant shall provide a copy of the complete permit application (including the compliance plan and all additional materials submitted to the department) directly to the administrator. The permit or permit modification shall not be issued without certification to the department of such notification. The department shall provide to the administrator a copy of each draft permit, each proposed permit, each final operating permit, and any other relevant information requested by the administrator.

(2) The department shall provide notice of each draft permit to any affected program on or before the time that the department provides this notice to the public under 20.2.70.401 NMAC, except to the extent that minor permit modification procedures require the timing of the notice to be different.

(3) The department shall keep for five [~~(5)~~] years such records and submit to the administrator such information as the administrator may reasonably require to ascertain whether the state program complies with the requirements of the federal act or related applicable requirements.

B. Responses to objections:

(1) No permit for which an application must be transmitted to the administrator under this Part shall be issued by the department if the administrator, after determining that issuance of the proposed permit would not be in compliance with applicable requirements, objects to such issuance in writing within [~~forty-five (~~]45[~~)~~] days of receipt of the proposed permit and all necessary supporting information.

(2) If the administrator does not object in writing under Paragraph (1) of Subsection B of 20.2.70.402 NMAC, any person may, within [~~sixty (~~]60[~~)~~] days after the expiration of the administrator's 45-day review period, petition the administrator to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in 20.2.70.401 NMAC, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the administrator objects to the permit as a result of a petition filed under [~~this~~] Paragraph (2) of Subsection B of 20.2.70.402 NMAC, the department shall not issue the permit until the administrator's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to the administrator's objection.

(3) The department, as part of the submittal of the proposed permit to the administrator (or as soon as possible after the submittal for minor permit modification procedures allowed under Subsection B of 20.2.70.404 NMAC), shall notify the administrator and any affected program in writing of any refusal by the department to accept all recommendations for the proposed permit that the affected program submitted during the public or affected program review period. The notice shall include the department's reasons for not accepting any such recommendation. The department is not required to accept recommendations that are not based on federally enforceable applicable requirements.

[11/30/95; 20.2.70.402 NMAC - Rn, 20 NMAC 2.70.402, 06/14/02]

20.2.70.403 PETITIONS FOR REVIEW OF FINAL ACTION:

A. Hearing before the board:

(1) Any person who participated in a permitting action before the department and who is adversely affected by such permitting action may file a petition for hearing before the board. For the purposes of [~~this Section~~] 20.2.70.403 NMAC, permitting action shall include the failure of the department to take final action on an application for a permit (including renewal) or permit modification within the time specified in this Part.

(2) The petition shall be made in writing to the board within [~~thirty (~~]30[~~)~~] days from the date notice is given of the department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered as required by [~~this~~] Paragraph (2) of Subsection A of 20.2.70.403 NMAC, and attach a copy of the permitting action for which review is sought. Unless a timely request for hearing is made, the decision of the department shall be final. The petition shall be copied simultaneously to the department upon receipt of the appeal notice. If the petitioner is not the applicant or permittee, the petitioner shall mail or hand-deliver a copy of the petition to the applicant or permittee. The department shall certify the administrative record to the board.

(3) If a timely request for hearing is made, the board shall hold a hearing within [~~sixty (~~]60[~~)~~] days of receipt of the petition in accordance with New Mexico Air Quality Control Act Section 74-2-7 NMSA 1978.

B. Judicial review:

(1) Any person who is adversely affected by an administrative action taken by the board pursuant to Subsection A of 20.2.70.403 NMAC may appeal to the court of appeals in accordance with New Mexico Air Quality Control Act, Section 74-2-9 NMSA 1978. Petitions for judicial review must be filed no later than [~~thirty (~~]30[~~)~~] days after the administrative action.

(2) The judicial review provided for by 20.2.70.403 NMAC shall be the exclusive means for obtaining judicial review of the terms and conditions of the permit.

[11/30/95; 20.2.70.403 NMAC - Rn, 20 NMAC 2.70.403, 06/14/02; A, 08/01/08]

20.2.70.404 PERMIT MODIFICATIONS:

A. Administrative permit amendments:

(1) An administrative permit amendment is one that:

(a) corrects typographical errors;

(b) provides for a minor administrative change at the source, such as a change in the address or phone number of any person identified in the permit;

(c) incorporates a change in the permit solely involving the retiring of an emissions unit;

(d) requires more frequent monitoring or reporting by the permittee; or

(e) any other type of change which has been determined by the department and the administrator to be similar to those in [~~this~~] Paragraph (1) of Subsection A of 20.2.70.404 NMAC.

(2) Changes in ownership or operational control of a source may be made as administrative amendments provided that:

(a) a written agreement, containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee, has been submitted to the department, and either the department has determined that no other change in the permit is necessary, or changes deemed necessary by the department have been made;

(b) the new owners have submitted the application information required in Paragraph (2) of Subsection D of 20.2.70.300 NMAC;

(c) no grounds exist for permit termination, as set out in Subparagraphs (b) and (c) of Paragraph (3) of Subsection A of 20.2.70.405 NMAC; and

(d) the permittee has published a public notice of the change in ownership of the source in a newspaper of general circulation in the area where the source is located.

(3) The department may incorporate administrative permit amendments without providing notice to the public or affected programs, provided that it designates any such permit modifications as administrative permit amendments and submits a copy of the revised permit to the administrator.

(4) The department shall take no more than [~~sixty (~~]60[~~)~~] days from receipt of a request for an administrative permit amendment to take final action on such request. The permittee may implement the changes outlined in Subparagraphs (a) through (d) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC immediately upon submittal of the request for the administrative amendment. The permittee may implement the changes outlined in Subparagraph (e) of Paragraph (1) of Subsection A of 20.2.70.404 NMAC or Paragraph (2) of Subsection A of 20.2.70.404 NMAC upon approval of the administrative amendment by the department.

B. Minor permit modifications:

(1) Minor permit modification procedures may be used only for those permit modifications that:

(a) do not violate any applicable requirement;

(b) do not involve relaxation of existing monitoring, reporting, or recordkeeping requirements in the permit;

(c) do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(d) do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include any federally enforceable emissions cap assumed to avoid classification as a Title I modification and any alternative emissions limit approved pursuant to regulations promulgated under Section 112(i)(5) of the federal act;

(e) are not Title I modifications; and

(f) are not required by the department to be processed as a significant modification pursuant to Subsection C of 20.2.70.404 NMAC.

(2) A permittee shall not submit multiple minor permit modification applications that may conceal a larger modification that would not be eligible for minor permit modification procedures. The department may, at its discretion, require that multiple related minor permit modification applications be submitted as a significant permit modification.

(3) An application requesting the use of minor permit modification procedures shall meet the requirements of Subsections C and D of 20.2.70.300 NMAC and shall include:

(a) a description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(b) the applicant's suggested draft permit;

(c) certification by a responsible official, consistent with Subsection E of 20.2.70.300 NMAC, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(d) if the requested permit modification would affect existing compliance plans or schedules, related progress reports, or certification of compliance requirements, an outline of such effects.

(4) The department shall, within [~~thirty (~~]30[~~)~~] days after its receipt of an application for a minor permit modification, review such application for completeness. Unless the department determines that an application is not complete, requests additional information or otherwise notifies the applicant of incompleteness within [~~thirty (~~]30[~~)~~] days of receipt of an application, the application shall be deemed complete. If the application is judged complete, a certified letter to that effect shall be sent to the applicant. If the application is judged incomplete a certified letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

(5) Within five [~~(5)~~] working days of notification by the department that the minor permit modification application has been determined complete, the applicant shall meet its obligation under Subsection A of 20.2.70.402 NMAC to notify the administrator of the requested permit modification. The department promptly shall send any notice required under Paragraph (2) of Subsection A of 20.2.70.402 NMAC and Subsection B of 20.2.70.402 NMAC to the administrator and affected programs.

(6) The permittee may make the change proposed in its minor permit modification application immediately after such application is deemed complete. After the permittee makes the change allowed by the preceding sentence, and until the department takes any of the actions specified in Paragraph (7) of Subsection B of 20.2.70.404 NMAC below, the permittee must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the permittee need not comply with the existing permit terms and conditions it seeks to modify. If the permittee fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(7) The department may not issue a final minor permit modification until after the administrator's 45-day review period of the proposed permit modification or until US EPA has notified the department that the administrator will not object to issuance of the permit modification, although the department may approve the permit modification prior to that time. Within [~~ninety (~~]90[~~(~~] days of ruling the application complete under minor permit modification procedures or within [~~fifteen (~~]15[~~)~~] days after the end of the administrator's 45-day review period, whichever is later, the department shall:

(a) issue the permit modification as it was proposed;

(b) disapprove the permit modification application;

(c) determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(d) revise the draft permit modification and transmit to the administrator the new proposed permit modification as required by Subsection A of 20.2.70.402 NMAC.

C. Significant permit modifications:

(1) A significant permit modification is:

(a) any revision to an operating permit that does not meet the criteria under the provisions for administrative permit amendments under Subsection A of 20.2.70.404 NMAC or for minor permit modifications under Subsection B of 20.2.70.404 NMAC above;

(b) any modification that would result in any relaxation in existing monitoring, reporting or recordkeeping permit terms or conditions;

(c) any modification for which action on the application would, in the judgment of the department, require decisions to be made on significant or complex issues; and

(d) changes in ownership which do not meet the criteria of Paragraph (2) of Subsection A of 20.2.70.404 NMAC.

(2) For significant modifications which are not required to undergo preconstruction permit review and approval, changes to the source which qualify as significant permit modifications shall not be made until the department has issued the operating permit modification.

(3) For significant modifications which have undergone preconstruction permit review and approval, the permittee shall:

(a) before commencing operation, notify the department in writing of any applicable requirements and operating permit terms and conditions contravened by the modification, emissions units affected by the change, and allowable emissions increases resulting from the modification; and

(b) within [~~twelve (~~]12[~~)~~] months after commencing operation, file a complete operating permit modification application.

(4) Where an existing operating permit would specifically prohibit such change, the permittee must obtain an operating permit modification before commencing operation or implementing the change.

(5) Significant permit modifications shall meet all requirements of this Part for permit issuance, including those for applications, public participation, review by affected programs and review by the administrator.

(6) The department shall complete review on the majority of significant permit modification applications within nine [~~(9)~~] months after the department rules the applications complete.

D. Modifications to acid rain sources: Administrative permit amendments and permit modifications for purposes of the acid rain portion of the permit shall be governed by regulations promulgated by the administrator under Title IV of the federal act.

[11/30/95; 20.2.70.404 NMAC - Rn, 20 NMAC 2.70.404, 06/14/02]

20.2.70.405 PERMIT REOPENING, REVOCATION OR TERMINATION:

A. Action by the department:

(1) Each permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised for any of the following, and may be revoked and reissued for Subparagraphs (c) or (d) of [~~the following~~] Paragraph (1) of Subsection A of 20.2.70.405 NMAC:

(a) additional applicable requirements under the federal act become applicable to a major source with a remaining permit term of three [~~(3)~~] or more years. Such a reopening shall be completed not later than [~~eighteen (~~]18[~~)~~] months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms or conditions have been extended past the expiration date of the permit pursuant to Subsection D of 20.2.70.400 NMAC;

(b) additional requirements (including excess emissions requirements) become applicable to a source under the acid rain program promulgated under Title IV of the federal act. Upon approval by the administrator, excess emissions offset plans shall be deemed to be incorporated into the permit;

(c) the department or the administrator determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the permit; or

(d) the department or the administrator determines that the permit must be revised or revoked and reissued to assure compliance with the applicable requirements.

(2) Proceedings to reopen and revise, or revoke and reissue, a permit shall affect only those parts of the permit for which cause to reopen or revoke exists. Units for which permit conditions have been revoked shall not be operated until permit reissuance. Reopenings shall be made as expeditiously as practicable.

(3) A permit, or an authorization to operate under a general permit, may be terminated when:

(a) the permittee fails to meet the requirements of an approved compliance plan;

(b) the permittee has been in significant or repetitious non-compliance with the operating permit terms or conditions;

(c) the applicant or permittee has exhibited a history of willful disregard for environmental laws of any state or Tribal authority, or of the United States;

(d) the applicant or permittee has knowingly misrepresented a material fact in any application, record, report, plan, or other document filed or required to be maintained under the permit;

(e) the permittee falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under the permit;

(f) the permittee fails to pay fees required under the fee schedule in 20.2.71 NMAC (Operating Permit Emission Fees); or

(g) the administrator has found that cause exists to terminate the permit.

(4) The department shall, by certified mail, provide a notice of intent to the permittee at least [~~thirty (~~30[~~)~~] days in advance of the date on which a permit is to be reopened or revoked, or terminated, except that the department may provide a shorter time period in the case of an emergency. The notice shall state that the permittee may, within 30 [~~(thirty)~~] days of receipt, submit comments or request a hearing on the proposed permit action.

B. Action by the administrator: Within [~~ninety (~~]90[~~(~~] days, or longer if the administrator extends this period, after receipt of written notification that the administrator has found that cause exists to terminate, modify or revoke and reissue a permit, the department shall forward to the administrator a proposed determination of termination, modification, or revocation and reissuance, as appropriate. Within [~~ninety (~~]90[~~(~~] days from receipt of an administrator objection to a proposed determination, the department shall address and act upon the administrator's objection.

C. Compliance orders: Notwithstanding any action which may be taken by the department or the administrator under Subsections A and B of 20.2.70.405 NMAC, a compliance order issued pursuant to New Mexico Air Quality Control Act Section 74-2-12 NMSA 1978 may include a suspension or revocation of any permit or portion thereof.

[11/30/95; 20.2.70.405 NMAC - Rn, 20 NMAC 2.70.405, 06/14/02]

20.2.70.406 CITIZEN SUITS: Pursuant to Section 304 of the federal act, 42 USC 7604, any person may commence certain civil actions under the federal act.

[11/30/95; 20.2.70.406 NMAC - Rn, 20 NMAC 2.70.406, 06/14/02]

20.2.70.407 VARIANCES: Pursuant to New Mexico Air Quality Control Act Section 74-2-8 NMSA 1978, applicants and permittees may seek a variance from the non-federally enforceable provisions of this Part.

[11/30/95; 20.2.70.407 NMAC - Rn, 20 NMAC 2.70.407, 06/14/02]

20.2.70.408 ENFORCEMENT: Notwithstanding any other provision in the New Mexico state implementation plan approved by the administrator, any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of the terms or conditions of a permit issued pursuant to this Part.

A. Information from the use of the following methods is presumptively credible evidence of whether a violation has occurred at the source:

(1) a monitoring or information gathering method approved for the source pursuant to this Part and incorporated in an operating permit; or

(2) compliance methods specified in the New Mexico state implementation plan.

B. The following testing, monitoring or information gathering methods are presumptively credible testing, monitoring or information gathering methods:

(1) any federally enforceable monitoring or testing methods, including those in 40 CFR Parts 51, 60, 61 and 75; and

(2) other testing, monitoring or information gathering methods that produce information comparable to that produced by any method under Subsection A of 20.2.70.408 NMAC or Paragraph (1) of Subsection B of 20.2.70.408 NMAC.

[11/30/95; 20.2.70.408 NMAC - Rn, 20 NMAC 2.70.408, 06/14/02]

20.2.70.409 NMAC to 20.2.70.499 NMAC [RESERVED]

20.2.70.500 NMAC to 20.2.70.599 NMAC [RESERVED]

HISTORY OF 20.2.70 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.

EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93.

History of Repealed Material: [RESERVED]

Other History:

EIB/AQCR 770, Air Quality Control Regulation 770 - Operating Permits, filed 11/15/93 was **renumbered** into first version of the New Mexico Administrative Code as 20 NMAC 2.70, Operating Permits, filed 10/30/95;

20 NMAC 2.70, Operating Permits, filed 10/30/95 was **renumbered, reformatted and replaced** by 20.2.70 NMAC, Operating Permits, effective 06/14/02.

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL AND REPLACEMENT OF 20.2.70 NMAC – *OPERATING PERMITS* AND TITLE V PROGRAM REVISION

No. EIB 25-10(R)

Air Quality Bureau
Environmental Protection Division
New Mexico Environment Department

Petitioner

DIRECT TESTIMONY OF NEAL BUTT

Witness Qualifications:

My name is Neal Butt, and I am an Environmental Analyst in the Control Strategies Unit of The Air Quality Bureau ("Bureau") in the Environmental Protection Division of the New Mexico Environment Department ("Department"). I have worked in the Bureau since March of 2014. Prior to this I worked for the City of Albuquerque's Environmental Health Department for 17 years, the last 13 of which were in the Control Strategies Section of the Air Quality Division, in the role of Environmental Health Specialist, Air Quality Planner and Environmental Health Scientist. I hold an M.S. Degree in Biology from the University of North Dakota, a B.S. Degree in Biology and a B.A. Degree in Environmental Planning and Design from the University of New Mexico, and an A.A.S. in Environmental Technology and an A.A.S. in Criminal Justice from CNM. My background and qualifications are set forth in my resume, which is marked as **NMED Exhibit 1**.

Introduction / Background

The Department proposes to repeal and replace 20.2.70 NMAC, *Operating Permits*, to comply with a mandate from the U.S. Environmental Protection Agency ("EPA") **[NMED Exhibit 2]** directing the removal of certain affirmative defense provisions from New Mexico's Title V Permit Program at 20.2.70.304 NMAC, *Emergency Provision*. In addition, EPA made a comment to the Department, indicating that one element (i.e. Paragraph (7)) of the definition of "Applicable Requirement" cited at 40 CFR 70.2, *Definitions*, is missing from the definition of "Applicable Requirement" at Subsection E of 20.2.70.7 NMAC:

To address this deficiency, new text, identical to Paragraph (7) of the definition of "Applicable Requirement" at 40 CFR 70.2, is proposed to be inserted as a new Paragraph (7) under Subsection E of 20.2.70.7 NMAC, *Applicable Requirement*. **[Page 2, Line 9, Attachment 2, 20.2.70 NMAC, Public Review Draft ("PRD") of NMED's Petition for Rulemaking, In the Matter of Proposed Repeal and Replacement of 20.2.70 NMAC – Operating Permits And Title V Program Revision, No. EIB 25-10(R)]**. The Department has also identified an incongruity between another element (i.e. Paragraph (13)) of the definition of "*Applicable Requirement*" cited at 40 CFR 70.2, *Definitions*, and the definition of "Applicable Requirement" at Paragraphs (11) and (12) at Subsection E of 20.2.70.7 NMAC. **[Page 2, Line 19-23, PRD]**. In addition, the definition of "*Regulated Air Pollutant*" at Subsection AC of 20.2.70.7 NMAC, is proposed to be amended to remove "total suspended particulate matter" ("TSP") from the list of regulated air pollutants under this definition because it is obsolete. **[Page 4, Line 42, PRD]**. *Total Suspended Particulates* at 20.2.**3**.109 NMAC, was repealed on November 30, 2018. In addition, the Department must update the regulation to meet current New Mexico Administrative Code requirements at Subsection C of 1.24.11.9 NMAC, which stipulates that "When an agency

amends a part that was not filed in the current style and format, it shall reformat the entire part (or use the reformatting done by the Records Center) and officially adopt the current style and formatting requirements in conjunction with the amendment." The Department will need to address these changes at the same time as the affirmative defense provisions are removed.

Title V Program

"In 1990, Congress amended the Clean Air Act ('CAA') and established, among other things, Title V of the CAA, which contains a national operating permit program for certain stationary sources of air pollution". (81 FR 38647, *Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program*, Proposed rule, 6/14/16). "It was intended to consolidate into a single comprehensive enforceable document, called the 'operating permit', all applicable requirements for 'major sources'. Under Title V, a source is considered to be 'major' if it has the potential to emit more than 100 tons per year of an air pollutant, such as nitrogen oxides ('NOx'), sulfur dioxide ('SO_2'), carbon monoxide ('CO'), or particulate matter ('PM'); or more than 10 tons per year of a hazardous air pollutant ('HAP'); or 25 tons per year of all hazardous air pollutants. On July 21, 1992 (57 FR 32250, *Operating Permit Program*, Final rule), the EPA adopted regulations establishing the minimum requirements for state Title V operating permit programs", codified at 40 CFR 70. (Page 2, NMED NOI Exhibit B, Direct testimony, Richard Goodyear, Manager, Permitting Section, AQB, EIB 05-12(R), 8/1/06). "Title V of the 1990 CAA Amendments. . .and implementing regulations at 40 CFR Part 70 (specifically 70.4 *State Program Submittals & Transition*) required that states develop and submit Operating Permit programs to EPA by November 15, 1993. . ." (61 FR 60032, *CAA Final Full Approval of Operating Permits Program; the State of New Mexico and Albuquerque/ Bernalillo County Agency*, Direct final

rule, 11/26/96). To meet this requirement, the Environmental Improvement Board ("EIB"), on November 12, 1993, adopted regulations for New Mexico's Title V program as Air Quality Control Regulation 770, *Operating Permits* (filed November 15, 1993), now known as 20.2.70 NMAC- *Operating Permits*. "The State of New Mexico submitted to EPA, under a cover letter from the Governor dated November 15,1993, the State's operating permits program". (61 FR 60033). "Where a program substantially, but not fully, meets the requirements of Part 70, EPA may grant the program interim approval for a period of up to two years". (61 FR 60032). This was the case for New Mexico, with EPA granting final ***interim approval*** of the program on November 1, 1994 (59 FR 59656, *CAA Final Interim Approval Operating Permits Program; NMED*, Final rule, published 11/18/94, effective 12/19/94). "This final interim approval required the State to correct the statutory defect in criminal fine authority". (i.e. "raising the criminal fine amounts to at least $10,000 for all offenses listed in 40 CFR 70.11(a)(3); and statutory revisions that provide authority for the imposition of those fines on a per day per violation basis, as required by 40 CFR 70.11(a)(3))". (61 FR 60032-60033). On November 12, 1996, EPA granted final ***full approval***, effective January 27, 1997. (61 FR 60032, 11/26/96).

Emergency Affirmative Defense Provisions

1. "On July 12, 2023 (88 FR 47029, *Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program*: Final rule, published 7/21/23, effective 8/21/23). **[NMED Exhibit 2]**, the EPA removed the 'emergency' affirmative defense provisions from CAA operating permit program (Title V) regulations. . .at Paragraph (g), *Emergency Provision*, of 40 CFR **70**.6, *Permit Content*, applicable to state/local/tribal permitting authorities **[NMED Exhibit 3]** and **71**.6(g), applicable when EPA is the permitting authority". (Fact Sheet, *Final Rule: Removal of Title V Emergency*

Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program, **[NMED Exhibit 4]**.

2. These provisions established an affirmative defense that stationary sources could have asserted to avoid liability in enforcement cases brought for noncompliance with technology-based emission limits contained in the source's Title V permit, provided that the source demonstrated that excess emissions occurred due to qualifying "emergency" circumstances. (Fact Sheet, *Final Rule: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program*). "The EPA acknowledges the underlying considerations supporting the EPA's past policies—especially the agency's recognition that even well-designed and appropriately operated equipment may sometimes fail due to circumstances beyond the control of the source (such as during emergencies) and that, in certain situations, enforcement for violations of technology-based standards may not be appropriate. EPA's rule revision does not change that general recognition. As discussed in Section III.D.2 (*Alternatives to an Affirmative Defense: Discretion to Initiate Enforcement and the Discretion of Decision Makers to Determine Appropriate Remedies),* of the final rule, the EPA continues to believe that enforcement may not be warranted under certain specific circumstances, such as during an emergency, as determined on a case-by-case basis by enforcement authorities. The EPA, states, citizens, and the courts retain the discretion and authority to consider such circumstances in evaluating how to respond to exceedances or violations. *However*, an affirmative defense provision that interferes with the authority of courts to assess penalties is no longer an appropriate or legally sound mechanism to address these situations". (88 FR 47038).

3. “These emergency affirmative defense provisions have never been required elements of state operating permit programs, or of individual operating permits. Nonetheless, some state, local, and tribal programs have adopted such provisions and include these affirmative defenses in Title V permits.” (Fact Sheet, *Final Rule: Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and the Federal Operating Permit Program*). According to EPA, “the Title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings.” (88 FR 47041). “The EPA does not believe that the removal of the narrowly drawn and apparently infrequently used Title V emergency affirmative defense provisions will have a significant impact on sources.” (88 FR 47042).

“The absence of an affirmative defense provision in a source's Title V permit does not mean that all exceedances of emission limitations in a Title V permit, including those resulting from an emergency, will automatically be subject to enforcement or automatically be subject to imposition of penalties or other remedies.

First, any entity that may bring an action to enforce Title V permit provisions has enforcement discretion that they may exercise as they deem appropriate in any given circumstance. . .

Second, even if an enforcement action is commenced for exceedances caused by an emergency, the absence of an explicitly defined affirmative defense provision does not affect a source's ability to demonstrate to the court (or to the EPA in an administrative enforcement action) that penalties or other kinds of relief are not warranted.” (88 FR 47043).

3a. “The EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA’s current interpretation of the enforcement structure of the CAA in light of prior court decisions from the U.S. Court of

Appeals for the D.C. Circuit - primarily the Court's 2014 decision in Natural Resources Defense Council ("*NRDC") v. EPA*, 749 F.3d 1055. (D.C. Cir. 2014)". (88 FR 47030).

"In *NRDC v. EPA*, the D.C. Circuit vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants ('NESHAP') for the Portland cement industry, promulgated under CAA Section 112 (*Hazardous Air Pollutants*). The D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Importantly, the court's decision did not turn upon any specific provisions of CAA Section 112, but rather on the provisions of CAA Sections 113 (*Federal Enforcement*) and 304 (*Citizen Suits*). These provisions pertain to enforcement of a wide variety of CAA requirements beyond Section 112 standards, including enforcement of emission limits contained in Title V permits. Thus, the mere fact that the court addressed the legality of an affirmative defense provision in the context of a Section 112 NESHAP does not mean that the court's interpretation of Sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning Sections 113 and 304 would not apply to the Title V emergency affirmative defense provisions, as well." (88 FR 47031-47032).

"The EPA is not basing this current action on potential air quality benefits, or a weighing of costs and benefits, associated with the removal of these provisions." (88 FR 47046).

4. ". . .State, local and tribal permitting authorities whose Title V programs contain impermissible affirmative defense provisions must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved Title V programs. . .the EPA expects that states with Title V programs containing impermissible affirmative defense

provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of this final rule-i.e., by August 21, 2024." (88 FR 47046). To this end, the Department submitted a letter to EPA on August 21, 2024, requesting an extension of this deadline until August 21, 2025. **[NMED Exhibit 5]**. On September 17, 2024, this request was granted by EPA. **[NMED Exhibit 6]**.

5. "States must also remove Title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from individual permits during the next permit revision or periodic permit renewal for the source that occurs following either: (1) the effective date of this rule (i.e. August 21, 2023) (for permit terms based on 40 CFR 70.6(g) or 71.6(g)); or (2) the EPA's approval of state program revisions (for permit terms based on an affirmative defense provision in an EPA-approved title V program)." (88 FR 47046).

5a. ". . .the EPA expects that program revisions to remove the Title V emergency [affirmative] defense provisions will include, at minimum: (1) a redline document identifying the State's proposed revision to its Part 70 program rules (**See Attachment 2, 20.2.70 NMAC, Public Review Draft, of NMED's Petition for Rulemaking, In the Matter of Proposed Repeal And Replacement of 20.2.70 NMAC – *Operating Permits* And Title V Program Revision, No. EIB 25-10(R)**); (2) a brief statement of the legal authority authorizing the revision (**See Petition for Rulemaking**); and (3) a schedule (**See request for extension, [NMED**

Exhibit 5]) and description of the State's plans to remove affirmative defense provisions from individual operating permits (see steps below)." (88 FR 47050).

The Department proposes the following steps to remove affirmative defense provisions from existing and future individual permits.

Step 1: Promulgate amendments to 20.2.70 NMAC, *Operating Permits*.

Step 2: The proposed amended rule requirements would become new applicable requirements, and facilities must comply with new applicable requirements. Specifically, see *Air Quality Bureau Title V Operating Permit Issued under 20.2.70 NMAC* Template version 01/22/2024 **[NMED Exhibit 7]**: PART B, *GENERAL CONDITIONS;* B101, *Legal;* Subsection A, *Permit Terms and Conditions (20.2.70 Sections 7, 201.B, 300, 301.B, 302, 405 NMAC)*; Paragraph (13). on Page B3 of *GENERAL CONDITIONS*:

> "(13) The permittee shall continue to comply with all applicable requirements. For applicable requirements that will become effective during the term of the permit, the permittee shall meet such requirements on a timely basis. (Sections 300.D.10.c and 302.G.3 of 20.2.70 NMAC)"

and;

Subsection E of 20.2.70.7 NMAC, *Applicable Requirement*:

> **E. "Applicable requirement"** means all of the following, as they apply to a Part 70 source or to an emissions unit at a Part 70 source (including requirements that have been promulgated or approved by the board or US EPA through rulemaking at the time of permit issuance but have future-effective compliance dates).
>
> **(1)** Any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52.
>
> . . .
>
> **(13)** Any regulation adopted by the board pursuant to the New Mexico Air Quality Control Act, Section 74-2-5(B) NMSA 1978.

Step 3: The Permitting Section will update their operating permit template to remove language at PART B, *GENERAL CONDITIONS*, B114, *Emergencies*, on Pages B18-19 of *GENERAL CONDITIONS*, which is identical to the language at 20.2.70.304 NMAC, *Emergency*

Provision, proposed to be repealed. This will ensure that new permits do not include the repealed language.

Step 4: As permits are renewed over the years, they will be issued using the new template that does not contain the removed language.

6. To comply with the requirements of the EPA mandate, the Department petitioned the Board to remove the affirmative defense provision of its operating permit standards at 20.2.70.304 NMAC, *Emergency Provision*, as well as other substantive amendments shown below:

PART 70 OPERATING PERMITS

20.2.70.3 NMAC, *Statutory Authority*.

Cites the statutes that provide authority for the regulation. The proposed amendments include changing the citation from Subsections "(C)" and "(D)" of 74-2-5 NMSA 1978, to Subsections "D" and "E" respectively, as well as reformatting. (Lines 12-15, Page 1, Public Review Draft)

> Environmental Improvement Act, [~~NMSA 1978, section 74-1-8 (A)(4) and (7)~~] Paragraphs (4) and (7) of Subsection A of Section 74-1-8 NMSA 1978, and Air Quality Control Act, [~~NMSA 1978,~~] Sections 74-2-1 et seq., NMSA 1978, including specifically, [~~section 74-2-5 (A), (B), and (C) and (D)~~] Subsections A, B, **D** and **E** of Section 74-2-5 NMSA 1978.

This change is necessary due to amendments made to 74-2-5 NMSA by the legislature in 2021:

> "**The 2021 amendment**, effective July 1, 2021, provided that if there is a determination that emissions from sources within the environmental improvement board's or local board's jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of the primary national ambient air quality standard for ozone promulgated pursuant to the federal act, the environmental improvement board or the local board must adopt a plan to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard, and removed provisions prohibiting the environmental improvement board and the local board from adopting certain types of state air quality regulations and standards more stringent than federal regulations and standards; **added new Subsection C and redesignated former Subsections C through E as Subsection D through F, respectively**; in Subsection D,

> Paragraph D(1), after "shall be", deleted "no more stringent than but", and deleted Subparagraph D(1)(b), Paragraph D(2), after "hazardous air pollutants that", deleted "except as provided in this subsection and in Subparagraph (b) of Paragraph (1) of Subsection B of this section", after "shall be", deleted "no more stringent than but", and deleted former Subparagraph D(2)(b), in Paragraph D(3), after "as stringent as", deleted "and may be more stringent than"; in Subsection E, after "this section shall be", deleted "consistent with" and added "at least as stringent as"; and added Subsection G." (Annotations, 74-2-5 NMSA)

One consequence of the aforementioned edits made by the legislature, was to substantively change the lettering sequence, by adding a new Subsection C, forcing a redesignation of former "Subsections C, D, and E" to "Subsections D, E, and F", respectively, necessitating a re-lettering of the statute and concomitant change to the statutory citation cited in 20.2.70 NMAC.

In addition, the State Records Center and Archives now requires that citations to statutory language follow the same formatting protocol as that for citations to NMAC rules.

20.2.70.5 NMAC, *Effective Date*.

Nonregulatory language found within the History Note (Line 24, Page 1, PRD), states that:

"[The latest effective date of any section in this Part is 01/01/2011]"

but it should actually read "02/06/13", because this rule was last amended on February 6, 2013. Specifically, Paragraph (2) of Subsection AL, *Subject to regulation*, of 20.2.70.7 NMAC, was amended to add clarifying language regarding "tons per year CO2e equivalent emissions". This effective date will change again if the proposed amendments are adopted, and the proposed amended rule is filed.

20.2.70.7 NMAC, *Definitions*.

EPA made a comment to the Department, indicating that one element (i.e. Paragraph (7)) of the definition of "Applicable Requirement" cited at 40 CFR 70.2, *Definitions*, (indicated by the

bolded paragraph below), is missing from the definition of "Applicable Requirement" at Subsection E of 20.2.70.7 NMAC:

"40 CFR 70.2 *Definitions*

. . .

Applicable requirement - means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;

(8) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(9) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(10) Any standard or other requirement for tank vessels under section 183(f) of the Act;

(11) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(12) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(13) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

. . ."

To address this deficiency, new text, identical to 40 CFR 70.2.(7), is proposed to be inserted as a new Paragraph (7) under Subsection E of 20.2.70.7 NMAC, *Applicable Requirement*. (Line 9, Page 2, PRD).

> **(7)** Any standard or other requirement under Section 126(a)(1) and (c) of the federal act.

By way of background, Section 126 of the CAA, referred to in this proposed new text, gives a state the authority to ask EPA to set emissions limits for specific sources of air pollution in other states that significantly contribute to nonattainment or interfere with maintenance of one or more National Ambient Air Quality Standards ("NAAQS") in the petitioning state. The CAA requires the EPA to respond to these types of petitions within 60 days of receipt. The citation to "Section 126(a)(1) and (c)" in particular, refers to 42 U.S. Code §7426, *Interstate pollution abatement*, specifically "(a) *Written notice to all nearby States*" and "(c) *Violations; allowable continued operation.*"

The proposed amendments also include the combining of Paragraphs (11) and (12) under Subsection E, *Applicable Requirements* of 20.2.70.7 NMAC, *Definitions*, into a single Paragraph (12), in order to align with Paragraph (13) of the definition of "*Applicable Requirement*" cited at 40 CFR 70.2, *Definitions*. This will rectify a mistake made when Air Quality Control Regulation ("AQCR") 770 (20.2.70 NMAC) was first adopted. (Lines 19-23, Page 2, PRD)

> [~~**(11)**~~]**(12)** Any national ambient air quality standard or [~~.~~ ~~**(12) Any**~~] increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act. This means that general permits for temporary sources must consider these requirements, but they are not applicable for other operating permits under this Part.

The definition of "Applicable Requirement" has been in existence since 1993 when *Operating Permits* was first adopted as AQCR 770, effective 12/19/94. When AQCR 770 (aka 20.2.70 NMAC) was originally drafted in 1993, the text incorporated from Paragraph (13) of the definition of "*Applicable Requirement*" at 40 CFR 70.2 *Definitions*, it was mistakenly split into two separate paragraphs at Paragraph (11) and (12) of Subsection E of 20.2.70.7 NMAC. This compromised the meaning intended by EPA. For reference, the text of Paragraph (13) of the definition of "*Applicable Requirement*" at 40 CFR 70.2 is shown below:

> "(13) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act."

In addition to this correction, new language is proposed to be added to the end of the newly combined paragraph to clarify what this sentence actually means:

> "This means that general permits for temporary sources must consider these requirements, but they are not applicable for other operating permits under this Part."

And finally, Paragraph (13) of Subsection E, *Applicable Requirement* of 20.2.70.7 NMAC, *Definitions*, must be reformatted because the State Records Center and Archives now requires that references to statutory language follow the same formatting protocol as that for NMAC rule language. (Lines 24-25, Page 2, PRD).

> **[~~(13)~~](13)** Any [~~regulation~~] rule adopted by the board pursuant to the New Mexico Air Quality Control Act, [~~Section 74-2-5(B) NMSA 1978~~] Subsection B of Section 74-2-5, NMSA 1978.

The definition of "*Regulated Air Pollutant*" at Subsection AC of 20.2.70.7 NMAC, *Definitions*, is proposed to be amended to remove "total suspended particulate matter" ("TSP") from the list of regulated air pollutants at Paragraph (1) under this definition. (Line 42, Page 4, PRD).

(1) nitrogen oxides [~~, total suspended particulate matter,~~] or any volatile organic compounds;

The limits for "maximum allowable concentrations of TSP in the ambient air", once required by 20.2.3 NMAC, *Ambient Air Quality Standards*, at 20.2.3.109 NMAC, *Total Suspended Particulates*, were repealed, effective November 30, 2018.

"EPA did not finalize a NAAQS for particulate matter ("PM") until April 30, 1971 (36 FR 8186, *National Primary and Secondary Ambient Air Quality Standards*). EPA published a revised PM NAAQS on July 1, 1987 (52 FR 24634, *Revisions to the NAAQS for PM*, Final rule, effective 7/31/87), replacing TSP as the indicator with PM_{10} (particulate matter 10 microns or less in diameter). In terms of the health and welfare effects of PM, scientific information supported the conclusion that there are greater risks of adverse health effects associated with respirable PM (which can enter the respiratory system, generally regarded as 10 micrometers or smaller in aerodynamic diameter). The primary (health) and secondary (welfare) standards for PM_{10} are identical. EPA published new $PM_{2.5}$ standards on July 18, 1997 (62 FR 38652, *NAAQS for PM*, Final rule, effective 9/16/97). The primary standards were set to provide increased protection against PM-related health effects, including premature mortality and increased hospital admissions and emergency room visits, and increased respiratory symptoms and disease in individuals with asthma. The secondary standards were set as appropriate protection against welfare effects including soiling, material damage, and visibility impairment. Therefore, the current PM NAAQS using PM_{10} and $PM_{2.5}$ as indicators, are better suited to address health concerns than standards based on TSP, such as 20.2.3.109 NMAC, *Total Suspended Particulates*. . .Additionally, EPA has not made any TSP nonattainment designations for many years. . .The

Department discontinued ambient monitoring for TSP in April 1998; therefore, TSP concentrations are not monitored. Compliance with the NMAAQS has been determined with dispersion modeling". (Pages 1 & 3, Exhibit 6, *Demonstrating Noninterference Under Federal Clean Air Act, Section 110(1)*, EIB hearing 18-04(R), In the Matter of Proposed Amendments To 20.2.3 NMAC-*Ambient Air Quality Standards*, 9/28/18).

The aforementioned 110(l) Demonstration showed that the repeal of the New Mexico TSP standards would not negatively impact the attainment status of the State's PM attainment areas, or negatively affect the Anthony PM_{10} nonattainment area, or any other CAA requirement.

20.2.70.303 NMAC, *General Permits*.

Paragraph (4) of Subsection B of 20.2.70.303 NMAC, must be reformatted because the State Records Center and Archives now requires that references to statutory language follow the same formatting protocol as that for references to NMAC rule language. (Line 41, Page 15, PRD).

> **(4)** The department may grant a request for authorization to operate under a general permit without repeating the public participation procedures required under 20.2.70.401 NMAC. Such an authorization shall not be a permitting action for purposes of administrative review under New Mexico Air Quality Control Act [~~section 74-2-7.H NMSA 1978~~] Subsection H of Section 74-2-7, NMSA 1978. Permitting action for the purposes of Section 74-2-7 NMSA 1978 shall be the issuance of the general permit.

20.2.70.304 NMAC, *Emergency Provision*.

This section is proposed to be repealed in its entirety as elucidated by the Statement of Reasons, shown as Attachment 1 of the Petition for Hearing. (Lines 49-55 of Page 15, and Lines 1-15 of Page 16, PRD).

20.2.70.304 [~~EMERGENCY PROVISION:~~

~~**A.** An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.~~

~~**B.** An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the permittee has demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~**(1)** an emergency occurred and that the permittee can identify the cause(s) of the emergency;~~

~~**(2)** the permitted facility was at the time being properly operated;~~

~~**(3)** during the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards or other requirements in the permit; and~~

~~**(4)** the permittee submitted notice of the emergency to the department within 2 working days of the time when emission limitations were exceeded due to the emergency; this notice fulfills the requirement of Paragraph (2) of Subsection E of 20.2.70.302 NMAC; this notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~**C.** In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.~~

~~**D.** This provision is in addition to any emergency or upset provision contained in any applicable requirement.~~] [RESERVED]

20.2.70.401 NMAC, *Public Participation*.

Subsection A of 20.2.70.401 NMAC is proposed to be amended by inserting the new text shown below. (Lines 22-23, Page 17, PRD).

> "Proceedings for all permit issuances (except administrative and minor permit modifications, pursuant to Paragraph (2) of Subsection A of 20.2.70.400 NMAC) [~~(~~]including renewals[~~)~~], significant permit modifications, reopenings, revocations and terminations, and all modifications to the department's list of insignificant activities, shall include public notice and provide an opportunity for public comment. . ."

This proposed language would mirror language in Paragraph (2) of Subsection A of 20.2.70.400 NMAC, *Action on Permit Applications*, in order to emphasize that minor modifications do not need public notice. This additional wording would identify in two places within the rule (not just one) that, administrative and minor permit modifications do not need public notice. The Department infrequently receives TV minor permit modifications, so it would be helpful to emphasize the point. Also, the parenthesis would be removed from around "including renewals", to make the wording stronger and not just parenthetical; especially when "renewals" are by far the majority of TV actions the Department deals with. Parentheses around "renewals" diminishes the importance of public notice and the need to provide an opportunity for public comment, when renewals most especially need public notice and comment.

Public Notice and Outreach

A preliminary review draft was shared with EPA in September of 2024. They provided a verbal comment to the Department that one element (i.e. Paragraph (7)) of the definition of "Applicable Requirement" cited at 40 CFR 70.2, *Definitions*, is missing from the definition of "Applicable Requirement" at Subsection E of 20.2.70.7 NMAC. To address this deficiency, new text, identical to Paragraph (7) of the definition of "Applicable Requirement" at 40 CFR 70.2, is proposed to be inserted as a new Paragraph (7) under Subsection E of 20.2.70.7 NMAC, Applicable Requirement. (Line 9, Page 2, PRD)

Stakeholder outreach was initiated on February 3, 2025, with a list serve *Notice of Availability of Stakeholder Review Draft - Proposed Amendments to 20.2.70 NMAC, Operating Permits* being sent to potentially affected parties and other stakeholders, outlining the AQB's proposal and soliciting comments, **[NMED Exhibit 8]**. The distribution list includes 2490 recipients who have expressed an interest in receiving updates from the Air Quality Bureau regarding various programs such as regulation and State Implementation Plan development, permitting, construction industries, small business, etc. This message was also run on February 5, 2025, in the Los Alamos Daily Post, the official newspaper of record in Los Alamos County, **[NMED Exhibit 8a]**. One comment was received by the March 3, 2025, deadline, from the State Records Center and Archives ("SRCA"), **[NMED Exhibit 9]**. The SRCA is requiring that: 1. When the rule is filed, the History Notes for each section should reflect that this rule change is a 'repeal and replace'. i.e. "[20.2.70.1 NMAC – Rp, 20.2.70.1 NMAC, xx/xx/2025]"; 2. The text "NMSA 1978" should be added to end of last sentence of 20.2.70.3 NMAC, *Statutory Authority*; and 3.

The "Effective Date" will need to be updated. Comments 1 & 3 will be addressed when the rule is filed. Comment #2 has already been incorporated into the Public Review Draft attached to the Petition. A proposed version of the rule to be filed, without any redline or strikeout (i.e. "clean") is shown as **NMED Exhibit 10**.

On March 17, 2025, the AQB announced via list serve, the availability of the Public Review Draft of 20.2.70 NMAC, in conjunction with the filing of the Petition for Regulatory Change, **[NMED Exhibit 11]**.

The AQB complied with requirements for public notice and hearings contained in *Rulemaking Procedures - Environmental Improvement Board* at 20.1.1 NMAC, and the *State Rules Act* at 14-4-1, NMSA 1978. Additional outreach was conducted as outlined in the Public Involvement Plan for the Proposed Repeal & Replacement of 20.2.70 NMAC, Operating Permits, and Title V Permit Program Revision (February 24, 2025).

Public Notice of Proposed Rulemaking was provided as shown by **NMED Exhibits:**

- **12a**. Posting on the AQB "Proposed Air Quality Regulations & Plans" website.
- **12b**. Posting on the NMED "Public Notices" website May 6, 2025
- **12c**. NM Sunshine Portal, April 24, 2025.
- **12d**. NMED Field Offices, (English and Spanish), April 23, 2025.
- **12e**. List Serve (English and Spanish), April 21, 2025.
- **12f**. NM Legislative Council Service, April 23, 2025.
- **12g**. Albuquerque Journal (English and Spanish), May 4, 2025.
- **12h**. NM Register (English and Spanish), May 6, 2025.
- **12i**. NM Land Grant Council, (English and Spanish), April 23, 2025.
- **12j**. Pueblos, Nations, and Tribes, April 23, 2025

EPA reviewed the proposed amendments and did not have any further comments.

The Department has also complied with the *Small Business Regulatory Relief Act*, at 14-4A-1 NMSA 1978, **[NMED Exhibit 13]**. This Act establishes a review process, not a standard or outcome. The Department must consider the effect of the proposed rule repeal on small businesses. If the Department identifies an adverse effect, it must consider the available methods to reduce the effect, but even if there are no such methods, the Board may approve the proposed rule amendments to accomplish the objectives of the applicable law. The Department does not foresee that the proposed amendments to Part 70 will have an adverse impact on the citizens or businesses of New Mexico.

Attention was also brought to EPA's mandate to remove 'emergency' affirmative defense provisions from CAA operating permit program (Title V) regulations, by the City of Albuquerque's Environmental Health Department Air Quality Program. (e.g. NM Register, Albuquerque Journal, public hearing, etc.). The Air Quality Program acts as the administrative agency for the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), which exercises air quality regulatory jurisdiction over the City of Albuquerque and Bernalillo County, New Mexico. On October 9, 2024, the Air Board adopted a revision to their *Operating Permits* rule to remove the 'emergency affirmative defense' provision at Subsection E of 20.11.42.12 NMAC, *Emergency Provision*, effective 11/5/24.

The Department received ??? comment from the public, [NMED Exhibit 18].

Conclusion

The Board has the authority to repeal and replace 20.2.70 NMAC pursuant to the *Air Quality Control Act*, Sections 74-2-5 and 74-2-6, NMSA 1978 (1967 as amended through 2021) and the *Environmental Improvement Act*, Section 74-1-8, NMSA 1978 (2000).

In considering the proposed amendments, the Board is required by the *Air Quality Control Act*, Subsection F of Section 74-2-5 NMSA 1978, to give weight it deems appropriate to all facts and circumstances, including; (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

The proposed amendments will not cause injury or interfere with health, welfare, visibility and property, in accordance with Paragraph (1) of Subsection F of Section 74-2-5 NMSA 1978. In addition, in accordance with Paragraph (2) of Subsection F of Section 74-2-5 NMSA 1978, the Department concludes that the public interest will be served by implementation of the proposed amendments by aligning 20.2.70 NMAC with 40 CFR 70, providing regulatory certainty, and ensuring the ability of the Department to implement the Title V program. Finally, the proposed amendments require no new technology and, with no anticipated cost associated with the amendments, are economically reasonable, in accordance with Paragraph (3) of Subsection F of Section 74-2-5 NMSA 1978.

The Department concludes that the factors specified by Subsection F of 74-2-5 NMSA 1978 all weigh in favor of adopting the proposed amendments.

This concludes my testimony before the Environmental Improvement Board on the proposed amendments to 20.2.70 NMAC. I respectfully request that the Board adopt the proposed amendments and Title V revision at the conclusion of this hearing.

Floor Amendments – 20.2.70 NMAC, Operating Permits

20.2.70.5 EFFECTIVE DATE: [~~11/30/95~~] November 30, 1995, except where a later date is cited at the end of a section.
[11/30/95; 20.2.70.5 NMAC - Rn, 20 NMAC 20.2.70.I.104, 06/14/02; A, 9/6/06]
[[~~The latest effective date of any section in this Part is [01/01/2011] 02/06/13.~~]]

20.2.70.7 DEFINITIONS: In addition to the terms defined in 20.2.2 NMAC (definitions), as used in this Part the following definitions shall apply.

. . .

AM. "Temporary source" means any plant that is situated in one location for a period of less than one year, after which it will be dismantled and removed from its current site or relocated to a new site. A temporary source may be semi-permanent, which means that [~~is~~] it does not have to meet the requirements of a portable source. Temporary sources may include well head compressors which meet this criteria.

20.2.70.9 DOCUMENTS: Documents cited in this Part may be viewed at the New Mexico Environment Department, Air Quality Bureau[~~, Runnels Building, 1190 Saint Francis Drive, Santa Fe, NM 87505 [1301 Siler Rd., Bldg. B, Santa Fe, NM 87507].~~]
[20.2.70.9 NMAC - Rp, 20.2.70.9 NMAC, xx/xx/25]
[As of April 2013, the Air Quality Bureau is located at 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico 87505]

20.2.70.300 PERMIT APPLICATIONS:

. . .

D. Content of application. Any person seeking a permit under this Part shall do so by filing a written application with the department. The applicant shall submit three copies of the permit application, or more, as requested by the department. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under 20.2.71 NMAC (operating permit [~~emission~~] emissions fees). Fugitive emissions shall be included in the permit application in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. All applications shall meet the following requirements.

. . .

(9) Provide other specific information that may be necessary to implement and enforce other requirements of the state or federal acts or to determine the applicability of such requirements, including information necessary to collect any permit fees owed under 20.2.71 NMAC (operating permit [~~emission~~] emissions fees).

20.2.70.302 PERMIT CONTENT:

A. Permit conditions.

(1) The department shall specify conditions upon a permit, including emission limitations and sufficient operational requirements and limitations, to assure compliance with all applicable requirements at the time of permit issuance or as specified in the approved schedule of compliance. The permit shall:

. . .

(e) include a provision to ensure that the permittee pays fees to the department consistent with the fee schedule in 20.2.71 NMAC (Operating Permit [~~Emission~~] Emissions Fees); and

20.2.70.302 PERMIT CONTENT:

. . .

J. Permit shield.

. . .

(3) Nothing in [~~this Section~~] Subsection J of 20.2.70.302 NMAC or in any Part 70 (20.2.70 NMAC) permit shall alter or affect the following:

20.2.70.405 PERMIT REOPENING, REVOCATION OR TERMINATION:

A. Action by the department:

. . .

(3) A permit, or an authorization to operate under a general permit, may be terminated when:

. . .

(f) the permittee fails to pay fees required under the fee schedule in 20.2.71 NMAC (Operating Permit [~~Emission~~] Emissions Fees); or

ERIC C. PETERS

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PROFILE

Knowledgeable, understanding, diplomatic builder of teamwork with a passion for innovation and adaptation. I have great motivation and good experience writing and using computer programs and databases as well as experience in environmental management areas such as air dispersion modeling and hazardous waste remediation. I communicate well both orally and in writing.

CAREER HIGHLIGHTS

New Mexico Environment Department/Air Quality Bureau ❑ Santa Fe, NM ❑ Control Strategies Manager/Air Dispersion Modeler/Computer System Analyst ❑ November 1997 to present ❑ 40 hours per week (average)

Job classification timeline:

Started working as Air Dispersion Modeler (Environmental Specialist) on November 3, 1997.
Change position to Information System Systems Analyst II (ISSA II) on 11/15/2000.
Reclassified as ESS-O (Air Dispersion Modeler) on 3/30/2002.
Designated as Lead worker in 2010.
Reclassified as ESS-A (Air Dispersion Modeler) in October 2012.
Changed position to Control Strategies Manager on May 11, 2024.

Job accomplishments:

· Analyzed and performed air dispersion modeling for hundreds of projects involving use of ISCST3, Calpuff, AERMOD, CTScreen, and other modeling software for evaluation of power plants, mining operations, and numerous other facility types.
· Performed modeling for the development of at least five General Construction Permits.
· Acted as primary author and editor for New Mexico Air Dispersion Modeling Guidelines.
· Trained over six employees to conduct air dispersion modeling reviews.
· Trained at least five employees to operate emissions inventory programs.
· Analyzed air quality regulations for use and potential modifications.
· Worked with groups to develop and implement regulations for prescribed burning and general permits.
· Assisted with legal strategy and testified as expert witness at over ten hearings.
· Created MergeMaster data conversion program using Microsoft Access and Visual Basic in 1998. The program analyzes and transforms input data into formats needed to efficiently run computer models, draws maps using the data, and writes reports to describe the results in detail.
· Rewrote MergeMaster location queries into PL/SQL in Oracle and JavaScript for better accessibility and future support. Program converts and QAs TEMPO data to produce PDF, Google Earth, HTML, and AERMOD file formats: https://air.web.env.nm.gov/mergemaster/.
· Mapped and migrated data to Oracle and MS Access databases from various relational database formats.
· Created database to store and manage emissions inventory and permit tracking for the state of New Mexico and helped migrate this data to TEMPO when NMED purchased TEMPO license.
· Extracted, analyzed, and transformed data from Oracle databases using SQL programming scripts.
· Researched, designed, and created Calcatenate program and training resources to calculate emissions for many air emission source types. Program writes SQL equations that to solve themselves while showing the work behind the solution. Program produces XML format output to upload into

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SEP/AEIR for Emission Inventory submittal completion. https://www.env.nm.gov/air-quality/calcatenate/.

· Wrote Oil & Gas General Construction Permit calculator program to automate determination of compliance. Converted calculator into PL/SQL for automatic ePermitting Portal use.
· Maintained Air Quality Bureau webpage using WordPress: https://www.env.nm.gov/air-quality/.
· Created and Maintained AQB Quick Links webpage using SharePoint to provide internal users easy and organized access to commonly needed resources.

Desert Research Institute ❑ Las Vegas, NV ❑ Technical Temporary ❑ Sept. 2003- March 2007 (part time)

· Designed MS Access database tools to describe and analyze visibility and pollutant monitoring stations.
· Programmed database to export data in HTML format for use in web pages.
· Wrote Visual Basic program to convert HYSPLIT output text files into GIS Shapefiles for use in ArcGIS.

Santa Fe Striders ❑ Santa Fe, NM ❑ President ❑ December 2000 to December 2002 (part time)

· Made management decisions for 100-member running club.
· Coordinated volunteers, police protection, insurance, sponsors, and technical support for races.
· Created database to track membership and race entries.

Environmental Protection Agency ❑ Kansas City, KS ❑ Environmental Engineer ❑ Jun.1992 to Sept. 1994 ❑ 40 hours per week

· Managed Pilot Projects to develop guidance on selecting treatment technologies for Superfund sites contaminated by polychlorinated biphenyls (PCBs), manufactured gas plants, or grain fumigation.
· Helped develop, procure, and manage contracts.
· Researched treatment techniques for PCB, manufactured gas plant, and grain fumigation sites.
· Compiled and analyzed data and wrote reports and guidance documents for treatment of site types.

University of Illinois ❑ Urbana-Champaign, IL ❑ Research Assistant ❑ 1991 ❑ part time

· Simulated protein folding by molecular dynamics using Silicon Graphics and Cray supercomputers.
· Analyzed and created computer codes written in Fortran using UNIX and Macintosh operating systems.

EDUCATION

Master of Science in Environmental Engineering
University of Kansas ❑ Lawrence, Kansas ❑ June, 1995

Bachelor of Science in Mechanical Engineering and
Bachelor of Science in Honors Biology with a minor in Chemistry
University of Illinois ❑ Champaign-Urbana, Illinois ❑ December, 1991

STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL AND REPLACEMENT OF 20.2.70 NMAC – OPERATING PERMITS AND TITLE V PROGRAM REVISION

No. EIB 25 – 10 (R)

DIRECT TESTIMONY OF ERIC PETERS

My name is Eric Peters, and I am the Control Strategies Manager for the Air Quality Bureau ("AQB" or "Bureau") of the New Mexico Environment Department ("NMED" or "Department"). I am presenting this written testimony on behalf of the Department in this proceeding on New Mexico's proposed repeal and replacement of 20.2.70 NMAC – Operating Permits and Title V program revision. My testimony will address the proposed changes to applicable requirements regarding air quality standards and Prevention of Significant Deterioration (PSD) increments.

I. QUALIFICATIONS

I have been an employee of the Bureau for over 27 years. I have spent many years reviewing compliance with ambient air quality standards and PSD increments. I have been a Control Strategies Manager since May 11th, 2024. In my current position, I oversee staff that are responsible for the development of air quality plans and regulations for New Mexico. The New Mexico operating permit rule is included in the significant projects that I oversee.

I hold B.S. degrees in Mechanical Engineering and Biology from the University of Illinois and a M.S. degree in Environmental Engineering from the University of Kansas.

My full background and qualifications are set forth in my resume, which is marked as NMED Exhibit 16.

II. PROPOSED CHANGES TO AIR QUALITY STANDARDS AND PSD INCREMENTS IN APPLICABLE REQUIREMENTS

Two types of changes are proposed to the applicable requirements definition for air quality standards, increments, and visibility requirements. One is to bring the language in line with U.S. Environmental Protection Agency (EPA) requirements. The second is to provide clarifying language to help explain the meaning of the requirement without requiring people to cross-reference and analyze federal regulations.

The current version of 20.2.70 New Mexico Administrative Code (NMAC), Operating Permits, lists National Ambient Air Quality Standards (NAAQS) as an applicable requirement at 20.2.70.7.E.11 NMAC, but this is inconsistent with U.S. Environmental Protection Agency (EPA) requirements. In the proposed rule, the Department proposes to correct this error to make the applicable requirements for NAAQS, PSD increments, and visibility requirements consistent with EPA's requirements.

Existing NMAC language defines the relevant applicable requirement as follows:

> (11) Any national ambient air quality standard.
> (12) Any increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act.

Compare that with the definition in the Code of Federal Regulations (40 CFR § 70.2):

> (13) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

The proposed NMAC language is the following:

> (12) Any national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act. This means that general permits for temporary sources must consider these

> requirements, but they are not applicable for other operating permits under this Part.

In the existing NMAC language, the sentence was separated into two separate requirements without including parallel language to limit the applicability to temporary sources. This makes the NAAQS an applicable requirement for all Title V sources instead of the limited circumstances when it is appropriate to address this within the context of an operating permit.

III. EXPLANATION OF CLARIFYING LANGUAGE AND CHANGE JUSTIFICATION

The EPA language ("but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act") is confusing and clarifying language is being added that does not change the EPA definition. EPA reviewed and approved the clarification. The goal of this clarification is to make it clear to readers of NMAC what the definition means without needing to cross-reference and analyze the federal regulations. Section 504(e) of the federal act (42 U.S. Code § 7661c - *Permit requirements and conditions*) contains the following language.

> (e) Temporary sources
> The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

504(e) generally indicates that permitting authorities may issue general permits for temporary sources if those general permits have conditions that ensure compliance with NAAQS, PSD increments, and visibility requirements. Because these are general permits, it

makes sense for the permitting agency to ensure compliance with air quality standards and PSD increments during the development of such a permit. For other operating permits, New Mexico ensures compliance with NAAQS and PSD increments during the construction permit evaluation requirements of 20.2.72 NMAC or through 20.2.70.201.D NMAC for sources that have not needed a construction permit.

EPA explains in Federal Register Vol. 89, No. 6, Pg. 1158:

> … it is well established that the NAAQS are not themselves applicable requirements because they do not apply directly to sources. That is, the promulgation of a NAAQS does not, in and of itself, automatically result in emission limits or other control measures applicable to a source. Instead, the NAAQS create an obligation on states to develop SIPs (and on EPA to promulgate FIPs, as necessary) that contain requirements necessary to achieve and maintain the NAAQS. 42 U.S.C. 7410(a)(1), (c)(1).

EPA relies on states to ensure compliance with NAAQS rather than relying on existing individual facilities to ensure that the cumulative sources in their area are in compliance with NAAQS. Cumulative situations are complicated, and a facility has no jurisdiction over other facilities in their area. It is appropriate for the state to make plans to ensure an area is in compliance with air quality standards and PSD increments rather than to ask a facility to control outside facilities or other sources such as highway traffic or agricultural activities.

IV. CONCLUSIONS

The proposed changes to the applicable requirement definitions make the rule more consistent with EPA requirements and more clear to people reading the rule. I recommend the EIB adopt New Mexico's proposed changes to 20.2.70 NMAC.

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Summary*:* Goal-oriented, professional with over 19 years in the biotechnology industry, public health, and environmental sciences.

Education:

Master of Science, Biology w/concentration in Biotechnology-University of California, Irvine-2005

Bachelor of Science, Biology-University of California, Irvine-2003

Experience:

New Mexico Environment Department-Air Quality Bureau: ESS-AO1 December 2024 to present

Major Source Manager Permitting Section – TV and PSD Units.

Management in all aspects of the air quality New Source Review (NSR) construction and Title V operating permits for Major Source facilities in the state of New Mexico. Responsibilities include supervising employees, interpreting state and federal environmental regulations, establishing policy and procedures, determining and implementing NSR and Title V program requirements, and coordinating and guiding the interface of staff with the federal Environmental Protection Agency (EPA), other clients and state agencies, various stakeholder groups, and the public.

New Mexico Environment Department-Air Quality Bureau: ESS-S February-December 2024

Title V Section Supervisor in the Major Sources Permitting Section – Project management and Team management Experience.

Principal tasks include technical expertise as well as project and team coordination to ensure Major Source TV and NSR team's permits timely and accurate completion.

Technical aspects entail complex emissions calculations/verifications, state and federal regulations interpretation and applicability, and issuance of legally enforceable air quality permits.

Team management duties encompass supervising and training team staff, reviewing and editing permits, and to provide guidance and oversight on TV program procedures, guidelines, policies and regulations as well as conducting staff meetings, evaluations of staff required by policy, and time approval. Planning special projects to support professional growth and communicating with staff to meet the vision of our Bureau while promoting a healthy team environment.

Project management focuses on EPA communication and preparation of semi-annual reports, staff assignments to ensure completeness of all actions with deadlines, including permit issuance, completeness determinations, work performance and prioritization of workloads. Ensure completion and timely submittal of travel requests and post-travel forms and submissions. Frequent internal agency and external customer service to industry, consultants, business owners, the public, other agencies, and stakeholders.

Completed all training related to Essentials of Supervision and Management (ESM) Program and continue technical professional development by recently attending WESTAR training in Petroleum Refinery, Industrial Boilers, and VOC Control Devices. Additionally, WESTAR Intermediate and Advance training in NSR/PSD permitting will be completed by September 2024.

New Mexico Environment Department-Air Quality Bureau: ESS-O July 2018- June 2019 and ESS-A June 2019-Jan 2024

***Technica*l and regulatory** review of air quality permit applications within regulatory deadlines, complex emissions calculations/verifications, application of state and federal regulations, issuance of legally enforceable air quality permits, use of standardized templates and protocols to process air quality applications, various stakeholder coordination during application review process, and special assignments to establish policy and procedures in order to achieve the goals of the Air Quality Bureau.

Project aspects included attending and preparing official documents for public hearings subject to rules and instructions of the hearing officer and legal counsel and provided testimony as a technical witness. Attended and obtained

certifications on various training such as Effective Permit Writing; Air Pollution Control; Hazardous Air Pollutants; H_2S Safety Training; NMED Civil Rights Training. Multiple site visits to a range of industrial sources of air pollution.

***Team Management*:** Training, mentoring, and supervising newly hired co-workers in the team since January 2023.

Cereon Biotechnology: Co-owner with Project Management and Business Management Experience June 2015-March 2018

Overview: Cereon seeks to identify promising botanicals of the boreal forest and arctic tundra to generate novel proprietary derivative compounds, as well as functional foods to blunt inflammatory and oxidative stress prevalent in the aging brain and diseased central nervous system, with the goal to protect and repair, or salvage cognitive abilities.

***Technical Skills*:** My duties required a range of management tasks including but not limited to time management, data management, meeting coordination, and communication with third parties. Wet lab/bench duties consisted of a variety of cell-based assays with SH-SY5Y neuroblastoma cells including ROS production measurements upon stressor and compound treatments, lipid peroxidation using TBAR assay, viability/cytotoxicity assessment after compound treatments, antioxidant capacity of botanical extracted compounds, protein complex assembly/functionality assessment, and actin rod formation using dissociated hippocampal neurons.

Project Management skills: Accurate notebook keeping and documentation, data analysis, reporting experiments usually in Excel format, creating detailed SOP's and Power Point presentations. As acting CFO and COO, payroll coordination and day-to-day management of laboratory tasks.

Team Management skills: Involved in coordinating lab space and instrument use with academic lab personnel including undergraduate, graduate students, and research professionals.

University of Fairbanks, Alaska: June 2015-March 2018

Overview: Nanodics technology can be used in a cell free system to integrate the membrane protein, NADPH Oxidase (NOX2). Nanodics consist of the scaffold protein MSP1E3D and various lipids. Lipids ratios can be changed to manipulate the lipid bilayer in order to determine how membrane architecture affects NOX2 activity.

Technical Skills: Molecular biology techniques including plasmid preparation, transformations, DNA extraction, agarose gel electrophoresis, Western Blot, SDS-PAGE. Protein biochemistry techniques such as protein expression and purification by size exclusion chromatography and his-tagged. Cell culture techniques and cell-based assays.

Project Skills: Accurate note-keeping and documentation, data analysis and experiment report usually in Excel format, creating detailed SOP's and Power Point presentations.

Team management skills: I participated in managing day-to-day tasks of other lab personnel focused mostly on laboratory training and project management such as note taking and SOP development.

Fairbanks North Star Borough-Air Quality Division: June 2014-June 2015

Overview: The EPA designated parts of the Fairbanks North Star Borough, as areas of non-attainment for the 24-hour PM2.5 air quality standard. Fairbanks sits in a valley surrounded by hills, and it is susceptible to temperature inversions, in which layers of cold air and pollutants are trapped close to the ground. This type of temperature inversions can last for days or even weeks at a time, leading to periods of poor air quality.

Technical Skills: Operation of DataRAM4000 air monitor integrated with GPS and temperature probes for PM2.5 data collection and data analysis utilizing GIS. Additionally, I provide technical and administrative support within the Division such as air quality studies, programs (specifically, Wood Stove Change Out Program, the Oil to Gas Conversion Program, and the Bounty Program for properties located in the PM2.5 Nonattainment Area), public education, complaints, and assistance with implementation of the State Air Quality Improvement Program. Revising and formatting old SOPs as well as writing and establishing new SOPs. ArcGIS I and ArcGIS II certified.

Gevo, Inc.: August 2011-January 2014

Overview: Gevo aims to convert renewable raw materials into isobutanol utilizing molecular engineering and biotechnology.

Technical Skill: Characterization of enzyme activity in metabolic pathways by kinetics and endpoint assays utilizing spectrophotometric or HPLC readout, analysis of cell pellets from fermentations for protein levels and activity of relevant enzymes, protein purification, organizing the execution of in-house customer sample submissions, measurements and interpretation of kinetics data, assay development, optimization, establishing, updating and publishing SOPs and formal reports, proper recording and documentation, reviewing/reporting experiments and resulting data, basic microbiology and molecular biology techniques, accurate preparation of reagents.

Weekly EH&S meetings to discuss performance management, work practice and behaviors in the work environment, emergency evacuation plan, risk assessment, incident report, personal protective equipment, health, and safety issues.

Alaska State Virology Lab (ASVL): December 2009-July 2011

Overview: The ASVL utilizes molecular biology, virology, and immunology techniques to test for infectious viral diseases. The ASVL is a high complexity CLIA accredited facility and uses sophisticated equipment and specialized confirmatory testing. Some of the many viruses handled at the facility are HIV, hepatitis, rabies, herpes, adenovirus and enterovirus, norovirus, influenza and many other respiratory viruses.
Technical skills: Robotics immunoassays and automated molecular platforms for high testing volume, as well as non-automated ELISAs for diagnoistic antibody/antigen detection, viral RNA extractions, RT-PCR antigen detection, amplicor qualitated hybridization assay (HCV). IFA/DFA and other viral isolation utilizing cell culture infections, microscopic analysis and other virology standard techniques. Proficient in BSL-2 and BSL-3 practices. Reviewed records and released sensitive documentation to providers in addition to direct communication with public health agencies and professionals.
Other Responsibilities: In 2010 acted as the sole ASVL Safety Officer for one year to oversee and manage all employees at the facility to meet all requirements to comply with health records, vaccinations, and periodic training, including safe work environments and practices, OSHA compliance, and MSDS information updates. This position as a liaison required delicate coordination between microbiologists, administration, and upper management. Liaise with emergency services.

MannKind Corporation: June 2007-April 2009

Technology Overview: Discovery in development of therapeutic drugs in the field of metabolic disorders and oncology.
Technical Skills: Cell-based assay development in drug discovery. All aspects of molecular biology, biochemistry, and cell biology including RNA studies, protein expression/signaling studies, cell proliferation, apoptosis and cytotoxicity assays. RNA isolation/purification from cell lysis, RT-PCR and Real Time PCR. Also, High-throughput screening of small molecules library (Beckman Coulter Biomek FX robot) and IC^{50} assays of thio and non-thio kinases.
Other Responsibilities**:** Cell-line maintenance, protein lysis/quantification by BCA, SDS-PAGE, Western Blotting, RNA isolation, RT-PCR, DNA electrophoresis, ELISA assays, data analysis, ongoing research presentations (PowerPoint format), purchasing, solution preparation, and general lab duties.

Xencor, Inc: May 2006-March 2007

Technology Overview: Structural and functional optimization of monoclonal antibodies by Fc domain engineering to improve binding affinity and potency of antibodies against tumor cells.
Technical Skills: All aspects of molecular cloning: primer design, quickchange mutagenesis, cut-paste ligation, PCR ligation, DNA extraction/purification, gel quantification, DNA electrophoresis, DNA preps and sequencing, TempliPhi-PCR, sequence clean-up, sequence analysis (Sequencher, Vector NTI), Protein A purification of antibody and receptor purification of GST-fusion and His-tagged proteins. SDS-PAGE,Western Blotting, protein concentration by centrifugation, dialysis, and protein quantification by BCA.

ViaCyte (formerly Novocell, Inc.) September 2005-April 2006

Technology Overview: The coating of islets (insulin-producing cells) with Polyethylene glycol (PEG) technology enables implanted cells to survive subcutaneously. Release of insulin through the porous PEG coating regulates glucose levels in Type 1 diabetic patients and eliminates the need for immunosuppressant drugs upon implantation.
Technical Skills: Human pancreatic islets isolation/encapsulation for cGMP human clinical trials. Tissue/cell maintenance for clinical and research projects. Aseptic gowning/technique and processes in clean room environment (ISO 5, ISO 6, and ISO 7). Prepare/revise SOP's and batch records for Phase I/II Clinical Trials. Familiar with cGMP, GLP and GTP compliance guidelines.

University of California, Irvine- September 2000-June 2005

Department of Medicine/Biological Chemistry-Bogi Andersen MD.
Student Researcher: Functional Biology of LMO4 in Breast Cancer.
Project Description: Knockdown of LMO4 expression using short hairpin siRNA constructs transfected into T47D breast cancer cells inhibits cells proliferation. Technical Skills: cloning, transformations, DNA-preps, Western blotting, cell

culture, transfections, RNA extraction, RT-PCR, colony formation assays, and soft-agar colony formation assays. Other Technical Skills: luciferase assays, DNA-extractions, genotyping, PCR, histology/staining, light microscopy.

Molecular Biology and Biochemistry Department-Alex McPherson PhD.
Student Researcher: Structural Analysis of TY3.
Project Description: To crystallize the major structural proteins, capsid, nucleocapsid, as well as reverse transcriptase and protease of the TY3 virus by cloning their corresponding encoding genes into expression vectors for protein expression and purification in order to solve their crystal structure at high resolution level using standard x-ray diffraction crystallography. Technical Skills: cloning into cloning vectors, cut/paste into expression vectors, site-directed mutagenesis, DNA-preps, DNA electrophoresis, protein expression using E. coli systems, OD monitoring using spectrophotometer, cells lysis with the use of French-press or sonicator, SDS-PAGE, FPLC (ATKA) operation (affinity chromatography and ion exchange), and dialysis. Other Technical Skills: some exposure to isoelectric focusing combined with SDS-PAGE, capillary electrophoresis, x-ray diffraction and data collection utilizing a synchrotron light source (ALS, Berkeley, CA).

Molecular Biology and Biochemistry Department-Hartmut Luecke PhD.
Student Researcher: Functional Analysis of Calretinin.
Project Description: Expression and purification of Calretinin with the purpose to screen for protein crystallization. Crystals can then be tested using standard methods in x-ray crystallography to solve the structure of Calretinin at high resolution level. Technical Skills: competent cells preparation, transformations, protein expression using E. coli systems, monitoring OD using spectrophotometer, cells lysis with the use of French-press, SDS-PAGE, FPLC (AKTA) (affinity chromatography and size exclusion), dialysis, and crystal growth screening. Other Technical Skills: some exposure to DLS, HPLC, and mass spectrometry.

Teaching Assistant, UCI Molecular Biology & Biochemistry Department – Academic year 2003-2004
Assignment: General Microbiology Lab: growing a population of organisms and purifying a single organism utilizing media manipulation and biochemistry techniques to identify the isolated organism.
Multiple microbiology class management of 30 students: Evaluated lab reports, exams and course work. Assisted students to understand microbiology concepts and experiments, experimental techniques, data analysis, literature searching, reading, scientific writing and presentations.

Coursework:

Protein Struct. & Function, Recombinant DNA tech., Struct. Biosyn. Nuc. Acids, Adv. Immunology lab, Cancer Development & Clinical cancer, Molecular Bio. & Biochem., Dev. & Cell Bio., Eukaryotic genes, Microbio/Pathogen,

Other Skills: Proficient in Microsoft Word, Word Perfect, PowerPoint, Excel, Imaging programs, and Internet navigation
Bilingual: English/Spanish